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**REFLECTIONS ON BREEN & STRANG'S
A LIGHT UNSEEN: A HISTORY OF
CATHOLIC LEGAL EDUCATION
IN THE UNITED STATES**

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In *A Light Unseen: A History of Catholic Legal Education in the United States*, Professor John Breen and Professor Lee Strang have undertaken a monumental task and have produced an impressive book, particularly with respect to the fascinating history of the development of Catholic legal education. They provide a thoughtful consideration of how Catholic law schools can be more distinctively Catholic and make a strong case for the critical need for more explicit curricular and scholarly integration of the Catholic intellectual tradition. In this Essay, I make suggestions in three areas: (1) on the record regarding failed efforts to develop a distinctly Catholic approach to legal education; (2) on the inculturation of the Catholic intellectual tradition within the law school; and (3) on the virtues shaping the Catholic law school professional ethics curriculum.

Before setting out my suggestions, I would ask the authors to consider broadening their claim that “[t]he Catholic faith, like all religions, is a set of ideas.”¹ I have always thought Catholicism is first and foremost an encounter with *a person*: Jesus the Christ, “*the* Sacrament of encounter with God.”² We meet Him in the Eucharist and in the Word, in the poor, and in our

[†] Professor of Law, Seton Hall University School of Law. I am grateful to Reverend Nicholas S. Gengaro, Paul Hauge, and Catherine McCauliff for comments on earlier drafts. The views expressed here are solely my own.

¹ John M. Breen & Lee J. Strang, *A Light Unseen: A History of Catholic Legal Education in the United States* 7 (Jan. 20, 2020) (unpublished manuscript) (on file with the *St. John's Law Review*).

² Robert P. Imbelli, *Stewards of the Tradition: Christ the Center*, BOS. C. C21 RESOURCES, Spring 2007, at 7–8, https://www.bc.edu/content/dam/files/top/church21/pdf/Spring_2007.pdf [<https://perma.cc/9P36-GQU3>]. I refer to the distinction between *fides quae*, the faith *that* is believed, and *fides qua*, the faith *by which* one believes. The former is a set of ideas, and the latter refers to trust, the action of believing in Christ. Further, *imitatio Christi*, at the heart of Christian spirituality from its earliest days, goes well beyond a set of ideas.

neighbor. This truth of encounter ensures that the “intellectual” tradition is broad enough to include the contemplatives and mystics and others who better understood “that the living Christ is the heart of the Catholic wisdom tradition”³ and that “love is the highest form of knowing.”⁴ Catholicism and its intellectual tradition may have generated grand and powerful ideas, but those ideas animate and shape people and institutions only through lived realities that are grounded in love, mercy, and solidarity. Perhaps a recognition of encounter with Jesus would help explain why, as the authors beautifully state,

wherever the Catholic tradition held sway, its ideas—about God and man and the universe, and the relationship between them—have informed existing social structures and institutions and given birth to new ones—everything from politics and economics to the arts and the family, even the very notion of the individual as a being who possesses inherent dignity and worth.⁵

I. DISTINCTIVENESS IN CATHOLIC LEGAL EDUCATION

The book laments the failure of Catholic legal education to be different from secular legal education. In reaching this conclusion, however, the authors have not given sufficient credit to the role of Catholic law schools in encouraging scholarly exploration of the relationship of law to the Catholic intellectual tradition. I understand that Chapter Four, not yet available, will describe this movement. I hope that it will be described in its fullness and diversity, and not primarily as a “revival of orthodoxy” among scholars, as the draft appears to contemplate.⁶

In fact, over the last twenty-five or so years, many professors at Catholic law schools (and Catholic law professors at non-Catholic schools) have been building a body of scholarship on Catholic perspectives on various fields of law and jurisprudential schools of thought. Professor Breen and Professor Strang, together

³ *Id.* at 8.

⁴ BERNARD MCGINN, *THE FOUNDATIONS OF MYSTICISM: ORIGINS TO THE FIFTH CENTURY* 235 (1994).

⁵ Breen & Strang, *supra* note 1, at 8.

⁶ *Id.* at 460 (noting that after 1990 we saw “heightened awareness of [the] need for distinctively Catholic culture-preserving institutions,” and as “part of [a] broader Catholic revival” there was a “revival of orthodoxy witnessed in other parts of [the] Church occurring among [the] new generation of Catholic legal scholars,” and further noting that “*Roe* prompted re-evaluation of [the] basis of law and [the] need for institutions that articulated that basis.”).

with the participants at this conference, have been major contributors to this movement. *Christian Perspectives on Legal Thought*, which I coedited with Protestant scholars Michael McConnell and Robert Cochran, was viewed as “new” and “pathbreaking” when it was published in 2001.⁷ Yet even before its publication, and increasingly since, scholars have convened conferences and published books and articles attempting to understand and critique law from religious perspectives. Unsurprisingly, Catholics dominate this area—because they have at their disposal intellectual tools from natural law, Roman law, Catholic social thought, and the Catholic intellectual tradition.

Catholics also dominate because many Catholic universities and their law schools have prioritized exploration in this area.⁸ Journals and centers create institutional openness and outlets.⁹ *A Light Unseen* should highlight these efforts prominently, perhaps even pulling together scholarly works and institutional resources in an appendix as a service to readers. Indeed, the authors’ main proposal—that law professors should draw on the Catholic intellectual tradition—is now possible precisely because we already have numerous examples of such efforts. A candid recognition of these efforts and their contribution to the development of at least some degree of distinctiveness within Catholic legal education should serve to temper the conclusion that “[t]here is next to nothing about their faculty and faculty

⁷ CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 255 (Michael W. McConnell et al. eds., 2001) [hereinafter CHRISTIAN PERSPECTIVES]. My contribution to that volume was *A Catholic View of Law and Justice*.

⁸ My home institution, Seton Hall Law School, has consistently encouraged me and my colleagues Kathleen Boozang (Catholic health care ethics), Michael Ambrosio (natural law), Catherine McCauliff (Catholic Intellectual Tradition, Medieval Thought), Paula Franzese (Catholic Social Thought), John Coverdale (History of Opus Dei), David Opderbeck (Evangelical Protestant thought), Edward Hartnett (Catholic Social Thought), and Bernard Freamon (Islam) to engage in religion and law teaching, or scholarship, or both; we have hosted the annual Religious Legal Theory conference and sponsored a law and theology speaker series.

⁹ Some examples: Seton Hall Law School sponsored many programs through its Center for Religiously Affiliated Non-Profit Corporations; journals like *Journal of Catholic Legal Studies* (St. John’s), *Journal of Catholic Social Thought* (Villanova), and *Journal of Law, Ethics and Public Policy* (Notre Dame), as well as secular journals like the *Journal of Law and Religion* and many law reviews, Catholic and non-Catholic, are open to publishing work discussing religious perspectives. Other institutions offer programming, like Fordham’s Institute on Religion, Law and Lawyer’s Work and Georgetown’s Initiative on Catholic Social Thought and Public Life (at the university but obviously important to the law school).

scholarship, their curricula and pedagogy, . . . that set them apart from the mine-run of American law schools. Catholic law schools are fundamentally the same.”¹⁰

Protestant Christians have also been exploring the relationship between religion and law, between love and justice.¹¹ As the Archbishop of Canterbury William Temple said, “It is axiomatic that love should be the predominant Christian impulse and that justice is the primary form of love in social organization.”¹² Catholic law schools should encourage dialogue with this scholarship, especially with regard to the conceptual and linguistic differences between love and justice, on the one hand, and the common good on the other.

II. ON THE CATHOLIC INTELLECTUAL TRADITION IN THE LAW SCHOOL SETTING

A. *Practical Obstacles to Catholic Legal Education: Defining and Enforcing the Catholic Intellectual Tradition*

The Catholic intellectual tradition, with special emphasis on the social teachings, is the proper frame for the intellectual architecture of a Catholic law school. The tradition is vast and developing, ancient and modern. It is possible to engage the world of ideas and converse with it. And yes, the Catholic anthropology is central.

The tradition is broad, pulling in thousands of years of classical, biblical, theological, and philosophical reflection. I see that breadth as a strength, not as a weakness. My concern is that some who are attracted to the book’s proposal might view the tradition’s breadth as a real danger and feel the need to cabin it. That, in my view, would be the greater danger.

Retaining the breadth of the Catholic intellectual tradition is critical to the success of any curriculum change or program of faculty scholarship. Moreover, the law school project must expect scholarly disagreement. Any two authors might bring religious reflection to a legal topic and employ distinct analyses and reach different conclusions. One might find that the “law and economics”

¹⁰ Breen & Strang, *supra* note 1, at 464.

¹¹ See generally AGAPE, JUSTICE, AND LAW: HOW MIGHT CHRISTIAN LOVE SHAPE LAW? (Robert F. Cochran, Jr. & Zachary R. Calo eds., 2017).

¹² Jeffrie G. Murphy, *Christian Love and Criminal Punishment*, in AGAPE, JUSTICE, AND LAW: HOW MIGHT CHRISTIAN LOVE SHAPE LAW?, *supra* note 11, at 151, 151–52. William Temple was Archbishop from 1942 to 1944.

approach is fully consonant with the Catholic intellectual tradition, and another might qualify that conclusion.¹³ Reaching different conclusions does not mean that the Catholic intellectual tradition is being misapplied. Instead, it is a recognition that more than one approach can emerge from the complexity and depth of the tradition. As the authors would have to admit, the tradition contains the work of titans who are in tension with one another. Augustinians and Thomists might disagree on the law's aim: the authors call that a pitfall,¹⁴ but I'd rather call it an opportunity—an opportunity to teach students and the readers of our work the ways in which some of our disagreements come from distinct emphases within the same tradition. Scholars and teachers will not find a blueprint, but they will find significant guideposts for doing the hard work of defining and promoting the common good in real times and places.

Chapter Five of *A Light Unseen* does provide some examples of the kinds of intellectual work that would fall outside the tradition's bounds: of course it would be inconsistent with the tradition to say the institution of private property or of government must be eliminated (since the tradition holds both as positives) or that a criminal had nothing to do with the commission of his crime (since the anthropology claims human agency). Yet a scholar could still critique these positions from within the tradition—private property is always subject to the social mortgage; government is accountable to the populations it serves and should follow the principle of subsidiarity; and control over one's actions can be diminished under certain circumstances, resulting in less severe punishment on the grounds of human dignity. More examples would be helpful, to provide readers with a greater sense of possibilities. Moreover, it should be expected that Catholic scholarship would not be insular. We should

¹³ Compare, e.g., Stephen M. Bainbridge, *Law and Economics: An Apologia*, in CHRISTIAN PERSPECTIVES, *supra* note 7, at 208, 222–23 (“a realistic social order therefore must be designed around principles that fall short of Christian ideals. . . . Christian visions of justice therefore cannot determine the rules of economic order. Instead, legal rules and predictions about human behavior must assume the fallen state of Man, which is precisely what I have tried to suggest Economic Man permits us to do.”), with George E. Garvey, *A Catholic Social Teaching Critique of Law and Economics*, in CHRISTIAN PERSPECTIVES, *supra* note 7, at 224, 224 (noting where Catholic Social Teaching is compatible with law and economics and where it is not).

¹⁴ Breen & Strang, *supra* note 1, at 513.

welcome discourse with any scholars who engage the tradition,¹⁵ as well as those with uncommon applications of the intellectual tradition.¹⁶ Likewise, we should welcome engagement with scholars who explicitly reject elements in the tradition.

The authors have set the benchmark for faculty work as “consistency with Catholic, doctrinal, theological, and philosophical commitments.”¹⁷ Academic freedom would extend to “areas of reasonable debate and discussion about the Catholic intellectual tradition and its implications.”¹⁸ Catholic law schools would be free, however, not to extend academic freedom to scholarship that is inconsistent with “central and mandatory facets of the tradition.”¹⁹ That sweeping prescription raises several questions: just what are those facets? And does this imply that the Catholic intellectual tradition is coextensive with Church doctrine?²⁰

A law school is not the Church, just as a university is not the Church. They are of course related, but distinct. The reader should know more about the meaning of the required consistency. Navigating the line between the Church and law school has been a challenge from the beginning of Catholic legal education—and *A Light Unseen* gives us a fascinating look at that history. Law faculty scholarship does not need a theologian’s *nihil obstat* or a bishop’s imprimatur, as theological writings might, nor should it.

¹⁵ Richard O. Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1, 13 (1991). Professor Brooks, a scholar of Aristotle and Aquinas who founded the Environmental Law program at Vermont Law School, applies classical insights to environmental law, arguing that “natural law philosophy” must be at the foundation of a system of environmental laws. *Id.*

¹⁶ Craig A. Ford, Jr., *A Natural Law for Queer and Racial Justice*, CANOPY FORUM (Jan. 21, 2020), <https://canopyforum.org/2020/01/21/a-natural-law-for-queer-and-racial-justice-by-craig-ford/> (continuing discussion in a series on the relationship between Natural Law and Human Rights in light of the State Department’s recently convened Commission on Unalienable Rights) [<https://perma.cc/X6L2-FSHN>].

¹⁷ Breen & Strang, *supra* note 1, at 499.

¹⁸ *Id.* at 529.

¹⁹ *Id.*

²⁰ On the distinction between Catholic doctrine and the Catholic intellectual tradition, see generally FRANCIS A. SULLIVAN, CREATIVE FIDELITY: WEIGHING AND INTERPRETING DOCUMENTS OF THE MAGISTERIUM 52 (2003); FRANCIS A. SULLIVAN, MAGISTERIUM: TEACHING AUTHORITY IN THE CATHOLIC CHURCH (2002), and Richard M. Liddy, *The Catholic Intellectual Tradition*, CONVERSATIONS ON JESUIT HIGHER EDUC., Fall 2009, at 2, <https://static1.squarespace.com/static/56172221e4b0d3605b642f70/t/5680b21ab204d52319b5c2dc/1451274778480/Conv36.pdf> [<https://perma.cc/3LT5-F8A5>].

An important follow-up question to whether Church doctrine governs the Catholic law school is this: If the answer is yes, then what are the impacts of such a criterion? How might a requirement of doctrinal consistency impact teaching and scholarship? Who makes the decision whether a piece of scholarship is inconsistent: Deans? Faculty peers? Priests at the university? A committee? Would this have a chilling effect on scholarship?²¹ How might this system work without discouraging Catholic scholars from becoming part of a more intentional Catholic community?

It is no secret that the Church itself is internally divided in many ways, including (but not limited to) integralists offering a critique of political liberalism, those who would remake Church teaching into the platform of the Republican or Democratic party, and those who don't even accept the legitimacy of Pope Francis. There are those who seek to minimize the reforms of the Second Vatican Council, those in the extreme who deny its legitimacy, and those who seek to highlight the Council's value and validity.²² I worry that the book's most significant contribution—the proposal of integrating the Catholic intellectual tradition into the law school curriculum—could be overshadowed by concerns about orthodoxy and its enforcement, about who's in and who's out. Most unfortunately, the specter of censorship (overt or subtle) could shut down various avenues of scholarly exploration that are fully consonant with the intellectual tradition. Even accepting the premise regarding consistency with the Catholic intellectual tradition, it is fair to expect some discussion concerning the “administrability” of this approach and its potential negative side effects.

²¹ For instance, as the authors note, the Catholic tradition “has not definitively identified one particular conception of the common good,” so there can be multiple perspectives. Breen & Strang, *supra* note 1, at 518. But a law school culture with a particularly strict view of church doctrine might have the effect of discouraging faculty from even exploring those perspectives.

²² For commentators with a more optimistic view, see, for example, ALBERIC STACPOOLE, *VATICAN II: BY THOSE WHO WERE THERE* (1986); *THE HISTORY OF VATICAN II* (Giuseppe Alberigo & Joseph A. Komonchak eds., Matthew J. O'Connell trans., 2006) (five volumes); JOHN W. O'MALLEY, *WHAT HAPPENED AT VATICAN II* (2008); MASSIMO FAGGIOLI, *TRUE REFORM: LITURGY AND ECCLESIOLOGY IN SACROSANCTUM CONCILIUM* (2012); RICHARD R. GAILLARDETZ, *AN UNFINISHED COUNCIL: VATICAN II, POPE FRANCIS, AND THE RENEWAL OF CATHOLICISM*, at ix–x (2015); MASSIMO FAGGIOLI, *POPE FRANCIS: TRADITION IN TRANSITION* (2015).

B. The Catholic Intellectual Tradition on the Limits of Law

In response to the previous concern, I would urge the authors to focus on the generous scope of the tradition, with a strong recommendation that they include a description of Aquinas's distinction between morality and law. That notion is critical to mediating between and among the Catholic intellectual tradition, Church doctrine, and the faculty's role in the law school classroom and in scholarship. John Courtney Murray, S.J., was the great expositor of this distinction in the American context. Gregory Kalscheur, S.J., has described Murray's thought as follows: "Morality (which governs all of human conduct) and law (which governs the public order of society) are not coextensive in their functions. Legal prohibitions can have only limited effect on shaping moral character."²³ A law that attempts to promote moral standards will thwart its own goals, in Fr. Murray's words, "by bringing itself into contempt."²⁴

Some of the concerns over orthodoxy resolve themselves when considering the limits of law. Following Aquinas, Fr. Murray said that "human law must be framed with a view to the level of virtue that is actually possible to expect from the people required to comply with the law."²⁵ He suggested evaluating whether a law is prudent by posing a series of questions:

Will the prohibition be obeyed, at least by most people? Is it enforceable against the disobedient? Is it prudent to enforce this ban, given the possibility of harmful effects in other areas of social life? Is the instrumentality of a coercive law a good means for the eradication of the targeted social evil? And since law that usually fails is not a good means, what are the lessons of experience with this sort of legal prohibition? If legislation is to be properly crafted—from a moral point of view and with the goal of promoting the common good of society, "these are the questions that jurisprudence must answer."²⁶

²³ Gregory A. Kalscheur, *American Catholics and the State*, AMERICA (Aug. 2, 2004), <https://www.americamagazine.org/issue/492/article/american-catholics-and-state> [<https://perma.cc/W7CU-YWLL>]. These concerns are echoed in our present day. See, e.g., Robert McElroy, *Bishop McElroy on Voting with Faith and a Conscience*, NAT'L CATH. REP. (Feb. 7, 2020), <https://www.ncronline.org/news/opinion/bishop-mcelroy-voting-faith-and-conscience> (describing why it is inappropriate to use intrinsic evil as the determiner of public policy positions) [<https://perma.cc/QZJ3-XNHS>].

²⁴ Kalscheur, *supra* note 23.

²⁵ *Id.*

²⁶ *Id.*

Fr. Murray further points to a modest prerequisite “level of consensus as to the goodness of the law.”²⁷ Without this consensus, changes in law “will be unenforceable, ineffective, and resented as unduly restrictive of freedom.”²⁸

Given this distinction, the role of the faculty member at a Catholic law school will necessarily entail addressing the efficacy of laws that prohibit or discourage what the tradition considers immoral conduct. This would include the exploration of empirical work regarding the impacts of laws in order to answer the questions Fr. Murray poses. If law is ineffective, then “[i]f society wishes to elevate and maintain moral standards above the minimal level required for the healthy functioning of the social order, *it must look to institutions other than the law.*”²⁹ Thus, faculty should tackle head-on these and other issues regarding the ways in which laws shape or discourage moral behavior. And faculty need not avoid expanding the discussion to extra-legal solutions. Indeed, these extra-legal solutions likely involve law as well, not as prohibitions but as vehicles for facilitating moral alternatives.

Take abortion as an example. I think it is fair to assume that even if abortion were completely criminalized everywhere in the nation, that would not be the end of abortion. If ending abortion is the goal, then the discussion must turn to ways in which a culture of life is built. This would involve a discussion of law, particularly affirmative laws that help create social and economic conditions which encourage family life.³⁰ It would also involve a discussion of new and existing private institutions that can provide help (broadly defined) to pregnant women, and the ways in which law facilitates their creation and coordination. Establishing housing or health care facilities, or the provision of financial assistance to pregnant women, raises many legal topics for an entity engaged in this mission: the freedom to incorporate, to locate, to advertise, and to seek funding; the types of

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* (emphasis added).

³⁰ Of course, Aquinas and Fr. Murray were only concerned about prohibitions. American law is so much more than bans on conduct. There are other ways that laws contribute affirmatively to creating social conditions that are pro-life, including health care, reductions in poverty, broadening the middle class, education, etc.

regulation that will apply to its establishment; and the like. This is a way to discuss a pro-life position that is practical and unafraid of exploration.

C. The Catholic Intellectual Tradition and Its Contribution to American and International Law

Students at Catholic law schools should know the history of Catholic contributions to the development of institutions that shaped and continue to shape American law. In addition to natural law, the involvement of clergy in the development of the common law and the law of equity offer a prime example.³¹ Mary Ann Glendon describes the unmistakable influence of Catholic thought on international human rights in the post-war period.³² This is not an attempt to overstate the influence, but rather to properly credit Catholic contributions to current legal institutions, processes, and doctrines.³³ As law and religion scholar Harold Berman poignantly asked, “Can we not say that God has revealed Himself in existing legal institutions, and that he continues to reveal Himself in the development of those institutions, insofar as they reflect justice and mercy and good faith?”³⁴

III. IDENTIFYING AN ADDITIONAL STRENGTH:
A REVOLUTION IN LEGAL ETHICS

When we graduate students, we send them out into the profession much like we are sent at the end of Mass: to love and to serve the world. We send them out to do justice and serve

³¹ John T. Noonan, Jr., *A Catholic Law School*, 67 NOTRE DAME L. REV. 1037, 1038–39 (1992).

³² Mary Ann Glendon, *Catholic Influences on the Human Rights Project*, BOS. C. C21 RESOURCES, Spring 2007, at 19, https://www.bc.edu/content/dam/files/top/church21/pdf/Spring_2007.pdf [<https://perma.cc/9P36-GQU3>].

³³ There is obviously some linkage to the Catholic scholars of the 1930s and 1940s described in Chapter Two. See Breen & Strang, *supra* note 1, at 180–86 (detailing a conspicuous lack of historical accounts of the prominent role played by Catholic legal scholars in the jurisprudential debates of the 1920s, 1930s, and 1940s); *id.* at 197–208 (describing the contributions of prominent Catholic legal scholars to the debate over Legal Realism).

³⁴ Harold J. Berman, *Foreword* to CHRISTIAN PERSPECTIVES, *supra* note 7, at xiii. Professor Berman has written extensively on the history of Catholic and Protestant influences on law. See generally HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION (1983); HAROLD J. BERMAN, LAW AND REVOLUTION, II: THE IMPACT OF THE PROTESTANT REFORMATION ON THE WESTERN LEGAL TRADITION (2003); HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION (1974); HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION (1993).

the common good. That means we are obligated to equip them for what they will encounter. We do that in many ways as we provide doctrinal courses, skills development and experiential learning, internships, and the like. It is no surprise that professional ethics would be a focus of Catholic legal education. *A Light Unseen* provides a solid view of character formation and virtue ethics that should animate our curriculum in this area: theoretical wisdom, practical wisdom, justice, temperance, and fortitude.³⁵ Our graduates move into public and private entities—media, finance, politics, education, government, and the nonprofit sector. We hope they will be upstanding persons of great character whose view of ethics goes beyond the rules of professional conduct.

But personal virtue might not be enough for true ethical action in certain situations when an accurate reading of one's context and one's role within it has become distorted. Deborah Rhode, a professor at Stanford and ethics scholar, focused on the lawyers involved in the 2003 Enron scandal—in-house, outside counsel, and counsel for the accounting firm—at a time when most attention was on the failures of accountants, managers, and boards of directors. Lawyers indeed contributed to the Enron collapse, given all of the “structural incentives” that affected their actions.³⁶ What happened? Professor Rhode explains, “When

³⁵ Breen & Strang, *supra* note 1, at 536. “A just lawyer is one who exercises judgment ‘according to the written law.’” *Id.* at 538 (quoting ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. II-II, Q. 60, art. 5 (Fathers of the English Dominican Province trans., Benziger Bros. ed., 1947)). A temperate lawyer will resist a bribe; a courageous lawyer “will advocate according to the law” even at the risk of professional harm. *Id.*

³⁶ Deborah L. Rhode, *If Integrity Is the Answer, What Is the Question?* 72 *FORDHAM L. REV.* 333, 343–44 (2003). To quote Professor Rhode:

Subsequent studies similarly demonstrate how market forces and organizational pressures can undermine moral judgment and professional responsibilities. When faced with a misalignment of ethical principles, peer pressures, and workplace incentives, many individuals unconsciously readjust their principles or develop strategies of moral disengagement that enable them to rationalize misconduct. In these circumstances, people often have a poor grasp of their own reasoning processes. Strategies such as euphemistic labelling, displacement or diffusion of responsibility, and reattribution of blame often permit lawyers and corporate managers to deny accountability for unethical actions. Such strategies are apparent not only in the massive moral meltdowns that have recently been on display, but also in everyday deceptions of seemingly petty proportion. Over time, such dissembling breeds a climate that corrupts judgment and lays the foundations for more serious misconduct. Fudging on hourly billing reports, willful blindness to client and collegial fraud, or strategic withholding of

faced with a misalignment of ethical principles, peer pressures, and workplace incentives, many individuals unconsciously readjust their principles or develop strategies of moral disengagement that enable them to rationalize misconduct.”³⁷ In particular,

lawyers’ professional norms of client loyalty often conflict with personal norms of honesty and integrity. To reduce the cognitive dissonance, lawyers will often unconsciously dismiss or discount evidence of misconduct and its impact on third parties. The risks of such dissonance are exacerbated when lawyers bond socially and professionally with the client’s management team. The more that counsel blends into the culture of corporate insiders, the greater the pressures of cohesiveness.³⁸

In these “everyday deceptions of seemingly petty proportion”³⁹ lawyers can easily come to be in denial regarding their role in a corrupt system.

material facts are all predictable responses to the institutional incentive structures prevailing in many workplaces. “Virtue,” Mark Twain once observed, “never has been as respectable as money.” And where short-term profits and personal salaries are the key determinants of power and status, integrity will often lag behind.

We obviously cannot solve those problems in business and professional schools. But we can devote more of our teaching and scholarship to institutional reforms that will make virtue more than its own reward. For example, greater attention should focus on strategies for creating ethical infrastructures and compliance programs in corporate and legal organizations. Such frameworks require clear standards of responsibilities and protections concerning internal whistle blowing, along with adequate ethical policies, training, reporting channels, enforcement, and reward structures.

Id. (quoting MARK TWAIN, *THE INNOCENTS ABROAD* 590 (Oxford Univ. Press 1996) (1896)).

³⁷ *Id.* at 343.

³⁸ Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 *STAN. J.L. BUS. & FIN.* 9, 32 (2002) (footnote omitted). Professor Rhode characterized Enron in this way:

American lawyers’ tendency to privilege client interests over other values is not, of course, readily challenged. The current norm is rooted not only in practitioners’ bottom-line concerns, as Vinson & Elkins’ conduct amply demonstrates, but also in cognitive psychological processes. . . . That, in turn, encourages lawyers to underestimate risk and to suppress compromising information in order to preserve internal solidarity. Yet, in the long run, this dynamic ill serves all concerned. Clients lose access to disinterested advice about their own liability; lawyers lose capacity for independent judgment and moral autonomy; and the public loses protection from organizational misconduct. Enron is a case history of all those costs.

Id. (footnotes omitted).

³⁹ Rhode, *supra* note 36, at 343.

Since that time, there has been a realization that character and virtue alone do not equip individuals to navigate ethically in certain circumstances. The explosion in compliance programs and the intentional creation of ethical corporate contexts have resulted from the realization that structural responses are necessary to create the right environments and the right incentives. Indeed, Seton Hall Law School has been a leader in the compliance area. Professors teaching courses in professional ethics have also responded.⁴⁰

I have wondered about the many lawyers who represented church entities when information about clergy sex abuse of children began to emerge. Were they lacking in virtues, as that term is described in the book? Did they lack courage to aggressively urge bishops to recognize the crisis and put preventive measures in place? Or were they enmeshed in a system, like Professor Rhode describes, in which they so identified with their client and the culture of clericalism, with its secrecy and protect-the-institution mentality, that they couldn't perceive a bigger role for themselves as counselors, as creative problem solvers, or as seekers of justice?⁴¹ Did any lawyer have the courage, the wisdom, and the distance to remind the bishop that he leads the Roman Catholic Church, which proclaims itself to be the sign and safeguard of the transcendence of the human person? And that the victimization of children is completely at odds with this proclamation?

⁴⁰ Rhode & Paton, *supra* note 38, at 36.

Yet while the contributions of professional responsibility education should not be overstated, neither should they be undervalued. Most research indicates that strategies for dealing with ethical issues change significantly during early adulthood, and that well-designed curricular coverage can improve capacities for moral reasoning. Such coverage can increase students' understanding of ethical dilemmas, as well as the analytic approaches and regulatory responses that can assist in solutions. Rather than abstract sermonizing on "right and wrong," ethics curricula can focus on concrete cases, as well as on professional codes, organizational policies, and doctrinal, statutory, and administrative requirements. So, too, well-designed courses can explore the structural conditions underlying moral dilemma and the most promising regulatory responses.

Id.

⁴¹ JOHN JAY COLL. RSCH. TEAM, THE CAUSES AND CONTEXT OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS IN THE UNITED STATES, 1950-2010, at 84–85 (2011), <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Causes-and-Context-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-in-the-United-States-1950-2010.pdf> (describing limits to institutional innovation when churches become overly concerned about institutional reputation and stability) [<https://perma.cc/DC6N-BR8P>].

Surely there were such courageous lawyers. We can certainly imagine how they began to recognize the crisis as early as the 1980s. We see their fingerprints when we consider some of the efforts of the early 1990s, like the establishment of principles by the national bishops' conference and preventive protocols in some dioceses. Even though efforts like these were scattered and ineffective, they nonetheless came *a full decade* before The Boston Globe exposé broke. Only after this did the bishops' conference make a concerted effort to take action.⁴² Looking back, then, we can see that some lawyers understood their "bigger role." But most did not, likely for the reasons Professor Rhode sets out. After dozens of trials, more than twenty diocesan bankruptcies, and newly reopened statutes of limitation, the Church has paid out nearly four billion dollars to victims.⁴³ State governments are now the heroes, cast as protectors of Catholic parishioners from a harmful Church hierarchy.

The Catholic law school's professional ethics program must consider the successes and failures of lawyers involved in these types of situations. Placing the study of virtue ethics within these challenging scenarios will give students a robust demonstration of the traditional virtues. Indeed, helping students develop a critical, prophetic voice in service of their clients could be an enormous contribution of the Catholic law school, by contextualizing virtues like prudence and courage in real-life situations and by expanding the traditional virtues to encompass love, compassion, empathy, and solidarity.

⁴² The United States Conference of Catholic Bishops adopted its Charter for the Protection of Children and Young People (2002) and related protocols. See *Charter for the Protection of Children and Young People*, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, <http://www.usccb.org/issues-and-action/child-and-youth-protection/charter.cfm> (last visited June 13, 2020) [<https://perma.cc/YM9J-96HQ>].

⁴³ Bernard Condon & Jim Mustian, *Surge of New Abuse Claims Threatens Church Like Never Before*, AP NEWS (Dec. 1, 2019), <https://apnews.com/621efb9528384f278c71a97308404531> [<https://perma.cc/XH42-DVYM>]; *Bankruptcy Protection in the Abuse Crisis*, BISHOPACCOUNTABILITY.ORG, <http://www.bishop-accountability.org/bankruptcy.htm> (last visited June 29, 2020) (listing all diocesan bankruptcies) [<https://perma.cc/3M3X-T536>].