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Professional Responsibility for Catholic Lawyers: The Judgment of Conscience

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Deep within his conscience man discovers a law which he has not laid upon himself but which he must obey. Its voice, ever calling him to love and to do what is good and to avoid evil, tells him inwardly at the right moment: do this, shun that. For man has in his heart a law inscribed by God. His dignity lies in observing this law, and by it he will be judged. His conscience is man’s most secret core and his sanctuary. There he is alone with God whose voice echoes in his depths.¹

I. INTRODUCTION

A. Purpose

The purpose of this Note is to provide Catholic lawyers with practical guidance for making ethical decisions in the practice of law in accord with the teachings of the Catholic Church.² Lawyers face many difficult problems requiring moral solutions. For example, how should a lawyer represent a client seeking a civil divorce? Suppose a criminal defense attorney, representing an alleged rapist, is told by the client that the client committed the crime. Can the lawyer continue to defend him? What should a lawyer do if, in a civil case, the lawyer discovers through his expert’s report that the opposing party has a grave physical ailment which, if revealed, will probably result in rejection of his client’s current settlement offer?³ In light of the teachings of the Church regarding capital punishment, may a prosecutor advocate imposing the death penalty on a criminal defendant?

In order to solve these and the countless other ethical quandaries which confront lawyers, the Catholic lawyer must rely on his conscience. A Catholic’s properly formed conscience is his “ethical compass,” which as-
sists him in finding true north—the objective good. This Note explores and reveals the teachings of the Church which provide guidance for the Catholic lawyer.

B. Overview

A Catholic's "ethical compass" is his moral conscience. Properly calibrated, the moral conscience serves as a guide through cloudy ethical issues. In order to assist lawyers with making good decisions, Part II of this Note discusses the function and the formation of the moral conscience.

The ultimate goal of a properly formed conscience is to choose good and avoid evil. As such, Catholic lawyers should come to understand several functional concepts which will assist them in properly forming their conscience and choosing in accord with that conscience. Helpful concepts include the Church's teachings on the natural moral law, on the principle of double effect, and on the concept of formal versus material cooperation with evil. Using these concepts, the Catholic lawyer can create a paradigm for resolving ethical conflicts. Each of these is discussed in Part III.

Additionally, as lay members of Christ's faithful people, Catholic lawyers must be cognizant of their role in society. Pope John Paul II has provided insightful guidance in this matter. In conjunction with the Pope's guidance, Part IV applies the Church's teachings to the ethical problems outlined earlier in this introduction.

Finally, some commentators suggest "role morality" as a plausible model for a lawyer's ethical responsibility. Role morality requires a lawyer to assume an amoral role when representing clients. However, since a Catholic is always obliged to obey his conscience, this model is an unacceptable alternative. Part V critiques the "role morality" paradigm from the Catholic perspective.

In the final analysis, a Catholic's faith is more than a mere vestment to be worn only on special occasions and then put away until the next ceremony when it is convenient to don it. Catholic lawyers cannot check their faith at the courtroom door. Catholics, and Catholic lawyers specifically, cannot excuse themselves "from their duties as disciples of the Lord."

C. Background

While the legal profession has a set of rules that purport to either resolve or help resolve ethical dilemmas, "[a] faithful Catholic will . . . form

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6 Id.
7 JOHN A. HARDON, THE CATHOLIC CATECHISM 292 (1975) ("No dictum is more firmly entrenched in Christian morality than this: Conscience must always be obeyed.").
9 MODEL RULES OF PROFESSIONAL CONDUCT (1994).
his . . . conscience in accord with . . . [the] teaching of the Church.”
Furthermore, the task of interpreting the word of God and articulating the Church’s teachings “has been entrusted only to those charged with the Church’s living Magisterium, whose authority is exercised in the name of Jesus Christ.” As Pope Pius XI stated:

Christ Himself made the Church the teacher of truth in those things also which concern the right regulation of moral conduct, even though some knowledge of the same is not beyond human reason. For just as God, in the case of the natural truths of religion and morals added revelation to the light of reason so that what is right and true, “in the present state also of the human race may be known readily with real certainty without any admixture of error,” so for the same purpose He has constituted the Church the guardian and the teacher of the whole of the truth concerning religious and moral conduct . . . .

Remaining faithful to the Church requires one to act in accord with one’s properly formed conscience. This is not an easy task, for it may require the Catholic lawyer to act contrary to popular, subjective norms. For example, as Bishop John J. Myers of Peoria noted:

[Catholics] must be able to stand before the Lord with a clear conscience and say they defended the rights of all human beings at every stage of existence to the best of their ability. They must never take refuge in the specious argument that they must enforce the law, whatever it may be.

Catholics believe that Christ, through the Church and her Magisterium, teaches them what is good and what is evil, what is ethical and what is unethical.

For many lawyers, serving society, the justice system and clients, as well as keeping abreast of the critical legal issues of the day, seem daunting enough without considering the additional requirements imposed by the Catholic Church. The nature of the legal profession creates “conflicts be-

10 Myers, supra note 8, at 71. As this Note will discuss, conflict exists between the accepted standards of professional conduct articulated in the Model Rules of Professional Conduct and the teachings of the Catholic Church.


14 Meyers, supra note 8, at 69.

15 Veritatis Splendor, supra note 12, at para. 8.
between a lawyer’s responsibility to clients, to the legal system and to the lawyer’s own interest in remaining an upright person while earning a satisfactory living.” However, remaining an “upright person” requires one to understand that “[t]he good is belonging to God, obeying him, walking humbly with him in doing justice and in loving kindness.” Acknowledging the Lord as God is the core and heart of the Law.

Catholic lawyers will face many difficult ethical decisions as a result of the nature of their profession—the teachings of the Church should guide these decisions. A Catholic's moral compass, as implemented through his conscience, is calibrated by the teachings of the Church. The direction one chooses should be guided by faith:

Clearly, by giving serious attention to divine revelation, one looks at legal questions in a different light. If, for example, one recognizes God as the creator of human life and the only one with full authority to ordain how that life should be lived and when it may lawfully be taken, this will surely influence one’s views on abortion, euthanasia, fetal experimentation, \textit{in vitro} fertilization, capital punishment, and a whole host of other life-and-death issues. If from revelation one concludes that the family is the central governmental unit, this will affect one’s thinking on parental rights in education, divorce, adultery, surrogate mother contracts, homosexuality, and many other matters. In brief, one will critique every legal proposal in terms of conformity to what is known of the law of God.

To choose good over evil, one must properly form one’s conscience. Understanding the nature, formation, and role of the conscience is critical to making the proper moral and ethical decision.

II. The Ethical Compass: Moral Conscience

A. The Nature of Conscience

The familiar maxim “let your conscience be your guide” is sage advice. The small voice that people call their conscience is “present at the heart of the person, enjoin[ing] him at the appropriate moment to do good and to avoid evil.” When one listens to one’s conscience, one can hear God speaking. Conscience “is a messenger of him, who, both in nature and in grace, speaks to us behind a veil, and teaches and rules us by his representatives. Conscience is the aboriginal Vicar of Christ.” Therefore, one not only engages in an interior dialogue with oneself, but with God as well.

\textsuperscript{16} \textit{Model Rules of Professional Conduct} pmbl. (1994).
\textsuperscript{17} \textit{Veritatis Splendor}, \textit{supra} note 12, at para. 11.
\textsuperscript{18} \textit{Id.} Here, \textit{Law} is defined as “a rule of conduct enacted by competent authority for the sake of the common good . . . . Law is declared and established by reason as a participation in the providence of the living God, Creator and Redeemer of all.” \textit{Catechism of the Catholic Church} para. 1951 (U.S. Catholic Conference, Inc. trans., 1994).
\textsuperscript{20} \textit{Catechism of the Catholic Church}, \textit{supra} note 18, at para. 1777.
\textsuperscript{21} \textit{Id.}
One's conscience is hidden from others, and it is often the only witness to one's ethical decisions. Additionally, since each person's conscience is secret and personal, only God and the individual person know what it is saying.

The moral conscience provides direction, particularly when the path is unclear. Like a compass, it is a tool for the lost or disoriented traveler. It is also similar to a compass in that if it is never used or if it is improperly calibrated it will never serve its proper function.

Lawyers often find themselves wandering amidst a host of cloudy ethical issues which may have grave moral implications. For example, issues regarding life, human dignity, family, freedom of speech, freedom of religion, and liberty require lawyers to make good decisions based upon their own sound judgment. This judgment is grounded in one's conscience:

Conscience is a judgment of reason whereby the human person recognizes the moral quality of a concrete act that he is going to perform, is in the process of performing, or has already completed. In all he says and does, man is obliged to follow faithfully what he knows to be just and right. It is by the judgment of his conscience that man perceives and recognizes the prescriptions of the divine law.

In the final analysis, one's conscience is the small voice within. It is a judgment of reason—formed through the teachings of the Magisterium—which guides one's decisions. It is an internal dialogue with God. It is one's personal "witness to the universal truth of the good." A person's "[m]oral conscience . . . opens him to the call, to the voice of God. In this, and not in anything else, lies the entire mystery and the dignity of the moral conscience: in being the place, the sacred place where God speaks to man."

Unfortunately, the conscience is not always right; as part of our humanity, it is fallible. Mistakes of conscience can be attributed to ignorance, oftentimes an ignorance which is invincible. Therefore, people must "seek the truth" and make decisions "in accordance with that same truth." In order to choose good over evil, the "[c]onscience must be informed and moral judgment enlightened." One's conscience must be properly formed through education.

23 Veritatis Splendor, supra note 12, at para. 57.
24 Catechism of the Catholic Church, supra note 18, at para. 1778.
25 See also St. Thomas Aquinas, Summa Theologiae 1, Q. 79, art. 13 ("For conscience, according to the very nature of the word, implies the relation of knowledge to something: for conscience may be resolved into cum alio scientia, i.e., knowledge applied to an individual case.").
26 Catechism of the Catholic Church, supra note 18, at para. 1781.
27 Veritatis Splendor, supra note 12, at para. 58 (citation omitted).
28 "[A]n ignorance of which the subject is not aware and which he is unable to overcome by himself." Id. at para. 62.
29 Id.
30 Catechism of the Catholic Church, supra note 18, at para. 1783.
B. The Formation of Conscience

Forming one’s conscience is a lifelong task. It involves a continual search for the objective truth. Throughout one’s search for truth, one must be careful “not to be conformed to the mentality of this world, but to be transformed by the renewal of our mind.” While knowledge of God’s law is necessary, “it is not sufficient: what is essential is a sort of ‘connatural-ity’ between man and the true good.” Pope John Paul II writes:

Such a connaturality is rooted in and develops through the virtuous attitudes of the individual himself: prudence and the other cardinal virtues, and even before these the theological virtues of faith, hope and charity. This is the meaning of Jesus’ saying: “He who does what is true comes to the light.” (Jn3:21)

In forming one’s conscience, “the Word of God is the light for our path.” The Catholic Church is entrusted with the responsibility “to announce and teach authentically that truth which is Christ, and at the same time with her authority to declare and confirm the principles of the moral order which derive from human nature itself.”

As Pope John Paul II has noted, some Catholics are “selective in their adherence to the church’s moral teachings,” and “[s]ome people appeal to ‘freedom of conscience’ to justify this way of acting.” Because of this mistaken belief, the Pope clarified that “it is not the conscience that ‘freely’ establishes what is right and wrong . . .” rather, the “[c] onscience detects moral truth: It interprets a norm which it does not create.” A Catholic’s fidelity to Christ implies a fidelity to the Church and her Magisterium: “Be faithful

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31 Id. at para. 1784.
32 VERITATIS SPLENDOR, supra note 12, at para. 64 (“Do not conform yourselves to the standards of this world, but let God transform you inwardly by a complete change of your mind. Then you will be able to know the will of God—what is good and is pleasing to him and is perfect.” (paraphrasing Rom. 12:2)).
33 Connatural is defined as “connected by nature: Inborn, Inherent, Natural.” WEBSTERS 3RD NEW INTERNATIONAL DICTIONARY 480 (1986).
34 VERITATIS SPLENDOR, supra note 12, at para. 64.
35 Id.
36 CATECHISM OF THE CATHOLIC CHURCH, supra note 18, at para. 1785.
37 VERITATIS SPLENDOR, supra note 12, at para. 64 (quoting Dignitatis Humanae para. 14, supra note 12, at 811).
40 Id. (emphasis added).
to your faith, without falling into the dangerous illusion of separating
Christ from His Church, or the Church from her Magisterium."\(^{41}\)

Therefore, the Church and her Magisterium are of great importance. Through the Church, one can properly calibrate one's moral compass. In helping reach this goal, the Church provides direction to true north—the moral good:

The Church puts herself always and only at the *service of conscience*, helping it to avoid being tossed to and fro by every wind of doctrine proposed by human deceit, and helping it not to swerve from the truth about the good of man, but rather, especially in more difficult questions, to attain the truth with certainty and to abide by it.\(^{42}\)

Catholic lawyers who are seeking to do good, who are seeking to make the right choices regarding the many difficult ethical decisions confronting them in their profession, can turn to the Church and its teachings. The Word of God, as articulated through the Church, sheds light on the dark paths, helping one to choose the right course. Therefore, Catholics must "assimilate" the Word of God "in faith and prayer and put it into practice. This is how moral conscience is formed."\(^{43}\)

C. Choosing in Accord With Conscience

Faced with a difficult moral and ethical question, one's conscience can make either a right choice in accord with "reason and the divine law," or a wrong choice "that departs from them."\(^{44}\) The many difficult moral and ethical questions faced by lawyers today do not often have very clear and simple answers. As previously stated, conscience is a "judgment of reason"; moreover, it is a "practical judgment... which applies to a concrete situation the rational conviction that one must love and do good and avoid evil."\(^{45}\) This principle of practical reason "constitutes the very foundation of the natural law... which... shines in the heart of every man."\(^{46}\)

One thing is clear: one must act in accordance with this judgment.\(^{47}\) If a person acts against his conscience or, "in a case where he lacks certainty about the rightness and goodness of a determined act, still performs that act, he stands condemned by his own conscience."\(^{48}\) Ignorance is no excuse. When a person "takes little trouble to find out what is true and good, or when conscience is by degrees almost blinded through the habit of committing sin'... the person is culpable for the evil he commits."\(^{49}\) However, if the "ignorance is invincible" or the person is "not responsible

\(^{41}\) Pope John Paul II, *Theology in an Age of Renewal*, Address to the Theologians of Spain Given at the Pontifical University of Salamanca (Nov. 1, 1982), in *12 ORIGINS*, Nov. 18, 1982, at 366, 368.

\(^{42}\) *VERITATIS SPLENDOR*, supra note 12, at para. 64 (citation omitted).

\(^{43}\) *CATECHISM OF THE CATHOLIC CHURCH*, supra note 18, at para. 1802.

\(^{44}\) *Id.* at para. 1786.

\(^{45}\) *VERITATIS SPLENDOR*, supra note 12, at para. 59.

\(^{46}\) *Id.*

\(^{47}\) *HARDON*, supra note 7, at 290 ("No dictum is more firmly established in Christian morality than this: Conscience must always be obeyed.").

\(^{48}\) *VERITATIS SPLENDOR*, supra note 12, at para. 60.

\(^{49}\) *CATECHISM OF THE CATHOLIC CHURCH*, supra note 18, at para. 1791 (footnote omitted).
for his erroneous judgment, [the person is not culpable for the evil committed. Still, it no less remains] an evil, a privation, a disorder . . . [Therefore one must . . . work to correct the errors of moral conscience.] To this end, one "must always seriously seek what is right and good and discern the will of God expressed in divine law." As discussed by Reverend John A. Hardon, S.J., the conscience "may be in any one of four states of certitude." The conscience may be, subjectively certain, because man has no doubt about the morality of the way he should act in a given case; or subjectively doubtful, because a person is undecided as to the morality of the action now before him. On the objective plane, his conscience is correct when its judgment reveals the true moral appraisal of a situation, and false when it erroneously tells a man that this present evil action is good or good action is bad. Since following one's conscience is crucial, the responsibility one has to follow one's conscience "depends on the degree of sincere certitude [one has] in facing a moral decision." One is always obliged to follow a conscience which is certain even if it is objectively wrong and even where one might be culpable for failing to form it properly; "because conscience is the nearest available norm we have for knowing what is right and wrong." Not following one's conscience would be analogous to the traveler who embarked upon a journey without bothering to inspect his compass to ensure that it was operating properly. While hopelessly lost in the deepest and darkest part of the jungle, the traveler must rely on his compass for he has no other instrument available to him. Likewise, a Catholic lawyer must rely on his conscience to guide him through difficult ethical dilemmas.

On the other hand, one must refrain from acting on a doubtful conscience; "unless the mind clearly says that a prospective action is permissible, [one] may not do it." Therefore, if one is in doubt, one "must either refrain from taking action or resolve the doubt. Information should be sought . . . [I]t requires development and careful training as a delicate instrument for knowing the laws of God." For example, if the same traveler suspects that his compass is not operating properly, it would be foolish and a mistake for him to rely on it. A necessary inspection before embarking on his journey would reveal to the traveler that he must repair his compass. Therefore, "[f]idelity to conscience . . . cannot be separated in practice from sincerity in wanting to learn the truth"—whether it be truth about the morality of one's actions or the truth that one's compass is not functioning properly. The Magisterium is at the service of those desiring to

50 Id. at para 1793.
51 Id. at para. 1787.
52 HARDON, supra note 7, at 292.
53 Id.
54 Id.
55 Id.
56 Id.
57 Id. at 293.
58 Id.
learn the truth\(^5^9\) in order to develop a properly functioning moral conscience.

To help Catholics calibrate their moral conscience—their ethical compass—the Church teaches that certain rules always apply:

—One may never do evil so that good may result from it;
—[T]he Golden Rule: "Whatever you wish that men would do to you, do so to them."
—[C]harity always proceeds by way of respect for one's neighbor and his conscience: "Thus sinning against your brethren and wounding their conscience . . . you sin against Christ." Therefore "it is right not to . . . do anything that makes your brother stumble."

An important point to highlight is that humans have free will; they can make moral or immoral choices. The Church recognizes that human acts which are freely chosen as a result of the judgment of conscience can be morally evaluated as either good or evil.\(^6^1\)

According to the Church, morality has three sources: (1) the object chosen; (2) the end in view or the intention; and (3) the circumstances of the action.\(^6^2\) The object chosen is the "matter of the human act . . . the act of the will."\(^6^3\) Some objects are intrinsically evil.\(^6^4\)

In comparison to the object, the "intention resides in the acting subject. . . . The intention is a movement of the will toward the end: it is concerned with the goal of the activity."\(^6^5\) However, ends do not justify means; "[a] good intention (for example, that of helping one's neighbor) does not make behavior that is intrinsically disordered, such as lying and calumny, good or just."\(^6^6\)

And finally, the circumstances are "secondary elements of a moral act."\(^6^7\) The circumstances can increase or diminish the moral goodness of an act (for example, the amount of a theft) or the responsibility of the actor (for example, acting in self-defense or out of a fear of death).\(^6^8\) However, circumstances cannot change an evil act into a good act.\(^6^9\)

Thus, a "morally good act requires goodness of the object, of the end, and of the circumstances together."\(^7^0\) An objectively evil act, such as adultery or murder, cannot be spared by good intentions.

When faced with an ethical decision, Catholic lawyers must seek to find the true, objective good. A Catholic must evaluate the morality of his actions. This moral evaluation may be a very difficult task without resorting to the teachings of the Church. The Church, for example, helps to clarify

\(^5^9\) Veritatis Splendor, supra note 12, at para. 27.
\(^6^0\) Catechism of the Catholic Church, supra note 18, at para. 1789.
\(^6^1\) Id. at para. 1749.
\(^6^2\) Id. at para. 1750.
\(^6^3\) Id. at para. 1751.
\(^6^4\) See Veritatis Splendor, supra note 12, at paras. 79-83; see also infra notes 110-13 and accompanying text.
\(^6^5\) Catechism of the Catholic Church, supra note 18, at para. 1752.
\(^6^6\) Id. at para. 1753.
\(^6^7\) Id. at para. 1754.
\(^6^8\) Id.
\(^6^9\) Id.
\(^7^0\) Id. at para. 1755.
difficult issues of morality such as contraception, abortion, euthanasia, and capital punishment. The teaching of the Church helps Catholics to understand which actions are intrinsically evil and to be avoided. The Church also helps Catholics to understand what is truly good. Religious education for Catholics is indispensable.

Choosing in accord with one's conscience can result in an erroneous judgment if the conscience has not been properly enlightened. Reflecting on the teaching of the Church must be a continuous, lifelong endeavor. The practical judgment of one's conscience must be founded in the objective truth. For this reason, the Church is the source of enlightenment for the conscience. The words of Cardinal Joseph Ratzinger, prefect of the Congregation for the Doctrine of Faith, are informative:

[C]onscience is the capacity to be open to the call of truth that is objective, universal, and the same for all who can and must seek it. It is not isolation, but communion; cum scire in the truth concerning the good, which accompanies human beings in the intimacy of their spiritual nature. It is in this relationship with common and objective truth that the conscience finds its dignity, a dignity which must always be guaranteed by a continuing formation. For the Christian, this naturally entails a sentire cum ecclesia, and so, an intrinsic reference to the authentic magisterium of the church.  

In order to help one make the correct choice according to one's conscience, the Church espouses several rules, principles, and concepts which are instructive. Three concepts of great import for Catholics include: (1) the natural moral law, (2) the principle of double effect, and (3) material versus formal cooperation with evil. Further discussion of these concepts will help Catholic lawyers properly understand how to choose good and avoid evil.

III. CHOOSING GOOD AND AVOIDING EVIL

A. The Natural Moral Law

In order to choose good over evil it is necessary for one to know what is good. Some commentators argue that a lawyer should not impose his moral beliefs on his clients. This position holds that it is the individual's choice which must prevail over the object of the choice. As Pope John Paul II

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72 See Monroe H. Freedman, Legal Ethics and the Suffering Client, 36 CATH. U. L. REV. 331, 336 (1987) ("That is why I say that the legal ethics of goodness collapses into the legal ethics of rectitude. Call it conscience or call it character and integrity—it is still the same hubris, the same paternalism and elitism."); Pepper, supra note 5, at 634 (arguing that a lawyer is a "good person" when the lawyer provides access to the law without moral screening; this serves the "moral values of individual autonomy and equality"); cf. THOMAS L. SHAFFER & ROBERT F. COCHRAN JR., LAWYERS, CLIENTS, AND MORAL RESPONSIBILITY 126 (1994) ("Lawyers must avoid the danger that they will make their own determination about a just resolution of the dispute and then impose it on their clients."). These commentators do not suggest that "goodness" is irrelevant; rather, they believe that a lawyer should not impose or coerce goodness. For a Catholic, the position of the Church is clear: "Conscience must always be obeyed." See supra note 7 and accompanying text.
stated: "Once the idea of a universal truth about the good, knowable by human reason, is lost, inevitably the notion of conscience also changes . . . . Taken to its extreme consequences, this [prerogative of independently determining the criteria of good and evil and then acting accordingly] leads to a denial of the very idea of human nature."

Since the Enlightenment, secularism, relativism, and individualism have been prevalent concepts in American culture. The rejection of the Church, the disbelief in God, and the celebration (or elevation) of the autonomy of the individual have combined to reinforce the notion that there is no objective good. Unfortunately, under this philosophy, man displaces God as the ultimate law maker. While it follows that a legal profession which bases its system of moral and ethical values on a secular foundation would be indifferent toward the objective good, a Catholic cannot turn his back to the objective truth. Pope John Paul II stated:

*When it is a matter of the moral norms prohibiting intrinsic evil, there are no privileges or exceptions for anyone. It makes no difference whether one is the*

Further, "[f]rom the very beginnings of the Church the disciples of Christ strove to convert men to confess Christ as Lord, not however by applying coercion or with the use of techniques unworthy of the Gospel but, above all, by the power of the word of God. . . . At the same time, however, they showed respect for the weak even though they were in error, and in this way made it clear how ‘each of us shall give account of himself to God’ (Rom. 14:12) and for that reason is bound to obey his conscience." *Dignitatis Humanae* para. 11, *supra* note 12, at 808. If the lawyer's conscience tells him that the client's actions are morally wrong then the lawyer must refrain from any further cooperation with the immoral act. God, and not the lawyer, will judge the culpability of the client for his acts. *See* Pope Paul VI, *infra* note 123. However, the Church teaches that one must always work to correct errors of conscience. *Catechism of the Catholic Church,* *supra* note 18, at para. 1793. Furthermore, acts which are intrinsically evil "are a disgrace, and so long as they infect human civilization they contaminate those who inflict them more than those who suffer injustice . . . ." *Veritatis Splendor,* *supra* note 12, at para. 80 (quoting original *Gaudium et Spes* para. 27).

In the final analysis, the client has a free will; however, the lawyer should try to correct ("coerce" is too strong and connotes hostility) the client's errors of conscience. "Hence, the more a correct conscience prevails, the more do persons and groups turn aside from blind choice and try to be guided by the objective standards of moral conduct." *See supra* note 1. The natural moral law provides the objective standard. *See also* *Veritatis Splendor,* *supra* note 12, at paras. 28-34.

73 *Veritatis Splendor,* *supra* note 12, at para. 32.

74 For a discussion of relativism, see ALLAN BLOOM, *The Closing of the American Mind* (1987). Bloom stated the following:

Relativism is necessary to openness; and this is the virtue, the only virtue, which all primary education for more than fifty years has dedicated itself to inculcating . . . . The true believer is the real danger . . . . The point is not to correct the mistakes and really be right; rather it is not to think you are right at all.

*Id.* at 25-26.

75 *See generally* Hans Kelsen, *Absolutism and Relativism in Philosophy and Politics,* 42 AM. POL. SCI. REV. 906 (1948) (arguing that philosophical relativism leads to democracy while philosophical absolutism leads to tyranny).

76 Charles E. Rice, *The Role of Natural Law In the 21st Century,* Goodrich Lecture, Wabash College, 1994 (transcript on file with author); *see also* Joseph Cardinal Ratzinger, *supra* note 71, at 755 ("The fundamental dogma of the Enlightenment is that man must overcome the prejudices inherited from tradition; he must have the boldness to free himself from every authority in order to think on his own, using nothing but his own reason.").

77 *See generally* Harold J. Berman, *The Crisis of Legal Education in America,* 26 B.C. L. REV. 347, 348 (1985) ("Only in the past two generations, in my lifetime, has the public philosophy of America shifted radically from a religious to a secular theory of law, from a moral to a political or instrumental theory, and from a historical to a pragmatic theory.").
master of the world or the “poorest of the poor” on the face of the earth. Before the demands of morality we are all absolutely equal.\textsuperscript{78}

From the natural moral law, one can discern through reason how one should act in order to achieve one’s final end—eternal happiness with God.\textsuperscript{79} The natural moral law is not solely a Catholic construct. However, “Saint Thomas Aquinas (1225-74), a Catholic, . . . provide[d] the most systematic explanation of the natural law in the context of reason as well as revelation.”\textsuperscript{80} Revelation includes the Old Testament and the New Testament; St. Thomas calls this the divine law. In addition to divine law, natural law and human law, St. Thomas described a fourth kind of law, eternal law, as “the Divine Reason’s conception of things.”\textsuperscript{81} St. Thomas stated:

[S]ince all things subject to Divine Providence are ruled and measured by the eternal law . . . it is evident that all things partake somewhat of the eternal law, in so far as, namely, from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law. . . . [The] light of natural reason, whereby we discern what is good and what is evil, which is the function of the natural law, is nothing else than an imprint on us of the Divine Light. It is therefore evident that the natural law is nothing else than the rational creature’s participation of the eternal Law.\textsuperscript{82}

The Catholic Church, through her teachings, proclaims the existence of a discoverable, objective good.\textsuperscript{83} “The natural law is promulgated by the very fact that God instilled it into man’s mind so as to be known by him naturally.”\textsuperscript{84} The first and self-evident precept of natural law is “that good is to be done and pursued, and evil is to be avoided. All other precepts of the natural law are based on this: so that whatever the practical reason naturally apprehends as man’s good (or evil) belongs to the precepts of the natural law as something to be done or avoided.”\textsuperscript{85} This law is “natural” because “reason which decrees it properly belongs to human nature.”\textsuperscript{86} According to St. Thomas, “all those things to which man has a natural inclination, are naturally apprehended by reason as being good, and consequently

\begin{itemize}
\item \textsuperscript{78} Veritatis Splendor, supra note 12, at para. 96.
\item \textsuperscript{79} Charles E. Rice, 50 Questions on the Natural Law: What It Is and Why We Need It 44-45 (1993).
\item \textsuperscript{80} Id. at 35; see also Charles E. Rice, Some Reasons for a Restoration of Natural Law Jurisprudence, 24 Wake Forest L. Rev. 539 (1989).
\item \textsuperscript{81} Aquinas, supra note 25, at I-II, Q. 91, art. 1.
\item \textsuperscript{82} Id. at art. 2.
\item \textsuperscript{83} See generally Rice, supra note 12 (arguing that the Pope, the Vicar of Christ, is the interpreter of the natural law).
\item \textsuperscript{84} Aquinas, supra note 25, at I-II, Q. 90, art. 4.
\item \textsuperscript{85} Id. at Q. 94, art. 2.
\item \textsuperscript{86} Catechism of the Catholic Church, supra note 18, at para. 1955.
\end{itemize}
as objects of pursuit, and their contraries as evil, and objects of avoid-
ance.” There are five basic inclinations of man:

1. To seek the good, including the highest good, which is eternal happi-
ness with God.
2. To preserve himself in existence.
3. To preserve the species—that is, to unite sexually.
4. To live in community with other men.
5. To use his intellect and will—that is, to know the truth and to make
his own decisions.

God put these inclinations into man in order to help man achieve eternal
happiness. “From these inclinations we apply the natural law by deduc-
tion: Good should be done; this action is good; this action therefore
should be done.” In this way, the application of natural law to a particular
case is discoverable through reason.

However, if reason were one’s only guide to the objective truth, confu-
sion could result. Since original sin has weakened mankind’s intellect, it is
necessary “for the directing of human conduct to have a Divine law.”
This divine law is God’s law. As Pope John Paul II stated, “To ask about the
good, in fact, ultimately means to turn towards God, the fullness of good-
ness.” As Jesus stated, “There is only one who is good. If you wish to
enter into life, keep the commandments.” The Commandments provide
an example of the objective good: “The Commandments, that first charter
of human rights, are a specific promulgation, to the wavering human con-
science, of the natural moral law itself.” Through God, one finds the ob-
jective good. Therefore, the natural moral law is a guide for human
conduct; it is a guide for ethical decisions.

For the Catholic lawyer, the natural moral law allows the lawyer to dis-
cern how he should act. For example, the natural moral law assists a lawyer
in his role as an advisor. The Model Rules of Professional Conduct state that
when a lawyer renders advice to a client, he “may refer not only to law but
to other considerations such as moral, economic, social and political fac-
tors, that may be relevant to the client’s situation.” A Catholic lawyer who
is educated in the teachings of the Church and who has a fundamental
understanding of the natural moral law is better equipped to advise his
client to do that which is objectively good. While the client, through his

87 Aquinas, supra note 25, at I-II, Q. 94, art. 2.
88 Rice, supra note 79, at 45 (footnotes omitted).
89 Id. at 45-46.
90 Id. at 46.
91 Aquinas, supra note 25, at I-II, Q. 91, art. 4.
92 Veritatis Splendor, supra note 12, at para. 9.
1992) (“Nor has our generation in the least outgrown the need for that authoritative, specific
promulgation.”); see generally Catechism of the Catholic Church, supra note 18, at paras. 2052-
557 (discussing the Commandments).
96 Cf. Shaffer & Cochran, supra note 72. The authors argue that the lawyer who is con-
cerned with the goodness of the client should act as the client’s friend: “[F]riends can help us to
be better people by helping us to determine the right thing to do. Determining what the good
requires can be a difficult task. It often requires hard thought; friends can help us in our think-
or her own free will, may choose to do otherwise, at least the lawyer can help the client to obey God. The next question, whether the lawyer will represent or continue representing a client, requires a close inspection of the lawyer's conscience. Support of an immoral position may morally implicate the lawyer.

As another example, suppose a trial lawyer, who is obviously concerned about the outcome of the case, knows of controlling legal authority which is adverse to his client's position. Should the lawyer disclose this information to the tribunal? The *Model Rules of Professional Conduct* say yes. Furthermore, one could reason that such a disclosure would be absolutely truthful and honest; therefore it is good. One's reason, directed by God's law, would produce the answer "yes" to this question. In this situation, the model rule is in consonance with the natural moral law.

These two examples help to illustrate at least two points. First, the natural moral law gives one a framework for reasoning as to what is good. And second, the *Model Rules of Professional Conduct* and commonly accepted standards of behavior for the legal profession may or may not be in consonance with the natural moral law. One's conscience must make the proper judgment.

In addition to the natural moral law, Catholic lawyers should be familiar with the principle of double effect and how it relates to one's choice of positions regarding ethical issues and meritorious claims.

B. Double Effect

The principle of double effect determines the moral permissibility of an act having both a good and evil effect. It can best be understood when it is aligned with the three sources of morality: the object, the intent, and the circumstances. An application of this principle is often described as the Church's justification for the indirect death of an unborn child due to

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97 Rice, supra note 12, at 39 ("God gives to each person sufficient grace to be saved, but each one has to make the same choice faced by Adam and Eve: to obey or disobey God.").

98 This issue will be discussed further in part III.C of this Note.


100 Rice, supra note 12, at 39 ("Just as the maker of an automobile has built into it a certain nature and gives direction for its use so that it will achieve its end, so God has given directions to man in Revelation and the natural law.").

101 This point is made clear with regard to client confidentiality in part IV.C of this Note.
an operation intended to save the life of the mother.\textsuperscript{102} This example helps to illustrate the elements of this principle.

In order for double effect to be licitly applied, four limiting norms must be fulfilled.\textsuperscript{103} First, the action causing the dual effect is good. In this example, the removal of a cancerous uterus saves the life of the mother. The saving of the mother's life is analogous to the object.

Second, the good effect is not obtained by means of the evil effect; one does not kill the unborn child to spare the reputation of the unwed mother or to slow population growth. In the case of the mother with the cancerous uterus, the mother's life is saved by the removal of the uterus which indirectly causes the death of the child.

Third, sufficient reason exists for permitting the unsought evil effect—the death of the child—which unavoidably follows. Saving the life of the mother can only be achieved concomitant with the death of the child. These second and third elements are analogous to the circumstances.

And fourth, the evil effect is not intended in itself, but is merely allowed as a necessary consequence of the good effect. Neither the mother, nor the doctor, intend to kill the child. Their sole objective is to save the life of the mother; unfortunately, this results in the death of the unborn child.\textsuperscript{104} This fourth element is analogous to the intent.

St. Thomas Aquinas used the principle of double effect to justify a killing in self-defense.\textsuperscript{105} Aquinas stated:

\[\text{The act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore, this act, since one's intention is to save one's own life, is not unlawful . . . . And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end.}\]

It is important to note that the moral quality of an act stems first from its object, which renders an act good or evil.\textsuperscript{106} Acts which are intrinsically evil in their object cannot be made good through intent and circumstances. Intentions may diminish subjective culpability and circumstances may increase or decrease an act's moral value; however, they alone cannot make an intrinsically evil act good.

The principle of double effect is applicable to the legal profession since it is another conceptual tool for helping a lawyer perceive the truth; it helps the conscience perceive that which is good. For example, under this principle, a lawyer could justify the legitimate claim of self-defense for a

\textsuperscript{102} See RICE, supra note 79, at 291.
\textsuperscript{103} HARDON, supra note 7, at 337.
\textsuperscript{104} Id.
\textsuperscript{105} Cf. JOHN PAUL II, THE GOSPEL OF LIFE: EVANGELIUM VITAE para. 55 (1995) [hereinafter EVANGELIUM VITAE] ("[T]he need to render the aggressor incapable of causing harm sometimes involves taking his life. In this case, the fatal outcome is attributable to the aggressor whose action brought it about . . . . ").
\textsuperscript{106} AQUINAS, supra note 25, at II-II, Q. 64, art. 7.
\textsuperscript{107} VERITATIS SPLENDOR, supra note 12, at para. 78 ("The morality of the human act depends primarily and fundamentally on the 'object' rationally chosen by the deliberate will . . . . ").
defendant charged with murder. Furthermore, under narrow circumstances, capital punishment may be prescribed for a criminal defendant.\textsuperscript{108} Finally, a third analytical tool available to lawyers is the understanding and application of the distinction between material and formal cooperation with evil.

\textbf{C. Material v. Formal Cooperation With Evil}

The concept of material versus formal cooperation with evil is a way of distinguishing types of complicity in certain evil acts. Catholics are “called upon under grave obligation of conscience not to cooperate formally in practices which, even if permitted by civil legislation, are contrary to God’s law.”\textsuperscript{109} The Catholic Church teaches that certain things are intrinsically evil; that is, they can never be good regardless of intentions.\textsuperscript{110} Intrinsically evil acts “are such \textit{always and per se}, in other words, on account of their very object, and quite apart from the ulterior intentions of the one acting and the circumstances.”\textsuperscript{111} The Second Vatican Council gave several examples of such acts. These include: “Whatever is hostile to life itself . . . ; whatever violates the integrity of the human person; [and] whatever is offensive to human dignity.”\textsuperscript{112} Furthermore, these acts “are a disgrace, and so long as they infect human civilization they contaminate those who inflict them more than those who suffer injustice.”\textsuperscript{113}

Catholics have a responsibility for the evil acts committed by others when they “cooperate in them: by participating directly and voluntarily in them; by ordering, advising, praising or approving them; by not disclosing or not hindering them when [they] have an obligation to do so; [and] by protecting evil-doers.”\textsuperscript{114} According to Bishop John J. Meyers, “[o]ne \textit{formally} cooperates in another’s wrongful act when one participates in the immoral act in such a way that it becomes one’s own.”\textsuperscript{115} Applying this concept to abortions, the Bishop stated that “one formally cooperates when one performs abortions, or acts to encourage, counsel, facilitate, or make abortions available . . . . One who supports legal abortion cannot avoid formal complicity by maintaining that he or she wills not abortion as such, but only the freedom of others to choose abortion.”\textsuperscript{116} Pope John Paul II stated:

\begin{quote}
[Formal] cooperation occurs when an action, either by its very nature or by the form it takes in a concrete situation, can be defined as a direct participation in an act against innocent human life or a sharing in the immoral intention of the person committing it. This cooperation can
\end{quote}

\textsuperscript{108} The issue of capital punishment will be discussed in part IV of this Note. Pope John Paul II has outlined a very difficult standard for the acceptability of capital punishment in his encyclical letter, \textit{Evangelium Vitae}.
\textsuperscript{109} \textit{Evangelium Vitae}, supra note 105, at para. 74.
\textsuperscript{110} \textit{Veritatis Splendor}, supra note 12, at para. 80.
\textsuperscript{111} \textit{Id}.
\textsuperscript{112} \textit{Gaudium et Spes} para. 27, supra note 1, at 928.
\textsuperscript{113} \textit{Veritatis Splendor}, supra note 12, at para. 80 (quoting original \textit{Gaudium et Spes} para. 27).
\textsuperscript{114} \textit{Catechism of the Catholic Church}, supra note 18, at para. 1868.
\textsuperscript{115} Meyers, supra note 8, at 70.
\textsuperscript{116} \textit{Id}.
never be justified either by invoking respect for the freedom of others or by appealing to the fact that civil law permits it or requires it.\textsuperscript{117} Alternatively, "[o]ne materially cooperates in another's wrongdoing when one's acts help to make that wrongdoing possible, although one does not intend that wrongdoing."\textsuperscript{118} For example, the legal counsel of the county hospital who drafts the gynecological consent forms may not will that an abortion happen, yet nevertheless helps to make an abortion possible.\textsuperscript{119}

All formal cooperation with evil is immoral; and so is most material cooperation.\textsuperscript{120} In the previous example concerning the hospital legal counsel, he may oppose abortions and intend only to further the morally just, indeed laudable, surgical procedures performed at the hospital.\textsuperscript{121} In this case, the hospital lawyer would be materially cooperating with evil (the abortions); however, he could continue to perform his work without being morally implicated.\textsuperscript{122}

What if the form were not for "gynecological consent" but for "abortion consent"? Here there is no justification for the lawyer's actions. The lawyer acted immorally for he directly participated in a concrete act which not only helps to make the abortion possible, but also probably rises to the level of shared intentions with the person committing the act. In the final analysis, God will judge the lawyer's subjective culpability.\textsuperscript{123}

\textbf{D. Summary}

One's acts can be morally evaluated as good or evil, right or wrong. According to the Church, morality has three sources: the object, the intent, and the circumstances. Furthermore, the first precept of natural law is to do good and avoid evil. Since all other precepts of natural law are based on this, whatever practical reason apprehends as good or evil should either be done or avoided. This law is said to be \textit{natural} since it shines in the heart of every man; it was inscribed by God. And deep within one's conscience, one discovers this law—calling one to love and to do what is good. Therefore, the natural law is a guide for human conduct; it is a guide for ethical decisions.

The principle of double effect and the concepts of material and formal cooperation with evil help Catholics to better understand when they may be morally culpable for their actions or the acts of others. This understanding helps Catholic lawyers to better integrate their faith into the practice of law.

\begin{footnotes}
\item[117] \textit{Evangelium Vitae}, supra note 105, at para. 74.
\item[118] Myers, supra note 8, at 70.
\item[119] \textit{Id.} Bishop Myers uses the example of a hospital worker who is responsible for cleaning and maintaining the operating room where abortions are sometimes performed.
\item[120] \textit{Id.}
\item[121] \textit{Id.}
\item[122] \textit{Id.}
\item[123] Pope Paul VI, The Lawyer's Role, Address to Representatives of the International Association of Lawyers (May 14, 1965), in 10 \textit{The Pope Speaks} 294, 295 (1964-65) ("The ultimate judgment of men's conscience does not belong to him . . . . This is the role that God reserves for Himself.").
\end{footnotes}
IV. THE CATHOLIC LAWYER AND SOCIETY: LAY MEMBERS OF CHRIST’S FAITHFUL PEOPLE

As a "public citizen having special responsibility for the quality of justice," a lawyer "play[s] a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system."\textsuperscript{124} While the standing rules of professional conduct do help to define this relationship,\textsuperscript{125} the definition of this relationship for a Catholic lawyer is not complete without the teachings of the Church. As a lay member of Christ’s faithful people, the Catholic lawyer has an important role in society. Pope John Paul II emphasized that “the lay faithful have an essential and irreplaceable role” in the Catholic Church; through the laity “Christ is made present in the various sectors of the world as a sign and source of hope and love.”\textsuperscript{126}

The Catholic Church commends those who, as a service to others, are dedicated to the public good of the state.\textsuperscript{127} “In keeping with the social nature of man, the good of each individual is necessarily related to the common good, which in turn can be defined only in reference to the human person.”\textsuperscript{128} According to the Church, the common good consists of “three essential elements: . . . respect for the person, . . . social well-being and development of the group, [and] peace.”\textsuperscript{129} Peace requires that authority “should ensure by morally acceptable means the security of society and its members.”\textsuperscript{130} This authority is found in the state’s role “to defend and promote the common good of civil society, its citizens, and intermediate bodies.”\textsuperscript{131} In our society, the justice system maintains this authority. As a public citizen, a lawyer has a “special responsibility for the quality of justice.”\textsuperscript{132}

According to the Church:

\begin{quote}
[P]ublic life on behalf of the person and society finds its continuous line of action in the defense and the promotion of justice understood to be a “virtue,” an understanding which requires education, as well as a moral “force” that sustains the obligation to foster the rights and duties of each and everyone based on the personal dignity of each human being.\textsuperscript{133}
\end{quote}

A lawyer's prominent and important role in the “promotion of justice” is clear.\textsuperscript{134} The teachings of the Church impose unique responsibilities for

\textsuperscript{124} Model Rules of Professional Conduct pmbl. (1994).
\textsuperscript{125} Id.
\textsuperscript{126} John Paul II, supra note 4, at para. 7.
\textsuperscript{127} Gaudium et Spes para. 75, supra note 1, at 982.
\textsuperscript{128} The “common good” is “the sum total of all those conditions of social life which enable individuals, families, and organizations to achieve complete and efficacious fulfillment.” Id. at para. 74.
\textsuperscript{129} Catechism of the Catholic Church, supra note 18, at para. 1905.
\textsuperscript{130} Id. at paras. 1906-09.
\textsuperscript{131} Id. at para. 1909.
\textsuperscript{132} Id. at para. 1910.
\textsuperscript{133} Model Rules of Professional Conduct pmbl. (1994).
\textsuperscript{134} John Paul II, supra note 4, at para. 42.
\textsuperscript{135} See Pope Paul VI, supra note 125, at 295.
Catholics. In order to assist Catholic lawyers with their moral and ethical responsibilities, this Note has used the metaphor of the moral compass as the guide to one's moral decisions. A lawyer's moral compass is his conscience, educated and enlightened in the teachings of Christ. In order to assist in its proper development, the Catholic Church is at the service of the conscience. As previously discussed, the moral compass must be properly calibrated to prevent wrong or immoral decisions.

Having outlined and discussed the role of the conscience, its formation and the importance of choosing in accord with one's conscience, as well as the three analytical tools consisting of the natural moral law, the principle of double effect, and material versus formal cooperation with evil, this Note intends to further illustrate the application of the Church's teachings to several ethical problems. The application of the teachings of the Church is crucial for one's service as a lay member of the Church. As Pope John Paul II stated, "God calls me and sends me forth as a laborer in his vineyard. He calls me and sends me forth to work for the coming of his Kingdom in history."\(^\text{3}\)

As previously discussed, the Church teaches that the sacrament of marriage is indissoluble: 

\[\text{what therefore God has joined together, let no man put asunder.}\]

Should the Catholic lawyer agree to represent this client? Is this a meritorious claim? If so, how should the lawyer advise the client?

The lawyer's properly formed conscience calls him to do good and to avoid evil; this is also the first precept of the natural moral law. As previously stated, "a morally good act requires goodness of the object, of the end, and of the circumstances together."\(^\text{137}\) The teachings of the Church offer guidance for the lawyer's response to the posed questions.

The Church acknowledges that the physical separation of the married couple is necessary in some situations.\(^\text{139}\) In cases where living together is "practically impossible," the Church permits the married couple to live apart.\(^\text{140}\) According to the Church, a civil divorce is not intrinsically evil. 

\(^{136}\) John Paul II, supra note 4, at para. 58.

\(^{137}\) Catechism of the Catholic Church, supra note 18, at para. 1614 (quoting Matt. 19:6).

\(^{138}\) Id. at para. 1755.

\(^{139}\) Id. at para. 1649.

\(^{140}\) Id.
However, "[t]he spouses do not cease to be husband and wife before God and so are not free to contract a new union."\textsuperscript{141}

Therefore, agreeing to assist his client in separating from his wife and obtaining a civil divorce would be consistent with Church teaching if living together becomes practically impossible. However, if possible, the lawyer should advise the client to seek the better solution and reconcile with his wife.\textsuperscript{142} Furthermore, the lawyer could advise his client to seek spiritual assistance through a priest or a member of the Catholic laity. The lawyer should not limit himself to a purely legal solution; some matters may not be best handled through the justice system.\textsuperscript{143}

While the Church recognizes that some situations do exist where a married couple should be separated physically, the Church also clearly states that if the divorced couple is "remarried civilly, they find themselves in a situation that objectively contravenes God's law."\textsuperscript{144} If a man or a woman divorces his or her spouse and then remaries, he or she has committed adultery against the other.\textsuperscript{145} The Sixth Commandment—"you shall not commit adultery"—is a specification of the natural moral law and a violation of it is objectively wrong.

A lawyer who assists with a civil divorce for the purpose of facilitating the remarriage of his client or who is aware that his client is seeking the divorce with the intent to remarry, is culpable for the immoral act. While the lawyer's actions may not constitute formal cooperation with the immoral act,\textsuperscript{146} he does materially cooperate by "help[ing] to make the wrongdoing possible."\textsuperscript{147} Therefore, a lawyer may be morally culpable depending upon the object of his actions, his intentions, and the circumstances of his actions. If he knows that his actions will likely result in an immoral act, the lawyer should refuse to represent this client.\textsuperscript{148}

\textsuperscript{141} Id.
\textsuperscript{142} Id.

[W]hat this matter truly needs is not judicial action, whether it be state or federal, but for the parties to search their consciences, recognize the needs and hopes of [each party], and arrive at an accommodation which serves and enriches all who are involved in and affected by it.

\textsuperscript{144} CATECHISM OF THE CATHOLIC CHURCH, supra note 18, at para. 1650.
\textsuperscript{145} Mark 10:11-12.
\textsuperscript{146} In order to formally cooperate with the evil act—adultery—the lawyer would have to "participate[ ] in the immoral act in such a way that it become's [his] own." Myers, supra note 8, at 70.
\textsuperscript{147} Id.
\textsuperscript{148} The Model Rules of Professional Conduct state:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1994). For a Catholic, this rule should be expanded to not only include criminal or fraudulent conduct, but intrinsically evil and objectively immoral conduct as well.
B. Criminal Defense

In the second hypothetical problem, the lawyer is a court-appointed criminal defense attorney who is representing an alleged rapist. During pretrial conversations, the defendant confesses to the attorney. Furthermore, the defendant threatens to commit perjury if he testifies.

This situation poses several questions concerning advice to clients, client confidentiality, and meritorious defenses. Professor Monroe H. Freedman contends that the adversary system of justice obliges lawyers to use all available means to promote their client's interests. Freedman posed three questions:

1. Is it proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth?
2. Is it proper to put a witness on the stand when you know he will commit perjury?
3. Is it proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury?

Freedman's answer to all three questions is yes. As the following analysis demonstrates, a Catholic lawyer's response would differ.

First, while the act committed by the defendant in this case is intrinsically evil, defending the person who committed the evil act is not. In fact, "the teaching of Christ goes so far as to require the forgiveness of offenses." Our court system is an institution designed to "improve the conditions of human life." Justice requires the state to carry its burden of proof with regard to a criminal defendant. There is nothing intrinsically evil about a defense attorney requiring the state to prove its case. In general, there is nothing wrong with a defense attorney representing a criminal defendant. However, the analysis does not end here.

During his representation of the defendant, the attorney must be honest. According to the Church, a public "statement contrary to the truth takes on a particular gravity. In court it becomes false witness. When it is

149 See Monroe H. Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966). But see John T. Noonan, Jr., The Purposes of Advocacy and the Limits of Confidentiality, 64 Mich. L. Rev. 1485 (1966). Judge Noonan stated: [Professor Freedman's] position is not cynical, but it does seem to ignore the dangers inherent in defining the lawyer's role without broader consideration of the demands of human personality and of society... A lawyer should not impose his conscience on his client; neither can he accept his client's decision and remain entirely free from all moral responsibility, subject only to the restraints of the criminal law.

150 Freedman, supra note 149, at 1469.
151 See Catechism of the Catholic Church, supra note 18, at para. 1933 ("Liberation in the spirit of the Gospel is incompatible with hatred of one's enemy as a person, but not with hatred of the evil that he does as an enemy.").
152 Id.
153 Id. at para. 1916.
154 Exodus 20:16 (Eighth Commandment: "You shall not bear false witness against your neighbor.").
under oath, it is perjury. Acts such as these contribute to condemnation of the innocent, exoneration of the guilty, or the increased punishment of the accused.” Since bearing false witness and perjury are objectively wrong, the lawyer must refrain from facilitating these acts. As well, the lawyer should not become an accomplice or an agent in furthering his client’s intentions to commit perjury. Therefore, Professor Freedman’s response to his “three hardest questions” is not in consonance with the Church’s teachings. All three of Professor Freedman’s questions answered in the affirmative would result in statements which are contrary to the truth and would contribute to the “exoneration of the guilty.” The criminal defense lawyer’s properly formed conscience would judge such acts as wrong; therefore, they are acts to be avoided.

With regard to the lawyer-client privilege, the Church has a clear position:

*Professional secrets—for example, those of . . . lawyers . . . must be kept, save in exceptional cases where keeping the secret is bound to cause very grave harm to the one who confided it, to the one who received it or to a third party, and where the very grave harm can be avoided only by divulging the truth. Even if not confided under the seal of secrecy, private information prejudicial to another is not to be divulged without a grave and proportionate reason.*

Therefore, client confidentiality, under most circumstances, can be and should be maintained.

In this case, the lawyer will not be avoiding a grave harm by revealing the defendant’s secret. Absent a grave and proportionate reason for revealing the confession, this professional secret can and should be maintained. The lawyer may not, however, intentionally engage in the defendant’s scheme to commit perjury if the defendant decides to take the stand. As the Church notes, such false witness contributes to the exoneration of the guilty and is wrong. Such material cooperation would make the lawyer an accomplice in the act of perjury. The perjury is foreseeable, and the lawyer is in a position to avoid it through carefully selecting his line of questioning, impeaching the defendant, or revealing the perjury to the court.

Assuming no legal obstacle prevents the defense attorney from refusing to represent this client, what are the considerations for the defense attorney’s representation? As noted previously, there is nothing intrinsically wrong with defending someone who has committed an evil act and requiring the state to meet its burden of proof. The teachings of the Church require forgiveness and refute hatred toward a person but not hatred of the evil that this person may have done. If, however, the defendant is a repeat offender and makes credible claims that he intends to continue to do evil, the defense lawyer should probably decline to represent this defendant. Since people have a responsibility for the evil commit-

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155 [Catechism of the Catholic Church, supra note 18, at para. 2476.]
156 *Id.*
157 *Id.* at para. 2491.
158 *Id.* at para. 1933.
ted by others when they cooperate with the evil-doers, the lawyer in this case is no longer providing a socially and morally desirable service. The system of justice is designed to promote the common good. An abuse of the system in order to protect and thereby facilitate continued evil acts is inconsistent with the common good. The cooperation by the defense lawyer would probably impute this evil to him.

C. A Personal Injury Case

In Spaulding v. Zimmerman, Spaulding, a youth, was badly injured in an automobile accident and sued for damages. The defense lawyer had his own doctor conduct a physical examination of Spaulding; the examination revealed that Spaulding had a life-threatening aortic aneurism. Unknown to Spaulding or his doctors, the aneurism was arguably caused by the accident. Ignorant of the aneurism, Spaulding was willing to settle the case for sixty-five hundred dollars. The defense lawyer chose to conceal the information regarding the aneurism for fear that revealing it would cause Spaulding to want much more than the current settlement offer. How should a Catholic lawyer respond to this situation?

Client confidentiality and doing right by one’s client in this case would pale in comparison to the grave harm that non-disclosure poses for the young Spaulding. Respect for the dignity of human life should prevail. In Evangelium Vitae, Pope John Paul II’s message was clear and unequivocal: “respect, protect, love and serve life, every human life!” Furthermore, the Pope has stated that “[t]he dignity of the person is the most precious possession of an individual. As a result, the value of one person transcends all the material world.” Under the Model Rules of Professional Conduct, however, the lawyer would be forbidden to reveal this information unless the lawyer’s client consented after consultation. The outcome of this rule would not be in consonance with the teachings of the Church in this case. As noted previously, professional secrets must be kept except where keeping the secret is bound to cause “very grave harm” to a third person. In this case, the Church’s teachings would assist a doubtful or erroneous conscience. The defense lawyer would be compelled to respect and protect the life of Spaulding by ensuring that someone informed Spaulding of his ailment in a timely fashion.

159 116 N.W.2d 704, 710 (Minn. 1962). The court set aside the settlement offer even though “no canon of ethics or legal obligation” required the defendant’s counsel to inform the plaintiff of the disability.
160 Evangelium Vitae, supra note 105, at para. 5.
161 John Paul II, supra note 4, at para. 37.
162 Model Rules of Professional Conduct Rule 1.6 (1994); see Monroe H. Freedman, Understanding Lawyers' Ethics 102-05 (1990). This rule allows disclosure in order to prevent the client from committing a criminal act which is likely to result in imminent death or substantial bodily harm or in order for the lawyer to defend himself in an action against the client. The rule does not allow the lawyer to divulge information if it relates to someone else committing a crime or if the crime the client is intending to commit is not likely to result in imminent death or substantial bodily harm. Furthermore, the rule is limited to future criminal conduct; therefore, it would not apply to Spaulding’s case.
D. Prosecution and Capital Punishment

Suppose a Catholic lawyer is a criminal prosecutor for a state which has the death penalty for murder. Could the prosecutor seek the death penalty? If the Pope calls all Catholics to respect, love, and protect all human life, how does this affect the prosecutor with regard to a capital murder case?

The Pope’s message in Evangelium Vitae calls everyone to promote the culture of life and reject the pagan culture of death. Prior to Evangelium Vitae, it was possible for Catholics to argue in support of the death penalty on much broader terms than now currently espoused by the Church. For example, the Catechism of the Catholic Church,163 which predates the Pope’s encyclical, and the teachings of St. Thomas Aquinas164 offered support for the death penalty. However, after Evangelium Vitae, a Catholic can support the death penalty only if, in consideration of all factors including the adequacy of the penal system, he concludes that such penalty is absolutely necessary in that “it would not be possible otherwise to defend society.”165 This standard is difficult to meet and would make the use of the death penalty “very rare, if not practically non-existent” because of “steady improvements in the organization of the penal system.”166 The Pope further asserts that “[m]odern society in fact has the means of effectively suppressing crime by rendering criminals harmless without definitively denying them the chance to reform.”167

In light of the teachings of the Church, there are probably very few, if any, situations where a prosecutor could and should seek the death penalty.168 The standard by which a prosecutor should judge his decision has been clearly articulated by the Pope.169

E. Conclusion

The problems presented are a small sampling of the myriad of moral dilemmas lawyers face throughout their careers. The circumstances surrounding most, if not all, of these problems are complicated. There are many tensions at work often making it difficult to discover what is good. These tensions include the client’s desires, fiscal incentives, the desire for

163 See CATECHISM OF THE CATHOLIC CHURCH, supra note 18, at para. 2266. Preserving the common good of society requires rendering the aggressor unable to inflict harm. For this reason the traditional teaching of the Church has acknowledged as well-founded the right and duty of legitimate public authority to punish malefactors by means of penalties commensurate with the gravity of the crime, not excluding, in cases of extreme gravity, the death penalty. Id. 164 AQUINAS, supra note 25, at II-II, Q. 64, art. 2. 165 EVANGELIUM VITAE, supra note 105, at para. 56. 166 Id. 167 Id. at para. 27. 168 Charles E. Rice, The Death Penalty, POSITION PAPER 265, at 23 (Jul. 1995). Professor Rice offers two situations where, arguably, the death penalty would be appropriate: (1) for “a prisoner already serving a life sentence who murders a guard or another inmate,” (2) “a condition of unrest or rebellion in which the authorities would lack the physical means to keep a murderer securely imprisoned.” Id. at 35. 169 Additionally, a Catholic juror would have the same problem as the prosecutor.
publicity and popularity, the harm or benefits to third parties, political goals and aspirations, peer pressure, societal pressure, and family pressure, to name only a few. These tensions make the solutions to such problems unclear. This "fog" of uncertainty can be overcome by resorting to one's moral compass—one's properly formed conscience.\(^{170}\) The choices one makes can be evaluated as either good or evil and may make one an accomplice in the evil done by others. And because humans are fallible, it is necessary that they seek the truth; the Church helps one discover the truth. In the final analysis, a Catholic lawyer must properly form his conscience and obey its direction.

V. ROLE MORALITY: AN UNACCEPTABLE ALTERNATIVE

It is important to address role morality\(^{171}\) because of its current popularity in the field of legal ethics, and because it conflicts with the theory presented in this Note. Much of the literature on legal ethics,\(^{172}\) as well as the ubiquitous law school discussions concerning lawyer's ethics, often address and support the role morality theory. This section critiques this theory from the Catholic perspective.

Advocates of role morality suggest that a lawyer should assume an amoral role.\(^{173}\) That is, a lawyer's personal views of morality should have very little, if any, influence on the services a lawyer performs. Proponents of role morality suggest that a lawyer principally serves the client and, therefore, must do as the client desires within the bounds of the law.\(^{174}\) In his article, Professor Pepper, describing the amoral professional role of the lawyer, stated:

The traditional view is that if such conduct by the lawyer is lawful, then it is morally justifiable, even if the same conduct by a layperson is morally unacceptable and even if the client's goals or means are morally unacceptable. As long as what lawyer and client do is lawful, it is the client who is morally accountable, not the lawyer.\(^{175}\)

According to Pepper, the amoral role supports the moral concepts of autonomy and equality. These moral concepts are promoted by providing access to the law without moral screening. Pepper's position is based on the idea
that law is a public good which increases autonomy, that increasing auton-
omy is morally good, and that autonomy often depends upon access to the law.176

In the final analysis, Pepper concludes that there is a place for the lawyer's moral autonomy. According to his theory, a good lawyer—the amoral professional—can be a good person if he adds together three elements. First, a good lawyer will maintain the "conscientious objection possibility" which allows the lawyer to follow his "higher value that supports conduct contrary to the lawyer role," but only in "extreme cases."177 Pepper makes it clear that conscientious objection is limited to only extreme cases (lest the amoral role be subsumed by morality). Arguably, an advocate of role morality would not accept a conscientious objection position for a lawyer asked to facilitate a civil divorce, draft an abortion consent form, seek the death penalty in a criminal case, or divulge a client's secret to the ailing Spaulding.

Second, Pepper argues that a lawyer should engage in moral dialogue with the client in order to permit the lawyer to communicate his moral stance on a particular issue.178 In this instance, the lawyer maintains his amoral role since the client is provided full access to the law; however, the client's decisions will now be informed by the lawyer's moral judgment. An additional benefit is that the lawyer will be instructed by the client's morality as well. However, according to Pepper, there are two drawbacks to this element: (1) it is expensive (the expense would come principally from the increase in time required to participate in this dialogue) and (2) the client may not be receptive.179 If the client's position conflicts with the lawyer's conscience, according to Pepper, the client's position, even if it is objectively wrong, should prevail.180 However, as discussed previously, the lawyer should seek to promote the objective good. The Catholic lawyer should

176 Id. at 617.
177 An example of an "extreme case" offered by Pepper is the following: if a murder defendant told his lawyer where to find "the hidden bodies" and upon investigation the lawyer found that one of the bodies was still alive, the "conscientious objection to the amoral role seems appropriate" and the lawyer could divulge the information to save the life of the dying victim. Id. at 633.
178 Id. at 630-32; cf. Stephen L. Pepper, Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering, 104 YALE L.J. 1545 (1995). In this article, Pepper attempts to answer the following question: "When the lawyer is in a situation in which the client may well use the relevant knowledge of the law to violate the law or avoid its norms, what ought the lawyer to do?" His solution points more toward the importance of moral dialogue and counselling. Pepper's final comments are quite interesting. He states:

It would be good to have more professionals and citizens who have developed the skills of practical wisdom (another way of referring to developed, educated moral character), but how we move toward building that skill—in our families, our law firms and corporate law offices, and the varied institutions throughout society and the profession—is far from clear . . . . We need practical wisdom because the rules and principles simply will not be sufficient to deal with the moral questions of lawyering. Id. at 1609-10 (emphasis added). This Note has outlined ways in which to "move toward building that skill . . . . to deal with the moral questions of lawyering."
179 See Pepper, supra note 5, at 631-32.
180 See id. at 618. Pepper emphasizes that this "is an echo of the underlying professional ethic" which states that the very idea of a profession connotes the function of service to the extent that the professional is to subordinate his interest to those of his client. Further, and more telling, Pepper states, "It also leaves one wondering whether there is any place for the lawyer's moral autonomy." Id. at 618 n.20.
not counsel his client to engage, or assist his client in engaging, in conduct the lawyer knows to be immoral. The lawyer should discuss the consequences of any proposed conduct and make a good faith effort to correct his client's errors of conscience. However, in the final analysis, a Catholic lawyer is bound to follow his properly formed conscience.181

Finally, Pepper argues, a lawyer should strive to promote the "inherent moral value of facilitating access to the law."182 This appears to be a principal motivator for Pepper's theory: that imposing the lawyer's moral standards upon a client denies the client access to the law and therefore denies the client equal access to this public good. While it is clear that access to the law is essential for everyone, especially the disadvantaged, mere access to the law is not a legitimate reason for advising or facilitating a client to do an objectively immoral act. Pope John Paul II said it best, "When it is a matter of the moral norms prohibiting intrinsic evil, there are no privileges or exceptions for anyone."183

In the final analysis, the amoral ethical role theory poses two principal problems for the Catholic lawyer. First, this theory exalts autonomy above the objective good. The moral object of individual autonomy or free choice is greater than the object of the choice. According to Pepper's theory, one could reason that if a man chooses to divorce his wife in a no-fault divorce jurisdiction for no other reason than his desire to have a younger and more attractive mate, the lawyer who refuses to facilitate the intended adultery would not be a "good person" because he limited access to the law through his moral screen.

Second, the amoral ethical role mistakenly frees a lawyer from any measure of accountability for assisting his client's immorality.184 As discussed previously, all formal cooperation with evil is immoral, as is most material cooperation. As Pope John Paul II stated, "This cooperation can never be justified either by invoking respect for the freedom of others or by appealing to the fact that civil law permits it or requires it."185

In the final analysis, the words of Pope John Paul II are instructive:

[W]e must not be content merely to warn the faithful about the errors and dangers of certain ethical theories. We must first of all show the inviting splendor of that truth which is Jesus Christ himself. In him, who is the Truth (cf. Jn 14:6), man can understand fully and live perfectly, through his good actions, his vocation to freedom in obedience to the divine law summarized in the commandment of love of God and neighbor.186

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181 This "paternalistic" position is warranted by the necessity of promoting the common good, by doing that which is objectively good. Criticism against an objective good often sounds in terms of paternalism; however, such concerns should not impede a Catholic from following his faith. See supra note 7.

182 See Pepper, supra note 5, at 635.

183 VERITATIS SPLENDOR, supra note 12, at para. 96.

184 See Pepper, supra note 5, at 618-19 (stating that inequality is "[o]ne of the unpleasant concomitants of the view that a lawyer should be morally responsible for all that [he] does").

185 EVANGELIUM VITAE, supra note 105, at para. 74.

186 VERITATIS SPLENDOR, supra note 12, at para. 83 (emphasis added).
Applying the teachings of the Catholic Church to a lawyer's daily life will enable him to avoid the "dangers of certain ethical theories." A conscientious lawyer cannot assume an amoral ethical role.

VI. CONCLUSION

This Note sought to provide practical guidance to Catholic lawyers for making ethical decisions in the practice of law. In order to choose the proper course, a Catholic must follow his moral conscience. A Catholic's moral conscience is his ethical compass—"calling him to love and to do what is good and to avoid evil." The moral conscience is a "delicate instrument for knowing the laws of God." In order for the moral conscience to function properly, it must be properly formed and educated. The education and development of the conscience is a primary function of the Catholic Church. The Magisterium of the Church is a source of enlightenment for the conscience.

The Church, through the interpretation of the word of God, teaches the objective truth. And since one's conscience is fallible, it is incumbent upon each and every Catholic to refrain from acting on a doubtful conscience and to seek the truth as taught by the Church and her Magisterium. The Magisterium has been entrusted to interpret the word of God.

Lawyers are constantly referring to authoritative sources in order to help them solve particular legal issues. These sources take many forms: cases, statutes, treatises, legal journals, and many others. For a Catholic, the teachings of the Church must be included as well. On the shelves in a lawyer's office, next to the Prosser and Keeton on Torts and a copy of the Model Rules of Professional Conduct, should stand The Catechism of the Catholic Church, the documents of Vatican II, and relevant encyclical letters such as Veritatis Splendor and Evangelium Vitae. Just as the conscientious lawyer subscribes to professional periodicals that keep him current on changing case law and new statutes, the Catholic lawyer should actively seek to remain informed of new statements of the Church clarifying issues confronting the faithful. While the many authoritative legal sources will provide the legal solution to a given issue, the authoritative Catholic teachings will provide the moral solution. It is through the teachings of the Catholic Church that a lawyer can properly form his conscience and make good ethical decisions.

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* In addition to the sources cited in this Note, a comprehensive listing of authoritative sources of Catholic teaching can be found in the Index of Citations to the Catechism of the Catholic Church, supra note 18.

See, for example, sources cited in Origins and The Pope Speaks.

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