

CATHOLIC LEGAL THEORY

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A legal culture, a State governed by law, a democracy worthy of the name, are therefore characterized not only by the effective structuring of their legal systems, but especially by their relationship to the demands of the common good and of the universal moral principles inscribed by God in the human heart.¹

The contours of a new movement are visible in the legal academy. A number of legal scholars regularly contribute to the Mirror of Justice weblog, which bills itself as a “blog dedicated to the development of Catholic legal theory.”² On January 8, 2005, coincident with the Annual Meeting of the Association of American Law Schools in San Francisco, the Law Professors’ Christian Fellowship, The Lumen Christi Institute, and the Villanova Journal of Catholic Social Thought sponsored a program entitled, “Taking Christian Legal Thought Seriously.” In 2001, Yale University Press published a collection of essays entitled, *Christian Perspectives on Legal Thought*.³ A number of law schools now offer courses in Catholic Social Thought and the Law, along with more traditional Law and Religion courses. And recently, this journal underwent a name change; after 50 years of publication, *The Catholic Lawyer* was rechristened the *Journal of Catholic Legal Studies*.

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¹ Pope John Paul II, Holy Father’s Address to the National Association of Magistrates on Contemporary Role of the Judiciary ¶ 2 (Mar. 31, 2000) (transcript available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2000/jan-mar/documents/hf_jp-ii_spe_20000331_magistrati_en.html).

² Mirror of Justice, <http://www.mirrorofjustice.com> (last visited Oct.1, 2005).

³ CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (Michael W. McConnell et al. eds., 2001).

For decades, when one talked about legal philosophy or legal thought, one invariably meant secular thought. However, more recently, a number of academics and nonacademic legal thinkers have become interested in pursuing the question of what Catholic thought adds to our discussion of the law. For those for whom this is a new and unfamiliar phenomenon, this essay briefly explores the question what is Catholic legal theory and the related question of what Catholic legal thought can contribute that is distinct from other Christian thought and from secular ways of thinking about the law and the legal system. In so doing, it also speaks to the legitimate place of Catholic legal theory in legal and political discussions in a pluralist society.

WHAT IS CATHOLIC LEGAL THEORY?

When asked in an interview with Zenit News Agency to define Catholic legal theory, Professor Mike Scaperlanda replied that:

Catholic legal theory is an ongoing project of Catholic law professors, legal philosophers and others to participate in drawing on the Catholic intellectual tradition to build a culture that values the dignity of the human person, sees the community as indispensable for human flourishing, and seeks authentic freedom for the person within the community.

Catholic legal theory focuses . . . on the ways that law and legal systems can aid or impede the building of a culture of life.⁴

There are three aspects of Professor Scaperlanda's description on which I want to briefly elaborate because they are critical features of what characterizes Catholic legal theory: the dignity of the human person, the indispensability of community for human flourishing, and the concept of authentic freedom.

Dignity of the Human Person

Catholic legal theory starts from an understanding of the inviolable dignity of every human person, the notion that each person, regardless of race, sex, age, national origin, religion, sexual orientation, employment or economic status, health, intelligence, achievement, or any other differentiating

⁴ Michael Scaperlanda, *Micheal Scaperlanda on a Person-Centered System*, ZENIT DAILY DISPATCH, Feb. 13, 2005, <http://www.zenit.org/english/visualizza.phtml?sid=66302>.

characteristic, has dignity and is worthy of respect.⁵ The basis for asserting the dignity of the human person is the belief that each human being is created in the image of God and that in every person there exists “the living image of God.”⁶

Catholicism speaks of the “equal dignity” of all persons.⁷ That all humans are created in the image and likeness of God makes them equally sacred and precious and invests them with a dignity that is not contingent.⁸ What is in the image of God is human nature, not gender, race, nationality, or any other human attribute and thus, from the side of God’s act of creation, there is no basis upon which to suggest superiority of one group over another.

Flowing directly from the dignity of the human person is the principle of respect for human life, a principle that recognizes that every person, from the moment of conception to natural death—regardless of their stage or state of life—has a right to life consistent with their human dignity.⁹ Life at every stage is precious and must be protected.

Theologian Kenneth Himes recently observed, “Any vision of the good society must have as its foundation a correct view of the human person and the nature of the good life for persons.”¹⁰ The “correct view,” from the perspective of Catholic thought, recognizes this dignity of the human person; “[a] just society can become a reality only when it is based on the respect of the transcendent dignity of the human person.”¹¹ Thus, the central question becomes “how the law and legal systems can best serve the development and flourishing” of the human person.¹²

⁵ See SECOND VATICAN COUNCIL, GAUDIUM ET SPES: PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD ¶ 26 (1965) [hereinafter GAUDIUM ET SPES].

⁶ See PONTIFICAL COUNCIL FOR JUSTICE AND PEACE, COMPENDIUM OF THE SOCIAL DOCTRINE OF THE CHURCH ¶ 105 (2004) [hereinafter COMPENDIUM].

⁷ See *id.* ¶ 144; GAUDIUM ET SPES, *supra* note 5, ¶ 29.

⁸ See CATECHISM OF THE CATHOLIC CHURCH ¶ 1934 (2d ed. 1997) (“Created in the image of the one God and equally endowed with rational souls, all men have the same nature and the same origin. Redeemed by the sacrifice of Christ, all are called to participate in the same divine beatitude: all therefore enjoy an equal dignity.”).

⁹ See *id.* ¶ 1935; JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 57 (1995).

¹⁰ Kenneth R. Himes, O.F.M., *To Inspire and Inform*, AMERICA, June 6–13, 2005, at 7, 8.

¹¹ COMPENDIUM, *supra* note 6, ¶ 132.

¹² Scaperlanda, *supra* note 4.

Indispensability of Community to the Flourishing of the Human Person

That individuals have dignity does not lead to the promotion of individualism, but rather to the notion of living and existing in community. Creation in the image of God implies that human existence is inherently relational; humans are constitutively related to God and others.¹³ From the Christian perspective, the God in whose image we are made is Trinitarian. That is, within the very nature of God is an eternal celebration of loving communion; the relationship between God and humans “is reflected in the relational and social dimension of human nature.”¹⁴ Humans are not solitary beings, but social beings.

Understanding this relational aspect is important. Without it, there might be a temptation to think that dignity of the human person feeds an emphasis on the individual instead of the community. Seeing the human person as fundamentally relational, as existing in communion with God and with others, leads to a very different perspective than a view of the person as autonomous, independent, and separate from others, a perspective that puts primary importance on the good of the individual. It is thus necessary to understand that when the Catholic tradition speaks of human dignity, it understands that the realization of dignity will always be in the context of community.¹⁵

Thus, human beings only flourish in the context of a community; our individual well-being is experienced amidst a setting in which other persons also flourish. From this perspective, two things flow. First, each of us has an obligation to contribute to the common good so that human life can flourish.¹⁶ While the state has a responsibility to safeguard the

¹³ Anthony Cardinal Bevilacqua referred to “the vertical and horizontal dimensions of the Church as communion,” explaining that the “vertical dimension refers to our intimate relationship with God as Trinity” and that flowing from that relationship “is the horizontal dimension which refers to our mutual relationship with one another in and through Christ.” Anthony Cardinal Bevilacqua, Pastoral Implications for the Study of Pastoral Theology Today (Oct. 26, 2003) in ANTHONY CARDINAL BEVILACQUA, LECTURESHIP IN PASTORAL THEOLOGY 17 (2003) (copy on file with author).

¹⁴ COMPENDIUM, *supra* note 6, ¶ 110.

¹⁵ See COMPENDIUM, *supra* note 6, ¶ 145.

¹⁶ *Gaudium et Spes* defined the common good as “the sum of those conditions of social life which allow social groups and their individual members relatively

common good, individuals also bear a contributory responsibility. Second, no description of the common good can exclude concern for any individual; no person or group may be written off as unworthy of our interest. This explains why human rights claims have become an important dimension of the common good in Catholic thought—no one should be denied the basic goods needed to join in the life of the community.

Authentic Freedom

From the inviolable dignity of the human person flow the inalienable rights of all persons to life, liberty, and the pursuit of happiness, as enshrined in our Declaration of Independence.¹⁷ Secular theory translates these into an understanding of freedom that is exclusively a “freedom from,” that is, a freedom from interference to follow individual pursuits, whatever they may be. This is freedom as individual autonomy, with no objective ranking or judgments about individual preferences. Prior to his election as Pope Benedict XVI, Cardinal Joseph Ratzinger characterized this understanding as a “dictatorship of relativism that does not recognize anything as definitive and whose ultimate goal consists solely of one’s own ego and desires.”¹⁸

The Catholic understanding of freedom, what is sometimes referred to as “authentic freedom,” is very different. In contrast with an understanding of freedom that admits of no judgments about individual preferences, authentic freedom is not unlimited; it is bounded by moral truth.¹⁹ Authentic freedom is the freedom to make choices that accord with truth.²⁰ As Pope John Paul II

thorough and ready access to their own fulfillment . . .” GAUDIUM ET SPES, *supra* note 5, ¶ 26.

¹⁷ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

¹⁸ Cardinal Joseph Ratzinger, Homily of His Eminence Card. Joseph Ratzinger Dean of the College of Cardinals (Apr. 18, 2005) (transcript available at http://www.vatican.va/gpII/documents/homily-pro-eligendo-pontifice_20050418_en.html).

¹⁹ See GAUDIUM ET SPES, *supra* note 5, ¶ 17 (“[A]uthentic freedom is an exceptional sign of the divine image within man.”).

²⁰ The *Catechism of the Catholic Church* speaks of human freedom as “a force for growth and maturity in truth and goodness; it attains its perfection when directed toward God, our beatitude.” CATECHISM OF THE CATHOLIC CHURCH, *supra* note 8, ¶ 1731.

observed, in *Centesimus Annus*, that “freedom attains its full development only by accepting the truth.”²¹

From the perspective of Catholic thought, freedom without truth is no freedom at all. “In a society in which truth is neither mentioned nor sought, every form of authentic exercise of freedom will be weakened, opening the way to libertine and individualistic distortions and undermining the protection of the good of the human person and of the entire society.”²²

Rather than “freedom from,” authentic freedom is “freedom for.” It is freedom to grow as a human being by making choices “consistent with the true good.”²³

THE VALUE OF ARTICULATING A CATHOLIC LEGAL THEORY

The notions expressed by Catholic legal theory—the dignity of the human person, the indispensability of community for human flourishing, and the concept of authentic freedom—clearly contribute something to our legal discourse. They provide a rich basis for claims of equality and human rights, for example, as well as a means for curbing excessive individualism where that interferes with the common good. Rejecting the pseudo value-neutrality permeating secular thought, the foundations of Catholic legal thought also provide a framework from which to

²¹ JOHN PAUL II, ENCYCLICAL LETTER *CENTESIMUS ANNUS* ¶ 46 (1991) [hereinafter *CENTESIMUS ANNUS*]. Pope John Paul II elaborated:

Since man’s true freedom is not found in everything that the various systems and individuals see and propagate as freedom, the Church, because of her divine mission, becomes all the more the guardian of this freedom, which is the condition and basis for the human person’s true dignity.

Jesus Christ meets the man of every age, including our own, with the same words: “You will know the truth, and the truth will make you free.”

These words contain both a fundamental requirement and a warning: the requirement of an honest relationship with regard to truth as a condition for authentic freedom, and the warning to avoid every kind of illusory freedom, every superficial unilateral freedom, every freedom that fails to enter into the whole truth about man and the world.

JOHN PAUL II, ENCYCLICAL LETTER *REDEMPTOR HOMINIS* ¶ 12 (1979) (quoting John 8:32).

²² CONGREGATION FOR THE DOCTRINE OF THE FAITH, DOCTRINAL NOTE ON SOME QUESTIONS REGARDING THE PARTICIPATION OF CATHOLICS IN POLITICAL LIFE ¶ 7 (2002), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20021124_politica_en.html; see also *CENTESIMUS ANNUS*, *supra* note 21, ¶ 46 (“In a world without truth, freedom loses its foundation and man is exposed to the violence of passion and to manipulation, both open and hidden.”).

²³ See COMPENDIUM, *supra* note 6, ¶ 135.

counter “[t]he image of the lawyer as a zealous or even blind advocate, committed to furthering the client’s interests regardless of considerations of truth or justice,” and “the impression that lawyers must act without fundamental ethical commitments.”²⁴

That does not mean that looking at a question through the lens of Catholic legal theory will always produce a different legal result than one might have obtained through an alternative lens. Consider for example, the indispensability of community. As I have discussed in great length elsewhere,²⁵ all religions support communitarian values, pointing “the way beyond ourselves to a deeper connection, both to others and to something sacred, immortal, and timeless . . . [motivating people] toward a sense of wholeness from which they are inspired to serve humanity.”²⁶ Thus, the notion of the common good and of the need for all human institutions to promote that common good is not unique to Catholic thought.

Moreover, there will not necessarily be a single Catholic legal theory answer to all questions. There will be differences in that different scholars will make different prudential judgments and come to different conclusions about where Catholic legal theory leads. This has been very evident in the corporate area, for example, where there is a significant difference among

²⁴ Mark A. Sargent, *We Hold These Truths: The Mission of a Catholic Law School*, COMMONWEAL, Apr. 25, 2003, at 14, 14–16 (arguing for the use of our Catholic heritage as “key to educating lawyers who can successfully integrate their professional identity with their deepest moral and religious convictions” and as a means of communicating the “falseness and soul-destroying traits of much of what currently drives the law world: lust for material wealth, pursuit of personal ambition at the expense of others, perfection of craft with indifference to the consequences, and a cynical belief in the irrelevance of justice or the importance of truth”).

²⁵ See Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 847–53 (2004) (describing a focus on interdependence and oneness of human beings, rather than a focus on individualism, as a common thread across different religions).

²⁶ Lewis D. Solomon, *Reflections on the Future of Business Organizations*, 20 CARDOZO L. REV. 1213, 1221–22 (1999); see also John M. Russell, *Gerald May on Unitive Experience: Oneness and Self-Identity in Spirituality*, 15 J. RELIGION & PSYCHICAL RES. 127, 128 (1992) (quoting May’s definition of spirituality as referring to “‘experience in which one feels at one with creation, deeply meaningful, and in pervasive union with all things,’ ” and observing that “through spirituality we experience meaning and oneness”); Martin Buber, *God and the Soul*, <http://radicalacademy.com/adiphiljewishessay5.htm> (last visited Oct. 1, 2005) (all mysticism, regardless of particular religious tradition, shares an experience of unity).

Catholic legal scholars about what Catholic thought contributes to our vision of the corporation.²⁷

However, the fact that Catholic legal theory does not necessarily yield different answers (or one clear different answer) from other lenses does not take away from the value of the alternative means it uses to reach those answers. A methodology that is focused on what it means to be human, on that which gives our lives meaning, is itself valuable. Catholic legal theory aims to place in our debates about our legal and political institutions those principles which allow the flourishing of the human person, which allow human institutions to aid in our growth as persons. In some cases that may result in our giving a richer rationale for accepting conclusions that might have been reached on different grounds. In others it may cause us to rethink decisions we have made about our human institutions, particularly in those areas where the values championed by Catholic legal theory are ignored in political and legal discourse.²⁸ In either event, however, it keeps our attention focused on our authentic needs as humans, “promot[ing] integrity by clarifying the goals or ends to which human beings are called to aspire, and the ways of living toward those ends that follow the Gospel,”²⁹ helping to change the cultural norms and ethos out of which we operate.

Let me specifically address the question of the introduction of Catholic legal theory in discussions that take place in a pluralistic society.³⁰ I raise the question because it is one thing

²⁷ See, e.g., Mark A. Sargent, *Competing Visions of the Corporation in Catholic Social Thought*, 1 J. CATH. SOC. THOUGHT 561, 562 (2004) (describing two competing notions, classifying one as communitarian and the other as an emphasis on the importance of economic liberty to human prosperity).

²⁸ As Professor Charles Clark observed, Catholic Social Thought represents values that are important to the functioning of a peaceful and just society, but which are not promoted by the vested interests of the powerful, nor are the natural outcome of the “invisible hand” of the market. It speaks for the voiceless and powerless, demanding that their interests are promoted.

Charles M. A. Clark, *Bringing Realism to Management Education: Contributions from Catholic Social Thought*, 25 REV. BUS. 6, 7 (2004).

²⁹ HELEN J. ALFORD, O.P., & MICHAEL J. NAUGHTON, *MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION* 19 (2001).

³⁰ This is a particularly apt time to be considering questions such as this; with the confirmations of John Roberts as Chief Justice of the United States and Samuel Alito as an Associate Justice, there are five Catholics sitting on the Court.

to say that being a follower of Christ requires avoiding a separation between faith and everyday life and that Catholic legal theory is an aid to those who adhere to the Catholic faith. But the claim made by those of us engaged in this endeavor is that Catholic legal theory has something meaningful to say in a pluralist society, that Catholic legal theory has something relevant to say to people who are not Catholics.

The introduction of the lens of Catholic legal theory does not, as many criticisms would seem to suggest, introduce individual religious values into something that is non-neutral. Although many behave as though our legal and political systems are divorced from any underlying theological and ethical worldview—viewing the set of principles from which we derive our notions of regulation as flowing from a neutral or rational source—this supposed neutrality is a fiction. “Every political theory promotes a particular kind of person even if it denies doing so.”³¹ Thus, we cannot have law or talk about law divorced from some vision of the human person. This is why I referred earlier to the “pseudo” value-neutrality of secular thought.

As I have explored in greater length elsewhere,³² much of the prevailing secular legal discourse is clearly rooted in a particular vision of the human person that is not morally non-neutral. For example, a significant secular jurisprudential lens is that of law and economics, a theory that is based on a view of the individual as self-existent and separate, a view that generates a vision of social welfare as meaning no more than the maximization of the preferences of those self-existent individuals.³³ Equally, our secular thought is characterized by a view of freedom as meaning no more than freedom *from* interference. As discussed earlier, Catholic legal theory is based on a different underlying view of the human person, one that sees the inherently social nature of the person and the fundamental interrelatedness of all persons and things of the world. It also has a very different view of

³¹ Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 722 (2003); see also Stephen M. Bainbridge, *Competing Concepts of the Corporation (a.k.a. Criteria? Just Say No)* 5 n.5 (Univ. of Cal., L.A. Sch. of Law, Law & Economics Research Paper No. 05-1, 2005), available at <http://ssrn.com/abstract=646821> (observing that “there may be no such thing as truly neutral priors” and that for normative discussions to be useful, non-neutral priors must be disclosed and examined).

³² See Stabile, *supra* note 25, at 847.

³³ See *id.* at 857–59.

freedom. The vision of the human person underlying Catholic legal theory does not replace neutral premises with non-neutral premises; it merely substitutes a different underlying theological and ethical worldview for the prevailing secular one.

Examples abound demonstrating the extent to which the secular viewpoint dominates how people approach political and legal questions. A recent piece by one law professor characterized Senator Rick Santorum's support for abstinence-only education as "nothing but education in religious values, utterly divorced from social reality," citing it as an example of Santorum's "choosing a religious agenda over the public good."³⁴ As Rob Vischer responded on Mirror of Justice, while one may agree or disagree with the effectiveness of abstinence-only education, "since when did a presumption that junior-highers and high-schoolers should not be having sex become 'nothing but education in religious values?'"³⁵ The point is not whether one agrees with Professor Vischer or Professor Hamilton, but rather that Professor Hamilton sees no need to defend her vision of the common good, assuming it must be superior to a vision of the common good that may have some relation to religious values.

Whether or not one ultimately accepts the vision of the human person and her relation to God and others that underlies Catholic thought or the vision underlying secular legal theory, it is necessary to address the fact that there are alternative visions that lead to different views of what promotes social welfare than that which currently dominates secular legal thought. We cannot avoid making a conscious choice about which vision is the one on which we should base our legal judgments. Catholic legal thought helps highlight the need to make that choice, and it does so by offering a "more human way of constructing law and legal theory."³⁶

³⁴ Marci Hamilton, *How Senator Rick Santorum, In Acting for His Church, Persistently Fails to Consider the Larger Public Good* (Aug. 11, 2005), <http://writ.news.findlaw.com/hamilton/20050811.html>.

³⁵ See Posting of Rob Vischer to Mirror of Justice, http://www.mirrorofjustice.com/mirrorofjustice/2005/08/hamilton_defend.html (Aug. 12, 2005, 08:57 EST) (quoting Marci Hamilton, *How Senator Rick Santorum, In Acting for His Church, Persistently Fails to Consider the Larger Public Good* (Aug. 11, 2005), <http://writ.news.findlaw.com/hamilton/20050811.html>).

³⁶ Scaperlanda, *supra* note 4.

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Some would happily ignore “the possibility that any insight might be gained from a religious perspective.”³⁷ Their temptation is to reject the vision of the human person offered by Catholic legal theory merely because it comes from a religious source. But there is a truth and the truth matters. It is neither justifiable nor sensible to ignore the possibility of the truth advanced by a religious perspective without examining the value itself. Catholic legal theory demands that the underlying (often unarticulated values) be examined and offers a developed and rich view of the human person as a serious alternative.

³⁷ See ALFORD & NAUGHTON, *supra* note 29, at 10. The intellectual tradition that has shaped much of Western thought is based on a suppression of any talk of God and religion.