

## How Distinctive Should Catholic Law Schools Be?

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## HOW DISTINCTIVE SHOULD CATHOLIC LAW SCHOOLS BE?

ROBERT K. VISCHER<sup>†</sup>

I was a teenager in the 1980s, and I was raised in evangelical Christian circles through which I was encouraged to listen to “Christian” rock music, not secular, which sometimes gave rise to some casuistic line drawing:

- Does U2 count as Christian? Yes, because of that line in *Sunday Bloody Sunday* about the victory Jesus won!<sup>1</sup>
- How about Bob Dylan? Yes, but only during his three-album “born again” period!<sup>2</sup>
- Amy Grant? Definitely, but even after she crossed over into the secular Top 40?<sup>3</sup>
- Does the song need to mention Jesus? What if it mentions Jesus but also has a swear word?

One of the things that I found refreshing about being Catholic is less preoccupation with line drawing, with the “in or out” question, at least when it came to matters of cultural engagement. In Catholic circles, I’ve never heard someone justify or condemn listening to Bruce Springsteen based on whether he can be considered a Catholic singer. He’s a great singer, and his lyrics convey powerful truths about the human condition. That he was raised Catholic has shaped his art, no question,<sup>4</sup> but isolating what precisely is “Catholic” about him—or how his “Catholic-ness” makes him different from all non-Catholic artists—would be an odd line of inquiry. We take him as he is in a holistic encounter with his contribution to the true, the good, and the beautiful.

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<sup>1</sup> U2, *Sunday Bloody Sunday, on WAR* (Island Records 1983).

<sup>2</sup> BOB DYLAN, *SLOW TRAIN COMING* (Columbia Records 1979); BOB DYLAN, *SAVED* (Columbia Records 1980); BOB DYLAN, *SHOT OF LOVE* (Columbia Records 1981).

<sup>3</sup> See, e.g., AMY GRANT, *HEART IN MOTION* (A&M Records 1991).

<sup>4</sup> See, e.g., BRUCE SPRINGSTEEN, *BORN TO RUN* (Columbia Records 1975).

I'm grateful that John Breen and Lee Strang have taken on this project. This is an important book. It is a worthy topic that does not lend itself to easy answers, and they bring valuable insight through their meticulous research and analysis.

That said, there were a few times reading it when I harkened back to my fourteen-year-old self, wondering whether I should be listening to the decidedly mediocre Christian metal band Stryper rather than the unmistakably non-Christian but brilliant Metallica. At times, the “in or out” line drawing loomed large in my reading of Breen and Strang's text. Maybe that's just the lens I bring, but I want to explore it a bit.

It should matter that a law school is Catholic, to be sure. But I think Breen and Strang may simultaneously be claiming too much and too little. They may claim too much by seeming to suggest that Catholic legal education matters only to the extent that it is distinctive. To cite a few examples of their focus on distinctiveness:

[A]lthough Catholic legal education came into existence and for a long time served the needs of underrepresented Catholics and other groups excluded by non-Catholic law schools, today, Catholic law schools' rationales, mechanisms, and results are at best equivalent to their non-Catholic peers.<sup>5</sup>

[T]hese reasons—securing additional revenue, enjoying institutional prestige, contributing to the public good, and promoting academic inquiry—would justify the existence of any university-sponsored law school. They do not justify the particular existence of a Catholic law school *as such*. Put another way, these rationales would justify the presence of a law school as part of a *university*, but not as a *Catholic university*.<sup>6</sup>

[I]n establishing legal clinics, Catholic law schools were following a trend rather than boldly marking out a space of special concern. They were not leaders in the vanguard of legal education, but disciples who jumped on the clinical bandwagon.<sup>7</sup>

This last quote—conveying a rather dismissive attitude toward Catholic law schools' embrace of clinical legal education as a case of bandwagon jumping—gave me pause. Would we look skeptically

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<sup>5</sup> John M. Breen & Lee J. Strang, *A Light Unseen: A History of Catholic Legal Education in the United States* 473 (Jan. 20, 2020) (unpublished manuscript) (on file with the *St. John's Law Review*).

<sup>6</sup> *Id.* at 477.

<sup>7</sup> *Id.* at 479.

at a Christian anti-hunger organization like World Relief because UNICEF has similar aims? Is it all a question of timing, of who's first to the space?

I do think that we need to be asking questions about why Catholic legal education matters. In the Minnesota law-school market, if the Catholic identity of St. Thomas does not render it any different from the University of Minnesota or Mitchell-Hamline, that's a problem. And yet, I think it's possible to overstate the need for distinctiveness. I wonder if the authors are claiming too much on this point.

At the same time, I wonder if they are also claiming too little by putting nearly all the weight on *intellectual* distinctives:

We argue that Catholic universities and law schools, and the deans and faculty responsible for these schools, can indeed justify their existence—that sound reasons exist to support and continue Catholic legal education—only if one identifies a body of thought capable of explaining and justifying the practice of Catholic legal education as an intellectual endeavor.<sup>8</sup>

I agree that the intellectual dimension of Catholic legal education is crucial, but I do not believe that it captures fully the potential distinctiveness of Catholic legal education.

Consider Pope John Paul II's admonition in *Ex Corde Ecclesiae* that a Catholic university should be “an authentic human community animated by the spirit of Christ.”<sup>9</sup> That phrase alone can become the impetus for a Catholic law school to distinguish itself in terms of:

- The centrality of relationships (faculty-student research projects, responsive teaching, mentoring programs, skills coaching, peer support)
- The integration of a student's faith commitments with his or her professional development
- Opportunities for community members to engage in moral reflection and growth
- Interprofessional exposure and collaboration<sup>10</sup>
- Attention to a narrative of meaning that can help a student develop a sense of vocation<sup>11</sup>

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<sup>8</sup> *Id.* at 482–83 (emphasis omitted).

<sup>9</sup> JOHN PAUL II, APOSTOLIC CONSTITUTION *EX CORDE ECCLESIAE* ¶ 21 (1990).

<sup>10</sup> For example, at St. Thomas Law, our clinical program is a collaboration between law, social work, and professional psychology. Ministering to the client's whole person is a manifestation of our Catholic identity.

<sup>11</sup> On these points generally, see, for example, Robert K. Vischer, *How Should a Law School's Religious Affiliation Matter in a Difficult Market?*, 48 U. TOL. L. REV.

I don't think any of these points of emphasis are captured fully by the focus on Catholic legal education's rationale being a distinctive intellectual framework.

Two more practical questions emerge from Breen and Strang's analysis. First, what is the role of boundaries in Catholic legal education? The authors assert that the Catholic intellectual tradition's anthropology "identifies boundaries to the law school's mission."<sup>12</sup> For example, "A class taught, or an article written by a faculty member, or talk given by a dean that directly or indirectly affirmed that humans lack free will would not fit this anthropology."<sup>13</sup> Because "[t]he Catholic understanding of what it means to be a human being is modest enough in scope that it permits a wide variety of claims and perspectives on a wide variety of legal issues," the "anthropology would prevent few claims or arguments about servitude law currently in circulation," for example.<sup>14</sup>

I'm not sure what weight the verb "prevent" is carrying in the previous sentence. Does a need for boundaries suggest that there are claims or arguments that should not be made in a Catholic law school? (Note that I'm asking about claims to be made *in* a Catholic law school, not *by* a Catholic law school, which I believe is a different matter.<sup>15</sup>)

The pedagogical function of these boundaries is not entirely clear. Breen and Strang explain:

[W]e are not arguing that a dean or other faculty member would not be allowed to say there is no such thing as free will. Rather, the presence of a Catholic anthropology will serve as a counterpoint to which materialist/determinist theories should respond. So, a faculty member can say those things, but if he does, it would be incumbent upon him to point out that this is not in keeping with the mission of the school.<sup>16</sup>

Without a doubt, this counterpoint function is important, but it strikes me as important in both directions. In addition to benefiting from learning Catholic anthropology as a counterpoint

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307 (2017); Jerome M. Organ, *From Those to Whom Much Has Been Given, Much is Expected: Vocation, Catholic Social Teaching, and the Culture of a Catholic Law School*, 1 J. CATH. SOC. THOUGHT 361 (2004).

<sup>12</sup> Breen & Strang, *supra* note 5, at 516.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 517.

<sup>15</sup> See, e.g., Robert K. Vischer, *Whom Should a Catholic Law School Honor? If Confusion Is the Concern, Context Matters*, 49 J. CATH. LEGAL STUD. 243 (2010).

<sup>16</sup> Breen & Strang, *supra* note 5, at 516 n.143.

to materialist/determinist theories, students at a Catholic law school would also benefit from having materialist/determinist theories presented as a counterpoint to the Catholic anthropology. Professors at a Catholic law school should be expected, I would think, to present views in opposition to the Catholic tradition in order to help students understand themselves as engaged participants in a critical dialogue. By the same token, shouldn't professors at non-Catholic law schools do the same? What precisely makes this commitment to counterpoint-driven dialogical teaching distinctive for a Catholic law school?

Perhaps the distinctiveness derives not from the presentation of counterpoints but from the professor's vouching for the validity of particular counterpoints. In other words, does the Catholic law school's distinctiveness require the professor to put his or her thumb on the scale by saying "this is the view that is affirmed by our mission"? If so, is that thumb on the scale intended to prevent confusion because it is presumed that students have already chosen to align with the tradition, or is the thumb intended to have a persuasive function in and of itself?

For example, when I have taught abortion law, I ask students to read thoughtful perspectives on both sides of the issue. I make sure a range of views are presented in their most compelling terms. I do not vouch for or against either side. Is my teaching consistent with my responsibility as a Catholic faculty member at a Catholic law school? If so, shouldn't that same responsibility extend to my work if I were on the faculty at the University of Minnesota? If my approach is not consistent with my responsibility as a faculty member at a Catholic law school, why isn't it? What else should I be saying?

The second broad question that emerges from my reading of Breen and Strang: What is the appropriate role of the market or professional relevance in defining Catholic legal education? I have helped create and teach a required law school course focused on the Catholic intellectual tradition. It is no easy feat. There is a huge difference between an elective and a required course in terms of securing student buy-in. It is very difficult to pull off a required course grounded in the Catholic intellectual tradition at a law school today. In my view, the difficulty stems not so much from the contested nature of Catholic truth claims but from questions of professional relevance. Many students struggle with the notion that principles emerging from the tradition are required elements of their development as lawyers.

There is such pressure to maximize return on investment that many law students are uncomfortable spending time and tuition dollars on courses that may strike them as geared more toward questions of good citizenship than effective lawyering.

Over the years, we have retooled our required course repeatedly, gradually focusing less explicitly on Catholic intellectual tradition and more on professional competencies, reflective moral judgment, and building relationships of trust with clients. I have begun to care less about the breadth and depth of their knowledge of Catholic social teaching, for example, and more about their comfort engaging in client-centered counseling that integrates moral considerations.

I will illustrate the murkiness of Catholic identity in the classroom with one more example. During orientation week at St. Thomas, the first case I teach our new students is *Buck v. Bell*, the Supreme Court case in which Justice Oliver Wendell Holmes proclaimed that “[t]hree generations of imbeciles are enough” in upholding forced sterilizations against women deemed mentally deficient.<sup>17</sup> I also ask our students to read about human dignity from a wide variety of perspectives, including Catholic, Jewish, Muslim, Buddhist, and several nonreligious philosophies. I then return to a discussion of *Buck v. Bell* through the lenses offered by these perspectives. I do not put my thumb on the scale. I try to equip students to express their own moral misgivings about the ruling using language that resonates with them, regardless of its source.

There is a smorgasbord aspect to this approach, to be sure. My goal is to help students discern and articulate the connections between the Supreme Court’s reasoning and the moral commitments they are bringing with them into law school.

Whether or not these conversations are happening at non-Catholic law schools, it is not a distinctly Catholic conversation. In fact, we strengthen the conversation by subsequently asking students to read a great article by Harvard Law professor Joseph Singer on the need for normative reasoning by lawyers.<sup>18</sup> Professor Singer is not Catholic, and his article makes compelling arguments for attorneys to become well-versed in moral reasoning without ever invoking the Catholic intellectual tradition.

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<sup>17</sup> 274 U.S. 200, 207 (1927).

<sup>18</sup> Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899 (2009).

If we decided to ask St. Thomas Law students to discuss *Buck v. Bell* in an intellectual framework that was distinctively Catholic, what would that look like? And what would be the value for students beyond the value presented by our current approach?

As the dean of a Catholic law school, I assuredly do not want to lose sight of the true, the good, and the beautiful. Our Catholic identity has to be meaningful, and Breen and Strang's exploration of this issue is enormously important to the extent that it brings these questions to the surface. But I want to be careful and gracious in my exploration of these questions, and I do not want to unduly limit the worthy manifestations of Catholic identity to those manifestations that are *not* exhibited by non-Catholic law schools. Not everything going on in legal education should be emulated by Catholic law schools, to be sure, but sometimes our commitment to core values will lead us to sound more like Metallica, less like Stryper. And I think that's okay.