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ARTICLES

A LIGHT UNSEEN: THE HISTORY OF CATHOLIC LEGAL EDUCATION IN THE UNITED STATES: A *RESPONSE TO OUR COLLEAGUES AND CRITICS*

JOHN M. BREEN & LEE J. STRANG[†]

INTRODUCTION

We are enormously grateful to the *Journal of Catholic Legal Studies* for hosting the conference on February 14, 2020, dedicated to a review of our book manuscript, *A Light Unseen: The History of Catholic Legal Education in the United States*, and for publishing the papers of the conference participants.¹ We are also grateful for the opportunity to offer some reply in the pages of the *Journal*. *A Light Unseen* sets forth a comprehensive history of the book's subject matter. The book describes the purposes for which Catholic law schools were founded, the schools maturation and success in achieving accreditation and some measure of respectability,² and their search for meaning since the 1960s-1970s when the prior unreflective cultural Catholicism of these schools dissipated and in some cases disappeared almost entirely. *A Light Unseen's* last chapter provides a blueprint for the creation of authentically Catholic legal education grounded in the Catholic intellectual tradition. In particular, we argue that Catholic law schools reach their fullest expression when their teaching, scholarship, and student formation—their intellectual hearts—employ the Catholic intellectual tradition and its moral anthropology.

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¹ Editors Anthony Nania and Matt Dean, along with *Journal* advisors Professors DeGirolami and Movsesian, performed yeoman's labor conceiving and executing the Symposium, and we express our heartfelt thanks to them for their efforts.

² Those four purposes were to: (1) provide means of upward socio-economic mobility for Catholic immigrants and their children; (2) provide resources and university status to the law schools' host institutions; (3) train attorneys for the local bar; and rarely, (4) provide a distinctively Catholic legal education.

I. AUTHENTIC CATHOLIC LEGAL EDUCATION—BOTH IN PRINCIPLE AND IN PRACTICE—CAN THRIVE IN THE UNITED STATES

The comments from the conference participants were wide-ranging, thoughtful, critical in a constructive fashion, and almost always charitable.³ Most of the commentators' remarks focused on Chapter 5 of *A Light Unseen*, where we set forth a prescription for authentic Catholic legal education. This is understandable

³ There are two instances where we believe the commentators' significantly misread our arguments and, in doing so, paint our arguments in an unnecessarily harsh light.

First, Dean Vischer claims that the manuscript "convey[s] a rather dismissive attitude toward Catholic law schools' embrace of clinical legal education as a case of bandwagon jumping." Robert K. Vischer, *How Distinctive Should Catholic Law Schools Be?*, 58 J. CATH. LEGAL STUD. 117, 118 (2019). With respect, we are in no way dismissive of the excellent legal work and education provided at legal clinics sponsored by Catholic law schools. Indeed, we have elsewhere argued that, in a Catholic setting, a law clinic can convey to the law student the basic Christian truth about the Incarnation—that every human being is made in the image and likeness of God, and even the poorest of the poor is simply Christ "in [a] distressing disguise." See MOTHER TERESA, IN THE HEART OF THE WORLD: THOUGHTS, STORIES & PRAYERS, 23 (Becky Benenate ed., 2010). Rather, our point is a historical one, made in response to the false claim that the clinics at Catholic law schools were mission-driven in their origin, reflecting a desire to further manifest their Catholic identity. We are not dismissive of clinical legal education. We are, on historical grounds, dismissive of the claim that these clinics were of Catholic inspiration.

Second, Dean Treanor claims that there is a "logical flaw" in our view of Catholic legal education. William Michael Treanor, *Reflections on a More "Catholic" Catholic Legal Education*, 58 J. CATH. LEGAL STUD. 99, 100 (2019). Treanor claims that, on the one hand, we argue that because Catholic law schools "are not advancing access [for disadvantaged students] or pursuing justice very well" that this aspect of the mission should be abandoned, but that, on the other hand, even though Catholic law schools "are not very good at teaching the Catholic intellectual tradition" that "we should redouble our efforts." *Id.* "This," he says, "is inconsistent." *Id.* The problem with this argument is that we nowhere argue that Catholic law schools should abandon their efforts to make legal education accessible to those who are disadvantaged. We acknowledge the laudable history of Catholic law schools providing Catholic immigrants and others with the opportunity for professional education and advancement. John M. Breen & Lee J. Strang, *A Light Unseen: A History of Catholic Legal Education in the United States* 468–69 (Jan. 20, 2020) (unpublished manuscript) (on file with the St. John's Law Review). However, because of the cost of legal education today and the financial position of most Catholic law schools, we think it is unlikely that these schools will be able to replicate this aspect of their past, creating opportunities for large numbers of economically disadvantaged students. We do not argue that the goal is not worth pursuing, only that it may not be realistic. We *do* argue that, even if Catholic law schools were to succeed in making legal education more accessible, they, nevertheless, will have failed in their mission if the education they provide students is indistinguishable from their secular counterparts. *Id.* There is no inconsistency in what we argue.

because the symposium participants are actively engaged in the project of Catholic legal education—some for many decades. Indeed, the commentators regularly noted how impactful their own experiences of Catholic education have been in their lives.

In Part I of this Response, we address four major themes in the commentators' essays: (1) the idea that authentic Catholic legal education can be defined entirely or for the most part by characteristics shared with non-Catholic institutions; (2) the claim that many or most Catholic law schools today *are* authentically Catholic in their mission, curricula, programming, and culture; (3) the claim that Catholic law schools that intentionally embrace the Catholic intellectual tradition as a defining feature will curtail the exercise of academic freedom; and (4) the prediction that our prescription for authentic Catholic legal education will be unattainable due to a lack of qualified faculty and insufficient student demand to meet sustainable enrollments.

A. *Defining What It Means to Be a Catholic Law School, and the Need to Be Distinctive*

A premise that underlies all of the essays, both critical and positive, is that there is a distinction between Catholic and non-Catholic legal education. However, if the concept of “Catholic legal education” is to be meaningful, and so have practical effect, it must be defined. The thesis we advance in the book is that, as part of a university, every law school is an intellectual enterprise. As such, a Catholic law school's Catholic identity must be reflected in the intellectual work that it performs in teaching, scholarship, and student formation. We argue that no matter how many crucifixes adorn its walls, no matter how active its campus ministry, no matter how lyrical and effusive its claimed commitment to “social justice,” a Catholic law school must be counted as failing in its mission if the Catholic intellectual tradition is not reflected in its heart—in the center of its intellectual operations.

Of course, the Catholic intellectual tradition is enormous in scope, spanning two millennia of thought, research, reflection, and argument, and involving every discipline and field of inquiry, from art and architecture, to literature and criticism, history and science, law and politics, philosophy and theology. We argue that the one aspect of this vast tradition that a Catholic law school must integrate into its intellectual life and introduce to its

students, if it is to fulfill its mission, is the Church's moral anthropology.

A number of the commentators explicitly agree with this thesis. Dean Vincent Rougeau says that our "idea of placing the Catholic anthropology of the human person at the core of what a Catholic law school does . . . strikes me as an essential part of the institutional architecture of a Catholic law school."⁴ Professor Richard Garnett agrees that a Catholic law school must hold a Christian moral anthropology at its center, "that is, an account of what it means to be human, why it matters that we are, and what it means for our lives together."⁵ Likewise, Dean Robert Vischer endorses the idea of a "Catholic anthropology [serving] as a counterpoint to materialist/determinist theories."⁶

Several of the manuscript commentators also expressly agree with the obvious and unobjectionable claim that Catholic legal education must be defined. Thus, Dean Kathleen Boozang sets forth her "vision of a Catholic law school" as one that is "founded upon the Catholic intellectual tradition embraced by a diverse community of faculty, staff, and administration"; one that accomplishes a "pervasive embrace of our intellectual tradition by both indirect and direct inculcation"; and one that "serve[s] as an intellectual hub for the Church."⁷

Professor Angela Carmella answers the question of a law school's Catholic identity more modestly through a *via negativa*. According to Carmella, "[a] law school is not the Church, just as a university is not the Church," and "[l]aw faculty scholarship does

⁴ Vincent Rougeau, *Reflections on A Light Unseen*, 58 J. CATH. LEGAL STUD. 89, 95 (2019).

⁵ Richard W. Garnett, *Persons and the Point of the Law*, 58 J. CATH. LEGAL STUD. 65, 69–70 (2019).

⁶ Vischer, *supra* note 3, at 120–21. Dean Vischer adds, however, that Catholic law schools "would also benefit from having materialist/determinist theories presented as a counterpoint to the Catholic anthropology." *Id.* As the manuscript makes plain, we believe that every idea should be open to consideration at a Catholic university, and that would include the ancient and modern anthropologies founded on materialism and determinism. But introducing students to these theories is not the challenge. They are a pervasive and inescapable part of American intellectual life, including the study of law. It would be odd to think that law students today at every law school in the country are not already inundated with these theories, both in their study of law, and in the popular culture they inhabit. These theories are the baseline to which a Catholic anthropology stands as a needed alternative and antidote.

⁷ Kathleen M. Boozang, *A Light Unseen?*, 58 J. CATH. LEGAL STUD. 5, 7 (2019).

not need a theologian's *nihil obstat* or a bishop's imprimatur."⁸ Here, it seems, Carmella identifies "the Church" with the Church's hierarchy. Certainly, a Catholic law school is not identical with the Church in this respect, but the same could be said of any lay person or organization. Even this minimal, negative definition is inadequate, however, in that every Catholic individual and institution—be it a school, a university, a hospital, a soup kitchen, or a cemetery—*belongs to* and *is part of* the Church. Thus, when individuals and institutions ostensibly identify themselves as "Catholic" and simultaneously "independent" of the Church, they are contradicting themselves,⁹ since the fact of belonging to the Church—of being Catholic—is a matter of communion, which is the antithesis of independence.¹⁰

Although Dean Vischer agrees with our thesis "that the intellectual dimension of Catholic legal education is crucial," he worries that it fails to "capture[] fully the potential distinctiveness of Catholic legal education" and that we give undue weight to "intellectual distinctives."¹¹ Following Pope John Paul II, Vischer says that a Catholic law school must be "an authentic human community animated by the spirit of Christ."¹² He identifies five qualities that distinguish Catholic legal education including the "centrality of relationships," the "integration of a student's faith commitments with his or her professional development," and "help[ing] a student develop a sense of vocation."¹³ These too are laudable goals, but not specifically Catholic goals.

What Vischer sees as the undue weight we give to the Catholic intellectual tradition in the study of law is owing to the woeful neglect of this tradition in the practice of Catholic legal

⁸ Angela C. Carmella, *Reflections on Breen & Strang's A Light Unseen: A History of Catholic Legal Education in the United States*, 58 J. CATH. LEGAL STUD. 15, 20 (2019).

⁹ See, e.g., *Mission and Values*, NAT'L CATH. REP., <https://www.ncronline.org/mission-and-values> [<https://perma.cc/RUF7-BQLB>] (last visited July 1, 2021) (describing itself as an independent news source and as "connect[ing] Catholics to church, faith and the common good with independent news, analysis and spiritual reflection").

¹⁰ See generally CONGREGATION FOR THE DOCTRINE OF THE FAITH, ON SOME ASPECTS OF THE CHURCH UNDERSTOOD AS COMMUNION (1992), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_28051992_communionis-notio_en.html [<https://perma.cc/KZF9-M8AE>].

¹¹ Vischer, *supra* note 3, at 119.

¹² *Id.* (quoting JOHN PAUL II, APOSTOLIC CONSTITUTION *EX CORDE ECCLESIAE* ¶ 21 (1990)).

¹³ *Id.*

education since the 1960s to the current day. Our emphasis on the intellectual tradition is not meant to “capture[] fully the potential distinctiveness of Catholic legal education.”¹⁴ Rather, we stress engagement with the tradition as a *necessary* component of legal education that every Catholic law school must perform precisely because the study of law is an intellectual enterprise. But it is not sufficient. To fulfill its mission, a Catholic law school should, for example, help its students develop a sense of vocation and see the centrality of relationships in both education and the practice of law. But even if these activities are carried out in superb fashion, they could not obviate the need for engagement with the tradition, for this is indispensable.

Of course, to say that a certain quality is *necessary* establishes a boundary around the thing defined. According to Dean Vischer, this sort of “‘in or out’ line drawing loom[s] large” in our project.¹⁵ It reminds him of the Evangelical Christianity of his youth which suffered from the same “preoccupation with line drawing.”¹⁶ He colorfully contrasts Evangelical support for “the decidedly mediocre Christian metal band Stryper rather than the unmistakably non-Christian but brilliant Metallica” as an example of ignoring what is excellent in favor of what is identifiably Christian.¹⁷ He contrasts this with a Catholic perspective which, he says, is less concerned with the “‘in or out’ question” and more concerned with whether a thing contributes to “the true, the good, and the beautiful.”¹⁸

There indeed is such a thing as an obsession with line-drawing—placing something in or out of a given category—that prevents one from appreciating the good qualities that the thing under examination possesses. Surely, however, Vischer would agree that some line drawing is both inevitable and desirable, if only to avoid fraud. There are many lovely sparkling wines made in Italy and France, but prosecco and champagne are not the same thing, and it would be false to claim otherwise. The term “Catholic” must have some boundaries, otherwise the term is meaningless. Dean Vischer, of course, recognizes this fact. He depends on the very line drawing he bemoans in promoting his own institution, the University of St. Thomas School of Law, as

¹⁴ *Id.*

¹⁵ *Id.* at 118.

¹⁶ *Id.* at 117.

¹⁷ *Id.* at 118.

¹⁸ *Id.* at 117.

“a Catholic law school.”¹⁹ In doing so, he means, at least in part, to distinguish St. Thomas from non-Catholic schools like the University of Minnesota and Mitchell Hamline School of Law that compete in the same market.

Furthermore, Vischer’s analogy breaks down upon closer inspection. It would be one thing for Metallica to say, “You should listen to our music because it is truly excellent heavy metal.” It would be another thing for Metallica to say, “Oh, and by the way, our music is really Catholic. This may not be apparent to you, but it is inherent in the quality of excellence that our music exudes.” A law school may be truly excellent—in the breadth of its curriculum, the quality of its teaching, and in the insightful scholarship published by its faculty. And these qualities should be appreciated, admired, and pursued. But these qualities do not in themselves render a school “Catholic,” even if the school advertises itself as such. Something more is required, and our book is in part an effort to define what this something more is.

Dean Treanor also takes issue with boundary-drawing, though he expresses this concern in terms of pluralism. According to Treanor, we err in thinking “that there is only one type of Catholic law school.”²⁰ Treanor proposes instead that, just as there are different religious orders within Catholicism possessing different charisms and methods of sharing the Gospel—Jesuits, Franciscans, and Benedictines—so too there are “equally valid paths to a Catholic education.”²¹ We should, he says, “be catholic about what it means to be a Catholic law school”²² as there are “diverse models and paths to arrive to a similar goal.”²³

But what is that goal? Treanor doesn’t say. Surely the goal of all law schools is to prepare law students to be competent and ethical members of the legal profession. Beyond this, Dean Treanor indicates that what sets Catholic law schools apart (or at least Fordham and Georgetown, where he has taught) is that

¹⁹ *About St. Thomas Law*, UNIV. OF ST. THOMAS SCH. OF L., <https://www.stthomas.edu/law/about/> [<https://perma.cc/ATA3-7N98>] (last visited July 1, 2021).

²⁰ Treanor, *supra* note 3, at 100.

²¹ *Id.* at 102.

²² *Id.* at 101.

²³ *Id.* at 104. Dean Rougeau echoes the same point. Rougeau, *supra* note 4, at 97 (“I think the way [Breen and Strang] seek to define a law school as Catholic is one way, but it is not the only way.”).

they “are explicit in their commitment to justice.”²⁴ He thinks it is significant that the motto for Georgetown University Law Center is “Law is but the means, – Justice is the end.”²⁵ But an explicit commitment to justice certainly is not a sufficient marker of an authentic Catholic legal education. Many non-Catholic law schools tell the world that their mission is to educate students for justice. Northwestern’s former Dean Kim Yuracko assured prospective students that, while the Law School is a “community of scholars, advocates and activists” with diverse “backgrounds, interests and passions,” they are “alike in [their] belief that law is a force of social justice and the bedrock of a civilized society.”²⁶ One of Cornell Law School’s mission statement goals is that its graduates “[e]xercise with due care the role entrusted to them as officers of the legal system and public citizens, having special responsibility for the quality of justice.”²⁷ Dean John Manning promotes Harvard Law School as “an exciting and productive community in which to study, to teach, to write, to debate, to explore, to question, to innovate, to litigate, to advocate, and to pursue the highest ideals of law and justice.”²⁸ If mottos on libraries are evidence of Catholic legal education, as Dean Treanor suggests, then Langdell Hall’s—“Non sub Homine sed sub Deo et Lege,” is proof that Harvard is even more Catholic than Georgetown!²⁹

Furthermore, the meaning of “justice” is not self-evident.³⁰ Indeed, different people often mean radically different things by

²⁴ Treanor, *supra* note 3, at 101.

²⁵ *Id.*

²⁶ Kim Yuracko, *Leadership and Strategy*, NW PRITZKER SCH. OF L., <https://www.law.northwestern.edu/about/leadership/> [http://web.archive.org/web/20201126175413/https://www.law.northwestern.edu/about/leadership/] (last visited June 30, 2021).

²⁷ *Registrar’s Office*, CORNELL L. SCH., https://www.lawschool.cornell.edu/registrar/aba_standards.cfm [https://perma.cc/GM7M-28KW] (last visited July 1, 2021).

²⁸ John F. Manning, *Dean’s Welcome*, HARV. L. SCH., <https://hls.harvard.edu/about/deans-welcome/> [https://perma.cc/2396-94PP] (last visited July 1, 2021); *see also About*, STAN. L. SCH., <https://law.stanford.edu/about/> [https://perma.cc/9DHB-8QMU] (last visited July 1, 2021) (“With alumni and students as partners, they champion law as an instrument of positive change on scales local, regional, national and global.”).

²⁹ *Langdell Hall*, HARV. L. SCH., <https://hls.harvard.edu/dept/facilities/buildings-overview/langdell-hall/> [https://perma.cc/F83K-ZGS9] (last visited July 1, 2021).

³⁰ *See* ALASDAIR C. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 1 (1988) (describing how the West today contains a “set of conflicting conceptions of justice, conceptions which are strikingly at odds with one another”).

use of the word. The content of this concept varies greatly depending upon the particular theory of justice employed and the application of that theory to a concrete set of facts. It is in fact obvious that different views of justice can be employed to reach radically different conclusions with respect to highly contested issues of the day, like abortion.³¹ So Treanor's assurance that Catholic law schools define themselves by commitment to an undefined variety of "justice" is inadequate.

Contrary to Dean Treanor's assertion, in the manuscript we do not contend that there is only one model for a Catholic law school. On the contrary, we recognize that an authentically Catholic law school could take different forms. At the same time, it is, of course, possible for one to be so "catholic" that one is no longer "Catholic." A Catholic law school could seek to serve the local community with practicing lawyers or to be counted among the country's elite national law schools.³² A Catholic law school might stress public service or private practice, emphasize clinical and experiential learning over classroom instruction, or be recognized for a particular legal expertise such as environmental law, intellectual property, corporate transactions, poverty law, or the American Founding.³³ Regardless of the model chosen, it is our claim that to be authentically Catholic, a law school must engage the Catholic intellectual tradition as it relates to questions of law and justice, specifically by introducing students to the Church's moral anthropology. Nowhere in any of the nine published responses is this basic claim explicitly rejected, let alone refuted.³⁴

Dean Treanor's own model is "a Jesuit path" of "immersion in the world and an openness to discourse among people of different backgrounds and faiths."³⁵ We regard open discourse

³¹ Compare DAVID BOONIN, A DEFENSE OF ABORTION 2–3 (2003), with FRANCIS J. BECKWITH, DEFENDING LIFE: A MORAL AND LEGAL CASE AGAINST ABORTION CHOICE xi–xiv (2007).

³² Cf. Mark Tushnet, *Catholic Legal Education at a National Law School: Reflections on the Georgetown Experience*, in GEORGETOWN AT TWO HUNDRED: FACULTY REFLECTIONS ON THE UNIVERSITY'S FUTURE 321, 321–22 (William C. McFadden ed., 1990) (arguing that Catholic law schools, insofar as they are Catholic, cannot be national law schools).

³³ See *Columbus School of Law Receives \$4.25 Million Gift*, CATH. UNIV. AM. (Apr. 26, 2021), <https://communications.catholic.edu/news/2021/04/law-originalism-gift.html> [<https://perma.cc/3HTA-G3NQ>].

³⁴ Even Treanor says that he "[does] not reject the model [we] offer." Treanor, *supra* note 3, at 100.

³⁵ *Id.* at 102.

among people from different backgrounds with disparate points of view not as a specifically Jesuit quality but as a trait common to all universities worthy of the name. Still, Treanor's model seems to us a reasonable approach that some, perhaps many, Catholic law schools should take—an approach that may easily fit under the broad umbrella of the Catholic intellectual tradition. The key question, however, is whether Dean Treanor's "Jesuit path" has a purpose and means that intentionally seeks to draw from the Catholic intellectual tradition to animate the intellectual work performed at law school.

Related to the question of defining Catholic identity is the question of distinctiveness. Dean Treanor believes that we focus too much on what we "see as 'distinctive' about a Catholic law school."³⁶ Instead, "we should embrace all the elements of our mission, even those that we share with non-Catholic schools."³⁷ Thus, he argues that just because schools that are not Catholic "have strong commitments to justice and to access . . . does not mean that that these two commitments cannot also be hallmarks of the mission of a Catholic law school."³⁸ Dean Vischer likewise worries that for us "Catholic legal education matters only to the extent that it is distinctive."³⁹ He does "not want to unduly limit the worthy manifestations of Catholic identity to those manifestations that are *not* exhibited by non-Catholic law schools."⁴⁰

This criticism is surprising since nowhere in the manuscript do we argue that the identity of a Catholic law school can *only* be found in those features "that are *not* exhibited by non-Catholic law schools."⁴¹ It would be more accurate to say that we believe that legal education is not *Catholic* legal education unless it possesses certain qualities. It may still be excellent *legal education* and so "matter" (to use Vischer's term) in that sense, but it would not provide the light that a Catholic worldview is meant to bring to the study of law. We agree that Catholic law schools should perform the aspects of their mission that they share with non-Catholic schools. A quote, often attributed to Martin Luther, captures the point. He is reported to have said

³⁶ *Id.* at 99.

³⁷ *Id.* at 100.

³⁸ *Id.* at 101.

³⁹ Vischer, *supra* note 3, at 118.

⁴⁰ *Id.* at 123.

⁴¹ *Id.*

that if he were in need of medical attention he would rather have “an Infidel for a surgeon than a faithful butcher.”⁴² Likewise, a law school that competently instructed its students in the law and legal analysis would be superior to a thoroughly Catholic institution that failed in these essential tasks.

As set forth in the manuscript, American legal practice and legal education is the sort of thing that contains a lot of givenness—like other professions and trades, such as accounting and plumbing—so that all competent American law schools will teach the same core subjects, skills, and virtues. Every law school will teach the principle of *stare decisis*, explain the rule of negligence in torts, and guide students through basic aspects of legal practice like filing a motion. Nothing can displace a solid grounding in the technical knowledge of law and the acquisition of skills necessary for the competent practice of law that all law schools must provide to their students.

Dean Rougeau accurately summarizes our claim, that “Catholic law schools in the United States are not *distinctive* in a way that is an obvious expression of their Catholic identity, [such that] these institutions have failed as *Catholic* law schools.”⁴³ As Professor Rick Garnett correctly notes, we believe that “if there is any value to distinctiveness, it must be rooted in, and reflect, an ‘intellectual architecture’” and that “the foundation and cornerstone of that architecture needs to be a distinctively Christian moral ‘anthropology.’”⁴⁴ Every law school should, as Garnett says, educate its students in the language of law, in legal doctrine and the tools of legal analysis, and in the policies and normative claims behind law.⁴⁵ These are features that all law schools share in common. But a Catholic school should go beyond this and help students see the connections between law and “the nature and destiny of the human person.”⁴⁶ This feature can accommodate a variety of law school models while ensuring a distinctive identity that enriches the diversity of the legal academy.⁴⁷

⁴² This quote has been attributed to Martin Luther but may be apocryphal.

⁴³ Rougeau, *supra* note 4, at 90.

⁴⁴ Garnett, *supra* note 5, at 69–70.

⁴⁵ *Id.* at 71–72.

⁴⁶ *Id.* at 73.

⁴⁷ See John H. Garvey, *Introduction, AALS Symposium on Institutional Pluralism: The Role of Religiously Affiliated Law Schools*, 59 J. LEGAL EDUC. 125, 130 (2009).

B. *The Claim That Catholic Law Schools Are Already Fulfilling Their Mission: The Abstract Mission Fallacy and Focal Case Analysis*

Perhaps not surprisingly, several of the commentators characterize their law schools as already fulfilling a genuinely Catholic mission. For example, Dean Boozang states that at Seton Hall they hope to “produce lawyers who subscribe to the Catholic intellectual tradition.”⁴⁸ She believes that “[m]uch of what we do at Seton Hall Law School does resemble the vision articulated by Professors Breen and Strang.”⁴⁹ She then points to a part of Seton Hall’s orientation for first-year students in which her colleagues introduce students to different conceptions of justice by reading Michael Sandel’s book, *Justice*.⁵⁰ As proof that an appreciation of justice has taken hold, she then proudly notes that “[m]ost students conclude their tenure with us by participating in a clinic in our Center for Social Justice.”⁵¹

Similarly, as noted above, Dean Treanor believes that Catholic law schools are distinctive when they make explicit their commitment to justice, something he suggests is not true of other law schools.⁵² At Georgetown a commitment to justice is “simply a given.”⁵³ He notes that the school offers “various paths for spiritual exercises” and “shorter courses in Jesuit spirituality.”⁵⁴ Georgetown is fulfilling its mission because it welcomes “the active contributions of Jesuits and other clergy in our law school’s Campus Ministry office” and because it offers “several courses” that relate to religious faith and the law.⁵⁵ Treanor believes that these features at Georgetown show that “[the school’s] Jesuit and Catholic identities very much define[s] it.”⁵⁶

It would be uncharacteristic of a dean not to expound upon the virtues of his or her law school, but these remarks reflect more than institutional loyalty. They strike a defensive posture which, notwithstanding the compliments paid to the book,

⁴⁸ Boozang, *supra* note 7, at 7.

⁴⁹ *Id.*

⁵⁰ *Id.* (citing MICHAEL SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* (2009)).

⁵¹ *Id.*

⁵² Treanor, *supra* note 3, at 101.

⁵³ *Id.*

⁵⁴ *Id.* at 103.

⁵⁵ *Id.*

⁵⁶ *Id.*

indicate a fundamental disagreement with our view that most Catholic law schools are not fulfilling their mission as Catholic institutions of higher learning. We argue that most law schools operating under Catholic sponsorship fail to introduce their students to the Catholic intellectual tradition with respect to questions of law and justice. By contrast, Deans Boozang and Treanor believe Catholic legal education as currently practiced is mission focused and on track. Although the St. John's symposium did not provide this backdrop, in delivering this assessment it was easy to imagine a large banner unfurled behind the deans declaring "Mission Accomplished!"

The discrete features that the deans highlight in their respective law schools are certainly positive aspects of the legal education they provide. Even when taken together, however, it is difficult to see how they represent the fulfillment of Catholic mission. Seton Hall is certainly doing its students a great service by introducing them to different understandings of justice early in their law school careers, but a brief introduction to natural law and virtue ethics alongside libertarianism, utilitarianism, and Rawlsian justice-as-fairness during their first-year orientation can hardly ensure that the study of law at Seton Hall introduces students to and forms them in the Catholic intellectual tradition. Michael Sandel is an important philosopher, but to have students read his book and think they have received an adequate introduction to a Catholic moral anthropology is misleading.

Similarly, Dean Treanor is right to applaud the active campus ministry at Georgetown University Law Center. Every Catholic law school should provide students with the opportunity for spiritual growth, and many non-Catholic law schools are fortunate to have active Newman Centers attending to the spiritual needs of their Catholic students.⁵⁷ But the immediate purpose of a law school, or any academic unit within a university, is not devotional or liturgical, but intellectual. Providing members of the law school community with opportunities to explore St. Ignatius' *Spiritual Exercises* and other dimensions of Jesuit spirituality is laudable, but these are no substitute for

⁵⁷ See, e.g., HARV. CATHOLIC CENTER, <https://www.harvardcatholic.org> [<https://perma.cc/MZ8R-UU8A>] (last visited June 30, 2021). Surely, Dean Treanor must know that the fact that there are secular and non-Catholic law schools, like Harvard, where the liturgical and other spiritual needs of Catholic students are met demonstrates that provision of these same things at a Catholic law school is insufficient to demonstrate the fulfillment of Catholic identity.

presenting students with the opportunity to study American law through the lens of the Catholic intellectual tradition and its moral anthropology. Moreover, a handful of discrete, elective courses in Catholic social teaching, and religion and a lawyer's work,⁵⁸ however well intentioned, cannot accomplish this goal for more than a handful of students. Most American law schools expose their students to a variety of perspectives in the courses they offer, including religious perspectives. Harvard Law School, for instance, has offered *Law and Catholic Thought: Liberalism and Integralism*, a course that addresses "[t]he social teaching of the Catholic Church—its teaching on political, economic, and legal justice, human dignity and rights, and the requirements of the common good,"⁵⁹ but it would be silly to suggest that Harvard is fulfilling a Catholic mission in legal education.

1. The Abstract Mission Fallacy

One reason why a number of commentators are able, in good faith, to see and portray their law schools as successfully living an authentic Catholic mission is because they employ what we call the "abstract mission fallacy." This occurs when the commentator shifts from one description of a phenomenon to a broader, more general, and abstract description of that phenomenon. It is an argumentative move that is ubiquitous in the debates over constitutional interpretation, where scholars and judges claim that the meaning of a particular constitutional text is abstract and then leverage that abstract meaning to reach a result that a more specific meaning would not have allowed.⁶⁰ For instance, Justice Ginsburg described the Commerce Clause as the source of congressional "authority to enact economic legislation 'in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent.'"⁶¹ This power "to solve national problems"⁶² was

⁵⁸ Treanor, *supra* note 3, at 103.

⁵⁹ *Course Catalog: Law and Catholic Thought: Liberalism and Integralism*, HARV. L. SCH. (2018), <https://hls.harvard.edu/academics/curriculum/catalog/default.aspx?o=73633> [<https://perma.cc/W3PH-UAD9>].

⁶⁰ See John O. McGinnis & Michael B. Rappaport, *The Abstract Meaning Fallacy*, 2012 U. ILL. L. REV. 737, 741–57 (describing this phenomenon).

⁶¹ The Healthcare Cases, 567 U.S. 519, 600 (2012) (Ginsburg, J., concurring in part).

⁶² *Id.* at 601–02.

an abstraction from the Clause's more specific original meaning.⁶³

Dean Rougeau makes this move when he progressively recharacterizes as more and more abstract the concrete purposes of early Catholic legal education. He accurately describes Catholic law schools as being created "to support the needs and aspirations of the marginalized immigrant Catholic newcomers to American society."⁶⁴ He later recasts this purpose more abstractly as "educating marginalized members of society, offering them a means to seek a more fully human existence in a new country,"⁶⁵ and then, more broadly still, as a mission that "has always been oriented toward social justice."⁶⁶

Dean Boozang makes a similar move. She states that "[m]uch of what we do at Seton Hall Law School does resemble the vision articulated by Professors Breen and Strang."⁶⁷ She then explains that Seton Hall's first year orientation is "built around a theme of justice," an abstraction from the tradition's own conception of justice.⁶⁸ The students read Michael Sandel's *Justice* and "begin playing with alternative jurisprudential theories to determine which outcomes satisfy the prerequisites of justice."⁶⁹

Professor Carmella likewise moves from agreeing with our thesis that the purpose of a Catholic law school requires an engagement with the Catholic intellectual tradition, to the "scholarly exploration of the relationship of law to the Catholic intellectual tradition," and finally to "books and articles attempting to understand and critique law from religious perspectives."⁷⁰

This move often occurs in the literature on Catholic legal education. For instance, in his well-researched book, *Fordham University School of Law: A History*, Robert Kaczorowski states and then restates Fordham's mission in abstracted form.⁷¹ Thus, early on in his account of Fordham, Kaczorowski describes the

⁶³ See *id.* at 659 (Joint Dissent) (making this point).

⁶⁴ Rougeau, *supra* note 4, at 91.

⁶⁵ *Id.* at 92.

⁶⁶ *Id.*

⁶⁷ Boozang, *supra* note 7, at 7.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Carmella, *supra* note 8, at 16–17.

⁷¹ ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* 5, 14 (2012).

Law School as having a specifically Catholic mission that was reflected in the teaching of Jurisprudence grounded in Thomistic natural law theory.⁷² Even up until the early 1960s, Kaczorowski says Fordham saw its mission as teaching law “against a Catholic background.”⁷³ By the end of his narrative, however, Fordham has no specific intellectual mission. Now, Fordham’s “distinctive characteristic” is described as being a community with a “commitment to excellence.”⁷⁴ The Law School fulfills this abstracted mission by reflecting “the Jesuit tradition of commitment to service and education.”⁷⁵

There are three important problems with this move. First, the abstract mission fallacy permits scholars to make an unwarranted connection between the abstracted mission, which is Catholic, and a particular school’s mission, and conclude that the latter is a fulfillment of the former. For instance, social justice is an aspect of the Catholic Church’s earthly mission, and therefore law schools who have been and are pursuing it are Catholic. Because the concept lacks rigor, however, the result of the move to abstraction is invariably to approve a school’s claimed Catholic identity. If a metric cannot identify any non-Catholic law schools, then it cannot serve as a means for judging the fulfillment of Catholic mission in legal education. Returning to Dean Rougeau’s claim, he abstracts from the distinct socioeconomic motivations for the founding of Catholic law schools to a broader social justice mission, one that is shared by most or perhaps all American law schools today. Since all or nearly all American law schools claim that part of their mission is social justice, this leads to the absurd conclusion that all or nearly all law schools are authentically Catholic, even if they do not overtly claim that identity.

Second, the abstract mission fallacy fails to fit the historical actors’ self-understanding. The founders and leaders of early Catholic law schools primarily saw themselves as providing opportunities for socioeconomic advancement for recent Catholic immigrants and their children. This motivation properly falls under the general heading of what we today would call social justice, but if one uses that label without qualification or specification, then one’s historical description will be thin and

⁷² *Id.* at 4–5, 15–19.

⁷³ *Id.* at 150, 143–52.

⁷⁴ *Id.* at 335.

⁷⁵ *Id.* at 345.

less accurate because it will not meaningfully correspond to the actual historical actors' own views and beliefs.

Third, the abstract mission fallacy enables scholars to obscure—or perhaps blinds them to—changes to and the severe thinning-out of Catholic identity because the law schools that now possess this thinner mission are still “Catholic” when the mission is stated abstractly. A law school retains its Catholic identity pursuing “social justice” even though its mission has materially changed from assimilating Catholic immigrants to “evaluating and potentially dismantling the structures of our society and economy that enrich the few . . . and move to create new ones that dignify and uplift the lives of the many who are weak and marginalized” today.⁷⁶

2. What It Means to Be a *Catholic* Law School: Focal Case Analysis

Although we reject our commentators' defense of the status quo, we do not deny that Dean Boozang's Seton Hall, and Dean Treanor's Georgetown, and other Catholic law schools operate with some real sense of Catholic mission. Their efforts, however, fail to satisfy the focal case of what a Catholic law school is.

The focal case of something is the best, most healthy, and flourishing instance of the kind of thing that it is.⁷⁷ A particular specimen can be a more or less healthy or a more or less developed example of a given type of organism. The focal case of an oak tree is a tall tree with a thick trunk, large canopy, abundant foliage, and many large acorns. But an oak tree may have dead branches, thin foliage, and few acorns and still be an oak tree.

This focal case analysis also applies to human institutions. For example, natural law theorists employ it as a way of responding to the claims of legal positivists with respect to the status of unjust laws. Legal positivists like H.L.A. Hart hold that an ostensible law *is* law if it enjoys the pedigree identified by the authoritative rule of recognition for lawmaking within a given legal system.⁷⁸ Lon Fuller added to this that, to be law, a given ordinance must possess certain Rule of Law qualities, including, for example, rationality, coherence, intelligibility,

⁷⁶ Rougeau, *supra* note 4, at 92, 95.

⁷⁷ See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 9–11 (2d ed. 2011) (describing focal case analysis).

⁷⁸ H.L.A. HART, THE CONCEPT OF LAW 265 (3d ed. 2012).

accessibility, prospectivity.⁷⁹ In addition to these qualities, natural law theorists add that to satisfy the focal case of law, an ostensible law must also possess additional characteristics regarding the law's substance, including that the law must rationally advance the common good.⁸⁰ A law that is a focal case of law is one that satisfies all of these conditions.

Not every law shares in all of these characteristics. As Mark Murphy explains, "the best way to understand the natural law alternative to legal positivism is not as an alternative account of legality, but as a more fully developed account of the idea of *nondefective* legality."⁸¹ Thus, a statute that is lawfully issued by a legislature, one that is both substantively just and meets the requirements of the Rule of Law, falls within law's focal case. By contrast, a statute passed by a legislature that satisfies the Rule of Law but which discriminates against citizens in the distribution of public benefits on the basis of race does not advance the common good and so does not come within the focal case of law. Such a statute is "law." It satisfies the rule of recognition. It is coherent, intelligible, and prospective. But because the law is unjust, it remains a defective form of legality.

If and when a Catholic law school reaches the fullest actualization of its potential—if it satisfies the focal case of Catholic legal education—it will be distinctive. Catholic legal education's focal case is excellent Catholic legal education. A Catholic law school at its best employs the Catholic intellectual tradition to research and write about legal questions, to teach law, and to form attorneys with the requisite knowledge, skills, and habits to practice American law at the highest level. The Catholic intellectual tradition is an essential aspect of flourishing Catholic legal education because it provides the resources to structure and justify its essential core, its intellectual heart. From the theoretical and foundational to the practical and mundane, the Catholic intellectual tradition has the capacity to structure legal education. From the tradition's description of the human person, who is simultaneously the subject and end of law, to the regalia worn by graduates, which can be traced back to the cowls worn by monks, the tradition can give Catholic character to legal education. In the manuscript, we described how the

⁷⁹ See LON L. FULLER, *THE MORALITY OF LAW* 39, 42–43 (rev. ed. 1969).

⁸⁰ See FINNIS, *supra* note 77, at 27 (describing the focal case of law).

⁸¹ MARK C. MURPHY, *PHILOSOPHY OF LAW: THE FUNDAMENTALS* 44 (2007).

Catholic intellectual tradition should inform the structure and contribute to the excellence of Catholic legal education:

One would expect that an academic institution (such as a law school) that claimed to be founded under a Catholic inspiration would be animated by Catholic ideas that informed the substance of its operations. In particular, one would expect that the Catholic understanding of the law in general (jurisprudence) and in a particular jurisdiction (the positive law) as well as the ultimate subject of law (the human person) and the end of law (justice) would inform a Catholic law school in the curriculum it offered, the teaching methods it employed, the questions it posed, and the scholarly answers it[] proposed.⁸²

A Catholic law school that provided “access and commitment to justice,”⁸³ one that educated and assimilated immigrants and outsiders⁸⁴ and advanced “social justice,”⁸⁵ one that was “an authentic human community animated by the spirit of Christ”⁸⁶ would fall short of its potential because *in addition* to these worthy activities, it can and should also employ the tradition in its scholarship, teaching, and formation. The Catholic intellectual tradition must reside in its intellectual essence.

The position we advance in the manuscript does not preclude the possibility—indeed, we see it as a *likelihood*—that actual, on-the-ground Catholic law schools will not fully actualize their potential. They will not satisfy the focal case of what it means to be a Catholic law school. It is likely that most Catholic law schools will lack some of the characteristics of a fully actualized Catholic law school. Some Catholic law school faculties will teach their class subjects without utilizing the tradition to justify, elucidate, and criticize the doctrines they teach. Similarly, some Catholic law schools may teach their graduates to treat legal practice as solely about earning a living, obtaining social standing, or access to power, and not as a personal vocation to provide justice to persons in need. Likewise, some Catholic law school clinics will teach the procedure and skills of American legal practice, without emphasis on the virtues lawyers

⁸² Breen & Strang, *supra* note 3, at 8.

⁸³ Treanor, *supra* note 3, at 100.

⁸⁴ Rougeau, *supra* note 4, at 91.

⁸⁵ *Id.* at 92.

⁸⁶ Vischer, *supra* note 3, at 119 (quoting JOHN PAUL II, APOSTOLIC CONSTITUTION *EX CORDE ECCLESIAE* ¶ 21 (1990)). To be clear, Dean Vischer does not exclude other aspects of the tradition, especially its “intellectual dimension”; he claims that the mission is broader than an intellectual framework. *Id.*

need to possess: prudence, fortitude, temperance, and especially justice. In other words, these Catholic law schools may carry the banner “Catholic” but will be indistinguishable from non-Catholic law schools regarding these facets of their programs. These schools may rightly be regarded as Catholic, but they are deficient in the realization of their Catholic identity.

The prescription set forth in the manuscript has the capacity to identify Catholic law schools that, to a greater or lesser degree, fulfill their potential. This capacity to identify gradations is itself a virtue that reflects the lived reality of how human beings and human institutions actualize themselves. Individual human beings characteristically fail to live up to their potential in many ways.⁸⁷ We tell “white lies,” we eat one piece of chocolate too many, and we fail to appreciate our family members. Human institutions, too, fail to achieve their potential with regularity. Scientific panels of experts may be influenced by considerations outside their technical field of competence.⁸⁸ The focal case analysis offered here identifies what makes a law school authentically Catholic. Moreover, because it can explain why and in what ways law schools regularly *fail* to fully utilize the Catholic intellectual tradition, it allows us to acknowledge the Catholic identity of Catholic law schools today while pointing to the ultimately inadequate expression of that identity.

In sum, Catholic legal education must be distinctive in order for it to merit the label Catholic. It must possess distinct qualities to achieve its distinctive goals, even if many of these qualities overlap with those of non-Catholic law schools. We argue that a Catholic law school whose purpose and means are

⁸⁷ Indeed, Christianity’s explanation for this typical human failing—original sin—gives Christianity significant explanatory power. See, e.g., MACINTYRE, *supra* note 30, at 154–58 (explaining St. Augustine’s conception of human will and its relatively greater explanatory power over Aristotle’s).

⁸⁸ See, e.g., Mallory Simon, *Over 1000 Health Professionals Sign a Letter Saying, Don’t Shut Down Protests Using Coronavirus Concerns as an Excuse*, CNN (June 5, 2020, 9:08 AM), <https://www.cnn.com/2020/06/05/health/health-care-open-letter-protests-coronavirus-trnd/index.html> [<https://perma.cc/H49C-DDFV>] (summarizing a letter sign by public health experts who had previously claimed that gathering in crowds for work, or recreation, or worship posed an unacceptable risk for spreading the Coronavirus but then claimed that gathering in crowds to protest racism does not because racism is an important public health issue). This is not a new phenomenon. For example, American atomic scientists leveraged their expertise in public policy debates at the dawn of the atomic age to make claims beyond their expertise. S. Waqar H. Zaidi, *Scientists as Political Experts: Atomic Scientists and their Claims for Expertise on International Relations, 1945-1947*, 63 CENTAURUS 17 (2021).

taken from the Catholic intellectual tradition would merit such a label.

By contrast, the commentators' contention—that a Catholic law school that is identical to a non-Catholic law school may still be regarded as authentically Catholic—is only partially accurate. Such a law school could indeed be Catholic, but it would be an immature, stunted, warped, or even diseased version of Catholic legal education. Such a Catholic law school may indeed provide access to legal education for immigrants and other disadvantaged groups, or it may in fact inculcate the pursuit of justice and public service in its graduates. These would indeed be marks of a Catholic mission even though they are shared with most non-Catholic law schools.⁸⁹ However, if these are the sole or primary ways in which a Catholic law school advances its mission—if its faculty members do not teach their subjects and engage in their scholarship with the Catholic intellectual tradition in mind, and if its students do not learn how to live their vocations well—then that law school has failed to achieve its potential.⁹⁰

Dean Vischer accurately states that a Catholic law school should be “an authentic human community animated by the spirit of Christ.”⁹¹ This is clearly an identity to which every Catholic law school should conform and one moreover that cannot animate secular law schools. Even this Catholic mission, however, is inadequate to serve as a justification for Catholic legal education without significant elaboration as to the substance of its academic course of study and intellectual life. Many communities and organizations profess to be animated by Christ's Spirit—soup kitchens, credit unions, scouting troops, and medical schools—but only those communities whose fundamental intellectual activities are legal scholarship, law teaching, and student formation, and that are performed drawing on the riches of the Catholic intellectual tradition, can claim to be a Catholic law school in the focal case, animated by the Spirit of Christ.

⁸⁹ See Garnett, *supra* note 5, at 69 (agreeing with this point).

⁹⁰ It is because a fully flourishing Catholic law school's intellectual activities are enhanced by the Catholic intellectual tradition that Professor Garnett argued that the “Catholic law school project” would be or is a new phenomenon, one not previously accomplished. *Id.* at 65–66.

⁹¹ Vischer, *supra* note 3, at 119. To be clear, Dean Vischer does not exclude other aspects of the tradition, especially its “intellectual dimension”; he claims that the mission is broader than an intellectual framework. *Id.*

Examining the Deans' factual claims through the lens of our focal case analysis suggests that they provide little evidence that Catholic law schools currently have a Catholic mission. We noted earlier that Dean Treanor's evidence that Fordham and Georgetown are authentically Catholic is that the "Catholic law schools where I have taught are explicit in their commitment to justice."⁹² As should be clear now, an explicit commitment to justice is not, by itself, sufficient evidence that the Catholic law school is flourishing. A commitment to justice is an aspect of a full Catholic law school, but if the law school lacks engagement with the Catholic intellectual tradition in its scholarship, teaching, and mentorship, it has yet to fully actualize its potential.

Dean Treanor also focuses on Catholic law schools' clinical programs as evidence of those schools' Catholic missions. He claims that both Fordham's and Georgetown's clinical programs reflect not only "a pedagogic commitment" but are evidence of each school's commitment to equip graduates "to work to make this a more just world,"⁹³ a sentiment he hears affirmed by his "fellow Catholic law school deans."⁹⁴ This, he says, is evidence of mission that "may not show up in the formal accreditation documents submitted to the ABA" but is nonetheless real.⁹⁵

This is pretty thin stuff. Georgetown's own public materials about its clinics fail to reference either their Catholic inspiration or mission to "make this a more just world."⁹⁶ More importantly, our claim is not that there was no evidence of Catholic mission of clinics in "formal accreditation documents," though that is true.⁹⁷ As set forth in the manuscript, our archival research has uncovered little evidence anywhere that Catholic law schools created clinics to fulfill their Catholic mission. The evidence we have found in the historical record is that Catholic law schools

⁹² Treanor, *supra* note 3, at 101.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Clinics*, GEO. L., <https://www.law.georgetown.edu/experiential-learning/clinics/> [<https://perma.cc/3BTR-VHK4>] (last visited June 30, 2021). Fordham comes closer because it tells the public that its clinics teach students "to solve real problems for individuals, and for our society." *Choosing A Clinic*, FORDHAM UNIV. SCH. L., https://www.fordham.edu/info/23690/choosing_a_clinic [<https://perma.cc/3UFB-BBX9>] (last visited June 30, 2021).

⁹⁷ With one potential exception: Loyola University New Orleans College of Law. Breen & Strang, *supra* note 3, at 478.

created clinics, like their secular peers, to help their students acquire skills and prepare for the world of legal practice.⁹⁸

We agree that, within any institution, there are ideas and commitments that go unnoticed by the outside observer. Even though they are not spelled out in a mission statement or policy manual, these ideas and commitments may be part of the culture of the place that deeply inform its day-to-day operations. Still, in the absence of any explicit reference to Catholic mission with respect to a law school's clinical programs, it is too easy for a dean to simply declare that every aspect of the school is infused with a sense of mission: "It's there! You just can't see it. Our Catholic mission may not be visible to the untrained eye, but it's pervasive. It's in the very air we breathe." But sweeping assertions like these must give way when specific questions are posed. For example, how does Georgetown's Women's Law & Public Policy Fellowship Program,⁹⁹ which serves as a pipeline to organizations working to advance abortion rights both at home and abroad,¹⁰⁰ draw inspiration from Georgetown's Catholic mission?

A number of commentators claim that the founding mission of Catholic law schools was the pursuit of social justice, and that today they continue to carry out that mission, though with varying degree of success. Dean Rougeau, for instance, characterizes the early mission of Catholic law schools as "educ[at]ing] and assimil[at]ing] mostly poor, often illiterate, immigrant outsiders . . ."¹⁰¹ This mission is a clearly Catholic mission because it "is deeply consistent with priorities Jesus announces in the Gospels,"¹⁰² one of "social justice."¹⁰³ Dean Treanor states that Fordham and Georgetown are authentically

⁹⁸ See, e.g., *Experiential Education*, FORDHAM UNIV. SCH. L., https://www.fordham.edu/info/23615/experiential_education [<https://perma.cc/4CZQ-CUVQ>] (last visited June 30, 2021). "In recognition of the importance of clinical and experiential education in preparing students for the practice of law, Fordham Law School guarantees to every" student a clinical opportunity. *Id.*

⁹⁹ See generally *Women's Law & Public Policy Fellowship Program*, GEO. UNIV. L. CTR., <https://www.law.georgetown.edu/wlppfp/> [<https://perma.cc/52J7-9YF4>] (last visited June 30, 2021).

¹⁰⁰ This is evident not only from the externships into which the Program places students, but in the work graduating fellows pursue after leaving Georgetown. See, e.g., *Alumnae Spotlight*, OUTREACH (Women's L. & Pub. Pol'y Fellowship Program at Georgetown Law, Washington, D.C.), Spring/Summer 2020, at 5.

¹⁰¹ Rougeau, *supra* note 4, at 91.

¹⁰² *Id.*

¹⁰³ *Id.* at 92.

Catholic because they “are explicit in their commitment to justice.”¹⁰⁴

Our focal case analysis suggests that a law school’s intellectual activities have to be enriched by the resources of the Catholic intellectual tradition in order for the school to be fully Catholic. A law school that in fact pursued social justice would be doing a very good thing. But that alone would not make it an authentically Catholic law school. Instead, at best, it would be a partially Catholic law school because its essential aspects lacked engagement with the tradition—an oak tree with thin foliage and few acorns.

Professor Angela Carmella takes up our claim that the Catholic identity of a law school must have an intellectual dimension. She identifies several important scholarly works over the past twenty-five years as evidence of scholarly engagement with the Catholic intellectual tradition,¹⁰⁵ including a book that she edited and to which she contributed.¹⁰⁶ Professor Carmella concludes that “many professors at Catholic law schools (and Catholic law professors at non-Catholic schools) have been building a body of scholarship on Catholic perspectives on various fields of law and jurisprudential schools of thought.”¹⁰⁷ She suggests that this robust body of work “should serve to temper the conclusion that ‘[t]here is next to nothing about their faculty and faculty scholarship . . . that set them apart from the mine-run of American law schools.’ ”¹⁰⁸

These are fair points, and we do not wish to diminish the real and good work being done currently with the Catholic intellectual tradition,¹⁰⁹ but we believe Professor Carmella overstates the significance and distinctiveness of Catholic law faculty and their scholarship. First, Professor Carmella’s argument, like the arguments of other commentators, moves from the particular—“scholarly exploration of the relationship of law to the Catholic intellectual tradition”—to the abstract—

¹⁰⁴ Treanor, *supra* note 3, at 101.

¹⁰⁵ Carmella, *supra* note 8, at 16–18.

¹⁰⁶ *Id.* at 17. Similar books include RECOVERING SELF-EVIDENT TRUTHS: CATHOLIC PERSPECTIVES ON AMERICAN LAW (Michael A. Scaperlanda & Teresa S. Collett eds., 2012), and AMERICAN LAW FROM A CATHOLIC PERSPECTIVE: THROUGH A CLEARER LENS (Ronald J. Rychlak ed. 2015).

¹⁰⁷ Carmella, *supra* note 8, at 16.

¹⁰⁸ *Id.* at 17–18.

¹⁰⁹ Indeed, both of us see our scholarship as (hopefully!) contributing to this body of work.

“books and articles attempting to understand and critique law from religious perspectives.”¹¹⁰ The former is a much smaller category than the latter, and the former is what is necessary for the full flourishing of a Catholic law school’s mission.

Second, the examples given by Professor Carmella as evidence of Catholic law school engagement with the Catholic intellectual tradition *are* evidence of such engagement, but only thin evidence. Professor Carmella describes these faculty as “engage[d] in religion and law teaching, or scholarship, or both.”¹¹¹ This label already shows that the scholars are not necessarily engaged with the Catholic intellectual tradition. Moreover, numerous scholars at law schools across the country are “engage[d] in religion and law,”¹¹² which is understood to refer to the study of religious liberty and church-state relationships. Many non-Catholic law schools have centers and institutes devoted to this field.¹¹³ Two of the scholars described by Professor Carmella are engaged in studying “Evangelical Protestant Thought” and “Islam,” which *may* include engagement with the Catholic intellectual tradition, but if so, it is not obvious; Out of fifty-three current, full-time faculty at Seton Hall, Professor Carmella identifies only four who appear to be engaged in the Catholic intellectual tradition in their scholarship.¹¹⁴ That is approximately seven percent of the faculty. Seton Hall’s Dean, Kathleen Boozang, endorses the idea of a “critical mass” of faculty who take up the intellectual mission of a Catholic law school,¹¹⁵ but seven percent is nowhere close to a critical mass, much less a majority of the faculty. Professor Carmella also points to two emeritus faculty who are engaged with the Catholic

¹¹⁰ Carmella, *supra* note 8, at 16–17.

¹¹¹ *Id.* at 17 n.8.

¹¹² *Id.*; *Seton Hall University 2019 Standard 509 Information Report*, ABA SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR, <http://www.abarequireddisclosures.org/Disclosure509.aspx> [https://perma.cc/LS2F-C3FJ].

¹¹³ Professor Carmella lists examples of Catholic law schools engaged in law and religion scholarship and teaching, and those centers do good work, but such work is certainly not the prerogative of Catholic law schools, nor is it necessarily evidence of engagement with the Catholic intellectual tradition. Emory’s Center for the Study of Law and Religion, BYU’s International Center for the Study of Law and Religion, Stanford’s Religious Liberty Clinic, and the University of Texas’ recent Law and Religion Clinic are prominent examples of a widespread law-and-religion phenomenon.

¹¹⁴ Professor Carmella lists Dean Boozang and Professors Ambrosio and Franzese. Carmella, *supra* note 8, at 17 n.8.

¹¹⁵ Boozang, *supra* note 7, at 8.

intellectual tradition and one who is engaged in Islam.¹¹⁶ While emeritus faculty in many instances contribute greatly to a faculty, their scholarly engagement typically diminishes over time, and they no longer participate in the governance of the law school. In sum, it may well be true that Seton Hall has “consistently encouraged” Carmella and her colleagues to pursue their Catholic and other religious interests in the law,¹¹⁷ but the data she cites hardly proves that Seton Hall has an institutional commitment to engagement with the Catholic intellectual tradition in its intellectual heart of scholarship, teaching, and student mentorship.

Professor Amy Uelmen identifies what she says is “the most urgent task for Catholic law schools” today, namely “to help students reflect on the question of how to make the *connection* between the difficult cultural, social, and institutional questions that they will face as attorneys, in the light of critical reflection on their own deep values systems.”¹¹⁸ It appears that Professor Uelmen believes that the mission of Catholic legal education is “to facilitate reflection on the actual connections that students make with their own values—and with problems in the world”¹¹⁹ because this is what law students need to prepare them for legal practice.¹²⁰ According to Uelmen, “[t]he distinctive purpose, the point of Catholic legal education, should be framed in terms of the problems that future lawyers will encounter in the world.”¹²¹ This focus is driven by a theology of the laity’s role in the secular world.¹²² Uelmen says she agrees that natural law, Catholic social thought, and various aspects of the intellectual tradition “are all valuable bodies of work for raising critical questions regarding a deep values structure.”¹²³ She insists that she does not seek to “discard the robust resources of the Tradition” but wants to “place much greater emphasis on the *methods* for helping students to engage these questions.”¹²⁴

¹¹⁶ Carmella, *supra* note 8, at 17 n.8 (Professors McCauliff, Coverdale, and Freamon.).

¹¹⁷ Carmella, *supra* note 8, at 17 n.8.

¹¹⁸ Amelia J. Uelmen, *The Distinctive Questions of Catholics in History*, 58 J. CATH. LEGAL STUD. 105, 110 (2019).

¹¹⁹ *Id.* at 112.

¹²⁰ *Id.* at 111–12.

¹²¹ *Id.*

¹²² *See id.* at 112 (“[T]he theological education of lay people should be shaped by their *distinct roles and tasks* in the world.”) (citation omitted).

¹²³ *Id.* at 110.

¹²⁴ *Id.* at 112.

We believe that Professor Uelmen's prescription for Catholic legal education could be consistent with our proposal, or it may fall seriously short of what we prescribe. There is nothing in our proposal that precludes connecting students with resources from the tradition so they may best navigate their professional lives. Nor did we counsel avoiding the existential questions students will have about themselves and their vocations. Indeed, we argued that authentic Catholic legal education will work hard to equip students with the knowledge, skills, and habits they need to thrive in professional settings to live out their vocation. On this compatibilist reading, Professor Uelmen provides useful concrete guidance about how Catholic law schools can do so.

We also think it is possible to read Professor Uelmen's essay as incompatible with our prescription, as downplaying and maybe eliminating Catholic legal education's "overarching conceptual system" in favor of "methods" to help students address the deep questions of law, justice, and vocation.¹²⁵ The Catholic intellectual tradition has given rise to a host of methods in a variety of disciplines, but the tradition "is not merely methodological or procedural but substantive in nature."¹²⁶ It is one thing for Uelmen to recommend that we need to move "beyond podium-style explanations of intellectual categories and content"¹²⁷ as ineffective given the current generation of law students. It is quite another thing to suggest that a Catholic law school can fulfill its mission in a solely methodological fashion without regard to the intellectual content it shares with students. If that is Professor Uelmen's meaning, then her suggestion is not compatible with our thesis. Catholic legal education is the sort of thing that is best when it is distinctive in its many dimensions, not only in its preparation of students, but also in its intellectual life, in the scholarship and teaching of its faculty. Professor Uelmen's account is too narrow because it focuses on student experiences, but says very little about faculty and their scholarship and teaching.

To see how this interpretation of Professor Uelmen's account would fall short of authentic Catholic legal education, imagine a

¹²⁵ *Id.* at 110, 112.

¹²⁶ John M. Breen, *Action as the Fruit of Contemplation: A Reply to Bryce, Donnelly, Kalscheur, and Nussbaum*, 43 GONZ. L. REV. 645, 665 (2007/2008) (critiquing Rev. Gregory Kalscheur, S.J.'s defense of Jesuit education as a method or "way of proceeding").

¹²⁷ Uelmen, *supra* note 118, at 112.

Catholic law school that sought to reach its students “where they are, just as they are” and to “help[] them integrate their personal and religious values into their professional identity.”¹²⁸ Imagine further that the school is populated with students who oppose religious liberty, as well as faculty who support this point of view and publish scholarly articles arguing that religious liberty and conscience exceptions are used as a tool of discrimination and a cudgel to limit the freedom of non-believers. It appears that if such a Catholic law school with such a faculty were to help such law students more fully understand why religious liberty is wrong and encourage such students to connect their beliefs with their future practice—taking clients who argued against religious liberty—then this would seem to be in keeping with the idea of Catholic identity understood simply as a *method*. That is, such a school would seem to “help students reflect on the question of how to make the *connection* between the difficult cultural, social, and institutional questions that they will face as attorneys, in the light of critical reflection on their own deep values systems.”¹²⁹ If this reading of Uelmen’s proposal of Catholic identity is correct—wherein methodology overshadows content—then our vision of Catholic legal education would be inconsistent with it, as Uelmen’s proposal would fail to describe Catholic legal education in its focal case.

C. *Big Tent Catholicism and the Fear That Authentic Catholic Identity Will Threaten Academic Freedom*

Several commentators believe that the vision for Catholic legal education that we set forth in the manuscript is overly narrow. There are, says Dean Treanor, “diverse models and paths”¹³⁰ that Catholic legal education can take. According to Dean Rougeau, the way in which we “seek to define a law school as Catholic is one way, but it is not the only way.”¹³¹ Moreover, modern university life is defined by academic freedom. Professor Carmella reminds us that “the Church itself is internally divided in many ways”¹³² and that Catholic law schools must embrace the diversity of views within the Church. In other words, Catholic legal education must accommodate “big tent Catholicism.”

¹²⁸ *Id.* at 115.

¹²⁹ *Id.* at 110.

¹³⁰ Treanor, *supra* note 3, at 104.

¹³¹ Rougeau, *supra* note 4, at 97.

¹³² Carmella, *supra* note 8, at 21.

Professor Carmella fears that our purportedly narrow conception of Catholic legal education may not encourage the Catholic intellectual tradition “in its fullness and diversity” but may instead be employed as a vehicle for the “revival of orthodoxy.”¹³³ Carmella rightly praises “the complexity and depth of the tradition”—a tradition “pulling in thousands of years of classical, biblical, theological, and philosophical reflection.”¹³⁴ Moreover, she sees the breadth of the tradition as “critical to the success of any curriculum change or program of faculty scholarship.”¹³⁵ “We should,” she says, “welcome discourse with any scholars who engage the tradition” including those “who explicitly reject elements in the tradition.”¹³⁶ However, Carmella is worried that, because we recognize that there are “central and mandatory facets of the tradition,”¹³⁷ our proposal for the integration of the tradition into Catholic law school curricula will be “overshadowed by concerns about orthodoxy” and “the specter of censorship.”¹³⁸ Dean Boozang is similarly alarmed by our claim that academic freedom at a Catholic law school should extend to “areas of ‘reasonable debate and discussion’” about the Catholic intellectual tradition.¹³⁹ She says this implies that there are positions that fall *outside* the tradition, yet faculty need unfettered freedom to consider the hard questions that may arise.¹⁴⁰

We agree with Carmella and Boozang that, with respect to academic freedom, the manuscript is underdeveloped, and we

¹³³ *Id.* at 16. We do indeed refer to a “revival of orthodoxy” in the manuscript, but we do so in the context of referring to the Church’s turning away from the worst of the aftermath of the Second Vatican Council in terms of theology, catechesis, and liturgy. The Church’s struggles in the wake of the council are well documented. Andrew Brown, *How the Second Vatican Council Responded to the Modern World*, THE GUARDIAN (Oct. 11, 201), <https://www.theguardian.com/commentisfree/andrewbrown/2012/oct/11/second-vatical-council-50-years-catholicism> [<https://perma.cc/2ZUC-UJUR>]. Here we were not specifically referring to Catholic legal scholarship, which largely ignores theology. There have, however, been some examples of law review articles that incorporated some of the heterodox opinions generated following Vatican II. See, e.g., Leslie Griffin, *Good Catholics Should Be Rawlsian Liberals*, 5 S. CAL. INTERDISC. L.J. 297, 372–373 (1997).

¹³⁴ Carmella, *supra* note 8, at 18–19.

¹³⁵ *Id.*

¹³⁶ *Id.* at 19–20.

¹³⁷ *Id.* at 20.

¹³⁸ *Id.* at 21.

¹³⁹ Boozang, *supra* note 7, at 11.

¹⁴⁰ *Id.* at 11.

appreciate their constructive criticism. Still, a few points can be said by way of response.

First, we acknowledge that “even for those central and mandatory facets of the tradition, Catholic legal scholars may reasonably engage with different implications of those facets.”¹⁴¹ Thus, when Carmella argues that there are tenets of the tradition that must be acknowledged (for example, the institution of private property and the reality of human agency) she also notes that these beliefs can be examined in a variety of ways from within the tradition (for instance, the idea that property rights are subject to a “social mortgage” and the possibility of circumstances that diminish the exercise of human freedom and so reduce culpability).¹⁴² This is “the complexity and depth of the tradition”¹⁴³ on display to which Carmella refers, and it is something that all Catholic law schools should happily welcome.

Second, an honest assessment of legal academia today would recognize that there is no shortage of law professors who reject core elements of the Catholic intellectual tradition, including such foundational beliefs as the inherent dignity of every human being. As Professor Collett notes in her response, this includes faculty members at Catholic law schools across the country.¹⁴⁴ “Engagement” with the tradition can take many forms: from whole-hearted endorsement to rote repetition, to harmonious extension, to friendly critique, and outright repudiation. Insofar as it is intellectually honest, each of these forms of engagement should be welcomed. But the problem in Catholic legal education is not a dearth of faculty who engage with the tradition through critique and repudiation. Just the opposite—the problem is the paltry number of faculty who have a competent grasp of the tradition and who are willing and able to engage it constructively in their scholarship and teaching. While different forms of engagement are welcome, “it cannot be the case that the exclusive or even predominant mode of engagement with the Catholic intellectual tradition is one of repudiation and critique.”¹⁴⁵ A Catholic law school that did as much would merely

¹⁴¹ Breen & Strang, *supra* note 3, at 529.

¹⁴² Carmella, *supra* note 8, at 19.

¹⁴³ *Id.*

¹⁴⁴ Teresa Stanton Collett, *Saints, Sinners, and Scoundrels: Catholic Law Faculty and A Light Unseen: A History of Catholic Legal Education in the United States*, 58 J. CATH. LEGAL STUD. 29, 33–36, 39–42 (2019).

¹⁴⁵ John M. Breen, *The Air in the Balloon: Further Notes on Catholic and Jesuit Identity in Legal Education*, 43 GONZ. L. REV. 41, 63 n.68 (2007/08).

replicate what is already taking place at non-Catholic and secular law schools.

Third, the commentators are right to note the capacious nature of the Catholic intellectual tradition. The tradition is indeed a vast country—full of peaks, valleys, and great plains, teeming cities and empty desert—but it is not a country without borders. One can wander outside its wide expanse, even as one claims to be in-country. Big as the tent is, it is possible to step outside its flaps. There are premises, propositions, and arguments that lie outside the tradition, and these stake out definite positions that are inimical to a genuinely Catholic vision of a just society. Contrary to what Carmella says, nowhere do we raise “the specter of censorship.”¹⁴⁶ Elsewhere we have suggested that Catholic universities may legitimately approach the question maintaining both Catholic identity and academic freedom in different ways,¹⁴⁷ but we have not endorsed any one approach.

If a law school is committed to structuring its activities within the Catholic intellectual tradition, there is simply no getting around the line-drawing concern raised by Boozang and Carmella. One cannot say that there are no boundaries because, in theory and in practice, that is inconsistent with the tradition itself. But, if one recognizes that there are boundaries to the tradition, then one must draw lines. We acknowledge that there will be reasonable disagreement about where those lines should be drawn, and by whom they should be drawn. Our proposal would locate the locus of decision-making within different bodies and persons, depending on the institution. This solution will lead to different on-the-ground interpretations of the tradition.

Fourth, and relatedly, the word “orthodoxy” draws shudders from faculty members at all law schools (including Catholic schools) conjuring up images of religious authorities wielding political power. This is understandable as the life of an academic is supposed to be a life free of enforced conformity in research, publication, and belief. Still, there are orthodoxies to which most members of the legal academy subscribe, opposition to which may preclude initial employment, success in publication, and professional advancement. Support for abortion rights is one

¹⁴⁶ Carmella, *supra* note 8, at 21.

¹⁴⁷ John M. Breen & Lee J. Strang, *Academic Freedom and the Catholic University: An Historical Review, a Conceptual Analysis, and a Prescriptive Proposal*, 15 U. ST. THOMAS L.J. 253, 253–55 (2019).

such orthodoxy. Here Professor Carmella's and Dean Boozang's remarks seem designed to preserve the status quo. Their comments seek to make room on Catholic law school faculties for support for abortion and the other positions on matters where the Church is a beacon of light in what Pope John Paul II referred to as the "culture of death"¹⁴⁸ and what Pope Francis has termed a "throwaway culture."¹⁴⁹ Thus, Boozang defends her scholarship on Catholic hospitals and "women's access to healthcare services"¹⁵⁰ wherein she argues that, where a religious accommodation is not achievable, "the state should require the religious hospital to provide the required health services [including contraceptive services and sterilization by Catholic hospitals], or condition licensure or certificate of need approval of the merged entity on the arrangement of an alternative provider of services."¹⁵¹

For her part, Carmella correctly notes that the Catholic tradition includes the distinction between law and morality and maintains that not everything immoral ought to be subject to criminal penalty.¹⁵² She also declares, without arguing, that laws outlawing abortion would not be efficacious. Carmella also cites to Greg Kalschur, S.J.'s interpretation of John Courtney Murray, S.J., that law must be supported by a "consensus" before being brought into effect.¹⁵³ These claims—the need for "consensus" before pro-life measures are adopted, and the supposed lack of efficacy enjoyed by those measures—can be answered by drawing upon resources within the tradition, as well as other fields of human knowledge.¹⁵⁴ Again, the fact that these sorts of

¹⁴⁸ Paul Galloway, *John Paul Condemns 'Culture of Death'*, CHICAGO TRIBUNE (Mar. 31, 1995), <https://www.chicagotribune.com/news/ct-xpm-1995-03-31-9503310188-story.html> [<https://perma.cc/MXC3-QYXS>].

¹⁴⁹ See, e.g., Josephine McKenna, *Pope Francis Urges Europeans to Reject 'Throwaway Culture'*, RELIGION NEWS SERVICE (Nov. 25, 2014), <https://religionnews.com/2014/11/25/pope-francis-urges-europeans-reject-throwaway-culture/> [<https://perma.cc/USW5-4QCZ>].

¹⁵⁰ Boozang, *supra* note 7, at 10–12.

¹⁵¹ Kathleen M. Boozang, *Developing Public Policy for Sectarian Providers: Accommodating Religious Beliefs and Obtaining Patient Consent to Care*, 24 J.L. MED. & ETHICS 90, 94 (1996).

¹⁵² Carmella, *supra* note 8, at 22–24.

¹⁵³ *Id.* at 22–23.

¹⁵⁴ The "consensus" criterion for pro-life legal measures was famously employed by Mario Cuomo at his notorious speech at Notre Dame in 1984. See Mario Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13, 14 (1984). For a critique of Cuomo's speech, including his misuse of Murray's concept of "consensus," see John M. Breen, *Priest*,

arguments can take place are a testament to “the complexity and depth of the tradition.”¹⁵⁵ Nevertheless, some things remain irretrievably outside the tradition. Because abortion is the direct killing of an innocent human being¹⁵⁶ the positive law “cannot declare to be right what would be opposed to the natural law”¹⁵⁷

While public authority can sometimes choose not to put a stop to something which—were it prohibited—would cause more serious harm, it can never presume to legitimize as a right of individuals . . . an offence against other persons caused by the disregard of so fundamental a right as the right to life.¹⁵⁸

Yet the right to kill an unborn child through abortion is either the premise or the conclusion in the abortion scholarship by law professors at Catholic and non-Catholic law schools alike. A law school that seeks to hire faculty who write in favor of abortion, who seek to advance a throwaway culture, does not live an authentic Catholic mission.

Dean Boozang appears to believe that our prescription requires that all, or almost all, faculty, and students, should be Catholic. That is not our position for a number of reasons, and we nowhere endorse any such view in the manuscript. First, Dean Boozang and other commentators claim that there are many faculty who could be considered to be “Catholic intellectuals who subscribe to the tradition though not Catholic”¹⁵⁹ That is an obvious fact that we acknowledge in the manuscript. Thus, we argued that an excellent Catholic law school would also include non-Catholic, mission-fit faculty from other religious traditions, and none at all, because of the valuable and representative perspectives these faculty would bring to the school, its classrooms, its scholarship, and its public service.

Prophet, and King: Abortion, the Vocation of Catholic Politicians, and the Culture of Life, 6 J. CATH. SOC. THOUGHT 353, 356 (2009). For a refutation of the claim that prohibitions against abortion prior to *Roe v. Wade* were ineffective that draws upon the Catholic tradition, law, and the social-sciences, see John M. Breen, *Modesty and Moralism: Justice, Prudence, and Abortion—A Reply to Skeel & Stuntz*, 31 HARV. J. L. & PUB. POL’Y 219, 221–22, 224–26 (2008).

¹⁵⁵ Carmella, *supra* note 8, at 19.

¹⁵⁶ JOHN PAUL II, ENCYCLICAL LETTER *EVANGELIUM VITAE* ¶58 (1995) [hereinafter *EVANGELIUM VITAE*].

¹⁵⁷ SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON PROCURED ABORTION *QUESTIO DE ABORTU* ¶ 21 (1974).

¹⁵⁸ *EVANGELIUM VITAE*, *supra* note 156, ¶ 71.

¹⁵⁹ Boozang, *supra* note 7, at 8.

Second, we made clear in the manuscript that the study of law is not like the study of theology in many ways. Catholic theology is theology done by the Church, so only men and women incorporated into the Body of Christ have the capacity to do it. Only those men and women who have received the faith can attend to the task of theology which is “to understand the meaning of revelation” and so “illumine one or other aspect of the mysteries of faith.”¹⁶⁰ There is nothing about law, legal scholarship, and teaching that requires the supernatural virtues and membership in the Church.¹⁶¹ Therefore, in principle, non-Catholics may participate in a Catholic law school’s intellectual activities.

Third, our core contention in the manuscript is that a critical mass of the faculty at a Catholic law school should be practicing Catholics, and that other non-Catholic faculty should be knowledgeable about and supportive of the school’s mission. Ideally, Catholic members of the faculty would not simply be Catholic in name only, or simply in their faith and religious practice, but Catholic intellectuals—men and women whose perspective on law is drawn from the Catholic intellectual tradition. A critical mass of Catholic faculty is crucial because such faculty will, by virtue of their communion with the Church, likely have a disposition of loyalty to the Catholic intellectual tradition and some knowledge of it. In this regard, our prescription parallels Professor Collett’s summary of the Church’s law governing the composition of Catholic university faculties.¹⁶² *Ex Corde Ecclesiae* and the USCCB’s *Application of Ex Corde* both require that a majority of faculty at Catholic universities be faithful Catholics.¹⁶³ This is a commonsensical, practical approach to the problem of identity.

¹⁶⁰ CONGREGATION FOR THE DOCTRINE OF THE FAITH, INSTRUCTION ON THE ECCLESIAL VOCATION OF THE THEOLOGIAN *DONUM VERITATIS* ¶10 (1990). To be clear, we are not claiming that non-Catholic or non-Christian theologians would not add value to a Catholic theology department. We are claiming that they cannot perform the work of Catholic theology.

¹⁶¹ Though they are valuable as all virtues are.

¹⁶² Collett, *supra* note 144, at 42–45.

¹⁶³ *Id.* at 42–44.

D. No Market, No Mission: The Impractical Nature of Authentic Catholic Legal Education

Several of the commentators maintain that the vision of Catholic legal education we set forth in the manuscript is impractical and ultimately unworkable for two reasons. These reasons concern the ability of authentic Catholic law schools to attract students interested in the school and to attract faculty capable of carrying forward the mission.

First, the commentators argue that a law school that lives out an authentic Catholic mission, as we have described it, will be unable to attract a sufficient number of students to sustain the institution financially. Dean Boozang bluntly states that “the business model of today’s law schools cannot support schools that adopt the vision urged by *A Light Unseen*.”¹⁶⁴ She incorrectly suggests that our model for Catholic legal education “focus[es] exclusively on education by or of Catholic lawyers.”¹⁶⁵ Although we nowhere argue or imply that a genuine Catholic legal education should be limited to students who are Catholic in background, she nonetheless argues that the model she attributes to us is impractical.

The economics of today’s law school market do not give most of us the luxury of intentionally recruiting a student body that is predominantly Catholic. Nor do I think that this is a good idea. The value of the Catholic intellectual tradition is such that we should seek to teach it beyond those who self-identify as Catholic.¹⁶⁶

According to Boozang, “the law school market will [not] support more than a handful of schools that adhere to the model” set forth in the manuscript.¹⁶⁷ She believes that

[w]hile a core number of Catholic students will unquestionably be drawn to the kind of Catholic law school the authors describe, [she does] not believe a sufficient number of students qualified for success in law school and on the bar exist to support the over twenty law schools the authors urge to subscribe to this model.¹⁶⁸

The reason for this alleged lack of demand is that “[f]ew of today’s aspiring law students are sufficiently rigorously educated

¹⁶⁴ Boozang, *supra* note 7, at 8.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 9.

¹⁶⁷ *Id.* at 12.

¹⁶⁸ *Id.*

in their faith to thrive at law schools that adopt the model advanced.”¹⁶⁹ Indeed, she says that, combined with the effects of COVID-19, law schools following our model would “position themselves for the demographic cliff.”¹⁷⁰

Dean Rougeau likewise recognizes that “Catholic law schools need to survive in an intensely competitive higher education market” but that many are “struggling.”¹⁷¹ Given these circumstances, he fears that some Catholic schools “will not survive the current economic crisis and will likely close.”¹⁷² Like Boozang, he worries whether the distinctively Catholic law school that we describe “will have broad appeal to students who want the best possible legal education.”¹⁷³ He suspects that the allure of a legal education through the lens of the Catholic tradition may not be appreciated by students with “more prosaic concerns” such as “limiting their educational debt and finding meaningful, reasonably remunerative employment.”¹⁷⁴ Thus, he is “not fully convinced that [our proposal] provides the kind of [law school] . . . that will have broad appeal to students who want the best possible legal education.”¹⁷⁵

The second impracticality identified by the commentators is the dearth of a sufficient number of legal academics capable of carrying out the project. Because the project of authentic Catholic legal education is intellectual in nature, it requires intellectuals to carry it out. As Professor Richard Garnett notes, “any distinctiveness with respect to character and mission [of Catholic law schools] depends on personnel—administrators, staff, students, but especially faculty—who see that distinctiveness as something to be pursued, valued, and protected.”¹⁷⁶

Professor Jeffrey Pojanowski agrees with this assessment. He recalls the history—recounted in the book—when the proposal to reform Catholic legal education in the middle of the twentieth century failed in part because schools were unable to hire sufficient numbers of competent faculty. According to Pojanowski, the challenges today are even greater. “The pool of

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Rougeau, *supra* note 4, at 94.

¹⁷² *Id.*

¹⁷³ *Id.* at 93.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ Garnett, *supra* note 5, at 68.

candidates to staff such a law school is even smaller, what with feeble catechesis, the waning institutional strength of the Church, and the increased secularization of American society and education.”¹⁷⁷

Dean Boozang is similarly pessimistic. She “doubt[s] that a sufficient number of Catholic aspiring academics exist to staff all of the Catholic law schools in the country.”¹⁷⁸ Just as there was a “paucity of professors” to carry on the mission in the past, so today there are few candidates “familiar with the Catholic intellectual tradition, [and] also qualified for whatever subject matter needs the particular law school has.”¹⁷⁹

Another practical limitation on the program of reform we propose almost goes unmentioned in the commentators’ remarks. This constraint stems not from the supply side of faculty talent, but the demand side. Today, most established faculty at Catholic law schools “would be downright hostile, rather than merely indifferent, to reorientation around natural law jurisprudence and the broader Catholic intellectual tradition.”¹⁸⁰ Amidst all the positive responses to the manuscript, and the many references by commentators to this program or that faculty member as evidence that their schools are in fact genuinely Catholic, Professor Pojanowski, his colleague Rick Garnett, and Teresa Collett are the only commentators with the candor to note the obvious: that many faculty regard a Catholic law school’s

¹⁷⁷ Jeffrey A. Pojanowski, *Teaching Jurisprudence in a Catholic Law School*, 58 J. CATH. LEGAL STUD. 75, 76 (2019).

¹⁷⁸ Boozang, *supra* note 7, at 12.

¹⁷⁹ *Id.* at 12. At the same time, Boozang agrees that “it is essential to have a core group of faculty who are well educated in the Catholic intellectual tradition” in order to “create an ethos and to influence the intellectual exchange.” *Id.* at 8. But she criticizes us for positing that a Catholic law school’s faculty should be composed of a “critical mass of practicing Catholics” because she has “never thought that this criterion guarantees mission success.” *Id.*

We do not contend that when a majority of a law school’s faculty members check the “practicing Catholic” box the school’s Catholic identity and the fulfillment of an authentic mission is assured. Boozang can cite to no passage in the text where we offer this view because it does not exist. We do, however, predict that practicing Catholics will be more inclined to preserve and maintain an authentic sense of mission. Does anyone really believe otherwise? We also suggest, as a practical matter, that those faculty who adhere to the Catholic faith are more likely to be formed in and have some knowledge of the Catholic intellectual tradition. Again, does Boozang or anyone else seriously contend that this is not the case? If so, they should offer an argument that supports such a counterintuitive view.

¹⁸⁰ Pojanowski, *supra* note 177, at 76.

distinctive mission as “an oddity to be hidden or an obstacle to be overcome.”¹⁸¹

These are all serious challenges. Because we offer our proposal as an actual program for reform, we are delighted that many of the commentators evaluated the practical viability of our prescription for authentic Catholic legal education. A great idea for a product that has no market will not get made, and an excellent legal education without faculty or students will not thrive.

First, with respect to faculty, we agree there is an insufficient number of mission-fit faculty to staff all existing law schools operating under Catholic auspices. The “feeble catechesis, the waning institutional strength of the Church, and the increased secularization of American society and education” that Professor Pojanowski bemoans pose significant limitations on the pool of qualified faculty candidates.¹⁸² Demographically and statistically, it *is* unusual for a person to have the inclinations and opportunities to be knowledgeable about the Catholic intellectual tradition. Few Americans attend Catholic schools from kindergarten to college, and the percentage of those who receive an academically excellent and orthodox education is smaller still. Moreover, if a person wished to master the tradition on his or her own, it would be difficult without someone knowledgeable to encourage and guide such a quest. Although many resources are available in print and online, there are few individuals who possess the initiative for such self-study. Lastly, whereas most Americans up through the mid-twentieth century perceived Catholicism as only an oddity, today it is regarded as

¹⁸¹ Garnett, *supra* note 5, at 68; *see also* Collett, *supra* note 144, at 62. Boozang tells us that she is familiar with Catholic law schools that deliberately hired Catholics because they were Catholic, but these individuals “did not advance the Catholic mission.” Boozang, *supra* note 7, at 8. She suggests that any strategy to hire faculty who will preserve and advance a school’s Catholic mission is unworkable: “[W]ho am I to judge and by what criteria?” she asks rhetorically. *Id.* Thus, even if one agrees with our thesis that (as Rick Garnett summarizes) “‘personnel is mission’ and mission is a decision,” Garnett, *supra* note 5, at 68, hiring for mission is impractical because its results are unpredictable. No one believes this. Finding the right personnel may require effort and resources, but no one believes that a law school is incapable of making informed decisions when it seeks to hire a candidate with a particular expertise or skillset. It is true that no one can predict the future, and a school’s hopes and expectations for the candidate selected may end in disappointment, but no one would suggest that the process is so unpredictable that no effort should be made to achieve the stated goal. Masquerading as a kind of practical realism, this is defeatism offered as an excuse for doing nothing.

¹⁸² Pojanowski, *supra* note 177, at 76.

positively wicked by many academics. Both woke radicals and liberal progressives regard orthodox Christianity with disdain, as something to be spurned and shunned, its adherents “cancelled.”¹⁸³ This public hostility to Catholicism hinders both interest in and mastery of the tradition.

Intertwined with this problem is the lack of mission-driven Catholic law schools.¹⁸⁴ In the manuscript we describe faculty hiring since the early-1970s as either not taking account of Catholic identity or taking it into account in a negative way. The result is that today few law schools operating under Catholic auspices treat mission as a hiring-positive.¹⁸⁵ And, as Professor Collett recounts, Catholic law faculty have a plausible reason to avoid being perceived by their peers as authentically Catholic because of the threat posed by adverse reputational consequences.¹⁸⁶

As things stand now, Catholic law students and lawyers who aspire to teach law typically avoid identifying themselves as Catholic to avoid giving faculty at existing schools a reason to reject their candidacy. It is unclear how many other law students and lawyers never even try to become law professors because of the handicaps and barriers they suffer in the hiring process. One indication that the hiring process currently filters out and disincentivizes Catholic faculty is the research by Professor James Lindgren, who has shown that Catholics are significantly underrepresented in the law professoriate.¹⁸⁷

Professor Collett argues that the problem caused by the lack of mission-fit faculty is exacerbated by the presence of mission-

¹⁸³ Witness the attempt to remove John Finnis, one the most thoughtful and prolific Catholic philosophers of the twentieth century, from Oxford University simply for offering a rational defense of views grounded in Christian orthodoxy. See Harriet Sherwood, *Oxford Students Call for Professor's Removal over Alleged Homophobia*, THE GUARDIAN (Jan. 9, 2019), <https://www.theguardian.com/education/2019/jan/09/oxford-students-call-for-professors-removal-over-alleged-homophobia> [<https://perma.cc/YF6N-7SYU>].

¹⁸⁴ See Pojanowski, *supra* note 177, at 76 (“With most Catholic law schools following the ambient culture in the past fifty years, most faculty would be downright hostile, rather than merely indifferent, to reorientation around natural law jurisprudence.”).

¹⁸⁵ *But cf.* Garnett, *supra* note 5, at 68 (“During my twenty years at Notre Dame Law School, this necessity has been appreciated and embraced by the faculty community.”).

¹⁸⁶ Collett, *supra* note 144, at 57–61.

¹⁸⁷ James Lindgren, *The Religious Beliefs, Practices, and Experiences of Law Professors*, 15 U. ST. THOMAS L.J. 342, 356 (2019).

hostile faculty on Catholic law faculties.¹⁸⁸ She uses Georgetown's faculty as an example and identifies a number of public advocates for non-Catholic positions on life and marriage.¹⁸⁹ As Collett acknowledges, it is hard to generalize to the average Catholic law school,¹⁹⁰ and this lack of information makes it difficult to predict with confidence the receptivity of existing faculty to mission-faculty hires. However, insofar as the survey data summarized by Professor Collett from Professor Lindgren is accurate and applies to Catholic law school faculties,¹⁹¹ it suggests that the problem is acute. Our first-hand and anecdotal knowledge of Catholic law school faculties fits this evidence. That being said, there are numerous—we would conjecture dozens of—current law professors who would be mission-fit faculty at a Catholic law school. That would be sufficient to provide a critical mass at a handful of the existing schools, but not much more.

The willingness of law schools to be overt and unapologetic in their Catholic identity and thereby provide a market for mission-fit lawyers to become law professors would increase this modest supply. Openly authentic Catholic law schools would incentivize law students and lawyers to opt into law teaching and identify themselves as mission-fit.

Analogous to the lack of mission-fit faculty is the lack of mission-fit students. As Professor Pojanowski summarizes, “[a]ll this and more applies to many students at Catholic law schools, who may be no better catechized or no more receptive to the Catholic intellectual tradition than the faculty and administration at would-be reforming schools.”¹⁹²

As we argued above, authentic Catholic legal education should take a variety of manifestations, some of which will be similar to existing law schools in many ways. Even the most robust implementation of the tradition will not alter the “given” aspects of American law, legal practice, and legal education. This means that, from most students’ perspectives, there will be little to repel them, and from some students’ perspectives, there

¹⁸⁸ Collett, *supra* note 144, at 34–36; *see also* Pojanowski, *supra* note 177, at 76.

¹⁸⁹ Collett, *supra* note 144, at 34–36.

¹⁹⁰ *Id.* at 37–39. Professor Collett attempted to survey faculty scholarship, from which she gleaned some additional valuable information, but the data set was too sparse to support robust conclusions. *Id.* at 39–42.

¹⁹¹ Professor Lindgren’s study included Catholic law school faculty but his findings did not parse out those faculties. *Id.* at 37–39.

¹⁹² Pojanowski, *supra* note 177, at 76.

will be aspects that attract them. This conclusion is especially true if most law students are looking for the best overall law school “package” that will advance their career goals. There is no reason to think that students would be put off by most implementations of the tradition, so long as the schools provide an effective pathway to the legal profession.

In the end, our current view is that there are sufficient markets of faculty and students to demand a small number (in the low-single digits) of authentically Catholic law schools. Dean Boozang shares this perspective because she believes that there is likely a market for “a handful” of mission-fit law schools.¹⁹³

Of the two market challenges—inadequate faculty and insufficient numbers of students—we believe the former is more pressing and harder to remedy. Our argument is that Catholic legal education is at its core an intellectual enterprise characterized by engagement with the Catholic intellectual tradition. Professors are the axial component because they carry on the intellectual life of the school in their teaching, scholarship, and mentoring. Without a mission-oriented faculty, the tradition will have almost no impact on legal education.¹⁹⁴

At the same time, a dearth of mission-fit faculty is very difficult to remedy in the short and medium terms. Persons with the inclination, skill, and knowledge to master one or more subjects of American law, become adept at legal scholarship, *and* to cultivate a working knowledge of the Catholic intellectual tradition and employ it in their work, is a tall order in the best of times. And these are not the best of times for the Church, families, and educational institutions that have the capacity to form such people.

II. SUGGESTIONS FOR THE CONCRETE IMPLEMENTATION OF OUR PROPOSAL

Many of the symposium participants agreed with our basic thesis that Catholic legal education has a “need for more explicit curricular and scholarly integration of the Catholic intellectual tradition.”¹⁹⁵ These contributions highlighted in greater detail

¹⁹³ Boozang, *supra* note 7, at 12.

¹⁹⁴ We say “almost” no impact because Catholic students may marginally impact a law school’s program of legal education through their own activities and through their advocacy for classes and (less frequently) faculty who will teach and write a particular way.

¹⁹⁵ Carmella, *supra* note 8, at 15.

the practical means whereby this basic thesis might be implemented. We deeply appreciate these helpful, practical proposals, both as evidence of what has and hasn't worked in our manuscript and as catalysts for us to bring our proposal into sharper resolution.

A. *Teaching Jurisprudence and Meeting Students Where They Are*

Professor Uelmen insists that Catholic legal education today must meet students where they are. As she sees it, “the most urgent task for Catholic law schools is to help students reflect on the question of how to make the connection between the difficult cultural social, and institutional questions that they will face as attorneys, in the light of critical reflection on their own deep values systems.”¹⁹⁶ Her remarks build off a quotation in the manuscript from Rev. Robert J. Henle, S.J., then Georgetown’s president, who in 1971 observed that students no longer come to college grounded in the faith such that the task of Catholic colleges and universities is “to reestablish the faith, to reestablish their belief, to help young people find and internalize a sound system of values for themselves.”¹⁹⁷ This has much in common with the themes of personal “encounter” and “accompaniment” that have echoed throughout Pope Francis’s pontificate.¹⁹⁸

Dean Boozang helpfully explains that Catholic law schools can meet students where they are by engaging them with the tradition both directly and indirectly.¹⁹⁹ She encourages Catholic law faculty to teach “through the prism of the Catholic intellectual tradition without naming it Catholic in the classroom.”²⁰⁰ Boozang is correct that not all engagement with the tradition need be overt. Some classes and faculty members may explicitly engage the tradition, while other classes and faculty may introduce students to aspects of the tradition in an indirect manner. For example, drawing upon a body of ecclesiastical documents that frequently cite to the Bible and the writings of the saints, a class on Catholic Social Thought would

¹⁹⁶ Uelmen, *supra* note 118, at 110.

¹⁹⁷ *Id.* at 106.

¹⁹⁸ See POPE FRANCIS, APOSTOLIC EXHORTATION *EVANGELII GAUDIUM* ¶¶ 163–73 (2013).

¹⁹⁹ Boozang, *supra* note 7, at 7.

²⁰⁰ *Id.* at 9.

naturally be explicit in its engagement. By contrast a first-year course in Contracts may only implicitly engage the tradition.²⁰¹ Furthermore, following Dean Boozang's advice, the way in which a law school may engage the tradition may depend on the composition of its student body. At the same time, a Catholic law school that meets its students where they are should not use the excuse of a diverse student body to render the tradition so nondescript and indirect that the faculty and students do not actually engage with it.²⁰²

Professor Pojanowski explains that his teaching of Jurisprudence has been influenced by his encounter with different kinds of students and his efforts to meet them where they are. In his contribution to the symposium Pojanowski describes how he arrived at his admittedly indirect approach to teaching this required course at Notre Dame. Although Notre Dame has many students who are attracted to the school specifically because of its Catholic mission, some students resent having to take the course.²⁰³ He sees his Jurisprudence students as falling into three general categories: those who are firmly committed to the tradition; those who are open to what the course has to offer; and those students who see the course as a waste of time having no practical value.²⁰⁴ Professor Pojanowski experimented with different versions of the course hoping to reach students in the latter two categories.²⁰⁵ He is aware that “[w]ith nonjudgmentalism, casual emotivism, and ‘you do you’ ensconced as leading doctrines of our day, invoking a universal moral order or objective truth about human flourishing is decidedly countercultural” and unlikely to persuade.²⁰⁶

Ultimately he arrived at a structure that indirectly seeks to convey to students the course's thesis “without bullying or propagandizing”: that the natural law tradition provides the most accurate and attractive way of thinking about our legal

²⁰¹ See JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 3 (1991) (showing that “present-day contract doctrine” is a product of a synthesis crafted by sixteenth and seventeenth century Spanish scholastics).

²⁰² Seton Hall, for instance, has a class on Catholic Social Doctrine, and there are other classes whose course descriptions suggest incorporating aspects of the tradition, but it is impossible to tell as an outsider if the vast majority of the courses offered are in fact being offered “through the prism of the Catholic intellectual tradition without naming it in the classroom.” See Boozang, *supra* note 7, at 9.

²⁰³ Pojanowski, *supra* note 177, at 79.

²⁰⁴ *Id.* at 77.

²⁰⁵ *Id.* at 77–78.

²⁰⁶ *Id.* at 82.

system and practice.²⁰⁷ This indirect presentation is achieved through posing a question: “Do we believe there is, in fact, a moral reality out there framing our deliberation about first-order questions of justice and second-order questions about who ought to answer them and how?”²⁰⁸ This course structure is realistic and effective, working to meet the needs of all of Professor Pojanowski’s students, while introducing them to the natural law tradition.²⁰⁹

B. Anthropology and Teaching Students the Layers of Law

The human person stands at the center of any plausible theory of law. After all, the human person is the author, the subject, the interpreter, and the enforcer of the laws that govern human society. A number of other views of human nature—grounded in materialism,²¹⁰ mind-body dualism,²¹¹ expressive individualism,²¹² hedonism, and moral relativism—are pervasive in Western culture and dominant in American legal education. Thus, one of the central claims we make in the manuscript is that, to fulfill the common mission they all share, Catholic law schools must introduce students to a Catholic anthropology.

Professor Garnett agrees that “the foundation and cornerstone of [Catholic law schools’ intellectual] architecture needs to be a distinctively Christian moral ‘anthropology.’”²¹³ In his contribution, Professor Garnett lays out, in preliminary fashion, how a Catholic anthropology would be present throughout the teaching of law at the law school.²¹⁴ Garnett describes how the study of law involves four layers of comprehension. The first layer includes the posited data of law, such as statutes and cases and gaining a familiarity with the language of law—the jargon that lawyers regularly employ in conducting their craft. The second layer involves a knowledge of legal doctrine and the tools of legal analysis for understanding

²⁰⁷ *Id.* at 79–81.

²⁰⁸ *Id.* at 82.

²⁰⁹ *Id.* at 80.

²¹⁰ *See generally* YUVAL NOAH HARARI, *SAPIENS: A BRIEF HISTORY OF HUMANKIND* (2015).

²¹¹ *See generally* RYAN T. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT* (2018).

²¹² *See generally* CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* (1989).

²¹³ Garnett, *supra* note 5, at 69–70.

²¹⁴ *Id.* at 70–73.

posited legal materials (such as cases and statutes), as well as non-posited materials (such as judge-formulated tests) that inhabit the legal system. The third layer is the stage of fit and justification, where students learn to identify a given law's point and purpose, and engage in normative and logical critique. The fourth and final layer is where students make "the connection between our human nature and the legal enterprise," where the fact of our nature makes law's import known.²¹⁵

There is a tremendous amount packed into Professor Garnett's four-layered approach, and we cannot do justice to all of its implications in this response. Here, however, we briefly note four important implications. First, these four levels operate (simultaneously) in all major facets of legal education: teaching, student character formation, and faculty scholarship. For instance, a classroom teacher, when pedagogically appropriate, should address not just the subject's key posited law, or its unposited techniques, or the possible justifications for that particular body of law. An excellent teacher in a Catholic law school will also raise and engage the question of whether and how law's point is tied to who we are as human persons living in community.

Second, the various levels Garnett identifies are reflexive so that change at one level puts pressure on the other levels to fit the change. For instance, a change in the meaning of "life" or "person" in the text of the Constitution at level one will put pressure on level four and vice versa.²¹⁶

Third, Professor Garnett's structure fits well with our focal case analysis of Catholic legal education.²¹⁷ Many Catholic law schools do an excellent job at levels one and two, and some appear to touch on level three—from both Catholic and non-Catholic perspectives. To the extent, however, that the fourth level is not engaged or is not engaged with resources from the tradition, as appears to be the case for most Catholic law schools—to that extent, a Catholic law school will have fallen short of its mission.

Fourth, the foundational level of Professor Garnett's analysis, the fourth layer of Catholic anthropology, includes

²¹⁵ *Id.* at 71–73.

²¹⁶ See O. CARTER SNEAD, WHAT IT MEANS TO BE HUMAN: THE CASE FOR THE BODY IN PUBLIC BIOETHICS 106–85 (2020) (explaining and describing this reflexivity in the context of United States abortion law).

²¹⁷ See *supra* Section II.B.2.

aspects that are properly natural *and* supernatural, and this latter aspect is not present in the current manuscript and requires additional consideration. Following Alasdair MacIntyre, Professor Garnett describes the key characteristics of the human person as being dependent, relational, and rational.²¹⁸ This claim, while central to the tradition, is not uniquely Catholic, or even religious. It is a claim that is open to natural inspection. As such, law students of every background should be open to serious consideration of this theory of human nature.

However, Professor Garnett also adds a fourth characteristic: “loved.”²¹⁹ Following Nicholas Wolterstorff, Garnett believes that what makes human dignity a fact “is that we are loved by God.”²²⁰ It is *this* aspect of our humanity that “provides a strong account, not only of the what, but also of the why, of dignity, of rights, and of justice—of the *point* of law.”²²¹ For Garnett “[i]t is not our capacities and abilities but our being-loved” that is the source of human dignity.²²²

We agree, of course, that being loved by God is an essential characteristic of being human. Indeed, “man would not exist were he not created by God[']s love and constantly preserved by it,”²²³ and we appreciate the Church’s warning that “[w]hen God is forgotten . . . the creature itself grows unintelligible.”²²⁴ Moreover, we acknowledge that justice secured under the rule of law is not sufficient for a harmonious society, that something more is needed—solidarity, friendship, love—“in order to keep the world going.”²²⁵

Still, we believe that the emphasis in Catholic legal education should remain on the other dimensions of a Catholic anthropology. The nature of human beings as rational animals gives the dignity of the human person a sound philosophical explanation that Catholic law schools should employ. John Finnis nicely summarizes this position: “the essence and powers of the soul seem to be given to each individual complete (as wholly undeveloped, *radical* capacities) at the outset of his or her

²¹⁸ Garnett, *supra* note 5, at 73.

²¹⁹ *Id.*

²²⁰ *Id.* at 74.

²²¹ *Id.*

²²² *Id.*

²²³ POPE PAUL VI, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD *GAUDIUM ET SPES* ¶ 19 (Dec. 7, 1965).

²²⁴ *Id.* ¶ 36.

²²⁵ JOSEF PIEPER, *THE FOUR CARDINAL VIRTUES* 110 (1966).

existence as such. And this is the root of the dignity we all have as human beings.”²²⁶ We believe this emphasis permits the legal system and Catholic legal education to retain their proper autonomy from theology. In particular, it maintains our claim that our proposal that Catholic legal education is and should be distinctive through its use of the Catholic intellectual tradition is properly philosophical and jurisprudential in nature, and not theological. Maintenance of this distinction fits well with the tradition’s consideration of law and with American legal practice. Furthermore, maintaining the philosophical character of our proposal ensures that faculty at Catholic law schools need not possess the theological virtues that only Christians may receive.

We offer this slightly expanded way of agreeing with Professor Garnett’s incorporation of being loved into the Catholic anthropology that undergirds Catholic legal education. God’s providence of creation operates through many means. God’s love is the cause of everything, including the existence of human beings. God’s love is therefore the final cause of the life of every human being and of humanity as a whole. At the same time, God is also our formal cause. God continually loves us into being, and he also formed each of us individually at a discrete moment in time, in cooperation with our parents, through the rational soul He gave to each of us. The nature of human beings as rational animals gives the dignity of the human person a sound philosophical explanation that Catholic law schools should employ.

Professor Garnett’s summary of the key aspects of the structure of law and legal education, and especially of Catholic anthropology that forms the foundation for a distinctive Catholic legal education, is attractive. We believe our incorporation of it is accurate because it acknowledges the fact of human dignity and it identifies a sound, widely accessible basis for that dignity. Our anthropology maintains our proposal’s natural orientation so it can fit within American legal practice, and it does not require from faculty or students the theological virtue of faith.

C. *The History and Role of Clinics in Catholic Legal Education*

Clinics, clinics, clinics! As we workshopped *A Light Unseen*, presented it at symposia and conferences, and discussed it with

²²⁶ JOHN FINNIS, *THE PRIORITY OF PERSONS* (2000), *reprinted in* INTENTION AND IDENTITY, COLLECTED ESSAYS: VOLUME II, at 35 (2011).

friends and colleagues, we regularly heard a version of the following claim: Catholic law schools today are Catholic in large part because of their clinical offerings. Several contributors to the St. John's symposium offered the same argument. Dean Vischer claims that the manuscript conveys "a rather dismissive attitude toward Catholic law schools' embrace of clinical legal education as a case of bandwagon jumping."²²⁷ Dean Boozang repeatedly references Seton Hall's clinics, the "Center for Social Justice," as a key situs where students learn about "justice and the common good."²²⁸

The claim we make in the manuscript is that the historical record provides little evidence that Catholic law schools established clinics to fulfill their Catholic mission.²²⁹ Nor is there evidence that more than a handful of clinics are operated distinctly, using the tradition's resources. Moreover, the subject areas addressed in the clinics operated at Catholic law schools—poverty and public assistance, child and family law, immigration, criminal defense, and veterans' benefits—while deserving of attention, are the same as those at their secular counterparts. With few exceptions, Catholic law school clinics do not serve clients or causes that are counter-cultural in a Catholic sense.²³⁰

²²⁷ Vischer, *supra* note 3, at 118.

²²⁸ Boozang, *supra* note 7, at 6–7.

²²⁹ Amy Uelmen says that "it is something of a sand trap to focus the narrative on the search for explicitly religious justifications." Uelmen, *supra* note 118, at 111. If by this she means that continued efforts to discover a Catholic motivation and justification for clinics will be futile, we agree. An honest review of the historical record will not yield a different result. She suggests that some other method, an "x-ray" might show the religious origin of clinics at Catholic law schools. *Id.* The idea is that a deep Catholic identity lurks behind these clinics, it just isn't visible to the naked eye. We make clear our skepticism for this claim above. *See supra* notes 92–99 and accompanying text.

²³⁰ A number of secular law schools host clinical programs and centers dedicated to "reproductive rights." *See, e.g., Reproductive Justice Clinic and Advance Reproductive Justice Clinic*, N.Y.U., <http://www.law.nyu.edu/academics/clinics/semester/reprojustice> [<https://perma.cc/H37L-LVM6>] (last visited June 30, 2021); *Center on Reproductive Rights and Justice*, U.C. BERKELEY SCH. L., <https://www.law.berkeley.edu/research/center-on-reproductive-rights-and-justice/> [<https://perma.cc/D38M-R288>] (last visited June 30, 2021); *Pro Bono Requirement Option, If/When/How: Lawyering for Reproductive Justice*, UNIV. PENN. SCH. L. <https://www.law.upenn.edu/probonoprojects/reproductive-rights/current-projects.php> [<https://perma.cc/RLX9-H2AB>] (last visited June 30, 2021). Of the country's twenty-nine Catholic law schools, only one hosts a clinic dedicated to the pro-life cause. *See* University of St. Thomas Prolife Center, <https://www.stthomas.edu/prolifecenter/> [<https://perma.cc/ZW8M-2QD>] (last visited June 30, 2021). Notre Dame recently began a Religious Liberty Initiative including a clinic. *See Religious Liberty Initiative*, UNIV. NOTRE DAME L. SCH., <https://law.nd.edu/religious-liberty/>

There is, however, ample evidence that Catholic law schools established clinics for the pedagogical benefits to their students and as a response to market pressures, so it is not surprising that they are operated like non-Catholic law school clinics. As we argued above, having a clinic is good and valuable, and all Catholic law schools should host them. They can help students acquire invaluable skills essential to legal practice and learn what it means to take on the heavy, personal responsibility of representing a client.²³¹ At the same time, we maintain that hosting clinics alone is insufficient evidence of authentic Catholic education.

CONCLUSION

American Catholic legal education has recently celebrated its 150th anniversary. From the small seeds planted in the Indiana wilderness near South Bend to today's numerous, respected, and influential law schools that span the country—from Manhattan to San Diego, from Washington state to Florida—a lot has changed. But, on a fundamental level, one aspect has remained the same: Catholic legal education needs an intellectual architecture to live up to its promise and fulfill its mission to bring the light of Christ to the legal profession. The Catholic law school deans and faculty who commented on *A Light Unseen* have provided valuable constructive criticism and commentary, and the book will be significantly better for it.

[<https://perma.cc/Q772-5HAK>] (last visited June 30, 2021). One Catholic school recently launched a clinic dedicated to LGBT rights. *Lincoln LGBTQ+ Rights Clinic*, GONZ. UNIV. SCH. L., <https://www.gonzaga.edu/school-of-law/clinic-centers/law-clinic/lgbtq-rights-clinic> [<https://perma.cc/ZN57-B2KR>] (last visited June 30, 2021).

²³¹ With respect to educating students in professional ethics, Professor Carmella cautions us that “character and virtue alone do not equip individuals to navigate ethically in certain circumstances” such as, when the lawyer’s workplace incentives are not aligned with what is ethical. Carmella, *supra* note 8, at 27. We imagine that a Catholic law school’s professional training program would take this insight on board, and that its clinics and simulations would present students with situations of tension between the students’ ethical responsibilities and their workplace.