

ARTICLE

PROFESSIONAL IDENTITY AND THE
CONTOURS OF PRUDENCE

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I. INTRODUCTION

Academics tend to traffic in big-picture theories. We like to construct abstract answers to abstract questions, and when we do decide to talk in terms that might be useful to folks in their everyday lives, the terms flow from theory. No wonder that relatively little attention has been paid to prudence, which Augustine defined as “love choosing wisely between things that help and those that hinder.”¹ Prudence does not lend itself to academic commentary; it is a sort of anti-theory, grounded in right thinking, not big answers.²

Our disregard of prudence is a shame because prudence connects the general (i.e., an authentic understanding of the human person and its relationship to creation) with the particular (i.e., how one should live in light of that understanding). By focusing on the actor’s exercise of sound judgment, prudence is not unprincipled, but it is not defined solely in reference to fixed principles either. This distinguishes it from the dominant mindset of many of our current culture-war battles, in which principles are deployed in absolute terms with little regard for context.

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1. DANIEL MARK NELSON, THE PRIORITY OF PRUDENCE: VIRTUE AND NATURAL LAW IN THOMAS AQUINAS AND THE IMPLICATIONS FOR MODERN ETHICS 84 (1992) (quoting AUGUSTINE, DE MORIBUS ECCLESIAE CATHOLICAE [OF THE MORALS OF THE CATHOLIC CHURCH] ch. 15).

2. See Anthony T. Kronman, *Alexander Bickel’s Philosophy of Prudence*, 94 YALE L.J. 1567, 1614 (1985) (arguing that “[p]hilosophy is a discipline that seeks first principles, clear and distinct truths, and any theory, like prudentialism, which celebrates qualities of mind and character that not only resist principled analysis but actually reflect a skeptical mistrust of philosophical argument, cannot itself be a philosophy”).

Consider the ubiquitous invocations of individual conscience—long considered a sacred fixture of the American ideological landscape³—as a trump card to be played against whatever institution happens to stand between the individual and her core moral convictions. Our public discourse long ago moved beyond any suggestion that an individual's conscience is the proper object of government regulation. The debate has been conclusively settled, in effect granting a trump to the dictates of conscience. The problem is that our collective certainty in the sanctity of individual conscience sheds very little light on many of the most pressing disputes over the role of religion in modern society. There is a rapidly expanding and intensifying conflict centering on the role that religious faith should play in the provision of the goods deemed foundational in our society, goods such as health care, education, charitable services, and law. These disputes do not pit the monolithic state against the noble individual. Rather, the battle lines are forming between consumer and provider, with both acting according to the dictates of conscience. Conscience drives a single mother to conclude that the morning-after pill is her best option to prevent an unplanned pregnancy, but also drives a pharmacist to decline to fill her prescription. Conscience drives a public school teacher to talk about the Christian heritage of our country during class, but also drives the parents of his students to insist that he be prohibited from doing so. Conscience drives a minor to seek an abortion, but also drives a Catholic lawyer to refuse to help her obtain judicial permission for that abortion. In these and other scenarios, the mere invocation of conscience's sanctity does not bring resolution.⁴

The principle—the liberty of conscience—is beyond question, but it cannot be invoked in the abstract, like a blunt hammer, and imposed on whatever scenario arises. Such tactics may work when state power targets an individual directly, but the competing claims made in many of our current contests over personal liberty have shifted, and our conversation must change accordingly. We need to begin to talk about prudence and explore its potential to serve as an accessible tool by which to resolve the conflicting invocations of fixed principles without sacrificing the power or validity of the principles themselves.

Prudence requires a consideration of the context in which an actor's conscience is to be exercised, and in many of our current disputes over conscience, our understanding of an actor's context will require an under-

3. JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785) in JAMES MADISON: WRITINGS, at 30 (Jake Rakove ed., 1999) (arguing that religious devotion "must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate").

4. See Steven D. Smith, *Interrogating Thomas More: The Conundrums of Conscience*, 1 U. ST. THOMAS L.J. 580, 587 (2003) ("It could be that 'conscience' is little more than an honorific term that we toss about when it suits our rhetorical purposes.").

standing of an actor's professional role.⁵ This article will endeavor to elucidate the relevance of prudence to professional role by examining why prudential judgment looks very different in the decision making of a judge versus that of a lawyer. In this context, at least, the contours of prudential judgment are informed by market dynamics: lawyers are market actors; judges are not. The professional's stance toward those whom they serve, and our evaluation of the way in which they serve, will turn on this distinction.

II. THE RELEVANCE OF ROLE

Even in the legal arena, the mere invocation of conscience does not necessarily establish the legitimacy of the act for which it is invoked. This can be readily illustrated by our reactions to the following statements:

- Actor 1, in reference to his public disobedience of a law he perceived to be unjust, said, "I have been ordered to do something I cannot do, and that is, violate my conscience."⁶
- Actor 2, in defending his own violation of a law, claims it is appropriate to defy a law "conscience tells him is unjust."⁷

Should we react differently to these essentially identical invocations of conscience as justifications for violating the law? Whether or not we should, we do: Actor 1 is Roy Moore, former Chief Justice of the Alabama Supreme Court, explaining his refusal to obey a federal court order that he remove the Ten Commandments monument from the courthouse rotunda.⁸ Actor 2 is Martin Luther King Jr., writing as he sat in a Birmingham jail, arrested for marching without a permit.⁹

It is safe to say that even among those who believe that the Ten Commandments should not have been banished from the courthouse, Roy Moore's understanding of conscience is problematic. At the same time, very few, regardless of political leanings, would condemn Martin Luther King Jr. for his version of the same claim. One basis for this discrepancy lies in role. Specifically, we resist the conflation of the role of the judge

5. See Kronman, *supra* note 2, at 1569 ("A prudent judgment . . . is, above all, one that takes into account the complexity of its human and institutional setting. . . .").

6. Jeffrey Gettleman, *Thou Shalt Not, Colleagues Tell Alabama Judge*, N.Y. TIMES, Aug. 22, 2003, at A1 (quoting Chief Justice Roy Moore of the Alabama Supreme Court at a rally).

7. MARTIN LUTHER KING JR., LETTER FROM BIRMINGHAM JAIL 5 (Apr. 16, 1963), available at <http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf>.

8. Chief Justice Moore testified that he placed the monument in the Supreme Court rotunda "to acknowledge God's law and God's sovereignty." *Glassroth v. Moore*, 335 F.3d 1282, 1287 (11th Cir. 2003). He rejected a request to permit a monument displaying a historically significant speech in the same space on the grounds that "[t]he placement of a speech of any man alongside the revealed law of God would tend in consequence to diminish the very purpose of the Ten Commandments monument." *Id.* at 1284.

9. KING, *supra* note 7.

with that of the prophet:¹⁰ those who are called to apply the laws of a nation evenhandedly and uniformly are evaluated on a substantively different moral scale than those called to critically engage the nation on the content of those laws.

There is not a universal resistance to that conflation, though. The late Yale law professor Robert Cover skewered judges during the Vietnam War for not publicly engaging “in creative judicial obstruction of the war effort.”¹¹ Though there is a huge gulf between Roy Moore and Robert Cover on the political spectrum, they both seem to conceive of the judge’s function as calling for the full integration of moral truth with official role.

Justice Scalia’s thought runs in the opposite direction, as he has long railed against what he calls the “judge moralist.”¹² In his famous discussions of the death penalty, he argues that if a judge is morally opposed to the death penalty, his only option is to resign from the bench.¹³ At least on this issue,¹⁴ he sees no space for judges who hold moral convictions that diverge from the positive law machinery they are obliged to operate. He stands with Moore and Cover in recognizing that a judge may not ignore his conscience, but he sees resignation, not subversion, as the acceptable outcome.

The positions espoused by Moore, Cover, and Scalia provide examples of principle unleavened by prudence, particularly in failing to account adequately for professional role. Viewing the judge through the lens of prudence helps explain why a fixation on unitary principles in either direction—that is, conscience compelling subversion or conscience compelling resignation—misses the broader context. A comparison of judges to lawyers brings greater clarity, underscoring that prudence must account for context, and in a modern pluralist democracy, the marketplace is a key dimension of that context. In this regard, the exercise of prudential judgment is different than the exercise of conscience, especially as the latter is understood in modern American legal parlance as an inward-looking, non-negotiable, personal moral stance. Prudential judgment is role-constrained, shaped directly by the surroundings.

10. On using the biblical prophet as a model for lawyers, see generally Thomas L. Shaffer, *The Lawyers as Prophets*, 15 ST. THOMAS L. REV. 469 (2003).

11. Robert M. Cover, *Book Review*, 68 COLUM. L. REV. 1003, 1006 (1968) (reviewing RICHARD HILDRETH, *ATROCIOUS JUDGES: LIVES OF JUDGES INFAMOUS AS TOOLS OF TYRANTS AND INSTRUMENTS OF OPPRESSION* (1856)).

12. The Associated Press, *Scalia Critical of What He Calls the ‘Judge-Moralist’*, BOSTON GLOBE, Mar. 15, 2006, available at http://www.boston.com/news/local/massachusetts/articles/2006/03/15/scalia_critical_of/.

13. “My vote, when joined with at least four others, is, in most cases, the last step that permits an execution to proceed. I could not take part in that process if I believed what was being done to be immoral.” Antonin Scalia, *God’s Justice and Ours*, FIRST THINGS, 17, 17–18 (2002).

14. Cf. *id.* at 18 (“[A] judge, I think, bears no moral guilt for the laws society has failed to enact. Thus, my difficulty with *Roe v. Wade* is a legal rather than a moral one.”).

One key to understanding prudential judgment's implications for any real-world issue is coming to grips with its nuanced, practical orientation. Prudence resists categorical answers, but does not ignore absolute truths; it is not unprincipled, but it does require an appreciation of context. As the path by which general principles are connected with lived reality, prudence turns on particular circumstances,¹⁵ seeking "to discern what is to be done now or in the future on the basis of knowledge of the present situation and past experience."¹⁶ Cultivating prudence as a virtue, operating in combination with other virtues,¹⁷ is necessary "precisely because our powers of will and intellect are not determined to specific ends."¹⁸ Prudence thus cannot be acquired as a theoretical matter via cognitive grasp or as a one-time devotion of the will; on the contrary, it must be "obtained and perfected through practice in deliberation and action, just as the virtue of temperance, for example, is cultivated through acting temperately."¹⁹ Put simply, prudence allows us "to act in the right way, for the right reasons, and at the right time."²⁰

Recognizing the contextual nature of prudential judgment is not meant to suggest that prudence can be understood fully in narrow slices of human existence. Aquinas cautioned against equating prudence with a particular role:

There are seeming prudences which contrive means for bad ends, like the prudence of the thief planning to thieve well. There are genuine but partial prudences: particular and not general like prudence in trade, or general but incomplete like that of men who investigate and decide well but don't implement their decisions. Prudence that is genuine, general and complete is the virtue of prudence. . . .²¹

Nelson explains that, "[t]o say that someone is prudent in an unqualified way is to say that he or she is prudent about life in general."²²

Certainly an individual who practices prudential judgment only in her professional role should not be mistaken for a person of prudence. By the

15. R.J. Araujo, S.J., *Thomas Aquinas: Prudence, Justice, and the Law*, 40 *LOY. L. REV.* 897, 908 (1995) ("[P]rudence directs us to specify that action which we must take in particular circumstances to do that which is good and avoid that which is evil in every day life.").

16. NELSON, *supra* note 1, at 81.

17. "[P]rudence needs the inclinations of justice, temperance, and fortitude as given matter already existing within the person." JAMES F. KEENAN, S.J., *GOODNESS AND RIGHTNESS IN THOMAS AQUINAS'S SUMMA THEOLOGIAE* 103 (1992); *see also* NELSON, *supra* note 1, at 48 ("The virtues do not operate autonomously but are coordinated and directed by reason through the virtue of prudence.").

18. NELSON, *supra* note 1, at 69.

19. *Id.* at 79.

20. *Id.* at 81.

21. THOMAS AQUINAS, *SUMMA THEOLOGIAE, Part II of the Second Part* q. 47 a. 13 (Timothy McDermott trans., 1989).

22. NELSON, *supra* note 1, at 79.

same token, an individual who is prudent only in her personal life lacks a vital dimension of prudence's import. The notion that universal principles emanating from the revealed order can or should be disconnected from one's professional life defies the unity of the human person and the all-encompassing validity of those principles. What is significant for our purpose is to note that the exercise of prudence in an individual's professional decision making may not resemble the exercise of prudence in her personal life. The lessons imparted by those universal principles may depend on the interests to be served by the specific role at issue. After all, principles need not be uniformly applied to be universally valid.

Especially in a publicly oriented vocation like the law,²³ the context-specific inquiry demanded by prudential judgment does not make our conception of prudence unduly narrow; rather, it acknowledges the power of prudence to bring general principles to bear on every aspect of an individual's life. Engaging the professional side of the inquiry should be seen as expanding prudence's reach, not narrowing its claim.

Seen in this light, lawyers and judges can recognize and articulate the ends of prudential judgment only by recognizing and articulating the ends of their specific roles. Jean Porter explains that "when Aquinas says that prudence determines the things that are directed toward the ends of the moral virtues, what he is saying is that prudence determines which courses of activity and specific actions would instantiate the virtues in the specific situations that make up our lives."²⁴ Prudence, in other words, will help us determine what specific action "is required in a particular situation in order to meet the demands of the relevant virtue."²⁵ Porter uses the example of eating a brownie. If we conclude that the demands of temperance require us to refuse a third brownie, no meaningful analysis of means or ends is necessary beyond recognizing the demand. All we need to do is decline the brownie.²⁶ The practice of prudence as a virtue enables the realization of other virtues, and the identity of those virtues arises from the facts at hand.

III. LAWYERS, JUDGES, AND THE MARKET

Given the nature of prudence, it may be more instructive to begin with my conclusion then trace the path by which prudence led to that conclusion. Accordingly, the exercise of prudential judgment results in a judge having less room to integrate her rightly-formed conscience into her professional role than a lawyer will have. The judge's exercise of prudence will justify her facilitation of means or ends that may create tension with an authentic

23. Interestingly, Aquinas spoke of a "true form of prudence that is oriented to public rather than private life." *Id.* at 83.

24. JEAN PORTER, THE RECOVERY OF VIRTUE: THE RELEVANCE OF AQUINAS FOR CHRISTIAN ETHICS 159 (1990).

25. *Id.*

26. *Id.*

vision of the human person, as her professional role gives her less room for discretionary moral judgment. The lawyer has greater room for moral discretion in her exercise of professional judgment, which means that her exercise of prudence will more rarely justify her facilitation of means or ends that conflict with the moral anthropology. This may help explain Pope John Paul II's statement contrasting judges with lawyers on the matter of divorce, in which he asserted that "[l]awyers, as independent professionals, should always decline the use of their profession for an end that is contrary to justice, as is divorce," while acknowledging that, "[f]or judges this may prove difficult, since the legal order does not recognize a conscientious objection to exempt them from giving sentence."²⁷

One way to view this distinction is that prudence warrants less deference by lawyers to prospective clients than is owed by judges to litigants, and this disparity in deference is a function, in significant part, of a marketplace dynamic. Judges should be discouraged from bringing in extralegal norms to their work, and lawyers may be encouraged to bring in extralegal norms to their work, because lawyers are market actors and judges are not.

If a lawyer decides to integrate Christian principles into her legal practice, and her integration leads her to tell the client, for example, that the lawyer will not attempt to impeach a witness if she believes that the witness is telling the truth, the client's moral agency has not been denied. The client can embrace that approach or decline to proceed with the representation and choose another lawyer. The American Bar Association's Model Rules are clear that "[a] client has a right to discharge a lawyer at any time, with or without cause."²⁸

The theoretical ability to choose another lawyer may not always mean much in practice, of course. If a litigant can reject her court-appointed lawyer only by paying for one herself, market dynamics are illusory. And even in the corporate sphere, the market had less vitality in earlier times given the tendency of large companies to attach themselves to a single law firm for decades, and to give all their legal business to that firm, ensuring that switching representation would incur a huge cost in terms of the firm's accumulated knowledge of, and familiarity with, the client.

27. Pope John Paul II, Address to the Prelate Auditors, Officials and Advocates of the Tribunal of the Roman Rota (Jan. 28, 2002), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/january/documents/hf_jp-ii_spe_20020128_roman-rot_en.html (emphasis in original); see also David O'Reilly, *Pope's Words Unsettle Catholic Lawyers*, PHIL. INQUIRER, Feb. 3, 2002, at B05 (reporting on the pope's statement to the Roman Rota); Cindy Wockner & Amelia Kerr, *Pope Acts to Stem 'Plague'—Catholic Lawyers Asked to Stop Handling Divorce Cases*, THE DAILY TELEGRAPH, Jan. 30, 2002, at 9 ("Pope John Paul II has created a storm of controversy around the world after calling on Catholic lawyers and judicial officers to avoid working on divorce cases."); Melinda Henneberger, *John Paul Says Catholic Bar Must Refuse Divorce Cases*, N.Y. TIMES, Jan. 29, 2002, at A4 (reporting that the pope instructed that "civil lawyers who are Roman Catholic must refuse to take divorce cases").

28. MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 4 (2003).

Things have changed now, though. Ronald Gilson identifies the rise of the in-house legal counsel as having largely eliminated “the information asymmetry between client and lawyer, so that no relationship-specific assets are created and no lock-in effect results.”²⁹ The consequence is “a dramatic reduction in the switching costs facing clients and an elimination of lawyers’ market power.”³⁰ Companies shop around among a variety of firms for each significant matter, staging beauty contests where firms parade through a conference room and do their best to sell themselves to the client. Much of the decision-making power now resides with in-house legal departments. But it is clear that, at least for corporate clients who are able to pay, they have a variety of options when it comes to their legal representation.

Anyone who doubts the power of market forces in the legal profession need look no further than the savings and loan scandal of the 1980s. One of the central figures, Charles Keating, expected his lawyers to push the envelope further than they were comfortable doing, and they resisted. His response was to fire the firm, and hire Kaye Scholer. The rest is well documented in any legal ethics casebook, as Kaye Scholer ended up paying \$41 million to the government stemming from the firm’s various ethical transgressions committed in deference to the market forces that kept its relationship with Keating so precarious.³¹ A similar dynamic is evidenced in the Enron debacle.³² As David Wilkins observes, “[i]n a competitive market filled with sophisticated repeat players, outside firms have little incentive to fail to seek their client’s objectives,”³³ even as those objectives push the bounds of the law.³⁴

29. Ronald Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 902–03 (1990).

30. *Id.*

31. William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998).

32. Robert K. Vischer, *Legal Advice as Moral Perspective*, 19 GEO. J. LEGAL ETHICS 225, 240 (2006) (“Every colorable explanation [of Enron’s collapse] implicates Enron’s lawyers as having failed to provide a needed check on the self-aggrandizing transgressions of Enron’s management.”); see also W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167 (2005); David A. Westbrook, *Corporation Law After Enron: The Possibility of a Capitalist Reimagination*, 92 GEO. L.J. 61, 88 (2003) (“Enron was badly advised by its lawyers, primarily Vinson & Elkins.”); Larry E. Ribstein, *Limited Liability of Professional Firms After Enron*, 29 J. CORP. L. 427, 428 (2004); Keith R. Fisher, *The Higher Calling: Regulation of Lawyers Post-Enron*, 37 U. MICH. J.L. REFORM 1017 (2004); Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185 (2003); Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9 (2002).

33. David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 884 (1998).

34. See *id.* at 885 (“If the *Kaye, Scholer* case is any indication, the economic incentives created by the new information order are likely to persuade some significant number of lawyers to move beyond tacitly refusing to stop their client’s wrongdoing and to become active participants in the corruption of the legal framework.”).

Litigants do not have remotely similar discretion in choosing their judge as clients have in choosing their lawyers. They may be able to seek recusal in cases where the judge's impartiality might reasonably be questioned,³⁵ but that's a far cry from an ability to deliberately align one's understanding of a proper judicial function with a judge who actually embodies that understanding. Witness the minor media storm in Chicago several years ago when two lawyers filed five identical suits within fourteen minutes on behalf of their client, hoping to land one of them with a preferred judge.³⁶ The lawyers and their firm were fined, and the state ethics committee opened an investigation.³⁷

There is no marketplace of judges. And more than that, there is no marketplace of judicial authority. Judges are the gatekeepers for the legitimate exercise of the state's coercive power, which it exercises on behalf of citizens. If individuals have a dispute that they cannot work out through private ordering, they need the authority that judges provide.

The recognition of market dynamics has significant implications for the function of prudence in the roles of judge and lawyer. The absence of a market makes a provider's exercise of conscience—even a rightly formed conscience—much more problematic. It is not just because we are in a place, as identified by Tom Shaffer, “where there is no difference between the Christian believer and those who worship the idols of civil religion.”³⁸ And it is not simply a begrudging concession to the rule of law that justifies a judge's self-restraint of conscience; there is an affirmative case to be made for why judges should embrace a certain degree of disconnection between their personal convictions and professional decision making. It flows from a vision of the rule of law as a moral good, a vision that is consistent with foundational elements of Catholic social teaching. Four elements in particular make up the content that the concept of role brings to prudential judgment.

First, subsidiarity holds that the lowest body that can address a problem effectively should be empowered to do so. In the words of Pope Pius XI, a free society should embody the “most weighty principle” of subsidiarity:

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

35. See 28 U.S.C. § 455 (2000).

36. See Randall Samborn, *Chicago Judge Sanctions Firm*, NAT'L L.J., Apr. 18, 1994, at A4.

37. See *id.*

38. Thomas L. Shaffer, *Nuclear Weapons, Lethal Injection, and American Catholics: Faith Confronting American Civil Religion*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 7, 19 (2000).

help to the members of the body social, and never destroy and absorb them.³⁹

This fundamental ordering “must be respected” because “needs are best understood and satisfied by people who are closest to them and who act as neighbours to those in need,” a perception that derives, in turn, from the fact that “certain kinds of demands often call for a response which is not simply material but which is capable of perceiving the deeper human need.”⁴⁰

In keeping with subsidiarity, individual judges cannot be tasked with settling legal disputes by invoking their own consciences, as such an individualized approach effectively disempowers citizens by negating the law-making efficacy of their democratic participation. Citizens do not enjoy full access to the law, but an access limited by the substance of the judge’s convictions. If, for example, a judge were to ignore the settled principles of contract law in order to preclude enforcement of an agreement that facilitated a company’s production of pornography, the company and its members no longer have the space to order their affairs that is contemplated by law, but simply the space contemplated by the judge’s own moral convictions. The good of reducing pornography may be furthered, but by a path that precludes a meaningful role for citizens in the resolution of the issue. This problem is most pronounced in cases that turn on statutory law; for common law cases, the cost is felt in the loss of the law’s predictability and stability, necessary ingredients for localized empowerment. The judge’s conscience-driven embrace of extralegal norms hampers the ability of associations and individuals to pursue and protect their own interests via unfettered access to the law.

By contrast, when a lawyer stakes out a position based on an extralegal norm with which the client disagrees, the client has an exit option, assuming that the norms are brought to the surface and made known to the client.⁴¹ If lawyers introduce their own extralegal moral norms into the representation without the client’s knowledge, they are functioning more like judges, narrowing a client’s access without allowing the client to seek other avenues.⁴² A lawyer who advises her client that a contract is unen-

39. POPE PIUS XI, QUADRAGESIMO ANNO ¶ 79 (May 15, 1931), available at http://benedictumxvi.va/holy_father/pius_xi/encyclicals/documents/hf_pxi_enc_19310515_quadragesimo-anno_en.html.

40. POPE JOHN PAUL II, CENTESIMUS ANNUS ¶ 48 (May 1, 1991), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jpii_enc_01051991_centesimus-annus_en.html.

41. See, e.g., Robert K. Vischer, *Heretics in the Temple of Law: The Promise and Peril of the Religious Lawyering Movement*, 19 J.L. & RELIGION 427, 475 (2004) (“[A] lawyer is obligated to keep the client apprised to the extent that the lawyer recognizes the bearing her own religious convictions and inclinations will have on the decisions presented by the matter.”).

42. See, e.g., Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661, 678 (2001) (worrying that, if a faith-informed conciliation approach is followed by all lawyers, there would be “so truncated a range of lawyering

forceable without revealing that the conclusion is grounded in her opposition to pornography, rather than the settled law, becomes a moral arbiter, rather than a partner in moral discourse.⁴³ But where a client has adequate information and viable market options, a lawyer is hard-pressed to justify the facilitation of immoral ends by invoking subsidiarity's impetus of localized empowerment.

Second, solidarity commands that we identify with the good of others, binding us "to make ourselves the neighbor of every person without exception, and of actively helping him when he comes across our path."⁴⁴ Solidarity envisions "the other" not only as "a human being with his or her own rights and a fundamental equality with everyone else, but [as] the living image of God the Father, redeemed by the blood of Jesus Christ and placed under the permanent action of the Holy Spirit."⁴⁵ As a result, every person must "be loved, even if an enemy, with the same love with which the Lord loves him or her; and for that person's sake one must be ready for sacrifice, even the ultimate one: to lay down one's life for the brethren."⁴⁶ Our commitment to others must not be instrumentalist,⁴⁷ nor can it be a question of individual duty, for solidarity "is an imperative which obliges each and every man and woman, as well as societies and nations."⁴⁸ At its core, then, solidarity "is not a feeling of vague compassion or shallow distress" at others' misfortunes, but rather "a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all."⁴⁹ What is needed is "a commitment to the good of one's neighbor with the readiness, in the gospel sense, to 'lose oneself' for the sake of the other instead of exploiting him, and to 'serve him' instead of oppressing him for one's own advantage."⁵⁰

For judges, this means that the disposition of the neighbor's claim requires doing so in a way that, even if not agreeable to the neighbor, is

styles for a client who seeks to vindicate a right, not reconcile with an opponent, or whose sense of violation would be compounded, not assisted, by efforts to seek reconciliation," and about "the lawyer who is so intent on conciliation that he or she does not explore with the client all the litigation options").

43. Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231, 244 (1979) (recognizing that the "[l]awyer and client depend on one another and influence one another," and that this "moral interdependence is the basis of [their] conversation").

44. POPE PAUL VI, GAUDIUM ET SPES ¶ 27 (Dec. 7, 1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vatii_cons_19651207_gaudium-et-spes_en.html.

45. POPE JOHN PAUL II, SOLLICITUDO REI SOCIALIS ¶ 40 (Dec. 30, 1987), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jpii_enc_30121987_sollicitudo-rei-socialis_en.html.

46. *Id.*

47. *Id.* ¶ 39.

48. *Id.* ¶ 32.

49. *Id.* ¶ 38.

50. *Id.*

accessible to the neighbor.⁵¹ Conscience is not accessible in the way that collectively decided legal norms are.⁵² It would be highly problematic, for example, for a family court judge to award custody of a child to a parent on the sole ground that the parent intended to raise the child as a Christian, and the other parent intended to raise the child in another faith tradition. Putting aside the obvious Establishment Clause concerns, the ruling stands in tension with solidarity because the ruling's basis makes sense only from a premise that accepts the validity of Christianity's claims of divinely revealed truth. The importance of ensuring the appearance of accessibility and evenhandedness also explains the requirement that judges forego the partisan political activity in which other citizens are entitled to participate.⁵³

Besides the problem of inaccessible outcomes, there is the related problem of unpredictable outcomes. A judge's elevation of conscience over positive law fails to respect the moral agency of individuals because the content or implications of conscience are not knowable beforehand. One virtue of the rule of law is that individuals can structure their actions with the law's content in view; such is not possible when the law's content resides in the heart of whichever judge they happen to draw. Conscience tends not to be accessible, nor predictable⁵⁴—two traits that are obstacles to a legal order reflective of solidarity. But again, as long as clients operate with adequate information and viable alternatives, the inaccessibility and unpredictability of the implications that a lawyer's conscience might have for the representation are not similarly problematic.

Third, the principle of reciprocity reminds us that natural rights "are inextricably bound up with as many duties, all applying to one and the same person," and that these "rights and duties derive their origin, their sustenance, and their indestructibility from the natural law, which in conferring the one imposes the other."⁵⁵ This understanding of reciprocity springs not

51. Teresa Collett, *The King's Good Servant, But God's First: The Role of Religion in Judicial Decisionmaking*, 41 S. TEX. L. REV. 1277, 1299 (2000) ("In deference to the free will of the individual, and the good of communal self-governance, deep respect for the positive law should govern the vast majority of a judge's decisions.").

52. Kent Greenawalt, *Natural Law and Public Reasons*, 47 VILL. L. REV. 531, 549 (2002) ("Within the law, judges are supposed to rely on reasons that have force for other judges, and the reasons need to be accessible, both in the sense of being comprehensible and in the sense of being capable of being grasped on the basis of rational thought, not faith or intuition.").

53. See CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 7 (2000) ("A judge should not . . . make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions.").

54. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 72 (1946) ("Stripped of all its technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances. . . .").

55. POPE JOHN XXIII, *PACEM IN TERRIS* ¶ 28 (William J. Gibbons, S.J. ed.) (Apr. 11, 1963), available at http://www.vatican.va/holy_father/john_xxiii/encyclicals/documents/hf_jxxiii_enc_11041963_pacem_en.html.

from some hypothetical social contract, but from our very nature, which draws us into relationships.⁵⁶

The contours of an individual's professional role cannot be defined without reference to the relationships in which it is embedded. When judges put their own conscience-driven claims to the side in order to adjudicate cases based on the settled law they are serving "the other." This service is not a one-way act of charity, but a recognition of the mutual self-giving⁵⁷ between citizens on which the rule of law is founded.⁵⁸ As John Finnis puts it, "the good that is common between friends is not simply the good of successful collaboration or coordination, nor is it simply the good of two successfully achieved coinciding projects or objectives; it is the common good of mutual self-constitution, self-fulfillment, self-realization."⁵⁹ Judges as private citizens enjoy the liberty of action made possible by the rule of law, a rule for which a degree of self-restraint by all citizens is necessary.⁶⁰ With lawyers, their integration of extralegal norms with their practice, if done openly, does not threaten a prospective client's liberty of action. The self-restraint needed by lawyers is simply to resist the temptation to subvert the client's autonomy through the covert introduction of extralegal norms.

Fourth, the common good, which is the "sole reason for the existence of civil authorities,"⁶¹ requires a "healthy *social pluralism*."⁶² In this way, "[t]he different components of society are called to build a unified and harmonious whole, within which it is possible for each element to preserve and develop its own characteristics and autonomy."⁶³ Aquinas acknowledged the place of pluralism when he recognized that prudence entails different actions depending on the community in which the actor is located; subjects of a monarchy act prudently in a different way than citizens of a democ-

56. Kenneth R. Himes, *Rights of Entitlement: A Roman Catholic Perspective*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 507, 516 ("Society is established neither because of sin nor the formation of a social contract but is due to the very nature of persons. . . . If life is to flourish, it is necessary for human beings to give and receive in relationships.").

57. POPE PAUL VI, GAUDIUM ET SPES, *supra* note 44, ¶ 24 (explaining that man cannot "fully find himself except through a sincere gift of himself").

58. Robert J. Araujo, S.J., *The Catholic Neo-Scholastic Contribution to Human Rights: The Natural Law Foundation*, 1 AVE MARIA L. REV. 159, 162 (2003) ("Aquinas further refined the notion of justice as being the mutuality or reciprocity shared among the members of society and essential to the dignity of each person when he argued that 'the virtue of the good citizen is general justice, whereby each person is directed to the common good.'").

59. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 286-87 (1980).

60. Jason Mazzone, *Speech and Reciprocity: A Theory of the First Amendment*, 34 CONN. L. REV. 405, 405 (2002) (referring to reciprocity as "the disposition of citizens to engage in cooperative behavior with each other for mutual benefit").

61. POPE JOHN XXIII, PACEM IN TERRIS, *supra* note 55, ¶ 54.

62. PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 151 at 66 (2004), available at http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html.

63. *Id.*

racy.⁶⁴ But every form of prudence will direct the individual “to the common good on which her individual good depends.”⁶⁵

It is important to remember that the common good cannot be confused with the collective good, on one hand, or the individual good, on the other—it encompasses both by transcending both. As Jacques Maritain explains, “[t]he common good is common because it is received in persons, each one of whom is a mirror of the whole.”⁶⁶ In Maritain’s work, as elucidated by Patrick Brennan, “the common good is not the collection or a summation of private goods; neither is it the good of a whole such that the goods of the components are sacrificed to the good of the whole.”⁶⁷ Rather, it is “the shared life of a political community of free persons living oriented toward justice, friendship, and the transcendent.”⁶⁸

The individual has a stake in the common good,⁶⁹ even though she remains “inferior and subordinated to the whole and must, as an organ of the whole, serve the common work.”⁷⁰ But she is not simply incorporated into the whole; she stands apart, and her flourishing cannot be equated with the interests of the collective, though they are inescapably related. On this point, Maritain warrants quoting at length:

For in the person there are some things—and they are the most important and sacred ones—which transcend political society and draw man in his entirety above political society—the very same whole man who, by reason of another category of things, is a part of political society. By reason of certain relations to the common life which concern our whole being, we are a part of the state; but by reason of other relations (likewise of interest to our whole being) to things more important than the common life, there are goods and values in us which are neither by nor for the state, which are outside of the state.⁷¹

As a trigger for the invocation of the state’s coercive force, the judicial voice must speak with deference toward the dimension of the common good

64. PORTER, *supra* note 24, at 164–65.

65. *Id.* at 165.

66. JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 49 (1966).

67. Patrick Brennan, *Jacques Maritain (1882–1973)*, in *THE TEACHINGS OF MODERN CHRISTIANITY ON LAW, POLITICS AND HUMAN NATURE* 75, 94 (John Witte & Frank S. Alexander eds., 2006).

68. *Id.* at 95.

69. See MARITAIN, *supra* note 66, at 51 (“[T]he common good of the city implies an intrinsic ordination to something which transcends it, it is because it requires, by its very essence and within its proper sphere, communication or redistribution to the persons who constitute society.”).

70. *Id.* at 70; see also Vincent D. Rougeau, *A Crisis of Caring: A Catholic Critique of American Welfare Reform*, 27 *HARV. J.L. & PUB. POL’Y* 101, 117–18 (2003) (“The sense of responsibility and reciprocity that solidarity require does not grow out of vague emotion or by intellectual engagement, but through a lived experience of community.”).

71. MARITAIN, *supra* note 66, at 73.

that is not defined by the collective will.⁷² This is why it is so important that judges recognize and invoke the rights needed to protect the human person from overbearing state incursions on individual and associational autonomy.⁷³ By the same token, the judge must not close down the space needed for individual self-direction by substituting her own extralegal norms for the collective will. Judicial self-restraint helps ensure that the common good is not defined and imposed from above as either a uniform, fixed norm or as an idiosyncratic product of the judge's own conscience, but is instead realized from the bottom up, constituted by the decisions and day-to-day actions of individuals and the communities to which they belong.

When lawyers within a functioning marketplace introduce extralegal norms into the advice they give clients or as the basis for declining a representation, they do not close down the divergent paths by which the common good is realized. In fact, lawyers who bring conscience to bear on their professional identities can help expand and enrich the common good by challenging the presumptions of the governing legal paradigm, whether by critically engaging the substance of the positive law or the objectives that the client wishes to pursue through the positive law. In keeping with the common good, the judge must facilitate the exercise of autonomy by non-state actors; the lawyer, by contrast, can and should help shape the exercise of autonomy itself.

The principles of solidarity, subsidiarity, reciprocity, and the common good are not empty vessels to be filled with the actor's preconceived priorities. They are comprised of substantive ideals emanating from a distinctive worldview. In this regard, they serve to demarcate the path of prudential judgment in meaningful ways. And yet even within these boundaries, the path of prudential judgment will take sharply different turns based on the nature of the traveler's professional role.

IV. THE MORAL DIMENSION OF JUDGING

So what does all of this mean in today's culture war terms? To begin with, it means that a pro-life federal district court judge faced with a constitutional challenge to South Dakota's recently enacted statute banning all types of abortion will, acting prudently, overturn the law based on the bind-

72. *Id.* at 82 ("[T]he good of the community (the authentic and true common good) is superior to the good of the individual person in the order of terrestrial values according to which the person is a part of the community. But these values are not equal to the dignity and destiny of the person.").

73. "[U]ntil men and women learn to live according to love, law is necessary to human living." Brennan, *supra* note 67, at 99 (quoting Maritain's statement that "If the person has the opportunity of being treated as a person in social life . . . it is first of all due to the development of law and to institutions of law." Jacques Maritain, *The Conquest of Freedom, in THE EDUCATION OF MAN: THE EDUCATIONAL PHILOSOPHY OF JACQUES MARITAIN* 172-73 (Donald A. Gallagher & Idella J. Gallagher eds., 1962)).

ing precedent of *Roe v. Wade*.⁷⁴ However, a pro-life lawyer asked by Planned Parenthood to bring the suit challenging the law would not be acting prudently in accepting the representation.⁷⁵

Another illustrative example occurred in Boston, where the law firm Ropes & Gray represented Catholic Charities as the latter searched for a way around a new state requirement that adoption agencies not discriminate against same-sex couples in placing children.⁷⁶ The Harvard Law School's student chapter of Lambda protested the firm's decision to work on that case, threatening to picket future on-campus interviewing by the firm, and the threats appear to have had their desired effect.⁷⁷ Regardless of one's view of the moral claims raised in Lambda's protest, the students' recognition of the moral dimension of a firm's decision to represent a given client or cause is commendable. For our purposes, it is essential to recognize that the moral dimension of lawyering amounts to more than the uncritical provision of access to the law: the conduct of the representation, and the acceptance of the representation itself, must be included in the moral evaluation of the lawyer's role, and the lawyer's extralegal moral norms are not irrelevant to any such evaluation.

But for a judge, extralegal moral norms should be kept at the margins when evaluating the performance of her professional role. This is not to pretend that a judge can function as an amoral robot, stepping out of her own morally laden identity whenever she picks up the gavel. But by looking beyond her own moral convictions (which is a starkly different proposition than pretending her moral convictions do not exist), she can acknowledge the moral significance of judging without subverting the rule of law. Often the judge's moral convictions will spark no tension with the legal framework, either because of substantive consistency between the two or because the law defers to—indeed, welcomes—the judge's exercise of discretion. But when the judge's convictions encounter resistance from the law, the value of the restrained judicial conscience comes into relief. Three essential functions stand out in this regard:

74. But see Michael Stokes Paulsen, *Accusing Justice: Some Variations on the Themes of Robert M. Cover's Justice Accused*, 7 J.L. & RELIG. 33, 37 (1989) ("Where it is not possible for the judge honestly to avoid the rule of *Roe*, the judge should refuse to enforce *Roe* in any event, not through the subversion of the rule of law, but by challenging the Supreme Court's clearly erroneous holding, by recusing himself in the particular case, or, if push comes to shove, by resigning.").

75. See Teresa Stanton Collett, *Speak No Evil, Seek No Evil, Do No Evil: Client Selection and Cooperation with Evil*, 66 FORDHAM L. REV. 1339, 1339–40 (1998) ("No religious believer should accept cases requiring the lawyer to advocate evil acts, or the total disregard of religious obligations, or the irrelevance of religious beliefs.").

76. See Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, BOSTON GLOBE, Mar. 11, 2006, at A1.

77. See Sacha Pfeiffer, *Harvard Law Group Hits Ropes & Gray*, BOSTON GLOBE, Mar. 15, 2006, at E1.

First, judicial decision making can have a meaningful pedagogical impact, especially when the judge who upholds a settled rule of law nevertheless dissents from the moral implications of the rule. In other words, what does the judge say in her opinion about the legal rule she upholds? This dynamic can be seen in federal district court judge Richard Casey's ruling in which he struck down a partial-birth abortion ban in light of binding Supreme Court precedent,⁷⁸ but nevertheless stated in the opinion that the practice is "gruesome, brutal, barbaric and uncivilized."⁷⁹ While judges should not utilize their public pedestals in a way that inspires disrespect for the law, there is nothing inherent in their professional role that disqualifies them from drawing the public's attention to the law's moral dimension.⁸⁰

Second, judges serve the structural good of maintaining access to the law even when they facilitate particular problematic ends in a particular case.⁸¹ A judge's moral qualms about a particular provision of law may actually deepen and enrich the quality of justice afforded under that provision.⁸² Of course, participating in the enforcement of morally objectionable laws is not without cost, particularly in terms of the legitimacy lent by the participation, which must be considered in the calculus.⁸³ But the calculus cannot simply consist of whatever moral weight is given to the specific problematic law to be enforced; there is a broader, systemic value to the morally dissenting judge's continued presence that must be factored into the equation.

78. *Stenberg v. Carhart*, 530 U.S. 914 (2000).

79. *Nat'l Abortion Fed'n. v. Ashcroft*, 330 F. Supp. 2d 436, 479 (2004).

80. Cf. Scott Idleman, *The Concealment of Religious Values in Judicial Decisionmaking*, 91 VA. L. REV. 515, 533 (2005) ("The inquiry . . . cannot simply be why a judge has employed religion in her reasoning, as if it were an extraordinary or bizarre aberration, but instead whether her particular use of religion is reasonable or permissible under the circumstances."); Shirley S. Abrahamson, Susan Craighead & Daniel N. Abrahamson, *Words and Sentences: Penalty Enhancement for Hate Crimes*, 16 U. ARK. LITTLE ROCK L. REV. 515, 541-42 (1994) ("Whether they serve to exalt or challenge the law, words and sentences from the judge's heart most assuredly serve justice.").

81. This is limited by the prohibition against formal cooperation. See, e.g., Pope John Paul II's reminder that "it is never licit to cooperate formally in evil," which 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." POPE JOHN PAUL II, EVANGELIUM VITAE ¶ 74 (Mar. 25, 1995), available at http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_25031995_evangelium-vitae_en.html.

82. See Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305, 318 (2004) ("A Catholic judge is entitled to bring that paramount respect for the value of life from his or her Catholic tradition to capital cases, to insist that they be handled with the utmost seriousness and care and with the fullest measure of procedural due process, even when innocence is not in doubt.").

83. Stephen Ellman, *To Resign or Not to Resign*, 19 CARDOZO L. REV. 1047, 1057 (1997) (noting that the presence of morally objecting judges "on the bench might encourage victims of injustice to seek judicial solutions rather than political mobilization . . . [and] might actually undercut opposition to injustice by lending a veneer of legitimacy to a fundamentally unjust enterprise.").

Third, in cases where the exercise of prudence suggests that the structural good is outweighed by the particular harm to be facilitated by a law's enforcement,⁸⁴ the judge's ability to recuse herself preserves the good she does in other cases where the law's indeterminacy may allow a judge's rightly-formed conception of justice to have a positive impact on the law's development.⁸⁵ "The judge's sense of right and wrong," after all, "shapes, to some extent, the direction in which the law evolves,"⁸⁶ and "resignation deprives the bench of some of those who may be most inclined to try to encourage positive changes in controlling law."⁸⁷

These three functions will resolve many questions over a judge's culpability in the enforcement of immoral laws, but they will not resolve all of them. One thorny question that arises in light of the above analysis concerns the moral responsibility and professional obligations of the judge in Nazi Germany. David Luban captures the "central jurisprudential question" of the Nazi judge as being, "In what way, and to what extent, does the rule of law . . . immunize jurists from the still small voice of conscience?"⁸⁸ And German historian Ingo Müller notes that, thanks to legal positivism, "no professional group emerged from the Nazi era with so good a conscience as that of the jurists."⁸⁹ Given my insistence that a judge should facilitate mor-

84. Perhaps a trial court judge asked to sentence a death-penalty-eligible defendant would qualify in this category.

85. Of course, the law's indeterminacy presents a question that also may need to be answered with reference to the judge's particular role. See, e.g., Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 889 (2003) ("[E]ven if courts should follow the ordinary meaning of text, it is reasonable to suggest that administrative agencies need not, in part because agencies are specialists rather than generalists. Compared to courts, agencies are likely to have a good sense of whether a departure from formalism will seriously damage a regulatory scheme; hence it is appropriate to allow agencies a higher degree of interpretive flexibility.").

86. Avery Cardinal Dulles, *Catholic Social Teaching and American Legal Practice*, 30 FORDHAM URB. L.J. 277, 288 (2002); see also Kenneth Williams, *Should Judges Who Oppose Capital Punishment Resign? A Reply to Justice Scalia*, 10 VA. J. SOC. POL'Y & L. 317, 318 (2003) ("[I]t is neither possible nor desirable for the judiciary to be populated with judges who lack strong moral convictions."); Paulsen, *supra* note 74, at 36 ("[W]hile natural law can provide a set of presumptions for interpreting positive law and serve as an *interstitial* source of positive law, it cannot actually *displace* clear positive law without also displacing the idea of democratic self-government under a written constitution (a value itself supported by natural law)."); Scott C. Idleman, *The Limits of Religious Values in Judicial Decisionmaking*, 81 MARQ. L. REV. 537, 550 (1998) ("[F]or a judge, in the process of reaching a decision about human relationships or institutions, to stand in earnest before this wealth of religious insight necessarily impresses upon him the sophistication of his task, the fallibility of his sense of judgment, and the significance of his fiduciary obligations.").

87. Jack B. Weinstein, *Every Day Is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131, 140 (2004).

88. David Luban, *A Report on the Legality of Evil: The Case of the Nazi Judges*, 61 BROOK. L. REV. 1139, 1140 (1995) (symposium panel comments).

89. INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 219 (Deborah Lucan Schneider trans., Harv. U. Press 1991). Müller establishes, though, that legal positivism had its limits in the Third Reich: "Placing the judiciary under a strict obligation to follow the letter of the law would have been an impediment to the 'legal order' of the Nazi regime and would have

ally problematic ends in a particular case in light of the overarching moral good occasioned by the continued rule of law, should the Nazi judge have enforced the legal rules of Hitler's democratically elected regime?

The case of the Nazi judge serves as a tragic reflection of the fact that the governing legal order is not always coextensive with the rule of law, especially when entire classes of persons are categorically excluded from the law's protection. Favoring circumscribed discretion for a judge to bring her conscience to bear on the law's substance should not be construed as requiring unquestioned judicial support of the existing legal order. Revolution cannot be excluded as the prudent path of last resort, and the covert subversion of the legal order by judges could be contemplated within that revolution. At some point, a society reaches a tipping point where the judges should aim to avoid or minimize the harm caused by a morally bankrupt legal system, and they can do so most effectively as judges, not simply in their personal capacities.⁹⁰ The precise tipping point may be difficult to discern—much less define in the abstract—and it will not be enough to point to isolated injustices as a defense for judges who elevate their own extralegal moral norms above the settled law. Further, the greater moral agency enjoyed by lawyers remains instructive: if judges, as judges, are justified in subverting the legal order, lawyers should have joined the revolution long before.

V. CONCLUSION

Principles still matter to the exercise of prudence. One such principle is the structural good of facilitating the democratic pluralism that creates space for human freedom. This principle should shape our responses to the high-profile conscience claims of other market actors, such as pharmacists⁹¹ and teachers.⁹² For these professionals, one's role in contributing to that structural good will shape the contours of one's prudential judgment. In a regime where the structural good is not authentically good, prudence cannot be invoked to justify the facilitation of immoral ends. But in today's American legal system, justice rightly understood requires prudential lines of de-

limited its power; for this reason, judges were required to declare their loyalty to the Fuhrer rather than to the law itself." *Id.* at 220.

90. See, e.g., Ellman, *supra* note 83, at 1051 ("I do not think we would criticize a judge in Nazi Germany for having devised a way to render consciously false verdicts that preserved the lives of persecuted Jews—for example, by finding, untruthfully, that the Jews before him were not Jews, and therefore were not to be executed."); Weinstein, *supra* note 87, at 140–41 ("In Nazi Germany, mass resignation of judges—especially if they gave their reasons—might have helped.").

91. See Robert K. Vischer, *Conscience in Context: Pharmacist Rights and the Eroding Moral Marketplace*, 17 STAN. L. & POL'Y REV. 83 (2006).

92. See Robert K. Vischer, *The Sanctity of Conscience in an Age of School Choice: Grounds for Skepticism*, 6 MD. L.J. OF RACE, RELIG., GENDER & CLASS 81 (2006).

marcation between the moral obligations of lawyers and judges.⁹³ Prudence does not provide an abundance of categorical pronouncements to guide the decision making of lawyers and judges, but it offers reason to caution against categorical pronouncements, albeit a principled caution shaped by professional role. And in the din of our culture war posturing, perhaps that is a good place to start.

93. Justice itself cannot be defined absent the exercise of prudence. *See* KEENAN, *supra* note 17, at 104 (“Justice as a natural inclination to observe the due measure among persons cannot attain the rule of reason except as it is moved and directed by prudence, which provides the mean and is itself the form, rule, and measure of justice.”).