

Justice Antonin Scalia address at the 2007 Annual Dinner at the Waldorf-Astoria on November 9, 2007

Thank you, your eminence, Excellencies, reverend clergy, especially my Xavier high school classmate, Father Connor, who is out there somewhere. Ladies and gentlemen, I am honored and delighted to be here this evening, I've been a friend of your Order for a long time. I have many friends who are Knights and Dames of your group. And I am probably one of the few people excluding those here, who have visited Malta. Malta is a phenomenal place. When I went there, I read the history written by an Englishman of the Siege of Malta. You can still see it in that place, the two forts that were the center of the battle against the Turks by the Knights, it's still there. I never knew why Hollywood didn't make a movie of it, it was just a magnificent defense by the Knights.

I have spoken at many dinners; I have never spoken at as elegant a dinner as this. You really look good out there. I have decided to talk, to the extent I can read my wine-soaked notes, about the role of Catholic faith in the work of a judge. And it's probably a poor selection on my part because it will probably cause you to think less of me.

Like most topics, this one will profit from a definition of terms. By Catholic faith, I mean belief in all the teachings of the Church, both those pertaining to doctrine, the Trinity, the divinity of Christ, the virgin birth, the Eucharist, the Sacraments, the Communion of Saints, etc., and of much greater relevance to the topic, those teachings pertaining to human conduct.

If you love me, you will keep my commandments. In this latter category, there are many commands and prohibitions that do not much separate Catholics from surrounding society, to tell you the truth. Love thy neighbor, help the poor, visit the sick, do not lie, steal, murder, etc. And there are some commands and prohibitions that very much do set Catholics apart from much of the society; prohibition of divorce, of heterosexual conduct outside of marriage, of homosexual conduct, of abortion, of suicide, of the destruction of stem cells.

The other term in the title, "the work of a judge", also requires some definition. Like any other human beings, judges, in the course of their work, have innumerable dealings with other human beings; counsel in the case, the officers of the court, their law clerks, their secretaries. And all of those dealings must be governed by the principles of charity, humility, and respect for human dignity that are part of our faith.

But I'm speaking this evening, only of that work which is distinctive to judges, namely, the making of rulings and the issuance of judgments and opinions in litigated cases. And I am narrowing the topic even further still to that judicial work which I am personally familiar - the work of a federal judge in the American system. That is different from the work of some other American judges in a significant respect. With minor exceptions, it always consists of the application of democratically-adopted texts, the constitution, statutes, regulations, etc. In other words, there is no federal common law. Federal judges never make it up. Or they are never supposed to make it up.

I may have a little to say about common law judging, but not much; it is not my line of work. Narrowing the subject as I have just done, the perhaps disappointing bottom line of my remarks this evening is that Catholic faith seems to me to have very little effect on the work of a judge.

In fact, only two commands of my faith occur to me, neither of which is particularly distinctive to Catholicism. The first is “be thou perfect as thy heavenly father is perfect.” That means striving for perfection in everything, including the performance of one’s life work. I expect that Jesus Christ never made a bad table.

And the second relevant command, hardly unique to Catholicism, is “thou shalt not lie.” Whatever commandment that is, whatever number, the rest of you know that, I don’t. I take that prescription seriously enough that I try to avoid the regrettably common judicial practice of re-characterizing prior cases to say what they really did not say. Better to distinguish them or to overrule them or to limit them to their facts, or if distinguishing is impossible and overruling and limiting is beyond your power, to adhere to them, rather than lie about them.

I realize, of course, and the lawyers in the room are probably are familiar with it, that distorting prior cases is regarded by many to be a legitimate part of the game...much like fouling the opponent who was on their way to any easy lay-up - technically illegal, but an accepted part of the strategy. I try earnestly to avoid that, but I am sure I have some critics who will say I am singularly unsuccessful. Beyond these two instances, I am really hard put to tell you of a single decision or opinion of mine that would have come out differently if I were not a Catholic.

Just as there is no Catholic way to cook a hamburger, so also there is no Catholic way to interpret a text, to analyze a historical tradition, or to discern the meaning or legitimacy of a prior judicial decision. Except of course, to do those things honestly and perfectly.

I am sometimes approached by co-parishioners at Mass, who thank me for supporting the pro-life cause. Specifically state, and federally imposed restrictions on abortion. I tell them that no thanks are really due since I have voted the way I have, not because I believe with the church, that a fetus is a human life. But because I believe, not believe, but because I know, that no constitutional provision adopted by the American people could plausibly have been thought to confer the right to abortion. If I thought otherwise, I would have voted the other way.

And just as I do not find in the constitution any prohibition of laws criminalizing abortion, neither do I find there any prohibition of laws permitting abortion...which the other side of the debate would like the court to hold. Some anti-abortionist would find such a prohibition in the provision of the 14th amendment which says: No states will deny “to any person” that word is key, to any person within its jurisdiction, equal protection of the laws. This requires, as the argument goes, that persons in the womb be protected by intentional killing, just as other persons are. The problem with this argument for those of

us who take texts seriously, is that the very next sentence of the 14th amendment provides that representatives be apportioned among the states. You know in the original constitution, they weren't apportioned by the total population, they were apportioned by the white population and 2/3^{rds} of the blacks. In the post civil war amendments, that was changed. And it says they shall be apportioned in the states by counting the whole number of persons in each state.

In other words, it was the very next sentence after the "no person shall be deprived of equal protection..." In other words, "person" in the 14th amendment plainly did not include persons in the womb...unless you think the census was supposed to count pregnant women twice.

The reality is that the constitution says nothing about abortion, either way. And the states are therefore allowed to prohibit or to permit it. I thought I might have identified an exception to the principle that there is no such thing as a Catholic judge or at least a Catholic federal judge two terms ago, I guess it's three now, when the Supreme Court did something of an about face on the constitutionality on a ban on so-called live birth abortions in a case called *Stenberg vs. Carhart*.

We had invalidated an earlier federal ban, because among other things, it did not contain an exception for the health of the mother. But in *Gonzales vs. Carhart*, we upheld a subsequent federal statute that did not contain such an exception. Our change of course, or at least a forceful opinion explaining our change of course, was made possible in large part by a clear and thorough record made in the trial court, the district court here in New York, in a related case, which described in plain language, and sickening detail what a brutal procedure was at issue. The district judge in that case had taken an active part in the questioning of expert witnesses - he would not let them get away with technical antiseptic language that a layman would not understand. He asked from the bench such questions as, "Does that mean that you pierce the exposed skull with the scissors?" The horror of the procedure became plain to see.

And my court's opinion was able to set it forth in nauseating detail - I sometimes find it hard to read that opinion. That district judge was Richard Casey, the first blind man to be appointed to the federal bench, and a devout Catholic. He has since died, quite recently. And it is appropriate that I do him honor here at this Catholic event, and ask that he be remembered in your prayers.

Well, was not Dick Casey giving effect to his case? I think not. Or rather I think he was giving effect to it only by observing the injunction to be perfect. Because I think any perfect judge would have gotten on the record in plain English just what the procedure so disfavored by congress consisted of. Oh and I neglected to mention, when it came to deciding the case, Dick Casey remained a perfect judge. Despite his Catholicism, he held a new federal statute to be unconstitutional, because that was the clear import of the Supreme Court's latest case which he was obliged to follow.

Some Catholics and some conservatives were disappointed in him because of that decision. But it was the right decision. It was the Catholic decision because it was a perfect decision, it was just what he was supposed to do. To obey the law that had been prescribed by the Supreme Court.

And now it could be argued that by reason of being a Catholic, Dick Casey was more disposed to being a perfect judge with respect to the expert evidence in an abortion case. Just as I suppose in divorce cases, a Catholic judge may be more disposed to do what all good judges should do, encourage reconciliation. And in criminal cases, the Catholic judge may be more disposed to giving proper weight to the factors that counsel a lesser sentence. Or in first amendment cases, a Catholic judge may be more disposed to give proper place to freedom of religion. But these are just tendencies of judicial perfection. And they no more make a Catholic a different judge, than do the tendencies toward judicial imperfection that go along with Catholic belief. For example the tendency to want to withhold restrictions on abortion, despite Supreme Court Law to the contrary.

It is my view that it is the sworn duty of a judge to resist such tendencies, both good and bad and to apply the law as it stands. So I stand by what I said. There is no such thing as a Catholic judge.

As a judge in Nazi Germany I assuredly could not pronounce a death sentence upon a man, because he was a Jew, or even I think, sit as an appellate judge to confirm the lawfulness of such a sentence. That would be direct participation in what I know to be evil. Abortion does not present such an issue, even for the state court or lower federal judge, who unlike me has to follow *Roe Vs. Wade*. I don't have to follow it, I can just say I disagree with it, which is what I always say. But other judges have to follow it. But I don't think that's a problem - not a moral problem. In disallowing a state imposed limitation on abortion, such a judge does not participate in the state's killing of a fetus - it is the mother and the abortionist that do that. And the judicial decision merely says what the law says, mainly, that the state cannot interfere.

On the other hand, imposing the death penalty or affirming in position of the death penalty presents a different situation. There, the judge is part of the state machinery that takes a life. If I thought that a passing statement in the papal encyclical, *Evangelium Vitae*, which said that the death penalty can only be imposed when other means of restraining the evil doer, such as prisons, are unavailable; if I thought that such statements are a correct pronouncement, of unchanging catholic doctrine. I would have to recuse myself from capital cases. And indeed, since capital cases form an appreciable part of federal judicial business, I would probably have to resign from my bench. Happily, I share the view of Avery Cardinal Dulles, that that isolated statement did not overturn, if it could, millennia of Catholic teaching that one of the legitimate purposes of criminal punishment is retribution and that the death penalty is sometimes appropriate to that end.

The church has always taught that an evil act creates disorder, disorder in the moral world. And punishment is necessary to set it right. Come to think of it, that's why Jesus Christ had to suffer in order to redeem us from the consequences of Adam's sin. He had

to redeem us. The sin could not just be forgiven, somebody had to pay for it. I think it's quite irresponsible to portray opposition to the death penalty as an established part of Catholic teaching, equivalent to opposition to the killing of innocent of abortion. People know that that has not been the teaching of the church. The patron saint of lawyers, Thomas Moore - a criticism of St. Thomas Moore was that he used the death penalty too often as chancellor of England. But he used it.

Equating capital punishment to abortion does nothing but raise doubts about the authority of the Church's ex cathedra teaching on abortion. And it is irresponsible for another reason, because it places Catholic judges and for that matter Catholic politicians in a needless moral dilemma. You should understand that what I have said about the limited role of my faith in my decisions is premised upon the very significant fact that I am a textualist and an originalist, that is to say I do not believe that my job is to cause statutes to produce desirable results, but rather to announce the results that follow from the statute's most natural reading. And the constitution, like statutes, does not change, what it permits, and what it forbids is no different today in my view, then when the relevant provision was approved by the people.

My job is to read the text and to determine what the text meant to the people who adopted it. Was the death penalty prohibited by the cruel and unusual punishments clause in 1791 when the Bill of Rights was adopted? If not, it is not prohibited by the cruel and unusual punishments clause today. It may be a very bad idea, a point on which I take no position. But it is assuredly not unconstitutional. For those of you who think that mere honest interpretation of democratically adopted texts is too modest a role for judges, who think judges should tweak statutes in a desirable direction, and should expand or constrict constitution as the times require, for those people, there assuredly is such a thing as a Catholic judge, just as there is assuredly a such thing as a Catholic legislator.

It is no more to be expected that, as a prescriber of human conduct, Dick Casey would suppress his Catholicism than that Oliver Windal Holmes would suppress his utilitarianism. I suppose it's theoretically possible for a judge who is a law giver, a policy maker, to be a constitutional evolutionist without believing the evolved constitution ought to mean what he thinks it ought to mean. The reality is, however, that I've never met such a constitutional evolutionist. They all begin with their own views and only then look to see whether those views are shared by the American people, for example, in a recent opinion holding it unconstitutional to impose the death penalty for anyone who is younger than 18 when he committed the murder. The evolution is, the majority of the court frankly admitted that in the last analysis, it did not matter what the states or the people thought about the matter. It was up to us, the justices of the Supreme Court.

Now if that were my judicial philosophy, my religious views would inevitably affect my opinions. Just as it must affect the votes of the Catholic legislator. As a practical matter the religious person cannot divide his view of man, of how man ought to behave, and how society ought to compel him to behave into that portion which proceeds from his religious beliefs and that portion that proceeds from purely naturalistic inclinations. What one believes to be true, one believes to be true. Catholicism is not some superficial

overlay that can be ignored as the occasion requires. It is as Thomas Moore said in a *Man for All Seasons*, it is who I am, as inseparably connected with me as my name and my face.

I was a young man at the time, and I remember being profoundly offended by JFK's plea during his presidential election campaign that he hoped nobody would vote against him because of his "Religious affiliation" as though being a Catholic is something like a voluntary club membership. You're a Moose, I'm an Elk. Besides the practical impossibility of distinguishing religiously motivated beliefs from beliefs that would exist even without religious motivation, adopting the principle that religiously motivated government policies, by legislatures or by judges who are evolutionist, adopting the principle that that is un-American would require the rewriting a good deal of American History.

The primary impetus for the drive to abolish slavery was a religious one. And the by the way, Catholic clergymen didn't play a significant part in. Despite the fact that the church, Rome, had condemned slavery for several centuries. Catholic priests were not in the leadership. You'll find they're all Protestant clergymen. So you know if you ever think that the American Church is always right, recall the words of the "Battle Hymn of the Republic" which ends "As He died to make men holy, let us die to make men free. While God is marching on." The abolition of slavery was a religious movement. And the same is true of government laws prohibiting the manufacture and sale what we call strong drink, up to and including the constitutional amendment instituting prohibition. Mandated temperance was a religious cause.

Religious motivation underlies many traditional laws, still on the books. Such as those against bigamy, or those prescribing public nudity. Societies with different religious beliefs managed quite well enough without them. Far from being a nation that has excluded religious based policies from the sphere of government, official public expression of belief in God, and the adoption of policies thought by the people to be in accord with God's law, have distinguished us from most western democracy. At least in the current century, and especially today. Of course to acknowledge (not for judges, at least my kind of judges, but for legislators,) religiously based social policies are not ipso facto unconstitutional is not to affirm the opposite, that they are ipso facto constitutional. Though there is no question I think about the constitutionality of laws regulating traditional areas of public morality, laws preserving what has always been referred to as "bonos mores," good morals, to use the common law expression

Moreover, to say that a religiously motivated law would be constitutional is not to say that it would necessarily be wise. Laws severely restricting civil divorce, are constitutional. But surely, it is a matter of prudence whether they will achieve more good than harm, in a society with a large plurality that no longer share the moral premises on which they were based. But at some point, the moral imperatives are so overwhelming that there is no room for prudential compromise. One does not argue whether or not it would do more harm than good to oppose laws permitting genocide. And that is in essence the church's position regarding laws permitting abortion.

But spreading religion through the government, which is what I've just been talking about, is really not the Christian way, it never has been. It's been done, but it's not the Christian way. Jesus not only talked about rendering to God what is God's and to Caesar what is Caesar's. He also turned down the kingship. The people came and wanted to make him king, what a great spot to be in if you thought the way to produce morality and to save mankind is to do it by law. It's not by law.

The Christian way is to change hearts. Or as Pope John Paul II put it, to change the culture. I have it on good authority that the prior Pope used to ask bishops, whenever they went to Rome for their visits, one question, "What have you done to change the culture?" Because the culture that we live in is increasingly non-Christian. In Europe, it is totally non-Christian. The main job of a Christian in current circumstances, I think, is to change the culture. Organizations like this can do it, individuals can do it, parents can do it by making their children understand what they see around them is not who they are, not what they are. But person-by-person, that's ultimately the way the change has to be made. As for me, don't come up and thank me after Mass, I am not being a good Catholic I'm just trying to be a good judge. Thank you very much.