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# Action as the Fruit of Contemplation: A Reply to Bryce, Donnelly, Kalscheur, and Nussbaum

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# Action as the Fruit of Contemplation: A Reply to Bryce, Donnelly, Kalscheur, and Nussbaum

John M. Breen\*

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## I. INTRODUCTION

I am grateful to Michael Bryce, Thomas Donnelly, Gregory Kalscheur, and Spencer Nussbaum for their thoughtful responses<sup>1</sup> to my article, *The Air in the Balloon: Further Notes on Catholic and Jesuit Identity in Legal Education*,<sup>2</sup> and its predecessor, *Justice and Jesuit Legal Education: A Critique*.<sup>3</sup> Reading my articles and their responses together might lead the casual reader to conclude that our views have little in common regarding the relative success of Jesuit-sponsored legal

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\*. Associate Professor, Loyola University Chicago School of Law; B.A. 1985, University of Notre Dame; J.D. 1988, Harvard University. I am grateful to the editors of the *Gonzaga Law Review* for the opportunity to set forth my ideas concerning Jesuit legal education in the pages of their journal and for inviting others to respond to what I have written. I am certain that the only means whereby Jesuit legal education will be able to realize its true potential is through the sort of dialogue that the editors have tried to foster through their work. As always, I am grateful to Susan Nelligan Breen and our sons, Peter and Philip, for their patience, love and support.

1. C. Michael Bryce, *Teaching Justice to Law Students: The Legacy of Ignatian Education and Commitment to Justice and Justice Learning in 21st Century Clinical Education*, 43 GONZ. L. REV. 577 (2008); Thomas More Donnelly, *The Leaven of the World: Serving the Poor Is Neither the Air in the Balloon Nor the Cherry on the Sundae*, 43 GONZ. L. REV. 607 (2008); Gregory A. Kalscheur, S.J., *Conversation in Aid of a "Conspiracy" for Truth: A Candid Discussion about Jesuit Law Schools, Justice, and Engaging the Catholic Intellectual Tradition*, 43 GONZ. L. REV. 559 (2008); Spencer K. Nussbaum, *No Man Can Serve Two Masters: A Student Perspective on Jesuit Legal Education*, 43 GONZ. L. REV. 631 (2008).

2. John M. Breen, *The Air in the Balloon: Further Notes on Catholic and Jesuit Identity in Legal Education*, 43 GONZ. L. REV. 41 (2007) [hereinafter Breen 2007].

3. John M. Breen, *Justice and Jesuit Legal Education: A Critique*, 36 LOY. U. CHI. L.J. 383 (2005) [hereinafter Breen 2005].

education and the ways in which it might improve. Such a conclusion would be a mistake. Although we plainly have important differences—differences that I hope to explore in the pages that follow—I think that it is important to begin with a brief review of what we hold in common with respect to this important subject.

First, we all agree that Jesuit legal education is something very much worth pursuing. Although basic, this point is not insignificant since it is at odds with those commentators who would prefer to witness the demise of any meaningful Catholic identity in legal education.<sup>4</sup> We all believe that, no matter how imperfect, no matter how far Jesuit-sponsored law schools may at present fall short of their potential, these institutions can make a vital contribution not only to the education of future lawyers, but to their formation as persons.<sup>5</sup> Indeed, if the Society of Jesus' ostensible commitment to the "promotion of justice"<sup>6</sup> and the genius of Ignatian pedagogy were realized in the law school setting, it would transform the face of legal education in this country.

Second, we agree that the distinctiveness of the legal education currently afforded students at Jesuit-sponsored law schools is overstated by these schools. At the same time, we also agree that being "distinctive" is not the true goal of Jesuit education.<sup>7</sup> Rather, the point is to be faithful to the principles that animate the mission of a Jesuit academic institution as such. Given the nature of the culture in general, including the culture dominant on most university campuses in the United States, it would come as no surprise to discover that a law school that carried out its Jesuit mission in an authentic and thoroughgoing manner would in fact be distinctive. It would stand out from the crowded field of American law schools and make a unique contribution to both the legal academy<sup>8</sup> and by extension, the legal profession.

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4. See Daniel Gordon, *Ex Corde Ecclesiae: The Conflict Created for American Catholic Law Schools*, 34 GONZ. L. REV. 125, 155 (1999) (concluding that "[i]f *Ex Corde Ecclesiae* fails to permit loosely affiliated free standing institutions within the Catholic Church, the law schools may have to shed their Catholic identities. No other choice may exist.").

5. See Kalscheur, *supra* note 1, at 567 (noting that the Jesuits entered the field of education "because of a desire to form a certain kind of person committed to serving the common good of society").

6. THE DECREES OF GENERAL CONGREGATION THIRTY-FOUR, THE FIFTEENTH OF THE RESTORED SOCIETY AND THE ACCOMPANYING PAPAL AND JESUIT DOCUMENTS, Decree 3, ¶ 3 (1995), reprinted in DOCUMENTS OF THE THIRTY-FOURTH GENERAL CONGREGATION OF THE SOCIETY OF JESUS 40 (1995) (concluding that "we want to renew our commitment to the promotion of justice as an integral part of our mission, as this has been extensively developed in General Congregations 32 and 33").

7. Donnelly, *supra* note 1, at 624 (remarking that the fact that Catholic institutions are not alone in serving the poor is not a cause for fear); Bryce, *supra* note 1, at 581 n.9 (quoting Mark A. Sargent, *An Alternative to the Sectarian Vision: The Role of the Dean in an Inclusive Catholic Law School*, 33 U. TOL. L. REV. 171, 186-87 (2001)). Although Professor Bryce suggests a failure on my part to grasp this point, I cited Sargent's article for this very proposition in my original article. See Breen 2005, *supra* note 3, at 395 & n.64.

8. Cf. Donnelly, *supra* note 1, at 624 (remarking that "what may be the distinctive

Third, we all agree that, as it is currently practiced, Jesuit legal education can be rightly criticized for its irregular and rather somewhat tepid engagement with the Catholic intellectual tradition. Although the willingness of each author to express this judgment in unvarnished form varies greatly, all four commentators acknowledge that the intellectual tradition that was responsible for the foundation of Jesuit colleges and universities in the first instance is largely absent from the law schools that today operate under Jesuit auspices. This lack of engagement with the tradition not only reflects poorly on the intellectual vitality of these institutions as places of learning, it also calls into question the desire of these schools to embrace their Ignatian heritage beyond the practical consequences of recruiting potential students and raising money among alumni. To say the least, this state of affairs leaves something to be desired.

Jesuits and their lay collaborators are fond of invoking the concept of *magis* as one of the defining features of Jesuit education.<sup>9</sup> *Magis*, the idea of “something more,” should itself be more than an advertising gimmick designed to lure students to Jesuit law schools under the pretense that the education they receive will be substantially different from the education available at non-Jesuit schools. My respondents and I all agree that something more is indeed needed, that Jesuit legal education is not what it is capable of becoming and what it should be. We differ, however, in identifying what that something is and how it should be made present in the context of the modern-day Jesuit law school.

Although my particular criticisms of Bryce, Donnelly, Kalscheur, and Nussbaum are set forth in the sections that follow, perhaps our points of agreement and disagreement are best captured by recalling a passage from Fyodor Dostoevsky’s *The Brothers Karamazov*. In a scene early in the book, Father Zosima, the elder in the local monastery, receives a number of visitors who come to him seeking spiritual advice. One of these visitors is Mrs. Khokhlakov, a wealthy and attractive land owner who complains to Father Zosima that she has been tormented for years by the anguish of doubt. “I suffer from my lack of faith . . .” she tells the elder monk.<sup>10</sup> Her doubts go to the heart of the faith including the existence of God and the reality of life after death. She is worried that “when I die it suddenly turns out that after life there’s

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characteristic of Jesuit and Catholic legal clinics [is that they] pursue[] the suffering with love”). See also John H. Garvey, *Institutional Pluralism*, AALS NEWS, Mar. 2008 at 1 (presidential address to the House of Representatives of the Association of American Law Schools arguing for “institutional pluralism” in the legal academy).

9. GEORGE W. TRAUB, S.J., DO YOU SPEAK IGNATIAN? A GLOSSARY OF TERMS USED IN IGNATIAN AND JESUIT CIRCLES 5 (1997) (defining *magis* as Latin for “more” and identifying it as “[t]he ‘Continuous Quality Improvement’ term traditionally used by Ignatius of Loyola and the Jesuits, suggesting the spirit of generous excellence in which ministry should be carried on”). Traub likewise sees this striving for generous excellence in the motto of the Society of Jesus, *Ad Majorem Dei Gloriam*. See *id.* at 1.

10. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 64 (Andrew H. MacAndrew trans., 1970) (1880).

nothing at all, nothing but wild grass growing on my grave.”<sup>11</sup> Father Zosima assures her that although “nothing can be proved” about the existence of God and the reality of life after death “one can become convinced” by performing “acts of love.”<sup>12</sup> He tells her:

Try to love your neighbors, love them actively and unceasingly. And as you learn to love them more and more, you will be more and more convinced of the existence of God and of the immortality of your soul. And if you achieve complete self-abnegation in your love for your fellow man, you will certainly gain faith, and there will be no room in your soul for any doubt whatsoever. This has been tested. This is the true way.<sup>13</sup>

Some contend that this passage and the remainder of Dostoevsky’s great novel demonstrate the primacy of action over contemplation as the authentic Christian means for coming to know God. As theologian Michael Himes has argued, Father Zosima’s advice “is not ‘Go home and pray’ or ‘Read the scriptures.’”<sup>14</sup> His advice is not to begin “by thinking about God” but “by loving those around you in the most concrete and practical ways.”<sup>15</sup>

In the context of the contemporary law school, this reading of Zosima’s advice might be taken as a justification for the “way of proceeding”<sup>16</sup> that has characterized Jesuit education over the last forty years: for the primacy of “contacts” over “concepts,”<sup>17</sup> for the stress on service over study, for the emphasis on doing justice in the law school clinic rather than merely talking about justice in the law school classroom. That is, just as Father Zosima advised Mrs. Khokhlakov to love her neighbors rather than study theology, so the program of the contemporary Jesuit law school has been to urge its students to practice justice in the legal clinic rather than study jurisprudence.

11. *Id.*

12. *Id.*

13. *Id.* at 64-65.

14. MICHAEL J. HIMES, *DOING THE TRUTH IN LOVE: CONVERSATIONS ABOUT GOD, RELATIONSHIPS, AND SERVICE* 55 (1995).

15. *Id.*

16. Father Kalscheur seems to be especially fond of this phrase. Kalscheur, *supra* note 1, at 563-64, 574, 576. At the Heartland II Conference on Jesuit identity held at Saint Louis University in May 1997, Father Michael Himes argued that this option for action over contemplation, for service over book learning was *the* Jesuit method of inviting students and others to discover the mystery of God. Although not a Jesuit, he said that this had been his observation as a longtime faculty member at Boston College.

17. Peter-Hans Kolvenbach, S.J., Address at Santa Clara Univ., Commitment to Justice in Jesuit Higher Education: The Service of Faith and the Promotion of Justice in American Jesuit Higher Education (Oct. 6, 2000), *available at* [http://www.creighton.edu/CollaborativeMinistry/kolvenbach\\_speech.html](http://www.creighton.edu/CollaborativeMinistry/kolvenbach_speech.html).

To be sure, actions do speak louder than words. The imperative of the Christian to act with love towards those whom he or she encounters in the world is undeniable. Indeed, it is constitutive of the Christian faith.<sup>18</sup> In a like manner, justice should be the virtue that guides the actions of all members of the legal profession.<sup>19</sup> Thus, in the concrete world of social relations, *acts* enjoy a kind of primacy over mere words and thoughts that go unspoken.<sup>20</sup> However, to somehow construe Zosima's advice to the troubled woman as an endorsement of a clinic-centered approach to learning about justice that eschews rigorous classroom learning on the subject would be to grossly misinterpret Dostoevsky's work.

Mrs. Khokhlakov does not need to read the scriptures for the first time because she has already read them. She knows what they say. She does not require a rudimentary introduction to the faith as she already has more than a passing familiarity with Christianity. Indeed, she has already been formed in this respect by the Orthodox faith that thoroughly imbued the Russian society of her day. She knows and understands this faith as an intellectual matter. What she lacks is a heartfelt conviction in the truth of what she has already learned. And conviction, Father Zosima reminds her, is not a matter of proof. Indeed, faith is not simply a matter of intellectual assent. It also involves a movement of the will—from self to other, from the individual to God.<sup>21</sup>

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18. See WORLD SYNOD OF CATHOLIC BISHOPS, *JUSTICE IN THE WORLD* (1971), reprinted in *CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE* 288, 289 (David J. O'Brien & Thomas A. Shannon eds., 1992) ("Action on behalf of justice and participation in the transformation of the world fully appear to us as a constitutive dimension of the preaching of the Gospel, or, in other words, of the Church's mission for the redemption of the human race and its liberation from every oppressive situation."); see also Donnelly, *supra* note 1, at 623 (quoting BENEDICT XVI, *ENCYCLICAL LETTER DEUS CARITAS EST* ¶ 22 (2005) (stating that with respect to the Church, the "exercise of charity . . . is as essential to her as the ministry of the sacraments and preaching of the Gospel"))).

19. Two of my respondents rightly emphasize the idea of justice as a virtue of the individual person. See Donnelly, *supra* note 1, at 613-16; Kalscheur, *supra* note 1, at 564, 567. Moreover, this is likely what Bryce has in mind when he states that the goal of legal education is "the development of judgment." Bryce, *supra* note 1, at 597.

20. See Donnelly, *supra* note 1, at 609 ("True justice lives not in words but in deeds.").

21. See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* II-II, Q.1, art. 4, at 1171 (Fathers of the Dominican Province trans., 1947) [hereinafter *SUMMA THEOLOGICA*] (arguing that "[f]aith implies assent of the intellect to that which is believed" and that one way in which the intellect assents to something is "not through being sufficiently moved to this assent by its proper object, but through an act of choice, whereby it turns voluntarily to one side rather than to the other"). Faith is not merely cognitive but is also volitional. See *id.*, II-II, Q.4, art. 2, at 1191. It demands that the person move from simple recognition, to devotion, from thought to action, from mere belief to love. See *id.*, II-II, Q.4, art. 3, at 1192; see also, John M. Breen, *The Catholic Lawyer: "Faith" in Three Parts*, 20 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 431 (2006) (discussing the threefold dimension of Christian faith as intellectual assent, devotion, and trust and the analogous types of faith that an ethical lawyer must exhibit).

Even here Mrs. Khokhlakov already possesses a glimmer of what she seeks to obtain in full. Indeed, why else would she be seeking the advice of a priest at a monastery? What she requires is a practical strategy that will demonstrate the truth she already knows in a way that no logical demonstration ever could. One can know, as an intellectual matter, that physical exercise will improve the health of one's body, but no amount of book learning can substitute for the knowledge gained by a routine of physical exertion that trains the body. Exercise, though directed outside the body, transforms the body from within. It changes the person who engages in it.<sup>22</sup>

In an analogous fashion, acts of love transform the person who engages in them. Although directed toward another—the beloved—acts of love change the person who loves from within. Thus, to undergo this transformation, to fully grasp the truth of love—that life will always be an insoluble puzzle unless one makes a gift of one's life to others in love,<sup>23</sup> that God *is* love,<sup>24</sup> and that Christ's sacrifice of love on the Cross conquers even death<sup>25</sup>—Mrs. Khokhlakov must engage in acts of love.

Similarly, although acts of justice are directed outward, toward others, they also change the person who engages in them—the person who acts justly.<sup>26</sup> Indeed, this is one of the virtues of clinical education: that it may work to habituate the future lawyer toward a certain kind of life. Yet today's law students are not educated to think about

22. In this regard, it is no coincidence that the title of Saint Ignatius Loyola's great work is *The Spiritual Exercises*. Indeed, Ignatius, the founder of the Society of Jesus, makes this point explicit from the start:

By the term "Spiritual Exercises" is meant every method of examination of conscience, of meditation, of contemplation, of vocal and mental prayer, and of other spiritual activities that will be mentioned later. For just as taking a walk, journeying on foot, and running are bodily exercises, so we call Spiritual Exercises every way of preparing and disposing the soul to rid itself of all inordinate attachments, and, after their removal, of seeking and finding the will of God in the disposition of our life for the salvation of our soul.

LOUIS J. PUHL, S.J., *THE SPIRITUAL EXERCISES OF ST. IGNATIUS I* (1951). He further makes clear that, in the *Spiritual Exercises*, "we make use of the acts of the intellect in reasoning, and of the acts of the will in manifesting our love." *Id.* at 2. Thus, the *Exercises* are intended to bring about a change in the whole person who performs them with discipline and reverence.

23. See SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD *GAUDIUM ET SPES* ¶ 24 (1965), reprinted in *THE DOCUMENTS OF VATICAN II*, at 199, 223 (Walter M. Abbott ed., Joseph Gallagher trans., 1966) [hereinafter *GAUDIUM ET SPES*], available at [http://vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_cons\\_19651207\\_gaudium-et-spes\\_en.html](http://vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html) (man "cannot fully find himself except through a sincere gift of himself").

24. 1 *John* 4:16.

25. 1 *Corinthians* 15:50-55.

26. See Donnelly, *supra* note 1, at 610 ("In doing justice, feelings inform the intellect, action acts on the actor, and the giver becomes the receiver. Doing justice transforms the doer in a way that no amount of talk can."); *id.* at 613-14 (serving the poor "has a transformative effect upon the actor that transcends any results of the service"). In this regard, both Judge Donnelly and Father Kalscheur fittingly cite the line of verse from the great Jesuit poet Gerard Manley Hopkins, S.J., "the just man justices." See Donnelly, *supra* note 1, at 618, 628-29; Kalscheur, *supra* note 1, at 564.

justice in the same way that Mrs. Khokhlakov was educated in the faith before she met with Father Zosima. Moreover, to the extent that today's students have been formed by the culture in which they inhabit, their understanding is likely skewed toward a particular brand of justice.<sup>27</sup> In the great tradition of liberal education, the Jesuit law school should seek to challenge its students' settled notions of justice<sup>28</sup> by exposing them to a wide variety of views on the subject. At the same time, because the institution is not agnostic with respect to the meaning of "justice," the Jesuit law school should encourage students to consider the rich patrimony of thought on the subject that can be found in the Catholic intellectual tradition.

A further passage in the same scene from *The Brothers Karamazov* shows the insufficiency of a merely experiential method of learning. It shows the need for rigorous classroom instruction concerning the nature of justice. Indeed, the passage shows that Mrs. Khokhlakov needs more than the priest's encouragement to treat others with love. She needs to be reminded what true love really is. As Father Zosima tells her:

A true act of love, unlike imaginary love, is hard and forbidding. Imaginary loves yearns for an immediate heroic act that is achieved quickly and seen by everyone. People may actually reach a point where they are willing to sacrifice their lives, as long as the ordeal doesn't last too long, is quickly over—just like on the stage, with the public watching and admiring. A true act of love, on the other hand, requires hard work and patience, and, for some, it is a whole way of life.<sup>29</sup>

Plainly, important differences exist between a person seeking spiritual direction from a priest and a diverse group of students attending law school hoping to become future lawyers. At the same time, they share the need to identify the kind of act to which they are enjoined. That is, just as Mrs. Khokhlakov needs to be reminded of what "[a] true act of love" is and what is "imaginary love,"<sup>30</sup> so students need to be given

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27. See Breen 2005, *supra* note 3, at 407 (discussing the equation in historic liberalism of justice and freedom understood as the absence of restraint).

28. Martin Diamond, *On the Study of Politics in A Liberal Education*, THE COLLEGE, Dec. 1971, at 6, 7 (arguing that in the liberal study of politics "the reasonable educational procedure is to begin with the familiar and then render it problematic."). Inexplicably, Professor Bryce at one point accuses me of maintaining "that law students don't have their own concepts of justice," Bryce, *supra* note 1, at 579 n.7, a point he later contradicts, *see id.* at 595 ("Breen recognizes in the first instance that students enter law school already with their own beliefs about justice.").

29. DOSTOEVSKY, *supra* note 10, at 66-67.

30. Donnelly reminds us that to act *with* justice towards the poor and *for* justice on their behalf will often be exceedingly difficult. Although transcendent moments of human connection do occur, *see* Donnelly, *supra* note 1, at 623-24, sometimes the client may not express the gratitude that the lawyer thinks is his or her due, *id.* at 619. The point, however, is not to seek gratitude or honor, but to act with justice and to love the person being served for the sake of justice and love. *See id.* at 625-26. This is strikingly similar to Dostoevsky's Father Zosima who warns that it is imaginary love,



the opportunity to explore the many meanings of justice and to discover for themselves what is real justice and what is imaginary. Indeed, if Jesuit law schools want their graduates to “promote justice,” students must be able to say what justice is and what it is not. The clinic can accomplish this for students in the narrow setting of a particular case. The larger questions of justice, however, are better addressed in the classroom where someone, like Father Zosima, can lead them in an exploration of the subject while modeling the virtue of justice itself. Such an experience will enrich students’ other doctrinal courses as well as any clinical program they might be asked to complete.

## II. MORE THAN CLINICS ARE KNEADED: WHY THE LEAVEN SUGGESTED BY BRYCE AND DONNELLY FALLS FLAT

Here I take up the responses by Professor C. Michael Bryce and Judge Thomas More Donnelly together. Although they differ in points of emphasis, Professor Bryce and Judge Donnelly fundamentally agree that what ails the modern-day Jesuit law school is not its emphasis on clinical instruction. On the contrary, they share the conviction that the law school clinic is the embodiment of Jesuit identity *par excellence*. Accordingly, they argue that any move to further enhance this identity should include the normative if not the physical relocation of the clinic from the periphery of the law school to its center.<sup>31</sup>

Professor Bryce argues on behalf of this centrality as a response to the malaise that seems to have overtaken a significant portion of the legal profession—a subject about which a number of authors have written at length.<sup>32</sup> Bryce believes that this malaise begins in law school with the anxiety and self-alienation fostered by the Langdellian model of legal education.<sup>33</sup> According to Bryce, the cure for this failed method, and many of the other maladies that afflict the legal profession, is “clinical legal education.”<sup>34</sup> He contends that in the clinic, law student learning “is active, engaged and inherently involves the application of theory and doctrine into practice

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not real love, that “yearns for an immediate heroic act,” that is willing to make a sacrifice so long as the public is “watching and admiring.” DOSTOEVSKY, *supra* note 10, at 66-67. True love, by contrast, “requires hard work and patience” and may last an entire lifetime, and go unnoticed. *Id.* at 67. Father Zosima’s comment also brings to mind the Flannery O’Connor character who thinks to herself: “She could never be a saint, but she thought she could be a martyr if they killed her quick.” FLANNERY O’CONNOR, *A Temple of the Holy Ghost*, in FLANNERY O’CONNOR: COLLECTED WORKS 197, 204 (1988).

31. See, e.g., Donnelly, *supra* note 1, at 608 (“Moving clinics from the periphery to the heart will make our law schools boldly Jesuit and unapologetically Catholic.”); *id.* at 610 (arguing for “radical change” by “transplanting clinics from the periphery to the center of our law schools”).

32. See Breen 2005, *supra* note 3, at 384-87 and accompanying notes.

33. Bryce, *supra* note 1, at 583-86.

34. *Id.* at 587.

[in a way] that . . . allow[s] for the development of the whole law student.”<sup>35</sup> Further, he argues that the law clinic experience, as a mode of education, is consonant with the teaching of Saint Ignatius and the now centuries-old tradition of Jesuit pedagogy.<sup>36</sup>

Although Professor Bryce’s description of the many positive attributes of clinical learning and its seemingly natural fit with Jesuit sensibilities strikes me as true,<sup>37</sup> it would be wrong to promote a mandatory clinical program as a kind of cure-all for the failure of Jesuit legal education to promote justice. Indeed, Bryce seems to miss my criticism regarding clinical education and the promotion of justice—a criticism that a mandatory clinical experience would not remedy. I do not, as Bryce alleges, contend “that justice can be learned well only in the normal scholastic educational method” of the classroom.<sup>38</sup> I make no such exclusive claim with respect to any pedagogical method—a point Bryce appears to concede, albeit reluctantly, in a footnote.<sup>39</sup> While I agree that clinics contribute to the Jesuit goal of promoting justice, I do not believe that clinics are capable of fulfilling the aspirations that Jesuits set for their institutions in this regard. To put the matter bluntly, even if every student at every Jesuit-sponsored law school participated in a clinical program, Jesuit legal education would still fail to promote justice as it should because of the affective and intuitive approach to questions of justice typically found in the clinical setting.

Justice is something that is not merely felt and intuited. It can also be the subject of rational discourse. Thus, in the original article, I argued that if Jesuit law schools are sincere in their desire to promote justice then they should encourage their students to think seriously about the nature of justice and its relationship to law in a required course dedicated to the subject. Moreover, because justice is a contested concept, such a course should fairly introduce students to the many competing notions of justice vying for attention within the academy and society at large, including those notions that have their origin in the Catholic intellectual tradition.<sup>40</sup>

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35. *Id.*

36. *See id.* at 588-89, 592-93.

37. Professor Bryce incorrectly attributes to me the claim that “the Jesuits’ commitment to justice and to neighbor began with the 1973 address of Fr. Arrupe.” *Id.* at 590. I never suggested that Jesuits were unconcerned with matters of justice prior to Pedro Arrupe’s tenure as Father General of the Society of Jesus. I did say that Jesuit concern for justice received a new emphasis beginning with Arrupe’s famous address at Valencia in 1973. The fact that the Society of Jesus itself regarded Arrupe’s address as calling for something new is so amply supported by the response of its members at the time and in the years since as to be beyond dispute. *See, e.g.,* John W. O’Malley, *The Jesuits’ Congregation: A Historical View*, AMERICA, Nov. 19, 1983, at 309 (arguing that General Congregations 32 and 33 effected a “paradigm shift” that “ordained a number of changes in the way Jesuits lived their lives on a day-by-day basis and especially how, for whom and in what fashion Jesuits would exercise their ministries”).

38. Bryce, *supra* note 1, at 596.

39. *See id.* at 596 n.112.

40. Breen 2005, *supra* note 3, at 403-08.

From this, Bryce claims that I argue that students “must participate in a mandatory classroom course in justice and theology”<sup>41</sup> and that “whoever is hired [as a faculty member] must have a sufficient understanding and commitment to Catholic religious teachings.”<sup>42</sup> He refers to the course I propose as an offering in “Justice/Theology”<sup>43</sup> and he claims that what I am “seeking to transmit through [my] mandatory proposals is significantly more religious in nature than jurisprudential.”<sup>44</sup> Indeed, he claims that I seek the “inculcation of religious concepts” in students.<sup>45</sup>

Professor Bryce offers no proof of this allegedly covert agenda, nor does he explain how he is able to discern my supposedly true intentions. Moreover, with respect to faculty members being required to have a “commitment to Catholic religious teachings,” Bryce fails to mention my insistence that a Jesuit law school must welcome faculty “regardless of religious background.”<sup>46</sup> Likewise, he chooses to ignore my contention that a “Jesuit law school should be open to every point of view—even those inimical to the Catholic faith,”<sup>47</sup> and that the Church’s point of view should be engaged “not as a privileged voice of unquestioned authority, but as a thoughtful participant in the wider conversation.”<sup>48</sup> Indeed, Bryce’s allegations seem plausible in the context of his essay only by replacing what I actually propose with Bryce’s own creation.

The truth is that Professor Bryce’s fellow respondent, Judge Donnelly, is far more religious than I am in his description of what authentic Jesuit legal education demands. Indeed, to his great credit, Donnelly attempts to ground the experience of the law clinic in the Gospel itself. He insists that “Catholic clinics must bring love to their work with the poor.”<sup>49</sup> Indeed, for Donnelly, “[u]napologetic Catholics [will] find a merely academic enterprise inadequate” and will instead want to “transcend academia through love in action.”<sup>50</sup> The law school sponsored clinic should, he says, be understood as love “unleashed in action on behalf of the suffering.”<sup>51</sup>

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41. Bryce, *supra* note 1, at 579 n.7.

42. *Id.* at 580 n.7.

43. *Id.* at 581.

44. *Id.* at 581-82 n.11.

45. *Id.*

46. Breen 2007, *supra* note 2, at 72; *see also id.* at 71 (arguing that it would be wrong to exclude a faculty candidate from consideration based on religious affiliation); Breen 2005, *supra* note 3, at 413-14 (arguing that the Jesuit law school should hire based on the willingness of candidates to embrace the mission of challenging students to think rigorously about justice, not religious affiliation).

47. Breen 2007, *supra* note 2, at 44.

48. Breen 2005, *supra* note 3, at 407.

49. Donnelly, *supra* note 1, at 609.

50. *Id.* at 610.

51. *Id.* at 619.

Thus, for Judge Donnelly, his proposal to move the clinic to the center of the Jesuit law school derives squarely from the school's religious affiliation which entails a commitment to the promotion of not only *justice*, but *love*. Indeed, he argues that a law school's Jesuit and Catholic affiliation places "service and clinical experience, rather than talk and the classroom at the law school's heart"<sup>52</sup> since "[t]he meat of Catholicism lies not in words but in the transformative action of love."<sup>53</sup> For Donnelly, "[c]linical experiences of the right kind present . . . students with the opportunity to unleash love."<sup>54</sup> Thus, he contends that if the clinic is made the focal point of the Jesuit law school, a renewed sense of identity will follow, "[a]ction, not words, will work the transformation."<sup>55</sup>

Judge Donnelly is undoubtedly correct in asserting that love is at the center of Catholic and Jesuit identity. Indeed, "[m]an cannot live without love."<sup>56</sup> That is, because "God's very being is love,"<sup>57</sup> and every human being is made in the image and likeness of God,<sup>58</sup> love is "the fundamental and innate vocation of every human being."<sup>59</sup> In fulfilling this vocation "[l]ove of neighbor is inseparable from love for God"<sup>60</sup> such that from the Catholic point of view "[i]f anyone says 'I love God,' but hates his brother, he is a liar."<sup>61</sup> Thus, I find myself in fundamental agreement with Donnelly on this subject. At the same time, his proposal is tremendously ambitious. I dare say that his vision for Jesuit legal education is a far cry from what typically goes on in most clinics at most Jesuit-sponsored law schools.<sup>62</sup> That is, while I am certain that students at Jesuit schools are taught to be respectful of their clients and dedicated to providing them with the highest quality of legal representation, I strongly suspect that the "love" of clients is not what is being taught at Jesuit law schools. My own proposal, by contrast, seeks only to hold Jesuit law schools minimally accountable to their own standards regarding the promotion of justice.<sup>63</sup>

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52. *Id.* at 608.

53. *Id.* at 610.

54. *Id.* at 620.

55. *Id.* at 608.

56. JOHN PAUL II, ENCYCLICAL LETTER *REDEMPTOR HOMINIS* ¶ 10 (1979), available at [http://www.vatican.va/edocs/ENG0218/\\_PB.HTM](http://www.vatican.va/edocs/ENG0218/_PB.HTM).

57. CATECHISM OF THE CATHOLIC CHURCH § 221 (2d ed. 1997) [hereinafter CATECHISM].

58. *Genesis* 1:27.

59. CATECHISM, *supra* note 57, § 1604.

60. *Id.* § 1878.

61. 1 *John* 4:20.

62. See, e.g., Donnelly, *supra* note 1, at 609 (insisting that "Catholic clinics must bring love to their work with the poor.").

63. With respect to justice and love, Judge Donnelly's article reflects a kind of conceptual confusion in that he seems to suggest that these two quite distinctive virtues are in fact identical. See *id.* at 620 ("We render to the suffering person what is their due, love."). Traditionally, justice has been defined as rendering to another that which is his or her due, see *SUMMA THEOLOGICA*, *supra* note 21, II-II, Q.58, art. 1, at 1435, a point that Donnelly seems to recognize, see Donnelly, *supra*

With respect to this less ambitious goal, I agree with Judge Donnelly's criticisms concerning the way in which jurisprudence is typically taught. He warns of "the snooze-factor" and of most law students' desire for practical answers.<sup>64</sup> He is right to complain that "[t]alking abstractly about justice has little meaning" for law students absent some connection to the real world, a connection that the clinic experience fully realizes.<sup>65</sup> Indeed, for Donnelly, in the clinic "[t]he mind discerns what justice *is* by seeing what it is not" such that the experience of injustice "points out justice as the compass's true north tells you south."<sup>66</sup> Likewise, Bryce contends that the contact that clinic students have with their clients "has significant impact" on how they see the world.<sup>67</sup> Working in the clinic makes students aware of the "daunting legal and social problems" that many people confront and this experience "transforms the students."<sup>68</sup>

Unfortunately for Professor Bryce and Judge Donnelly, this approach to the subject seems to confirm the very point I attempted to make in the original article, namely, that in the clinical setting, students are led to believe that identifying justice and injustice calls for the exercise of feeling and intuition, not scrupulous thought. The notion is that justice and injustice are qualities that are self-evident and so should be perceived by the student once he or she is exposed to the situation. Much as Justice Stewart famously remarked with respect to obscenity, identifying injustice

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note 1, at 619 n.61 (quoting JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES: PRUDENCE, JUSTICE, FORTITUDE, TEMPERANCE* 44 (1966)), whereas love is the virtue whereby one wills not only to bring about the good of another, but to be united to the beloved. See *SUMMA THEOLOGICA*, *supra* note 21, II-II, Q.27, art. 2, at 1306. Justice is something which the legal and political order can demand and compel, whereas love is the free gift of self. See BENEDICT XVI, *ENCYCLICAL LETTER DEUS CARITAS EST* ¶¶ 26-29 (2005) (distinguishing justice and love), available at [http://www.vatican.va/holy\\_father/benedict\\_xvi/encyclicals/documents/hf\\_ben-xvi\\_enc\\_20051225\\_deus-caritas-est\\_en.html](http://www.vatican.va/holy_father/benedict_xvi/encyclicals/documents/hf_ben-xvi_enc_20051225_deus-caritas-est_en.html). Unfortunately, Professor Bryce provides readers with a similarly confused understanding of love. In defending the affective approach to "justice learning" that currently defines clinical education, Bryce declares that "[c]ertainly love is an affective concept and is learned in an affective way." Bryce, *supra* note 1, at 599. Although I do not doubt that love *is* affective in many important respects (a point that Donnelly effectively makes by invoking Martha Nussbaum, see Donnelly, *supra* note 1, at 609 n.12 (citing MARTHA NUSSBAUM, *THE FRAGILITY OF GOODNESS* 307-08 (1986))), it is simply wrong to see love primarily as a matter of affection or sentiment since it is also, and above all, "an act of the free will." PAUL VI, *ENCYCLICAL LETTER HUMANAE VITAE*, ¶ 9 (1968), available at [http://www.vatican.va/holy\\_father/paul\\_vi/encyclicals/documents/hf\\_p-vi\\_enc\\_25071968\\_humanae-vitae\\_en.html](http://www.vatican.va/holy_father/paul_vi/encyclicals/documents/hf_p-vi_enc_25071968_humanae-vitae_en.html).

64. Donnelly, *supra* note 1, at 616. In the original article I addressed the pedagogical weakness of traditional jurisprudence classes Donnelly identifies and suggested that students' impression that the subject of justice is abstract could be overcome by an emphasis on cases and contemporary problems. See Breen 2005, *supra* note 3, at 402 n.87.

65. Donnelly, *supra* note 1, at 609.

66. *Id.*

67. Bryce, *supra* note 1, at 600.

68. *Id.*

does not require one to engage in argument, rather, “I know it when I see it.”<sup>69</sup> Surely there are instances of such self-evident injustice in the world—examples of injustice that only the most callous and malformed individuals could defend as permissible forms of human conduct—but these instances are relatively few in number<sup>70</sup> in comparison to the many occasions in which the path to justice is less obvious.

Professor Bryce rightly insists that “[r]eal learning is not solely intellectual,”<sup>71</sup> and that the goal of legal education is not the retention of “abstract formal knowledge about justice” but “the development of judgment” which requires “reintegrating that knowledge into a practical context of indeterminate situations.”<sup>72</sup> Likewise, Judge Donnelly argues that in addition to challenging the intellect, the will must also be trained to desire what is genuinely good, to have a passion for what is just and right.<sup>73</sup> Justice, says Donnelly, “is learned through habituation, not treatises,”<sup>74</sup> and habit involves both intellect and desire. He contends that “[t]he best manner in which to teach desire is experience,”<sup>75</sup> and for law students this means the experience of the clinic.

While I do not doubt either the power of the experiences Judge Donnelly recounts from his own practice as a public defender,<sup>76</sup> or the capacity of clinical education to transform students that Professor Bryce rightly applauds,<sup>77</sup> the law requires more. Indeed, one must be able to give an account for the positions one assumes, for the path one chooses to follow. To make a *legal* argument in favor of some course of action—whether it be the strategy behind a particular line of questioning in a deposition or the critique of a statute in an appellate brief—one must be able to do more than simply refer to the power of one’s own life experience. Thus, Donnelly acknowledges that “[t]hought fulfills action”<sup>78</sup> and that clinical education, as it is currently practiced, “falls short.”<sup>79</sup>

What can be done to correct this? Beyond adding a mandatory clinical component to the curriculum,<sup>80</sup> how can the clinical experience be improved so as to

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69. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring); *cf.* Donnelly, *supra* note 1, at 612 (“Putting students face-to-face with injustice may be just the experience to ignite their passion to discover justice.”).

70. For a list of acts of gross injustices identified in the Catholic tradition see *GAUDIUM ET SPES*, *supra* note 23, ¶ 27.

71. Bryce, *supra* note 1, at 597.

72. *Id.*

73. *See* Donnelly, *supra* note 1, at 613-16.

74. *Id.* at 614.

75. *Id.* at 617.

76. *Id.* at 620-22, 624.

77. Bryce, *supra* note 1, at 594.

78. Donnelly, *supra* note 1, at 615.

79. *Id.* at 612.

80. Both Bryce and Donnelly criticize me for not writing an article in support of a

more fully satisfy its potential and fulfill the Jesuit mission of promoting justice? Bryce and Donnelly have two suggestions in this regard that are somewhat conflicting. On the one hand, they suggest that a jurisprudential course like the one I recommend ought to follow, in sequential fashion, a required law clinic experience. On the other hand, they suggest that a jurisprudential course might be integrated into an existing clinical program.

With respect to the first suggestion, Donnelly argues that because “the complexities of the intellectual life must be grounded in the concrete particulars” the clinical experience should serve “as a prerequisite to the theoretical.”<sup>81</sup> Although reflection—the “intellectual work” of habituation—has its role, Donnelly is emphatic that “deeds come first.”<sup>82</sup> Indeed, he insists that “[t]he best manner in which to teach desire is experience”<sup>83</sup> such that “clinical work must precede the intellectual formation of [the] lawyer in [the] habit of doing justice”<sup>84</sup>—a point with which Bryce agrees.<sup>85</sup> Thus, after setting forth his ultimate proposal “to have a clinical course as a requirement for each student,”<sup>86</sup> Bryce adds that “[a] separate course on jurisprudence, not unlike the one Professor Breen suggests, can be recommended to each student who is taking a clinic.”<sup>87</sup>

Although I am delighted that Professor Bryce sees some merit in my proposal, his endorsement is somewhat bewildering given that the gist of his article up until this point was to criticize such a class as “positivist”<sup>88</sup> and “scholastic” and so not in keeping with the Jesuit approach to learning.<sup>89</sup> Given his confidence in the ability of clinics to introduce students to “ethical, jurisprudential and moral questions,”<sup>90</sup> such a

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mandatory clinical experience at Jesuit-sponsored law schools. See Bryce, *supra* note 1, at 594; Donnelly, *supra* note 1, at 613 & n.31. Such a requirement would, says Bryce, address my point regarding the current marginality of clinical education. Bryce, *supra* note 1, at 594. I suppose that every law review article could be faulted for what it does not say. Thus, although I believe that I clearly indicated my support for mandatory clinical education, I suppose that my articles might be criticized for not being emphatic enough in this regard, that is, for not being the pieces that Bryce or Donnelly (or some other author) would have written. Moreover, for the reasons stated above, making clinical education mandatory would not overcome its inherent limitations with respect to the teaching of justice. See *supra* notes 37-40 and accompanying text.

81. Donnelly, *supra* note 1, at 611.

82. *Id.* at 609.

83. *Id.* at 617.

84. *Id.* at 614.

85. See Bryce, *supra* note 1, at 600 (stating that “practice can actually precede theory” (citing Thomas L. Shaffer, *Roman Catholic Lawyers in the United States of America*, 21 J.L. RELIGION 305, 310 (2005-06)); *id.* at 578 (citing Shaffer, *supra*, at 310).

86. *Id.* at 602.

87. *Id.*

88. *Id.* at 601.

89. *Id.* at 584, 592, 596.

90. *Id.* at 595.

course would seem to be superfluous. Although Bryce elsewhere seems irritated that I “will not accede that clinics are sufficiently promoting justice and justice learning in law schools,”<sup>91</sup> I am grateful that he sees at least some value in my proposal.

More importantly, Judge Donnelly and Professor Bryce’s suggestion seems to have gotten the order of things exactly wrong. Action should be the fruit of contemplation and reflection, not its antecedent.<sup>92</sup> Students are not equipped to engage in clinical practice when they first begin law school.<sup>93</sup> Thus, if the course examining justice must take place after the required clinical experience that Bryce and Donnelly would mandate, then students would not enroll in such a class until the second semester of the second year, at the earliest. Indeed, Bryce would have such a course as an upper-level offering and would require clinical participation in the third year.<sup>94</sup>

The problem with this sequential approach is that it treats the study of justice almost as an afterthought rather than as the animating force behind Jesuit legal education. If the promotion of justice is to pervade the Jesuit law school, then conversations about justice must take place throughout the curriculum.<sup>95</sup> By postponing the proposed course dedicated to the study of justice, however, a school would deprive its students of the conceptual tools and intellectual resources they would need to engage in rigorous discussions of justice in their various doctrinal classes, including the foundational courses of the first year.

With respect to their second suggestion, Bryce and Donnelly strongly endorse an integrated approach to justice education in the clinical setting such as the one proposed by Professor Andrew Moore.<sup>96</sup> Indeed, Donnelly insists that “[i]t is particularly the responsibility of Catholic and Jesuit law schools to integrate praxis

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91. *Id.*

92. *Cf.* SUMMA THEOLOGICA, *supra* note 21, II-II, Q.188, art.6, at 1999 (“And this work is more excellent than simple contemplation. For even as it is better to enlighten than merely to shine, so is it better to give to others the fruits of one’s contemplation than merely to contemplate.”).

93. Although some commentators have written in support of a clinical experience in the first year, see for example Michael A. Millemann & Steven D. Schwinn, *Teaching Legal Research and Writing with Actual Legal Work: Extending Clinical Education Into the First Year*, 12 CLINICAL L. REV. 441, 441 (2006); Margaret Martin Barry et al., *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 41-44 (2000), most law professors would, I think, agree that “most first-year law students are [not] ready to take primary responsibility for representing a client in an adversarial proceeding even in a relatively simple case. The typical first-year student simply does not know enough, either in terms of substantive law or lawyering skills.” Deborah Maranville, *Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning*, 51 J. LEGAL EDUC. 51, 62 (2001).

94. Bryce, *supra* note 1, at 602, 604.

95. See Breen 2007, *supra* note 2, at 74.

96. See Bryce, *supra* note 1, at 597, 600, 604-05; Donnelly, *supra* note 1, at 612 n.28, 618-19 (citing Andrew F. Moore, *Contact and Concepts: Educating Students at Jesuit Law Schools*, 41 GONZ. L. REV. 459, 478 (2006)).



into a theoretical understanding of the virtues.”<sup>97</sup> Likewise, Bryce argues that students should “reintegrate” the “abstract formal knowledge about justice or values” that they gain in the classroom “into a practical context of indeterminate situations.”<sup>98</sup> He suggests that a course similar to the one I recommend could be “interweaved with other third-year courses.”<sup>99</sup>

While I strongly support the idea that the academic study of justice should be integrated with students’ clinical experiences, I do not believe that this can be accomplished in the clinic alone. My judgment in this regard has nothing to do with doubting the ability of clinical faculty to teach jurisprudential subjects—yet another thing of which Bryce accuses me<sup>100</sup>—and everything to do with the inherent pedagogical limitations of any one law school class. As a practical matter, I do not see how a clinical course can give students the intellectual tools they will need to think through substantive questions of justice presented in their various doctrinal courses while at the same time competently teaching students the substantive law, practical skills, and ethical lessons that they should obtain through a clinical experience. This is not because I think that “clinical education is not rigorous”—something else of which I stand accused by Professor Bryce.<sup>101</sup> On the contrary, it is precisely because clinical courses are rigorous and demanding that they are unable to also provide the sort of introduction to justice that I recommend. In the same way, I do not believe that a first year course in civil procedure, torts, contracts, or constitutional law could hope to provide students with a challenging introduction to the basic concepts of justice and at the same time adequately introduce students to the doctrinal material at the heart of these respective subjects. Time is a significant

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97. Donnelly, *supra* note 1, at 618.

98. Bryce, *supra* note 1, at 597.

99. *Id.* at 604-05.

100. Bryce accuses me of assuming “that all clinical faculty members teaching at Jesuit Law Schools do not have a background in either Jurisprudence or Catholic Social Teaching.” *Id.* at 595 n.105. Where Bryce derives this supposed assumption on my part is anything but clear.

101. *Id.* at 598. Sadly, Professor Bryce misstates or mischaracterizes my argument on a number of other points as well. For example, I do not, as Bryce accuses me, criticize Jesuit law schools “for referencing clinical law programs as embodying their commitment to promote justice.” *Id.* at 594. On the contrary, I forthrightly admit that clinical education embodies a commitment to the Jesuit ideal of promoting justice. See Breen 2005, *supra* note 3, at 398; Breen 2007, *supra* note 2, at 45-46. I did criticize what I regard as the misuse of clinics in law school propaganda which claims that clinics represent the fulfillment of the Jesuit ideal of promoting justice in legal education. Indeed, I believe that when the pursuit of this ideal is confined to the clinic, the pedagogical commitment to the promotion of justice will necessarily be incomplete. Bryce also says that I “criticize[] clinical education for being affective in nature.” Bryce, *supra* note 1, at 594. On the contrary, I criticized clinical education for generally being affective in the way it presents questions of justice. In fact, I believe that clinical education is intellectually rigorous and demanding in the way in which it teaches students practical skills, ethical conduct, and knowledge of the procedural rules and substantive law in the matter assigned.

limitation on our pedagogical ambitions, regardless of how laudatory our ambitions may be.

### III. MORE THAN A METHOD: KALSCHUR'S MISTAKEN UNDERSTANDING OF THE CATHOLIC INTELLECTUAL TRADITION

Father Kalschur chose not to comment on what I regard as the misuse of clinics in the struggle to define Jesuit identity. Instead, his remarks are directed toward my thesis that it is incumbent on those law schools claiming a Jesuit affiliation to make a serious engagement with the Catholic intellectual tradition an integral part of the life of their institutions. More precisely, I argued that the Jesuit goal of promoting justice entails the duty to teach students how to think about justice. While the Jesuit law school should broadly introduce students to the many competing theories of justice, such an introduction should also include exposure to the Catholic intellectual tradition as it pertains to questions of law and justice.

In reading Father Kalschur's response, I was gratified to find that he agrees with my "most basic point."<sup>102</sup> At the same time, he doubts whether I understand the characteristics of the Catholic intellectual tradition and "what engagement with the tradition might actually look like in the contemporary Jesuit law school."<sup>103</sup> He also questions what he describes as my "embattled tone" suggesting that it might be more of an impediment than an asset in encouraging serious consideration of my thesis.<sup>104</sup> Tone and style, he says, are especially crucial with respect to inviting our diverse colleagues to participate in a conversation that many will find "difficult, unfamiliar, and threatening."<sup>105</sup> Moreover, he insists that, given the reality of faculty governance, there is no substitute for "the hard work of finding ways to invite our colleagues into a candid conversation about these issues."<sup>106</sup> The Society of Jesus, he assures us, cannot simply intervene and "make things right"<sup>107</sup> by imposing a top-down solution.

While I might take issue with Father Kalschur's characterization of my tone as "embattled," I concede that in both of my articles on Jesuit legal education I forgo the chummy and often self-congratulatory effusions frequently found in writings on the subject. Absent this kind of frank talk, one wonders how candid the conversation would be, notwithstanding the good intentions of Father Kalschur and others.

I have no illusions about the difficult task ahead. I do not pretend to think that the Jesuits can immediately and unproblematically set things right by edict from on high, but neither do I think that the Jesuits should be excused from the demand that they exercise real leadership in the universities that operate in their name. Blaming

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102. Kalschur, *supra* note 1, at 559.

103. *Id.* at 562.

104. *Id.* at 559.

105. *Id.* at 562.

106. *Id.*

107. *Id.* at 563; *see id.* at 576.

the Society of Jesus full score for the debacle of Jesuit identity in legal education would not be fair, but to deny that a problem is present and that the Jesuits have any responsibility for achieving a solution in this regard is a non-starter.

The tone of both articles, while somewhat strident, was designed to rouse those in positions of leadership from their complacency. Father Kalscheur is probably right that the same tone would be counterproductive given a different audience. Under the circumstances, however, I thought it was appropriate. Undoubtedly, many colleagues at Jesuit law schools will, as Kalscheur says, find the project of renewed Jesuit identity “difficult, unfamiliar, and threatening”<sup>108</sup> such that they will avoid the conversation altogether, or they will engage in it on only a *pro forma* basis, abandoning the project when the possibility of real change emerges. It is precisely for this reason that real leadership from Jesuits and others in positions of responsibility is needed.<sup>109</sup> While there is no substitute for the candid conversation that Kalscheur describes, given the current make up of law school faculties, the prospect of the project advancing spontaneously from the bottom up, without aid from above, is negligible.

Unfortunately, a certain unwillingness to engage in the very sort of candid conversation that Father Kalscheur admits is necessary is evident in his essay. Nowhere in his remarks does Kalscheur overtly criticize the current practice of any Jesuit law school with respect to its purported identity, no matter how outrageous it might be.<sup>110</sup> Moreover, Kalscheur emphatically rejects my “stark conclusion that Jesuit legal education must be characterized as an ‘abysmal failure’ as *Jesuit* education.”<sup>111</sup> He also thinks it somewhat odd that I have announced this failure while acknowledging that the vision of Catholic legal education that I set forth “calls for building something new, rather than reclaiming an idealized past that never really

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108. *Id.* at 562.

109. Indirectly and perhaps unintentionally, Kalscheur acknowledges this point in describing the introduction to the Jesuit tradition in education that he provides to entering students at Boston College during their first-year orientation. *See id.* at 569-70, 575-76. That is, Kalscheur gives this introduction because he was invited to do so by the dean of Boston College Law School, John Garvey. Another dean, less concerned with Jesuit and Catholic identity, would not have made the effort to bring this component into the school’s first-year orientation.

110. *See* Courtney Lario, *GU Law Loosens Internship Policy: School Reverses Abortion Rule*, HOYA, Sept. 25, 2007, available at <http://www.thehoya.com/node/4215> (reporting the decision of Georgetown Law Center’s Dean Alexander Aleinikoff, reversing a prior administrative decision, to now fund student internships where Georgetown law students perform legal work for abortion rights advocacy groups). Other Catholic law schools with a more robust understanding of both justice and Catholic identity have approached the subject in a very different way. *See, e.g.*, Richard John Neuhaus, *The Public Square*, FIRST THINGS, June/July 2003, at 65-66, available at [http://www.firstthings.com/article.php?id\\_article=497](http://www.firstthings.com/article.php?id_article=497) (reprinting Villanova University School of Law’s Dean Mark Sargent’s explanation for why the School’s Public Interest Fellows program cannot pay stipends to students who work for abortion rights advocacy groups).

111. Kalscheur, *supra* note 1, at 563.

existed.”<sup>112</sup> This should not be a source of puzzlement. The failure of Jesuit law schools today is not judged against some historical model recovered from the past but by the present-day standards set forth by the Society of Jesus, together with the self-descriptions of law schools operating under Jesuit auspices.

One reason that Kalscheur gives for rejecting my conclusion regarding the failure of Jesuit legal education is that I have mistakenly “reduce[d] what is essential in the Jesuit mission to a single focus on either justice or a static conception of the Catholic intellectual tradition.”<sup>113</sup> Indeed, because I proposed that Jesuit law schools require their students to take up the subject of justice in a course dedicated to it, Kalscheur repeatedly accuses me of engaging in “reductionism.” He says that I have “improperly reduced [my] consideration of what is necessary for a law school to manifest fidelity to its Jesuit identity to a single criterion.”<sup>114</sup> At the same time, Kalscheur acknowledges that I regard the required course in jurisprudence that I recommend as necessary “but not sufficient” to satisfy the demands of Jesuit identity.<sup>115</sup>

Plainly, as a matter of logic, if one argues that a particular criterion is *necessary* but not *sufficient* to achieve a certain state of affairs, then one has not reduced that state of affairs to a “single focus” or a “single criterion.” Thus, I argued that the teaching of such a course in justice would be necessary to avoid failure, not that it would be sufficient to ensure success. Moreover, in the second article, I underscored the limited nature of my argument by making clear that in the original piece I had not intended to set forth “a comprehensive proposal for the teaching of justice in a Jesuit law school” or “a complete agenda for programmatic reform of Jesuit legal education.”<sup>116</sup>

In both articles, however, I do put forth the view that if a school is serious about its desire to fulfill the Jesuit mission of promoting justice, then examination of the subject cannot be confined to one required course.<sup>117</sup> Indeed, I make clear that “the successful implementation of a ‘pervasive method’ in which discussions of justice are integrated into substantive courses throughout the curriculum will be a necessary component of any serious attempt to fulfill the Jesuit mandate of promoting justice

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112. *Id.* at 560. That is, because my “understanding of the Jesuit Catholic law school calls for building something new,” Kalscheur wonders whether my “proclamations of failure irrefutably demonstrated are misplaced” since something yet to be tried cannot rightly be described as having failed. *Id.*

113. *Id.* at 563.

114. *Id.*

115. *Id.* at 571 (citing Breen 2005, *supra* note 3, at 411 n.119).

116. Breen 2007, *supra* note 2, at 45.

117. Breen 2005, *supra* note 3, at 403 (calling on Jesuit law schools to “challenge[] [their] students to think seriously about the meaning of justice through both [their] required and elective curriculum”).

and forming ‘men and women for others.’”<sup>118</sup> Thus, Kalscheur’s comment that justice should be “a concern throughout the curriculum, not simply in one required class”<sup>119</sup> is advice with which I readily agree and have already taken to heart in advancing my thesis.

Father Kalscheur recounts his own efforts to urge his students to think seriously about the nature of justice and its relationship to law in his first-year course in civil procedure. Although he candidly admits the difficulties involved in such an exercise,<sup>120</sup> he then erroneously concludes that such intermittent and incomplete conversations may “bring the promotion of justice more powerfully into the curriculum than will the addition of one course explicitly dedicated to the question of justice.”<sup>121</sup> Plainly, having such conversations in substantive doctrinal classes and having a required course dedicated to justice as such are not mutually exclusive. Moreover, Father Kalscheur fails to see how the latter may actually enhance the former. That is, the sort of required course that I recommend, or something similar to it, could provide students with the conceptual background that would enable them to better appreciate the introduction of questions relating to justice in their doctrinal courses and to more meaningfully participate in the conversations that would ensue. Indeed, it simply is not realistic to expect students to be able to engage in rigorous and meaningful discussions of “justice” without first giving them an introduction to the basic ideas that relate to it. In the same way, no one would expect a law student to be proficient in discussing the notion of “liability” without first having taken such foundational courses as torts and contracts. Without providing students with the intellectual background for such conversations, classroom discussions of justice that do take place are likely to be facile and uninformed, operating as an opportunity for the expression of feelings rather than the occasion for reasoned argument.

With respect to my treatment of the Catholic intellectual tradition itself, Kalscheur contends that I have again fallen into the trap of reductionism. He says that I have “reduce[d] justice and engagement with the Catholic intellectual tradition to a set of concepts to be thought about, rather than as virtues to be lived.”<sup>122</sup> The Catholic intellectual tradition, he says, “is a way of proceeding, a distinctive intellectual dynamism, not a body of doctrine.”<sup>123</sup>

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118. Breen 2007, *supra* note 2, at 74.

119. Kalscheur, *supra* note 1, at 568-69; *see also id.* at 570 (“If sensitivity to justice is to be part of the entire curriculum, these are questions that we need to try to attend to in all of our classes, not just in a jurisprudence course that includes exposure to the Catholic intellectual tradition.”).

120. *Id.* at 571. In teaching the introductory course in contracts to first year students I have encountered the same sorts of difficulties and limited successes that Father Kalscheur describes. Indeed, it was in part my frustration with this experience that led me to explore how this situation might be remedied through the sort of required course in justice that I recommend.

121. *Id.*

122. *Id.* at 563.

123. *Id.* at 564.

Although it is correct to describe the Catholic intellectual tradition as possessing a certain methodological approach that is unique to it, the tradition is not so blandly procedural and non-committal as Father Kalscheur suggests. It cannot be reduced (to use Kalscheur's favorite description of my own work) to a mere "way of proceeding." While describing the Catholic intellectual tradition as a "body of doctrine" perhaps overstates the case, there can be no doubt that a number of substantive convictions and truth claims undergird the tradition. They constitute the basic premises, the "fundamental agreements"<sup>124</sup> that demarcate the tradition, which make this certain "way of proceeding" possible. As such, the foundation of any tradition is not merely methodological or procedural but substantive in nature.<sup>125</sup>

Kalscheur gives some indication that he understands the substantive nature of the tradition in that, although he denies that it is "a body of doctrine,"<sup>126</sup> he concedes that it "has produced a body of wisdom."<sup>127</sup> Perhaps Kalscheur's emphasis on process and his understatement of substance derive from his desire to ensure the dynamism of the tradition<sup>128</sup> as a "living, ongoing, not-yet-completed conversation."<sup>129</sup> Yet the substantive foundation of the Catholic intellectual tradition (or of any tradition) does not render it fixed, static, and sterile. A tradition is alive, and its foundational commitments make the tradition and its vitality possible. These commitments ground the tradition and give it an orientation as it develops and goes forth along its "way of proceeding." Indeed, without these shared commitments, "the tradition loses all coherence and fails to survive."<sup>130</sup>

Absent the sort of substantive commitment that orients further inquiry, Father Kalscheur's assurance that the Catholic intellectual tradition includes "a commitment

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124. ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 12 (1988).

125. Although Kalscheur cites to MacIntyre's work, he seems not to fully appreciate this fundamental point. See Kalscheur, *supra* note 1, at 576 n.63 (citing ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 206-07 (1981)). Indeed, the point that there is no purely procedural method of inquiry—that there is no rationality independent of substantive commitments, that even liberalism (which purported to be just such a neutral "way of proceeding") is itself "just one more such tradition with its own highly contestable conceptions of practical rationality and of justice"—is one of the central claims of MacIntyre's work. MACINTYRE, *supra* note 124, at 346.

126. Kalscheur, *supra* note 1, at 564.

127. *Id.* at 566.

128. Kalscheur repeatedly refers to Catholic intellectual tradition as an "intellectual dynamism." *Id.* at 564-65. Moreover, his preference for the procedural over the substantive extends to his description of the Jesuit tradition of education. That is, Kalscheur prefers to see this tradition as "an ensemble of conditions constituting a distinctive educational style or culture, rather than a check list of essential substantive components." *Id.* at 572. Here again, he seems to recognize the vacuous nature of the merely procedural and so insists that the Jesuit mission includes a "commitment both to substantive values (the promotion of justice) and to a way of proceeding characterized by dialogue." *Id.* at 573.

129. *Id.* at 566.

130. MACINTYRE, *supra* note 124, at 12.

to justice and the common good”<sup>131</sup> is literally meaningless. The same could also be said of Kalscheur’s insistence that justice is a “virtue”<sup>132</sup> and a “verb.”<sup>133</sup> These expressions lack meaning unless we can identify the habit of desire (justice as a virtue) and the kinds of actions (justice as a verb) that have the quality of “justice” as such.<sup>134</sup> While in no way foreclosing the “dialogue of inquiry”<sup>135</sup> that must take place between traditions and cultures, nor disparaging the laudable approach of “intellectual solidarity”<sup>136</sup> that Kalscheur recommends, one would hope that the Society of Jesus and the law schools that operate under its sponsorship would be more forthcoming in acknowledging the substantive nature of the intellectual tradition they purport to embody and the virtue and the verb they claim to promote.

#### IV. MORE THAN A FEW SPRINKLES ARE REQUIRED FOR REAL FLAVOR: NUSSBAUM, EXTRA-CURRICULAR ACTIVITIES, AND THE NEED TO HIRE FOR MISSION

In many respects, Spencer Nussbaum’s remarks constitute the most important response to my article. As a non-Catholic student enrolled in a Jesuit law school, Nussbaum represents an important constituency within Jesuit education—a constituency to whom proponents of Jesuit education will want to appeal. Although his observations are not especially encouraging, what he has to say should be taken to heart by everyone who sincerely hopes to see the Jesuit mission succeed in the context of legal education.

While Mr. Nussbaum was initially attracted to Gonzaga University School of Law because of its Jesuit identity, he soon discovered that there was “very little Jesuit and Catholic influence in the school.”<sup>137</sup> Indeed, he concludes that what remains of

131. Kalscheur, *supra* note 1, at 566. The same could be said of Kalscheur’s assurance that the Jesuit tradition includes a “commitment . . . to substantive values (the promotion of justice).” *Id.* at 573.

132. *Id.* at 564.

133. *Id.* at 568, 570.

134. The Catholic intellectual tradition plainly acknowledges that justice is “the intentional habit,” “the virtue which enables man to give to each one what is his due.” PIEPER, *supra* note 60, at 44. At the same time, the tradition recognizes that the justice of an act is not a matter of a person’s subjective disposition. Indeed, “[j]ustice is realized above all in an external act” such that “[t]he justice of an act . . . can be judged even from the outside, by an impartial third party.” *Id.* at 60. The just person does both. He or she desires what is just as a habit of mind and heart and acts accordingly. As Pieper says “[w]henver justice in the full sense is done, the external act is an expression of an inner assent.” *Id.* at 63. This, in fact, is the meaning of the wonderful verse by Gerard Manley Hopkins, S.J., that Kalscheur quotes: “the just man justices.” See Kalscheur, *supra* note 1, at 564.

135. *Id.* at 566.

136. *Id.* at 567.

137. Nussbaum, *supra* note 1, at 632.

the school's Jesuit and Catholic identity is "perhaps only hanging on by a thread."<sup>138</sup> Accordingly, he compares the meager offerings of this identity to the few decorative sprinkles placed on top of a dish of ice cream.<sup>139</sup> At the same time Nussbaum faults my critique of Jesuit legal education for "not giving enough credit to the extra-curricular activities provided by the law school and university ministry."<sup>140</sup>

I am certain that the extra-curricular activities at Gonzaga that Nussbaum describes—the various student organizations and panel presentations—make the experience at Gonzaga truly enriching. But that is just the point: these activities are *extra-curricular*. While undoubtedly worthwhile, in the judgment of those responsible for running Gonzaga Law School, these activities are not so important as to be included in the school's curricular offerings. Now, perhaps not all of these activities are suitable for course work or for academic credit. The point is that the school could mandate other kinds of work that would be appropriate for academic credit in a law school class which would further Gonzaga's stated mission of "foster[ing] a learning environment for all students to pursue the knowledge of . . . natural rights" that "are the cornerstone of true human dignity to which every person . . . is entitled."<sup>141</sup>

Mr. Nussbaum is right to applaud both Gonzaga's graduation requirement that students complete thirty hours of public service and the quality of the school's clinical programs.<sup>142</sup> Even with respect to the latter, however, Nussbaum recognizes the inability of the clinic "to teach and instill in *all* of [the law school's] students the sense of justice in society."<sup>143</sup> Thus, like Bryce and Donnelly, Nussbaum recommends that the school "would do well requiring [a clinical component] for graduation."<sup>144</sup> Again, even if a clinical requirement were implemented, a Jesuit law school would still need to educate students to think about justice as a subject of rational argument and analysis.

Here, Nussbaum's own experience in a jurisprudence course at Gonzaga is not encouraging. Indeed, the overbearing emphasis on positivism and Kantianism and the apparently facile dismissal of natural law theory that he describes seems to be at odds with the contents of Gonzaga's mission statement, not only with respect to the natural rights that it champions, but also with respect to the intellectual rigor that it says is part of the Jesuit tradition of education.<sup>145</sup>

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138. *Id.*

139. *Id.* at 633.

140. *Id.* at 632.

141. Breen 2005, *supra* note 3, at 423 (quoting the Gonzaga University School of Law's mission statement from 2005).

142. Nussbaum, *supra* note 1, at 634-37.

143. *Id.* at 636.

144. *Id.* at 637.

145. *Id.* at 640.



This, in turn, raises the question of “hiring for mission,” not in order to find teachers who will give short shrift to positivism and Kantianism, but in order to find faculty who can fairly present the many divergent theories of justice to which students should be exposed. Contrary to Nussbaum’s suggestion, the composition of such a faculty will not require the Jesuit law school to forgo its pursuit of a “talented and diverse” group of professors,<sup>146</sup> nor will the school have “to gauge the religiosity” of faculty candidates.<sup>147</sup> It will, however, require the Jesuit law school to be diligent in its efforts to find candidates who have the proper disposition and intellectual acumen to carry out the mission. Moreover, if this process is carried out in a proper manner, I am certain that the Jesuit law school will welcome a diverse group of faculty—Catholic and non-Catholic alike—who will be proud to participate in the intellectual life of the school.

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146. *Id.* at 637.

147. *Id.* at 642. In both of my articles on Jesuit education I have focused on “the promotion of justice” as the defining feature of Jesuit identity that should be evident in the law schools that operate under Jesuit sponsorship. In point of fact, however, General Congregation 32 defines the mission of the Society of Jesus as “the service of faith, of which the promotion of justice is an absolute requirement.” THE DECREES OF THE 32ND GENERAL CONGREGATION OF THE SOCIETY OF JESUS, Decree 4, ¶ 2 (1975), *reprinted in* DOCUMENTS OF THE 31ST AND 32ND GENERAL CONGREGATIONS OF THE SOCIETY OF JESUS 411 (1977). Although I was hesitant to address the issue of “the service of faith” in the context of legal education, Nussbaum squarely raises the question in his essay. He forthrightly offers that, in his own experience, “very little, if any, effort has been made to share the gospel of Christ in the law school.” Nussbaum, *supra* note 1, at 639. Indeed, Nussbaum says that “I have never even heard about Christ’s triumph on the Cross, and I do not know many who would even feel comfortable mentioning it.” *Id.* From this Nussbaum concludes “that either the Jesuits are ashamed of their gospel message or simply do not care enough about the non-Catholic students to share it with them.” *Id.* I believe it would be all too easy to reject this criticism as mistaken and to dismiss Nussbaum as someone who failed to perceive the Jesuits’ subtle efforts at evangelization. It would be easy to dismiss Nussbaum’s remarks as those of a student at a Jesuit school who “just didn’t get it.” However, drawing such a conclusion would be wrong because Nussbaum appears to be a student who was in fact looking for these efforts. Indeed, from his essay he appears to have been someone who was interested in and receptive to (at least on a certain level) the Jesuits and the Catholic faith they profess. The Society of Jesus has been blessed by many martyrs who died for the faith beginning not long after the founding of the Society right up to present day. See, e.g., JOSEPH N. TYLEND, S.J., *JESUIT SAINTS & MARTYRS: SHORT BIOGRAPHIES OF THE SAINTS, BLESSED, VENERABLES, AND SERVANTS OF GOD OF THE SOCIETY OF JESUS* (2nd ed. 1998); Charles Berine, S.J., *Ordinary People Made Extraordinary*, COMPANY, Fall 1999, available at <http://companymagazine.org/v171/ordinary.html> (remembering the six Jesuits at the University of Central America in El Salvador and their two lay companions who were murdered in November 1989). The Jesuits are not ashamed of the Gospel, though their contemporary efforts at evangelization may give some that misperception. While I am sure that the Society of Jesus has many sound pastoral reasons for its subdued articulation of the faith and its understated approach to sharing the truth of Jesus Christ, its members should take to heart what Mr. Nussbaum has to say. It should give them pause as to the wisdom of the techniques they currently employ.

## V. CONCLUSION

The lesson I believe the reader should take away from this exchange is that the reform of Jesuit legal education that should take place will require greater and more intense dialogue. A dialogue is a conversation to be held, not a debate to be won. Moreover, a conversation—if it is to be more than the sequential expression of divergent opinions in rapid succession—calls for a certain generosity of spirit and openness to being challenged. It calls, as Father Kalscheur reminds us, for “listening as well as speaking and demands serious attention to our colleagues’ questions and concerns.”<sup>148</sup> What I fear is that many members of the Society of Jesus, administrators of Jesuit universities, and Jesuit law school deans have not given serious attention to the questions and concerns of some colleagues—that they have been reluctant to listen to criticism that calls into question their fulfillment of the Jesuit mission. Indeed, when the conversation has called for something more—for authentic *magis*—the response that has been forthcoming has often reflected a denial of the problem and a dogged defense of the status quo.

Although every dialogue calls for careful listening, this does not mean that every point of view expressed has equal merit. With respect to proposals having to do with the Jesuit mission in legal education, some proposals may result in a deeper and more nuanced understanding of justice, an inculcation of virtue, and a willingness to put into practice the lessons that have been learned, while others will almost certainly result in the same “fuzzy abstraction”<sup>149</sup> that has defined the Jesuit “way of proceeding” for more than a generation. Let us hope that all those involved in Jesuit legal education can find the candor, the generosity, the openness and the courage to have the conversation that will be necessary for true Ignatian renewal to take place.

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148. Kalscheur, *supra* note 1, at 562.

149. Alfred C. Kammer, S.J., *Why Should a Jesuit University Have a Law School*, 10 ST. LOUIS U. PUB. L. REV. 565, 586 (1991) (criticizing the “fuzziness” of other commentators’ efforts to define Jesuit identity in the context of legal education). For a more thorough discussion of Kammer’s argument see Breen 2005, *supra* note 3, at 411 n.119.

