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## **The Catholic Intellectual Tradition**

### **Scholarship, Faith, and Higher Education**

Edited by John J. O’Keefe, Gina Merys, and Bridget Keegan

### **Response**

#### **The Catholic Intellectual Tradition in the Context of the Legal Academy**

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[1] When John O’Keefe first asked me to participate in this exploration of the Catholic Intellectual Tradition, I wondered to myself, which one is he talking about? The Jesuit one? The Dominican one? The Franciscan one? Are we staying within Roman Catholicism, or are we going beyond that to the Orthodox, Anglican, Chaldean? Are we talking about the life of the Catholic Intellectual Tradition in the universities and colleges, or down to the grammar and high schools, or out into the laity? Ever the cautious philosopher, John declined to offer parameters.

[2] Thus, I was ruminating on this very question in the Spring of 2009 during a trip to the Kurdistan region of northern Iraq. I was accompanied by Father Ray Bucko, S.J., Chair of Creighton University’s Anthropology/Sociology Department. Our mission was to study the

Kurdish people as a distinct culture, a people upon whom genocide was visited twenty years ago, and a nascent political entity that is trying to carve out for itself a place in the world. We talked to them, got to know them, and even were called upon to consult with them over two days on their new draft constitution.

[3] On our travels, we spent the better part of a day in the Christian settlement of Ankawa, outside the regional capital of Erbil. There we encountered Father Bashar, a Redemptorist from the University of Leuven. In Ankawa, they are building a new Catholic enterprise that spans a large compound containing a half-finished church, dormitory, school, library, and seminary. Militant Arabs in Baghdad had severely persecuted the Christian community after the fall of Saddam – to the point that Catholic priests were being targeted, kidnapped, and murdered.

[4] Consequently, the collective decision was taken to abandon that part of Iraq and resettle in the north amongst the Kurds, who were much more tolerant. Indeed, the Kurdish Finance Minister is Christian. The buildings left in the south were leased to U.S. military and government units so that a small income stream could finance this removal, together with some outside support and the support of the Kurdish regional government.



Figure 1. Father Bashar (right) donates a book in Arabic cataloguing all the current and former monasteries and churches in Iraq to the Creighton University library through Father Bucko (left).

[5] Father Bashar shared their struggles, their move north from Baghdad, their dedication to preserving Aramaic as a living language – which they still teach the children and in which they celebrate their mass. Indeed, they have three hundred children in catechism – which Father Bucko said was more than they have in parts of Omaha!

[6] And it occurred to me, as I thought about John’s charge to talk about the Catholic Intellectual Tradition that I was sitting amongst it – right there. In Ankawa. In the very center of the Muslim world. In the shadow of a new seminary. In the heart of the Middle East, this small group of Catholics was moving forward against all odds; and they were not just content to build a church for worship, they were building schools and stocking libraries, and opening their minds within the context of their faith.



Figure 2. The new Catholic compound under construction in Ankawa, Iraq

[7] And that is just as much a part of the Catholic Intellectual Tradition as professors preaching in echo chambers about Catholic thought within their ivory towers. To limit acknowledgement of the Catholic Intellectual Tradition to academics is to unfairly truncate it and limit its power.

[8] At bottom, the Catholic Intellectual Tradition is an ongoing conversation about truth. Where that happens is not as important as that it happens. This conversation does not have to be contained within theology departments at liberal arts schools. And we must not forget that who engages in it colors the conversation. Indeed, there is the possibility, and perhaps

probability, of competing or clashing versions of the Catholic Intellectual Tradition since it is not owned and “unified” by one group. There is a very recent example of this phenomenon from the legal world – of which I am a part as a law professor.

[9] In the late 1990s, a group of alumni from the law school at the University of Detroit-Mercy broke away to form a new law school called Ave Maria and took half the faculty with them. Led by the Domino’s Pizza mogul, Tom Monaghan, the group amassed enough financing to attract influential conservative Catholic lawyers like former U.S. Circuit Court judge Robert Bork and former Catholic University School of Law dean Bernard Dobranski. The underlying argument was that the Jesuits at Detroit-Mercy were too liberal and not adhering to a properly conservative faith-based teaching of the curriculum. Influenced by a group with Opus Dei connections and motivated by what they called a missionary zeal to animate the Catholic Intellectual Tradition, the founders of the new law school in Ann Arbor, Michigan sought to more fully blend legal education with faith.

[10] This move almost proved the end of the old Jesuit law school in Detroit. At one point, Detroit-Mercy’s entering class was down to only sixty students; but they ultimately rebuilt. Ave Maria is now relocating to Naples, Florida as part of a larger university that has been founded on the same ultra-conservative principles. Who is the proper holder or purveyor of the “Catholic Intellectual Tradition?” Both? Neither?

[11] Indeed, Professor John Breen of Loyola University in Chicago intimates that it certainly can be properly wielded by one or another typology of Catholic legal institution and contends that Jesuit law schools in the United States are falling down on the job. “[A] university cannot honestly claim to be authentically Jesuit unless the intellectual work that it performs involves a serious engagement with the Catholic intellectual tradition. Sadly, some faculty at Jesuit schools may regard the “Catholic intellectual” tradition as a contradiction in terms. Others may sincerely claim to be unfamiliar with the tradition.” (Breen: 405).

[12] He argues that a key element of this alleged decline is a lack of focus in the hiring process. Moreover, he concludes that if a school does not hire the right people to effectuate the Catholic Intellectual Tradition, then it becomes lost and the mission of the school begins to fade. However, Breen’s articulation of this problem seems to envision everyone singing from the same hymnbook – which could be construed as cutting against academic freedom:

No matter how an institution defines its ambitions, talk of “mission” inevitably leads to talk of “hiring for mission.” Though awkward and potentially divisive, if a university is to have any hope of realizing its mission, such a discussion simply cannot be avoided. Indeed, “the issue must be raised explicitly.”

If, instead, a strategy of silence is followed – the path of least resistance – if the suitability of candidates for mission is not discussed, then, over time, a law school will find that its mission has been covertly altered. More correctly, a school will discover that, while its mission statement and other descriptions of Jesuit identity remain in place, the reality of the law school’s operations will have become something quite different. Indeed, the woeful neglect of

hiring for mission is in large part responsible for precisely this situation in Jesuit law schools today.

If the mission of a Jesuit law school is indeed the promotion of justice, attained not only through clinical programs but through an encounter with the Catholic intellectual tradition, then plainly the school must have faculty who are willing to take up this mission, embrace it, and carry it forward. Presumably, many of these faculty members will be Catholic due to their familiarity with the tradition and the likelihood that they will find the mission appealing. However, the faculty needed to advance the mission need not be Catholic, and indeed Jesuit law schools would be poorer institutions if people from other faith traditions were not welcomed and included as colleagues in the project of Jesuit legal education. Still, to be a true colleague requires genuine collaboration in support of the mission, not passive indifference, let alone veiled or open hostility (Breen: 412-14).

This argument also appears to presuppose a rather rigid or correct form of Catholic Intellectual Tradition that should not be tampered with by faculty. Yet the Catholic Intellectual Tradition, both in the legal context and otherwise, is evolutionary in nature. This evolutionary nature is sometimes driven by necessity and can lead to unjust results judged by modern lights.

[13] For example, faced with the problem of legally dispossessing native peoples of their land in the New World, European colonial powers drew upon much older legal theories of dispossession that were used against non-Christians in the Middle East during the Crusades. The central theory of this legal power is the Pope's position as God's designated shepherd with spiritual jurisdiction over all the souls on earth (Williams: 15-21).

The Crusades to the Holy Lands of the eleventh through thirteenth centuries represented the first large scale effort by the Catholic Church and Christian European military leaders to implement the papacy's theoretical universal authority over non-Christian peoples outside Europe. These papally-proclaimed and directed holy wars were fought under the legal justification that as usurpatious "heathens and infidels," the non-Christian peoples who occupied and possessed Jerusalem and the Levant could be conquered and displaced by Christian European princes and their armies, acting on orders from the Pope in Rome (Getches: 43).

Consequently, the Crusades occasioned the drafting of many legal opinions justifying this Papal authority over non-believers – clearly utilizing the Catholic Intellectual Tradition to form probing and fundamental queries that then employed logic as a method to arrive at some sort of resolution. Pope Innocent IV was actually trained as a lawyer, and, as such, he ultimately settled on the question of Papal authority over non-Christians as a natural law concept. In his *Commentaria Doctissima in Quinque Libros Decretalium*, Innocent wrote:

[I]s it licit to invade a land that infidels possess or which belongs to them? \* \*  
\* [T]he pope has jurisdiction over all men and power over them in law but not in fact, so that through this power which the pope possesses I believe

that if a gentile, who has no law except the law of nature [to guide him], does something contrary to the law of nature, the pope can lawfully punish him, as for example in Genesis 19 where we see that the inhabitants of Sodom who sinned against the law of nature were punished by God. Since, however, the judgments of God are examples for us, I do not see why the pope, who is the vicar of Christ, cannot do the same and he ought to do it as long as he has the means to do so. And so some say that if they worship idols [the pope can judge and punish them] for it is natural for man to worship the one and only God, not creatures. Also, the pope can judge the Jews if they violate the law of the Gospel in moral matters if their leaders do not punish them. \* \* \* The Pope can order infidels to admit preachers of the Gospel in the lands that they administer, for every rational creature is made for the worship of God \* \* \*. If infidels prohibit preachers from preaching, they sin and so they ought to be punished. In all the aforementioned cases and in all others where it is licit for the pope to command those things, if the infidels do not obey, they ought to be compelled by the secular arm and war may be declared against them by the pope and not by anyone else (Muldoon 1977: 191-92).

Natural law, of course, was the bedrock on which the great Catholic legal scholar, St. Thomas Aquinas, based much of his work fusing morality and the law together (Shaffern: 148-49).

[14] Innocent's theories were much discussed by lawyers for the Spanish Crown during the era of New World colonization. Dispossessing Native Americans was clearly analogous to dispossessing non-Christian natives of the Holy Land (Muldoon 1979: 348). Indeed, King Duarte of Portugal directly employed this theory in 1436 when seeking the Pope's blessing in Portugal's conquest of the Canary Islands. He wrote that the Island inhabitants:

[A]re not unified by a common religion, nor are they bound by the chains of law, they are lacking normal social intercourse, living in the country like animals. They have no contact with each other by sea, no writing, no kind of metal or money. They have no houses and no clothing except coverlets of palm leaves or goat skins which are worn as an outer garment by the most honored men. They run barefoot quickly through the rough, rocky and steep mountainous regions, hiding \* \* \* in caves hidden in the ground (Muldoon 1977: 54).

The Pope then issued the bull *Romanus Pontifex*, which amounted to a legal edict that was considered binding on all Christian monarchs and which confirmed Portugal's exclusive rights to colonize the Canary Island and Africa. This motivated Spain to look elsewhere for colonization. Upon receiving a description of the native peoples of the New World from Christopher Columbus after his 1492 discoveries, the Spanish Crown immediately dispatched lawyers to Rome seeking the confirmation of Pope Alexander VI for Papal-based Spanish sovereignty over the new lands and people. Pope Alexander obliged with a series of bulls *Inter caetera Divinae* in 1493.

[15] With their title secure, Catholic lawyers for the crown next conceived of novel legal methods, again using the Catholic Intellectual Tradition, for effectuating the colonization

and Christianization of the New World. The process that emerged by 1513 was called the *Requerimiento*, or Requirement. A very early form of what we in America have come to know as the Miranda Warning that is read to people before the police arrest them, the *Requerimiento* was required to be read aloud to any group of Native people discovered by Spanish conquistadors before they could engage in any hostilities. This legal procedural requirement was meant to ensure that both parties understood each other and allowed the Natives a chance to submit.

[16] The *Requerimiento* informed natives that “God had given charge of [humanity] to the Pope in Rome, who had donated their lands to the King and Queen of Spain. All of this was contained in the papal bulls, which the Indians were told they could see if they wished” (Getches: 47). The *Requerimiento* then explained to the Natives as follows:

Wherefore as best we can, we ask and require that you consider what we have said to you, and that you take the time that shall be necessary to understand and deliberate upon it, and that you acknowledge the Church as the ruler and superior of the whole world, and the high priest called the Pope, and in his name the king and queen Dona Juaña our lords, in his place, as superiors and lords and kings of these islands and this mainland by virtue of the said donation, and that you consent and permit that these religious fathers declare and preach to you the aforesaid.

But if you do not if this or if you maliciously delay in doing it, I certify to you that with the help of God we shall forcefully enter into your country and shall make war against you in all ways and manners that we can, and shall subject you to the yoke and obedience of the Church and of their highnesses; we shall take you and your wives and your children and make slaves of them, and as such shall sell and dispose of them as their highnesses may command and we shall take away your goods and shall do to you all the harm and damage that we can, as to vassals who do not obey and refuse to receive their lord and resist and contradict him; and we protest that the deaths and losses which shall accrue from this are your fault, and not that of their highnesses, or ours, or of these soldiers who come with us. And that we have said this to you and made this *Requerimiento* we request the notary here present to give us his testimony in writing, and we ask the rest who are present that they should be witnesses of this *Requerimiento* (Getches: 47; quoting Gibson).

Although the legal process that emerged from this intellectual process appeared quite formalized and, in theory at least, was meant by the Catholic lawyers in Spain to provide a method for the peaceful acquisition of land and dominance, the Spanish conquistadors’ use of the *Requerimiento* was spotty at best. According to Hanke,

A complete list of the events that occurred when the Requirement’s formalities ordered by King Ferdinand were carried out in America, more or less according to the law, might tax the reader’s patience and credulity, for the Requirement was read to trees and empty huts where no Indians were to be found. Captains muttered its theological phrases into their beard on the edge of sleeping Indian settlements, or even a league away before starting the

formal attack, and at times some leather-lunged Spanish notary hurled its sonorous phrases after the Indians as they fled into the mountains (qtd. in Getches: 47).

[17] Meanwhile, in London, Saint Thomas More was writing about a much broader, more inclusive version of the law, albeit within harmonious and hierarchical structures. More eventually found himself in a showdown with Martin Luther over the Catholic Intellectual Tradition. Devoutly religious in his early life, after studying law, More joined an order of Carthusian monks, but ultimately left to marry. For More, law was a tool to be used as a means of achieving societal advancement, and this was, of course, reflected in his most famous literary work, *Utopia*.

[18] Christendom's unity was important for More as a foundation for understanding human nature and achieving just law. Indeed, even today, the Christian tradition forms the basis for criminal and civil law in the United States and the Western world. The moral underpinnings rest there.

[19] And so More found himself commissioned by King Henry VIII as chief rhetorical responder to Luther. In the early 1520s, there were several cross-Channel exchanges between More and Luther revolving around Catholic unity or division and implicitly wielding their own versions of the Catholic Intellectual Tradition against one another (famously laced with many expletives).

[20] Ironically, More and Luther were rather like one another. Marius notes in his biography of More:

We have several times had occasion to note similarities between More and Luther. Both sprang from the same aspiring class; their fathers were city dwellers with high ambitions for their brilliant sons, ambitions they hoped to see fulfilled by putting those sons to the study of law. Luther gave up the law and, much against his father's wishes, entered the monastery. More was powerfully drawn to a clerical career but decided to marry, and acquiesced to his father's wishes and became a man of the law. Both More and Luther had intense sexual drives that troubled their piety. Both felt their own sins as an almost impossible weight of guilt, and both longed passionately for heaven and feared the judgment of God.

In each of them burned an intensity that was often comic but could become fury at the slightest provocation, and each did battle for principle against an uncompromising and ruthless foe. Neither of them could believe that an opponent was honest or free of malice; each assumed that enemies were inspired by the most depraved wickedness. Each found it impossible to compromise doctrinal positions, and each disputed so passionately and at times so viciously for his own version of faith that in the cool detachment of our own religious nonchalance, we may wonder if each might have been driven by the horrifying suspicion that Christianity might be a myth.

And so, these two devout lawyers did battle in rhetorical splendor. Henry rewarded More by later appointing him Lord Chancellor of England – the chief lawyer. This tenure, however,

only lasted three years as More refused to validate Henry's rejection of Papal authority for the king's own familial reasons – a decision that ultimately cost More his life.

[21] All twenty six American Catholic law schools today have a portrait of St. Thomas More hanging somewhere in the building. He is the patron saint of lawyers. Over half of these schools, fourteen to be exact, are Jesuit. The rest are Diocesan, Augustinian, Benedictine, Holy Cross, Marianist, Spiritan, Vincentian, or independent of an Order. What do these Catholic law schools bring to the table by way of the Catholic Intellectual Tradition? What these schools produce is an intellectually rigorous environment where values and moral underpinnings of laws can be debated in a reason-based exchange that is informed by if not driven by faith.

[22] As Bauerschmidt notes in his essay (this collection), the American law school pedagogy is most closely related to the medieval model of academic inquiry. We use the Socratic method in our teaching – so that faculty provide no answers, only questions. It is for the students to discover the answers, much as judges discover the law. Our main task is to guide them to this enlightenment. With their critical thinking skills thus developed, they are better prepared to engage in the legal world of debate and reason.

[23] In the Jesuit articulation of the Catholic Intellectual Tradition, we focus on social justice issues (Taylor). At the law school, our legal clinics operate as a real-world incubator for fostering this goal. The law clinic for indigent people with immigration and landlord/tenant issues is constantly oversubscribed by students eager to help. Our Community Economic Development Clinic has broken new ground in micro-financing for minority-owned businesses in North and South Omaha and has also been successful in litigation directed against agri-business that seeks to overwhelm small family farming operations in out-state Nebraska.

[24] In other words, standing up for those who cannot fight for themselves – this is what we want our students to do, and we lead by example. The Catholic Intellectual Tradition, although we do not acknowledge it as such, certainly motivates this (Bryce).

[25] As a product of state and Jesuit colleges and as a faculty member in both state and Jesuit colleges, I detected a distinct difference in the student body, but not so much in the faculty. Students at the Jesuit schools were much more interested in the “why” question, whereas at the state schools, the emphasis was on getting the answer to pass the test and move on – so much more of an end-game focus.

[26] Does the Catholic Intellectual Tradition manifest itself this way? Because of the different student focus, I had to alter the way I taught in moving from Michigan State University to Creighton University. Is it simply that these types of students self-select? I have no idea. But there is a discernable difference.

[27] So in the legal academy, the Catholic Intellectual Tradition persists. It may not be the same from school to school. But that is because it is flexible and adaptable. Just as it could be used by both More and Luther to clobber one another in the 16<sup>th</sup> Century, it can be used by Opus Dei and the Jesuits to clobber one another in the 21<sup>st</sup> Century. While the interpretations and adaptations of it may differ, the core remains the same.

[28] So too is it adaptable across the academic disciplines. We in one discipline might not recognize its use or even existence in another because our language is different. I certainly do not have the language of a physicist. But the utility of it does not stop there. One can even find it working in the little parish study group. That is the beauty of it. The Catholic Intellectual Tradition exists in all these forms. It persists in an unlikely community, building a seminary and stocking a Catholic library in the mountains of northern Iraq. It persists in the underground Bible study groups clandestinely held in the slums of Beijing. It persists on the East Coast at Boston College, on the West Coast at San Francisco, in the middle here at Creighton, and across the US.

### Bibliography

Breen, John M.

- 2005 "Justice and Jesuit Legal Education: A Critique." *Chicago Law Journal* 36 (Winter): 383-431.

Bryce, C. Michael

- 2007 "Teaching Justice to Law Students: The Legacy of Ignatian Education and Commitment to Justice and Justice Learning in 21st Century Clinical Education." *Gonzaga Law Review* 43: 577-606.

Getches, David H., Charles F. Wilkinson, and Robert A. Williams, Jr.

- 2005 *Cases and Materials on Federal Indian Law*. Fifth edition. Eagan: Thomson-West.

Gibson, Charles, editor

- 1968 *The Spanish Tradition in America*. Columbia: University of South Carolina Press.

Marius, Richard

- 1984 *Thomas More – A Biography*. London: J. M. Dent.

Muldoon, James, editor

- 1977 *Innocent IV, Commentaria Doctissima in Quinque Libros Decretalium, in The Expansion of Europe: The First Phase*. Frankfurt: Mineva.

Muldoon, James

- 1979 *Popes, Lawyers, and Infidels*. Pittsburgh: University of Pennsylvania Press.

Shaffen, Robert W.

- 2009 *Law and Justice from Antiquity to Enlightenment*. Lanham: Rowman & Littlefield.

Taylor, Scott A.

- 2008 "Spirituality and Academic Performance at a Catholic Law School: An Empirical Study." *California Western Law Review* 45 (Fall): 89-137.

Williams, Robert A., Jr.

- 1990 *The American Indian in Western Legal Thought: The Discourses of Conquest*. New York: Oxford University Press.