

Saints, Sinners, and Scoundrels: Catholic Law Faculty and A Light Unseen: A History of Catholic Legal Education in the United States

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**SAINTS, SINNERS, AND SCOUNDRELS:
CATHOLIC LAW FACULTY AND A *LIGHT
UNSEEN: A HISTORY OF CATHOLIC LEGAL
EDUCATION IN THE UNITED STATES***

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INTRODUCTION

As a faculty member at a Catholic law school for the past seventeen years, I have often been frustrated with the inability of many professors and administrators at Catholic law schools to describe what makes a law school “Catholic.” As Professors Breen and Strang report in *A Light Unseen: A History of Catholic Legal Education in the United States*, too often the description is limited to something like “a commitment to social justice,” or “inculcating a strong sense of professional ethics.” Yet as the authors observe, “Catholic law schools do not have a monopoly on or even a special claim to caring for the poor or promoting professional virtue.”¹ Breen and Strang trace how we got to this place and propose an ambitious path to the “Light Unseen.”

Breen and Strang propose to create a jurisprudence grounded in Catholic social thought and human anthropology, and thus imbue Catholic law schools with a strong Catholic identity.² As the coeditor of a collection of essays seeking to incorporate

[†] Professor of Law, University of St. Thomas School of Law (MN). I want to thank Professors Breen and Strang for their years of scholarship exploring what it means to be a Catholic law school, Anthony M. Nania and the staff of the *St. John's Law Review* for their amazing patience and work ethic during a difficult and complex time, and my husband for patiently reading multiple versions of this article as it evolved from a personal memoir of the joys and disappointments of joining a Catholic law school faculty, to an imperfect survey of faculty publications, to its final form analyzing the possible impact of Canon Law and the *U.S. News and World Report* Law School Rankings on efforts to create a uniquely Catholic law school.

¹ John M. Breen & Lee J. Strang, *A Light Unseen: A History of Catholic Legal Education in the United States* 478 (Jan. 20, 2020) (unpublished manuscript) (on file with the *St. John's Law Review*).

² *Id.* at 495–519.

Catholic anthropology into American law,³ I fully support the authors' proposal. I also appreciate the care with which they have built their case that such a project is necessary to avoid the continuing secularization of most Catholic law schools—secularization that both scandalizes⁴ and discourages many faithful Catholics.⁵

My focus, however, is not to reargue the case for the creation of such jurisprudence, but to explore the capacity to initiate such a project within existing Catholic law schools given the current state of the American legal professoriate. While I will not go so far as to say a spiritual awakening and enthusiasm for the Breen and Strang project is impossible at most Catholic law schools,⁶ I believe such an awakening and project will require fervent prayer, God's favor, and skillful committed leadership by both clergy and lay professionals.

Part I of this Article provides a short summary of the historical record of Catholic law schools developed by Breen and Strang with some examples of prominent dissent by contemporary law faculty members. Part II reviews the limited demographic data available on the religious affiliation and beliefs of law school faculty. A roadmap of current magisterial documents establishing

³ RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW (Michael A. Scaperlanda & Teresa Stanton Collett eds., 2007).

⁴ Christ talked of scandal when exhorting the disciples to avoid drawing others into sin. "Things that cause people to stumble are bound to come, but woe to anyone through whom they come. It would be better for them to be thrown into the sea with a millstone tied around their neck than to cause one of these little ones to stumble." *Luke* 17:1–2 (New International). The duty to avoid giving scandal requires Christians abstain from acts that encourage others to sin. CATECHISM OF THE CATHOLIC CHURCH ¶¶ 2284–87 (2d ed. 1997) [hereinafter CATECHISM]. This concern was part of the motivation for the Cardinal Newman Society's creation of a dossier on the practices of Georgetown University in selecting and retaining faculty. CARDINAL NEWMAN SOC'Y, CATHOLIC IDENTITY CONCERNS AT GEORGETOWN UNIVERSITY (Jan. 2017), <https://web.archive.org/web/20181219042328/newmansociety.org/wp-content/uploads/Dossier-Catholic-Identity-Concerns-at-Georgetown-Updated-Jan-2017.pdf> [<https://perma.cc/YZ7Q-R76U>].

⁵ Joan Frawley Desmond, *William Peter Blatty Submits Petition to Halt Georgetown's Drift from the Church*, NAT'L CATH. REG. (Oct. 4, 2013), <https://www.ncregister.com/daily-news/william-peter-blatty-submits-petition-to-halt-georgetown-drift-from-the-ch> [<https://perma.cc/YQ3P-ZP74>]. The Holy See declined to intervene directly due to procedural deficiencies in the petition but characterized the complaint as "well founded." Joan Frawley Desmond, *Exorcist Writer Gets Response from Holy See on Georgetown Petition*, NAT'L CATH. REG. (May 12, 2014), <https://www.ncregister.com/daily-news/holy-see-responds-to-william-peter-blattys-canon-law-petition-for-georgetow> [<https://perma.cc/Q9WG-Q46Y>].

⁶ "Jesus looked at them and said, 'With man this is impossible, but with God all things are possible.'" *Matthew* 19:26 (New International).

the Church's requirements related to the composition of faculty at a Catholic university follows as Part III. Part IV identifies some differences and ambiguities in these documents, while Part V is devoted to showing how law school rankings discourage creation of uniquely Catholic law schools. I end on a somewhat hopeful note, expressing my gratitude to Professors Breen and Strang for their extensive research and careful arguments in favor of a Catholic jurisprudence incorporating the Church's holistic understanding of the human person and community.

I. THE HISTORICAL RECORD

It is fascinating to read Breen and Strang's carefully documented history of Catholic legal education. It provides a persuasive explanation of the current inability of many faculty (and even some deans) of Catholic law schools to identify a single distinctively Catholic characteristic of their school's legal education. Breen and Strang recognize that this has been a problem for decades. They note that the genesis of Catholic legal education in this country was not missionary zeal to evangelize the profession or to shape American law to reflect a more perfect understanding of natural law or even the demands of justice. More often than not, Catholic law schools were established to provide Catholics with entry to the profession at a time when they were discriminated against by many law schools, or to buttress Catholic liberal arts colleges' claims that they were evolving into universities.⁷

Notwithstanding these beginnings, because of the strength of the Catholic culture of the time, Catholic law schools largely reflected a Catholic worldview until the 1960s and 70s.

In the 1950s, Catholic law schools squarely saw themselves as part of the Church—as properly counted among the network of institutions contributing to the life of ecclesial community. Along with hospitals, orphanages and other charities, parishes and parochial schools, and even cemeteries, part of the function of Catholic universities and their law schools was to introduce individuals to the Catholic faith in a way appropriate to the nature

⁷ Breen & Strang, *supra* note 1, at 14–15 (“Catholic law schools were founded to enhance the academic reputation of their host universities and to serve the professional ambitions of their natural constituencies. Financial and market-driven considerations were responsible for the creation of these institutions and not a distinct jurisprudential mission.”).

of the institution. . . . [A]ll Catholic institutions self-consciously saw themselves as participating in the central task of spreading the Gospel.⁸

The institutional self-identification of these schools was reflected in the religious commitments of their faculty, their general environment, and some aspects of their curriculum, such as a requirement that all students take jurisprudence or moral theology classes. More often than not, priests or other members of a religious order taught these “unique” classes.⁹

All of this changed in the 1960s and 70s, as Catholic law schools, like other American institutions, were buffeted by dramatic cultural shifts arising from national debates over foreign policy, race relations, women’s role in society, and sexual morality. Simultaneously, there were heated debates within the Church regarding the role of the laity and the nature of authority, as well as the role of the Church in the world.¹⁰ The response of Catholic legal education to these cultural shifts—a contested definition of patriotism, strained race relations, the changing role of women, and the sexual “revolution”—as well as the theological confusion following Vatican II, is the focus of Chapter Three of *A Light Unseen*.

As Breen and Strang explain, one of the major effects of the cultural shifts was explosive growth in law school enrollments, which “more than tripled” in the years between 1960 and 1980.¹¹ Catholic law schools enjoyed their proportionate share of this growth, also tripling the number of students enrolled. Initially overwhelmed with applications, these law schools shifted their focus from providing legal education to Catholics who had been largely excluded from secular law schools to providing legal

⁸ *Id.* at 444–45.

⁹ *Id.* at 62 (“A typical and important exception to Catholic law schools’ curricular conventionality was the regular offering of a required course in jurisprudence. These kinds of courses were normally dedicated to showing the superiority of the natural law tradition over other conceptions of law, and they were often taught by a non-lawyer priest who was a member of the religious order sponsoring the school.”).

¹⁰ *Id.* at 215–17. One of my favorite illustrations of the intersection of these two from popular culture is the 1968 feature film, *Where Angels Go, Trouble Follows*. The best impulses of both the conservative and liberal wings of the Church are depicted by conservative Mother Superior guiding a modern young nun as they accompany a high-spirited group of high school girls on a bus trip across the United States to an ecumenical youth rally. WHERE ANGELS GO, TROUBLE FOLLOWS (Columbia Pictures 1968).

¹¹ Breen & Strang, *supra* note 1, at 394.

education to applicants with the most impressive academic credentials.¹² This resulted in a growing percentage of non-Catholics being enrolled in Catholic law schools.

When student bodies were overwhelmingly Catholic, law schools saw providing spiritual care to their students as a natural part of their responsibilities. Religious exercises adjunct to academic activities were common, with faculty and students worshipping and praying together at various law school functions.¹³ Classroom crucifixes and opening masses were ubiquitous. As enrollments changed to include growing numbers of non-Catholics, these practices declined in favor of more “ecumenical” activities perceived as more inclusive. Too often, however, inclusivity devolved into exclusion of Catholic practices and symbols, out of what often proved to be a misguided fear of “offending” non-Catholic students and colleagues.¹⁴

Also during this period Catholic law schools began recruiting non-Catholic deans¹⁵ and faculty members, partially in response to pressure by secular accrediting organizations¹⁶ and partially in response to the sheer number of new faculty needed to teach expanding student bodies.

Fast-forward forty or fifty years, and these changes have yielded today’s faculty selection processes at the vast majority of Catholic law schools. These processes are virtually identical to those of secular schools. Candidates are evaluated chiefly on their academic pedigree, the school’s curricular needs, and, perhaps most importantly, perceived potential for scholarship that will be valued by the secular professoriate.¹⁷ This, in turn,

¹² *Id.* at 401–02.

¹³ *Id.* at 98–99, 402–05.

¹⁴ *Id.* at 416–18; e.g., Marek Fuchs, *Religion Journal; At One Catholic College, Crucifixes Make a Comeback*, N.Y. TIMES (June 12, 2004), <https://www.nytimes.com/2004/06/12/nyregion/religion-journal-at-one-catholic-college-crucifixes-make-a-comeback.html> [<https://perma.cc/G6K5-TZFU>]; see also Kit Lively, *A Debate over Crucifixes Provokes Larger Questions at Georgetown U.*, CHRON. HIGHER EDUC., Nov. 28, 1997, at A43; Kit Lively, *Georgetown Announces Plan to Place Crucifixes in Most of Its Classrooms*, CHRON. HIGHER EDUC., Mar. 6, 1998, at A44.

¹⁵ Breen & Strang, *supra* note 1, at 419–20.

¹⁶ *Id.* at 88–90 and 428–30. For a short survey of other legal developments that impacted hiring at Catholic universities, see Peter J. Harrington, *Civil and Canon Law Issues Affecting American Catholic Higher Education 1948–1998: An Overview and the ACCU Perspective*, 26 J.C. & U.L. 67 (1999).

¹⁷ E.g., Breen & Strang, *supra* note 1, at 432. My own experience confirms this. During a one-year visit at Notre Dame, as a “substitute teacher” for a faculty member visiting elsewhere, a senior faculty member casually informed me that he would never vote for a faculty candidate who had not graduated from an Ivy

has resulted in large numbers of tenured law professors at Catholic law schools who publicly dissent or are openly indifferent to Church teaching, particularly in the area of sexual morality.

II. THE DEMOGRAPHIC DATA

A. *The Example of Georgetown University Law Center*

Georgetown Law may be the most notable among Catholic law schools for appointing and retaining prominent academic dissenters, including among its faculty several architects of the gay rights movement and defenders of abortion.

Among academic supporters of gay rights, Chai Feldblum is perhaps the most famous dissenter, both for her scholarship and for her political advocacy.¹⁸ In her capacity as a tenured professor, she launched the Moral Values Project at Georgetown. Notwithstanding the seemingly innocuous title, the project mission statement reflects antipathy to Church teaching on sexual identity and morality:

[W]e believe that Americans can articulate, and live up to, a more progressive set of moral values regarding sexuality, sexual orientation and gender equity. Sexuality can be a positive, important force in our lives. Heterosexuality, homosexuality and bisexuality are all morally neutral. But the love that is expressed by those who are straight, gay or bisexual is morally *good*—and all *equally* morally good.

All forms of gender are morally neutral. But lack of gender equity is morally *bad*.¹⁹

League law school. Another shared that as a non-Catholic the recent hiring of multiple Catholic faculty made him uncomfortable about his place in the faculty, notwithstanding his senior status as a tenured faculty member. See also ANNE B. HENDERSHOTT, STATUS ENVY: THE POLITICS OF CATHOLIC HIGHER EDUCATION (2009) for a discussion of these phenomena in Catholic higher education more generally.

¹⁸ Mark Joseph Stern, *Mike Lee Is Sabotaging Trump's EEOC Picks To Feud With the Agency's First Openly Gay Member*, SLATE (Dec. 19, 2018, 6:06 PM), <https://slate.com/news-and-politics/2018/12/mike-lee-chai-feldblum-eeoc-trump-picks-lgbtq.html> (characterizing Professor Feldblum as “the intellectual godmother of the theory that federal prohibitions on ‘sex discrimination’ protect LGBTQ people . . .”) [<https://perma.cc/B2GH-NHFB>].

¹⁹ MORAL VALUES PROJECT, <https://web.archive.org/web/20100405075414/http://www.law.georgetown.edu/moralvaluesproject/> (last visited July 5, 2020) [<https://perma.cc/75CX-HMNS>]; see also Chai R. Feldblum, *The Moral Values Project: A Call to Moral Action in Politics*, in MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD 205 (Gordon A. Babst et al. eds., 2009).

This characterization of homosexuality and bisexuality is directly contrary to longstanding Church teaching,²⁰ and launching the project as a Georgetown initiative clearly implicates the Catholic identity of the institution.

Based in large part on Feldblum's work for gay rights, President Obama appointed her to the Equal Employment Opportunity Commission in 2010 through a recess appointment. She was confirmed by the Senate later that year and continued to serve on the Commission through 2019. During her tenure on the Commission, Professor Feldblum expressed her view that when religious liberty and sexual liberty collide, protection of sexual liberty as a "compelling state interest" must prevail.²¹

On life issues, Georgetown law faculty have been equally active and public in their dissent from Church teaching. The scholarship of tenured Professors Robin West and Lawrence Gostin provides illustrative cases. As a feminist legal scholar, West endorses the legal availability of abortion,²² although she believes that the judicial creation of a right to abortion has impeded the development of a political consensus in favor of abortion rights.²³

²⁰ *E.g.*, CONGREGATION FOR THE DOCTRINE OF THE FAITH, LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS ¶ 6 (1986).

²¹ Given Professor Feldman's repeated claims that her views have been misrepresented, it is valuable to quote her directly:

When dealing with [objections by] religious organizations, the government should work to ensure that such organizations can thrive and flourish even if they hold and teach views that others may find offensive. When dealing with individuals, the government should respect a statement by a religious person that complying with a non-discrimination law or some other law will place a burden on that person's religious beliefs, unless there is a good reason to believe that statement is false. If there is a way to accommodate the person and still achieve the compelling purpose of the law, the government should do that. If there is no way to accommodate the person, and still ensure that the compelling purpose of the law is achieved, *then the accommodation should not be made.*

Chai Feldman, *What I Really Believe About Religious Liberty and LGBT Rights*, MEDIUM (Aug. 1, 2018) (emphasis added), <https://medium.com/@chaifeldblum/what-i-really-believe-about-religious-liberty-and-lgbt-rights-2cc64ade95a2> [<https://perma.cc/XMH2-EVWK>].

²² Robin West, *Concurring in the Judgment, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S MOST CONTROVERSIAL DECISION 121* (Jack M. Balkin ed., 2005).

²³ *Id.* at 147; see also Richard Byrne, *Robin L. West '76, UMBC MAGAZINE: COURTING CONTROVERSY* (Nov. 11, 2010), <https://magazine.umbc.edu/courting-controversy-robin-l-west-76/> [<https://perma.cc/8HQD-GCJY>].

Professor Gostin, now an internationally recognized expert on global health law, publicly supports physician-assisted suicide²⁴ and opposes many abortion regulations as undermining trust in the patient-physician relationship, offending women's dignity, and jeopardizing women's health and emotional well-being.²⁵ In contrast, Catholic doctrine teaches that physician-assisted suicide is a "false mercy"²⁶ and "morally unacceptable."²⁷ The Church's condemnation of induced abortion is even stronger, defining abortion as the unjust taking of an unborn child's life and a great moral evil.²⁸

These examples could be dismissed as merely anecdotal, or illustrative of only one law school, without additional information about the religious beliefs and views of faculty at Catholic law schools more generally. The following section attempts to address these arguments by exploring the religious beliefs and views of faculty at Catholic law schools.

"I think it was unfortunate that that issue was constitutionalized," West says. If keeping abortion rights legal is a progressive goal, she continues, "*Roe v. Wade* and its aftermath are not doing a very good job right now. The list just goes on and on of the undermining of *Roe* through state legislation."

West argues that pro-choice advocates should place greater faith in politics and organizing. "I don't think it's true that the political process is going to yield these horrific results on the abortion side," she says. In fact, the emphasis on the courts as a battleground for the issue has created "this huge brain drain of smart pro-choice people focusing entirely on litigation and courts, rather than on organizing in those states where it seems like a little organization might help."

Id.

²⁴ Lawrence O. Gostin, Commentary, *Physician-Assisted Suicide: A Legitimate Medical Practice?*, 295 JAMA 1941, 1943 (2006); see also CARDINAL NEWMAN SOC'Y, *supra* note 4, at 47–48.

²⁵ Rebecca B. Reingold & Lawrence O. Gostin, Opinion, *State Abortion Restrictions and the New Supreme Court: Women's Access to Reproductive Health Services*, 322 JAMA 21, 22 (2019).

²⁶ POPE JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶ 66 (1995) [hereinafter *EVANGELIUM VITAE*].

²⁷ CATECHISM, *supra* note 4, ¶ 2277.

²⁸ *E.g.*, SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON PROCURED ABORTION ¶¶ 6–7 (1974); *EVANGELIUM VITAE*, *supra* note 26, ¶¶ 61–62.

B. Profile of Law School Faculties' Religious Affiliations

Most commentators agree that a “critical mass”²⁹ of the faculty must be Catholic if the institution is to be infused with a Catholic character. Breen and Strang go so far as to identify it as one of three preconditions that must exist if their proposal for reform is to succeed:

[A] strong, courageous law school dean and university president; a critical mass of faculty willing and able to engage the Catholic intellectual tradition as it relates to questions of law and justice; and a sufficient number of students interested in a kind of legal education that offers professional training, critical reflection, and character development.³⁰

In 2016, Professor James Lindgren published a comprehensive demographic study of the legal academy.³¹ He found that Catholics are among the three groups most underrepresented on law faculties when compared both to the general population and to members of the legal profession.³²

²⁹ Fernand N. Dutile, *A Catholic Law University, Maybe; But a Catholic Law School?*, in *THE CHALLENGE AND PROMISE OF A CATHOLIC UNIVERSITY* 71 (Theodore M. Hesburgh ed., 1994); Daniel J. Morrissey, *The Catholic Moment in Legal Education*, 78 MARQ. L. REV. 413, 420 (1995); Robert John Araujo, “*The Harvest Is Plentiful but the Laborers Are Few*”: *Hiring Practices and Religiously Affiliated Universities*, 30 U. RICH. L. REV. 713, 776 & n.269 (1996). *But see* Leonard Pertnoy & Daniel Gordon, *Would Alan Dershowitz Be Hired To Teach Law at a Catholic Law School? Catholicizing, Neo-Brandeisism, and an American Constitutional Policy Response*, 23 SEATTLE U. L. REV. 355, 366 (1999).

³⁰ Breen & Strang, *supra* note 1, at 25.

³¹ James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, 39 HARV. J.L. & PUB. POL'Y 89 (2016). In addition to Catholics, Republicans and Protestants are also underrepresented by wide margins. *Id.* at 93. Professor Lindgren's study was preceded by an American Bar Foundation study of various characteristics of tenured law professors published in 2011. The study noted that “a large number of respondents [to the 66-item survey] did not answer this question [on religious preference], and a few respondents took time to comment that they did not wish to report on their religious preferences because they felt this to be a sensitive subject.” ELIZABETH MERTZ ET AL., *AFTER TENURE: POST-TENURE LAW PROFESSORS IN THE UNITED STATES* 18, 59 (2011), http://www.americanbarfoundation.org/uploads/cms/documents/after_tenure_report_final_abf_4.1.pdf [<https://perma.cc/78YE-Y5KN>]. Based on the responses that were received, authors of the study reported that fifteen percent of faculty identified themselves as Protestant while eleven percent self-identified as Jewish. *Id.* Seven percent of the respondents identified themselves as Roman Catholic, and a small number responded they were Muslim. *Id.* An additional twelve percent reported that they had no religious affiliation. *Id.*

³² For a more recent demographic study of the political alignments of law professors, see Adam Bonica et al., *The Legal Academy's Ideological Uniformity*, 47 J. LEGAL STUD. 1 (2018).

In 2019, Professor Lindgren published a second study based on new survey data focused exclusively on the religious beliefs, practices, and experiences of law professors. Like his earlier survey and a previous American Bar Foundation study, Lindgren found that Catholics are substantially underrepresented among law faculty. More dramatic, however, were his findings related to atheists and agnostics. Law professors were almost five-and-a-half times more likely than members of the public to agree with the statement “I don’t believe in God.”³³ They were also two-and-a-half times more likely to agree with the statement “I don’t know whether there is a God.”³⁴

Both surveys by Professor Lindgren included a variety of public and private law schools. Neither of his articles provide a way of segregating the religious beliefs and affiliations of faculty at Catholic law schools. Review of publications by Catholic law school faculty provide some information about the religious affiliation of a small group of professors,³⁵ but the vast majority of articles are silent on this issue. This silence is not particularly notable given that many discussions of particular statutes, regulations, and cases do not require, or even occasion, exploration or exposition of uniquely Catholic principles or doctrines, and even fewer require revelation of the author’s religious affiliation. As one author has noted, “there is no ‘Catholic law’ of torts, contracts, or criminal procedure.”³⁶ That said, much, if not most, legal analysis depends upon the author’s

³³ James Lindgren, *The Religious Beliefs, Practices, and Experiences of Law Professors*, 15 U. ST. THOMAS L.J. 342, 352 (2019).

³⁴ *Id.* at 352, 353 fig.10.

³⁵ Compare e.g., Teresa Stanton Collett, *Sacred Secrets or Sanctimonious Silence*, 29 LOY. L.A. L. REV. 1747 (1996) (exploring the “often ambiguous or difficult” problem of applying Roman Catholic teachings to pastoral practices that have legal implications, such as the seal of confession), with Andrew Steele, *Teaching OB/GYN Residents Bioethics Within a Catholic Healthcare Context*, 32 ISSUES L. & MED. 173, 175 (2017) (discussing the basic misunderstandings of Church teaching on contraception as “mystifying for an evangelical protestant such as me, who enters practice in a Catholic University and hospital”).

³⁶ Dutile, *supra* note 29, at 77. This observation echoes that of the Court in *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 762 (1976), where Justice Blackmun, writing for the plurality, noted, “There is no danger, or at least only a substantially reduced danger, that an ostensibly secular activity—the study of biology, the learning of a foreign language, an athletic event—will actually be infused with religious content or significance.”

understanding of the human person—his nature and his behavior—and that understanding often reflects the theological views of the author, be she atheist or religious.³⁷

C. Legal Scholarship by Faculty at Catholic Law Schools

Twenty years ago, John Fitzgerald, a gifted Notre Dame law student, attempted to identify Catholic law school faculty who were committed to Church teaching and distinctively Catholic ideals on the basis of their scholarship. He surveyed faculty writings to determine if a professor exhibited an interest in religious issues in general; produced scholarship on controversial issues, such as abortion, euthanasia, and homosexuality; or collaborated with organizations known to be sympathetic to Catholic moral teaching.³⁸ Based on his survey of faculty curriculum vitae published on law school websites, he concluded that:

Notre Dame appears to lead the way with at least four full-time professors who have published works against abortion, physician-assisted suicide, or same-sex marriage; most Catholic law schools appear to have one or even none. In contrast, some of these schools appear to have at least a few professors that have publicly supported the other side of these issues.³⁹

In a footnote, the author observes:

Notre Dame appears to particularly stand out in this respect when placed alongside the nation's other three most academically prestigious Catholic law schools. Georgetown appears to have only one full-time professor who has published a piece in the last ten years that is sympathetic to the Catholic Church's

³⁷ In crafting the apostolic constitution for Catholic colleges and universities, *Ex Corde Ecclesiae*, St. John Paul II specifically addressed the influence of the Catholic faith on scholarly research, noting that such research should reflect the Catholic faith and “fidelity to the Christian message” as revealed by the Catholic Church. JOHN PAUL II, APOSTOLIC CONSTITUTION *EX CORDE ECCLESIAE* ¶ 13 (1990) [hereinafter *EX CORDE ECCLESIAE*].

³⁸ John J. Fitzgerald, Student Article, *Today's Catholic Law Schools in Theory and Practice: Are We Preserving Our Identity?*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 245 (2001). Based on his survey of law school websites, the author concluded, “Notre Dame has at least fifteen full-time professors who have demonstrated a scholarly interest in religious issues in general. Judging from the various websites, no other law school appears to have more than five professors who have published material on religious issues.” *Id.* at 287 (footnotes omitted).

³⁹ *Id.* at 288–89 (footnotes omitted).

position on one of these moral issues; while Boston College and Fordham do not appear to have any such professors at this point in time.⁴⁰

I discovered a more complex picture when I attempted to update his study of scholarship authored by Catholic law school faculty as represented on current university websites.

Georgetown, Notre Dame, Fordham, and Boston College remain the top-ranked Catholic law schools according to the 2021 *U.S. News and World Report*.⁴¹ Faculty scholarship at Georgetown and, to a lesser degree, Fordham, included multiple articles by authors dissenting from Church teaching on prominent cultural issues such as abortion, and what Pope Francis has called “gender ideology”⁴² meaning sexual orientation and gender identity. The writings of Boston College law faculty varied widely in evidencing any commitment to Catholic teaching.⁴³ Notre Dame faculty, while occasionally dissenting from orthodoxy, were largely either silent or strong defenders of positions advanced by Church teaching.⁴⁴

⁴⁰ *Id.* at 288 n.210 (citations omitted).

⁴¹ *2021 Best Law Schools*, U.S. NEWS, <https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited July 8, 2020) [<https://perma.cc/NU5J-L7WY>]. The impact of the publication of law school rankings by the *U.S. News and World Report* is discussed *infra* in the text accompanying notes 117–121.

⁴² POPE FRANCIS, APOSTOLIC EXHORTATION *AMORIS LAETITIA* ¶ 56 (2016); *see also* CONGREGATION FOR CATHOLIC EDUCATION, “MALE AND FEMALE HE CREATED THEM” ¶ 2 (2019).

⁴³ *Compare, e.g.*, Scott T. Fitzgibbon, *Wojtylan Insight into Love and Friendship: Shared Consciousness and the Breakdown of Solidarity*, in *CULTURE OF LIFE—CULTURE OF DEATH: PROCEEDINGS OF THE INTERNATIONAL CONFERENCE ON THE GREAT JUBILEE AND THE CULTURE OF LIFE* (Luke Gormally ed., 2002) (describing a fundamental clash in contemporary society between, on the one hand, an orthodox Christian understanding of human dignity and, on the other hand, a secularist vision of human existence), *with, e.g.*, Kari E. Hong, *Obergefell’s Sword: The Liberal State Interest in Marriage*, 2016 U. ILL. L. REV. 1417, 1419 (arguing that “those who opposed same-sex marriage often did so by citing to inflammatory and faulty studies,” but that these “proponents of traditional marriage were correct in asserting that the institution of marriage has benefits that no other relationship currently provides”).

⁴⁴ Among the many strong defenders of Church teaching on the faculty at Notre Dame Law School are Gerard V. Bradley; Paolo Carozza, who served on the Pontifical Council on Interreligious Dialogue as an invited delegate in Catholic-Muslim dialogues and fora from 2011 to 2014; John Finnis; Nicole Stelle Garnett; and Richard W. Garnett. *See, e.g.*, Gerard V. Bradley, *Natural Law Theory and Constitutionalism*, in *THE CAMBRIDGE COMPANION TO NATURAL LAW JURISPRUDENCE* (George Duke & Robert P. George eds., 2017); *CHALLENGES TO RELIGIOUS LIBERTY IN THE TWENTY-FIRST CENTURY* (Gerard V. Bradley ed., 2012); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (2d ed. 2011); MARGARET F. BRINIG & NICOLE STELLE GARNETT, *LOST CLASSROOM, LOST COMMUNITY: CATHOLIC SCHOOLS’ IMPORTANCE IN*

I attempted to survey the writings of faculty from the remaining twenty-six Catholic law schools, but I do not have sufficient confidence in the results to publish them at this time, given the unavoidable time constraints created by the COVID crisis, conversion of legal education to online teaching, and the publication needs of this journal.⁴⁵

In addition to a need to go beyond each faculty member's publication listing, there are serious questions about limiting review to "culture war" issues, while ignoring other articles that affirm or advance other important Church teachings such as debt forgiveness for developing countries, abolishing human trafficking, or eliminating weapons of mass destruction. This is not to suggest a moral equivalence between live-dismemberment abortion and loan forgiveness for developing nations, but it is to make clear that measuring faculty commitment to Church teaching requires more than an examination of a professor's curriculum vitae. It also requires careful identification of those issues or positions that are distinctively Catholic,⁴⁶ and those issues that, while important to the Church, are embraced by large numbers of secular or non-Catholic scholars such as elimination of racial discrimination or improving the lives of the poor.

In the end, the real value of such a survey, properly constructed, may lie in identification of academic writings that are scandalous in the sense that they actively mislead both the public and faithful Catholics about the content and weight of Church teachings. While avoiding scandal is only one aspect of the vocation of being a Catholic law professor, it is an important and necessary component of being "witnesses and educators of authentic Christian life," who evidence "integration between faith and life, and between professional competence and Christian wisdom."⁴⁷

URBAN AMERICA (2014); Richard W. Garnett, *"The Freedom of the Church": (Towards) an Exposition, Translation, and Defense*, 21 J. CONTEMP. LEGAL ISSUES 33 (2013).

⁴⁵ I hope to refine the research and include it in a subsequent article on scandal and scholarly publication.

⁴⁶ The difficulty of crafting an effective method of classification is discussed in the context of criminal law in Dan Villalba, Duren, *Pope Francis, and the Death Penalty: How Catholics Can Render the Capital Jury Selection Process Unconstitutional*, 57 AM. CRIM. L. REV. 1663 (2020). "What constitutes a 'practicing Catholic?' Would group members need to follow every official Church teaching? The impossibility of examining the veracity of an individual's faith would make the group undefinable and thus not distinct." *Id.* at 1677.

⁴⁷ *EX CORDE ECCLESIAE*, *supra* note 37, ¶ 22.

Church teaching requires that the majority of the faculty at each law school be committed to, and capable of, being such “witnesses and educators.” This vision for faculty at Catholic law schools is articulated in magisterial documents of the highest canonical authority and is the topic of the next section of this Article.

III. MAGISTERIAL REQUIREMENTS FOR FACULTIES OF CATHOLIC COLLEGES AND UNIVERSITIES

Ex Corde Ecclesiae (“*Ex Corde*”) is the apostolic constitution governing all Catholic colleges and universities that was promulgated in 1990 by St. John Paul II.⁴⁸ The authority of apostolic constitutions has been described as “the most solemn kind of document issued by a pope in his own name. Constitutions can define dogmas but also alter canon law or erect new ecclesiastical structures.”⁴⁹ As such, *Ex Corde* carries great weight in Church governance, clarifying and expanding the preexisting requirements of canon law.⁵⁰ In *Ex Corde*, St. John Paul II directs all faculties at Catholic universities to maintain a majority of Catholic professors⁵¹ and that these professors “be faithful to . . . Catholic doctrine and morals in their research and teaching.”⁵²

⁴⁸ Earlier papal teachings contained in *Sapientia Christiana* and *Deus Scientiarum Dominus* established norms for ecclesiastical universities and faculties teaching the “sacred sciences” of philosophy, theology, and canon law.

⁴⁹ Mary Anne Hackett, *Levels of Papal Authority in the Roman Catholic Church*, CATH. CITIZENS OF ILL. (June 19, 2015, 12:12 AM), <https://catholiccitizens.org/views/60999/levels-of-papal-authority-2/> (citing Fernando Ocariz Braña, *On Adhesion to the Second Vatican Council*, L'OSSERVATORE ROMANO, Dec. 2, 2011, at A1) [<https://perma.cc/HR7C-8HGQ>].

⁵⁰ “Canon law is the body of laws and regulations made by or adopted by ecclesiastical authority, for the government of the Christian organization and its members.” Auguste-Marie Boudinhon, *Law, Canon, in* 9 THE CATHOLIC ENCYCLOPEDIA (1910). *The Code of Canon Law* is a codification of those laws and regulations that have been promulgated by the pontiff “to ensure order both in individual and social life, and also in the Church’s own activity.” JOHN PAUL II, *Introduction to 1983 CODEX IURIS CANONICI* (Canon Law Society of America trans., 1998) (1983) [hereinafter CIC-1983]. It contains “fundamental elements of the hierarchical and organic structure of the Church,” “fundamental principles which govern the exercise of the threefold office entrusted to the Church itself,” and “certain rules and norms of behavior.” *Id.*

⁵¹ *EX CORDE ECCLESIAE*, *supra* note 37, pt. II, art. 4, § 4.

⁵² *Id.* pt. II, art. 4, § 3.

This formulation differs from the standard articulated in Canon 810 of the 1983 *Code of Canon Law*:

The authority competent according to the statutes has the duty to make provision so that teachers are appointed in Catholic universities who besides their scientific and pedagogical qualifications are outstanding in integrity of doctrine and probity of life and that they are removed from their function when they lack these requirements; the manner of proceeding defined in the statutes is to be observed.⁵³

A more lenient standard applies to the appointment of non-Catholic faculty members, as well as to the admission of students, who are merely required to “recognize and respect the distinctive Catholic identity of the University.”⁵⁴

The United States Conference of Catholic Bishops (“USCCB”) somewhat tepidly affirmed these requirements for American Catholic universities in their decree “The Application for *Ex Corde Ecclesiae* for the United States” (“Application”).⁵⁵ The norms regarding faculty in article 4, section 4 provide:

⁵³ CIC-1983, *supra* note 50, c.810 § 1. General regulations governing Catholic universities, as opposed to “ecclesiastical universities,” are found in cc. 807–14 of the 1983 code. ERNEST CAPARROS ET AL., CODE OF CANON LAW ANNOTATED 624–29 (2d ed. 2004).

⁵⁴ *EX CORDE ECCLESIAE*, *supra* note 37, pt. II, art. 4, § 4.

⁵⁵ NAT’L CONFERENCE OF CATHOLIC BISHOPS, *The Application for Ex Corde Ecclesiae for the United States*, pt. II, art. 4, §§ 4(a), (b) (2000), <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/higher-education/the-application-for-ex-corde-ecclesiae-for-the-united-states.cfm> [<https://perma.cc/EMD8-ZS67>]. While the application was authored on behalf of the National Conference, I refer to the USCCB throughout this article because the United States Conference of Catholic Bishops (USCCB) is the successor organization that currently exists and would be involved in constructing any current or future attempts to enforce *Ex Corde* in the United States. The historical distinction between the National Conference of Catholic Bishops (NCCB) and the USCCB is described on the USCCB website.

The NCCB attended to the Church’s own affairs in this country, fulfilling the Vatican Council’s mandate that bishops “jointly exercise their pastoral office.” NCCB operated through committees made up exclusively of bishops, many of which had full-time staff organized in secretariats. In USCC the bishops collaborated with other Catholics to address issues that concern the Church as part of the larger society. Its committees included lay people, clergy and religious in addition to the bishops. [In] 2001[,] the NCCB and the USCC were combined to form the United States Conference of Catholic Bishops (USCCB). USCCB continues all of the work formerly done by the NCCB and the USCC with the same staff.

About USCCB, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS (citations omitted), <http://www.usccb.org/about/> (last visited July 9, 2020) [<https://perma.cc/8K9D-PD2X>].

- a. In accordance with its procedures for the hiring and retention of professionally qualified faculty and relevant provisions of applicable federal and state law, regulations and procedures, the university should strive to recruit and appoint Catholics as professors so that, to the extent possible, those committed to the witness of the faith will constitute a majority of the faculty. All professors are expected to be aware of and committed to the Catholic mission and identity of their institutions.
- b. All professors are expected to exhibit not only academic competence and good character but also respect for Catholic doctrine. When these qualities are found to be lacking, the university statutes are to specify the competent authority and the process to be followed to remedy the situation.⁵⁶

The bishops take pains to explain that the requirement that all professors exhibit “respect for Catholic doctrine” does not “imply that a Catholic university’s task is to indoctrinate or proselytize its students.”⁵⁷ Rather, “[s]ecular subjects are taught for their intrinsic value, and the teaching of secular subjects is to be measured by the norms and professional standards applicable and appropriate to the individual disciplines.”⁵⁸

This document was created and promulgated in obedience to article 1, section 2 of *Ex Corde*.⁵⁹ Like *Ex Corde* and *The Code of Canon Law*, it is binding on Catholic universities and colleges, but only those “within the territory encompassed by the United States Catholic Conference of Bishops,”⁶⁰ and only to the extent

⁵⁶ NAT’L CONFERENCE OF CATHOLIC BISHOPS, *supra* note 55 (footnotes omitted).

⁵⁷ *Id.* § 4(b) n.37. This comment may simply reflect ongoing attempts to avoid being characterized as “sectarian” institutions and thus ineligible for public funding or programs. This concern is addressed *infra* in notes 105–113 and accompanying text.

⁵⁸ *Id.*

⁵⁹ “The General Norms are to be applied concretely at the local and regional levels by Episcopal Conferences and other Assemblies of Catholic Hierarchy in conformity with *The Code of Canon Law* and complementary Church legislation, taking into account the Statutes of each University or Institute and, as far as possible and appropriate, civil law.” *EX CORDE ECCLESIAE*, *supra* note 37, pt. II, art. 1, § 2 (footnote omitted).

⁶⁰ NAT’L CONFERENCE OF CATHOLIC BISHOPS, *supra* note 55, pt. I, § 1.

that the Application is consistent with the teaching of the universal Church, as confirmed by means of a *recognitio* from the relevant curial office of the Holy See.⁶¹

IV. AMBIGUITIES, DIFFICULTIES, AND CHALLENGES

Canon 810, *Ex Corde*, and the USCCB Application describe the standards for recruiting and retaining Catholic faculty in slightly different ways. All three documents require faculty to be professionally competent. Canon 810 requires that faculty be “scientific[ally] and pedagogical[ly] qualifi[ed.]”⁶² These requirements are incorporated into the norms established by *Ex Corde*, article 4, section 1.⁶³ Paragraph 22, which precedes the binding norms, describes the obligation of faculty “to improve their competence and endeavour to set the content, objectives, methods, and results of research in an individual discipline within the framework of a coherent world vision.”⁶⁴ The USCCB norms require that faculty be “professionally qualified” and exhibit “academic competence.” There are few cases in which a faculty candidate or professor would be qualified under one of these standards, but not under another. In short, while the words differ, the standards appear to be largely the same.

The more significant differences appear in the documents’ descriptions (or lack thereof) related to Catholic professors’ knowledge of and commitment to the teachings of the Church. Canon 810 requires all Catholic professors to be “outstanding in integrity of doctrine and probity of life.”⁶⁵ The norms articulated

⁶¹ Hackett, *supra* note 49 (“A *recognitio* supplies the acceptance by the relevant office of the Holy See of a document submitted to it for review by a local conference of bishops. . . . A *recognitio* thus gives conference documents legislative effect.”).

⁶² CIC-1983, *supra* note 50, c.810 § 1.

⁶³ “The identity of a Catholic University is essentially linked to the quality of its teachers and to respect for Catholic doctrine. It is the responsibility of the competent Authority to watch over these two fundamental needs in accordance with what is indicated in Canon Law.” *EX CORDE ECCLESIAE*, *supra* note 37, at pt. II, art. 4, § 1 (footnote omitted) (citing CIC-1983, *supra* note 50, c.810, n.49).

⁶⁴ *EX CORDE ECCLESIAE*, *supra* note 37, ¶ 22.

⁶⁵ One commentator has suggested that these requirements apply only to professors teaching the “sacred sciences” of philosophy, theology, and canon law. James A. Coriden, *Catholic Universities and Other Institutes of Higher Studies* (cc. 807-814), in *THE CODE OF CANON LAW: A TEXT AND COMMENTARY* 574 (James A. Coriden et al. eds., 1985); see also Sean O. Sheridan, *Ex Corde Ecclesiae: A Canonical Commentary on Catholic Universities* 61–62 (2009) (unpublished J.C.D. dissertation, Catholic University of America) (on file with the *St. John’s Law Review*) (quoting Coriden, *supra*). This argument is undercut by the content of Canon 812 that directly regulates teachers of sacred sciences. James J. Conn,

in *Ex Corde* require that all faculty “promote, or at least to respect” the Catholic identity of the institution,⁶⁶ and all Catholic faculty “be faithful to . . . Catholic doctrine and morals in their research and teaching.”⁶⁷ The USCCB Application requires that all faculty “exhibit not only academic competence and good character but also respect for Catholic doctrine,” but there are no unique or specific requirements for Catholic faculty.⁶⁸

When examined consecutively, these documents suggest that the requirement of orthodoxy for Catholic faculty significantly diminished in the two decades between 1983 with the promulgation of *The Code of Canon Law* and 2002 when the USCCB published *An Application for Ex Corde Ecclesiae for the United States*. “Outstanding in integrity of doctrine and probity of life” is reduced to “faithful to Catholic doctrine and morals in their research and teaching” in *Ex Corde*, which is further lowered to “good character and respect for Catholic doctrine” by the USCCB. This conclusion of declining standards would be correct if each variation resulted in implicit modification or repeal of the prior standard. Careful review of the documents, however, reveals that the requirements of Canon 810 continue to apply to all Catholic colleges and universities in all jurisdictions.

The introduction of *Ex Corde* notes that the constitutional “prescriptions” are “based on the teaching of Vatican Council II and the directives of the Code of Canon Law.”⁶⁹ The norm requiring university leadership to recruit “teachers and administrators, who are both willing and able to promote that [Catholic] identity” explicitly relies on Canon 810, quoting the language of the Canon requiring Catholic faculty be “outstanding in integrity of doctrine and probity of life.”⁷⁰

Canonical Norms for Catholic Universities: Stewardship for the Catholic Academy, in EX CORDE ECCLESIAE: A CONVERSATION “FROM THE HEART OF THE CHURCH” 22 (David O’Connell ed., 1999) (quoted in SHERIDAN, *supra*, at 44).

⁶⁶ *EX CORDE ECCLESIAE*, *supra* note 37, at pt. II, art. 4, § 2.

⁶⁷ *Id.* at pt. II, art. 4, § 3. In his description of the pastoral ministry of Catholic universities, the Pope calls for “a practical demonstration of its faith in its daily activity,” noting that “Catholic members of this community will be offered opportunities to assimilate Catholic teaching and practice into their lives and will be encouraged to participate in the celebration of the sacraments” and that “teachers and students [should be encouraged] to become more aware of their responsibility towards those who are suffering physically or spiritually.” *Id.* ¶¶ 39–40.

⁶⁸ NAT’L CONFERENCE OF CATHOLIC BISHOPS, *supra* note 55, art. 4, § 4.

⁶⁹ *Id.* ¶ 11.

⁷⁰ *Id.* pt. II, art. 4, § 1 & n.49.

The USCCB Application must be read as consistent with both the Canon Law and *Ex Corde*. This suggests that the “character” requirement must be understood to mean the same as “probity of life.” The general requirement that all faculty exhibit “respect [for] Catholic doctrine” does not deviate from the general requirements of *Ex Corde*,⁷¹ but fails to describe the unique responsibilities of Catholic faculty. While this omission is troubling, the absence of specific norms for Catholic faculty does not *sub silencio* eliminate the requirements that such faculty comply with Canon 810 and *Ex Corde*. The Application, itself, notes that Catholic universities must clearly set out their “[c]ommitment to be faithful to the teachings of the Catholic Church” in their official documentation, as well as “implement in practical terms their commitment to the essential elements of Catholic identity.”⁷² That said, the norms contained in the Application devote substantial attention to defining the limits of Church authority within the university, with no mention of “integrity of doctrine” and scant attention to faithfulness to Church teachings. Even so, the best reading of the Application does not excuse Catholic colleges and universities in the United States from the requirements of Canon 810.

It is important to note that these requirements apply to Catholic faculty teaching secular subjects in all Catholic universities that are not “ecclesiastical universities.”⁷³ “Ecclesiastical universities” and faculties teaching the “sacred arts” are governed by the more stringent requirements of Canons 815 through 821.⁷⁴ The Catholic University of America is the only ecclesiastical university in the United States, making it unique among American Catholic universities.⁷⁵

⁷¹ See *id.* pt. II art. 4, § 3.

⁷² NAT'L CONFERENCE OF CATHOLIC BISHOPS, *supra* note 55, § 7.

⁷³ CAPARROS ET AL., *supra* note 53, at 624. In addition to ecclesiastical universities, the Holy See may create or approve certain faculties within a Catholic university to confer degrees by the authority of the Holy See. Michael Galligan-Stierle, *Clarifying Terms—Ecclesiastical Faculties Granting Canonical Degrees*, 11 SEMINARY J. 18 (2005), <http://www.usccb.org/beliefs-and-teachings/how-we-teach/catholic-education/higher-education/clarifying-terms-ecclesiastical-faculties-granting-canonical-degrees.cfm> [<https://perma.cc/7ES4-B3SL>]. Those faculties also are governed by Canons 815–21.

⁷⁴ CAPARROS ET AL., *supra* note 53, at 624.

⁷⁵ This status was an important factor, but not the only factor, in both canonical and civil courts' rejection of Fr. Charles Curran's challenge to his dismissal by the Catholic University of America. *Curran v. Catholic Univ. of Am.*, No. 1562-87 (D.C. Super. Ct. filed Feb. 27, 1987). Both the canonical and the civil cases are

A. *The Requirements of Canon 810*

Canon 810 requires the appointment of faculty “who besides their scientific and pedagogical qualifications are outstanding in integrity of doctrine and probity of life.”⁷⁶ Neither Canon 810 nor the related canons within the code define “integrity of doctrine” or “probity of life.” Most commentators describe these requirements as imposing two related but different conditions.⁷⁷

For a professor to be “outstanding in integrity of doctrine,” some have argued that the professor must have a holistic understanding of Scripture and Church teachings⁷⁸ and be faithful to that doctrine.⁷⁹ Alternatively, and more modestly, some scholars have argued that “outstanding in integrity of doctrine” merely requires a professor to accurately understand and describe the texts and meanings of Church teachings as the Church proclaims those teachings.⁸⁰ Clearly, the second interpretation imposes no new condition on faculty. Teachers and scholars are generally required to accurately describe the materials they use as a matter of academic competence in all disciplines. In other words, “integrity of doctrine” may merely mean that faculty integrating Church teaching into their teaching and scholarship know what they are talking about and represent it accurately. Regardless of the correct reading of this requirement, it has occasioned far less comment among American academics and theologians than the second requirement that faculty be “outstanding in probity of life.”

discussed in Michael Scott Feeley, *A Historical Account of the Curran Controversy*, 32 CATH. LAW. 1 (1988); see also AAUP, *Academic Freedom and Tenure: The Catholic University of America*, ACADEME, Sept.–Oct. 1989, at 27, <https://aaup.org/file/Catholic-University-of-America.pdf> [<https://perma.cc/6WWW-8HYB>].

⁷⁶ CIC-1983, *supra* note 50.

⁷⁷ See, e.g., David M. O’Connell, *An Analysis of Canon 810 of the 1983 Code Of Canon Law and Its Application to Catholic Universities and Institutes of Higher Studies in the United States* 44–50 (June 1990) (unpublished J.C.D. dissertation, Catholic University of America) (on file with the *St. John’s Law Review*).

⁷⁸ Sheridan, *supra* note 65, at 66 (quoting James A. Coriden, *Introductory Canons (cc. 747–755)*, in *NEW COMMENTARY ON THE CODE OF CANON LAW* 914 (John P. Beal et al. eds., 2000)).

⁷⁹ “Although no Christian is bound to accept any ‘mode’ of Church teaching uncritically, the legislator expects that all the baptized, including those teaching doctrine at Catholic universities, receive the full content of Church teaching proposed by the legitimate authority of the Church with uncompromising and faithful acceptance.” O’Connell, *supra* note 77, at 48.

⁸⁰ See Sheridan, *supra* note 65, at 64–67.

Concerns about imposing a “probity of life” requirement have been expressed by American academics, attorneys, and religious.⁸¹ Properly understood, this provision requires Catholic faculty to conduct their public and private lives in accordance with Church teaching. Failure to do so may lead to dismissal. Historically this requirement has been incorporated in teacher contracts at Catholic elementary and secondary schools.⁸² Such requirements, often called “morals clauses,” have become increasingly contested, however, due to growing acceptance of contraception,⁸³ abortion,⁸⁴ nonmarital sexual activity,⁸⁵ divorce,⁸⁶ homosexual conduct,⁸⁷ and

⁸¹ *Catholic College and University Presidents Respond to Proposed Vatican Schema*, 15 ORIGINS, Apr. 10, 1986, at 699–700.

⁸² Patrick Reilly, *Who Will Defend Catholic Education?*, CARDINAL NEWMAN SOC’Y (July 26, 2019), <https://newmansociety.org/who-will-defend-catholic-education/> [<https://perma.cc/FKE5-QY2U>]. Similar provisions have been routine in public school contracts as well, many times as required by statutes governing education. Marka B. Fleming et al., *Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns*, 2009 BYU EDUC. & L.J. 67, 68.

⁸³ “Solid majorities of all major religious groups in the U.S. support government-backed health insurance programs covering contraceptives. Those numbers decline among all religious groups on support for covering abortion, with the considerable variance between only 22% support from white evangelical Protestants and 80% support among Unitarian Universalists.” *The State of Abortion and Contraception Attitudes in All 50 States*, PRRI (Aug. 13, 2019), <https://prri.org/research/legal-in-most-cases-the-impact-of-the-abortion-debate-in-2019-america> [<https://perma.cc/HS4H-5GD3>].

⁸⁴ “Catholics are divided (48% support legality in most or all cases vs. 46% oppose legality in most or all cases), but there are significant differences by race and ethnicity. A majority (52%) of white Catholics, compared to 41% of Hispanic Catholics, support the legality of abortion.” *Id.*

⁸⁵ According to a 2019 Pew Research Center poll, 74% of Catholics “say it’s acceptable for an unmarried couple to live together even if they don’t plan to get married,” 58% of Catholics say “cohabiting couples can raise children just as well as married couples,” and only 57% of Catholics say “society is better off if couples . . . get married.” Juliana Menasce Horowitz et al., *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewsocialtrends.org/2019/11/06/marriage-and-cohabitation-in-the-u-s/> [<https://perma.cc/NA8J-5W4X>].

⁸⁶ Pope Francis would allow Catholics living in an “irregular union” to receive Communion in certain circumstances, a position that seems directly contrary to the Catechism and previous canon law. See Gerard O’Connell, *Top Vatican Legal Expert: Pope Francis Opens the Door to Communion for Catholics in Irregular Marriages*, AMERICA MAG. (Feb. 22, 2017), <https://www.americamagazine.org/faith/2017/02/22/top-vatican-legal-expert-pope-francis-opens-door-communion-catholics-irregular> [<https://perma.cc/E2S2-GLYQ>]. Among 2,632 employees of the Catholic Church in the United States surveyed by NBC, slightly more than 66% “generally agree with Pope Francis’s words on divorce and Holy Communion.” *Explore Our Catholic Church Employees Survey Results*, NBC CONN. (Feb. 12, 2020, 11:49 AM), <https://www.nbcconnecticut.com/news/national-international/explore-our-catholic-church-survey-results/2156323/> [<https://perma.cc/QB4F-6EJ2>].

reproductive technology.⁸⁸ It is somewhat ironic that, at the very time attacks on the use of morals clauses by Catholic schools are increasing, the use of similar provisions are being incorporated into employment contracts for professional athletics and show business.⁸⁹

Some argue that the application of such provisions allow otherwise illegal discrimination based on sex, sexual orientation, sexual identity, marital status, or violations of privacy.⁹⁰ Such

⁸⁷ The acceptance of homosexual conduct by Catholic law schools is evidenced by the number of schools having lesbian, gay, bisexual, or transgender student organizations, as well as faculty and administrators openly identifying their sexual orientations. Teresa Stanton Collett, *A Catholic Perspective on Law School Diversity Requirements*, 15 U. ST. THOMAS L.J. 322 (2019).

LSAC annually surveys law schools regarding their policies to provide “information of importance to LGBT students.” In the most recent survey results there were few noticeable differences between Catholic law schools and other respondents. All of the 142 U.S. respondents indicated that their school had a non-discrimination policy related to sexual orientation or gender identity. Only two law schools, Catholic University of America (CUA) and Faulkner University, reported not having a lesbian, gay, bisexual, or transgender student organization. Twenty-three U.S. law schools reported not having any openly lesbian, gay, bisexual, or transgender faculty members. Of the twenty-three, five were Catholic—CUA, Loyola Chicago, Loyola New Orleans, Marquette, and Notre Dame. Forty-two U.S. law schools, six of which are Catholic (University of Dayton, Loyola Chicago, Loyola New Orleans, Marquette, University of St. Louis, and the University of St. Thomas (MN)), have no openly lesbian, gay, bisexual, or transgender administrators. Benefits for domestic-partner or same-sex marriage are offered to faculty, staff, or students at all but seventeen U.S. law schools, four of which are Catholic—CUA, Detroit Mercy, Loyola New Orleans, and St. Thomas University (FL).

Id. at 334 (footnotes omitted). More than 40% of employees of the Catholic Church in the United States believe “the Church should consider recognizing same sex marriages as non-sacramental unions and allow Catholics in these unions to receive communion.” *Explore Our Catholic Church Employees Survey Results*, *supra* note 86.

⁸⁸ See *Herx v. Diocese of Ft. Wayne-S. Bend Inc.*, 48 F. Supp. 3d 1168, 1177 (N.D. Ind. 2014), *appeal dismissed*, 772 F.3d 1085 (7th Cir. 2014). For additional insight, see Peter Jesserer Smith, *Diocese To Lose \$2 Million in Teacher’s IVF Lawsuit*, NAT’L CATH. REG. (Dec. 27, 2014), <https://www.ncregister.com/daily-news/diocese-to-lose-2-million-in-teachers-ivf-lawsuit> [<https://perma.cc/Z4G7-TA9F>].

⁸⁹ Erin Mulvaney, *Workplace Morals Clauses Take Hold Beyond Show Biz in #MeToo Era*, BLOOMBERG L. (Mar. 11, 2020, 5:38 AM), <https://news.bloomberglaw.com/daily-labor-report/workplace-morals-clauses-take-hold-beyond-show-biz-in-metoo-era> [<https://perma.cc/V8GY-KDZ5>].

⁹⁰ See, e.g., Bianca Danica S. Villarama, Note, *Unusual but Not Immoral: Pregnancy Outside of Marriage and Employee Dismissal After Leus v. Saint Scholastica’s College Westgrove*, 89 PHIL. L.J. 349 (2015).

contractual provisions are routinely upheld, however, both as a matter of contractual freedom and to avoid unnecessary entanglement of civil courts in the internal affairs of the Church.⁹¹

In one of the few cases involving private behavior of university faculty, *Mercado Rivera v. Universidad Católica de Puerto Rico*, the court upheld a Catholic university's discharge of faculty members who had married without obtaining canonical annulments of prior marriages.⁹² Professor Mercado Rivera married a man who, previously married in the Catholic Church, failed to seek and obtain an annulment before remarriage.⁹³ Professor Jeannette M. Quilichini was divorced from her husband at the time she was hired to teach English at the Catholic University of Puerto Rico.⁹⁴ At the time of her appointment to the faculty, the University Vice President Gotay de Hatton is reported to have stated, "although the faculty manual is silent on the matter, if she remarries she knows 'what will happen.'" ⁹⁵ After being tenured, Professor Quilichini married again without having first obtained a declaration of nullity for her first marriage.⁹⁶ She was dismissed when university officials learned of her second marriage.⁹⁷

Both professors sued to have their discharges overturned, arguing that the university's actions violated Puerto Rican statutes and the territorial Constitution.⁹⁸ The trial court held that the professors had voluntarily signed their employment

⁹¹ "All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it." *Watson v. Jones*, 80 U.S. (13 Wall.) 679, 729 (1871); see also *Baxter v. McDonnell*, 155 N.Y. 83 (N.Y. 1898).

A priest or minister of any church[,] by assuming that relation[,] necessarily subjects his conduct in that capacity to the laws and customs of the ecclesiastical body from which he derives his office and in whose name he exercises his functions[,] and when he submits questions concerning rights, duties and obligations as such priest or minister to the proper church judicatory, and they have been heard and decided according to the prescribed forms, such decision is binding upon him and will be respected by the civil courts.

Baxter, 155 N.Y. at 84.

⁹² *Mercado Rivera v. Universidad Católica de P.R.*, 143 P.R. Dec. 610 (P.R. 1997).

⁹³ *Id.*

⁹⁴ AAUP, *Academic Freedom and Tenure: The Catholic University of Puerto Rico*, ACADEME, May–June 1987, at 33, 34, <https://www.aaup.org/file/Catholic-University-of-Puerto-Rico.pdf> [<https://perma.cc/X7WH-79YV>].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Mercado Rivera*, 143 P.R. Dec. at 620.

contracts and therefore “they were subject to the discipline of faith in accordance with the religious doctrine that considers marriage indissoluble and therefore prevented them from exercising academic functions in said institution.”⁹⁹ The court rejected claims that the university violated procedural requirements prior to discharge, engaged in illegal sex discrimination, and violated the constitutional right to privacy of faculty members.¹⁰⁰

While recognizing the professors’ right to be free of state interference in their decisions to marry, the Court rejected the claim that their right to privacy trumped the institutional right of Catholic universities to freely exercise their religious belief by governing their institutions in accordance with Church teaching:

When we examine the particular facts of this case, we realize that what appellants really ask—after duly exercising their rights—is that we impose on the University the obligation to recognize, within its own sphere of action, the marriages of Professors Quilichini and Mercado. In other words, they want the University to take an action that runs counter to the tenets of the Catholic doctrine. In contractual terms, this means that the University would be barred from enforcing the grounds for dismissal included in the Faculty Manual and in the faculty’s annual contracts. As we have seen, such grounds were included by mandate of *The Code of Canon Law*. This means that, if we delve into this matter to determine whether the University, as part of the grounds for dismissal, may include “professional or personal conduct that violates the moral and doctrinal principles of the Catholic Church,” we would be assessing the wisdom of the canonical mandate given to Catholic universities and interfering with the call for “submission to hierarchy and to the Holy See” contained in *Gravissimum Educationis*. For the Catholic Church and affiliated educational institutions, this matter is essentially comprised within the dogmas of the Church, and shall be observed by those who teach at Church-affiliated universities. We cannot think of a more glaring example of intrusion in matters of dogma, faith and religious autonomy.¹⁰¹

Ultimately, the Puerto Rico Supreme Court upheld the university’s actions as permitted under the terms of the faculty manual, which the court characterized as a freely negotiated

⁹⁹ *Id.* at 619–20.

¹⁰⁰ *Id.* at 648.

¹⁰¹ *Id.* (emphasis omitted) (citation omitted).

contract.¹⁰² “So if the professors voluntarily and freely accepted to be part of the University faculty, subject to the conditions of not violating the postulates of the doctrine and morals of the Catholic Church, they cannot go before the civil courts to invalidate the decision.”¹⁰³

This case illustrates that American law does not preclude enforcement of Canon 810 when its requirements are incorporated into faculty employment contracts at Catholic law schools.¹⁰⁴ That is not to suggest other impediments to enforcement do not exist.

B. Public Funding

For years, Catholic universities debated their ability to condition employment of Catholic faculty on the faculty member’s faithfulness to Church doctrine. While permissible as a matter of contract and constitutional law, administrators expressed concern that such conditions would result in the university being denied federal aid available to “non-sectarian” colleges and universities.¹⁰⁵

These concerns were based on failed challenges to certain forms of government assistance to religiously affiliated colleges and universities as violations of the Establishment Clause.¹⁰⁶

¹⁰² *Id.* at 649; accord *Otero-Burgos v. Inter Am. Univ.*, 558 F.3d 1, 12 (1st Cir. 2009).

¹⁰³ *Mercado Rivera*, 143 P.R. Dec. at 649; cf. *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991).

¹⁰⁴ The United States Attorney’s General Memorandum of October 6, 2017, affirms:

where educational institutions are “owned, supported, controlled or managed, [in whole or in substantial part] by a particular religion or by a particular religious corporation, association, or society” or direct their curriculum “toward the propagation of a particular religion,” such institutions may hire and employ individuals of a particular religion. And “a religious corporation, association, educational institution, or society” may employ “individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”

Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49,668, 49,677 (notice published Oct. 26, 2017) (alteration in original) (citations omitted), <https://www.govinfo.gov/content/pkg/FR-2017-10-26/pdf/2017-23269.pdf> [<https://perma.cc/4MTQ-L6CU>].

¹⁰⁵ *Catholic College and University Presidents Respond to Proposed Vatican Schema*, *supra* note 81.

¹⁰⁶ *Tilton v. Richardson*, 403 U.S. 672, 681 (1971) (finding that federally financed building projects for libraries, language labs, a science building, and an arts building were constitutional absent a showing that “religion seeps into the use of any of these facilities”); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736, 754–66 (1976) (upholding state fiscal subsidy to Catholic colleges where the subsidies remained on the “secular

While the United States Supreme Court affirmed participation of Catholic colleges and universities in such programs, administrators continued to insist that requiring that faculty adhere to Church teaching in their professional and personal lives would endanger government aid to Catholic institutions, and thus the financial viability of most, if not all, institutions.

In 1988, then Deputy Assistant Secretary for Higher Education Programs for the United States Department of Education, Kenneth D. Whitehead responded with a devastating critique of these claims. Not only had the Catholic universities prevailed in challenges to their participation in government assistance programs, but the Supreme Court had also embraced a district court's ruling that "there is no necessity for state officials to investigate the conduct of particular classes of educational programs to determine whether a school is attempting to indoctrinate its students under the guise of secular education."¹⁰⁷ In other words, unless challengers could prove that Catholic colleges and universities were using government resources to "indoctrinate" students in the Catholic faith, government funding was constitutionally permissible.

Based on a careful analysis of federal statutes and case law, Whitehead concluded, "The question, though, is whether religiously affiliated colleges and universities can qualify generally for various types of federal assistance to higher education, and the answer is emphatically 'yes.'"¹⁰⁸

In the thirty years since Whitehead published his analysis, the case has only become stronger that there no threat exists to prohibit federal funding from being given to Catholic law schools requiring Catholic faculty to adhere to Church teachings in their professional and personal lives. In 2017, the United States Attorney General issued a memorandum entitled "Federal Law Protections for Religious Liberty." He summarized federal law thus:

Religious corporations, associations, educational institutions, and societies—that is, entities that are organized for religious purposes and engage in activity consistent with, and in furtherance of, such purposes—have an express statutory

side" and did not primarily advance religion or excessively entangle church and state under the *Lemon* test).

¹⁰⁷ *Roemer*, 462 U.S. at 762 (quoting *Roemer v. Bd. of Pub. Works*, 387 F. Supp. 1282, 1289 (D. Md. 1974)).

¹⁰⁸ K.D. WHITEHEAD, CATHOLIC COLLEGES AND FEDERAL FUNDING 29 (1988).

exemption from Title VII's prohibition on religious discrimination in employment. Under that exemption, religious organizations may choose to employ only persons whose beliefs and conduct are consistent with the organizations' religious precepts.¹⁰⁹

More directly to the point, the memorandum notes:

Religious organizations are entitled to compete on equal footing for federal financial assistance used to support government programs. Such organizations generally may not be required to alter their religious character to participate in a government program, nor to cease engaging in explicitly religious activities outside the program, nor effectively to relinquish their federal statutory protections for religious hiring decisions.¹¹⁰

In describing the legal basis for these conclusions, the Attorney General emphasized that the Free Exercise Clause does not allow the government to favor secular organizations over the secular components of religious programs.¹¹¹

American law does not require that Catholic law schools abandon canonical requirements for the hiring and retention of faculty, and any attempt to do so would violate the law school's institutional right to free exercise of religion. Given this fact, the refusal to conform to such requirements must be motivated by other concerns. In his analysis of claims that federal law required abandonment of a distinctive Catholic identity, Whitehead suggested that the abandonment was motivated, in part, by hostile accrediting agencies utilizing biased definitions of

¹⁰⁹ Federal Law Protections for Religious Liberty, 82 Fed. Reg. at 49,670. The exemption reflects current constitutional interpretation of the Free Exercise Clause of the First Amendment. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012) (holding that a religious organization cannot be subject to legal penalties for hiring or firing such employees, even if the hiring or firing is alleged to be "discriminatory" or otherwise improper in the eyes of the civil authorities). The exact breadth of that exception came before the Court last term in *Our Lady of Guadalupe Sch. v. Morrissey-Berru*. See 140 S. Ct. 2049 (2020). The Court cautioned that too rigid an application of *Hosanna-Tabor's* "ministerial exemption" "risk[s] judicial entanglement in religious issues." *Id.* at 2069.

¹¹⁰ Federal Law Protections for Religious Liberty, 82 Fed. Reg. at 49,670.

¹¹¹ See *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (recognizing that the government may not impose special disability or withhold government benefits on the basis of one's religion); cf. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 114 (2001) (recognizing that the Establishment Clause does not justify discrimination against religious clubs seeking use of public meeting spaces); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 837, 841 (1995) (recognizing that the Establishment Clause does not justify discrimination against a religious student newspaper's participation in a neutral reimbursement program).

academic freedom.¹¹² Professors Breen and Strang document this hostility in their book.¹¹³ The impact of that hostility on law school rankings and the effect of those rankings is the subject of the next section of this Article.

V. THE LAW SCHOOL RANKINGS GAME

A. *Devaluing Church Doctrine*

There is little question that Catholic doctrine contradicts prevailing views of the legal academy on a variety of subjects. If the contradictions were merely differing prudential judgments on difficult legal questions, this might be of little concern. Unfortunately, many of these differences appear to encompass foundational moral questions. They range from the permissibility of abortion to the mandatory use of pronouns like “ze, zir/zem, zir/zes,” and everything in between.

Often these differences lead to secular faculty and institutions devaluing practices and publications consistent with or supportive of Church doctrine.¹¹⁴ This devaluing, in turn, can adversely affect Catholic law schools and faculty in numerous ways. Anti-Catholic bias¹¹⁵ can reduce law school rankings by practitioners and legal academics; impede accreditation by professional associations; and deter potential donors, prospective legal employers, and, more to our present purposes, prospective faculty members.

Professors Breen and Strang amply document such bias in the accreditation of Catholic law schools,¹¹⁶ so we turn to the adverse effect of anti-Catholic bias on national rankings.

¹¹² WHITEHEAD, *supra* note 108, at 53–55.

¹¹³ See generally Breen & Strang, *supra* note 1.

¹¹⁴ See JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 365–66 (2012).

¹¹⁵ The historian Philip Jenkins argues that there is a special antipathy for the Catholic Church among political liberals due in part to Church teaching on human sexuality. PHILIP JENKINS, THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE 47–50 (2003).

¹¹⁶ “Catholic law schools frequently saw accreditors as employing double-standards that turned on the schools’ religious tradition and worked toward their disadvantage.” Breen & Strang, *supra* note 1, at 53–54.

Even as they received approval from the accrediting bodies, Catholic law schools were still regarded as “exceptional” in a pejorative sense. Catholic schools were not the only law schools that were ostensibly religious in character, but aside from the divinity schools they sometimes

B. U.S. News and World Report *Rankings*

National rankings of law schools have become a major influence on how law schools operate.¹¹⁷ *U.S. News and World Report* publishes the most prominent ranking of American law schools annually.¹¹⁸ *U.S. News and World Report* first published a ranking of law schools in 1990. The success of this publication was due, at least in part, to the rapid growth of legal education from the 1960s to the 1980s,¹¹⁹ and changing law student demographics and aspirations.¹²⁰ Prospective students and their parents simply did not know how to sort through the increasing options in legal education. Published rankings provided a sense of certainty about whether prospective students were using the proper criteria and arriving at correct decisions when evaluating law schools.¹²¹

hosted, the universities under Protestant sponsorship that maintained law schools had largely abandoned any meaningful sense of religious identity in their academic structure and intellectual work.

Id. at 54–55.

A further explanation for Catholic law schools' conventionality in pedagogy and curriculum was the schools' concern to achieve and maintain accreditation. The schools saw themselves as viewed suspiciously by the leading schools in the legal academy and by accreditors. The primary source of this suspicion was the schools' Roman Catholicism.

Id. at 76.

¹¹⁷ "Rankings create precise distinctions among schools whose relative status might once have been considered ambiguous or even equal. The distinctions produced by rankings are increasingly important and taken for granted, along with the advantages and disadvantages associated with them." WENDY NELSON ESPELAND & MICHAEL SAUDER, ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY 57 (2016).

¹¹⁸ For a brief history of the *U.S. News and World Report's* ranking of law schools, see *id.* at 10–14.

¹¹⁹ See *supra* text accompanying notes 10–13.

¹²⁰ See Breen & Strang, *supra* note 1, at 394–416; see also Richard Abel, *Crunched by the Numbers*, 66 J. LEGAL EDUC. 961 (2017) (reviewing ESPELAND & SAUDER, *supra* note 117).

[C]umulative changes began making a ranking desirable, even inevitable. These included: rapid growth in the number and size of law schools (from 144 schools enrolling 72,000 students in 1969 to 200 schools enrolling 147,400 in 2010–2011); the availability of educational loans; gradual diversification of law students by gender (with proportions now resembling those in the larger society) and ethnicity (with proportions still not representative); institutionalization of judicial clerkships as quasi-apprenticeships; and the proliferation and growth of large law firms, provoking a salary war to attract associates.

Id. at 962 (footnote omitted).

¹²¹ "Prospective law students have always had to weigh the potential benefits of a legal education with the debt that they will incur during their three years of legal

Two prominent sociologists have explained the influence of these rankings:

With the possible exception of sports teams, the ranking of schools is the most popular and influential form of ranking in the United States. A school's rank serves as a status marker and a signal of what a degree might be worth. [*U.S. News and World Report's*] law school rankings, much like educational rankings of other fields, create a very public hierarchy among schools, one that overwhelms other conceptions of how schools might be compared to one another. Within this ranking universe of educational institutions, legal education is unique: in this field, one ranking entity has a monopoly on public perception, and all accredited law schools are ranked together according to the same metrics.¹²²

The authors note that these rankings “influence[] how law schools define their goals, admit students, and deploy resources, and how employers evaluate candidates. . . . [T]hey promote a single, idiosyncratic definition of what it means to be a ‘good school’ and punish schools that do not conform to the image of excellence embedded and embodied in the rankings.”¹²³

Catholic law schools are not immune from these influences, and bias against religiously affiliated law schools in the rankings would discourage such schools from manifesting their religious identities in many ways, including the hiring and evaluating of faculty candidates and professors. Unsurprisingly there is evidence that such bias exists.

The *U.S. News and World Report* rankings are based on an increasingly complex algorithm of multiple factors, but chief among the factors are reputational ratings by legal academics,

training, and the rankings—because they provided information about how graduates of schools stood relative to one another—quickly became a proxy for predicting job outcomes.” ESPELAND & SAUDER, *supra* note 117, at 49.

Rankings matter less for older applicants; those who wish to practice solo or in small firms; those who wish to practice in a particular region, especially if it has few law schools; those invested in particular legal specialties such as family, immigration, or real estate law; and those who can't afford high tuition. . . .

Conversely, rankings matter most for those who aspire to careers with large, prominent firms (often called Big Law), those deciding among schools close to tier cut-off points, and those in competitive law school markets, such as New York, Chicago, or Los Angeles.

Id. at 56.

¹²² *Id.* at 5.

¹²³ *Id.* at 6.

lawyers, and judges.¹²⁴ While ratings by legal academics and practitioners often vary somewhat, the variance in the two groups' rating of religiously affiliated law schools is far greater than any other variance identified. In examining this variance, Professors Stewart and Tolley found a "significant and temporally persistent bias held by the American legal academy against conservative religiously affiliated law schools, a bias resulting from the academy's disagreement with traditional religion on the great cultural/moral issues of our day."¹²⁵

¹²⁴ Robert Morse et al., *Methodology: 2021 Best Law School Rankings*, U.S. NEWS (Mar. 16, 2020, 9:00 PM), <https://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology> [<https://perma.cc/HW2L-LEDX>]. Ratings by legal academics comprise 25% of the total score, while ratings by lawyers and judges comprise 15%. *Id.* Ironically, placement and bar passage rates combined weigh less than the views of legal academics. *Id.*

¹²⁵ Monte N. Stewart & H. Dennis Tolley, *Investigating Possible Bias: The American Legal Academy's View of Religiously Affiliated Law Schools*, 54 J. LEGAL EDUC. 136, 137 (2004); see also David M. Smolin, *A House Divided? Anabaptist and Lutheran Perspectives on the Sword*, 47 J. LEGAL EDUC. 28, 38 (1997) (the "dominant leftist ideologies," of secular law faculty has led to an "aversion" to "traditionalist Christians" because of their position on contemporary cultural/moral issues such as abortion and homosexuality); Robert A. Destro, *ABA and AALS Accreditation: What's "Religious Diversity" Got to Do with It?*, 78 MARQ. L. REV. 427, 454 (1995) ("Concerns about the intellectual diversity of law schools and their faculties should not be limited to institutions in which the students and faculty are of a predominantly orthodox religious stripe. Law schools with impeccable progressive credentials are equally capable of manipulating the learning environment 'and have done so with great fanfare, and largely without apology.'").

Justice Scalia alludes to a similar bias in his dissent in *Obergefell v. Hodges*:

Judges are selected precisely for their skill as lawyers; whether they reflect the policy views of a particular constituency is not (or should not be) relevant. Not surprisingly then, the Federal Judiciary is hardly a cross-section of America. Take, for example, this Court, which consists of only nine men and women, all of them successful lawyers who studied at Harvard or Yale Law School. Four of the nine are natives of New York City. Eight of them grew up in east- and west-coast States. Only one hails from the vast expanse in-between. Not a single Southwesterner or even, to tell the truth, a genuine Westerner (California does not count). Not a single evangelical Christian (a group that comprises about one quarter of Americans), or even a Protestant of any denomination. The strikingly unrepresentative character of the body voting on today's social upheaval would be irrelevant if they were functioning as *judges*, answering the legal question whether the American people had ever ratified a constitutional provision that was understood to proscribe the traditional definition of marriage. But of course the Justices in today's majority are not voting on that basis; *they say they are not*.

Obergefell v. Hodges, 135 S. Ct. 2584, 2629 (2015) (Scalia, J., dissenting).

This conclusion is consistent with other research establishing that a disproportionate percentage of law faculty identify as liberal. At least six empirical studies published in a variety of journals over a twenty-year period have concluded that between seventy-five and eighty-six percent of law professors are liberal politically,¹²⁶ a percentage significantly exceeding the percentage of lawyers and judges identifying as liberal. It is well established that our political views influence our assessment of those holding different views.

Once people join a political team, they get ensnared in its moral matrix. They see confirmation of their grand narrative everywhere, and it's difficult—perhaps impossible—to convince them that they are wrong if you argue with them outside of their matrix. . . . [L]iberals might have even more difficulty understanding conservatives than the other way around, because liberals often have difficulty understanding how the Loyalty, Authority, and Sanctity foundations have anything to do with morality. In particular, liberals [who focus on care, liberty, and fairness] often have difficulty seeing moral capital, which I defined as the resources that sustain a moral community.¹²⁷

This confirmation bias and difficulty in understanding other values by liberals suggests that any anti-Catholic bias is more often the product of moral myopia or blindness than of animus.¹²⁸ Regardless of the motivation, given the political homogeneity of the legal academy, it is unsurprising that conservative, religiously affiliated law schools are subject to “significant and temporally persistent [negative] bias.”¹²⁹

¹²⁶ Debra Jones Merritt, *Research and Teaching on Law Faculties: An Empirical Exploration*, 73 CHI.-KENT L. REV. 765 (1997); Christopher F. Cardiff & Daniel B. Klein, *Faculty Partisan Affiliations in All Disciplines: A Voter-Registration Study*, 17 CRITICAL REV. 237 (2005); John O. McGinnis et al., *The Patterns and Implications of Political Contributions by Elite Law School Faculty*, 93 GEO. L.J. 1167 (2005); James C. Phillips, *Why are There So Few Conservatives and Libertarians in Legal Academia? An Empirical Exploration of Three Hypotheses*, 39 HARV. J.L. & PUB. POL'Y 153 (2016); Lindgren, *supra* note 31; Bonica et al., *supra* note 32. For a summary of the results of these studies see Bonica et al., *supra* note 32, at 6 tbl.1.

¹²⁷ HAIDT, *supra* note 114, at 365.

¹²⁸ This is not to suggest that animus toward liberals does not exist in some Catholic quarters, nor that conservatives (whether Catholic or not) are immune to confirmation bias.

¹²⁹ Stewart & Tolley, *supra* note 125, at 137.

It is equally unsurprising that some Catholic law schools, in response to lower national rankings, in part due to this bias, have jettisoned identifiers of their Catholic identity and welcomed dissenters to their faculty. As Professors Breen and Strang observe, “Catholic law schools have devoted their energies to mimicking their secular peers—in the courses and programs they offer, the faculty they hire, what and how the faculty teach, faculty scholarship, and the students they seek to attract.”¹³⁰ To date, this strategy has permitted Catholic law schools to survive in an increasingly competitive environment, but as Professors Breen and Strang argue, these schools have failed to become the “incomparable centre[s] of creativity and dissemination of knowledge for the good of humanity” that St. John Paul II envisioned in *Ex Corde*.¹³¹

Yet it need not be so. A faculty devoted to the Catholic faith, seeking to examine contemporary American law through the lens of Catholic intellectual tradition, could indeed produce the sort of jurisprudence Breen and Strang envision and contemporary society needs.

CONCLUSION

Catholic law schools were not born of a burning desire to rebuild American jurisprudence with a fuller conception of natural law, or even of a more complete sense of justice. They were not born of a desire to produce great legal jurists like Moses and Deborah, judges of old.¹³² Nor were they born from the desire to proclaim good news to the poor, freedom for the prisoners,¹³³ or rescue those being led away to death.¹³⁴

Most Catholic law schools were established for much more pedantic reasons: educating immigrant Catholics, providing access to the middle class through professional degrees, and bolstering Catholic colleges’ claims that they were emerging as universities. Each of these pragmatic reasons brought benefits to Catholics and thus to the Church. None provides any reason to believe Church leadership intended to create centers where law students could learn “integration between faith and life, and

¹³⁰ Breen & Strang, *supra* note 1, at 9.

¹³¹ *EX CORDE ECCLESIAE*, *supra* note 37, ¶ 1.

¹³² *Exodus* 18:2–4 (New International); *Judges* 4:4 (New International).

¹³³ *Luke* 4:18–19 (New International).

¹³⁴ *Proverbs* 24:11 (New International).

between professional competence and Christian wisdom.”¹³⁵ With few exceptions, our law schools were the product of Church leaders who, while faithful, were attentive to the worldly needs of their flock, and who relied on a strong Catholic culture to infuse the law schools with a sense of Catholic identity.

And it worked—relatively well—until the cultural upheaval of the 1960s. Then “question authority” became the mantra of the younger generation, both within and outside the Church. As Professors Breen and Strang document, what was hailed as authentic human liberation led to Catholic universities embracing secular culture and alien values as they expanded to meet new demands for legal education. Adhering to Church discipline in the form of canon law and papal directives became so foreign to the culture that many university and law school administrators lost their capacity to identify any distinctively Catholic aspect of their mission or curriculum.

When magisterial teachings were rearticulated and developed through the teaching of St. John Paul II, bishops and leaders of American Catholic universities complained mightily, arguing that their very existence would be threatened if they were to require authentic orthodoxy¹³⁶ by their Catholic faculty and others.

This trend toward secularization has only accelerated with the advent of national law school rankings that isolate particular characteristics of the law school admissions process and rely extensively on what is basically a popularity contest conducted among legal academics and practitioners. The slump in law school applications in 2010 to 2015 increased the sense of urgency among administrators to identify the “value proposition” of their programs,¹³⁷ and, for some, Catholic identity became even more expendable.

The pre-COVID-19 recovery from 2016 to 2020 spurred more students to apply to law schools, and at the time of the in-person component of this symposium, I was guardedly optimistic that at

¹³⁵ *EX CORDE ECCLESIAE*, *supra* note 37, ¶ 22.

¹³⁶ GILBERT K. CHESTERON, *ORTHODOXY* (1908).

¹³⁷ See Robert K. Vischer, *How Should a Law School's Religious Affiliation Matter in a Difficult Market?*, 48 U. TOL. L. REV. 307, 307 (2017). “In my experience, for the overwhelming majority of prospective students—including students of the school's own faith tradition—a law school's religious affiliation is only relevant to their choice of school to the extent that the school is competitive on the key factors that nearly every prospect is focused on: employment outcomes, student debt, and the quality of professional preparation.” *Id.* at 310.

least a few Catholic law schools, or more likely a spontaneous fellowship of Catholic law faculty, would take up the challenge that Professors Breen and Strang present in *A Light Unseen: A History of Catholic Legal Education in the United States*. Today I am less sanguine.

It appears we may be entering a worldwide recession, the likes of which our generation has not seen. This is likely to lead to depressed demand for legal education, notwithstanding that the need for lawyers will explode as new rules, regulations, and forms of interaction emerge. Liability and responsibility for what some perceive as belated or inadequate responses to threats of infection and impaired commercial arrangements will have to be sorted out. I am convinced a legal education will be a huge asset as we negotiate necessary changes to the world we live in—but how legal education will be delivered and who will be able to afford it remain real questions.

Yet, as it is oft repeated, every crisis presents an opportunity. If there was ever a time that the wisdom of the Church, with its commitment to care and community, liberty and authority, sanctity and fairness, would be needed, it is now. So, in the end, I return to my guarded optimism. Who knows? God does work in mysterious ways, and Professors Breen and Strang may yet witness the development of an authentic Catholic jurisprudence integrating the Catholic intellectual tradition and American law.