

1997

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## Recommended Citation

Gerard V. Bradley, *Catholic Faith and Legal Scholarship*, 47 *J. Legal Educ.* 13 (1997).

Available at: [https://scholarship.law.nd.edu/law\\_faculty\\_scholarship/761](https://scholarship.law.nd.edu/law_faculty_scholarship/761)

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# Catholic Faith and Legal Scholarship

Gerard V. Bradley

The most obvious and the most personally important way in which scholarship reflects faith knows no distinction between Protestants and Catholics. For all of us who are Christians, the life of the scholar is our vocation, our contribution to the building of the Kingdom, our share in the church's mission. We did not just stumble upon this life of scholarship, or choose it because it is interesting, exciting, or fun (though sometimes it is). Rather, we discerned through prayerful reflection upon our gifts, our opportunities, and the needs of our communities that God called us to serve others by striving to know, and to communicate by teaching and publication what we come to know. Perhaps some dramatic experience like that which befell Saul on the road to Damascus pointed us on the scholarly way. No matter. The discovery occurred.

What of the questions we choose to engage? Again, it seems to me that Catholics and Protestants alike are properly influenced by the scholarly state of the art, by a senior colleague's advice, and by what the elite law reviews seem to want. Partly, it is a matter of what interests us: that some question seems compelling is quite possibly evidence of God's plan for us. But this feeling of being grabbed must be subordinated to a calm consideration of what, here and now, is worth figuring out because it will help build the Kingdom.

Is that the end of the way our faith influences our scholarship? Is there anything between the covers (after we have identified a topic) that distinguishes the *Catholic* legal scholar's articles, book chapters, monographs? Where on the pages are the Roman fingerprints? Let us leave aside the more obvious telltale signs: a citation to Aquinas or to a document of Vatican II; a decidedly pro-life perspective on abortion by someone named Murphy whose middle initials are F. X.; an article on social justice by someone named Gaffney.

There have always been some deep divergences in Catholic and Protestant perspectives on some perennial legal and constitutional questions. Protestants and Catholics have contended in America, for instance, over the definitions of "liberty of conscience" and "spiritual" or "religious" liberty. To Protestants "liberty of conscience" denoted individual interpretation of Scripture and the direct unmediated encounter of the soul with God through grace. It has also

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commonly been an anti-Catholic slogan expressing hostility especially to the priesthood. It stood, relatedly, for Bible reading in the public schools.<sup>1</sup>

“Spiritual” or, less commonly, “religious” liberty for a very long time meant to American Catholics about the same thing as “ecclesiastical” liberty: the immunity and freedom of the church in society. To Protestants, especially to Calvin, the “spiritual” in earthly manifestation was the person and his conscience. The church was an ephemeral teaching instrument, not the ark of salvation. Indeed, to most Protestant Americans the “ecclesiastical” has rather been the enemy of the genuinely “spiritual.” To Catholics, the two have been harmonious, sometimes practically identical.

These differences are now much less salient than they were a generation ago. Why? Partly due to the increasing Protestantization of American Catholics, and partly because Catholics and Protestants have more in common these days, thanks to a common enemy in secularism.<sup>2</sup> (Indeed, as I write, there is a burgeoning controversy within the Catholic Church over whether Catholics should make common political cause with Ralph Reed’s Christian Coalition.) But Catholics still have a take on religious liberty that Protestants are unlikely to share. The law of church and state is determined by *Everson v. Board of Education*’s<sup>3</sup> neutrality principle: public authority may not promote or foster religion, even if it does so with no partiality among religions.<sup>4</sup> This norm of public morality cannot be squared with the authoritative teaching of Vatican II on religious liberty, *Dignitatis Humanae*, which holds that it is a duty of public authority to foster and encourage the religious life of the people.<sup>5</sup> My point here is *not* that Catholics must hold, somehow as a matter of faith or morals, that the First Amendment contains this teaching. It would be a bit surprising if the First Amendment as originally framed by Protestants coincided with present Catholic teaching. (Surprise! I am prepared to argue that it does.) My point is that Catholics should see the Court’s interpretation of the First Amendment as inimical to the common good.

1. “Relatedly” because for a very long time (at least) the common Protestant criticism of the priesthood was rooted in the Protestant commitment to “Sola Scriptura”; that is, Protestants claimed that the Catholic clergy obscured the truth. Very basically, Protestants commonly thought that they could save children from the priesthood by exposing them to the Bible in school—the King James version!
2. See the joint statement of a prominent group of Catholics and evangelical Protestants, Evangelicals and Catholics Together: The Christian Mission in the Third Millennium, First Things, May 1994, at 15.
3. 330 U.S. 1 (1947).
4. *Id.* at 15–16.
5. *Dignitatis Humanae*, a solemn declaration of the Second Vatican Council subscribed to by the many church fathers present, articulated a basic human right to immunity from coercion in religious matters. Even so, it expressly enjoined those exercising public authority to foster the religious life of the people, in ways that do not violate the right to immunity from coercion. Evenhanded state aid to religious schools is one thing that the fathers may have had in mind. Under the Supreme Court’s interpretation of the Establishment Clause, direct assistance to the religious school is unconstitutional. Indirect assistance (say, tuition tax credits) is highly problematic.

Another perennial of American constitutionalism is Madison's observation in *Federalist* 51: if men were angels, no government would be necessary. To be sure, angels have no defect of will. No sanctions are necessary to induce angels to observe the law. If "sanction" is a necessary part of a proper definition of law, then Madison is right. But "sanction" is not a necessary part of the proper definition of law; much less is law helpfully defined as "force" or "violence." For even angels have coordination problems. Someone has to identify George Bailey's (*It's a Wonderful Life*) need as compelling and well suited to the talents of the yet-to-be-winged angel Clarence. And at Armageddon, one supposes, angels will have to be directed by someone in authority. (The archangel Michael?) Cooperation, even among angels, requires an authoritative stipulation of how the common aim is to be achieved. These authoritative directives for *how* to cooperate for the common good are properly called "laws." I am inclined therefore to disagree with Madison. I am, finally, inclined to think there is a distinctly Protestant influence upon *him*, and a distinctly Catholic influence on *me*.

The leading distinguishing feature of Catholic legal scholarship is still probably a commitment to "natural law." In a loose sense, the Catholic Church has been for a generation or so the bulwark of an objective morality, including some exceptionless moral norms, so much so that if next week you said to a colleague that you met a natural lawyer at the AALS meeting, I dare say your colleague would assume that the person you met was Catholic. In my view, the most interesting work in natural law theory—indeed, in jurisprudence—is being done by a handful of Catholics. I refer to the new classical theory of practical reason conceived and articulated by Germain Grisez and brought into legal scholarship most notably by John Finnis.<sup>6</sup> This new natural law theory has yet to command the scholarly interest it deserves outside the church. Within the church it is well known, but controversial. One reason for its controverted status within the church is the orthodoxy of Grisez, Finnis, and their collaborators, especially with regard to church teachings on the morality of contraception, sodomy, and abortion. These are issues upon which there is much dissent among Catholic intellectuals in America. Still, this body of work is, in my judgment, the most important work in legal scholarship today.

How is the natural law related to Kingdom building? How for that matter does the scholar help to build the Kingdom? How, that is, is scholarship a *vocation*? The scholar believes that one can know, and that knowing is worthwhile in itself, even if it also has instrumental value. Scholarship is a community effort; no one scholar working alone can accomplish much. The scholar is thus required to work with others, and that means that truthful communication is essential to his or her vocation.<sup>7</sup> And, for the Catholic scholar at least, whatever truths one comes to know by scholarly investigation do not, because

6. Grisez, *The Way of the Lord Jesus: Christian Moral Principles* (Chicago, 1983); Finnis, *Natural Law and Natural Rights* (New York, 1980).

they cannot, conflict with the truth made available to us by God's revelation. Reality, in the end, is one, and it is not inconsistent. Someone who affirms natural law implicitly affirms free choice (an endangered species in legal scholarship) and confirms St. Paul's belief that God has written a law into the human heart. That is, natural law is distinguished partly by its commitment to universal, categorical moral norms.<sup>8</sup>

As the Holy Father made so powerfully clear in the encyclical *Veritatis Splendor*, when we preach the Gospel we preach the good news of salvation through Jesus. It is "precisely on the path of the moral life that the way of salvation is open to all."<sup>9</sup> The moral truth is the path to salvation for those who, through no fault of their own, have not embraced the faith. Doing scholarly work on natural law theory, and bringing natural law theory to bear upon *any* topic in legal scholarship, thus can be evangelical work.

The point of scholarship is to articulate, and thereby share, the truth as one has come to understand it. Scholars must respect the integrity of the discipline in which they work and the general canons of scholarly inquiry. In addition, the Catholic scholar must immerse himself in the Catholic tradition, especially in authoritative teachings on morals and social doctrine. Only *after* such immersion can one make competent judgments about the tradition's relevance to one's scholarship. I do not suppose that there is invariably a Catholic take on legal issues—that one is guaranteed to discover, for example, a "Catholic view" of letters of credit or the Sherman Act. Maybe there is. I don't know. I don't know because I have not given the matter any thought in light of the Catholic tradition. Only someone who knew the tradition and had investigated the relevant legal materials in light of that tradition according to the relevant norms of scholarly inquiry would be qualified to say.

*Only* by immersing oneself in the tradition can one function at the minimum level of Catholic scholarship: one must never deny any proposition the denial of which entails the falsity of some truth of the faith, including truths accepted upon the basis of authority. Note well: even propositions accepted because they are taught—i.e., believed on the basis of authority—are held by Catholics as *true*. And here I refer *not* to rules and disciplines which on their own terms (rules on fasting, liturgical rhythms) apply only to the faithful. I refer to norms expressed in such form as *No one may* (for example) *commit adultery*. Only by knowing the tradition will one avoid proposing to the scholarly community *as true*, sound, valid, etc., some proposition that the scholar actually holds to be *false*, unsound, invalid (again, even if just on the basis of authority).

7. Scholarship is in this sense what Alasdair MacIntyre calls a tradition, the work over an extended period of time of a group of people with its own standards of excellence. Such a tradition requires that its members exercise virtues, especially truthfulness. See generally *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame, 1984).

8. Romans 2:15–16.

9. John Paul II, *Veritatis Splendor* § 3 (Washington, 1993).

I do not propose that Catholic scholars make some such proposition the premise of an article. That would serve no good purpose, for the entire article then would depend upon a premise which is left undefended, unless all the arguments for accepting the teaching authority of the church are laid out as well. That is the task for another occasion. One might, however, devote an article to a rational defense of some truth accepted on the basis of authority. As a *rational* defense, the work would be entirely accessible to any interested reader, regardless of the reader's faith commitments. One might succeed, in which case one would have illumined the faith. Failure would not be scandalous; the truth of any proposition is logically independent of any argument for it.

Some examples. The new universal Catechism allows that some persons have no "right" to the truth, and may be told lies.<sup>10</sup> That probably is supported by a preponderance of authority in the tradition. But I would defend the "minority" view, which is compatible with the Catechism (which does *not* say that anyone is ever *obliged* to lie): lying is always wrong.

People lie when they assert a proposition as true which they believe to be false. When do trial lawyers assert propositions? Do trial lawyers lie when they cross-examine a witness in a way that suggests some part of the witness's story is false—a part that the lawyer knows to be true? How about closing argument? Can the entire trial exercise be considered a performance, in which lawyers are understood to play parts, so that the norm against lying is inapposite? That sounds a bit like our adversarial system, and a lot like the average trial lawyer's understanding of it. But, if so, how can trials be defended as a proper means of dispute resolution? Trials resolve claims of right, which are aspects of justice. But justice has to do with the truth about what happened.

The Catholic scholar must be alert to the relevance of truths of the faith to legal issues. Right-to-die judicial opinions typically implicate three such truths. Almost any such opinion will make one or more of the following three claims. First: persons who refuse medical treatment because they prefer to die (and so rid themselves of pain, indignity, etc.) do not commit suicide, but simply let nature take its course. Second, a metaphysical dualism: the body is the instrument of the "person," much as a car is related to its driver. Third: opposition to the right to die rests upon "sectarian" or "theological" doctrine, not on a "rational basis."

The Christian (not just the Catholic) must resist any action theory which does not, as these opinions do not, allow us to see how our Lord was a martyr, not a suicide. The Christian must reject all dualistic accounts of the person, and affirm that the person is a dynamic unity of body and spirit. Dualism denies that unity, and so undermines the faith lives of Christians, who can no longer understand the dignity of bodiliness and find it difficult to take seriously many aspects of faith—Jesus in the Eucharist, the virgin birth, resurrec-

10. Catechism of the Catholic Church § 2483 (Mahwah, N.J., 1994).

tion of the body, original sin, and so on. Finally, Christians can hardly allow courts to tell them what is knowable by reason and what is knowable only via revelation. That is for persons working *within* the tradition. That is for Christian scholars.