



THE DIAMOND JUBILEE



Cardinals Clancy, Pell and Cassidy concelebrate the 75th Red Mass, 31 January 2005

This special double issue of Utopia commemorates an extraordinary period in the life of the St. Thomas More Society. 2005 began with the 75th celebration of the Red Mass, which included a special message sent to the Society on behalf of the Holy Father, Pope Benedict XVI.

Later in the year the Society marked its Diamond Jubilee as well as sponsoring, with the NSW Jewish Board of Deputies, an international ecumenical commemoration at the Great Synagogue of the 40th anniversary of Vatican II's declaration *Nostra Aetate*.

The Diamond Jubilee celebrations culminated in a series of Papal Honours conferred by Cardinal Pell on behalf of the Holy See in September 2006. This issue is a permanent record of a number of the important homilies and speeches delivered during these special years.

Below: Cardinal Pell (centre) with the Papal Honour recipients. L to R: Fr B Byron (Chaplain), F J Esler SM (Former Chaplain), The Hon J Slattery QC (Founding Member), A J Reynolds (Former Treasurer), J McCarthy QC (Former President)



75TH RED MASS HOMILY

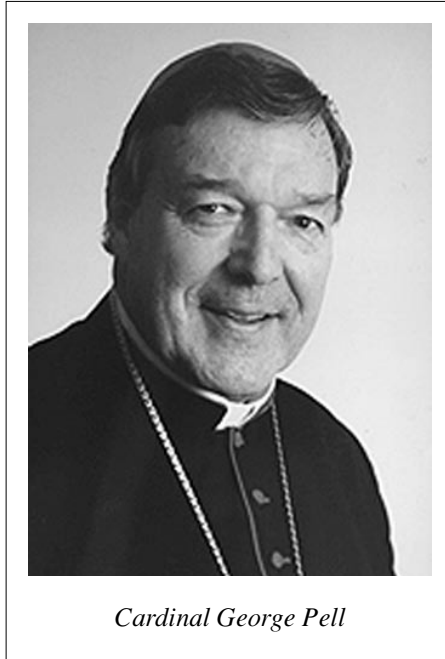
St. Mary's Cathedral, Sydney – 31 January 2005

Ezek 36:23-8; Ps 144:8-14; 1 Cor 2:10-16; Lk 4:16-21

The Society's Patron, Cardinal George Pell, was Principal Celebrant and homilist at the 75th Red Mass. In honour of the occasion the concelebrants were Cardinal Edward Clancy, Emeritus Archbishop of Sydney, Cardinal Idris Edward Cassidy, Emeritus President of the Holy See's Council for Promoting Christian Unity, Auxiliary Bishop Anthony Fisher OP, Father Brian Lucas, General Secretary of the Australian Catholic Bishops Conference, and Father Paul Stenhouse. Both Bishop Fisher and Father Lucas were solicitors before commencing their studies in the seminary.

The readings were given by Michael Slattery QC, Senior Vice President of the New South Wales Bar Association and Mr John McIntyre, President of the NSW Law Society. The Prayers of the Faithful were read by John McCarthy QC, then President of the Society. The congregation included Mr Slattery QC's father, retired Supreme Court justice the Hon John Slattery QC, who is the last surviving founder of the Society. Richard Perrignon (Councillor) conducted the choir and Francois Kunc (Secretary) was Cathedral Cantor at the Mass.

On this 75th celebration of the Red Mass in the Archdiocese of Sydney, when we remember too the Diamond Jubilee of the St. Thomas More Society, I would like to begin with these few words of reflection by reading a letter I received recently from the Secretariat of State in the Vatican, sent, and I quote, "to the distinguished participants gathered for this solemn occasion":



Cardinal George Pell

The Holy Father was pleased to be informed that the St. Thomas More Society is celebrating the Diamond Jubilee of its foundation, as well as the seventy-fifth 'Red Mass' on 31 January 2005. He asks you kindly to convey his warm greetings and good wishes to the distinguished participants gathered for this solemn occasion.

The Church in Australia today is faced with the task of fulfilling her evangelizing mission in an increasingly secularized society. The sense of God and of his loving Providence has diminished for many people, with a subsequent neglect of Man's necessary relationship with the loving Creator (cf. *Ecclesia in Oceania*, 18). In the midst of this challenge the Holy Father encourages the members of the legal profession to recall that "faith in fact has the force to shape culture itself by penetrating it to its very core" (*ibid.* 20).

His Holiness is confident that, inspired by the radical and complete witness of Saint Thomas More and sustained by the truth that is in Jesus Christ (cf. *Eph* 4:21), this sixtieth anniversary celebration will be an occasion for all those taking part to deepen their commitment to defend the inviolable dignity and rights of every human being – from conception until natural death – and to promote the common good in accordance with the demands of compassion, justice, and respect for truth.

With these sentiments, the Holy Father invokes upon all present an outpouring of the Holy Spirit's gifts of wisdom, light and strength, and he cordially imparts his Apostolic Blessing as a pledge of joy and peace in our Lord Jesus Christ.

The first meeting of the St. Thomas More Society took place in the presence of Archbishop Norman Gilroy, as he then was, on 14 August 1945, the eve of that wonderful day when victory was declared in the Pacific and peace arrived after the terrible Second World War.

A constitution was proclaimed then, with specific objects consonant with the juris praeceptor of the Justinian Code, promulgated by the Byzantine Emperor Justinian in 529, "*honeste vivere, alterum non laedere, suum cuique tribuere*" i.e. "live honestly, do not hurt others, pay each his due".

More specifically these objects were spelt out as providing members opportunities to understand better the principles of Christian ethics and morality, and their relationship to the law, to encourage free enlightened discussion on these points and their application in every day legal practice.

In these discussions over the years the writings, and the personal and professional story of Thomas More, “the King’s good and loyal servant, but God’s first” have played a prominent part.

He is a worthy model, not merely for the supreme sacrifice he paid, but for his learning, independence and moderation, his good humour and loyalty to family and friends.

Legend has it that when they met together for the first time Erasmus opened by saying “you must be Thomas More or nobody”. More replied “and you must be Erasmus or the Devil!”

The scholarly contributions of the Society’s chaplain Fr. Brian Byron on More are well known, but many lawyers too over the sixty years developed professional expertise in his writings as well as a personal devotion and reverence. Copies of Holbein’s splendid portrait, now in the Frick Gallery in New York, which Anne Boleyn tried to destroy but only succeeded in ripping slightly at the top, are still found in the homes and offices of Catholic lawyers. The son of one Catholic lawyer, not from Sydney I hasten to add, told me some years ago that he thought his father would like a picture of More in every room in the house. I was quietly pleased when I was able to persuade the lad to take John Fisher as his confirmation patron.

Robert Bolt’s play and the subsequent film enlarged More’s circle of admirers, helping provoke an immense increase of Morean scholarship in the 1960s, and in 1978, the five hundredth anniversary of More’s birth, under the leadership of the then Mr. Justice Slattery, the Society sponsored a very successful international congress here in Sydney. I also found the golden jubilee publication of the Society “Thomas More – the Saint and Society” edited by John McCarthy and Anthony Reynolds full of delightful articles as well as providing a wealth of useful information for this sermon.

Any good system of laws must be built upon an honest and genuine pursuit of justice, on the part of those legislators who frame the laws and those legal practitioners who have to put these positive laws into practice. Any good society is held together by good people following just laws.

This is part of what Ezekiel, one of the strangest of the Old Testament prophets, is saying when he has the Lord promising to give his people a heart of flesh rather than a heart of stone, so that God’s laws will be followed.

In ancient times in the Middle East all peoples experienced human tyranny and the extremities of nature more regularly and vividly than most of us in Australia today. Despite this, and without ignoring this evil and suffering, Jewish monotheism learnt that God was good, predictable and just. So the refrain from Psalm 144 today is that the Lord is just in all his ways. God’s rule lasts from age to age as the Lord supports all who fall and raises all who are bowed down.

It was from within this framework of law that Jesus applied the prophecies of Isaiah to himself when he proclaimed his anointing to set the downtrodden free, to proclaim the Lord’s year of favour.

We should pray today that this commitment to justice, indeed this passionate commitment to justice will never grow cold in Australia, much less in the Australian Catholic community.

Saint Thomas More understood this well. He told William Roper, his son-in-law and biographer, “If the parties will at my hands call for justice, then all were it my father stood on the one side, and the Devil on the other, his cause being good, the Devil should have right.”

I find this reassuring, much more reassuring than those who tell us blithely that there are no such things as truth or justice underlying our structures of power and our social constructs.

However none of these relativists can consistently follow their constructs to their logical conclusions. A small story exemplifies this.

Professor Robbie George’s book *The Clash of Orthodoxies* has a foreword written by John J. Dilulio Jr which tells of a brilliant student in moral philosophy who wrote a passionately argued paper “There is no such thing as justice”. He was failed by his lecturer. Stunned and disappointed the student complained, explaining the considerable work he had done and that he thought it was a good piece of work

The professor agreed saying it was the best piece of work he had received in 30 years lecturing; that it was a brilliantly successful and destructive attack on all legal, moral and religious orthodoxies. In fact, he said, “you persuaded me there is no such thing as justice, so don’t complain”.

I don’t know whether this story is a regular part of academic legend, but if it is, it still bears repetition.

Let us continue to pray that justice will be followed and justice will be done in our Australian society. May the story of Thomas More continue to provide inspiration and markers to our legislators and lawyers. May the St. Thomas More Society continue to prosper!

May an increasing number of people come to realise that faith has a central place in a well ordered society, that truth is not always relative and that reason has long been on tradition’s side in debates about justice, faith and truth.

A HISTORY OF THE RED MASS

This article, by Dr Joe Morley, originally appeared in The Catholic Weekly. The Society thanks the author and The Catholic Weekly for permission to reproduce it here. Dr Morley acknowledges for assistance in research the co-operation of Bishop Peter Ingham of Wollongong, Dr Paul Collins, Pauline Garland (Archivist of the Archdiocese of Sydney), staff of the Veech Library and libraries of the University of Wollongong and the State Library of NSW.

When the Votive Mass of the Holy Spirit – commonly known as The Red Mass – was celebrated in St Mary’s Cathedral in Sydney, the celebrant (George Cardinal Pell) and the congregation re-enacted a rite with its origin in the European Middle Ages. The celebrants wore the scarlet vestments recalling the tongues of fire of the Holy Spirit, who is invoked by the singing of the most famous of all hymns (the Veni, Creator Spiritus) to bestow wisdom and justice upon those present and, as with the scarlet robes of cardinals, signify the wearer’s willingness to defend to death the truth conveyed by the Holy Spirit. The scarlet and ermine-trimmed robes of the assembled judges of the Supreme Court replicated those worn by the judges of the Sacred Roman Rota, the Lord High Justices of England, Peers of the House of Lords, Doctors of Law wearing academic scarlet robes and hoods in the Middle Ages and today.

In various locations, invitations to the Mass differ. While in some places they are restricted to judges and court officials, in others they include canon lawyers, all sectors of the justice system, the legislature, the diplomatic corps, law professors and lecturers, law students and the civic administrators.

The Red Mass is celebrated annually in St Mary’s Cathedral at the beginning of the Law Term.

Two letters in the Cathedral archives record how the practice began. On December 13, 1930, Sydney solicitor, WJ Dignam, wrote to the then Archbishop of Sydney, Dr Michael Kelly, thus: “Your Grace, It is desired by a large number of barristers and solicitors in Sydney to see established in this State the time-honoured custom observed by lawyers in Europe, especially at Rome, Paris and London, of assisting at a Red Mass on the opening of the first law term of the year. A meeting has been arranged for Thursday next (18th inst) of the Catholic legal profession for the purpose of discussing this matter; but before calling upon the profession to lend their support to the project, we should like to feel that we would have in this respect the guidance and approval of Your Grace.’

On December 20, Dignam received this reply: “Dear Mr Dignam, His Grace the Archbishop replies to your request of the 13th inst for his approval of a Red Mass on the opening of the first Term of the year. The proposal is very much appreciated by Michael, Archbishop of Sydney. After you have had your proposed meeting of the Catholic members of the Legal Profession, you can lay before His Grace more concrete proposals in regard to the details of time, place, etc. Personally I will be only too pleased to assist the project in every way. Yours faithfully, Archbishop’s Secretary.” The Freeman’s Journal of February 19, 1931, reported that the first Red Mass “for the law community” was held at St Mary’s Cathedral on February 16, 1931.

The Red Mass appears to have been celebrated for the first time in Europe in the 12th century. It is possible that it was celebrated in Rome by the pope of the day for the judges of the papal courts that preceded establishment by Pope John XXII of The Roman Rota

at Avignon in France (during “The Babylonian Captivity”) in 1331 by his Bull Ratio Juris. The Rota ceased to function in 1870 after the loss of the Papal States but was reconstituted by Pius X’s constitution Sapienti Consilio of June 29, 1908. From time to time popes have reorganised the Rota. The last to do so was John Paul II on April 18, 1994.

In France, the first recorded Red Mass was celebrated in Notre Dame Cathedral in Paris in 1245. For centuries later it was celebrated in the chapel of the Order of Advocates commonly known as Sainte Chapelle - The Holy Chapel - (originally within the Royal Palace complex now the Palais De Justice area, close to Notre Dame Cathedral). King (Saint) Louis IX - among other things the patron saint of architecture - had the Sainte Chapelle built between 1243 and April 25, 1248, and consecrated the next day, to house alleged sacred relics of Christ’s Passion (the Crown of Thorns, part of the True Cross and other items associated with the life of Christ) which he had redeemed at a cost of 135,000 livres in 1239 from the Venetians to whom his cousin Baudouin II, Emperor of Constantinople, had pawned them. The chapel cost 60,000 livres.

The chapel was damaged by fire in 1630 and 1776 and desecrated during the French Revolution when the shrine for the relics was melted down and the relics scattered. Some were recovered and stored in the church of St Germain L’Auxerrois (on the Right Bank, near the Louvre). They are now kept in the Treasury of Notre Dame Cathedral. Used to house the Justice Archives from 1832 to 1837, the chapel was restored by Louis Phillippe between 1837 and 1868 and dedicated exclusively to the celebration of the Red Mass.

In 1906 the French Parliament secularised the chapel and forbade celebration of the Red Mass in it. However, the Red Mass was transferred to the church of St Germain L'Auxerrois. In France the Red Mass is also celebrated in honour of St Ivo (in English St Ives) the French patron saint of lawyers, while in England and other English-speaking places such as Australia, the United States and Canada, St Thomas More, also a patron of lawyers and politicians, is honoured.

The exact date of the first Red Mass in England is not known. Some writers say that it was celebrated in Westminster Abbey in 1310 in the reign of Edward I, the English "Justinian", a title bestowed on him because of his fame as a law giver, which is absurd as Edward died on July 7 1307. However, it is now generally believed that the Red Mass

was first celebrated either in St Stephen's Chapel in the Palace of Westminster or in Westminster Abbey before its destruction in the 13th century.

It was held then as now at the opening of the Michaelmas Law Term. As Westminster Abbey is no longer a Catholic church, the Red Mass is now celebrated at Westminster Cathedral, presided over by the Catholic Archbishop of Westminster, while non-Catholics hold a service in Westminster Abbey.

The first Red Mass in the United States took place in St Andrew's Church in Duane Street, New York, near the courthouses in Foley Square, on October 6, 1928. The annual Red Mass in St Matthew's Cathedral in Washington DC, was first celebrated in 1953. The Red Mass (in some cases in St Patrick's Cathedral in New York) has been attended by all presidents of

the United States since Harry Truman, including Jimmy Carter, Ronald Reagan, Bill Clinton and the incumbent, George W Bush Jr, who attended for the first time in 2006, accompanied by then newly-appointed Catholic Chief Justice of the Supreme Court, John G Roberts, a number of justices of the Supreme Court, Secretary of State Condoleeza Rice, heads of state departments, law professors, lawyers and representatives of evangelical and other religions.

Controversy about the constitutional standing of the Red Mass in the US was aired in an episode of the popular TV drama The West Wing and in an episode of Law and Order. To maintain the separation of Church and State, all those who attend the Mass do so as individuals, not as representatives of the law and administration.



The 75th Red Mass. L to R: The Hon JJ Spigelman AC, Chief Justice NSW; Fr Neil Brown, Dean, St Marys Cathedral; Assembled Judges.

THOMAS MORE AND THE CRISIS OF MODERN LAW



Dr Samuel Gregg

On 21 June 2005 Dr. Samuel Gregg, Director of Research at the Acton Institute in the United States delivered the Patronal Feast Day address.

In 2005, almost 500 years after his martyrdom, it is difficult to imagine that there is much left to be said about Thomas More. Alongside the numerous honors accorded him by a grateful Church, countless books and articles have been written which cover his entire life and thought. As well as being recognized as one of the leading classical scholars of his time, More's friendship with that other well-known Christian humanist, Erasmus, is well-documented. More's book, *Utopia*, is universally regarded as a work of genius, despite the fact that perhaps a majority of commentators do not understand it.

Most of More's written work, of course, was directed against the heretics of his time, and many have come to realize that his critique of Luther is equally applicable to many contemporary dissenting Catholic theologians. Even More's contribution to the arts has been recognized.

If More had not commissioned Hobbins to paint his family's portrait in 1527, it is unlikely that Henry VIII would have encountered the artist, in which case some of the Tudor monarchy's most powerful images would have been unknown. Likewise, More's legal skills been underlined, most notably when he turned his own trial from being a foregone conclusion into a damning public indictment of not only Henry VIII and his policies, but also of those who acquiesced in the Tudor monarch's blatantly illegal actions.

More, we ought to recall, was able to achieve this because of his profound grasp of the law which, at the time, was profoundly influenced, synthesized, and to varying extents codified by the Catholic Church. Thus it was that More was able to explain that the English Parliament could not claim to legislate for that part of the Church that happened to be in England; that it could not make laws that defied the universal and known laws of Christendom; and that it could not make laws that conflicted with its own legal guarantees of the Church's liberty from royal power, such as those contained in *Magna Carta* – unless, of course, the English Parliament wanted to change fundamentally the nature of law.

For the end of Thomas More's life was more than an instance of heroic Catholic martyrdom. As he mounted the scaffold in 1535, More knew that much more was coming to an end than simply orthodox Catholicism's reign in England. More understood, perhaps better than anyone else at the time, the extent to which Henry VIII's policies concerning his faux marriage to Ann Boleyn and his promotion of the theological absurdity that the King of England was head of the Church in his realm, paved the way for nothing less than a legal revolution.

For the means by which much of the Henrican program was achieved, such as declaring the King-in-Parliament to be the supreme source of law, contributed to destroying the idea that there was a universal law of Christendom to which even kings were subject, and to which More appealed so eloquently at his trial.

Since More's time, of course, it seems clear that the Western legal tradition has slowly slipped away from its Christian moorings, and has evolved into something quite different. I say "evolved," because the changes have been gradual, sometimes in such subtle ways that we are surprised when their full impact becomes apparent.

How, for example, could it be that a document of fundamental European law, such as the now-dead 511-page European Constitution, deliberately excluded any reference to Christianity's decisive contribution to the formation of Europe's understanding of law and constitutions? How is it possible that the language of rights, unquestionably Christian in its genesis, is now employed in law to allow lethal force to be used against human beings who are, in terms of their fundamental human identity, as fully human as everyone here this evening? How is it possible that the legal principle of the sanctity of life has been slowly replaced by such nebulous concepts such as quality of life and what amounts to the promotion of autonomy as the supreme trump-card of legal argument? How is it possible that, just over 100 years after the abolition of slavery, that the law in most of the West has effectively codified the fiction that there are human persons and human "non-persons," with fewer and fewer restrictions existing on the manipulation, cloning, dismemberment, and termination of the latter?

How is it possible that in a number of jurisdictions, the anthropological impossibility of homosexual “marriage” is now receiving judicial fiat even before legislatures consider and vote on such a question? How is it possible that Dutch courts could agree that it is legal for doctors to intentionally kill babies born with disabilities who, in the doctor’s opinion, will not enjoy an adequate “quality of life?”

All of these questions should make us rather less than relaxed and comfortable. They should also be causing us to ask ourselves why many Catholics, not to mention the cultures in which we live, move, and have our being, have become so anesthetized to the legal sanctioning of practices for which the criminal regime of Nazi Germany was justly condemned. Why is it that so few people recognize, including many Catholic jurists and lawyers, that the prevalence of phrases like “the priority of autonomy” or “a reasonable consensus” in contemporary legal discourse reflects changes in the nature of law in the West that Thomas More would have found incomprehensible. Perhaps the biggest change in the West has been the replacement of a distinctly Christian ethic with that of a secularist humanism that is incapable of morally vindicating anything save by reference to autonomy or preferences. In other words, the rule of law – which both Thomas More and Thomas Aquinas clearly understood as the rule of right reason over the passions – continues to be increasingly subverted by the rule of men.

In both Australia and the United States, though to a lesser-degree in the UK and Ireland, Catholics and other Christians have become more attentive to these difficulties. It is, however, true that, until relatively recently, contemporary Catholic reflection upon the nature of law was in a spectacularly bad shape to meet such challenges.

This flows, in part, from a widespread ignorance or misunderstanding of the idea of natural law which prevails among many Catholic lawyers, some of whom have been taught the new gospel, as I was, that serious jurisprudence only began in 1971 with the publication of John Rawls’ *A Theory of Justice* and that nothing written beforehand was worth our attention. Indeed, in most law schools today, including perhaps a majority of American Catholic law schools, natural law is treated as a quaint relic from medieval times, if mentioned at all. A particularly low point in Catholic discussion about natural law and its applicability to the formation of positive law came in 1989 when the late-Cardinal Joseph Bernardin suggested in a speech that Catholic lawyers ought to adopt the natural law theory of Ronald Dworkin. See Cardinal Joseph Bernardin, “Seeking a Common Ground on Human Rights,” *DePaul Law Review* 36 (1987): 159-165.

Leaving aside the fact that few legal philosophers have been as assiduous as Professor Dworkin in working for the legalization of such things as abortion, euthanasia, and so-called homosexual “marriage,” no serious analysis of Dworkin’s thought would conclude that that his ideas accord with authentic natural law theory. Then there is the sad fact that some of the more well-known Catholic lawyers in America, such as the late Justice William Brennan, not to mention the infamous Fr. Robert Drinan, S.J., have contributed in many of their decisions to the law’s increasing embodiment of what both John Paul the Great and Benedict XVI have accurately and poignantly described nothing less than as a culture of death.

When thinking about how to respond to this crisis in law, the response of some Catholic lawyers is either despair, silent acquiescence, or a call to return to the past. None of these responses, to my mind, seem adequate.

There is no going-back to the Christendom that Thomas More knew so well. History is not, and can never be static, not so long as human beings – as the Catholic Church almost alone today insists – possess the unique capacity for reason and free will. Moreover, we know that there can be unexpected opportunities to erect new edifices upon the wreckage of the old. Less than 100 years after Thomas More’s martyrdom, for example, Catholic theologians and lawyers such as Francisco Suarez and Bartolome de Las Cases laid the foundations for a new theory of international law that was embraced by both Catholics and Protestants in a Europe that had been split by the 16th century religious schism.

Perhaps something similar is happening today with the resurgence of natural law theory, predominately within the English-speaking Catholic Church. Figures such as Russell Hittinger, Robert P. George, and John Finnis have produced a formidable body of work that has attracted much attention – and in many instances, approval – from Catholics and non-Catholics, precisely because it offers a principled and reasonable way of thinking about law and a serious alternative to the rights-talk and obsession with autonomy that dominates most Anglo-Saxon jurisprudence today.

But before their ideas take root among Catholic lawyers today, it seems to me necessary that another difficulty has to be confronted, this time within the Church. It involves the tendency among some Catholics today to draw contrasts between the Church of love and the Church of law. For this argument in this paragraph and the following, see Joseph Ratzinger, “Crises of Law,” Address at the LUMSA Faculty of Jurisprudence in Rome, 10th November, 1999.

In this scenario, law – especially the moral law – is seen as “repressive” and “constraining”, to use the contemporary language of therapy-speak, whereas love is essentially reduced to the secularist lexicon of sentimentalism and sincerity but above all “non-judgmentalism” – except, of course, severely negative judgment of those who insist that Christian love and authentic Christian moral teaching are inseparable. The separation of Christian love and Christian moral law was, incidentally, an explicit part of Luther’s early theological arguments, its anarchical implications were noted by Thomas More, and its effects were realized in the bloodbath of the German Peasants Revolt.

In its Pastoral Constitution *Gaudium et Spes*, the Second Vatican Council invited Catholics “to impress the divine law on the affairs of the earthly city.” Second Vatican Council, Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes* (1965), No.43. As no less an authority as Thomas More would agree, there is much room for prudential judgment about how this is done. The choice not to work towards this end, however, is contrary to the Catholic Faith. The Catholic Faith goes, of course, beyond the realm of strictly human reason and directs our minds to contemplation of higher truths about human freedom, human dignity, and human communion. Faith, however, in the Divine Creator is inseparable from faith in his Son the Redeemer. Christ’s redemption of us does not dissolve God’s creation or the moral law that He has imprinted upon it. Rather, Catholic Faith holds that our Redeemer has restored for us the possibility of better comprehending this natural law and thereby better understanding the foundations of human law and the forms it ought to take.

As Thomas More stressed in his last writings, faith and reason, grace and nature, law and love are not opposed, but rather are intimately connected. As Benedict XVI once wrote, “where there is no law, even love loses its vital context.” Ratzinger, “Crises of Law,” 10th November, 1999. The Catholic Faith, as professed by as eminent a lawyer and Catholic as Thomas More, does not seek to supplant the law of the land. Our Faith should, however, motivate Catholic lawyers, as citizens of the City of God, to ensure that the law of the City of Man affirms human dignity and resists the steady encroachments of the cold, harsh utilitarianism that increasing corrupts and calcifies human hearts, human reason, and human law.

In the end, of course, it is easy to become discouraged about the prospects of affirming this view of law in the conditions of the modern world. Our modern world, new in good and new in evil, is, after all, a world which often denies our dignity by telling us that we are nothing but a sex object; nothing but a consumer good; nothing but a material to be manipulated in the laboratory; and nothing but an instrument to be used and discarded, a freak of evolution created by accident and doomed to eternal extinction. In such a world, the prospects for affirming human dignity through the law might seem bleak.

For those who desire, however, to apply the implications of human dignity to the law, there is no alternative to engaging this modernity. Humanity has gone through an irreversible gate from which there is no return. Here the author draws upon George Weigel, *Witness to Hope: The Biography of John Paul II* (New York: HarperCollins, 2001), p.490. The call for human law to recognize the dignity of all human beings in such a world is a call to the modern world to be open to a modernity in which human beings are recognized as greater than modernity ever imagined.

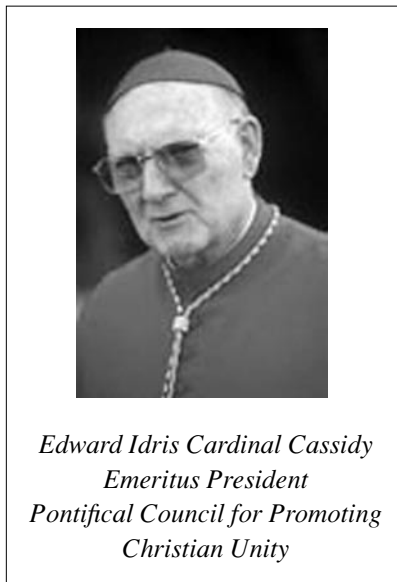
It involves believing that modern men, modern women, modern lawyers, and modern judges can, for all their experience of choice, still recognize their own worth in each other’s eyes, still know what is true and good, and still choose truth, good, and excellence. It involves believing, as Thomas More’s entire life testifies, that self-mastery, not self-assertion, is the index of a truly human freedom, a liberty that remains possible no matter how pulverized human existence has become in a world that increasingly measures people according to their political, medical, or sexual utility to us. It involves believing that it is possible to build a true humanism in which neither moral truth nor the law are seen as limits on our freedom, but rather is understood as making us free and enabling us to live our freedom towards its goal, which is happiness: the happiness that comes from transforming ourselves from the persons-that-we are into the persons-that-we-ought-to be.

References:

- Cardinal Joseph Bernardin, “Seeking a Common Ground on Human Rights,” *DePaul Law Review* 36 (1987): 159-165.
- Joseph Ratzinger, “Crises of Law,” Address at the LUMSA Faculty of Jurisprudence in Rome, 10th November, 1999.
- Second Vatican Council, Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes* (1965), No.43.
- George Weigel, *Witness to Hope: The Biography of John Paul II* (New York: Harper Collins, 2001).

REDISCOVERING VATICAN II ECUMENISM AND INTERRELIGIOUS DIALOGUE

On 20 October 2005 the Society, with the NSW Jewish Board of Deputies, sponsored an international commemoration at The Great Synagogue of the 40th anniversary of Vatican II's *Nostra Aetate*. This was one of the most important ecumenical events held in Sydney. The evening was chaired by the Governor of New South Wales, Her Excellency Prof Marie Bashir AC. Two speakers were present in person: Rabbi Raymond Apple and Cardinal Cassidy. Pre-recorded video addresses were also delivered by Cardinal Walter Kasper in the Vatican and Rabbi David Rosen from Jerusalem.



Firstly, I wish to express my deep gratitude to the St. Thomas More Society and the NSW Jewish Board of Deputies for having made this evening possible. It was their idea to commemorate in a special way the fortieth anniversary of the Second Vatican Council document *Nostra Aetate*, and then to make this the occasion for the launch of my book, *Rediscovering Vatican II – Ecumenism and Interreligious Dialogue*. A very special word of thanks to John McCarthy QC and David Knoll for their part in the organization of this evening. To have our State Governor preside at this function is a signal honour for me, not only because of the high position that she fulfils so graciously, but also for the fact that she is so greatly loved and admired by the people of this State.

The offer of having this launch here in The Great Synagogue of Sydney has given new significance to the launch of a book that traces in some detail the wonderful story of Jewish-Catholic relations since the historic Council declarations in *Nostra Aetate*.

Two thousand years of hostility on the part of the Christian world to the Jewish people, culminating in the great crime of the *Shoah* or Holocaust have, thanks to that declaration and the efforts to implement its teaching, brought us here this evening in this Great Synagogue, which is so close to St. Mary's Cathedral, yet it has only recently that the communities these buildings serve have come to be so close to each other.

None of the progress made in this relationship, or in the others dealt with in my book, could have been realised without the ready and courageous positive response of outstanding leaders of the other Christian, Jewish, and Muslim communities, to the new approach of the Catholic Church. Our presence here tonight is a further example of that spirit of cooperation and trust, and I express my warmest appreciation for that to the Senior Minister, Rabbi Jeremy Lawrence and to his predecessor and good friend, Rabbi Raymond Apple.

Before I say a few words about my book, I would like to speak briefly about what was, for me, and I can say for Pope

John Paul II himself, a high point and consummation of what *Nostra Aetate* has meant for Jewish-Catholic relations; and then share with you some thoughts about the future. It was my privilege to accompany Pope John Paul II on his visit to Israel in March 2000. It was most appropriate that the background to Cardinal Kasper's address this evening was a view of the late Pontiff at the Wailing Wall in Jerusalem. As I stood there a few steps behind the Pope and saw him place in the Wall a copy of the prayer asking pardon "for the behaviour of those who in the course of history have caused these children of yours to suffer" that had been offered in St. Peter's Basilica a couple of weeks earlier on behalf of the whole world-wide Catholic community, I felt that I was witnessing the close of 2000 years of a sad and tragic history and the confirmation of the new era of cooperation and understanding that dawned with the promulgation of *Nostra Aetate*. That moment, together with the visit to Yad Vashem two days earlier, where I carried the wreath for Pope John Paul II to lay on the memorial to the victims of the *Shoah*, will remain always among my most cherished memories.

Turning to the future, I share Cardinal Kasper's comment that "we are truly at the beginning of the beginning". The way is now open for us to consolidate our gains by ensuring that our Jewish and Catholic communities are informed and educated in accord with the new spirit that has been created, a spirit of friendship, mutual respect, cooperation and understanding. We all know that much more has to be done in this field in both communities. But we must not be satisfied with that, for we have so much in common that we can offer together to a troubled world.

We have the same God, our moral values have the same source in the Torah or Old Testament of the Bible, we have the same understanding of this world in which we live, our “new spirit of friendship and caring for one another may be the most important symbol that we have to offer to our troubled world” (ILC meeting Prague 1990 – page 195 of my book).

Preceding speakers have given an introduction to my book and an appreciation of my work. It has been for me a work of love. Like every love story, the preparation was at times very demanding and provided its challenges and difficulties. Despite some health problems, I was able to finish the work on schedule and am pleased that this is the first of the series of eight volumes on Vatican Council documents being published by Paulist Press to commemorate the fortieth anniversary of the close of the Second Vatican Council.

In my case, the aim was to revisit and, as it were, re-discover the two Vatican documents *Nostra Aetate* on the Church’s relations with other great World Religions and *Unitatis Redintegratio* on the Church and Christian Unity.

The book therefore consists of two sections, the first on Ecumenism and the second on Interreligious Relations. In writing the second section, I was faced with the fact that, while the Vatican Council considers Catholic-Jewish relations in a special number of *Nostra Aetate* dedicated to Interreligious relations in general, following on the Council Pope Paul VI, at the request of Cardinal Bea, entrusted Catholic-Jewish relations to the Secretariat of Christian Unity and not to the Secretariat responsible for relations with other Religions. My solution was to deal in the second section of my book, on the chapters on the implementation of the Council decrees and the present State of the Question, with a) Religions other than the Jewish Religion and b) Catholic-Jewish Relations.

It might seem strange to include in one volume ecumenism, interreligious dialogue in general and Catholic-Jewish relations, and yet they all have much in common. The progress in each of these fields is based on a common approach. Inspired by the principles proposed by the Second Vatican Council, the Church set out to enter into dialogue or discussions, to listen, learn and explain.

In genuine dialogue individuals and religions clarify their own identities as they explore similarities and differences with others.

From my own experience as President of the Pontifical Council for Christian Unity and of the Holy See’s Commission for Relations with the Jews, and as a member of the Pontifical Council for Interreligious Dialogue, I not only learnt much, but was also greatly enriched. As Pope Paul VI once stated, “true dialogue is an exchange of gifts”.

The volume that is launched this evening is a proof of this. Open and honest dialogue has led us along new paths, from hostility or indifference, to understanding and appreciation, and more recently to cooperation and joint initiatives in favour of common values, peace, justice and the protection of our environment. That we continue to advance is important for the challenge that is common to all who see themselves as children of Abraham, namely to work together for the good of our society, to heal a broken world.

Thank you all for your presence here this evening, and may God be with you all.



40th Anniversary of *Nostra Aetate* commemoration at The Great Synagogue

76TH RED MASS HOMILY

St. Mary's Cathedral, Sydney - 30 January 2006

Kings 3:5,7-12; Ps 118; James 3:3-18; Lk 17:7-10



Bishop Julian Porteous

The Principal Celebrant and homilist at the 76th Red Mass was Bishop Julian Porteous, Auxiliary Bishop of Sydney. The setting of Psalm 118 used in the liturgy was specially composed for the occasion by Justice George Palmer of the Supreme Court of NSW.

For a Catholic key moments are marked by the celebration of the Mass. Key moments, like, of course, our First Communion, our Confirmation, Marriage, and our Funeral. The Mass, each Mass, engages our lives with the mystery and grace of God. Each Mass is a transcendental moment – earth and heaven unite. Christ, Son of God, Word made flesh, who suffered, died and rose again, becomes truly present amongst us, according to his own words. “He who eats my flesh and drinks my blood lives in me, and I live in him”.

Our lives become engaged with God “who did not cling to his equality with God, but emptied himself to assume the condition of a slave and became as men are”, as St Paul puts it in his letter to the Philippians (2, 6-7).

Thus we Catholics from the very beginnings of the Church celebrated the mystery of Christ each Sunday, or the Lord’s Day. Through the Mass our lives, lived week by week, are brought into the mystery of Christ. Each Mass is an act of worship on our part – we acknowledge God as the author and sustainer of our being. We humbly recognize that all is from him, and he deserves our praise and thanksgiving. We join the angels in acknowledging the greatness and wonder of God – “Holy, holy, holy, Lord God of power and might”.

Each Mass is an offering of ourselves and a placing of our lives before Almighty God. And knowing the poverty and frailty of our human condition we come seeking from the Father of All the grace of strength, guidance, peace. Amidst the trials and strains of life we take an opportunity for refreshment to our spirits, for encouragement to faithfully fulfill our tasks, and at times for healing of hearts damaged by the pains of life.

Each Mass is a moment to bring ourselves in our humanity, full of the struggles and weaknesses, into the crucible of redemption – the mystery of the death and resurrection of the Lord.

Divine Wisdom

At the commencement of the Law Term of 2006 may I reflect with you upon a theme proposed by the First Reading. Solomon humbly asks of the Lord, “Give your servant a heart to understand how to discern between good and evil, for who could govern this people of yours that is so great”. It is a gift I am sure all of us would want to ask for.

The Lord’s response is given, “Since you have asked for this and not asked for long life for yourself or riches or the lives of your enemies, but have asked for a discerning judgment for yourself I give you a heart wise and shrewd as none before you and none will have after you”.

And so history and common speech will acknowledge the Wisdom of Solomon.

And what is wisdom? It is a natural gift in some, born of an insightful mind, a sense of truth, and the product of experience. Our Christian tradition also speaks of it as a distinctive attribute of God that can be shared with us. Divine Wisdom. St Thomas Aquinas thought that though a good mind can give you knowledge of divine things, God’s supernatural gift of wisdom makes your mind divine (ST 2-2, 45, 2). Thomas does not mean you become like God, but he means that with the divine gift of wisdom you feel at home with the divine. You accept the divine perspective readily and you now see the world in a literally different way - you see things now through God’s eyes.

Accepting this divine gift of wisdom means developing a particular sensitivity towards truth, and a distaste for falsehood and deception. Wise men and women find truth comes as naturally to them as good food and clean air - and falsehood is as repulsive to them as rotten meat and foul stench. People often explain law by appeal to the great cardinal virtue of justice, but justice is meaningless unless it is an attempt to get to the truth. People who are not wise can of course know all sorts of truths, but wisdom means seeing how all these truths fit together as parts of the divine plan, and, indeed, having an absolute love of the truth.

Of course, knowing the truth always has an effect on action; truth does not stay in the mind: it lives through our words and actions. The greatest Catholic thinkers have asserted, often against a hostile world, that our individual and social actions are not to be aimed at pleasure or utility or personal convenience but at truth.

This is not an easy thought to uphold today, but it is crucial. Whole generations of young people grow up – and enter professions such as the law – believing that we should act for whatever is most socially useful, or has mass community endorsement, or is convenient, or gives great pleasure.

These are not bad people: they really believe that this is what we ought to do. But of course these same ideas have been used internationally to justify the most abhorrent acts and policies, and to justify the worst negligence towards human beings and timeless moral values. Instead, Catholic teaching asserts that social and legal action is to reflect the truth about the human person and to communicate that truth throughout society. Whether in family law, criminal law, stem cell research, abortion legislation, IR legislation or wherever, good law does not rest with enabling what people find agreeable or convenient: it seeks out the truth about the person and upholds that truth even in the face of community indifference, even in the face of community hostility.

The path of Wisdom will not always be a popular path, but is it our great task and responsibility.

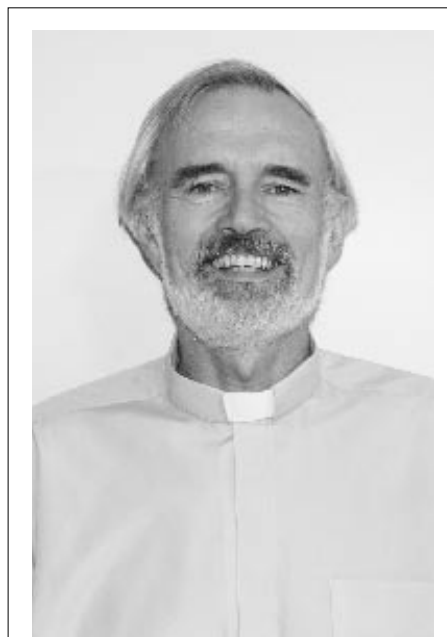
Today, in this Mass as we bring our lives and our service in the law before God, we can make young Solomon’s prayer our own: “Give your servant a heart to understand how to discern between good and evil”.

THE PASTORAL NATURE OF CHURCH LAW AND MARRIAGE: REFLECTIONS ON THE ADDRESS OF POPE BENEDICT XVI TO THE ROMAN ROTA, 15 FEBRUARY 2006

On 25 May 2006 the Society began what it is hoped will be regular breakfast seminars. The first such meeting was addressed by a distinguished canon lawyer in the Archdiocese of Sydney, Rev John Doherty, BTh, DCL, PhD.

Introduction

I would like to thank the Saint Thomas More Society for the invitation to speak today, which came to me through your president, Greg Smith. In advance of today’s presentation, the Society has made available to you an address of Pope Benedict XVI given to the Roman Rota on 15 February 2006 and I will use this address as a reference point for my reflections today on the pastoral nature of Church law and marriage.



Rev John Doherty

My approach today will be discursive rather than academic and my aim is to use the Pope’s address to draw out some aspects of the Church’s understanding of marriage and the role of canon law in protecting these doctrinal values.

As a canon lawyer, I represent a different system of law as compared to the common law system and a secondary aim today will be to point out some comparisons to our civil understanding of marriage. In drawing your attention to some similarities and differences in the two legal systems, perhaps both may come into a clearer focus.

The Pope's address, while having a rather precise focus, contains references to some important aspects of marriage as the Church understands it and to the canon law on marriage. Indeed, the Church's canon law and its legal structures are at the service of and the protection of the institution of marriage. They are meant to protect the truth about marriage, which is part of the divine revelation handed on by the Church.

The Roman Rota

First, I will say something about the Roman Rota and its role in fostering the pastoral nature of Church law and marriage. The Roman Rota is a Court of the Holy See; if you will, it is the Pope's own Court – or "Tribunal" – and the great majority of the cases heard at the Rota are marriage nullity cases.

The Rota has a very important role to play in the application of the doctrine of marriage in particular cases and how these doctrines are to be given legal weight in other Church Tribunals. In other words, the Rota's jurisprudence, developed as the law is applied in these cases, is a benchmark for other Tribunals. This point brings to me the first difference in our legal systems. Church Courts are not hierarchic as are our civil courts. It may surprise practitioners trained in the common law system to learn that a Second Instance Court is not a superior court in the way that a Court of Appeal may be in Australia. However, there is a sense in which the Rota influences other Tribunals; the Church's position is that the "lower" Courts are to be guided by the doctrines of marriage of the Rota – its jurisprudence. The Pope's annual address to the Rota, in turn, gives him the chance to deal with doctrinal and procedural themes that will influence the practices and decision-making of the Rota and, indeed, all Courts that deal with marriage nullity. Over many years, these addresses have collectively advanced the doctrine of marriage and jurisprudence pertaining to marriage.

In the 2006 Rotal address, Pope Benedict refers to previous Rotal addresses of John Paul II and the key doctrinal themes of those addresses (the pastoral nature of law in 1990 and 2005, and the indissolubility of marriage in 2000 and 2002).

The central theme of the 2006 Rotal address

The Pope's theme in his 2006 address is not an easy one. It explores the relationship between the pastoral needs of a party who seeks a declaration of nullity of marriage before a Church Court and the role and function of the Tribunal itself, specifically those laws and procedures that govern the Tribunal's adjudication of the validity of a particular marriage.

These often seem to be in conflict, as many of the faithful are seeking a declaration of nullity so as to be allowed to go to Holy Communion and seem frustrated by the obstacle of juridical formalities. The purpose of law is, ultimately, the salvation of souls but these juridical formalities seem at odds with this pastoral dimension of the law and may even frustrate it.

In dealing with and resolving this "false opposition," as the Holy Father describes it, he develops some doctrines about marriage and even the procedural law used in determining its validity.

The Church's canonical doctrine of marriage

The Church's canon law on marriage flows from and reflects its dogmatic teaching on marriage. It is important to understand the relationship between canon law and doctrine. Law always follows doctrine and the various commentaries on the Code of Canon Law will point out the sources of the law.

The Church's doctrines about marriage have many sources, including divine and natural law. There is an explicit reference to this when the Pope refers to marriage's "twofold natural and sacramental dimension."

When the Code of Canon Law, drawing on the Church's dogmatic teaching on marriage, describes marriage in canon 1055, it describes all marriage and then goes on to say that Christ has added something to this natural reality by raising the marriage of baptised persons to the dignity of a sacrament.

In fact, Church marriage law is a blend of divine, natural and positive law and must be understood and applied accordingly. An example of divine law is the teaching of Jesus about the indissolubility of marriage which is given expression in canon law (e.g., canon 1056 of the Code of Canon Law). The natural law on marriage is expressed in several areas of Church marriage law, such as the fact that marriage is between a man and a woman (canon 1055).

These laws based on divine or natural law cannot change. An example of a positive law that is not divine or natural is the law on the form of marriage: for validity, marital consent must be exchanged before a priest and two witnesses. This, of course, could change.

The indissolubility of marriage

One element of this doctrine is the indissolubility of marriage. All marriages are indissoluble, and Christian marriage, to quote canon 1056, "takes on a special firmness in virtue of the sacrament." The Pope observes that "this truth is sometimes obscured in the consciences of Christians and of peoples of good will." The language here is nuanced but the meaning is clear. Indeed, it could be argued that very few Australian Catholics, perhaps through no personal fault, truly adhere to the doctrine of indissolubility as the Church understands it.

This is where the Church's doctrine and legal practice diverges from most civil legal systems. For the Church, marriage is both intrinsically and extrinsically indissoluble; that is, it cannot be dissolved by the parties or any other human power.

In Australia, marriage is only intrinsically indissoluble; it cannot be dissolved by the parties but the State can dissolve it. Underpinning the two approaches are different doctrines of marriage: the Church teaches indissolubility, and the State stability but not indissolubility.

While the Church in some matters defers to the State (see canon 1059), it does not concede to civil society, or any human entity, the power to dissolve a marriage. What does the Church concede to the State? It concedes things that do not touch on the essentials of marriage, such as property rights and custody, or what name a married woman may choose to use, and so forth.

However, the Pope does say that the institution of marriage, which “establishes the institution of the family”...“deeply concerns the Church and civil society.”

Another doctrine, one that is not explicit in the Pope’s address, is that marriage is between a man and a woman. This is being debated in many countries, including our own, but for the moment the Australian civil law doctrine is the same as that of the Church. It goes without saying that, if Australia does move to allow same sex marriage, the Church will be in the same position as it is with the dissolution of marriage.

Procedural law in defence of marriage

The Pope now takes up the matter of procedural law in detail. In doing so, he affirms the role of procedures, those “juridical formalities” which seem to some to frustrate the pastoral role of canon law.

One point that he makes forcefully is that, in a marriage nullity case, the trial is not against the other party. One of the parties petitions for a decree of nullity and the other party is always summoned to appear. This is a matter of justice and is intended to reach the truth in that particular case.

However, the real defendant is the marriage bond itself, now being impugned by the party seeking the declaration of nullity. Here the Pope refers to the role of the Defender of the Bond, which, as he points out, is a relatively recent innovation in these cases (1741).

The defence of the bond provides the necessary “dialectic” in the proceedings. The Defender’s role is a reminder that the Church is, in a sense, one of the parties in the case and the Tribunal’s role is to protect and even foster marriage as a service to the Church. The standard of proof in canon law is called “moral certitude,” which is similar to the “beyond reasonable doubt” standard of criminal cases in the common law system. If a Tribunal cannot reach moral certitude, then the case must be resolved in favour of the marriage bond (canon 1060). This dialectic aims at ascertaining the truth about a particular marriage.



Nostra Aetate Commemoration. l to r: Sir Nicholas Shehadie; David Knoll, President, NSW Jewish Board of Deputies; Rabbi Jeremy Lawrence of The Great Synagogue; Her Excellency The Governor; Cardinal Cassidy

However, this creates a dilemma for people who work in Tribunals who are easily touched by the sometimes wrenching stories of those who come to the Tribunal and may struggle to put the search of truth, which may suddenly appear to be an abstract and cold principle, ahead of the personal needs or desire of the client. I am sure that this dilemma is not confined to marriage nullity cases in canon law. Every legal practitioner will be aware of this tension. He or she has a responsibility to the community as well as the client, and getting the balance right can be difficult.

The tension resolved: the search for truth

The seeming contradiction between the pastoral needs of someone seeking a declaration of nullity and the juridical formalities necessary to it are resolved by taking account of the purpose of these juridical formalities.

Their purpose is to help the Tribunal reach the truth about the validity of a particular marriage. In fact, the Pope states that the love of truth is where canon law and pastoral ministry meet. The Holy Father here speaks of the possibility of another approach, one that cannot be said to reflect truth. He speaks of pastoral love being contaminated by “complacent attitudes toward the parties.” These sometimes have the semblance of truth but do not reflect the real good of the parties or the Church.

Conclusion

In a passing comment near the end of the address, the Pope called for cases to be processed “in a reasonable time.” This comment received considerable publicity at the time leading some commentators to conclude that the Pope was calling for a relaxation of the procedural rules in favour of pastoral considerations. A close reading of the address in its entirety will dispel this notion.

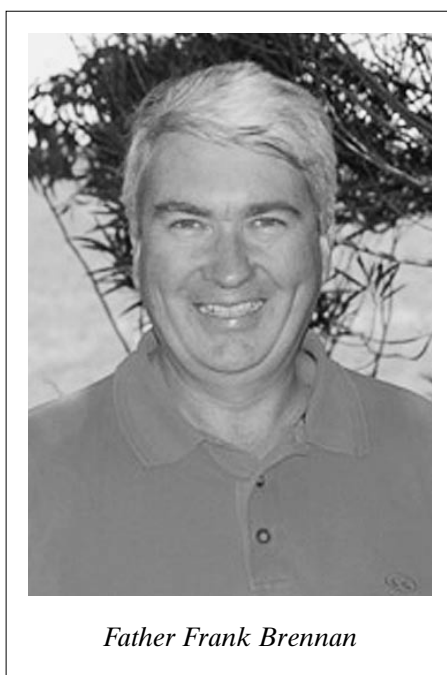
Indeed, the Pope calls for an adherence to the procedural integrity of the process. This is not to frustrate the party, but only the truth truly serves those who are seeking a declaration of nullity. Not to search for truth compromises the pastoral role of canon law and, as the Holy Father says, can even compromise the saving encounter of the party with Christ.

The 2006 address by Pope Benedict to the Roman Rota will help those working in Marriage Tribunals to see the doctrinal basis of their work and the service they can provide the Church, as well as the genuine pastoral care they give to those who seek a declaration of nullity. I trust that this brief reflection on the themes of the address will serve to help members of the Saint Thomas More Society come to a deeper understanding of the pastoral nature of canon law and its role in the protection of marriage.

IS A FAIRER AUSTRALIA POSSIBLE? AT WHAT COST?

On 17 August 2006 Father Frank Brennan SJ spoke to a joint meeting of the Society and the Guild of St Luke

It is an honour to address this first joint gathering of the Guild of St Luke and the St Thomas More Society here at the University of Notre Dame where I have been appointed the inaugural professor for human rights and social justice. With my father being a lawyer and my mother a doctor, I am very happy to be amongst you. Your convenors, knowing that I am not an economist and knowing that you are lawyers and doctors have asked me to address the questions “Is a Fairer Australia Possible?” and “At what cost?” Our present pope Benedict back in 1985



Father Frank Brennan

offered a profound theological reflection on “A Christian orientation in a pluralist democracy”. He wrote:

“Catholic theology has since the later Middle Ages, with the acceptance of Aristotle and his idea of natural law, found its way to a positive concept of the profane non-Messianic state. But it then frequently loaded the idea of natural law with so much Christian ballast that the necessary readiness to compromise got lost and the state could not be accepted within the limits essential to its profane nature. Too much was fought for and as a result the way to what was possible and necessary was blocked”.

In the public forum, all religious authorities need to acknowledge the primacy of the citizen's conscience over the teaching authority of the citizen's church when it comes to the church's and the citizen's participation in the law and policy making of the State.

The wise religious authority will acknowledge that "experience, especially experience enlarged by empathy, adds to the force of a teaching."

Good law and sound public policy in a pluralist democracy must be spared much of the Christian ballast of internal Episcopal declarations so that conscientious Catholics can engage with the necessary readiness to compromise within the workings of the essentially profane State.

There is a vast range of issues we could explore: from the new WorkChoices legislation in which we would question the balance between the employee's rights and the conditions needed to maximise employment through economic growth, through to same sex marriage which calls for a consideration in civil law and public policy of the correct application of principles of non-discrimination and the need to consider the natural right of any child to have and to be nurtured by a known biological mother and a known biological father. But let me open our proceedings by opening three issues which are presently on the table and which are likely to prompt some lively discussion amongst such a group but with slightly more prospect of common agreement without partisan division on party lines and without emotions running too high. I will take up one legal question – the Bill of rights, one question of concern to all citizens – border protection and the rights of refugees, and one medical question – stem cell research.

I will hint at ways in which our Catholic heritage can help inform civil discourse in finding if not the right answer, then at least an appropriate way of balancing conflicting claims, with a suitable margin of appreciation in a pluralist, democratic society like Australia.

Bill of Rights

One argument for a bill of rights is that it helps to uphold community values when those values are most at risk, though not necessarily when they are most contested. A bill of rights is a legislative or constitutional text which sets down individual entitlements especially against the State, such entitlements being consistent with principles which are derived from community values. When a society is facing new challenges and rapid change, a bill of rights may provide bright line solutions for judges and legislators trying to navigate the challenges of change, remaining true to those values. Chief Justice Murray Gleeson says, "In the past, religion provided many of the common values by reference to which conflicts of rights or interest were resolved. Our law still reflects many Christian values." Reflecting on the nature of a pluralist society, he comments:

"By definition, that means that there is competition, not only when it comes to applying values, but also in identifying values. Everybody is aware that our society is rights-conscious. A rights-conscious society must also be values-conscious. If it is not, then we have no way of identifying those interests that are rights, or of resolving conflicts between them. Rights cannot work without values."

When asked about these remarks in a broad ranging, profile interview in 2006, Gleeson told the *Australian Financial Review*:

"I don't think judges should allow idiosyncratic values to influence their reasoning process.

I can't think of any examples in which I have self-consciously applied my own values except insofar as they are reflected in ... legal principles. But self analysis is a risky process. A judge's duty is to administer justice according to law and if you can't perform that task then you shouldn't be a judge."

In his 2006 Australia Day Address, Prime Minister John Howard looked back on the first century of Australian nationhood and reflected on the balance we have achieved as a nation, encouraging "individual achievement and self-reliance without sacrificing the common good", valuing our independence, chafing against bureaucracies that deny us choice and the capacity to shape our lives, while being "determined not to let go of the Australian ethos of the fair go for all". We are now a "diverse society which practices tolerance and respect".

He set down his catalogue of Australian values:

- respect for the freedom and dignity of the individual
- a commitment to the rule of law
- the equality of men and women
- a spirit of egalitarianism that embraces tolerance, fair play and compassion for those in need.

Conceding our cultural diversity, he insisted that like most nations we have a dominant cultural pattern, and for us that pattern comprises Judeo-Christian ethics, the progressive spirit of the Enlightenment and the institutions and values of British political culture.

When addressing the Australian Parliament on 27 March 2006, British Prime Minister Tony Blair said:

"We know the values we believe in: democracy and the rule of law, but also justice, the simple conviction that, given a fair go, human beings can better themselves and the world around them.

These are the values that our two countries live by, and others would live by if they had the chance. But we believe in more than that. We believe that the changes happening in the world that make it more integrated, the globalisation that with unblinking speed reshapes our lives, are an opportunity as much as a risk. We are open societies. We feel enriched by diversity. We welcome dynamism and are tolerant of difference.”

While Tony Blair came to office with a passionate commitment to enacting the *UK Human Rights Act 1998*, John Howard has remained implacably opposed to the introduction of a bill of rights in Australia. Whereas Blair thought community values could be enhanced by a statutory bill of rights, Howard thinks a bill of rights in any form is inimical to the maintenance of Australian values. In his 2006 Australia Day Address, Howard put a bill of rights off the legislative agenda for his remaining time as prime minister. He told the National Press Club that there was always the need to find “the right balance between the legitimate interests of the community on the one hand and individual civil rights on the other. And inevitably this will be a matter for passionate debate.” He then launched a lengthy salvo against a bill of rights in any form.

In 1998, I published *Legislating Liberty* in which I opposed the introduction of a constitutional bill of rights for Australia. Conceding the shortfall for the protection of rights in our constitutional machinery, I suggested four means for making up the shortfall:

- The passage of a statutory bill of rights similar to the *New Zealand Bill of Rights Act 1990*
- A constitutional amendment guaranteeing non-discrimination against persons so that we could

permanently fetter the Commonwealth parliament and government from discriminating against people on the basis of race, gender or sexual orientation

- Continued access to the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) which provides for equal protection and a ban on arbitrary interference with privacy
- A High Court open to the influence of international norms of human rights on statutory interpretation and development of the common law.

In the short term I suggested the creation of a Senate Committee for Rights and Freedoms which could complement and incorporate the existing Scrutiny of Bills Committee, the Regulations and Ordinance Committee and the Legal and Constitutional Committee by implementing a Commonwealth Charter of Espoused Rights and Freedoms as “a precursor to a statutory bill of rights”.

I conceded that “bipartisan intransigence by our federal politicians confronted with violations against unpopular, powerless minorities would remain a problem”. But I suggested, “That intransigence presents an even greater obstacle to a more entrenched proposal such as a statutory bill of rights or a constitutional bill of rights”.

I suggested that we had two distinctive Australian safeguards against majoritarianism:

- A Senate in which the balance of power will be held by minor parties whose political niche, in part, is carved from the espousal of individual and minority rights.
- A judiciary shaping the common law and interpreting statutes while responding to international developments in human rights jurisprudence.

So what has changed in eight years? Even before considering the new challenge of balancing civil liberties and

national security in the wake of terrorist attacks off shore and threats on shore, we need to acknowledge the profound changes that have occurred to our checks and balances:

- The government no longer takes any notice of procedures under the first optional protocol.
- The government now controls the Senate.
- The High Court has become isolated from other final courts of appeal. With the passage of the *UK Human Rights Act 1998*, even the UK courts (like the courts in the US, Canada, South Africa and New Zealand) now work within the template of a bill of rights when confronting new problems, seeking the balance between civil liberties and public security.
- In *Al-Kateb v Godwin* (2004), the isolated High Court has found itself unable to interpret a statute so as to avoid the possibility of a stateless asylum seeker spending his life in detention without a court order or judicial supervision.

Days prior to his retirement from the High Court, Justice McHugh had cause to lament publicly the “tragic” outcome in *Al Kateb*. He told law students:

“*Al Kateb* highlights that, without a Bill of Rights, the need for the informed and impassioned to agitate the Parliament for legislative reform is heightened. While the power of the judicial arm of government to keep a check on government action that contravenes human rights is limited, the need for those with a legal education, like yourselves, to inform the political debate on issues concerning the legal protection of individual rights is paramount.”

In the past, I had suggested there was no point in any one State jurisdiction going it alone on a bill of rights and that we were better off waiting for a uniform bill of rights at the Commonwealth level.

The ACT passed its *Human Rights Act* in 2004. The Victorian Parliament has now passed its *Charter of Human Rights and Responsibilities Act 2006* part of which will take effect on 1 January 2007, with the Act taking full effect on 1 January 2008. The Court of Appeal of the Supreme Court of Victoria will be well positioned to be the leading interpreter of human rights instruments in Australia, unless and until the High Court whets its appetite for granting special leave applications to interpret bills of rights provisions which presently are confined to two jurisdictions.

The terrorist threat combined with the tight discipline of the government parties and the unwillingness of the parliamentary Opposition to invest much political capital in protection of minority rights in these uncertain times contribute added potency to the call from the community for a statutory bill of rights which can consolidate the checks and balances needed in a modern democracy.

Border Protection and the Rights of Refugees

The Howard government justified the 2001 Pacific Solution as a means of stopping secondary movers in faraway places from employing people smugglers and ending up in Australia. That rationale does not work for Papuans in canoes.

Last Thursday, the government told Parliament that the proposed 2006 Pacific solution will be a means of “prevent(ing) Australia from being used as a staging post for political protests” and of “removing the incentive to reach mainland Australia”.

The government gives the assurance that future Papuan asylum seekers will be processed just as fairly and just as quickly on Nauru.

If they are like the 43 Papuans from last year, they will be proved to be refugees. No other country will take them.

No other country will have a greater obligation than Australia to take them. They will be resettled in Australia. Won't they? And just as quickly, won't they? They will be free to protest, won't they?

Why not process them just as fairly and as quickly at the \$300 million Christmas Island facility and save some money? Or is the idea to leave proven political refugees languishing in Nauru out of sight and out of mind where their protests will not be heard?

Stem Cell research

Ending the 2002 parliamentary debate on human cloning and embryonic stem cell research, Stephen Smith leading the debate for the ALP said: “A ban on human cloning is sensible, is necessary and, on the basis of the debate both here and in the Senate, has the universal and unanimous support of the parliament”. The ban applied to all forms of cloning, both reproductive and therapeutic.

In the Senate, there had been very detailed consideration of one form of therapeutic cloning called somatic cell nuclear transfer (SCNT).

In part, this was because Senator Natasha Stott Despoja was very informed about the developing technology; also Senator Brian Harradine was concerned to ensure a comprehensive ban on embryo experimentation. Senator Kay Patterson, then Minister for Health and Ageing, defended the bill's definition of “embryo” as one that “encompasses all embryos, regardless of how they were created....This includes embryos created by somatic cell nuclear transfer.” The cloning of all embryos was banned.

So what's changed? Is there a need for another conscience vote? The Lockhart Committee was asked to review the legislation in the light of changed community standards and developments in research. There has been some progress over the last four years with research using adult stem cells.

But in those jurisdictions which allow embryonic stem cell research there have been no breakthroughs.

The committee conceded that “it is not known at this stage whether embryonic or adult stem cell research will provide greater benefits (if any)”. It acknowledged that embryonic stem cell research is still “mainly confined to preclinical (animal) studies because the cells are not yet characterised well enough for use in clinical trials and there are significant risks (such as tumour formation)”.

So the committee, prompted by scientists threatening to leave Australia for more liberal research environments, seized on changing community standards. The committee thought that “in the face of moral diversity, it is unjustifiable to ban embryo research and therapeutic cloning.”

They put to one side Parliament's unanimous prohibition of all cloning and unanimously recommended therapeutic cloning even with the use of enucleated animal eggs. They thought scientific exploration should be permitted provided there were not strong arguments against it from all groups, including those who discounted the moral significance of the life of the human embryo.

There are three moral positions that might be put about experimentation on human and hybrid embryos.

- First, experimentation on any embryo, not for the benefit of that embryo, is wrong.
- Second, experimentation on an embryo which was created with the possibility of implantation, and as member of a group of embryos created to maximise the prospect of successful implantation of a healthy embryo, is permitted once it is no longer required.

- Third, the creation of embryos specifically for experimentation and destruction is permitted, provided only that the experimentation is aimed at improving the lot of humanity.

In 2002, the majority of our Parliament thought the community standard was reflected in position two, though a significant minority of the Parliament thought it was reflected in position one. The Lockhart Committee thought that the community standard is reflected in position three. This may well be the personal preference of each member of the Lockhart Committee.

On the vast plain of embryo research, there are two Rubicons. The Australian community crossed the first Rubicon in 2002, given the lack of community reaction to the Parliament's decision to permit experimentation on excess embryos from IVF.

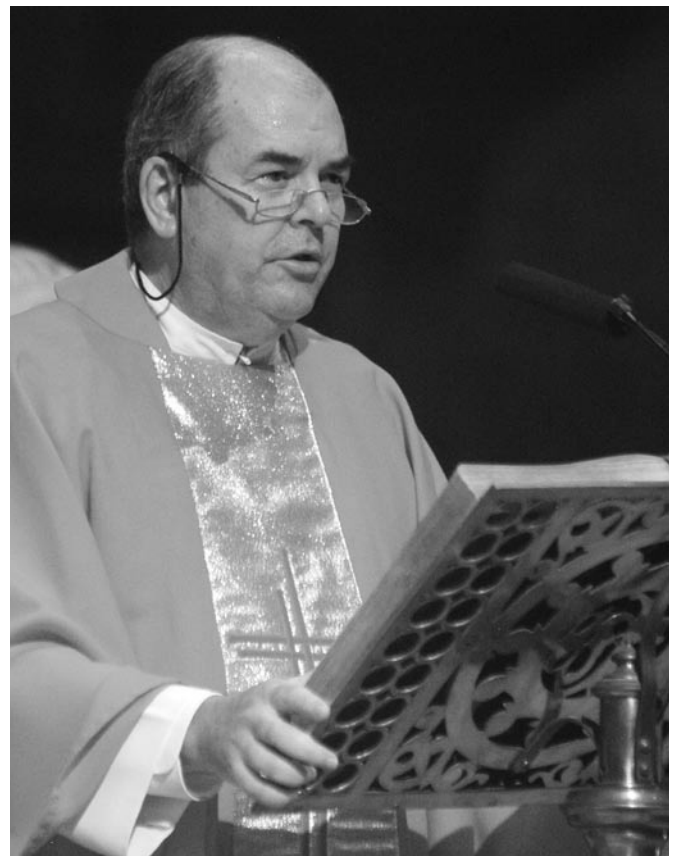
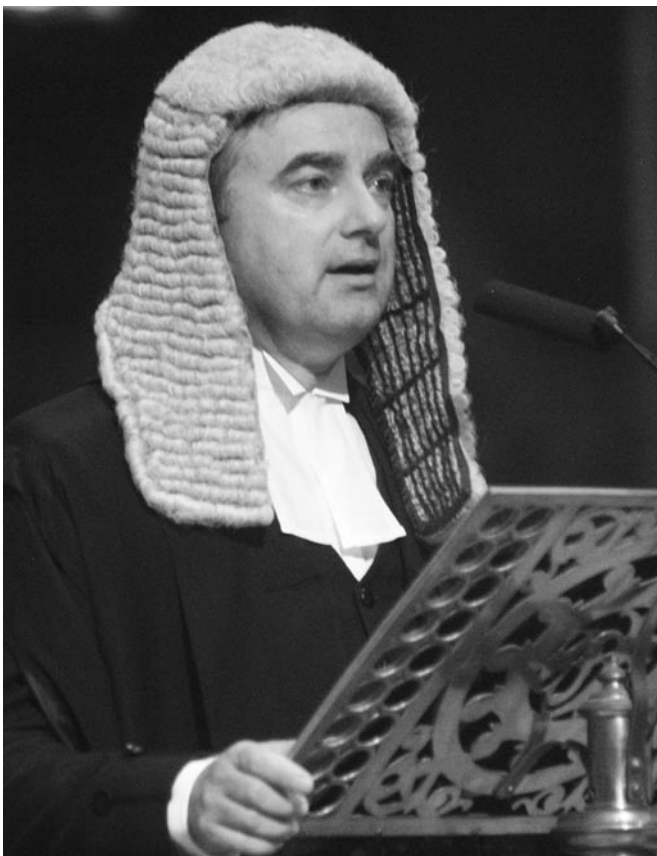
These are embryos created with the intention of their being available for selection for implantation. There is a strict requirement that there not be any more embryos created than are required for the successful implantation of a healthy embryo.

But there is a second Rubicon. That is where we now stand. Beyond this second Rubicon is a city where the scientist is justified in creating human life only so that he might experiment upon it and destroy it without the need for any respect of the dignity of that human life. In 2002, our parliament unanimously stopped short of crossing the second Rubicon.

To date, we have drawn a moral distinction between creating an embryo which has a chance at life and creating an embryo which has no chance at life. The second is created only so that it might be experimented upon and destroyed.

There is still the prospect that stem cells could be produced from a collection of cells which is not an embryo. Community standards and the near universal condemnation of all cloning (including SCNT) by our elected politicians just four years ago point to the need for Australians to wait until conscientious scientists have exhausted all efforts to find ethical sources of pluripotent stem cells for research and therapies available to all. The ethical dilemmas cannot be solved by redefining the product of therapeutic cloning as anything but a human embryo.

There has not been sufficient change in the state of scientific knowledge nor in community acceptance of deliberate creation of human life for destructive experimentation to warrant a revisiting of Parliament's 2002 decision.



The 75th Red Mass. left: Michael Slattery QC, then Senior Vice-President, NSW Bar Association, offering a reading. right: Fr Brian Lucas, General Secretary, Australian Catholic Bishops Conference, reads the Gospel.

The science has not changed; the moral arguments have not changed; community standards have not changed. It should take more than a handful of scientists seeking out more value-free research environments for our politicians to change their conscience vote.

Conclusion

A fairer Australia is possible if we maintain the Catholic commitment to justice, rights and dignity for all, especially the most marginalised and vulnerable in our society. As lawyers and doctors we can contribute to this mission of our Church and to good citizenship.

In the Catholic tradition we have never seen a contradiction between the two. The bishops and the declining number of priests and religious cannot do it on their own. They never could. You are the church in legal and medical mode.

References

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F. Brennan, *Legislating Liberty*, University of Queensland Press, 1998, pp. 44 and 178

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Justice McHugh was one of the majority in the 4-3 decision. He observed at p.581: "As a result, tragic as the position of the appellant certainly is, his appeal must be dismissed."

M. McHugh, HYPERLINK "http://www.highcourt.gov.au/speeches/mchughj/mchughj_12oct05.pdf" "The Need for Agitators - the Risk of Stagnation" Sydney University Law Society Public Forum, Sydney, 12 October 2005

AWARD OF PAPAL HONOURS FOR THE DIAMOND JUBILEE OF THE ST. THOMAS MORE SOCIETY

On 21 September 2006 at Cathedral House, George Cardinal Pell conferred Papal Honours on several distinguished members of the Society in honour of the Diamond Jubilee. The Society's President, Greg Smith SC, offered these opening remarks.

Today is another great day for the St. Thomas More Society, which last year celebrated sixty years of life.

We are delighted that the Holy Father, Pope Benedict XVI, has very generously honoured five distinguished members of the Society, four of whom the Society nominated for Honours and the fifth of whom was nominated personally by His Eminence Cardinal Pell.

The four are Reverend Fathers and Doctors Brian Byron and Jim Esler, both of whom have loyally served as the Society's present and immediate past Chaplains, as well as The Honourable John (Jack) Slattery QC, a founding member and long serving Past President



Greg Smith

of the Society, Anthony Reynolds, a long serving Treasurer of the Society. The fifth is His Eminence's personal nominee, our immediate past and long serving President, John McCarthy QC. The Society congratulates our good friends, the recipients of these honours.

We are most grateful to His Eminence for his hospitality in inviting us to be present at this reception, to his Private Secretary, Dr Michael Casey (a member and former Councillor of the Society) for his assistance in obtaining the appropriate decorations and support in arranging this function and to Mrs Helen Hoffman for her customary skilful and cordial organization of the refreshments to be served here today.

In June of this year, I was privileged to be present at the unveiling of a bronze statue of St Thomas More in the Speaker's Garden of the NSW Parliament House, donated to the Parliament and blessed by His Eminence.

I was moved by the significance of the occasion, as I had decided to seek Liberal Party preselection for my local seat of Epping, which was falling vacant due to the impending retirement of the long term sitting Member, my friend Andrew Tink MP.

I anticipated that I may have to call on our great Patron and the Patron Saint of politicians to intercede for me if I was elected to the Parliament.

St Thomas More provides a wonderful example of courage in the face of adversity. I hope and pray that his presence will cause a lifting of standards in those who are entrusted by the electors of this State with the privilege of representing them.

I also hope and pray that he will continue to guide the members and honorary life members of this Society and all their loved ones and friends so that we may continue to uphold the splendour of the truth and strive for justice in all our lives and work.



Greg Smith SC makes his opening remarks

RESPONSE ON BEHALF OF RECIPIENTS OF PAPAL HONOURS



John McCarthy

John McCarthy QC, immediate Past President of the Society, responded on behalf the recipients of the Papal Honours.

I am doubly honoured this evening – firstly, to receive this Award (KCSG) in the Order of St Gregory the Great from the Holy See, secondly, to be invited to respond on behalf of the recipients to the gracious words of introduction by Dr Michael Casey.

So on behalf of Fathers Brian Byron and James Esler, Jack Slattery, Tony Reynolds and myself, I express our heartfelt gratitude to the Holy Father and to our patron, Cardinal Pell, to the Holy See and the Archdiocese for the great honour bestowed on each of us this evening and the further honour you all give us by being present at this investiture ceremony.

To each of my fellow recipients, I offer my warmest congratulations on your awards. First to Jack Slattery – no one here is more worthy of honour and recognition than yourself.

It is a splendid privilege to have you here – a founder of the Society 61 years ago, and the sole surviving founder present for the Diamond Jubilee.

Jack, you are the only one left who heard the prophetic words of this resolution at the foundation meeting on 14 August 1945:

“There is every reason to hope and no reason to doubt that the St Thomas More Society will flourish in NSW and will fulfill its noble ideals unbrokenly throughout the course of the years to come. Looking forward far into those years we may visualise someone or other of the Society’s members of future time looking back to think upon the Society’s beginning. For such, the provisional Council in presenting this, its report to the first annual general meeting of the Society, places on record all the details of the Society’s origin.”

Through papal recognition of the Society's work into the second generation that prophecy has been fulfilled.

Jack, no one has contributed more to the objectives and purposes of the Society over these years and decades than yourself – long-term Councillor, President for nine years, constant promoter and supporter of the Society's activities – a great judge and lawyer, a fine spiritual son of St Thomas More, shrewd leader, gentleman and scholar – exemplar and pride of Sydney Catholic lawyers – loved and admired by all.

Jack, it is a great privilege to receive a Papal Award in your presence, for services to the Society, as part of the second generation of members, mostly not even born when the Society was founded. This is recognition that the vision and faith of yourself and the other founders has found continued approbation from the Church both in Sydney and in Rome.

It is a matter of pride to be associated with you in this way – in the service of our Faith, our Society and the Law. God bless you. You have given us more than can be repaid in earthly terms.

To Fathers Esler and Byron – we are all in your debt – for your spiritual and intellectual guidance and presence in the Society. Consecutively, for nearly forty years, you have been at the spiritual heart of our guild.

Father Esler – our family connections have been deep and lasting. You were at school in Parkes with my dear mother, who is here tonight with us. You married Christine and myself and have kept a fatherly eye on us, as you have for so many other legal families. You are a great lawyer, a university medalist, and subsequently, a splendid priest and moral theologian. You deepened the Society's understanding of the relationship of faith and reason, of natural law and the place of worship and prayer in the life of lawyers.

You defined and widened the life of the spirit in busy and pressured legal practitioners whose cares and troubles you had shared as a solicitor. You proposed to Society members the idea of law as a vocation of service and virtue and a path of salvation. You have been our longest serving Spiritual Director (1968 – 1992) and acclaimed recipient of the St Thomas More Award. Please remember the Society and its members in your prayers.

Father Byron – you are Australia's leading More scholar, of international renown. The Society has been honoured with your presence amongst us. No one can bring our Patron Saint and his times more alive or, paint more vividly, More's spiritual journey than yourself. Thomas More is better known and loved by all of us through your work with us.

The Patronal Feast Day Mass and Dinner was a Byron proposal which has much enriched our Society. You have associated us with the international world of More studies and its doyen, Abbe Mach'adour – we are more learned and more Catholic through your service with us. It is rumoured that you have even come to like lawyers and, perhaps, parliamentarians as your recent initiative for a Thomas More connection in Australian parliaments begins to bear fruit.

You were delighted to be associated with the presentation by Cardinal Pell on behalf of Sydney Catholics of a magnificent bronze statue of St Thomas More to the NSW Parliament and which the Speaker (the Hon John Aquilina), who is with us this evening, has placed in the Speakers' Garden – More of course, was a notable Speaker of the House of Commons.

Father Byron, we all have acquired anecdotes about More from your vast erudition about our Patron saint. The one I like best is Pius XI's response to a query about miracles attributed to More at the time of his canonisation in 1935.

The Holy Father remarked that one of the most extraordinary miracles he had ever witnessed was that Irishmen and others of Irish descent were petitioning for the canonisation of an Englishman – a true sign from heaven!

Father Byron, without congratulations go our prayers. You have had serious health problems of late. We earnestly hope all will be well with you.

Tony Reynolds – you were the longest serving Treasurer in the Society's history. No one has ever worked, day in day out, on the Society's affairs and programmes as you have. The books, records and accounts have never been in better order. Your supervision of numerous events, publications and correspondence was faithful, meticulous and unassuming – wrinkles were smoothed and mishaps avoided.

Our Golden Jubilee publication "The Saint and the Society" was literally the happy outcome of your persistence, drive and organising talents. You know how to meet a deadline and make sure everyone else does. Your handling of the Society's voluminous records damaged by flooding in a basement bank vault left all of us forever in your debt and you worthy not only of a knighthood, but beatification. Congratulations on the recognition of your fine service to the Church, to lawyers and the Society.

For myself – it has been an honour to serve the Society throughout my life in the law, back to the 1970's. Place and circumstance shape all of us. In my case I could never forget that the chambers to which I belong – the old fighting fifth – the Fifth Floor Chalfont and now Fifth Floor Wentworth, was the unofficial headquarters of many of our founders – the chambers of John McKeown, Cyril Walsh and Billy Sheahan, Hugh Maguire, Doug McGregor and many other members of the Society. These were men I had come to admire and revere and I sought to follow them and their successors for this apostolate.

Thomas More can be also striking in his influence – the date of my commission as Queen’s Counsel is 6 July 1988. The Vice Regal Commission on behalf of a successor of Henry VIII was signed on the anniversary of More’s execution – just a co-incidence perhaps, but in Christian terms, perhaps not.

I particularly want to thank Cardinal Pell for his nomination of myself for this award. I have greatly appreciated his warm support and approval of the Society’s activities which he frequently talks about and regularly attends (as had his predecessors). His Eminence regards the work of our guild as an important part of the Catholic presence in the legal profession and public life and he has praised our particular association through the Red Mass with St Mary’s Cathedral, Australia’s mother Church. This ceremony and these awards are another happy instance of the close interest of our Patron in our affairs.

For me it has been a great honour to serve as President of an association I love dearly and which has provided me with so many opportunities and occasions of spiritual gain, friendship and insight. To have had the confidence of the Society for so long will always be one of my most cherished memories. I remain troubled by how well I served our Patron Saint and the Church. It always seemed that so much remained undone or underdone – for which I must remain accountable. My spirit is consoled by the approbation of the Holy See and our Patron (the Cardinal) for my service in the second generation of the Society.

I thank and salute all of the officers and Councillors who have served with us for their work, support, inspiration and common sense.

I thank my beloved wife and family for their patience and understanding and for coming to know and accept Thomas More as our family patron and to weaving him into their ideals, their prayers and their thoughts.

I cannot close without speaking of Louise Pritchard, my secretary. She is known to everyone associated with the Society and its activities from Governors-General to Chief Justices to new members – she worked on all our affairs with cheerful devotion. The good order and reputation of the Society was her constant concern for over a decade. Nothing was too much trouble for Louise, her skills and professionalism allowed us to transcend many of the limitations of a voluntary association. On my own behalf and on behalf of the Society and the Church, I express our heartfelt gratitude to her for all her splendid work over the last ten years.

Thomas More is a greater figure in the world and the Church today than fifty years ago, or at the time of his canonisation in 1935. In 2000, Pope John Paul II declared him the Patron Saint of elected leaders and parliamentarians. He has long been a patron saint of lawyers. The Holy See has encouraged interest in More as vitally important for both lawyers and those in public life. This evening’s ceremony re-affirms, that under Pope Benedict, the Holy See continues to strongly promote and encourage guilds and societies associated with this great lay saint and martyr for the unity of the Church. More’s Christian ideal of duty, “the King’s good servant but God’s first” has become the Church’s ideal for lawyers and all those in public life.

In closing, I offer on behalf of all of us who have been honoured by these Papal Awards, a renewed pledge of fealty to the Holy Father, in the spirit of St Thomas More and expressed in the words of another great Englishman (John Henry Cardinal Newman):

“And I hold in veneration for the sake of Him alone,
Holy Church as His creation
And Her teachings as His own”.

God bless the Holy Father, preserve him and give him grace and strength as our Vicar of Christ in this troubled world. May St Thomas More bless you all. May he remain with us and give us all fortitude and wisdom.

