

Religion, Politics and Human Rights

The 2010 Loyola Lecture

Le Moyne College
Syracuse
New York

3 November 2010
7,350 words

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President Pestello, Fr Rector, ladies and gentlemen: It is an honour as a visitor to your shores to be invited to deliver the 2010 Loyola Lecture on this feast day of Blessed Rupert Mayer, the German Jesuit who took a stand being imprisoned and persecuted by the Nazis for his daring to preach the word fiercely. He was back in his pulpit the moment the Prefect of Munich declaimed, “The priests are all the same. Threaten them enough with arrest, rattle the keys of the concentration camp; they subside without further ado and shut up.” I acknowledge the sponsors of the lecture: Le Moyne’s Jesuit community, the Sanzone Center for Catholic Studies and Theological Reflection, and the Rev. Kevin G. O’Connell, S.J., Distinguished Professorship in the Humanities.

I have just come from the American Academy of Religion Conference in Atlanta enjoying the company of your Professor Mary MacDonald, and experiencing something of the great richness of academic tradition and dedication in this country.

In recent years, I have enjoyed the occasional academic appointment at some of your splendid US Jesuit universities.

I had the good fortune to receive a Fulbright at the Georgetown Law Center in 1995. Being walking distance from the US Supreme Court, I had the opportunity to see the workings of your constitutional arrangements for the protection of human rights up close. I did not altogether like what I saw. I returned home and wrote a book *Legislating*

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Liberty which I dedicated to your late Justice William Brennan who had befriended me. In my acknowledgment I pointed out that he had failed to convince me of the need for a constitutional bill of rights in which judges always had the last word. I was attracted to the idea of a statutory bills of rights which set down the key civil and political rights, allowing judges to interpret laws consistent with those rights and their limits, and requiring elected politicians to have a special care about overriding those rights in the public interest or for the common good or so as to preference some rights over others.

I was at Boston College during your 2004 presidential election, trying to make sense of when it was or was not appropriate for a priest to deny communion to a Catholic political candidate usually on the basis of his or her views about desirability or utility of trying to legislate to restrict the availability of abortion within the constitutional constraints set down by your Supreme Court. I went home and wrote a book *Acting on Conscience* trying to answer the question how can we responsibly mix law religion and politics.

I then had opportunities at Santa Clara and again at Georgetown to write and reflect about rights just before being appointed to conduct the Australian National Human Rights Consultation for the Australian government – a task which I completed just over a year ago. During the course of that inquiry some religious groups including the occasional Church leader agitated against any further statutory recognition of human rights on the basis that this would allow unelected judges rather than elected politicians alone to play a role in setting the limits on the exercise of the freedom of religion.

The Australian Catholic Bishops Conference (ACBC) submitted to my committee:

In considering the question raised by the terms of reference of the National Human Rights Consultation, it is noted that much discussion has been about whether or not there should be a Charter of Rights. On that particular issue, the ACBC does not take a particular stand at this stage.

In their submission, the ACBC restated: “The Australian Catholic Bishops Conference does not have a position as to whether or not there should be a Charter of Rights.”

In contrast to this submission, the Archdiocese of Sydney submitted:

There are initiatives which could be taken to better protect and promote human rights in Australia, but there are serious reasons for doubting that a statutory charter of rights is the best way of doing this.

This submission followed upon Cardinal George Pell's public condemnation of a charter of rights in any form:¹

The suspicion of majority — that is, parliamentary — rule, the preference for judicial, as opposed to political, determination of fundamental questions, the unacceptable transfer of responsibility from the parliament to the courts, and the unspoken assumptions which inform not only these tendencies but the particular social and political agenda which a bill of rights is intended to implement, are some of critical problems with proposals for a bill or charter of rights. These problems are compounded by confusion over the foundations of human rights, freedom and truth.

You have to remember that in Australia we have only one active Cardinal Archbishop and he is Cardinal George Pell, the Archbishop of Sydney. On contested social and political issues his statements are sometimes at variance from the statements of the bishops conference – not only in tone but also in substance. He is a colourful and robust character. When you have only one active cardinal in a country, he is likely to attract more media attention than his fellow cardinals who minister in countries with a plurality of cardinals – especially when the Murdoch press is active. In his weekly newspaper column he is described as “Australia's most senior Catholic clergyman”. I don't think you have the equivalent in the United States.

In Australia over the last couple of years, I have been involved in a few public controversies about the relationship between religion, politics and human rights. Tonight, given that this is the Loyola Lecture at a Jesuit college, I want to take the opportunity to reflect on a distinctively Ignatian quandary that I have carried through these controversies. I know that the same quandary has confronted you here recently with the health care debate marked by a clear division of opinion between many of the Catholic

¹ Cardinal George Pell, Four Fictions: An Argument Against a Charter of Rights, Address to the Brisbane Institute, 29 April 2008

bishops and Catholic Health USA, then closely followed by the purported excommunication of Sister Margaret Mary McBride in relation to the termination of a pregnancy in a Catholic hospital.

During your health care debate, Sister Carol Keehan, D.C., president and chief executive officer of the Catholic Health Association said “We urge Congress to continue its work toward the goal of health reform that protects life at all stages, while expanding coverage to the greatest possible number of people in our country.” The editors of the Jesuit magazine *America* noted that Sr Carol expressed her view “with civility and candor”. The *America* editorial of 26 April 2010 remarked:

The sisters entered the fray burdened, like an athlete at the Olympics with family problems on her mind. First, their communities have been the focus of an ongoing Vatican investigation, the purpose of which has never been fully explained. That troubling circumstance alone might have paralyzed less committed advocates. Second, toward the end of the legislative process, the sisters found themselves holding a different view from that of the U.S. Catholic bishops on a matter of prudential judgment concerning possible loopholes for federal funding of abortion resulting from the bill.

Reading this editorial, I mused: when is it appropriate for a Jesuit or one imbued with the Ignatian spirit to take a stand against a bishop or group of bishops? When is it truly Ignatian to express disagreement with a bishop, a cardinal or even the Pope about issues of human rights and matters of political judgment? Or is it always most Ignatian to sit mute in the name of loyalty to the Church? What is Jesuit or Ignatian loyalty in these circumstances? What does it mean nowadays for us to be thinking with the Church while being engaged in the controversies of the public square in a free, robust, pluralist democracy whose citizens are less likely than they were to swear allegiance to the hierarchy of the Roman Catholic Church? It is not as simple as asking, “What would Ignatius have done in his day?” Rather we must ask: “What would Ignatius think appropriate for a person of the 21st century, inspired by his spirit, and active in the public square motivated by a faith that does justice agitating for the protection of human rights at law? Would Ignatius have thought it appropriate that there be persons (not necessarily

Jesuit major superiors) involved in this enterprise in the public square? What would he have thought the appropriate response when there is a variety of approaches by bishops?

In the rules for thinking with the Church appended to his Spiritual Exercises, Ignatius says:

First Rule. All judgment laid aside, we ought to have our mind ready and prompt to obey, in all, the true Spouse of Christ our Lord, which is our holy Mother the Church Hierarchical.

Ninth Rule. Finally, to praise all precepts of the Church, keeping the mind prompt to find reasons in their defence and in no manner against them.

Thirteenth Rule. To be right in everything, we ought always to hold that the white which I see, is black, if the Hierarchical Church so decides it, believing that between Christ our Lord, the Bridegroom, and the Church, His Bride, there is the same Spirit which governs and directs us for the salvation of our souls. Because by the same Spirit and our Lord Who gave the ten Commandments, our holy Mother the Church is directed and governed.

Some of Ignatius's rules for thinking with the Church are obviously outdated in our age. Consider for example his sixth rule which includes the injunction: "to praise relics of the Saints, giving veneration to them and praying to the Saints; and to praise Stations, pilgrimages, Indulgences, pardons, Cruzadas, and candles lighted in the churches." It will come as no surprise to this audience that Jesuits are very adept at drawing distinctions, perhaps even being Jesuitical, when it comes to the contemporary interpretation and application of these rules.

What is novel about our age compared with the time of Ignatius is that bishops nowadays make statements about all manner of things, not just strictly faith and morals for Catholics, but also about law and public policy appropriate for people of all faiths and none. And often there is spirited disagreement amongst the bishops themselves about these issues. It is no disrespect to the bishops to note that there are often other church members who know more about the issue at hand than do the bishops. Ignatian loyalty to the Church cannot mean silence in the face of Episcopal division of opinion, nor can it

mean the same deference to the hierarchy on matters of law and public policy in a pluralist society as on matters strictly classifiable as faith and morals for the church community. As a Jesuit and a lawyer, I continue to be perplexed by the continued failure of many bishops adequately to distinguish between law for all citizens and morality for church members. There are many things we as fellow believers might hold to be morally wrong but that does not mean that there should be a law prohibiting those things regardless of the citizen's beliefs and regardless of the utility of such a law.

My quandaries about Ignatian loyalty were heightened during World Youth Day down in Sydney in 2008. In preparation for that event, the government enacted a regulation which placed severe restrictions on the capacity of citizens to cause disturbance, interference, inconvenience or annoyance to pilgrims - and in the most public of places including the city's central park, major railway stations and even university campuses. By any reckoning, this was an overbroad measure. The media sought my comment. I knew that some of the media in Australia wanted to rain on the Catholic parade. So I did not make any statement until first making contact with the World Youth Day organizers. Being a Jesuit lawyer with a known commitment to human rights, I thought I should say something about the offending law, and I did. I also saw it as a moment for evangelization, not just of prospective pilgrims but also of any heathen out there in the parks or at the railway stations who might not greet the arrival of the pilgrims and the pope as all good news for the city of Sydney. So I issued a written statement questioning the utility, legality and justice of the law, including a short analysis highlighting that the law was arguably inconsistent with Catholic social teaching, especially Pope John XXIII's magisterial statement on rights, his 1963 encyclical *Pacem in Terris*. (My statement is an attachment to this lecture.) I was then interviewed on national radio about the unworkability of such a law. I spoke about the unsuccessful invocation of a similar law at the Sydney Opera House on the occasion of the funeral of Australia's richest resident media tycoon Kerry Packer. I said:²

There was a protest and it was said that those protesters were breaching the law about annoyance and

² "New WYD laws cause Catholic Church infighting", ABC Radio, PM Program, 7 July 2008

inconvenience. How were the police called in? The police didn't make the decision themselves it was annoyance or inconvenience. The general manager of the Opera House made that decision. Now, what are we to expect here? There are going to be church officials making decisions about annoyance and inconvenience and asking police to come in? That would be very unseemly.

None of this pleased the Cardinal Archbishop who when asked about my remarks replied to the national media:³

I think Father Brennan... I'm tempted to say it's a typically unhelpful remark. On occasion he shows a conspicuous sense of due proportion [but this is a] bit of a lack of common sense. It's a beat-up.

After the pilgrims had gone home, the Cardinal made clear: "As I said publicly on a number of occasions during discussion of this matter, these laws were never requested or sought by me or World Youth Day organisers, and as I fully expected they proved to be completely unnecessary."

So what was the unhelpful, beat up, lack of common sense displayed by me at the time the law was promulgated? Given that the law was completely unnecessary and had never been sought by the Church authorities, was it not only appropriate but also desirable that someone from the Church express concerns about the injustice and unworkability of the law? If applied, the law could have caused acute embarrassment to bishops calling out police to rectify annoyance and inconvenience to pilgrims. I still wonder why the Cardinal saw fit to offer such a personal, public critique of me for having criticised the law.

Was I simply amiss in my timing? Should we all have allowed the unjust, unworkable and suspect law to remain on the books during World Youth Day and then later once all the pilgrims had gone home raise the alarm about the now spent law? Before the pilgrims arrived, a court struck down the most offensive provisions of the law, and I thought I was vindicated in expressing the concerns when I did.

³ Cardinal George Pell, ABC Radio, Breakfast, 7 July 2008

Then during World Youth Day, pressure started to build over the issue of sexual abuse and the failure of the hierarchy to take timely and resolute action. There was a suggestion that the Pope might meet with some victims of abuse and apologise. The media meanwhile had focused on a couple of cases: one in relation to which Cardinal Pell had not apologized to a victim Mr Jones for a failure to effect a prompt, transparent investigation; and another in relation to a second Sydney bishop Anthony Fisher for insensitive remarks which many television viewers construed as applying to Mr and Mrs Foster, the parents of two children who had suffered undoubted criminal abuse by a priest years before, one of the children having committed suicide after the abuse. In part because the local bishops had not apologized, the media were minded to dismiss the papal apology when it came towards the end of the Pope's visit. I commended the papal apology but conceded in various interviews to the media, including Al Jazeera TV, that it would have been much better for the public reception of the papal apology if the local bishops had first been able to apologise personally for their failures. Though Bishop Fisher had issued a prompt media release apologizing for the unintended slight on the Fosters, he did not appear in person to apologise until the day after the Pope had issued his own generic apology for sexual abuse. Once Cardinal Pell had issued his apology to Mr Jones, I wrote a letter to the editor of one of the more reputable newspapers saying:

Pope Benedict's apology to abuse victims was heartfelt and included a clear directive to the local church to extend compassion, care and justice to the victims. Thankfully, Cardinal Pell has now apologised to Mr Jones ("Pell says sorry for priest sex abuse letter", *The Age*, 13/8). Bishop Fisher apologised for his remarks about people "dwelling crankily on old wounds" on the Sunday evening after Benedict made his apology. The papal apology would have been heard more clearly if the local bishops had first apologised for their unfortunate remarks and admitted mistakes. Let's hope those of us who are the local church can follow the papal lead and get things right more promptly in future.

Some of my Jesuit colleagues were internally a little critical of me, thinking it would have been better for me to remain silent. Had the local bishops apologized first, I thought there then would have been a much healthier environment, both within and without the church, for the reception of the papal apology.

I respect those Jesuits who usually think that in such circumstances we should say nothing publicly while faithfully labouring behind the scenes to inform better outcomes.

But may it not be time to acknowledge that thinking with the Church requires that those Church members engaged in political science, ethics, media and communications, and the law be heard publicly and seen publicly working for greater transparency and accountability within the Church – inviting the conversation? Is this not an integral, respectful role for us as we rediscover our universality in the world and our home in the Church?

Let me now consider the role of church leaders during election campaigns. In Australia, the bishops conference, much like yours, publishes a statement well before the election date setting out the principles to be applied by the conscientious voter deciding how to vote, and drawing attention to a smorgasbord of contemporary issues with a moral dimension requiring an application of those principles both by the conscientious voter and the conscientious candidate. This year our bishops published such a statement. I found it unexceptionable. The President of the ACBC issued a press release accompanying the statement. He said:

Catholic Bishops do not tell people who to vote for. Bishops are aware that, at election time, many in the community look to church leaders for advice about relevant issues.

We are privileged to live in a democracy such as Australia where voting matters. We urge all people to take their vote seriously. We urge them to think carefully about the issues that are relevant in their local area and nationally. We urge them to think about the issues that are not just important for them but for the whole of Australia.

The 2010 Federal Election is of great importance for the future and the welfare of all residents of Australia. Though many Catholics are rightly involved in the political process in all political parties, the Catholic Church in Australia does not take sides in party politics.

I cannot speak for the US. But in Australia the major parties often appear virtually indistinguishable to many of the voters, especially to the young. With our parliamentary system, this then provides room for smaller third parties to emerge. As in many European countries, this third party niche is presently occupied by the Greens, a party with a strong commitment to environmental protection and to reversal of the effects of climate change.

At the most recent Australian election, there was widespread disillusionment with the incumbent Labor government which had postponed to 2013 plans for a carbon pollution reduction scheme despite the Prime Minister having described climate change as “the greatest moral challenge of our generation”. The Labor Party’s primary vote declined by 5.4%. The opposition parties’ primary vote went up by only 1.5%. The real leakage of votes from the government party was to the Greens who increased their vote from 7.7% to 11.7% of the primary vote.

Cardinal George Pell joined forces with a group called the Australian Christian Lobby (ACL) to advocate that Christians not vote for the “anti-Christian” Greens who the Cardinal described as “sweet camouflaged poison”. He made these remarks the day before the scheduled publication of the ACBC election statement with the result that the statement of his brother bishops sunk without trace. Here was “Australia’s most senior Catholic clergyman” telling Catholics they should not vote for a particular political party. Now that was big news. The ACL launched the initial salvo describing the Greens as “a party whose philosophical father, Peter Singer, clearly places the rights of animals above the rights of children, but at the same time endorses sex with animals, which presumably are robbed of any right of consent.” The Cardinal took up the call: “In 1996 the Green leader Bob Brown coauthored a short book *The Greens* with the notorious philosopher Peter Singer (now at Princeton University in U.S.A.), who rejects the unique status of humans and supports infanticide, as well as abortion and euthanasia.”

The Cardinal urged voters “to examine the policies of the Greens on their website and judge for themselves how thoroughly anti-Christian they are.”

The Greens were not in the contest for Government and they were always very unlikely to have much, if any, say in the House of Representatives. Their political purchase after the election is in the Senate where they will now hold the balance of power.

Some Christians, myself included, think that it is never a good thing for the government of the day to control the Senate. When the government controls the Senate, hubris set in.

When the government does not control the Senate, it needs to garner support for legislation by putting coherent arguments, attracting a handful of Senators on the cross benches.

In days past, those cross benches were occupied by the Democratic Labor Party which boasted Catholic credentials and then the Democrats (not your “Democrats”) who were just as secular as the Greens. When asked to respond to the Cardinal’s remarks about the Greens I suggested that a thoughtful Christian was entitled to consider the workings of the Senate when deciding where to allocate preferences in their voting. A thoughtful Christian could give their first or second party preference to a minor party like the Greens confident that this minor party would hold to account whichever party was in power on contested legislative proposals.

I was careful not to endorse the Greens or any other party. I even went to the extent of publicly indicating that I would not be voting for the Greens. But I saw fit to contest the Cardinal’s classification of the Greens as being straight out anti-Christian. I wrote:

On some policy issues, I daresay the Greens have a more Christian message than the major parties. Consider their stand on overseas aid, refugees, stewardship of creation and the environment, public housing, human rights protection, and income management. On all these issues, the Greens are far more in synch with the periodic utterances of most Church leaders than either of the major political parties. The Greens have been the only party to hold back the tide against the race to the bottom in the asylum seeker debate since Kevin Rudd was replaced as Prime Minister. Admittedly the Greens can afford to be more idealistic on some of these issues because they will never occupy the treasury benches. This idealism appeals to some voters, especially the young. Even some of us hardened older voters see a place for some idealism expressed by minor political parties.

Like Cardinal Pell, I part company with the Greens on issues like abortion, stem cell research, same sex marriage and funding for church schools. But on none of these issues

will the Greens carry the day given that policy changes in these areas will occur only if they are supported by a majority from both major political parties.

If all the Greens' policies were truly classifiable as "anti-Christian", I would have no problem with church leaders urging people to vote for another party. But given that some of their policies, and on issues which will be legislated in the next three years, are arguably more Christian than those of the major parties, I think it best that Church leaders maintain a discreet reticence about urging a vote for or against any particular political party.

I thought the language of our Cardinal on this occasion unbecoming and unhelpful in the cause of church credibility in the public square.

The contrasting remarks of the Cardinal and me attracted some ongoing media attention during the election campaign. I was strongly challenged by a teacher from one of our Jesuit colleges. He wrote me:

[A]s a Catholic, I find it deeply concerning that you (a Catholic priest) are so happy to show public dissent and disagreement with the Catholic Archbishop of Sydney. Your actions foster disunity and dissent, not unity, peace and harmony.

With great respect, as I have a deep respect for the Catholic Church and the priesthood, I wish you would please show some solidarity with your Bishop and start supporting him, rather than taking any opportunity to publically disagree with him. Cardinal Pell would be neglecting his responsibility as Bishop, if he didn't warn the faithful of potential dangers. True, the Church cannot tell the faithful who to vote for, but if there are moral issues at stake, as there clearly is in this situation, then the Cardinal has a moral obligation to warn the faithful.

I responded first by pointing out that I did not live in Sydney but in Canberra, the national capital:

You may not realise that I live in Canberra and thus my bishops are Archbishop Mark Coleridge and Bishop Pat Power. As far as I know, they agree with the statement issued by the Australian Catholic

Bishops Conference on 9 August 2010 in relation to the election. In case you have not seen the statement, I attach it. It has not had much coverage because it was drowned out in the media by your bishop's individual statement of the previous day. I find it very difficult to reconcile your bishop's statement with the statement of the ACBC. So what am I as a conscientious Jesuit to do?

I then said:

We are agreed that neither of us would vote for the Greens. You are helped by your bishop describing them as “thoroughly anti-Christian” and as “sweetly camouflaged poison”. I am helped by my bishop(s) not describing them in that way. I think that language in the public square is unbecoming and unhelpful - no matter who uses it. You think language like that is helpful and becoming - especially if it is used by a bishop. I think a church leader who uses language like that in the public square does harm to the Church. You think it does the Church good.

Maybe it is just a matter of taste and manners. I just hope the students you educate are urged not to use language of that sort, and that when it comes to church leaders talking about who to vote for, they play the ball and not the man, and they acknowledge the plurality of issues involved - some consistent with church teaching, and some not. I commend to you the statement of the ACBC. I think it is far more appropriate for dialogue in contemporary Australia than the statement you personally find helpful and appropriate.

The teacher in all good faith thought I had been very disloyal to the Church as a Jesuit. I readily conceded that most Jesuits, like most Bishops, think it not only appropriate but also highly desirable (perhaps even essential) that a studious silence be maintained when someone like Cardinal Pell makes a public statement even if it be inconsistent with the view of most other bishops, inconsistent with Church tradition, and harmful to the Church's standing in the public square. As in politics, disunity is seen to be death.

I had been asked by a national Jesuit publication to comment on the Cardinal's remarks. I could have remained silent. I thought I should raise a public voice contrary to Cardinal Pell on this occasion for two reasons.

First I have met many young Christians who think it a good thing to vote for the Greens, despite their many shortcomings, because they want to put pressure on our elected leaders to take more concerted action about climate change. I thought the risk of their further

alienation from the Church even greater in light of comments by a leading ecclesiastic that the Greens were “thoroughly anti-Christian” and “sweetly camouflaged poison”.

Second I have become more convinced in recent times that part the problem highlighted by the Church’s handling of sexual abuse is that there is a deafening silence when Church leaders get it wrong and our silence accords these Church leaders an unreviewable power and influence which no longer deserves currency.

For me, this was one time when I thought my silence could be construed as hypocrisy or disengagement, holding that the statement of Cardinal Pell was reconcilable with the statement of the ACBC and consistent with our tradition and way of proceeding. I thought if the Cardinal’s statement were left unchallenged, this would work further harm to the Church’s public standing, especially amongst young Australians whose consciences dictate that they do what they can about climate change.

There is now another election due in the Australian state, Victoria. I am delighted to note that the Victorian bishops have issued an election statement proclaiming:⁴

The bishops are not advocating any political party. They have raised issues and questions to help inform voters on important issues for the future. Catholics are encouraged to put specific questions and issues to candidates in the areas of Families, Life, Education, Health and Aged Care, Criminal Justice, Drugs and Alcohol and Religious Freedom. Questions ask for commitments of candidates in relation to euthanasia, respect for rights of conscience, support for expectant and new mothers, abortion, homelessness targets, funding for schools, support for people with disabilities, for people with mental illness, increasing opportunities for rehabilitation in the criminal justice system, crime prevention, the defence of religious freedom and the rights of religious organisations.

They have circulated a pamphlet in all schools and parishes *Your Vote, Your Values* in which they state:

⁴ Archbishop Denis Hart, Media Release, 29 October 2010

As Bishops we are not advocating any political party. That is not our role. We do however raise some issues and questions which you may wish to address to the candidates for election in helping inform your decision on whom to vote for.

On release of the pamphlet, the Archbishop of Melbourne was interviewed on television and listed euthanasia and abortion as two key issues for Catholics when it comes to deciding how they should vote at the state election. The Greens want to legalise euthanasia. The Archbishop rightly said, “We disagree totally with the Greens view on this issue. We believe that the value of life is so important that we can't step aside from it.” On present polling, the Greens can expect to pick up almost 19% of the primary vote in Melbourne, the capital of that state Victoria.

I think, with respect, this approach of the Archbishop of Melbourne is far preferable to the more combative approach of the Archbishop of Sydney. It is more helpful, more becoming, and less likely to be counterproductive.

Let me take one more case study from contemporary Australia. In New South Wales, we have a new breed of Australian politician. The state premier Kristina Keneally, originally an American described by the media as “a devout Catholic, she studied religion and political science at the Catholic University at Dayton before completing a masters degree in feminist theology.”⁵ A theologically educated and literate Catholic politician is a novel development for us in Australia. Thank you America!

I am one of those Catholics who was delighted to read the speech by Kristina Keneally to the NSW Parliament when she was explaining why she would support legislation allowing same sex couples to adopt children when such an adoption is judged to be in the best interests of the child, while at the same time allowing Church adoption agencies to opt out of any arrangements facilitating adoptions by same sex couples. Explaining why she was allowing her party a conscience vote on the issue, she told Parliament: “This bill is not ordinary business. It goes to core beliefs about how families form and how children are raised. It requires us to consider views that will either be in conflict or in congruence

⁵ *The Australian*, 4 December 2009

with our values and beliefs, which are formed by our personal experiences and therefore deeply held. For many of us it raises issues of faith.” She concluded her speech with these words:⁶

I recognise that these issues are complex and nuanced and they demand respectful attention. Particularly to those who share my faith, I say that in my mind the Gospel message is one of acceptance. Jesus was not a man of judgement but rather a man of love. When I look at this issue about the adoption of children who are vulnerable, children who would know no other love and acceptance, and I see people offering up that unselfish love to a child, it is something that I, not just as a Christian and a Catholic but as the Leader of this State, want to support. In considering my decision, I have sought to form my conscience fully. I have considered the Gospel, and particularly Jesus’ teaching that all laws of the Church should be based on the commandment to love God and to love one another. I have observed how same-sex parents show us examples of that love in how they sublimate their needs for the children in their care. Perhaps most compellingly I have reflected my own experience of such love, first as a child and now as a parent. I am fully appreciative of the empowerment a child receives when love and stability is provided in their life. In considering all of that, I must, in my conscience, support this legislation.

Barry O’Farrell, the leader of the Opposition party, also a Catholic, supported the legislation. He told Parliament: “I support this measure ... for the sake of children but also because I don't believe our society should exclude because of gender, sexuality, faith, background or some other factor, people who have a contribution they can make...That's not the free and confident society I seek.” Not every Catholic would reach the same conclusion. But we can be proud that Catholic civic leaders have been prepared to give an account of themselves having formed and informed their consciences. The Premier outlined the process she had followed, by praying the scriptures and reflecting on Church teaching and then acting on her conscience.

Cardinal Pell was clearly displeased with the approach taken by these Catholic civic leaders, claiming that this law “represents bad social engineering”, being just “a re-election stunt to seek the votes of minority groups, (having) little to do with extending even mistaken notions of human rights (same-sex parenting orders are already available)

⁶ New South Wales, Legislative Assembly, *Hansard*, 1 September 2010, at <38>

and clearly subordinat(ing) the rights of the child to those of an adopting adult.”⁷ I read Mrs Keneally as being on about much more than that, and very nobly so. And I did not read Mr O’Farrell as just playing catch-up with Mrs Keneally. It is difficult to conceive how either leader was engaging in a re-election stunt given that they had adopted the same approach to the legislation, thus not giving the voters any grounds for distinguishing them on this issue.

In fairness to the Cardinal, I concede that there is a Vatican jurisprudence on these issues which not all Catholics find compelling when applied in the public square of the democratic pluralist society. In 2003, the Congregation for the Doctrine of the Faith (CDF) published its “Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons” stating:

As experience has shown, the absence of sexual complementarity in (homosexual) unions creates obstacles in the normal development of children who would be placed in the care of such persons. They would be deprived of the experience of either fatherhood or motherhood. Allowing children to be adopted by persons living in such unions would actually mean doing violence to these children, in the sense that their condition of dependency would be used to place them in an environment that is not conducive to their full human development. This is gravely immoral and in open contradiction to the principle, recognized also in the United Nations Convention on the Rights of the Child, that the best interests of the child, as the weaker and more vulnerable party, are to be the paramount consideration in every case.

The principal signatory of that document was none other than the present Pope Benedict XVI who was then Prefect of the CDF. With all respect to the man who is now pope, I do not think this analysis sufficiently considers the different classes of children who might be affected by such adoption legislation in jurisdictions which already provide for the fostering of children and for the adoption of children by one adult already having a special relationship with the child.

In her very mature consideration of the issue, Kristina Keneally considered the three classes of children who would be affected by the legislation. First are those children who

⁷ Cardinal George Pell, *Sunday Telegraph*, 5 September 2010

are already living with two same-sex parents where one of the parents is not fully recognised by the law. Keneally observed that these children “are currently denied legal and material benefits flowing from adoption, including confirming the child’s entitlement to inheritance if their parent dies and providing certainty about custody if one parent dies. This puts these children in a vulnerable position.”

Second are children who have been fostered by same sex couples but unable to be adopted by their foster parents. Keneally told Parliament: “This is a particularly vulnerable group of children. They can no longer be cared for by their birth parents. What we know is that for children in this situation the stability of adoption by their foster parents provides the best possible chance for their development, their health, their wellbeing and their education.”

Then there is a third group, those children not already in a relationship with their adoptive parents and who are adopted after their birth parents have relinquished them. In New South Wales, there were only 20 of these unknown, unrelated children last year. Adoption decisions in these cases are always made considering the best interests of the child. Keneally observed: “This legislation would make it legal for these children to be adopted by same-sex parents. However, under the *Adoption Act* the views of the relinquishing parents must be considered in relation to what is in the best interest of the child. This includes any views regarding same-sex parenting. The proposed legislation makes no change in this regard.”

Especially in relation to the first two groups of children who may already be in loving, sustained, state-sanctioned relationships with adults who happen to be homosexual, is it not time to acknowledge that the CDF’s overbroad argument is inapplicable? It is no disrespect to the CDF to observe that its general observation that “[a]llowing children to be adopted by persons living in such unions would actually mean doing violence to these children” has no bearing on a correct moral and policy analysis of what is in the best interests of these children, there being no evidence that the CDF has even adverted to the needs of these particular children? I have every sympathy for those who espouse the

ideal that every child have and know a father and mother. But in our broken world that is not always the case. Have not the Catholics Keneally and O'Farrell done the right thing in this situation? On these and other contested moral issues in the realm of law and public policy, the days have gone when bishops can simply issue universal edicts commanding assent by Catholic politicians. What's needed is respectful dialogue and informed conversation as well as pastoral attention to the particular individuals affected by proposed law or policy.

I was heartened by the approach of the Pontifical Biblical Commission when they concluded their document *The Bible and Morality* with this observation:⁸

Ethics place considerable reliance on the resources of reason. ...[T]he Bible has much in common with the wisdom of various peoples (convergence), it also knows how to contest, to row against the tide (contrast) and to outdo (advance). Christian morality cannot in any way evolve independently of this new and mysterious breath that it derives from the enlightenment of the Holy Spirit. More than rational and sapiential, the discernment of believers is spiritual, and here the vital theme of the formation of conscience finds its place.

At the intersection of religion, politics and human rights, we all need to be more respectful of the discernment exercised by persons performing their various distinctive roles – pastors, politicians and judges. Each needs to form and inform their conscience, and to that conscience be true.

True loyalty to the church hierarchy in the public square demands honesty with the mass media, and not just putting the Church party line. Those church personnel who do put just the party line become increasingly marginal in the public square. Open conversation, respectful dialogue and considered pastoral reflection rather than authoritative declarations should be the Church's primary tools of trade in this exercise. On these issues of law and public policy none of us is infallible. We should always play the ball, not the man, and give credit where it is due.

⁸ Pontifical Biblical Commission, *The Bible and Morality: Biblical Roots of Christian Conduct*, 2008, (2010 version), para. 154, pp. 219-20

In that spirit might I acknowledge that Cardinal Pell with whom I have voiced some disagreement in this lecture, preached superbly at the mass of thanksgiving after the canonization of Mary MacKillop in Rome two weeks ago. He spoke with a very down to earth and historically grounded message about the graced life of Mary MacKillop: “We are grateful that she was not eccentric, not religiously exotic. We warm to her advice, are encouraged by her perseverance in sickness and adversity. Her faith and moral goodness are heroic, but not in a way which is off-putting or surreal. She does not deter us from struggling to follow her.”

I don't know if it will be any consolation to Sr McBride here in the US. But its worth noting that St Mary MacKillop was also excommunicated by her local bishop back in 1871. 139 years later, at the Mass of Thanksgiving, none other than Cardinal Pell declared that the bishop who excommunicated her was “a foolish and arrogant man, who let himself be misled by priestly lies”. It would have been unthinkable that such a remark be published by any bishop about another bishop back in 1871. Perhaps we can all be of greater service to the Church in the twenty-first century if we name things as they are in the Church while showing due deference to those in the world, speaking in charity and in truth, now and not in a century's time. That is the challenge of the age for those of us committed to religion, politics and human rights.

As we wrestle with the demands of justice and the common good, let's always make a place and accord a respectful hearing to all our fellow citizens whatever their religious or philosophical worldviews. May the most reasonable of legislators accord respect to the most devout citizens of faith. May your Congress and our Parliament, the airwaves, the social media platforms and our public squares be places where charity and truth temper our passion for politics while that passion enhances our commitment to truth and charity for all. I trust you will forgive any lack of loyalty to the Church on my part this evening. Let's hope that Ignatius is well pleased, or at least open to the ongoing conversation, with those active in public life, imbued with his spirit, vision and mission.

ATTACHMENT

Statement on the World Youth Day Amendment Regulation 2008

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4 July 2008

The great Catholic document on human rights is Pacem In Terris, the 1963 encyclical of Pope John XXIII. He said:

It is generally accepted today that the common good is best safeguarded when personal rights and duties are guaranteed. The chief concern of civil authorities must therefore be to ensure that these rights are recognized, respected, co-ordinated, defended and promoted, and that each individual is enabled to perform his duties more easily. For "to safeguard the inviolable rights of the human person, and to facilitate the performance of his duties, is the principal duty of every public authority."

Thus any government which refused to recognize human rights or acted in violation of them, would not only fail in its duty; its decrees would be wholly lacking in binding force.

One of the principal duties of any government, moreover, is the suitable and adequate superintendence and co-ordination of men's respective rights in society. This must be done in such a way 1) that the exercise of their rights by certain citizens does not obstruct other citizens in the exercise of theirs; 2) that the individual, standing upon his own rights, does not impede others in the performance of their duties; 3) that the rights of all be effectively safeguarded, and completely restored if they have been violated.

No fair application of these principles would permit an extension of police powers simply to preclude protesters from causing annoyance to pilgrims attending World Youth Day. There is presently strong debate in Australia about the desirability of a bill of rights. The NSW Government is strongly opposed. The Victorian Labor government is strongly in favour having enacted its own Charter of Human Rights and Responsibilities Act. There is no way that the Victorian parliament would have passed a law authorising police to stop protesters simply from causing annoyance to pilgrims. Any Victorian regulation like

that made by the NSW Government would be struck down for being beyond power provided by any statute compliant with the Charter.

If the originating statute itself was inconsistent with the Charter, the Victorian Supreme Court could be asked to make a declaration of inconsistency with s. 15 of the Charter which provides:

- (1) Every person has the right to hold an opinion without interference.*
- (2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—*
 - (a) orally; or*
 - (b) in writing; or*
 - (c) in print; or*
 - (d) by way of art; or*
 - (e) in another medium chosen by him or her.*
- (3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—*
 - (a) to respect the rights and reputation of other persons; or*
 - (b) for the protection of national security, public order, public health or public morality.*

Limitation on such rights in Victoria and the ACT is now permitted only if the limitation can be demonstrably justified in a free and democratic society.

It is a mistake for the church to be seen to be endorsing in any way the overbroad "annoyance and inconvenience" provision. It is misleading to suggest that this is just a routine law and order measure. Where these terms have been used in the past in relation to public places generally, they are usually qualified by the addition of the term "by disorderly or insulting conduct", and these words do not appear in the WYD regulation. Where these terms have been used without those added qualifying words, the regulation is usually restricted to trust property or a sporting venue and applied only to public places providing entry or egress to the trust property or sporting venue. In the case of WYD, the provision is to apply to public places including Hyde Park, the Domain, Botanic Gardens, Centennial Park, Central Railway Station and all other inner city

railway stations, Sydney Harbour Bridge, much of Sydney Harbour, and the entirety of the pilgrimage walking route. It is even to apply to the entire campus of the University of Sydney.

As the public clamour now shows, the use of an "annoyance and inconvenience" provision, without qualification, is unacceptable law making causing injury not only to prospective protesters but also to pilgrims of good will, WYD supporters wanting public acceptance of the event, and hapless police having to implement an overbroad unworkable and unjust law.

The focus should be on dignified pilgrimage and peaceful protest under acceptable and workable laws which do not trample the civil liberties of those opposed to a partially taxpayer funded religious event which is spilling over into many public domains in Sydney.

The NSW regulation is a dreadful interference with civil liberties, and contrary to the spirit of Catholic social teaching on human rights. As an Australian Catholic lawyer, I am saddened that the State has seen fit to curtail civil liberties further in this instance than they have for other significant international events hosted in Sydney. The rights of law abiding, peaceful protesters at WYD need to be "recognized, respected, coordinated, defended and promoted", just as surely as the rights of the pilgrims. The rights of free speech and assembly should not be curtailed only because visiting pilgrims might be annoyed or inconvenienced in public places.