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RESPONSE

COMMUNITARIANISM AND THE COLUMBUS SCHOOL OF LAW: REFLECTIONS ON THE 1993 POPE JOHN XXIII LECTURE

*Harold A. McDougall**

In his Pope John XXIII Lecture, entitled "The Future of Catholic Social Thought" and delivered at the Columbus School of Law on March 25, 1993, Father William Byron, immediate past President of the Catholic University of America, focused on the role of Catholic social thought in framing social questions for pedagogy and action such that clear thinking might engage itself with truly significant social problems.¹ Citing Michael J. Schuck's book on the social teaching of the Papal Encyclicals,² Father Byron pointed out that Catholic social teaching has traditionally offered communitarian recommendations for the resolution of social problems.³

The communitarian theme is to bring people together as a way of solving such problems, a unifying theme which Father Byron suggests can best be expressed in the overarching question: "How can the human community of persons and nations live together in peace secured by justice?"⁴ This fundamental question, Father Byron stated, appears in our approaches to problems arising in the areas of religion, politics, culture, science and technology, the family, the economy, and even our uses of leisure time.⁵ To

* Professor of Law and Director of the Law and Public Policy program, Columbus School of Law, Catholic University of America. I wish to thank my colleagues Ray Marcin, David Lipton, William Wagner, Leah Wortham, and Benjamin Mintz for criticism and comments.

1. William J. Byron, S.J., *The Pope John XXIII Lecture*, 42 CATH. U. L. REV. 557, 557 (1993).

2. MICHAEL J. SCHUCK, *THAT THEY BE ONE, THE SOCIAL TEACHING OF THE PAPAL ENCYCLICALS* (1991).

3. Byron, *supra* note 1, at 559-60; *see also* George E. Garvey, *Address at the Mirror of Justice Lecture 15* (Nov. 17, 1992) (transcript on file with the *Catholic University Law Review*) (noting that "[t]he primary significance of Catholic Social Teaching is that it applies religiously-based values, those of Catholic tradition, to the pressing social and economic conflicts of the day").

4. Byron, *supra* note 1, at 560.

5. *Id.* at 563.

answer this question, Father Byron asserts that a balance must be established between solidarity ("true interrelatedness and interdependence") and individual autonomy and dignity.⁶

In striking an appropriate balance between solidarity and autonomy in each of the foregoing arenas, every person affected must be involved in both the formulation of the social question and the crafted response. Catholic social thinkers and Catholic social activists, in particular, must be included in the dialogue, putting "both thought and action in harness."⁷ Father Byron suggests that all who are affected be encouraged to join and not avoid the fray. I am not a Catholic, but because Father Byron suggested that pursuit of these questions is the "daily business of teaching and research at the Columbus School of Law,"⁸ I accepted the Law Review's invitation to reflect on Father Byron's lecture.

I am a guest in a house which has been built and maintained by Catholics, and it is here that I work and flourish.⁹ I am not a theologian, and any theological insights I may have are quite rudimentary, stemming from a few books I have read in the field which have influenced my own scholarship and from conversations with religious scholars who are members of the Columbus School of Law faculty. I speak as a member of the community, affected by Catholic social teaching.¹⁰

One of the most influential books I have read on theology is Paul Hanson's *The People Called (The Growth of Community in the Bible)*.¹¹ Hanson identifies a dialectic, or a tension in Judaeo-Christian tradition of two apparently opposing approaches to religion: the bureaucratic tradition and the prophetic, or charismatic tradition.¹² The Old Testament, which records the

6. *Id.* at 562.

7. *Id.* at 568.

8. *Id.* at 569.

9. Reflecting on his work at Notre Dame Law School, a community tied together by theology, philosophy, and "socio-cultural bonds," Professor Harold J. Berman remarked on "the value of such a community, especially compared with the blandness of most other law school communities, their lack of definite character, their excessive individualism, their lack of close bonds, indeed, their soullessness!" Harold J. Berman, Lecture at the Sesquicentennial of the University of Notre Dame 5 (Sept. 27, 1991) (on file with the *Catholic University Law Review*).

10. Professor Berman commented on his experience at a "Christian law school . . . [that] remains true to its own faith by welcoming into its midst persons of all other faiths, by offering its services wholeheartedly to the cause of the poor, the oppressed, and the disfavored, and by devoting itself to law, in theory and in practice, both as an instrument of the common good and as a testimony of divine providence." *Id.* at 13.

11. PAUL D. HANSON, *THE PEOPLE CALLED: THE GROWTH OF COMMUNITY IN THE BIBLE* (1986).

12. See generally *id.* at 87-135 (discussing "a transformation in the biblical notion of community as it passed from early Yahwism to prophetic Yahwism"). Hanson goes on to state:

development of the Jewish faith, is replete with examples of this tension.¹³ The Jewish people called for kings such as Saul and David to organize them as a secular society capable of withstanding the might of similarly organized, competing societies such as the Ammonites and the Philistines, respectively.¹⁴ At the same time, prophets rose time and again to challenge the kings to adhere to the faith, to the Word of God, and rebuked them when their concerns with the institutional, or bureaucratic, character of society overwhelmed their connection with the Divinity as the source of truth and meaning.¹⁵

Hanson posits that Jesus Christ was a prophet in this tradition, and certainly the early Christians were decidedly evangelical and anti-bureaucratic in their organization and style.¹⁶ However, the bureaucratic, or institutional, aspect of devotional society soon became necessary again, to preserve the faith in the context of larger human frailty.¹⁷ The proper balance between the prophetic and the bureaucratic, the spiritual and the institutional, between autonomy and solidarity remains a challenging question for all religious people.¹⁸

These juxtapositions between material and spirit, familiar in the realm of religion, are interestingly mirrored in the communitarian surge which has

Unlike the judges before them, who had returned to their farms after battles had been fought, Israel's kings, knowing that their term of rule extended over a lifetime, frequently turned to plans motivated by personal ambition. . . . The . . . commensurate response . . . to kingship was *prophetism*."

Id. at 96. Hanson further remarks that conflict between prophets and kings was "inevitable," as they represented "two very divergent views of community, the one egalitarian, the other hierarchical and authoritarian, the one dedicated to a continuous process of reform of existing structures on behalf of the disadvantaged, the other placing a higher value on security and stability." *Id.* at 472.

13. *Id.* at 98-100; *see also id.* at 100 (discussing King Saul and the prophet Samuel, and describing King Saul's fall as he drew attention away from God and toward himself); *id.* at 101 (noting King David and the prophet Nathan); *id.* at 140-41 (describing King Ahab and the prophet Elijah).

14. *Id.* at 89, 101.

15. *See* HANSON, *supra* note 11.

16. *Id.*

17. *Id.* at 466. According to Hanson, the Catholic Church "emerged as an increasingly powerful institution defining its place among other institutions in the world," raising questions such as "[a]re life in the spirit and church order compatible or mutually exclusive elements . . . ?"; "[w]hat is the relationship between the Kingdom of God and the Kingdom of this world?"; and "[w]hat is the nature of the Christian vocation in this complicated situation?" *Id.* A contemporary example is the critical role of the Catholic hierarchy in the downfall of communist dictatorship in eastern Europe. Note from David Lipton, Professor of Law, Columbus School of Law, The Catholic University of America to Harold McDougall, Professor of Law, Columbus School of Law, The Catholic University of America (May 6, 1993) (on file with the *Catholic University Law Review*).

18. Garvey, *supra* note 3, at 17 (noting that "[t]he core of Catholic [social] teaching seems to embody a dual commitment to freedom and responsibility").

caught the attention not only of our country's religious leaders, but its political and social leaders as well.¹⁹ Communitarianism is a social movement which seeks to re-voke the personal energy of citizens vis-a-vis the bureaucratic structures of both government and economy, to enhance not only the public interest but also public and private morality and overall social responsibility.²⁰ Communitarians view the moral values that come from strong communities as essential to the operation of both a market economy and a democratic form of politics.²¹

Communitarians see their movement as a kind of course correction, a response to the "counterculture of the 60s and the money culture of the 80s."²² In a word, they seek to balance the "rights talk" associated with individual autonomy with the responsibilities associated with solidarity.²³ We cherish freedom of choice to organize our own behavior in keeping with our individual sense of our own "rightness," our individual connection with the divine. Yet we are not alone in this world; society and human relation-

19. President Bill Clinton, for example, said in his acceptance speech, "We need a new spirit of community, a sense that we're all in this together. If we have no sense of community, the American dream will continue to wither." William J. Clinton, Presidential Election Acceptance Speech (Nov. 4, 1992), in *Communitarian Acceptance Speeches*, 3 RESPONSIVE COMMUNITY 9 (1993).

20. AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* 20 (1993). At the same time that popular participation is being celebrated in our political system, our economy is becoming increasingly centralized, and popular ownership of corporations is decreasing, a trend apparently celebrated by academics. See Note from David Lipton to Harold McDougall, *supra* note 17.

21. E.J. Dionne, Jr., *Recovering a Lost American Dream*, WASH. POST, Apr. 18, 1993, (Book World), at 1, 1 (reviewing AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* (1993)). Some of my colleagues, however, observe that communitarianism seems to lack a moral center. See Memorandum from Raymond C. Marcin, Professor of Law, Columbus School of Law, The Catholic University of America, to Professor Harold McDougall, Professor of Law, Columbus School of Law, The Catholic University of America (May 10, 1993) (on file with the *Catholic University Law Review*) (arguing that "the new communitarians . . . are falling into the same flaw that beset the 18th century communitarians, who mellowed in republicanist and egalitarian sentiments"). Similarly, my colleague Bill Wagner questions whether communitarians are prepared to accept "the claim of the Catholic social justice tradition that it is both set apart in a religious sense, but yet is still competent to contribute to the formation of a social and political community which does not presuppose the religious tenets of Catholicism as such." Memorandum from William Wagner, Associate Professor of Law, Columbus School of Law, The Catholic University of America, to Harold McDougall, Professor of Law, Columbus School of Law, The Catholic University of America (May 15, 1993) (on file with the *Catholic University Law Review*).

22. Dionne, *supra* note 21, at 1.

23. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991). Ironically for us as a law school, Professor Amitai Etzioni launched his quest to create a communitarian social movement after learning that while most young Americans feel they are entitled to a jury of their peers, they are unwilling to serve on juries themselves. ETZIONI, *supra* note 20, at 3.

ships shape us just as our own psyches do.²⁴ Hence, we have a responsibility to those others who support us.²⁵

According to our Associate Dean, George Garvey, the Columbus School of Law is part of a "research university to the American Catholic Church and to the nation."²⁶ As such, Dean Garvey says, we have a special role as "mediator of the Catholic and American visions of a just society."²⁷ What is that role? Somehow, he indicates, we must find a way to harmonize, in our teaching and in our practice, the role of the law—which is to "coerce . . . if necessary" with the role of the Church—which is to "teach and cajole."²⁸ In this harmonizing, to recall Father Byron's words, we must beware the "fault lines" in human institutions to which every significant social question can be traced.²⁹ To manage such fault lines, Father Byron suggests the com-

24. See, e.g., Gregory S. Alexander, *Dilemmas of Group Autonomy*, 75 CORNELL L. REV. 1, 2 (1989) (discussing the communitarian approach to "the question of group autonomy in the context of residential associations").

25. I have explored these themes in a recently published book, which juxtaposes, in the history of the African-American community, the "rights-based" approach of W.E.B. DuBois with the "responsibility-based" vision of Booker T. Washington, and suggests that these two approaches are complimentary, rather than contradictory. HAROLD A. MCDUGALL, *BLACK BALTIMORE: A NEW THEORY OF COMMUNITY* (1993).

26. Garvey, *supra* note 3, at 1. The 1993 Catholic University of America Commencement Program reprinted the official statement of the aims of the University, approved by the Board of Trustees and the Holy See and promulgated with the school's bylaws in 1970. Historical Note, in *The One Hundred and Fourth Annual Commencement Program*, Catholic University of America, Washington, D.C. (May 15, 1993), (on file with the *Catholic University Law Review*). In pertinent part, the statement maintains that the Catholic University of America desires to cultivate and impart an understanding of the Christian faith within the context of all forms of human inquiry and values. It seeks to assure, in an institutional manner, the proper intellectual and academic witness to Christian inspiration in individuals and in the community, and to provide a place for continuing reflection, in the light of Christian faith, upon the growing treasure of human knowledge.

Id. Seeking to achieve distinction in the American academic community of which it is a part, and accepting the standards and procedures of that community, the University, "[f]aithful to the Christian message as it comes through the Church and faithful to its own national traditions . . . has unique responsibilities to be of service to Christian thought and education in the Catholic community as well as to serve the nation and the world." *Id.*

27. Garvey, *supra* note 3, at 1.

28. *Id.* at 18; see also Berman, *supra* note 9, at 16-17. Reflecting on a "Christian" practice of law, Professor Berman suggests that such a practice has a pastoral, a prophetic, and a priestly aspect. *Id.* at 16. Pastoral, in that such lawyers must be "genuine counselors," devoting themselves not only to their clients' financial well-being but also to their "total" well-being. *Id.* Prophetic, in that such lawyers must advance the cause of "social justice and humanity," and a Christian law school should encourage their students in this respect "not only in all its courses but also in its program of student legal services for the poor, for racial equality, for protection of the environment, and for law reform generally." *Id.* Priestly, in that such lawyers are called to "play a part as responsible leaders in their communities," to "maintain unity within the society, resolve conflict, and allocate power." *Id.* at 16-17.

29. Byron, *supra* note 1, at 568 ("Every significant social question can be traced to fault lines in human institutions."). A possible fault line in communitarianism itself was identified

munitarian approach: working within human institutions, participating in ongoing human processes, repairing fault lines and creating new institutions where necessary.³⁰

To build commitment to both rights and responsibilities requires a continuing dialogue involving every member of the community. Harry Boyte, Director of Project Public Life at the Hubert Humphrey School of Public Affairs at the University of Minnesota, posits that such dialogue is carried on at three levels.³¹ The most intimate and sheltered level of family and friends lies at one extreme; the most public debate, at the other. In between is the "free" space, a concept at the heart of true communitarianism: a space in which the skepticism of public debate is muted by concern for one's fellow participant, and the intimacy of family and friends is exchanged for an elusive something that we sometimes call "collegiality."³² In our law school, these free spaces are found in faculty committees, in the *Law Review* and other student organizations, and in study groups. It is in these free spaces that the discussion should go on, eventually strengthening itself to the point where it can be carried on in public spaces like faculty meetings and the

by my colleague Ray Marcin, who was concerned that the new communitarian thought seems to "toss nonliberal religion and tradition on the scrap heap while at the same time arguing for a new moral order." Memorandum from Raymond C. Marcin to Harold McDougall, *supra* note 21, at 1. He further views Professor Amitai Etzioni, one of the principal figures in the new communitarian movement, as rejecting religion as the basis for the communitarian moral order because Etzioni views religion as "intolerant in its insistence on an absolute version of the truth." *Id.* For Professor Marcin, there are some truths which indeed *are* absolute, which lie at the center of all major religions, and which have been stressed by major twentieth-century figures such as Mahatmas Ghandi, Martin Luther King, Jr., and Pierre Teilhard de Chardin. *Id.* at 3. Namely, that moral empowerment can only be accomplished by a "confrontational, cathartic, spiritual rebirth" and, because of original sin, cannot be achieved in "controlled or directed dialogue." *Id.* (citing *Psalms* 118:22; *Matthew* 22:42); see also Memorandum from William Wagner to Harold McDougall, *supra* note 21. Professor Wagner emphasizes the possible tensions between Catholic social thought and communitarianism. Where communitarians might believe in the power of dialogic processes to redefine essential human characteristics and needs. *Id.* Catholic social thought might be skeptical of the power of individuals to so transform themselves without reference to divine revelation. *Id.* Where communitarians might stress the legitimacy of political commitments reached by "inclusive strategies," Catholic social thought might remain skeptical of claims to legitimacy for social and institutional structures created solely through the efforts of flawed human beings. *Id.*

30. Memorandum from Raymond C. Marcin to Harold McDougall, *supra* note 21, at 3; *Byron*, *supra* note 1, at 568 ("Only by working within those institutions can the fault lines be repaired. Only by participation in human processes, political for the most part, can we create new institutions to provide just exchanges, promote just relationships, and provide peace.").

31. SARA M. EVANS & HARRY C. BOYTE, *FREE SPACES: THE SOURCES OF DEMOCRATIC CHANGE IN AMERICA* 184-87 (1986).

32. *Id.* at 191-92.

town meetings that have distinguished the law school's decisionmaking processes.³³

Guidance as to the questions to be discussed in our free spaces is provided by Father Byron's talk. How can we all live in peace, with justice? How can we as a community balance solidarity with autonomy? What is the proper balance of rights and responsibilities in our law school's new era?³⁴ How can the relation between the "dignity of each individual and the solidarity of all individuals" stressed by Catholic social teaching best be pursued in our law school and by our graduates?³⁵ How can we respond to the "new things"³⁶ which beset us as a community and as a nation, the alienation which undermines solidarity,³⁷ the intolerance which undermines autonomy?³⁸ These questions merit close attention, particularly when the 1980s has delivered to us a "new tribalism," in which various subgroups retreat into their own specialized television and radio stations and magazines, be-

33. I believe this corresponds to the idea of "subsidiarity" found in Catholic social teaching, which Associate Dean Garvey described as a principle under which "[r]esponsibilities and decisions should be attended to as close as possible to the level of individual initiative in local communities and institutions. Mediating structures of families, neighborhoods, community groups, small businesses, and local governments should be fostered and participated in." Garvey, *supra* note 3, at 17 (quoting PETER HENRIOT, *CATHOLIC SOCIAL TEACHING: OUR BEST KEPT SECRET* 21 (1988)).

34. Particularly troubling is the problem of "hate speech" and similar forms of intolerance. As my colleague Ben Mintz observed, "how do we uphold the freedom to speak which deeply hurts others? Where should the line be drawn [to uphold rights without infringing obligations]?" Note from Professor Benjamin Mintz, Professor of Law, Columbus School of Law, The Catholic University of America, to Harold McDougall, Professor of Law, Columbus School of Law, The Catholic University of America (May 14, 1993) (on file with the *Catholic University Law Review*). My colleague Leah Wortham suggests that perhaps such offensive, or "politically incorrect" speech should not be made illegal, but "ideally, communities should have norms that 'shame' people who utter hurtful speech." Note from Assistant Dean Leah Wortham, Columbus School of Law, The Catholic University of America, to Harold McDougall, Professor of Law, Columbus School of Law, The Catholic University of America (May 6, 1993) (on file with the *Catholic University Law Review*).

35. Garvey, *supra* note 3, at 25.

36. This recalls the first Catholic social encyclical in modern times, issued in 1891 by Pope Leo XIII. *Id.* at 6. Its title, *Rerum Novarum*, means "new things"—new things that challenged the church, as a "moral infrastructure" to respond. *Id.* at 18.

37. *Cf. id.* at 20.

38. One commentator noted that "strengthening the social institutions and practices that undergird the moral and social values of the community . . . need not entail a return to [an authoritarian] society that discriminated against women [and] minorities." Amitai Etzioni, *Clinton and the Spirit of the Community*, *LEGAL TIMES*, March 15, 1993, at 46, 47; see also Richard Scheinin, "Communitarians" Urge Commitment to Families, Society; Movement Seeks A "Moral Infrastructure" for Greater Public Good, *DALLAS MORNING NEWS*, Jan. 3, 1993, at 33A (noting that a political movement around what Americans have in common should not be "at the expense of social justice and the rights that different groups—blacks and women—have fought and died for" (quoting Stewart Burns, Associate Editor of the Martin Luther King Papers, Stanford University)).

coming more and more isolated from the American mainstream.³⁹ These questions are with us as we enter a watershed as an institution and as a community, a watershed brought on, ironically, by the challenges associated with progress.

We have a thriving intellectual and moral community. Students get smarter every year. The faculty has steadily strengthened its teaching and scholarship. The administration has brought together the forces needed to provide us with a splendid new home. As we step to this next plateau, we must remember that these blessings came to us not simply because of our own individual intellectual or moral power, but also because we are part of a community, a community which has a strong sense of solidarity, responsibility, and faith.⁴⁰

Communitarians such as Professor William Galston, now an advisor to President Clinton, endorse Abraham Lincoln's view that "the highest responsibility of democratic . . . leadership is to unite the citizenry by appealing to the better angels of our nature."⁴¹ However, it is well to remember that our leaders cannot be expected to persevere without our support,⁴² and our support is best presented in the form of an active community, engaged intelligently and with passion in a robust discourse through which our own principles and those of our colleagues are simultaneously developed.⁴³ The moral tone of the law school can be developed and maintained only through a multiplicity of individual and small group efforts.⁴⁴ The inscription which will appear on our new building, a quotation from Micah, charts our way: "Do justice, love mercy, and walk humbly with your God."⁴⁵

39. Joe Klein, *Whose Values?*, NEWSWEEK, June 8, 1992, at 18; see also Garvey, *supra* note 3, at 25-26 (stating that peace cannot be achieved while nations and classes of people are denied their individuality).

40. Cf. Dionne, *supra* note 21, at 1 ("Human beings are torn by competing desires: on the one side, the wish to belong, to share, to experience the joys of solidarity; on the other, the need for autonomy, independence and freedom. . . . [But] preserving freedom is in reality a cooperative venture.")

41. William Galston, *A Communitarian Budget: Deficit Reduction and Job Creation*, 3 RESPONSIVE COMMUNITY 7 (1993).

42. Amitai Etzioni, *To Stay the Communitarian Course*, 3 RESPONSIVE COMMUNITY 4 (1993).

43. See DAVID GRANFIELD, *THE INNER EXPERIENCE OF LAW: A JURISPRUDENCE OF SUBJECTIVITY* 129-48 (1988) (discussing the role of the community in developing public order).

44. Keith Henderson, *Advocate for a Community Ethos*, CHRISTIAN SCI. MONITOR, April 19, 1991, at 13; see also Etzioni, *supra* note 38, at 47 ("[O]nly if we all accept more of our social responsibilities . . . will the moral, social, and political environment . . . significantly improve.").

45. *Micah* 6:8.