Chapter 2

The Ethics of Lawyers & Judges: Perspectives from Catholic Social Teaching

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> The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and the law itself.
>
> ABA MODEL RULES OF PROFESSIONAL CONDUCT, *Scope* ¶14

> In a jurisprudence of mitzvoth, the loaded, evocative edge is at the assignment of responsibility. ...
>
> Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & REL. 65 (1987)

> All the Christian faithful, and especially bishops, are to strive diligently to avoid litigation among the people of God as much as possible, without prejudice to justice, and to resolve litigation peacefully as soon as possible.
>
> Code of Canon Law, 1446 §1

There is no such thing as a lawyer without a client. The roles of the lawyer—and, hence, the boundaries of acceptable professional conduct—are defined by the duties the lawyer undertakes on behalf of the client. A person who is otherwise qualified to practice law does not really become a lawyer until the moment that he/she undertakes to advise or represent a client, and the client accepts. So too with a judge, who swears or affirms that he/she "will administer justice without respect to persons, and do equal right to the poor and to the rich,

and...will faithfully and impartially discharge and perform all the duties incumbent upon me...under the Constitution and laws of the United States."[1] A corrupt or biased judge is, by this measure, no judge at all.

Because duty is the foundation of all professional relationships, the task at hand is to explore the ways in which Catholic Social Teaching (CST) can guide the American lawyers' understanding of the duties they undertake when they represent their clients, when they serve as prosecutors, or when they ascend to the bench. This chapter focuses only on the ethics of judging and provides a brief comparison between the process orientation of the Code of Judicial Conduct for United States Judges[2] and the more substantive orientation of Catholic Social Teaching.

The observations in this chapter apply with equal force to *all* discussions of professional ethics—not just those that bind the legal profession. Though professions may differ in the ways in which they parse the duties that define the professional relationship (*e.g.,* lawyer-client, judge-litigant, doctor-patient, social worker-client, priest-penitent, *etc.*), *every* profession's definitions of "good practice," "professionalism," and "professional conduct" are based on the degree to which the professional has complied with the duties that define the relationship.

"Good practice," "professionalism," and "professional conduct" are also defined—to a large degree—by simply "following the rules" of professional conduct. Michael Davis of the Illinois Institute of Technology's Center for the Study of Ethics in the Professions observes that "following 'the rules,' while not all there is to professional ethics, is generally enough for responsible conduct (or, at least, is so when the profession's code of ethics is reasonably well-written, as most are)."[3]

> If rules were merely verbal entities, as nonsense syllables are, learning them would amount to nothing more than memorizing formulas. Such rote learning is (as Whitbeck says) not worth the attention of a college course. But rules, especially the rules of professional ethics, are more than nonsense syllables. They mean something. That meaning is not merely linguistic (like the meaning of most puns) or merely propositional (like the meaning of a scientific law). What rules generally mean, and what rules of professional ethics always mean, are acts required, allowed, or forbidden. Rules are guides to conduct (and, so, also standards for evaluating conduct). No one has learned a rule of professional ethics (in any robust sense of "learned a rule") who has not understood it as a guide to conduct, indeed, who does not have a pretty good idea how to guide her conduct by the rule. Those who learn the rules of professional ethics without understanding how they guide conduct have taken only a small step toward learning them.[4]

The observations in this chapter are anchored to the specific rules of professional conduct governing judges, in the law governing judicial conduct, in the

Code of Canon Law governing judges, and in the principles of Catholic Social Teaching that are relevant to the duties judges have as they execute their judicial role. Since the ultimate audience for this book is (or should be) Catholic lawyers and judges, the goal is to demonstrate that the task of reading rules of professional conduct *in light of* Catholic Social Teaching is not simply a means of "restating existing legal obligations, [it] is [rather] to set a new standard of care, one higher than existed before."[5]

The Rules in Context: Catholic Social Teaching as an Ethical Framework

Before launching into an examination of the specific ethics rules governing the behavior of federal judges, it is useful to explain "Catholic Social Teaching." In an address entitled "Catholic Social Teaching and American Legal Practice," the late Avery Cardinal Dulles, S.J., provided the following description:

> Over the centuries, and especially in the past 150 years, the Catholic Church has built up a body of social teaching that is intended to contribute to the formation of a society marked by peace, concord, and justice toward all. This body of teaching, based on reason and revelation, has been refined through dialogue with Greek philosophy and Roman law, as well as the experience of the Church throughout two millennia, in interaction with many cultures in Europe, the Americas, and other continents. It seems safe to say that no other institution has developed a body of social teaching rivaling that of the Catholic Church, in depth, coherence, and completeness. Unlike the Church's strictly doctrinal teaching, which is addressed specifically to believers, Catholic social teaching is directed to all persons of good will, including those of any or no religion. It presupposes only that its addressees are interested in building a just and peaceful society on earth.[6]

The first compilation of that vast body of work, the *Compendium of the Social Doctrine of the Church* was completed on June 29, 2004.[7] Its purpose was to produce an authoritative collection of materials in which the Church would "speak 'the words that are hers' with regard to questions concerning life in society" and provide a compilation that would "systematically present[] the foundations of Catholic social doctrine."[8] More recent documents, published in the ten years since publication of the *Compendium*, include encyclicals by Pope Benedict XVI and Pope Francis,[9] as well as their homilies, letters, and speeches;[10] the pronouncements of the United States Conference of Catholic Bishops and its counterparts around the world;[11] and the reflections of those who examine the anthropological and moral principles on which the Catholic natural law tradition is based. Writing in 2003, Saint Pope John Paul II suggested that the nature of the legal profession is such that:

> it behoves lawyers, all law-makers, legal historians and legislators themselves always to have, as St Leo the Great asked of them, a deep "love of justice" (*Sermon on the Passion,* 59), and to try always to base their reflections and practice on the anthropological and moral principles which put man at the centre of the elaboration of laws and of legal practice.[12]

Speaking to a visiting delegation from the International Academy of Trial Lawyers in 1989, Saint Pope John Paul II observed that "lawyers ... are committed to the resolution of conflicts and the pursuit of justice through legal and rational means," and confirmed the nearly universal (if unexpressed)[13] view of most lawyers that our "work is indispensable for the construction of a truly humane and harmonious social order...."[14] This is true, said the Pontiff, if (and only if) lawyers understand that "all the branches of law are an eminent service to individuals and society."[15]

Among the many themes in the corpus of Catholic Social Teaching that speak to the fundamental obligations that lawyers owe to their clients, to the system of justice, and to themselves, the following are most directly relevant to the life and work of lawyers, and the important role they play in society.

1. The dignity of the human person: "A just society can become a reality only when it is based on the respect of the transcendent dignity of the human person,"[16] understood and valued as "an intelligent and conscious being, capable of reflecting on himself and therefore of being aware of himself and his actions."[17]

2. The priority of the common good: "Just as the moral actions of an individual are accomplished in doing what is good, so too the actions of a society attain their full stature when they bring about the common good."[18] It is therefore "the duty of the state"—and of the lawyers who formulate, interpret and enforce its policies—to ensure by their actions "the coherency, unity and organization of the civil society of which it is an expression."[19]

3. Solidarity as both a moral virtue that demands recognition of "the interdependence between individuals and peoples,"[20] *and as a social principle* that becomes the measure by which we can determine the need for the "creation or appropriate modification of laws, market regulations, and juridical systems.[21]

4. The principle of subsidiarity, which affirms the inherent dignity and natural rights of communities formed by individuals for a common purpose, and which, by definition, rejects "various reductionist conceptions of the human person"[22] that would view the client as either "an absolute individual being, built up by himself and on himself, as if his characteristic traits depended on no one else but himself," or "as a mere cell of an organism that is inclined at most to grant it recognition in its functional role within the overall system."[23]

5. The universal destination of goods requires that the poor, the marginalized, and in all cases those whose living conditions interfere with their proper growth should be the focus of particular concern.[24]

Through a Clearer Lens: The Lawyer as Judge

The Preamble to the ABA's Model Rules of Professional Conduct begins with a statement of the important roles that lawyers undertake on behalf of their clients and society: [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.[25]

The Preamble to the ABA's Code of Judicial Conduct contains a similar admonition:

> [1] An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system.[26]

For me, the most important phrase in these excerpts is in the Preamble to the Model Rules of Professional Conduct: "having special responsibility for the quality of justice." If there is to be a meaningful discussion of the ethical obligations of lawyers and judges, we need to know *which* lawyers bear that "special responsibility for the quality of justice": *all of them*, whatever their role, or the subset of lawyers who are operating in their role as "public citizens?"

In order to discern the most natural reading of the Preamble to the Model Rules, we must engage in a bit of statutory construction. We must take the words as we find them and read them together as a whole in light of their intended purpose.

Reading the Preamble as a whole, we find that the text differentiates among the "representational functions" described by paragraph [1], the "non-representational roles" described in paragraph [3], and the "official" functions described in paragraph [2]. In this reading, a "*special* responsibility for the *quality* of justice" arises only when the lawyer is acting as "a public citizen":

> A lawyer, as a member of the legal profession, is
>
> [1] a representative of clients (when serving as an advisor, advocate, negotiator, or evaluator)[27]
> [2] an officer of the legal system, and
> [3] a public citizen having special responsibility for the quality of justice (when serving in a non-representational role, such as third-party neutral, an advocate for prison reform, a member of the business community, or other any non-practicing capacity).[28]

Reading the Preamble in light of the *entire* Model Code of Professional Conduct, however, produces a more striking possibility: *i.e.* that the *every* lawyer *always* has "a special responsibility for the quality of justice."[29]

I can hear the objections already. One is statutory: a fair reading of the text and structure of the Model Rules in light of their history cannot support that proposition. The other is ethical: A lawyer's duty is to her client *alone*.[30]

The point here is simple: Acting together in the courts, lawyers and judges "interpret and apply the law that governs our society." It only stands to reason that those who, by virtue of their training, experience and position, play such a critical role in administering the law *should* have a "special responsibility for the quality of justice."

Expressed in this manner, the initial paragraph of the Preamble would be *understood* to make the following statement of principle:

> As a member of the legal profession, a lawyer has a "special responsibility for the quality of justice" in [*all* cases, including when] serving as:
> [1] a representative of clients [*e.g.*, advisor, advocate, negotiator, or evaluator]
> [2] an officer of the legal system, *or*
> [3] a public citizen [when serving in a non-representational role, such as third-party neutral, a member of the business community, or other any non-practicing capacity, including as a private citizen.

There is little doubt that assigning a "special responsibility" for the *quality* of justice to every lawyer, notwithstanding the role being played raises significant questions about how this "quality of justice" obligation affects the other obligations assumed by lawyer in the role that she is playing at the time (*e.g.*, advisor, advocate, judge, law professor). Answering these questions is one of the more urgent tasks facing the legal profession.

This is where looking at the obligations of lawyers *in light of* Catholic Social Teaching is helpful. We need to see whether it would help us to formulate a "restat[ment of] existing legal obligations, [and] to set a new standard of care, one higher than existed before."[31]

In the sections that follow, I attempt that "restatement" of the existing legal obligations of a judge, and attempt to show that, when read in light the principles of CST, the relevant codes of professional conduct *already* require that higher standard of care.

The Lawyer as Judge: Ethics & the Code of Judicial Conduct

This analysis begins with the rules governing the conduct of lawyers who become judges for a very simple reason: The role of the judge (or Justice) is *to do justice* in *every case*. Or is it?

Consider again, the words of the oath of office required of all federal judges:

> Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, XXX XXX, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as XXX under the Constitution and laws of the United States. So help me God."[32]

A close reading of the judicial oath says a good bit about the obligations of the judicial role. Its components are 1) to administer justice; 2) without respect to persons; 3) to do equal right to the poor and to the rich; and 4) to faithfully and impartially discharge all the duties assigned to a judge under the Constitution and laws of the United States.

If viewed purely through the lens of the applicable rules of judicial conduct—here, the Code of Conduct for United States Judges[33]—we begin to get a sense what each of these components means. The "administration of justice without respect to persons" includes faithful execution of all "adjudicative" and "administrative" responsibilities in a "patient, dignified, respectful, and courteous manner" that respects "every person who has a legal interest in a proceeding, and that person's lawyer," as well as "jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity."[34] "[I]mpartially discharg[ing] all the duties assigned to a judge under the Constitution and laws of the United States" is, if understood purely by reference to the specific prohibitions of the Code, largely a command that the judicial *process* be conducted in an environment where the proceedings are formal, balanced, fully transparent, and untainted by any conceivable appearance of bias or conflict of interest.[35]

It is only when we get to the command that the judge "do equal right to the poor and to the rich" that the process orientation of the Code of Conduct for U.S. Judges becomes painfully apparent. To the extent that the clause commands that the judge afford an identical *process* to the poor and the rich, the clause adds nothing of substance to our understanding of the obligations of the judge.[36] She must treat *all* persons coming before her court with dignity and respect.

If, however, the "equal right to the poor and to the rich" clause has substantive content *beyond* "process equality," it must be found somewhere *outside* the Code of Conduct for U.S. Judges: *i.e.,* in the Constitution and laws of the United States, or in legal traditions that draw explicitly on the teachings of scripture that do impose such obligations.

The New Lens: Catholic Social Teaching on the Duties of a Judge

The examination of the duties of a judge viewed through the lens of Catholic Social Teaching begins with a short story told by United States District Court

Judge Joseph F. Anderson of South Carolina. In the course of a speech lamenting the demise of the civil jury trial, Judge Anderson reported on a remark he "overheard at a recent judicial conference," and observed that

> ... [O]ne of my colleagues on the federal bench commented that he had not tried a single civil case in the preceding calendar year. Some had been pruned from the docket with orders granting summary judgment or motions to dismiss, and the rest were put to bed with successful ADR tactics—mediation before an appointed mediator or bare-knuckled settlement conference with the judge. That judge concluded his glowing self-assessment with the observation, "After all, we're in the dispute resolution business."
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> The oath that we Article III judges take when we assume the bench says nothing about dispute resolution. Instead, the oath commands that we "will administer justice . . . and do equal right to the poor and the rich . . . ."[37]

In Judge Anderson's view, the objective of a "real trial" is "to arrive at the truth, vindicate rights, and to do justice."[38] In an Alternative Dispute Resolution (ADR) proceeding, by contrast, "every claim is assumed to have some value; where true justice is considered too expensive or an unattainable abstraction."[39]

Consider, now, the approach embodied in Canon 1446 of the Code of Canon Law:

> §1. All the Christian faithful, and especially bishops, are to strive diligently to avoid litigation among the people of God as much as possible, without prejudice to justice, and to resolve litigation peacefully as soon as possible.
>
> §2. Whenever the judge perceives some hope of a favorable outcome at the start of litigation or even at any other time, the judge is not to neglect to encourage and assist the parties to collaborate in seeking an equitable solution to the controversy and to indicate to them suitable means to this end, even by using reputable persons for mediation.
>
> §3. If the litigation concerns the private good of the parties, the judge is to discern whether the controversy can be concluded advantageously by an agreement or the judgment of arbitrators according to the norm of cann. 1713-1716 [which, in order to prevent judicial contentions, permits the judge to refer the case to one or more arbitrators).

There is no lament here when a trial ("judicial contention") is either settled or referred for arbitration. What explains the difference in approach?

The answer is relatively simple: Judge Anderson's story speaks volumes because it provides a fleeting glimpse of how one federal judge conceives his role—and, hence, his obligations as a federal judge. If Article III judges are not in the business of "dispute resolution," the judge has no independent obligation

to be a *doer* of justice. In this view, federal judges are *administrators* of justice—impartial referees. As we shall see shortly, both the rich *and* the poor suffer under such a crabbed interpretation of the judicial role.

Canon Law takes the opposite approach. The judge is most definitely "in the dispute resolution business" because his duty is "to strive diligently to avoid litigation among the people of God as much as possible, without prejudice to justice."[40] So, too, do the Hebrew Bible[41] and Shari'a.[42]

In order to understand why this is so, we must return to the principles of CST enshrined in the *Compendium*:

1. Lawsuits are, by definition "contentious." To the extent that the *priority of the Common Good* means anything, it is the duty *of the state*—and of the lawyers who formulate, interpret and enforce its policies—to ensure by their actions "the coherency, unity and organization of the civil society of which it is an expression."[43] A judge must, therefore, have the authority to seek mediators and, in case of impasse, to refer the matter for ADR, *whether the litigators want to proceed with the trial or not.*

2. Lawsuits are brutal, time consuming, and expensive. To the extent that we take seriously the argument that "[a] just society can become a reality only when it is based on the respect of the transcendent dignity of the human person,"[44] the judge cannot simply be an impartial referee. A robust understanding of "the transcendent dignity of the human person" requires that the *judge* take and keep control of the trial so that the transcendent dignity of the persons involved in the dispute is respected at every point in the proceeding.[45]

3. Lawsuits leave deep scars, especially when the winning party is thought by the other as having gamed the system. *Solidarity as a moral virtue*, by contrast, demands recognition of "the interdependence between individuals and peoples," *and as a social principle*, it becomes the measure by which we can determine whether there is a need for the "modification of laws, market regulations, and juridical systems,"[46] including the Code of Judicial Conduct.

4. Lawsuits represent a *failure* of the negotiating process, in that a "contentious" proceeding is the result of the parties being either unable or unwilling to resolve their dispute amicably. To the extent that we take the principle of *subsidiarity* seriously, the judge is obligated under Cannon 1141(2) to force negotiations or arbitration whenever he or she "perceives some hope of a favorable outcome at the start of litigation or even at any other time ..."

5. Lawsuits are expensive and are generally beyond the means of persons of limited means. They are impossible for the poor. To the extent that we take seriously the *universal destination of goods*, we must pay special attention to the way in which our adversarial legal system imposes crushing burdens on "the poor, the marginalized and in all cases those whose living conditions interfere with their proper growth."[47] ADR proceedings (mediation or arbitration) are the *preferred* dispute resolution mechanisms in such cases because they are less expensive, and strive to preserve the relationships among the parties.

Conclusion

The goal of this chapter is to demonstrate that reading the rules of professional conduct *in light of* Catholic Social Teaching is not simply a means of "restating existing legal obligations, [it] is [rather] to set a new standard of care, one higher than existed before."[48] We could, of course, wait for the Supreme Court of the United States to rule that the poor are entitled to free legal advice and counsel whenever they need it, but given the Court's record on the subject thus far, I would not hold my breath. Nor would I wait for the states either.

To the extent that progress needs to be made in improving the plight of those trapped in the gears of the legal system, we must consider retraining—and reorienting—the judges themselves. In an extremely thoughtful, and thought-provoking, speech the Honorable Joan B. Gottschall of the United States District Court for the Northern District of Illinois suggested that commentators:

> ... usually paid little attention to the place where I believe ethical and/or religious views play the greatest role: in judges' determination of the facts of a controversy. Here, trial court judges have an enormously important role to play: in the facts we make part of the evidentiary record—whether by our evidentiary rulings or by our power to call for and hear evidence the parties might not otherwise present to us—and in the facts we choose to emphasize in our decisions. In these ways, by our substantial power to shape the evidentiary record, and in our largely unreviewable power to decide what evidence should be believed or credited as salient or determinative, our most important values—whether their source is ethical, religious, or political—have a frequently dispositive impact on the outcome. Indeed, as every practicing lawyer knows, the facts the lawyers prove and the facts the judge finds frequently compel the disposition of the case.[49]

Offering judges a short course on Catholic Social Teaching would not be popular, and, in some states, it is doubtful that a CLE program coordinator would even approve such a course for credit. (It would not be "legal" enough.) Nonetheless, the remarks of thoughtful lawyers like Judge Gotschall and the many others suggest that there is a need to try.

Notes

1. 28 U.S.C. §453 (Oaths of Justices and Judges). *Compare*, Ohio Rev. Code §3.23 (2014) ("that I will administer justice without respect to persons, and with faithfully and impartially discharge and perform all the duties incumbent upon me [as a judge] according to the best of my ability and understanding.")

2. The Code of Conduct for United States Judges [hereinafter CCUSJ] *available at:* http://www.uscourts.gov/RulesAndPolicies/CodesOfConduct/CodeConductUnitedStatesJudges.aspx (accessed April 1, 2014). The Code was initially adopted by the Judicial Conference of the United States on April 5, 1973. *See* Judicial Conference of the United States (1971), "Communication from the Chief Justice of the United States transmitting the Proceedings of the Judicial Conference of the United States, April 5-6, 1973, House Doc. No. 93-103 (93rd Cong., 1st Sess., May 21, 1973) at 9-11, at http://www.uscourts.gov/uscourts/FederalCourts/judconf/proceedings/1973-04.pdf (accessed April 1, 2014).

3. Michael Davis, "Professional Responsibility: Just Following the Rules," 18, no. 1 *Business & Professional Ethics Journal* (Spring 1999): 65.

4. Davis, "Just Following the Rules" at 67-68 & n. 3 (footnote omitted), *referencing* Caroline Whitbeck, *Ethics in Engineering Practice and Research* (Cambridge: Cambridge University Press, 1998).

5. Davis, "Just Following the Rules" at 75.

6. Avery Cardinal Dulles, S.J., *Catholic Social Teaching and American Legal Practice*, 30 FORDHAM URBAN L.J. 277, 279 (2002) (footnote omitted). *See* Harold J. Berman, *The Interaction of Law and Religion* (Abingdon Press, 1974), 49-76.

7. Pontifical Council for Justice & Peace, *Compendium of the Social Doctrine of the Church* (Washington: USCCB Communications, 2005) [hereinafter *Compendium*].

8. Letter to His Eminence Cardinal Renato Raffaele Martino from Cardinal Angelo Sodano, Secretary of State, 29 June 2004, ¶1.

9. *See, e.g.*, Pope Francis, *Lumen fidei* ("The Light of Faith"), June 29, 2013 ¶3:

> In the process, faith came to be associated with darkness. There were those who tried to save faith by making room for it alongside the light of reason. Such room would open up wherever the light of reason could not penetrate, wherever certainty was no longer possible. Faith was thus understood either as a leap in the dark, to be taken in the absence of light, driven by blind emotion, or as a subjective light, capable perhaps of warming the heart and bringing personal consolation, but not something which could be proposed to others as an objective and shared light which points the way.

10. *See, e.g.,* Pope Francis, Morning Meditation in the Chapel of the *Domus Sanctae Marthae*, "Disciples of the Lord and Not of Ideology," Thursday, October 17, 2013 (commenting on Luke 11:47-54), which recounts the Lord's warning to the doctors of the law: "Woe to you lawyers! For you have taken away the key of knowledge; you did not enter yourselves, and you hindered those who were entering.")

11. *See, e.g.*, Homily of Cardinal Seán O'Malley, Mission for Migrants, Mass on the Border in Nogales, Arizona, April 1, 2014 (commenting on the famous question posed to Jesus by a scholar of the law in Luke 10:25-29: "Who is my neighbor?"); Permanent Council of the Canadian Conference of Catholic Bishops, Pastoral Letter on Freedom of Conscience, Monday, May 14, 2012.

12. *Message of John Paul II to Bishop Lucien Fruchaud of Saint-Brieuc and Tréguier for the 700th Anniversary of the Birth of St. Ivo Hélory [St. Ives] of Brittany,*

May 13, 2003.

13. Mary Ann Glendon has observed that "In the Law Day rhetoric of bar association officials, exhortations to uphold the rule of law have given way to self-serving portrayals of lawyers as vindicators of an ever-expanding array of claims and rights." Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (Boston: Harvard Univ. Press, 1996) at 5.

14. *Address of His Holiness John Paul II, to the Members of the International Academy of Trial Lawyers,* Castel Gandlofo, September 22, 1989.

15. *Message of John Paul II to Bishop Lucien Fruchaud, supra* note 12.

16. *Compendium*, ¶132.

17. *Compendium*, ¶131.

18. *Compendium*, ¶164.

19. *Compendium*, ¶168.

20. *Compendium*, ¶193.

21. *Compendium*, ¶186.

> Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do." For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them.

Pius XI, *Quadragesimo Anno* ¶79 (1931); *cf.* John Paul II, Encyclical Letter *Centesimus Annus*, ¶48 (1991); *Catechism of the Catholic Church,* ¶1883.

22. *Compendium*, ¶124.

23. *Compendium*, ¶125.

24. *Compendium*, ¶182.

25. American Bar Association, Model Rules of Professional Conduct [hereinafter ABA Model Rules]. ABA Model Rules, Preamble ¶1 (brackets and numbering supplied).

26. American Bar Association, Model Code of Judicial Conduct (2011), Preamble ¶1.

27. *See* ABA Model Rules, Preamble ¶2.

28. ABA Model Rules, Preamble ¶3.

29. *See, e.g.,* ABA Model Rules, Rule 1.14, Comment 5 (Clients with diminished capacity; need to take protective action when the client is "at risk of substantial physical, financial or other harm unless action is taken"); Rule 2.1 [Advisor] (In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political facts, that may be relevant to the client's situation.); ABA Standards for the Prosecution Function 3-1.2 (c): "The duty of the prosecutor is to seek justice, not merely to convict."

30. ABA Model Rules 1.6, 1.7 (conflict of interest).

31. Davis, "Just Following the Rules," *supra* note 3 at 75.

32. 28 U.S.C. §453 (Oaths of Justices and Judges). *Compare* Ohio Rev. Code §3.23 (2014) ("that I will administer justice without respect to persons, and with faithfully and impartially discharge and perform all the duties incumbent upon me [as a judge] according to the best of my ability and understanding.").

33. The Code of Conduct for United States Judges [hereinafter CCUSJ].

34. CCUSJ, Canon 3(A)(Adjudicative Responsibilities). These include (1) "be[ing] faithful to, maintain[ing] professional competence in the law"; (2) "hear[ing]

and decid[ing] matters assigned, unless disqualified ..." and (6) "dispose promptly of the business of the court." CCUSJ, Canon 3(B)(Administrative Responsibilities); CCUSJ, Canon (3)(A)(3); CCUSJ, Canon 3(A)(2-3).

35. 28 U.S.C. §455 (requiring disqualification when a judge's impartiality "might reasonably be questioned); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 129 S.Ct. 2252 (2009) (Due Process Clause of the Fourteenth Amendment requires recusal when "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *See generally,* Charles Gardner Geyh, *Federal Judicial Center, Judicial Disqualification: An Analysis of Federal Law, Second Edition* (Federal Judicial Center, 2010); CCUSJ, Canon 2 (avoidance of impropriety and appearance of impropriety); Canon 3(B)(1)("partisan interests, public clamor, or fear of criticism"; B(2)(control of the courtroom environment); (B)(4)(no *ex parte* communications); B(6)(avoid public commentary); (C)(grounds for disqualification); Canon 5 (avoidance of political activity).

36. *See, e.g., Patterson v. McLean Credit Union*, 485 U.S. 617, 618 (1988) (*per curiam*) (no special consideration for civil rights plaintiffs); *Kern v. TXO Corp.*, 738 F.2d 968 (8th Cir., 1984)(dismissal without prejudice should have been conditioned on plaintiff's payment of costs and attorney fees, even though plaintiff was an individual and defendant was a large corporation); *United States v. VandeBreak*, 679 F.3d 1030, 1042 (8th Cir., 2012) (Beam, J., dissenting) (complaining that the District Court's calculation of the sentence imposed on the defendants had been improperly influenced by its view that "both were already wealthy, multi-millionaire businessmen").

37. Joseph F. Anderson, Jr., *Where Have You Gone, Spot Mozingo? A Trial Judge's Lament over the Demise of the Civil Jury Trial*, 4 FED. CTS. L. REV. 99, 107-08 (2010).

38. Anderson, *Where Have You Gone?* at 107.

39. Anderson, *Where Have You Gone? quoting* an "avowed opponent of mandatory ADR, Arkansas Federal Judge Thomas Eisele." *See* G. Thomas Eisele, "The Case Against Mandatory Court-Annexed ADR Programs," 75 *Judicature*, June-July 1991, at 34, 36:

> [ADR programs] ... are clearly different in kind and in basic philosophy. In real trials, the objective is to arrive at the truth, vindicate rights, and to do justice. The evidence presented at a real trial is all important. . . . Not so with ADRs. They operate in a different atmosphere: where fault, guilt or innocence, right or wrong are not central to the process; where one-tenth of a loaf is better than none; . . . where the evidence is de-emphasized; where every claim is assumed to have some value; where true justice is considered too expensive or an unattainable abstraction.

40. Code of Canon Law, c. 1446 §1.

41. Isaiah 11:3-4:

> And his delight shall be in the fear of the LORD; and he shall not judge after the sight of his eyes, neither decide after the hearing of his ears; But with righteousness shall he judge the poor, and decide with equity for the meek of the land; and he shall smite the land with the rod of his mouth, and with the breath of his lips shall he slay the wicked;

Isaiah 1:17: Learn to do well; seek justice, relieve the oppressed, judge the fatherless, plead for the widow.

42. Qur'an:

> 95:8 Is not God the most just of judges?

> 4:58 BEHOLD, God bids you to deliver all that you have been entrusted with unto those who are entitled thereto, and whenever you judge between people, to judge with justice. Verily, most excellent is what God exhorts you to do: verily, God is all-hearing, all-seeing!
> 26:83 "O my Sustainer! Endow me with the ability to judge [between right and wrong], and make me one with the righteous,
> 38:22 As they came upon David, and he shrank back in fear from them, they said: "Fear not! [We are but] two litigants. One of us has wronged the other: so judge thou between us with justice, and deviate not from what is right, and show [both of] us the way to rectitude.

43. *Compendium*, ¶168.

44. *Compendium*, ¶131.

45. *Estelle v. Williams*, 425 U.S. 501 (1976) is a good example of this problem. Writing for the Court, the late Chief Justice, Warren Burger, held that, while a state judge may not compel an accused person to stand trial before a jury while dressed in prison garb, his failure to make a timely objection waived his objection. Justices Brennan and Marshall dissented, arguing:

> The Court's statement that"[t]he defendant's clothing is so likely to be a continuing influence throughout the trial that . . . an unacceptable risk is presented of impermissible factors "affecting the jurors' judgment, thus presenting the possibility of all unjustified verdict of guilt, *ante* at 425 U. S. 505, concedes that respondent's trial in identifiable prison garb constituted a denial of due process of law.

The dissenting Justices noted further that:

> Respondent appeared at trial wearing a white T-shirt with "Harris County Jail" stenciled across the back, oversized white dungarees that had "Harris County Jail" stenciled down the legs, and shower thongs. Both of the principal witnesses for the State at respondent's trial referred to him as the person sitting in the "uniform." Record on Appeal in Tex.Ct. of Crim.App. 108, 141 (No.73-3854).

425 U. S. at 515-16 & n. 1.

46. *Compendium*, ¶193.

47. *Compendium*, ¶182.

48. Davis, "Just Following the Rules," *supra* note 3 at 75.

49. Hon. Joan B. Gottschall, *Factfinding as a Spiritual Discipline*, 4 U.ST. THOMAS L. J., 325 (2006).