

ADDRESS AT THE RED MASS
SEPTEMBER 20, 2009
BOSTON

I thank you for the honor of being asked to speak tonight. I am the dean of the Boston College Law School. It is both a Catholic school and, according to U.S. News & World Report, one of the best law schools in the America. Our daily work is figuring out how to integrate law and the life of faith.

There was a time when that was an easier question to answer. In the English-speaking world the Red Mass is a tradition that began in the early 14th century, about the time of Edward I (“the Confessor”). There were in those days four terms of court (as there are today four school terms): Michaelmas, Hilary, Easter, and Trinity. Michaelmas – the feast of St. Michael – was the first. On that day, September 29, judges and lawyers together would attend a Mass to inaugurate the legal year. Because it was a Mass of the Holy Spirit the cardinal archbishop wore red vestments. The judges of the King’s Bench, doctors of law, also wore red robes. The liturgy takes its name from their garb.¹

We continue this tradition here today, but with several important differences. The most obvious is that in 14th century England nearly everyone was Catholic. No less important, though less obvious, is that the English had an established church. The judges of King’s Bench attended the Red Mass in their official capacity. There was no clean break between the church and the legal system. They were part of the same enterprise. There is a lot to be said for this setup. We could have all the judges,

¹ Edward R. Tiedebohl, *The Red Mass, A Legal and Judicial Tradition*, 18 U. Det. Mercy L. Rev. 59. Tiedebohl says the tradition began “during the reign of Edward I, about the year 1310.” Edward I died in 1307. He was succeeded by his son Edward II (1307-27).

lawmakers, and lawyers in Norfolk, Suffolk, Essex, and Middlesex Counties participate in this exercise – not just a fraction of them. We would have built into the structure of the legal system the recognition that our laws are inferior to God's. The supreme law of the land would not be the United States Constitution (as article VI says), but the word of God. The Red Mass would be a ceremony marking official, legal recognition of that point. And we wouldn't have any trouble figuring out how to integrate the law and our faith. The legal system would do that for us.

I said there was a lot to be said for that kind of system, but it is not the one we have, and that is probably for the best. The Puritans who settled the Massachusetts Bay Colony integrated their law and their faith pretty carefully, but Catholics were not welcome here. One hundred eighty years passed after the arrival of the Mayflower before Catholics could build their first church – the first Cathedral of the Holy Cross. The Anglicans who settled Virginia also had an established church, but it wasn't Catholic either. One problem with integrating church and state turns out to be that the established church may not be ours. (This is a lesson we see today in Iran, Nigeria, and Pakistan.)

A second problem has been that a mixture of church and state is not always theocratic. Sometimes the state has the upper hand. Queen Elizabeth II, not the Archbishop of Canterbury, is the head of the Church of England. In this sort of arrangement religious principles are sometimes submerged in reasons of state. Let me put it more concretely. As Catholics we would rather recite prayers composed by St. Francis or the local bishop than ones written by Governor Patrick or the General Court of the Commonwealth, because we believe that the first two are guided by the Holy Spirit.

After two millennia of experience and reflection on this subject the Catholic Church put its conclusion this way in the *Declaration on Religious Freedom* promulgated at Vatican II (¶ 6):

It follows that a wrong is done when government imposes upon its people, by force or fear or other means, the profession or repudiation of any religion, or when it hinders men from joining or leaving a religious body.

This is how we think of it in the first amendment to our constitution: the government should make no law respecting an establishment of religion, nor prohibit the free exercise of religion.

The popular press often abbreviates these directions by saying that the constitution erects a wall of separation between church and state. But that phrase is misleading. It suggests that we are doing something wrong here today, in praying that our legal system may exhibit justice, mercy, and compassion. Some people even take it to mean that religion is bad for the law – a sort of H₁N₁ virus that we need to contain lest it infect our public life. That gets our principles backwards. The reason we protect religious freedom and worry about religious establishments is that government can be bad for religion, not the other way around.

So what exactly is the proper relationship between our Catholic faith and our careers as lawyers? I think you should never squeeze more than two ideas into an after-dinner speech, so here are mine. The first concerns lawyers who hold public office or promote public causes. These people are the principal target of separationists: legislators, judges, prosecutors – people who make or enforce the laws. And close behind them are other public figures – lawyers who are public opinion leaders. Does the constitution require them to keep their religious

convictions to themselves? Let me give a few examples. Abortion comes to mind first, not just for alphabetical reasons. Those who defend a wall of separation sometimes say that religious groups (Catholics among them) have no right to urge protection for the unborn, because their argument rests on religious premises about when life begins. Legislators should ignore their religious convictions in voting on bills that come before them, separationists say.

I do not agree with this contention. To begin with, it asks the impossible. How exactly would I think about abortion if I did not hold the convictions I do about the origin and value of human life? I have no idea. I cannot centrifuge my beliefs and separate out the religious element:²

We sometimes ask juries to do that when hearsay evidence slips in. But here religious teaching is not a piece of evidence. It is a way of looking at the world [I] can no more set it aside than [I] can set aside [the] idea of color or shape in looking at a picture. [Asking me to act without reliance on my religious convictions is] like asking me how [I] would decide if [I] were someone else.

There is another and maybe more important objection to separationism. In the debate over abortion there is no detached or neutral point of view. To say that life begins at conception is to take a position on a religious proposition. But to say that life does *not* begin at conception is *also* to take a position on a religious proposition. We cannot resolve this disagreement by forbidding the other side to speak. There was a lawsuit on this point which reached the Supreme Court in *Harris v. McRae*.³ Opponents of the Hyde Amendment, which forbade abortion funding, complained that Catholics (and

² Garvey, *The Pope's Submarine*, 30 San Diego L. Rev. 849, 872 (1993).

³ 448 U.S. 297 (1980).

others) had supported it for religious reasons. The Supreme Court said:

[I]t does not follow that a statute violates the Establishment Clause because it “happens to coincide or harmonize with the tenets of some or all religions.” That the Judeo-Christian religions oppose stealing does not mean that a State or the Federal Government may not, consistent with the Establishment Clause, enact laws prohibiting larceny. . . . [T]he fact that the funding restrictions in the Hyde Amendment may coincide with the religious tenets of the Roman Catholic Church does not, without more, contravene the Establishment Clause.

Here is another example about religion in public life, also taken from the front of the alphabet. In recent years the pope and the American Catholic bishops have spoken out strongly against capital punishment. The U.S. Catholic Conference issued a statement in 1980. Pope John Paul II issued an encyclical (*Evangelium Vitae*) in 1995. In part they have made two common, and not necessarily religious, objections: that the legal system, even here, makes mistakes; and that the system deals more harshly with the poor and minorities. But their more forceful objection is a religious one: that the Gospel of Jesus says we should love one another, and taking life in retribution is inconsistent with this message. If the constitution really required a strict separation of church and state, Catholics would be forbidden to offer this as a reason for banning capital punishment. But a rule like that would itself be unconstitutional for two reasons. First, it is inconsistent with our right to freedom of speech. And second, it would inhibit our freedom of religion, by forbidding us to preach the Gospel.

So this is my first point: it is OK for lawyers who serve in public life to follow their religious principles. They may always consider them, and almost always follow

them. And in the rare case where the law's and the church's commands conflict, I commend to them the example of St. Thomas More. More was the Lord Chancellor of England under Henry VIII. When the Act of Succession annulled the marriage between Henry and Catherine of Aragon, More refused to sign. For this he was convicted of treason and beheaded in 1534. He died saying he was the king's good servant, but God's first.

Most of us, though, do not serve the law in an official capacity. We are private lawyers who work for private clients. What does our faith have to do with our work? This question is not afflicted with the same conceptual difficulties as the last. The first amendment does not govern private relations between lawyers and clients. Separationism does not come up. It might be better to characterize these as questions of professional responsibility: does our faith impose on us any duties that exceed or vary from those found in the Code of Professional Responsibility?

The ways in which our faith bears on the private practice of law are too numerous to mention. Rather than try to catalog them, I would like to spend my last 3½ minutes on just one virtue, which I think is both peculiarly Catholic, and fits well with the nature of our business in ways that lawyers may sometimes overlook. We are taught in law school to be zealous advocates on behalf of our clients. Zeal in defense of a just cause is admirable. It is the trait the general public instinctively associates with lawyers. "I have been wronged by my business associates [my employer] [the government] [the oil company next door], and I need an advocate who will stand up for me." I do not mean to denigrate that service. It *is* one of the things we do.

But the law is not war. The people on the other side of our lawsuits and transactions are not the enemy – they are our brothers and sisters in Christ. There comes a time

in every adversary relationship when the virtue called for is not courage or zeal but forgiveness. It may not be until recompense is made. At that point, though, we need to do what we can to heal the relationship that a wrong has disrupted. If I may detour from this context for just a moment . . . insufficient attention to this point explains our enthusiasm for the death penalty: we want to take the full measure of revenge on the murderer, to wipe him out completely so that *we* can feel better. Life in prison leaves time for contrition and forgiveness; death does not.

The legal system should keep this in mind in dealing with capital cases. But we too should teach our clients that our aim is only victory, not destruction. This is not a thought we call to mind at the end of case. The possibility of forgiveness must always be there. If it is not, we may so poison an already strained relationship that it becomes impossible to heal.

I probably don't need to add that there is room for this virtue not just in our clients' relations with their adversaries, but in our own relations with opposing counsel. This might, in fact, be the place where it is called for first of all. I have a tendency to fly off the handle when dealing with children who stay out past curfew. My wife reminds me that I'm not really teaching them what time to come home – I'm teaching them how to deal with children who stay out past curfew. They learn from what we do, not from what we say. It's not exactly the same with clients. But the snares of the legal system are, for them, a strange environment, and they learn something from our behavior.

Today is the 25th Sunday in ordinary time. We have been reading for a few weeks from the middle section of St. Mark's Gospel. St. Mark was big on the idea of the messianic secret. Today's Gospel began by saying that Jesus and his disciples were passing through Galilee, but

he did not want anyone to know about it. Two weeks ago Jesus healed a man with a speech impediment and told the crowd to keep it quiet. Last week he asked the disciples who they thought he was. When Peter said he was the messiah, “he warned them not to tell anyone about him.” The reason for the secrecy was this: Jesus didn’t want people talking about him until he had prepared them for the kind of messiah he was. Peter told Jesus that he shouldn’t suffer and be killed – that’s not the kind of messiah he had in mind. Today the disciples were arguing on the road to Capernaum about who was the greatest – contending, I suppose, for who was going to be Secretary of State, Attorney General, and so on. And once again the lesson is that being important is not important. The last shall be first. Little children, not big shots.

The apostles didn’t really get it until Jesus died and rose from the dead. The secret Mark refers to is this: we have to revise our mental picture of the messiah. He is not going to be Alexander the Great or Julius Caesar. His mission is the forgiveness of sins. That is the power the risen Christ gave to his apostles. That is what the Nicene Creed says baptism is about. If we want to be united with the messiah who died and rose, we should concentrate on forgiveness. We are all God’s people. We should contend with our brothers and sisters with that thought in mind. Justice is a cardinal virtue. But forgiveness is divine.