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ROMAN CATHOLIC LAWYERS IN THE UNITED STATES OF AMERICA

Thomas L. Shaffer[†]

My agenda here is Roman Catholics in the American legal profession, from George Higgins's Jerry Kennedy to Judge Samuel Alito's joining the four other Catholics to make a majority on the federal Supreme Court. (I thought, as I said this in Washington, just before the Senate confirmation hearings in January 2006, that some in attendance may not have thought about this, and may have wanted to leap to their feet and phone their senators.)

Begin with ethnographic narrowing: When I talk about Catholic lawyers in the U.S., I mean to talk about descendants of the late immigrants—that is, people whose ancestors came here between the end of the Civil War and the end of World War I, when Congress stifled European immigration. I am talking, closer to home, about the twenty-five or thirty American law schools that were set up to provide vertical mobility to the children and grandchildren of the late immigrants. There were, to be sure, Catholic lawyers in this country before the late immigrants and the Catholic law schools. Roger Taney was a Catholic, although we don't brag about him much. Lord Baltimore no doubt had a few Catholic lawyers in tow when the Carrolls and the Calverts came to Maryland in 1734. But the immigrants and the Catholic law schools have provided most of the numbers; they are at the heart of the lawyers I am thinking about here. "A people within a people," as David Gregory puts it.

To talk about the German, Irish, Italian, Polish, and Slavic immigrants is to talk about pervasive WASP bigotry, which has not disappeared and probably won't disappear, not even with five Catholic justices presiding in Washington. From the beginning, my colleague John McGreevy, an historian, wrote recently: "[A]nti-Catholicism is integral to the formation of the United States":

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—Andrew Greeley reported last September in *Commonweal* a survey of American attitudes toward Catholics and found that more than half of America believes Catholics do not think for themselves.

—Anti-immigrant folklore said that Catholics, even when they think, don't think very well. The *New Republic* wrote in the 1920s, when the late immigrants were settling in:

The real conflict is . . . between a culture which is based on absolutism and encourages obedience, uniformity, and intellectual subservience, and a culture which encourages curiosity . . . [and] verification by facts and a consciousness of the processes of individual and social life as opposed to conclusions about it.

—Murray Sperber's book *Shake Down the Thunder*¹ locates the issue where it should be located. His book, according to Jason Kelly, writing in the *South Bend Tribune* last November, "analyzed the social context that allowed [anti-Catholic bigotry] to thrive," as Knute Rockne's "savvy built Notre Dame football into the iconic image of Catholic America, particularly Irish immigrants, in an era of blatant discrimination." Coach Rockne, and Ronald Reagan playing the Gipper, "provided a bridge between Al Smith's loss in the 1928 presidential campaign and John Kennedy's victory in 1960," as it "helped alter the portrayal of Catholics in the popular culture . . ." You begin with French priests and American Indians in Northern Indiana in the 1840s and you end with Bing Crosby and Barry Fitzgerald in *Going My Way*. All thanks to Notre Dame football.

It has, of course, never been that easy or that clear, and it was far from over in 1960. I did my basic training for the legal profession in the largest law firm in Indiana. Until I got there in 1961, it had no Catholics (no Jews either, needless to say—no black people, not even to sweep the floor—and no women except secretaries and a librarian). A partner from the firm came to Notre Dame to recruit, for the first time, seeking a new associate (male, white) after Catholic clients began to notice who wasn't in the office, perhaps also to suspect that the absence of Catholics had to do with the fact that the firm's founder was said to have been in the Klan—and not in response either to President Kennedy's ascension or football in South Bend. I was treated very well by the firm—no complaints. It may have helped that the firm inadvertently recruited another Catholic that year, at Indiana University. The firm has Jews and women lawyers now; we Catholics led the way.

1. Murray Sperber, *Shake Down the Thunder* (Ind. U. Press 2002).

* * *

Second observation: Catholic lawyers are less likely to find moral guidance in the profession's official rules than they are to find it in the Church or in their families and neighborhoods—or in Ann Landers. My daughter Mary and I, for our book *American Lawyers and Their Communities*,² noticed that Catholic lawyers are closer to their immigrant ancestors than other lawyers are. (I think of Mario Cuomo.) They are less likely—certainly the Irish—to feel cozy about England, about English law and lawyers and judges—about professional regulation that owes itself to England as much as the Rule Against Perpetuities does. (Think again of George Higgins's Boston street lawyer Jerry Kennedy, or of Paul Newman facing James Mason in *The Verdict*.)

We write of one nineteenth-century Italian immigrant who wrote home to say that Americans are “pickled in the sour juices of Puritanism.” He probably now has grandchildren who are lawyers, who might say the same thing, who might think of their rich Italian moral heritage and say, as their grandfather did, that WASPs eat their fruit green—*senza sapore*. This is not to say that Catholic lawyers are less likely to follow the Rules of Professional Conduct. It is to say that they are less likely to be solemn about the rules, more likely to realize, as Sandy Levinson puts it, that the legal profession in this country is a regulated public utility—and more likely, when it comes to ethics, to find their morals elsewhere.

* * *

Third observation: Catholic lawyers are more likely than Protestants, perhaps almost as likely as Jews and lawyers in Islam, to be communitarian. Catholic lawyers are less charmed by the Enlightenment than other Christians have been, less attracted to lonely individualism than the typical hero or heroine of an American novel, more inclined to cherish in their lives what political scientists call “mediating institutions”—especially to cherish their local communities, their parish communities, and their own families, as distinguished from American families described from Virginia Beach and Colorado Springs.

My colleague, Father John Pearson, C.S.C., preaching last January in the Notre Dame campus church on *I Samuel*, chapter three, and the first chapter of *John's Gospel*, said:

2. Thomas L. Shaffer & Mary M. Shaffer, *American Lawyers and Their Communities* (U. Notre Dame Press 1991).

One thing we believe and have believed from the beginning is that our journey to God is not a solo one. You and I, or you and those close to you, or you and your neighbor—we are walking the way together. As we see how one another lives, as we sense how each one of us sees or doesn't see, hears or doesn't hear the Lord, it changes the way we see or don't see, hear or don't hear. We help each other along the way or we impede one another along the way The disciples who invited themselves to see where Jesus was staying and came to see as Jesus told them to, became his closest disciples, by being with him and seeing him and participating in his life. Samuel lived in the temple and only after a time did the Lord speak to him, and he needed the help of Eli to identify the voice as the Lord's. He listened. He followed. He changed the people of Israel and one day would choose David to be their king.

Which is to say that Catholic lawyers may turn more than other lawyers to what the Lutheran theologian Gilbert Meilaender described as their "first moral order," a "tradition of conduct . . . the form of life into which we are immersed . . . the sea in which we float and then, perhaps, swim." Maybe we Catholics turn less, or less instinctively than the descendants of the Reformation do, to a second moral order of analysis, logical reasoning, criticism, and lonely moral choice. The contrast might explain why Catholic lawyers have tended to be uncomfortable with the American profession's exaltation of the morals of gentlemen. (Think, again, of *The Verdict* or of Higgins's Jerry Kennedy. If one wants to understand Catholic lawyers, she needs to read Higgins. He, like his hero J.K., was an Irish Catholic Boston street lawyer and a graduate of the Boston College Law School.)

* * *

I think such observations about Catholic lawyers can be defended, but defending them uncovers tension. For one thing, Catholic lawyers are apparently less interested in the substantive social teaching of their Church than professors in Catholic law schools (such as Bob Rodes, Vince Rougeau, Rick and Nicole Garnett, Amy Uelmen, David Gregory, Mark Sargent, and I) might hope they would be. If my impression about that is right, lawyers are among American Catholics in general. They are in the same moral soup, as Jerry Kennedy would put it:

—My late colleague Bill Lewers was a convert to Catholicism. Someone once asked him what attracted him to the Catholic Church. Bill said it was because he had heard about the social teaching of the Church. He said he later found out he was the only one who had.

—Not long ago, the U.S. Catholic Bishops instructed the country—not just Catholics, but all Americans of good will—against pre-emptive war and the first use—or, perhaps, any use—of nuclear weapons. The folklore in Washington was that the Pentagon then got worried about the Catholic naval officers who had their fingers on the buttons in nuclear submarines, worried that these Catholic guys would not fire the nukes when they were told to. The conclusion, after a while, was that the Pentagon needn't have worried. As my sometime colleague Father Jim Burtchaell put it,

[W]ithin a few weeks . . . [the Pentagon] realized that there was no risk at all. Catholics weren't paying attention to the Bishops because the Bishops had been trying so long to preach to the Oval Office that they stopped preaching to the Catholics . . .

That contrast describes the tension: Jim Burtchaell's nuclear-sub example shows, first, how important it has been to Catholic lawyers—the children of immigrants—to be patriotic, and, second, where Catholic Social Teaching has been, and not been, directed from on high.

—The more evident tension is between the internationalism and the creeping pacifism of the modern Roman Catholic Church and the patriotic inheritance of American Catholic children. The tension shows up at Sunday mass, as a seasoned pastor tells his new assistant, fresh from the seminary: "Don't ever ask people to choose between their country and their church." That pastor, quoted in *America* magazine, drew on an old strain in immigrant Catholicism, something my colleague Rick Garnett identified as the notion that there is "a fundamental harmony between Catholicism and the United States."

—So taught Orestes Brownson, eminent Catholic University scholar, buried in the floor of the parish church at Notre Dame. According to my colleague McGreevy (see Garnett review cited at the end of this article), Brownson urged immigrants to be "nationalized as well as naturalized, and to merge themselves in the great American people." And, McGreevy says, Brownson once wrote that "without the Roman Catholic religion, it is impossible to preserve a democratic government, and secure its free, orderly, and wholesome action." Over the main door of the church where Brownson is buried is carved the inscription: "God, Country, Notre Dame."

—Walker Percy, one of the most piercing of American Catholic writers, described the Catholic tension between faith and patriotism sarcastically when he imagined what he called the American Catholic Church, with headquarters in Cicero, Illinois, "which emphasizes property rights . . . and plays the Star Spangled Banner at the elevation"

of the Host.

—Catholic Social Teaching illuminates the tension as it also sharpens it with modern teachings on subsidiarity and solidarity, teachings illustrated not so much in theological discourse as in David Gregory's recent exposition of the radicalism of the theologically conservative Catholic Dorothy Day. Her practiced insistence was on human dignity and community (her way of seeing subsidiarity) and on solidarity as what she called "seeking one another out." Professor Gregory shows how such social teaching came for Day not from Marxism but from *Matthew* chapters 5 and 19, and *Mark* chapters 12 and 21. "As long as the great mass of workers have to live in unsanitary, unheated tenements," she wrote in *The Catholic Worker* in 1939, "no one has a right to his comfort while his brother is in misery." And to her critics in the American Roman Catholic Hierarchy, she said, "No one in the Church can tell me what to think about social and political and economic questions without getting a tough speech back"

* * *

Among us Catholic law teachers, the sad part of Jim Burtchaell's observation about patriotism and the Bishops is that it tends to push aside the contribution Catholic Social Teaching might make to what we have to teach about the moral lives of lawyers and their clients. That contribution should be prominent in Catholic law schools, and I think it does show up, if only occasionally, among Jewish and Christian lawyers who teach in those schools, as it does among those who teach elsewhere and take a chance.

What has happened for me in this respect, in the recent past (fourteen years), has happened in the Clinic in my Catholic law school. When we have been at our best, our Clinic has brought together people who need legal help and law students—most of them bright, self-aware Roman Catholics—who want, for religious reasons, to help poor people. Our student-lawyers don't talk much about Catholic Social Teaching, but they act as if they know about it. The practice is ahead of the theory—not always a bad thing in a university, and a good reason for having clinics.

Beyond that, the point for legal education would be that our social teaching is not only a *Catholic* thing. Cardinal Dulles wrote recently that

no other institution has developed a body of social teaching rivaling that of the Catholic Church, in depth, coherence, and completeness . . . directed to all persons of good will It

presupposes only that its addressees are interested in building a just and peaceful society on earth.

I think of Professor Marie Failinger's study of religiously affiliated law schools and of the contrast she drew between our pilgrimage and our exodus. My faithfully Lutheran friend Marie will not be astonished to notice that she has pointed out how to be a Catholic and a lawyer in America: "[W]e are all recipients of the promise," she wrote.

To the extent that we feel stranded in the wilderness, our hope is not in our own ability [to] change our circumstances, but our hope is in Yahweh's ability to deliver, to keep His promises to us The justice of our institutions is thus not dependent on how successful we ourselves are in coming up with fair . . . policies or good environments It rests on how willing we are to heed the commands of God to do justice, seek mercy and walk humbly in the place where we find ourselves to be.

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