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The Air in the Balloon: Further Notes on Catholic and Jesuit Identity in Legal Education

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The Air in the Balloon: Further Notes on Catholic and Jesuit Identity in Legal Education

John M. Breen*

TABLE OF CONTENTS

I. INTRODUCTION.....	41
II. A REPLY TO THREE CRITICISMS: CURRICULUM, LEGAL CLINICS, AND NOSTALGIA.....	44
III. THE ARGUMENT NOT HEARD	52
IV. CONCEIVING OF CATHOLIC IDENTITY: THE ICING ON THE CAKE VS. THE AIR IN THE BALLOON.....	53
V. THE TRADITION IN A SOUND-BITE: “MAN IS NOT THE MEASURE OF ALL THINGS”	58
VI. THE EDUCATED LAITY AND HIRING FOR MISSION	63
VII. INVITING AND ENABLING CURRENT FACULTY TO PARTICIPATE IN THE MISSION.....	72
VIII. CONCLUSION.....	75

I. INTRODUCTION

In an earlier article entitled *Justice and Jesuit Legal Education: A Critique*,¹ I took issue with a claim made frequently by those whose job it is to promote Jesuit legal education. The gist of this claim is that the type of education offered to students at Jesuit law schools is distinctive and, at least by implication, qualitatively better than the education made available to students at other law schools.² I argued that this

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

2. These arguments are nicely summarized in Steven M. Barkan, *Jesuit Law Schools:*

purported distinctiveness has more to do with the imagination of those who draft brochures for prospective students and prepare the content of Jesuit law school websites, than it does with the reality of legal education that takes place at such schools.³

Indeed, in the original piece I argued that Jesuit legal education, as it is currently practiced in this country, must be judged a failure based on the very standards of success set forth by the Society of Jesus.⁴ That is, Jesuit law schools seek to distinguish themselves from other schools by defining their special mission as “the promotion of justice.”⁵ References to this goal and the related goal of forming “men and women for others” litter the mission statements and other self-descriptions of these institutions.⁶ The schools derive this language from the foundational documents of the Society of Jesus, especially General Congregations 32 and 34.⁷

Challenging the Mainstream, CONVERSATIONS ON JESUIT HIGHER EDUC., Spring 1993, at 7. For my response to Barkan’s particular contentions, see Breen, *supra* note 1, at 411 n.120.

3. See Breen, *supra* note 1, at 391-403 (arguing that the provision of clinical programs does not distinguish Jesuit law schools from other kinds of law schools and that the vaunted Jesuit concern for “the promotion of justice” is not a evident in any special way in the curricula of law schools sponsored by the Society of Jesus).

4. Let me make clear that in writing the original piece, I did not single out Jesuit institutions for special treatment. Instead, they invited the scrutiny and criticism they received on themselves. After all, they had the audacity (a cherished Jesuit trait) to claim that their schools stand apart from the bulk of the legal academy in their singular devotion to the promotion of justice, a devotion which they claim pervades the life of these institutions precisely because they are Jesuit. Having said that, much of what I had to say in the original article (and in these remarks) is applicable to other, non-Jesuit Catholic law schools. Indeed, regardless of the sponsoring religious community, many of the failures of Catholic legal education are shared failures.

5. See, e.g., Saint Louis University School of Law, Law School History, <http://law.slu.edu/Alumni/history.html> (last visited Oct. 13, 2007) (“Since its inception, the School of Law has adhered to the Jesuit spirit of ‘Men and Women for Others’ and that creed is incorporated in all facets of our community.”); Marquette University Law School, Jesuit Mission, <http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=154> (last visited Oct. 13, 2007) (quoting statement of Father General Peter Hans Kolvenbach, S.J., echoing Father Arrupe that the purpose of Jesuit education is to form “men and women ‘for others’”).

6. The source of this phrase is the now famous address that the late Father General of the Society of Jesus, Pedro Arrupe, delivered at the Tenth International Congress of Jesuit Alumni in Europe. See Pedro Arrupe, S.J., Superior Gen. of the Society of Jesus, Address at Valencia: Spain, Men for Others (July 31, 1973), available at <http://www.creighton.edu/CollaborativeMinistry/men-for-others.html>. As the Creighton University website makes clear, the phrase “men for others” has been “adapted . . . to include ‘men and women’ to make its powerful message applicable for a contemporary Jesuit alumni audience.” *Id.*

7. See THE DECREES OF THE 32ND GENERAL CONGREGATION OF THE SOCIETY OF JESUS, Decree 4, ¶ 2 (1975), reprinted in DOCUMENTS OF THE 31ST AND 32ND GENERAL CONGREGATIONS OF THE SOCIETY OF JESUS 411 (1977) [hereinafter 32ND GENERAL CONGREGATION] (stating that “[t]he mission of the Society of Jesus today is the service of faith, of which the promotion of justice is an absolute requirement”); THE DECREES OF GENERAL CONGREGATION THIRTY-FOUR, THE FIFTEENTH OF THE RESTORED SOCIETY AND THE ACCOMPANYING PAPAL AND JESUIT DOCUMENTS, Decree 3, ¶ 3

The difficulty with this identification is that these schools almost invariably point to the clinical opportunities that they make available to students as proof of their commitment to justice and the fulfillment of their mission.⁸ Although clinical legal education is surely a necessary component of Jesuit identity, it is not a sufficient one. According to the American Bar Association, at most, only one out of every three students goes through a clinical experience while in law school.⁹ Thus, clinical education cannot be the means whereby justice is promoted *throughout* the student body. In addition, clinical education cannot be the distinguishing feature of Jesuit legal education since every law school in the country offers some sort of clinical program that provides legal services to the poor and disadvantaged. If clinical education is the heart and soul of Jesuit identity, then Harvard, Texas and UCLA are excellent “Jesuit” law schools, to say nothing of Pepperdine and Cardozo.¹⁰ Furthermore, to the extent that education about justice does take place in the clinical setting, it is almost entirely *affective* rather than *intellectual* in nature. In this context, justice is taken to be something that is immediately perceived in an intuitive fashion rather than as something that often requires careful thought and deliberation in order to be understood. Because *none* of the fourteen Jesuit sponsored law schools require a course in jurisprudence,¹¹ it is entirely possible for a student to graduate from one of these institutions without ever having been asked to think seriously and rigorously about the nature of justice and its meaning in law.

Instead, the one indispensable feature that a Catholic or Jesuit law school must have in order to be deserving of the name is to bring the Catholic intellectual tradition to bear on questions of law and justice. Indeed, the school’s Jesuit and Catholic

(1995), reprinted in DOCUMENTS OF THE THIRTY-FOURTH GENERAL CONGREGATION OF THE SOCIETY OF JESUS 40 (1995) [hereinafter 34TH GENERAL CONGREGATION] (renewing the Jesuit commitment “to the promotion of justice as an integral part of our mission”).

8. For examples of how clinical programs are invoked by Jesuit law schools as proof of their Jesuit identity, see Breen, *supra* note 1, at 391-98; see also *id.* app. at 419-31 (appendix gathering statements from the self-descriptions of the fourteen Jesuit sponsored law schools, many of which refer to their clinical programs as proof of the fulfillment of their Jesuit mission).

9. See A.B.A.—SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP 252 (1992); see also Breen, *supra* note 1, at 396 n.67 (citing other authorities likewise concluding that only about one-third of all law students participate in a clinical program).

10. Descriptions of the respective clinical opportunities available to students at these law schools can be found at the following websites: Harvard Law School—Clinical and Pro Bono Programs, <http://www.law.harvard.edu/academics/clinical/index.htm> (last visited Oct. 13, 2007); The University of Texas at Austin School of Law—Clinical Education at UT Law, <http://www.utexas.edu/law/academics/clinics/> (last visited Oct. 13, 2007); Pepperdine University School of Law, Clinical Education Program, <http://law.pepperdine.edu/clinical/> (last visited Oct. 13, 2007); Benjamin N. Cardozo School of Law, Clinical Programs, http://www.cardozo.yu.edu/academic_prog/clinical_prog.asp (last visited Oct. 13, 2007).

11. See Breen, *supra* note 1, at 402 n.86 (surveying the curricular requirements of the fourteen Jesuit sponsored law schools).

identity must be located in the heart of the academic enterprise itself: in the classroom, in the law school's curriculum, and in the research and other intellectual work supported by the school. To banish this identity to the periphery, to the non-academic activities of the law school, would ultimately render that identity meaningless—Catholic window dressing on an otherwise secular institution. Although a Jesuit law school should be open to every point of view—even those inimical to the Catholic faith—if it does not seriously engage the Catholic intellectual tradition and invite its students to do the same, then it should cease to engage in the pretense of being either Catholic or Jesuit. Absent this kind of engagement, Jesuit law schools will continue to offer “more of the same” rather than the distinctive brand of legal education they claim to provide.

What I had hoped to accomplish in advancing this thesis in the original article was to demonstrate that the claim of Jesuit distinctiveness in legal education simply cannot stand-up to scrutiny. What I hope to do in the article that follows is to clarify and further develop some of the ideas set forth in that piece, and to respond to some of the criticisms that I have received since its publication.

II. A REPLY TO THREE CRITICISMS: CURRICULUM, LEGAL CLINICS, AND NOSTALGIA

In setting forth the critique described above, it was my intention to “stir the pot” of Jesuit legal education, a pot that has sat undisturbed for so long that its contents have begun to ossify. Part of this stirring consisted of sending a reprint of the original article to every faculty member at every Catholic law school in the country, some 1,400 in all. This effort to encourage a frank discussion of Jesuit identity in legal education, beyond the confident slogans of Jesuit distinctiveness, has borne some fruit in that the piece has been discussed in a number of forums.¹² Perhaps it is not surprising that I have received a large number of comments in response to the piece, some of which I hope to answer in the remarks that follow.

One such criticism concerns the scope of my proposal. I am told that the piece suffers from the fact that, among other things, it does not address the curriculum as a whole.¹³ Although I believe that the article is clear on this point, let me leave nothing

12. In September 2005, I presented an abbreviated version of the paper as part of a conference entitled *Joy in the Truth: The Catholic University in the New Millennium*, sponsored by Notre Dame Center for Ethics and Culture. See Notre Dame Center for Ethics and Culture, Annual Fall Conferences—Joy in the Truth, <http://ethicscenter.nd.edu/events/fallconfs/jitt.shtml> (last visited Oct. 13, 2007).

The piece has also been cited by Richard John Neuhaus in a recent installment of *The Public Square* in FIRST THINGS. See Richard John Neuhaus, *The Public Square*, FIRST THINGS, Aug.-Sept. 2006, at 66, 82. It has also been the subject of an extensive debate on the Catholic legal theory blog Mirror of Justice. See, e.g., Posting of Susan Stabile to Mirror of Justice, Catholic Law Schools Revisited, <http://www.mirrorofjustice.com/> (July 8, 2005, 12:11), available at http://www.mirrorofjustice.com/mirrorofjustice/2005/07/catholic_law_sc.html.

13. E-mail from John T. Halloran to John M. Breen (Jan. 23, 2005, 23:37:29) (on file with

to doubt. In the original piece, I did not offer, nor did I purport to offer, a comprehensive proposal for the teaching of justice in a Jesuit law school. My aim was much more modest than this. My proposal was designed merely to save Jesuit institutions from the embarrassment of being judged deficient by the very criteria that the Society of Jesus sets forth as the defining features of its apostolate, including its educational apostolate.¹⁴ I leave the task of setting forth a complete agenda for programmatic reform of Jesuit legal education to another day, and perhaps to others more familiar with the ideals of Saint Ignatius and the unique charisms of his company.¹⁵

A second criticism that I have received is that the piece is insufficiently supportive of clinical programs.¹⁶ I do not think that a fair reading of the text supports this characterization of my position. Indeed, I expressly stated that “[c]linical legal programs are enormously valuable both as a pedagogical tool and as

author).

14. See 34TH GENERAL CONGREGATION, *supra* note 7, Decree 3, ¶ 3 (concluding that “we want to renew our commitment to the promotion of justice as an integral part of our mission, as this has been extensively developed in General Congregations 32 and 33”); *id.*, Decree 17, ¶ 7 (asserting that “the adjective ‘Jesuit’ . . . requires that the university act in harmony with the demands of the service of faith and promotion of justice found in Decree 4 of [General Congregation] 32.”).

15. Although I am the product of sixteen years of formal Catholic schooling (parochial school through college) my first introduction to Jesuit education was my appointment at Loyola. Thus, my ideas for a more thorough-going reform are generally more Catholic than specifically Jesuit.

I should add, however, that my reluctance to speak in an authentically Jesuit way reflects a recent failure on the part of the Society of Jesus to share its unique charism with others. My familiarity with the Ignatian tradition of education is almost entirely a product of self-education. During my now ten-year experience as a faculty member, the Jesuits have made almost no effort to share their identity with those who might be interested in it. I say this notwithstanding the Heartland Conferences and other institutional mechanisms ostensibly employed to introduce faculty to Jesuit identity.

As a newly hired assistant professor, I vividly recall my wife and I attending a dinner welcoming me and other new faculty to Loyola University. After dinner, the head of the University’s Center for Faith and Mission showed a video entitled *Shared Vision: Jesuit Spirit in Education*, prepared by the Institute of Jesuit Sources at Saint Louis University, introducing the Society of Jesus and detailing the early life and conversion of St. Ignatius Loyola. SHARED VISION: JESUIT SPIRIT IN EDUCATION (St. Louis University 1995). As my wife and I both noted, nowhere in the film or in the ensuing conversation was Jesus Christ ever mentioned. I am mindful both of the fact that the purpose of events of this sort is not Christian evangelization, and of the difficulties faced in trying to transmit the Ignatian vision in the face of rapidly declining numbers of Jesuits at Jesuit institutions. Still, it is difficult to comprehend how even a minimally adequate introduction to the Society of Jesus could take place without referring to the One for whom the Society is named and for whose sake all of its activities are undertaken.

16. See, e.g., Andrew F. Moore, *Contact and Concepts: Educating Students at Jesuit Law Schools*, 41 GONZ. L. REV. 459, 470 (2005-2006) (contending that my prior article “neglects to make an explicit connection between the issue of justice in Jesuit legal education” and “the most powerful learning experience in legal education,” namely, “direct service to the poor and underserved”).

a means of supporting the Jesuit mission.”¹⁷ Further, I noted in passing that “a powerful case can be made that a Jesuit law school should insist on the completion of some formal clinical experience as a requirement for graduation.”¹⁸ Elsewhere I have argued that the attorney-client relationship has a profoundly religious and spiritual dimension to it insofar as the practice of law affords lawyers the opportunity to serve the needs of other human beings with whom God is profoundly united in the Mystery of the Incarnation.¹⁹ Plainly, this value—a value at the heart of Jesuit spirituality²⁰—is present in an especially poignant way in the representation of disadvantaged persons in a clinical setting. Accordingly, Jesuit law schools should be especially enthusiastic in their support of clinical education if they are to be true to their identity as Jesuit and Catholic.²¹

A third criticism that has been aired is that the normative view of Catholic legal education set forth in my earlier piece is in some way nostalgic for a by-gone era in which authentic Catholic identity flourished.²² I must confess that I find this criticism somewhat bewildering in that I do not believe that the article contains any trace of nostalgia. I do not pine for some past age when Catholic, and in particular, Jesuit law schools fulfilled their distinctive mission effectively and with enthusiasm, nor do I believe that the article expresses any such sentiment. Indeed, to my mind, no “Golden Age” of American Catholic legal education has ever existed—either before or after the Second Vatican Council—such that there is no historical model that Catholic law schools today should seek to emulate. Rather, in attempting to describe what a Catholic and Jesuit law school ought to look like, those engaged in the conversation today are attempting to provide something new, or at any rate something more thoughtful and self-conscious than the relatively simple and unreflective models that were in place when many of these institutions were founded. In *What’s Wrong with the World*, G.K. Chesterton famously remarked: “The Christian ideal has not been tried and found wanting. It has been found difficult; and left untried.”²³ Something very similar to this could be said of Catholic legal education. Acceptance of a genuinely Catholic law school in the wider academy has been found difficult,

17. Breen, *supra* note 1, at 398.

18. *Id.* at 396.

19. John M. Breen, *The Catholic Lawyer: Justice and the Incarnation*, 39 CATH. LAW. 269, 270-75 (2000).

20. See generally, DAVID LONSDALE, EYES TO SEE, EARS TO HEAR: AN INTRODUCTION TO IGNATIAN SPIRITUALITY (2000).

21. Mark A. Sargent, *An Alternative to the Sectarian Vision: The Role of the Dean in an Inclusive Catholic Law School*, 33 U. TOL. L. REV. 171, 187 (2001) (arguing that a Catholic law school must be committed to making the kind of service learning that takes place in law clinics available to students “because it is Catholic”).

22. See, e.g., Posting of Amy Uelmen to Mirror of Justice, Questions for John Breen on his Critique of Jesuit Legal Education, <http://www.mirrorofjustice.com/> (May 4, 2005, 9:20), available at http://www.mirrorofjustice.com/mirrorofjustice/2005/05/Questions_for_j.html.

23. G.K. CHESTERTON, WHAT’S WRONG WITH THE WORLD 37 (1910).

and so the great project of Catholic legal education in all its fullness has been left largely untried.

Having said that, and without, I hope, sounding too triumphal, I am nostalgic in one respect. Although the original article did not express this point of view, I confess to being nostalgic for one of the characteristics that defined most Catholic law schools prior to the 1970s, namely, the fact that these schools were not ashamed of being Catholic and of promoting that identity in public.²⁴ Today it seems, most law schools are at best apologetic about their Catholic affiliation—"apologetic" not in the original sense of the word, of being able to give an account of what one believes and why, but "apologetic" in the more contemporary sense of being embarrassed.²⁵ Moreover, if they manifest some pride in this identity, it is only insofar as that identity can be translated into terms that are readily understood and accepted in the secular academy, hence the emphasis on clinics.

As a general historical matter, law schools sponsored by Catholic universities identified with their Catholic mission in a more muted fashion than their undergraduate counterparts.²⁶ This identification became even more understated

24. In the late 1950s through the 1960s, the *Catholic Lawyer* published a series of profiles of the various Catholic law schools. Typically, these pieces were authored by the dean or a faculty member at the school. See *infra*, note 26. The profile for St. Louis University School of Law states: "The school is indelibly Catholic. For this it feels need to offer neither explanation nor justification. In law as in life the Catholic effort is toward finding truth in both its oneness and diversity. No obstacle exists to sharing that goal with others." John E. Dunsford, *St. Louis—Pioneer Catholic Law School*, 3 CATH. LAW. 237, 241 (1957). Nothing even approaching this kind of forthright endorsement of Catholic identity can be found in the mission statements or websites of any of the fourteen Jesuit sponsored law schools that exist today, including St. Louis' whose current mission statement blandly states: "The School of Law is guided by the Jesuit tradition of academic excellence, freedom of inquiry and respect for individual differences." St. Louis University School of Law, Mission, <http://law.slu.edu/admissions/apply/overview.html> (last visited Oct. 13, 2007). It would, indeed, be remarkable to find a law school—secular or religious—that does not subscribe to precisely these values. The same simply could not be said of St. Louis' earlier self-description.

25. Cf., Mark A. Sargent, *We Hold These Truths – The Mission of a Catholic Law School*, COMMONWEAL, Apr. 25, 2003, at 14, 15 ("The first essential characteristic is that the school is unapologetic about its Catholic identity. Catholic identity should not be downplayed because some members (or potential members) of the community may find its expression uncomfortable."). Proof that a sense of embarrassment persists can be seen in the sparse mention made of Jesuit and Catholic affiliation on the websites of the fourteen Jesuit sponsored law schools. Indeed, three law school websites make no mention of this affiliation at all. See Breen, *supra* note 1, app. at 419-31 (summarizing the content of Jesuit law school and university websites with respect to mission). Further, as an anecdotal matter, several students have told me of their experiences visiting other ostensibly Catholic law schools as prospective students during which time they were told by their tour-guides that the purported Catholic affiliation was "nothing to worry about."

26. For example, in the series of Catholic law school profiles noted above that appeared in the *Catholic Lawyer*, several of the schools chose to make almost no mention of their Catholic affiliation, choosing instead to emphasize the programs, courses of instruction, library, classroom facilities, and other features that made them centers of legal education comparable to their non-

Catholic counterparts. See, e.g., William Hughes Mulligan, *The Fiftieth Anniversary of Fordham University School of Law*, 2 CATH. LAW. 207, 207, 212 (1956) (noting only the Jesuit origins of Fordham and an address by John Courtney Murray, S.J.); Warren P. McKenney, *Santa Clara University College of Law*, 5 CATH. LAW. 61, 61-62 (1959) (acknowledging the Jesuit origins of the school and noting the presence of a St. Thomas More Society whose members sponsor a quarterly Communion Breakfast); James N. Castleberry, Jr., *St. Mary's University School of Law*, 6 CATH. LAW. 49, 49-50 (1960) (noting only the school's sponsorship by the Society of Mary and the annual presentation of a St. Thomas More Award); Edward F. C. McGonagle, *Duquesne University School of Law*, 6 CATH. LAW. 137, 137 (1960) (mentioning only the school's founding and sponsorship by the Congregation of the Holy Ghost); William Kelly Joyce, Sr., *The University of Detroit Law School*, 7 CATH. LAW. 41, 44 (1961) (stating that the school has "two objectives—professional and apostolic" and that it "blends" two great traditions "the legal and the Jesuit"); Vincent F. Vitulio, *Loyola University School of Law—Chicago*, 7 CATH. LAW. 305, 305 (1961) (stating only that Loyola in Chicago strives to be "a law school of the highest excellence conducted in the Jesuit tradition"); Owen G. Fiore, *Loyola University School of Law*, 9 CATH. LAW. 219, 219, 221 (1963) (noting only that Loyola in Los Angeles is sponsored by the Jesuit order and hosts a St. Thomas More Law Society).

Those law schools that did mention their Catholic identity often did so by referring to opportunities for prayer, reception of the sacraments, and religious retreats. See, e.g., Francis E. Lucey, S.J., *The Story of Georgetown Law School*, 3 CATH. LAW. 129, 135 (1957) (mentioning the chapel in a law school dormitory as well as the school's annual retreats and monthly Mass and Communion Breakfast including an address by a theologian or ethics professor); Dunsford, *supra* note 24, at 239 (stating that a Jesuit priest "is available throughout the semester to advise the students on personal problems, and closed retreats at Hazelwood, Jesuit retreat house near St. Louis, are offered to the Catholic students"); *Boston College Law School*, 4 CATH. LAW. 153, 156 (1958) (observing that Boston College has "[a] regular spiritual program conducted by the student St. Thomas More Society [which] includes an annual retreat, periodic talks and the daily rosary under the guidance of Father John A. Tobin, S.J."); Miriam T. Rooney, *Seton Hall University School of Law*, 5 CATH. LAW. 305, 308 (1959) (noting that to "inculcate a consciousness of God as the Author of all law and the cause of our freedom, each class is begun with the recitation of the Lord's Prayer" and that at Seton Hall "each academic year is begun with a Mass invoking the assistance of the Holy Spirit"); Robert Q. Kelly, *De Paul University College of Law*, 6 CATH. LAW. 287, 289 (1960) (referring to a St. Thomas More window in the law school chapel, and the annual Red Mass "accompanied by a sermon on the natural law"); Joyce, *supra*, at 44 (noting that Detroit "revived one of the medieval traditions of the law, namely, the celebration of the so-called Red Mass"); Guy F. Smith, *Gonzaga University School of Law*, 7 CATH. LAW. 121, 124 (1961) (noting that in 1959 "Gonzaga celebrated its first Red Mass" in conjunction with the meeting of the Washington State Bar Association).

Those schools that discussed their Catholic identity as an aspect of the academic work of the school invariably mentioned the natural law tradition, often in religious and theological rather than philosophical terms. See, e.g., Harold Gill Reuschlein, *Villanova—Newest of the Catholic Law Schools*, 3 CATH. LAW. 15, 17 (1957) (stating that Villanova was founded out of "the need for a place dedicated to the synthesis of Christian wisdom and painstaking legal scholarship" but not describing how this is present in the curriculum); Lucey, *supra* at 129-30 (noting that Georgetown offers "a course on Ethics and its relation to positive law" and a course on Comparative Jurisprudence); Dunsford, *supra* note 24, at 241 (asserting that the "underlying approach to the study of law" at St. Louis "accepts a philosophy which recognizes the divine origin and destiny of man and his responsibility to guide his actions by revealed truth and natural law" while also recognizing that most

positive laws “are not unchangeable, but depend upon the contingencies of time and place”); Reynolds C. Seitz, *Marquette Law School—Fifty Years of Service in the Middle West*, 3 CATH. LAW. 331, 331-32 (1957) (observing that Marquette draws from St. Ignatius and the Jesuits “the ideals and spirit which cause it to acknowledge that there is an ideal and objective order of justice based upon the natural law by which human beings are endowed with certain inalienable God-given rights and obligations” such that every student is required to take two courses in Jurisprudence, a general overview of natural law principles and a specific application to the positive law taught by faculty “who acknowledge the existence of the natural law [and] frequently evaluate problems in the light of such law”); John E. North, *Creighton Law School—A Private Institution in the Public Service*, 4 CATH. LAW. 77, 82 (1958) (remarking that Creighton “places strong emphasis upon the moral value of the legal principles, rules, and policies found in the various courses” such that students form “the habit of testing past and prospective patterns of legal activity by the law of God”); Vernon X. Miller, *The Law School of the Catholic University of America*, 4 CATH. LAW. 333, 336-37 (1958) (stating that CUA’s law school is “working to relate Catholic social and moral philosophy to the problems of politics as they are reflected in court decisions, legislation and the tradition of the common law” while acknowledging differences of opinion among faculty, stating that they “have in common an appreciation of the profound implications and soundness of Catholic philosophy”); Antonio E. Papale, *The Law School of Loyola University, New Orleans*, 5 CATH. LAW. 219, 220 (1959) (noting that Loyola in New Orleans is “entrusted with the significant responsibility of presenting the positive law of the State as a means by which the scholastic concept of natural law ought to be implemented” and describing natural law as “the objective pattern of moral behavior consonant with human nature and the will of a divine Lawgiver” and asserting that natural law “is the integrating element in the entire law school curriculum” and indeed its “controlling philosophy”); Rooney, *supra*, at 306 (recognizing that a required course in Jurisprudence at Seton Hall “affords the principal means of ascertaining the philosophical premises implicit in many judicial opinions, and of forcing the student . . . to give some thought to how he could improve the law while asking himself why the rule is so”); Richard A. Vachon, S.J., *The University of San Francisco School of Law*, 6 CATH. LAW. 221, 223 (1960) (highlighting San Francisco’s course in Jurisprudence and stating that the school “adheres to the Christian principle that the truth shall make men free” and to “the equally valid principle” that the truth is not always “knowable now”); Alfred F. Geimer, *University of San Diego School of Law*, 8 CATH. LAW. 121, 122 (1962) (quoting the dean as stating that the school’s purpose is to give students “a sound legal education in an environment conducive to the development of high ethical standards compatible with Catholic philosophy” and “awakening in the student an appreciation of natural law”); Sidney B. Hill, *Catholic University of Puerto Rico School of Law*, 8 CATH. LAW. 305, 306, 342 (1962) (stating that the purpose of the school is “[t]o probe the relationship of the civil and common law with that of the ethical and natural law” and “to perpetuate the Christian Doctrine and Philosophy of the law.”); John J. Murphy, *St. John’s University School of Law: A Profile*, 18 CATH. LAW. 270, 271 (1972) (celebrating the publication of CATHOLIC LAWYER and quoting the current law school bulletin as saying the school “strives to integrate a sound legal education with a love of God, a respect for His laws and a zeal for equitable administration of justice” by creating “an environment for all students Catholic and non-Catholic alike which is favorable to the development of high ethical standards and of a sound and mature philosophy of law compatible with Catholic philosophy”).

Perhaps not surprisingly, the most thorough exposition of Catholic identity in terms of curricular and other academic features can be found in the article describing the Notre Dame Law School. See Edward F. Barrett, *The Notre Dame Experiment*, 2 CATH. LAW. 294, 297-307 (1956) (giving special emphasis to the school’s Natural Law Institute and subsequent *Natural Law Forum*). Indeed, in what might be taken as an implicit criticism and challenge to other Catholic law schools—both at the time and today—the article contends that: “A ‘Catholic’ law school is *Catholic* when its Catholic name and symbols truly mean that the philosophy of Catholicism is the soul of the entire curriculum and

beginning in the 1970s when law school enrollments exploded with the entry of large numbers of women and minorities into the applicant pool.²⁷ Catholic law schools sought to respond to this new demographic reality by appealing to a wider group of potential applicants beyond their historic constituencies.²⁸ Regrettably, this move often included the tendency to minimize Catholic identity as a distinctive, let alone positive, feature of the institution.²⁹

I confess to being nostalgic for Catholic schools that were not ashamed of their Catholic identity *as such*. This is not a sentimental longing for the past, but a desire to recover the courage to be Catholic. Christian triumphalism is, of course, anathema to many who claim membership in the tired and now-aging generation of self-described “Vatican II Catholics.”³⁰ While this point of view is often overstated, it

not merely of one isolated course. Otherwise, it is but a convenience maintained by a Catholic university for the benefit of Catholic students who might just as well go elsewhere to study law.” *Id.* at 294.

27. See, e.g., Thomas O. White, *A Retrospective Examination of Law School Admissions, The Law School Admission Council, and Law School Admission Services*, in *LAW SCHOOL ADMISSIONS, 1984-2001: SELECTING LAWYERS FOR THE TWENTY-FIRST CENTURY* 13, 28 (Walter B. Raushenbush ed., 1986) (“Between 1972-73 and 1982-83, the number of women grew from 11.8 percent to 36.8 percent of all law students, an increase of more than 285 percent. Substantial growth was also realized in the number of minorities enrolled in law school—an increase of some 73 percent between 1972-73 and 1982-83.”). By noting these demographic changes, I do not mean in any way to suggest that the admission of women and minorities somehow led to a compromise of Catholic identity of necessity. On the contrary, it is my contention that Catholic law schools may have maintained a robust sense of their identity while at the same time welcoming students from traditionally under-represented groups.

28. The fact that Catholic law schools traditionally provided a means of entry into the legal profession for the children of recent immigrants, many of whom were Catholic, has been observed by both supporters and opponents of Catholic legal education. See, e.g., Thomas L. Shaffer, *The Catholic Tradition*, 22 *VAL. U. L. REV.* 669, 670 (1988); 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, 323 (William C. McFadden ed., 1990).

29. A striking example of this enormous change can be found in the contrast between the self-description offered by St. Louis University School of Law in 1957 and that offered by the school today. See *supra* note 24.

30. See, e.g., JAMES CARROLL, *CONSTANTINE’S SWORD: THE CHURCH AND THE JEWS—A HISTORY* 12, 577-87 (2001) (asserting that “Christian faith can seem to triumph over every evil except Christian triumphalism” and that the Church can only overcome its triumphalism and exclusivism by abandoning its belief in the Incarnation and the salvific work of Christ’s passion, death and resurrection); DANIEL C. MAGUIRE, *THE MORAL CODE OF JUDAISM AND CHRISTIANITY: RECLAIMING THE REVOLUTION* 38 (1993) (declaring that “[t]here can no more be ‘one true religion’ than there could be one exhaustively ‘true’ poetry that supersedes all others. The mystery does not allow for such reductionist imperialism.”); Arthur Jones, *Theologians See, Experience Downside to John Paul II’s Papacy*, *NAT’L CATH. REP.*, Apr. 2, 2005, available at <http://www.nationalcatholicreporter.org/update/conclave/arthurjones.htm> (quoting Rev. Charles Curran as saying what “bothered” him about John Paul II’s papacy was that the Pope taught that “[t]he church has the truth”

must be admitted that there is something altogether correct in this perspective.³¹ Thus, while I am not nostalgic for the inflated pride that may have typified a certain segment of the Church prior to the Council, I do hope that Catholic universities can recover a proper understanding of Christian triumph: the triumph of the Cross. This is not triumphalism in the sense of self-righteousness or vanity but joy—the joy of the Christian heart and mind that, with genuine humility, feels compelled to share what it knows.³² It is the humble triumphalism of the early Church that, as Saint Paul said, dared to speak and “liv[e] the truth in love.”³³ It is this strange, paradoxical Christian

with “never any mention that the church has to learn the truth” such that “there was this horrendous triumphalism”).

31. Pride in the splendor of Christ’s gift of redemption was often expressed in the past as a personal pride, as pride in oneself as a member of the redeemed. This kind of pride often took the form of a belief in the superiority of persons and nations rather than a pride in the triumph of Christ over sin and death, a pride in Christ as the ultimate revelation of God in history. As the fathers of the Second Vatican Council stated, Jesus Christ is “the Lord in whom the full revelation of the supreme God is brought to completion.” SECOND VATICAN ECUMENICAL COUNCIL, DOGMATIC CONSTITUTION ON DIVINE REVELATION *DEI VERBUM* ¶ 7 (1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651118_dei-verbum_en.html. Moreover, because the Incarnate Savior established “the new and definitive covenant [that] will never pass away . . . we now await no further new public revelation before the glorious manifestation of our Lord Jesus Christ.” *Id.* ¶ 4 (citation omitted). See generally CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON THE UNICITY AND SALVIFIC UNIVERSALITY OF JESUS CHRIST AND THE CHURCH *DOMINUS IESUS* ¶ 4 (2000), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20000806_dominus-iesus_en.html (criticizing relativistic theories that seek to justify religious pluralism while rejecting the claim that the revelation of Jesus Christ is somehow incomplete such that it may be supplemented by other religions). It is surely laudable to show respect for the sincere religious beliefs of non-Christians and to encourage inter-religious dialogue especially in the present context of globalization and wide-ranging religious pluralism. See, e.g., SECOND VATICAN ECUMENICAL COUNCIL, DECLARATION ON THE RELATIONSHIP OF THE CHURCH TO NON-CHRISTIAN RELIGIONS *NOSTRA AETATE* ¶ 2 (1965), available at http://www.vatican.va/archive/histcouncils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en.html (“The Catholic Church rejects nothing that is true and holy in these [other] religions. She regards with sincere reverence those ways of conduct and of life, those precepts and teachings which, though differing in many aspects from the ones she holds and sets forth, nonetheless often reflect a ray of that Truth which enlightens all men.”). Unfortunately, the desire on the part of some theologians to promote this kind of dialogue has led to an abdication of the Christian message in its integrity. See generally ROGER HAIGHT, *JESUS: SYMBOL OF GOD* (1999). For the Church’s magisterial response to this error, see CONGREGATION FOR THE DOCTRINE OF THE FAITH, NOTIFICATION ON THE BOOK “JESUS SYMBOL OF GOD” BY FATHER ROGER HAIGHT, S.J. (2004), available at http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20041213_notification-fr-haight_en.html.

32. 1 *Corinthians* 9:16 (“If I preach the gospel, this is no reason for me to boast, for an obligation has been imposed on me, and woe to me if I do not preach it!”).

33. *Ephesians* 4:15. See JOHN PAUL II, APOSTOLIC CONSTITUTION *EX CORDE ECCLESIAE* ¶ 32 (1990) [hereinafter *EX CORDE ECCLESIAE*], available at http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html (“[A] Catholic

triumph that gives hope, not for a return to the past, but for a future in which Jesuit and other Catholic law schools have confidence in the power of the tradition to address the issues of the day in a way that people will find compelling.

III. THE ARGUMENT NOT HEARD

Although I have received a number of comments and criticisms in response to the piece, I have yet to hear an argument that directly challenges the central thesis.³⁴ No one has been brave enough to argue that the promotion of justice can be attained simply through the affective experience of sympathy for a disadvantaged client in a clinical setting, while ignoring the study of justice as an academic subject in the classroom. Simply put, to promote a desire for justice on the part of students at Jesuit law schools, these students must be given the opportunity to carefully consider what justice is, and what it is not. Similarly, no one has argued that if a Jesuit law school

university must have the courage to speak uncomfortable truths which do not please public opinion, but which are necessary to safeguard the authentic good of society.”)

34. The absence of any argument challenging my central thesis, it should be noted, is true even of the most forceful and thoughtful responses I have received in response to the original article. See Moore, *supra* note 16; Gregory A. Kalscheur, S.J., “The Just Man Justices”: Justice and the Curriculum in the Jesuit Law School (unpublished paper delivered at the RALS conference at Baylor, on file with the author). For example, although Andrew Moore has misgivings about my proposal that Jesuit law schools require a first-year course in jurisprudence, he does not dispute the failure of such law schools to live up to their avowed commitment to the promotion of justice. Although Moore stresses the special capacity clinical education has for making a lasting impression on students (a quality I happily acknowledge and support), he admits that clinical education as it is currently practiced at Jesuit law schools is “insufficient,” that what is lacking is an intellectual engagement to match the personal experience, “an integration of contact with concepts.” Moore, *supra* note 16, at 470. Although Father Kalscheur says that my proposal suffers from a “fundamental flaw” in that I purportedly “reduce” education concerning justice to a required course in jurisprudence, Kalscheur, *supra*, at 1-3, he refrains from engaging in the conceit that the law schools sponsored by the Society of Jesus today have succeeded in fulfilling the ambitions of General Congregations 32 and 34, and with good reason. To do so would call into question the otherwise reasonable points that he raises. Indeed, to celebrate the current state of Jesuit legal education as the realization of Jesuit mission would be to forsake an honest assessment of the state of these law schools for a kind of wish-fulfillment.

The source of the distinction between “contact” and “concepts” to which Professor Moore refers is an address by Father Peter-Hans Kolvenbach, S.J., the Father-General of the Society of Jesus. See Peter-Hans Kolvenbach, S.J., The Service of Faith and the Promotion of Justice in American Jesuit Higher Education, Address at Santa Clara University § III.A (Oct. 6, 2000), available at http://www.creighton.edu/CollaborativeMinistry/kolvenbach_speech.html. Perhaps the most succinct and thoughtful rebuke to this contemporary Jesuit emphasis on “contact” over “concepts,” on direct service over rigorous thought, on the affective over the intellectual, comes from the late Pope John Paul II who observed “there is no renewal, even social, that does not begin with contemplation.” John Paul II, Address to the Third Ecclesial Convention of the Church in Italy, Palermo (November 23, 1995), in THE PRIVATE PRAYERS OF POPE JOHN PAUL II: AN INVITATION TO PRAYER 26 (2002).

were to introduce students to different theories of justice, such a school would not have the further obligation to introduce the contributions to this discourse found in the Catholic intellectual tradition. Likewise, no one has argued that the Catholic identity of a Catholic law school need not be concerned with the intellectual work of the school reflected in its curriculum and classroom teaching, as well as in the scholarship that it encourages and promotes.

I do not believe that any *argument* has been offered against the thesis advanced in the earlier article because none can be offered. It would indeed be laughable to suggest that a Jesuit law school had adequately equipped its graduates with the intellectual tools they will need to address the many difficult questions of justice in practice simply by giving them the option to work for a semester in a law clinic. It would be even more ludicrous to suggest that a Catholic university could fulfill its identity by ignoring the Catholic tradition in the intellectual work that it performs. Instead of an argument based on reason, the only objection that can sensibly be made is an assertion of *will*—a claim made on the part of some faculty to the effect that “I don’t want my law school to look like that, to engage in that sort of academic enterprise.” Surely such a claim could be dressed-up to look like a legitimate argument when accompanied by reasons of a practical nature concerning the school’s limited resources, its likely appeal to a diverse applicant pool, as well as its ability to attract talented faculty, and the like. These practical arguments may reflect a genuine concern on the part of faculty or they may be a useful subterfuge for avoiding a candid discussion about Jesuit identity. What they are not are conceptual arguments that a law school can be authentically Catholic and Jesuit and still ignore the Catholic intellectual tradition. An argument to this effect simply cannot be credibly maintained.

IV. CONCEIVING OF CATHOLIC IDENTITY: THE ICING ON THE CAKE VS. THE AIR IN THE BALLOON

How is it that the presence of clinics became the conventional answer given in response to questions concerning a law school’s fulfillment of its Jesuit and Catholic mission? Several reasons immediately come to mind that explain the prevalence of this response. First, clinical programs are conspicuous. They are by their very nature highly visible to the public in that they serve clients from outside the law school and university communities. Moreover, unlike classroom instruction which directly benefits only the students enrolled, the work of clinics is not simply a matter for internal consumption. Second, and relatedly, the services performed by clinical instructors and law students have the practical effect of helping those in need. Although a thoughtful seminar on immigration law or the morality of capital punishment may help to advance a school’s Catholic mission, representing an illegal immigrant facing deportation or a convicted felon on death row has the visceral feel of a concrete response to injustice. Regardless of the merits of one’s case, justice demands that an individual receive competent legal representation, and clinics are a

way of meeting this need. Third, and perhaps most importantly, law school clinics serve a useful purpose within the scheme of faculty politics by keeping the potentially divisive matter of religious affiliation off the table. As such, law school clinics became the predictable response to questions concerning mission because they provided a convenient diversionary tactic. By pointing to clinics as a clear sign of meaningful Jesuit and Catholic identity, law school deans and faculty avoided answering far more difficult questions concerning the place of this identity in the intellectual work of the institution. With the willing acquiescence of university officials, law school faculty avoided asking what “the promotion of justice” meant in the context of a Jesuit and Catholic law school and how their teaching and scholarship helped to advance this project. Having never asked the question, Jesuit law school faculties thus avoided any uncomfortable conclusions that may have followed.

Although each of these reasons may, in part, explain why Jesuit and other Catholic law schools turned to their legal clinics as proof of their commitment to justice and the fulfillment of their mission, there is another, deeper reason which accounts for this common strategy. This reason can be found in the very notion of Catholic identity in the context of a university that has been conceived and is still conceived in the minds of many Catholic educators. Specifically, it is the notion that Catholic identity is “something more” in an arithmetic sense. It is an additive, a bonus feature, an extra ingredient that is placed along side that which is already present, namely, the university itself. It may change the flavor of the institution to a greater or lesser degree, but it does not change the essential quality of the institution as a university. As such, Catholic identity is a component that can be removed from the whole without any substantial change in the function of the university or its way of being. It is a quality that remains on the surface. It does not penetrate the whole and alter its internal constitution. In an ultimate sense, the quality of being “Catholic” is an additive that remains external to the quality of being a “university” as such. At most, the relationship is one of complementary juxtaposition, the effect of which is largely aesthetic.

Perhaps more than any other document, the famous *Land O’ Lakes Statement*, issued by the presidents of several prominent Catholic universities in 1967, led to the popular acceptance of this view among Catholic colleges and universities.³⁵ Indeed,

35. LAND O’ LAKES STATEMENT: THE NATURE OF THE CONTEMPORARY CATHOLIC UNIVERSITY (1967), reprinted in AMERICAN CATHOLIC HIGHER EDUCATION: ESSENTIAL DOCUMENTS 1967-1990, at 7 (Alice Gallin ed., 1992) [hereinafter LAND O’LAKES STATEMENT]. The departure by many Catholic and other Christian sponsored colleges and universities away from a definite sense of mission and toward a more secular character has been the subject of several recent historical studies. See, e.g., JAMES TUNSTEAD BURTCHAELL, THE DYING OF THE LIGHT: THE DISENGAGEMENT OF COLLEGES AND UNIVERSITIES FROM THEIR CHRISTIAN CHURCHES (1998) (describing the process of secularization at institutions sponsored by seven different Christian denominations); GEORGE M. MARSDEN, THE SOUL OF THE AMERICAN UNIVERSITY: FROM PROTESTANT ESTABLISHMENT TO ESTABLISHED NONBELIEF (1994) (setting forth the Protestant foundations of American higher

the *Land O' Lakes Statement* clearly embodies the notion that Catholic identity is an additive, an extra ingredient not found in the recipes of other universities. In its opening lines the Statement provides: "The Catholic University today must be a university in the full modern sense of the word, with a strong commitment to and concern for academic excellence" but that "[t]he Catholic university *adds* to the basic idea of a modern university distinctive characteristics which round out and fulfill that idea."³⁶ The Statement goes on to say that although "[e]very university, Catholic or not, serves as the critical reflective intelligence of its society[;] . . . the Catholic university has the *added obligation* of performing this same service for the Church."³⁷ Clearly, this presupposes that a "Catholic university" is a "university"

education and the subsequent marginalization of Christian identity).

36. LAND O'LAKES STATEMENT, *supra* note 35, § 1 (emphasis added).

37. *Id.* § 5 (emphasis added). The same paragraph continues to say that "the [Catholic] university should carry on a continual examination of all aspects and all activities of the Church and should objectively evaluate them. The Church would thus have the benefit of continual counsel from Catholic universities." *Id.* Although the authors of this passage may have intended it as a generous offer to place the talents of Catholic university professors at the service of the Church, the hubris reflected in these few words is nothing short of staggering. Indeed, the remarkable role envisioned for Catholic universities in this passage is that they should function essentially as outside auditors overseeing "all aspects and all activities of the Church" rather than as communities of the faithful within the Church who share the same heart and mind. *Id.*

It has often been said that to appreciate the beauty of a cathedral's stained glass windows one must view them from inside the church. The same could be said of the Church's doctrines and practices. Thus, to offer the Church the gift of one's "critical reflective intelligence" is one thing, but to "objectively evaluate" the Church from an external perspective is problematic at best. What would it mean, for example, to examine and "objectively evaluate" the Eucharist? What would an objective evaluation of the Church's teaching on homosexuality, or abortion, or the possibility of women's ordination entail? Indeed, if, as David Schindler contends, "there are no instances of purely formal, hence neutral, methodological procedures . . . that, on the contrary, all methodological procedures, insofar as they claim to *mean* anything at all . . . imply and thus are shaped internally (if often tacitly) by metaphysical and theological presuppositions," DAVID L. SCHINDLER, HEART OF THE WORLD, CENTER OF THE CHURCH: COMMUNIO ECCLESIOLOGY, LIBERALISM, AND LIBERATION 154 (1996), then the objective evaluation promised in the *Land O' Lakes Statement* is simply not possible. Indeed, such an examination and evaluation of the Church's teachings and practices might incorporate metaphysical and theological presuppositions inimical to the faith of the Church.

In its exuberance, the *Land O' Lakes Statement* glosses over the apparent tension that exists between commitment to the truth as already known and proposed by the Church and commitment to the truth as suggested by one's academic discipline. The tension is no longer felt when the former commitment is no longer present, or when Catholic identity is abandoned, when it is thought of as something "other," as something distinct and separate from the intellectual work of the university in general and the discipline in particular.

In his apostolic constitution on Catholic universities, *EX CORDE ECCLESIAE*, John Paul II was clearly aware of the purported tension between "the search for truth and the certainty of already knowing the fount of truth." See *EX CORDE ECCLESIAE*, *supra* note 33, ¶ 1 (footnote omitted). He contends, however, that precisely because it is committed to the truth of the faith, the Catholic university is actually "more capable of conducting an impartial search for truth, a search that is

with something more added to it, an appealing bonus feature, but one that does not alter the central activity of the university as such, namely, the intellectual work that it performs in research and classroom instruction.

So conceived, Catholic identity is like the icing on the cake, or the cherry on top of a sundae. Icing may add flavor to a cake, but one could still have and enjoy a cake even if icing were never added. Catholic identity is thought of in the same manner with respect to a Catholic university or law school, as a non-essential and un-integrated component.³⁸ The claim that clinics function as the repository of Jesuit and Catholic identity reflects precisely this view—the view that such identity is a distinct item that can be added to the make-up of an institution without changing it in a substantial fashion. Thus, a strong desire to promote justice, as evidenced by the mere presence of a law school's legal clinics, is the something more—the cherry on top of the sundae of Jesuit legal education.

Let me propose an alternate conception of Catholic identity. Instead of thinking of Catholic identity as the icing on the cake, it should be thought of as the air in the balloon—as that which literally *inspires* the university filling every part of it with meaning and direction. It is not a component that is something in addition to that which is already there. Rather, it is integral to the thing itself. Without the air inside, the balloon would surely lose its integrity and purpose.

In the Christian and Hebrew scriptures, the image of breath or spirit³⁹ has enormous significance: It is the spirit—the breath—of God that moves over the waters of the abyss at the beginning of creation.⁴⁰ At the pinnacle of this creation is

neither subordinated to nor conditioned by particular interests of any kind." *Id.* ¶ 7. Because "truth cannot contradict truth" the seeming need to choose between one's commitment to the faith and one's commitment to an academic discipline is a false choice. The tension is only apparent, not real. Similarly, John Henry Newman resolved this apparent tension with an audaciously bold claim, a claim that is in fact the underlying premise of every genuinely (as distinguished from the merely nominally) Catholic university: "Right Reason, that is, Reason rightly exercised, leads the mind to the Catholic Faith, and it plants there, and teaches it in all its religious speculations to act under its guidance." JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* 137 (Martin J. Svaglic ed., 1982).

38. Moreover, because it is not constitutive of the university itself, the extra ingredient is interchangeable with a variety of different components. Ham is essential to a ham sandwich, but whether it is made with Swiss cheese on rye or Monterey Jack on wheat is entirely a matter of taste. It is something separable (if not something entirely separated) from that which is already present. Likewise, under the conception of Catholic identity reflected in the *Land O' Lakes Statement*, Catholic identity is thought of as something that is a separable if not entirely separated from the university *per se*. It is a component or quality that can be segregated from the whole, set apart from the institution which remains intact and complete in itself.

39. CATECHISM OF THE CATHOLIC CHURCH ¶ 691 (1997) ("The term 'Spirit' translates the Hebrew word *ruah*, which, in its primary sense, means breath, air, wind. Jesus indeed uses the sensory image of the wind to suggest to Nicodemus the transcendent newness of him who is personally God's breath, the divine Spirit.") (referring to the discourse between Jesus and the Pharisee Nicodemus in *John* 3:1-21).

40. *Genesis* 1:2.

the human person. God forms man “out of the clay of the ground” breathing “into his nostrils the breath of life” so that man becomes “a living being.”⁴¹ After His resurrection, Christ visits his disciples in the upper room, even though the door was locked. He breathes on them and they receive the Holy Spirit which is the life of the Church.⁴² In the same manner, the Catholic identity of a Catholic university—and by extension a Catholic law school—should literally be its life’s breath!

In the law school setting, this alternate way of thinking about Catholic identity forbids relegating it to the mere existence of legal clinics. Likewise, the tradition of celebrating a Red Mass, the presence of a law school chaplain on campus, or the placement of crucifixes on the classroom walls will not suffice. Although each of these features is significant in its own way, each is an un-integrated bonus feature. Each is a component part that rests on the surface of the law school without altering its internal constitution. If Catholic identity is as vital to a Catholic law school as air is to a balloon, then it must be present in an essential way throughout the school’s operations, including the intellectual work performed by its faculty in teaching and scholarship. Simply put, the faculty of a Catholic law school must be engaged with the Catholic intellectual tradition.

Accordingly, to borrow from John Courtney Murray, one might describe a Catholic university as a “conspiracy” for truth.⁴³ Murray reminds us that the original Latin meaning of the term is not invidious. A “conspiracy” literally means a “unison, concord, unanimity in opinion and feeling, a ‘breathing together.’”⁴⁴ Those who breathe together unite in action “for a common end about which there is agreement.”⁴⁵ The common end of a university is the education of its students and the search for truth. The “conspiracy” of an authentic Catholic university can be found in that its faculty and students all breathe the air of the Catholic intellectual tradition. It is not essential that faculty share a unanimity of opinion with respect to the truth of what that tradition proposes on every conceivable subject. Indeed, some diversity of opinion is unavoidable given the competing voices within the tradition itself, in addition to those outside it. Moreover, as a practical matter, the diverse makeup of faculties and the exercise of academic freedom guarantee a wide range of opinion. What is essential is that faculty members acknowledge the centrality of the tradition in the life of the university. At the very least, the “conspiracy” of Catholic higher education demands that teachers make the substance of the Catholic intellectual tradition available to students as a perspective in their classes, and that the

41. *Genesis* 2:7.

42. *John* 20:19-23.

43. See JOHN COURTNEY MURRAY, S.J., *WE HOLD THESE TRUTHS: CATHOLIC REFLECTIONS ON THE AMERICAN PROPOSITION 22* (1960). I am indebted to my colleague Michael J. Schuck for suggesting Murray’s wonderful phrase to me.

44. *Id.*

45. *Id.*

institution generously support those scholarly efforts that seek to advance the tradition in the contemporary academy.

V. THE TRADITION IN A SOUND-BITE: "MAN IS NOT THE MEASURE OF ALL THINGS"

In my original article, I attempted to summarize some of the defining features of the Catholic intellectual tradition, notwithstanding its long history and enormous scope.⁴⁶ I also described in rather broad terms the essential content of what I take to be the Catholic perspective on the nature of justice and its relation to law.⁴⁷ Obviously, a great deal more could be said about each of these subjects. Nevertheless, perhaps a better way to describe the significance of the tradition in the context of legal education is to say what it is not.

What distinguishes, or what should distinguish, a Catholic law school is that it offers an alternative to the secular perspective on reality, including the nature of law. By "secular" I do not refer to the basic premise that underlies our political order, namely, the claim that individuals must be free to believe in whatever religion they choose or none at all, without interference from the state,⁴⁸ and that the institutions of government may not promote the religious beliefs of any particular faith.⁴⁹ I do not use the term "secular" in the sense of being "non-religious" or the opposite of "theocratic." Instead, I use the term to refer to something more basic.

The word "secular" comes from the Latin "saeculum" which means "the current age" or, as we might say, "the times." On a certain level we are all "secularists" in that we are all concerned with the practical demands and requirements of the work-a-day-world. Whether those demands involve the price of gasoline, the latest weather forecast, or the hour of one's next appointment, our field of vision and concern is

46. See Breen, *supra* note 1, at 405-09 (especially n.96).

47. *Id.* at 406-10.

48. See, e.g., *Torasco v. Watkins*, 367 U.S. 488, 492-93, 495-96 (1961) (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 15-16 (1947)) (striking down Maryland's requirement that any person assuming public office must declare a belief in God since "neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion'" nor can it "pass laws or impose requirements which aid all religions as against non-believers" or "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs"). This freedom also means that the government must abstain from resolving religious controversies among religious adherents. See, e.g., *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (stating that courts should refrain from attempting to resolve such disputes because "the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern").

49. See, e.g., *Lee v. Weisman*, 505 U.S. 577, 596 (1992) (prohibiting a public high school from including a prayer as part of its commencement ceremony because "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation").

focused on the present times. To be “secular,” in this older and deeper sense, is to limit one’s self to what is immediately at hand.

Because the conventional genealogy of secularism conflates the concept of secularism with liberal democracy’s strict separation of state power and ecclesial authority, the origins of secularism are often traced back to the Enlightenment.⁵⁰ In fact, the philosophic origins of secularism, properly understood, predate the Enlightenment by nearly two millennia. This world-view is perhaps best summarized in the teachings of one of the pre-Socratic philosophers, Protagoras of Thrace. According to Protagoras “[o]f all things the measure is Man, of the things that are, that they are, and of things that are not, that they are not.”⁵¹

This expression may be interpreted in a variety of ways ranging from the commonsensical to the genuinely radical. It is, for example, indisputable that individuals and groups of people must, as a practical matter, decide what is true and what is false. Each of us must make these sorts of judgments in order to manage our own affairs. In this way, the claim that “Man is the measure of all things” is true, but uncontroversial.

However, the expression can also be construed as a radical claim about the nature of human knowledge in general, and of moral knowledge in particular. First, to say that “Man is the measure of all things” can be interpreted to mean that reality is circumscribed by that which man can see and grasp. Indeed, as the former Joseph Ratzinger noted in an important book written shortly after the Second Vatican Council, “[m]an is a seeing creature, whose living area seems to be marked off by the range of what he can see and grasp.”⁵² Because man is a sensual being, some regard knowledge gained through the senses as normative for all forms of knowledge. Indeed, the defining characteristic of the scientific attitude that so deeply influences our culture is that knowledge is limited “to ‘phenomena’, to what is evident.”⁵³ As Ratzinger notes, the methodology of the natural sciences is restricted to that which “can be seized in our [own] measuring grasp”⁵⁴ either through the senses or by

50. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* xxii-xxvii (1996 paperback ed.).

51. KATHLEEN FREEMAN, *ANCILLA TO THE PRE-SOCRATIC PHILOSOPHERS* 125 (1996).

52. JOSEPH CARDINAL RATZINGER, *INTRODUCTION TO CHRISTIANITY* 50 (J.R. Foster trans., 2004) (1968).

53. *Id.* at 58.

54. *Id.* Ratzinger’s critique of this severely constricted view of human reason has been a recurrent theme throughout his life. See, e.g., JOSEPH CARDINAL RATZINGER, *SALT OF THE EARTH: CHRISTIANITY AND THE CATHOLIC CHURCH AT THE END OF THE MILLENNIUM—An Interview with Peter Seewald* 163-64 (Adrian Walker trans., 1997) [hereinafter *SALT OF THE EARTH*] (criticizing the dominant world-view from the Enlightenment that “takes a very dogmatic posture and excludes interventions of God in history” and reduces religion “to the purely subjective” and observing that this “naked rationality reduced to the natural sciences” is unable to “answer the real questions—questions like where do we come from, what am I, what must I do to live properly, what am I here for at all”); JOSEPH CARDINAL RATZINGER, *VALUES IN A TIME OF UPHEAVAL* 66 (Brian McNeil trans., 2006) [hereinafter *VALUES IN A TIME OF UPHEAVAL*] (“The real problem that confronts us today is

devices that function as extensions of the senses. Ratzinger traces this perspective back to the thought of Rene Descartes, Immanuel Kant and especially Giambattista Vico who replaced “the old equation of truth and being” with the new equation of “truth and factuality.”⁵⁵ According to this new equation “all that we can truly know is what we have made ourselves.”⁵⁶ The task of the human mind is no longer “to think about being; rather, it is to think about the *factum*, what has been made, man’s own particular world, for this is all we can truly understand.”⁵⁷ Although Ratzinger attributes this point of view to three major figures of the Enlightenment, across the centuries the voice of Protagoras can be heard: “Man is the measure of all things.”

This voice can also be heard in the realm of normative discourse. It is the voice of subjectivity and relativism. Because “Man is the measure of all things” no objective standards exist by which to judge the morality of human conduct.⁵⁸ Instead, the individual has “the prerogative of independently determining the criteria of good and evil and then acting accordingly.”⁵⁹ Moreover, from this perspective, law, like morality itself, is a mere human construct, a pure invention. Although law

reason’s blindness to the entire nonmaterial dimension to reality.”).

During his recent address to the faculty at the University of Regensburg, Joseph Ratzinger, now Pope Benedict XVI, offered “a critique of modern reason from within” arguing for a “broadening [of] our concept of reason and its application” and rejecting “the self-imposed limitation of reason to the empirically falsifiable” as the sole criterion for genuine knowledge. Benedict XVI, Faith, Reason and the University: Memories and Reflections (Sept. 12, 2006), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/september/documents/hf_ben-xvi_spe_20060912_university-regensburg_en.html. “Modern scientific reason,” he argued, “bears within itself a question which points beyond itself and beyond the possibilities of its methodology” precisely because it “quite simply has to accept the rational structure of matter and the correspondence between our spirit and the prevailing rational structures of nature as a given.” *Id.*

As Benedict argued in a subsequent address, the scientific world-view according to which “only what is experiential and calculable would be rationally valid,” creates a culture that “represents a radical and profound break not only with Christianity but more in general with the religious and moral traditions of humanity.” Benedict XVI, Address to the Fourth National Ecclesial Convention in Italy (Oct. 19, 2006), *available at* http://www.vatican.va/holy_father/benedict_xvi/speeches/2006/october/documents/hf_ben-xvi_spe_20061019_convegno-verona_en.html. As such, it is “not able to establish a true dialogue with other cultures.” *Id.* By reducing ethical claims to merely subjective matters of opinion, this narrow rationality wrongfully suggests that “we live in a world that almost always appears to be of our making, in which, so to speak, God no longer appears directly but seems to have become superfluous, even out of place.” *Id.*

55. RATZINGER, *supra* note 52, at 61.

56. *Id.* at 59.

57. *Id.* at 61.

58. See ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 19 (2d ed. 1984) (describing the central claim of emotivism as being “that there are and can be no valid rational justification for any claims that objective and impersonal moral standards exist and hence that there are no such standards”).

59. JOHN PAUL II, *ENCYCLICAL LETTER VERITATIS SPLENDOR* ¶ 32 (1993), *available at* http://www.vatican.va/edocs/ENG0222/_P4.HTM.

may provide a means for the resolution of disputes and the legitimate exercise of state power, law can only function as a matter of convention. It cannot be a matter of truth since there is no objective truth that reality presents to the human mind for its reception. There is only that which man, the measure of all things, makes for himself. He is the creator of his own moral and legal universe.⁶⁰

The Catholic intellectual tradition may be taken as an extended refutation of this radical claim—a claim that is the premise upon which much of modernity is based. Granted, man must discern the truth, and he influences that which he comes to believe is true through this process of discernment.⁶¹ Nevertheless, the truth is still principally something outside of man himself, and the process of discernment aspires to be a movement beyond the immediate confines of his being, beyond that which he has made. In his search for truth, man does not want merely to find himself. Indeed, he wants to know the other, in itself, and not as a construct of the one who searches.

60. Some might object that this is a false dilemma, that some defensible middle ground exists between a wholesale form of relativism and some version of natural law or moral realism. For example, it might be suggested that some version of Kantian constructivism provides an intellectually respectable *via media* for those who fear the abyss of relativism yet can't quite bring themselves to embrace a kind of natural law.

To set forth a thorough-going response to this objection would far exceed the scope of this essay. Briefly put, I would argue—together with Alasdair MacIntyre—that Kant failed in the great project of demonstrating the authority and objectivity of moral rules apart from a teleological understanding of the human person. Indeed, MacIntyre argues that Kant recognized this failure in the *Critique of Practical Reason* and concluded that “without a teleological framework the whole project of morality becomes unintelligible.” MACINTYRE, *supra* note 58, at 56. Once detached from “any view of man as having an essence which defines his true end,” *id.* at 54, the content of morality that Kant inherited and advocated could only be sustained as a matter of convention. If MacIntyre is correct in this critique, then Kant and his successors—including those successors most popular among American legal academics such as John Rawls, Ronald Dworkin, and Bruce Ackerman—set forth more or less sophisticated versions of moral conventionalism. See Michael S. Moore, *Metaphysics, Epistemology and Legal Theory*, 60 S. CAL. L. REV. 453, 457-59 (1987) (describing the work of Dworkin and Rawls as examples of contemporary conventionalism in moral and legal theory). Conventions are, by definition, man-made practices or constructs that serve a practical end, often simply as a matter of convenience. See Michael S. Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 878-81 (1989) (describing the difference between philosophical realism and conventionalism); John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 430-42 (2000) (discussing the idea of a convention and its relationship to truth, and the notion of legislative intent as a matter of convention).

While I do not believe that either Kant or the contemporary conventionalists noted above succeed in avoiding the pitfalls that are at the heart of MacIntyre's powerful diagnosis of normative discourse, I do not mean to suggest that the contributions of these thinkers should not be part of the examination of justice in a Jesuit law school curriculum. On the contrary, because the work of Rawls, Dworkin and others is of importance in the present legal culture, their ideas should receive thoughtful consideration in the Jesuit classroom.

61. The observer always enters into the process of observation and influences the data that results. See DAVID BOHM, *WHOLENESS AND THE IMPLICATE ORDER* 69 (1983) (discussing the Heisenberg indeterminacy principle).

Thus, according to the Catholic perspective on law and justice, man is *not* the measure of all things. Indeed, it is precisely this erroneous perspective which has led and continues to lead to the most pernicious forms of injustice.⁶² Accordingly, from the Catholic point of view “[i]f there is no transcendent truth, in obedience to which man achieves his full identity, then there is no sure principle for guaranteeing just relations between people.”⁶³ When the truth regarding the morality of human conduct is not recognized “then the force of power takes over, and each person tends to make full use of the means at his disposal in order to impose his own interests or his own opinion, with no regard for the rights of others.”⁶⁴ Once “[s]undered from that truth, individuals are at the mercy of caprice, and their state as person ends up being judged by pragmatic criteria based essentially upon experimental data, in the mistaken belief that technology must dominate all.”⁶⁵ When man regards himself as “the measure of all things,” then he judges himself free to determine, in whatever way he pleases, that most basic of all legal and moral questions, namely, who qualifies as a “person,” as a stakeholder in and beneficiary of the legal and political order.⁶⁶

From an institutional perspective, the claim that “Man is the measure of all things” is anathema to a Catholic university. Indeed, to embrace such a perspective would constitute an abdication of right reason, properly understood. At the same time, sheltering students from this point of view is neither possible nor desirable. Students cannot help but be exposed to the sort of relativism contained in this expression since it is in the very cultural air that we breathe. However, being exposed to something, like a contagion in the atmosphere, is quite different from being made aware of it, having the opportunity to study it critically, and respond to it in an appropriate fashion. Because of their overt commitment to the “promotion of justice,”⁶⁷ any law school that claims a Jesuit identity must guarantee that its students have the opportunity to critically examine the various strains of thought that make human beings “the measure of all things,” that place the human will at the center of existence by treating it as the original source of meaning. Moreover, such a law

62. See, e.g., *VALUES IN A TIME OF UPHEAVAL*, *supra* note 54, at 51 (noting that “neither the Nazi nor the Communist dictatorship considered any specific action in itself as evil and invariably immoral” and indeed, these regimes held that “[w]hatever served the goals of the Movement or the Party was good, irrespective of how inhuman it might appear”).

63. JOHN PAUL II, *ENCYCLICAL LETTER CENTESIMUS ANNUS* ¶ 44 (1991), available at http://www.vatican.va/edocs/ENG0214/_P7.HTM.

64. *Id.*

65. JOHN PAUL II, *ENCYCLICAL LETTER FIDES ET RATIO* ¶ 5 (1998), available at http://www.vatican.va/edocs/ENG0216/_P2.HTM.

66. For a powerful example of how this perspective has played a pivotal role in contemporary American jurisprudence, see John T. Noonan, Jr., *The Root and Branch of Roe v. Wade*, 63 *NEB. L. REV.* 668, 673 (1984) (arguing that the Supreme Court in *Roe v. Wade* “felt free to impose its own notions of reality” such that “the biological reality” of the developing child in the womb “could be subordinated or ignored by the sovereign speaking through the Court”).

67. See *supra* notes 2-7 and accompanying text.

school must ensure that its students are given the chance to consider possible alternatives, including the various alternatives afforded by the Catholic intellectual tradition.

VI. THE EDUCATED LAITY AND HIRING FOR MISSION

It is, of course, the faculty of any school that is primarily responsible for the kind of intellectual engagement that defines the educational experience of its students. Thus, a Jesuit law school that takes seriously its responsibility to promote justice through a rigorous examination of the topic needs to adopt policies for identifying, hiring, and retaining faculty suited to the task. This necessarily includes attracting faculty who are willing to engage the Catholic intellectual tradition in some fashion.⁶⁸

There are undoubtedly a number of ways in which a Jesuit law school could go about constituting such a faculty. However, in all likelihood, a Jesuit law school will not ensure that its students enjoy a meaningful examination of justice and engagement with the Catholic intellectual tradition simply by “counting heads.” That is, a Jesuit law school will almost certainly not provide its students with the kind of intellectual engagement required by its identity merely by hiring faculty who are ostensibly or even professedly Catholic and then assuming that the mission will take care of itself.

Two reasons explain why such an approach is likely to fail. First, and most importantly, “hiring for mission,” as I understand it, is not about hiring persons of a particular religious affiliation.⁶⁹ Instead, it is about identifying faculty candidates

68. Engagement with the Catholic intellectual tradition can take a number of different forms. These different modes of engagement can vary widely, from a whole-hearted embrace of the tradition and constructive participation within it, to a thorough critique of the tradition as a whole, or rejection of some specific theme or claim expressed within it. Certainly a wide variety of perspectives on the many intellectual traditions and schools of thought across the various disciplines are legitimate and welcome parts of academic life in any university. However, in a Catholic university, it cannot be the case that the exclusive or even the predominant mode of engagement with the Catholic intellectual tradition is one of repudiation and critique. If that were the case, then the institution would undermine its very reason for existence. Moreover, because rejection of the tradition in many ways defines the contemporary academic milieu, a neutered Catholic university—a Catholic university that abdicated its responsibility to engage the tradition constructively—would not offer its students an education that would markedly differ from the kind of education available at avowedly secular and non-Catholic universities. Indeed, the vibrant conversation that should define the academic enterprise within and among institutions would be denied an important voice.

69. This is a point I was careful to emphasize in the original article. I specifically said that faculty who can advance a law school’s Jesuit mission “*need not be Catholic*” and that “Jesuit law schools would be poorer institutions if people from other faith traditions were not welcomed and included as colleagues in the project of Jesuit legal education.” Breen, *supra* note 1, at 413-14.

Unfortunately, this emphasis did not prevent some critics from misconstruing the point. For example, shortly after my original article on Jesuit legal education was cited in *First Things*, the *Chicago Daily Law Bulletin* published a story about the piece. See Jerry Crimmins, *Professor on*

who have the knowledge and inclination to “promote justice” through an examination of the topic both in the classroom setting and in their scholarly work. Hiring faculty who are Catholic may help to ensure the Catholic and Jesuit character of the institution in other ways, but the specifically academic mission of the institution is open to all. Indeed, faculty candidates of every religious persuasion or none at all should find a Jesuit law school all the more appealing precisely because it takes the promotion of justice seriously. Second, religious affiliation standing alone is a poor indicator of the requisite knowledge and willingness to take up the educational mission which Jesuit institutions profess. Plainly, the Catholic intellectual tradition has made a vital contribution to the understanding of justice over the past two millennia, and engaging this tradition must be an essential part of the classroom experience at every Jesuit law school. Although it might seem reasonable to assume that individuals who are Catholic in their upbringing or current religious affiliation would be well-versed in this tradition and willing to embrace it in their role as

Quest to Put ‘Catholic’ Out Front, CHI. DAILY L. BULL., Aug. 4, 2006. A few days later, another story appeared in the paper in which Loyola’s dean, David Yellen, and the former chair of the faculty hiring committee, Anne-Marie Rhodes, defended Loyola’s Jesuit identity and its hiring approach. See Jerry Crimmins, *Dean: Loyola ‘Very Much a Jesuit’ School*, CHI. DAILY L. BULL., Aug. 11, 2006. In the article, Professor Rhodes states that some faculty candidates were under the misimpression “that only Catholics were hired” or that non-Catholics did not advance or fit in at the institution. These views reflect a profound ignorance of the nature of Catholic higher education in general and of Loyola in particular. Indeed, when viewed in a less charitable light, one might see these views as reflecting a latent prejudice against Catholic institutions as closed-minded, insular and discriminatory. As should be the case, Professor Rhodes says that candidates were informed that Loyola does “not discriminate on the basis of religious background.” She says that it was her goal “to hire good colleagues. They may be Catholic and they may not be Catholic.” *Id.*

Unfortunately, one might incorrectly infer from these remarks that I am somehow opposed to hiring non-Catholic faculty. I do not believe that a competent reading of what I stated in print—both in the original law review article and in the subsequent newspaper story—support such a conclusion. Indeed, my arguments and claims on the subject are entirely consistent with Professor Rhodes’ stated goal.

In the hiring process, Professor Rhodes insists that the subject of religious affiliation does not come up. “It is not a question we ask. . . . We’re always looking for the best qualified faculty, and issues of religion just do not come out.” *Id.* Certainly, for a variety of reasons, it is improper to bluntly ask a candidate about his or her religious affiliation. Indeed, any move that would make a potential colleague feel unwelcome due to his or her religious belief, or none at all, should be rejected. At the same time, Professor Rhodes’ comments suggest that “looking for the best qualified candidate” is a matter wholly unconnected to the question of religious identity. In fact, empirical studies have shown, not surprisingly, that Catholic faculty are more likely to support a vibrant Catholic identity at the institutions where they work. See D. Paul Sullins, *The Difference Catholic Makes: Catholic Faculty and Catholic Identity*, 43 J. SCI. STUDY RELIGION 83, 83, 86 (2004). Although Professor Rhodes says that questions of religious affiliation are not brought up, what I fear was not brought up is any discussion of Loyola’s Jesuit mission as a meaningful feature in the life of the institution. What I fear is that no mention of the school’s Jesuit identity was made beyond the platitudes of “social justice” and “service for others.”

teachers, such an assumption would, in fact, be highly problematic. The reason why this is so is deserving of some special attention.

There is a refrain that one hears repeated, over and over again, from certain quarters in the Church, that we are fortunate in this country to have a highly educated laity. Indeed, according to Richard McBrien, the United States has “the best educated laity in the entire history of the church,”⁷⁰ and we have the many colleges and universities that operate under Catholic sponsorship to thank for this happy set of circumstances. According to McBrien, we should be grateful to these institutions for helping to create “a more spiritually vibrant and faith-full church.”⁷¹

Although the point does not serve to advance the larger purpose that McBrien intends, it must be admitted that there is some truth to this claim. While the American laity still boasts a large number of people who recently arrived here from other countries,⁷² the Church in the United States is no longer predominantly a church of immigrants.⁷³ Catholics in America attend college and graduate school at rates comparable to the rest of the population.⁷⁴ American Catholics today occupy

70. Richard P. McBrien, *Why I Shall Not Seek a Mandate*, AMERICA, Feb.12, 2000, at 14, 16, available at http://www.americamagazine.org/content/article.cfm?article_id=531. If Father McBrien recites his office as often as he appears to recite this mantra of liberal Catholic orthodoxy, then he is to be complimented, at least for the former. For similar remarks about the American laity, see Tom Roberts, *From the Editor's Desk*, NAT'L CATH. REP., Nov. 14, 2003, at 2, 2, available at http://natcath.org/NCR_Online/archives2/2003d/111403/111403b.htm (quoting Rev. J. Bryan Hehir speaking at Boston College as stating: “[T]he laity needs to say, at every level, ‘We simply won’t accept anything less than adult conversation’ – which is not rebellion or an attempt to defy the church” and that “[Y]ou can’t have a situation . . . where men and women in corporations, universities, politics, in charge of their own lives . . . are not treated as adults in the church. We have in the U.S. today the most educated laity the Catholic church has confronted in 2,000 years.”). A slightly different version of what Father Hehir said can be found in *From This Church Forward: Beyond the Present State of Catholicism*, B. G. MAG., Fall 2003 (statement of Rev. J. Bryan Hehir), available at http://bcm.bc.edu/issues/fall_2003/c21_russert.html. (“[M]y view is, as a kind of simple principle, that we’ve got to treat adults as adults in the Church. We now have in the United States the most educated laity the Catholic Church has confronted in 2,000 years of history. You can’t have a situation where men and women are in charge of their lives, treated as adults in corporations, universities, and politics, and are *not* treated as adults inside the Church.”).

71. McBrien, *supra* note 70, at 16..

72. For a vivid picture of how immigration continues to play an especially significant role in the development of the Church in one region of the United States, see CALIFORNIA CATHOLIC CONFERENCE, PLANNING FOR THE FUTURE OF THE CALIFORNIA CATHOLIC CHURCH: A DEMOGRAPHIC STUDY (2006) (concluding that by 2025 one-third of all Californians will be Catholic, a change that will occur largely through immigration and the higher birthrate among Hispanic Catholics).

73. For a thoughtful overview of the Church’s immigrant history in the United States and the ongoing process of Catholic assimilation into American society, see *generally* PHILIP GLEASON, KEEPING THE FAITH: AMERICAN CATHOLICISM PAST AND PRESENT 35-81 (1987).

74. See, e.g., MARK S. MASSA, CATHOLICS AND AMERICAN CULTURE: FULTON SHEEN, DOROTHY DAY, AND THE NOTRE DAME FOOTBALL TEAM 203 (1999) (stating that “Catholics were, by 1966, more likely to have more years of education and have a higher income than the national

important positions in business, organized labor, the professions, and politics. The recent appointment of John Roberts and Samuel Alito to the Supreme Court (bringing the number of “Catholics,” if not “Catholic jurists,” who sit on the high court to five) demonstrates the relatively newfound prominence enjoyed by what had been, little more than a generation ago, an outlier’s religious sect.⁷⁵

But this fact raises two significant points concerning the faculties at law schools that operate under Catholic auspices. First, if this demographic transition of Catholics from disadvantaged immigrants to highly educated citizens is true, then why aren’t these individuals being recruited to serve on the faculties of Catholic universities and law schools? One study conducted on the religious make-up of law school faculties found that, compared to their representation in the general population, Catholics are grossly underrepresented in the legal academy.⁷⁶ Although this phenomenon may

average, despite the media propagation of stereotypes of hard-hat ‘urban ethnics’”). A recent survey of 112,232 entering first year students attending 236 diverse colleges and universities across the country indicated that Catholics accounted for 28% of entering freshman, the highest percentage of any religious denomination, whereas the mainline Protestant faiths (Episcopalian, Presbyterian, Methodist, and Lutheran) constituted 17% of entering freshmen combined. HIGHER EDUC. RESEARCH INST., UNIV. OF CAL., L.A., *THE SPIRITUAL LIFE OF COLLEGE STUDENTS: A NATIONAL STUDY COLLEGE STUDENTS’ SEARCH FOR MEANING AND PURPOSE* 3, 17 (2005), available at <http://spirituality.ucla.edu/results/index.html>; see also Christian Smith & Robert Faris, *Socioeconomic Inequality in the American Religious System: An Update and Assessment*, 44 J. SCI. STUD. RELIGION 95, 97-98 (2005) (reporting data covering 1998-2000 showing that 21.7% of Catholics held college degrees compared to 16.4% of Southern Baptists, 24% of Missouri and Wisconsin Synod Lutherans, 27% of United Methodists, 39.7% of Presbyterians, 45.5% of Episcopalians, 60.2% of Jews, and 61.1% of Unitarians).

75. See, e.g., Margaret Ramirez & Manaya A. Brachear, *With Alito, Catholics Would Be Court Majority*, CHI. TRIB., Jan. 13, 2006, at C12 (noting the change in the national perception of Catholics since the election of President John F. Kennedy and cautioning against attaching too much significance to a Catholic majority on the Court because of a diversity of views on particular issues by professing Catholics); *The Papal Court*, ECONOMIST, Jan. 28, 2006, at 34, 34 (placing the Alito appointment in the context of electoral politics where Catholics function as swing voters, but likewise concluding that “[t]he court’s Catholic majority is unlikely to vote as a block, even though they were all appointed by Republican presidents”).

For an account of how virulent anti-Catholicism in the United States was regarded as intellectually respectable as recently as the 1950s, see generally JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM* 166-88 (2003) (discussing the overt anti-Catholicism of author Paul Blanshard, Supreme Court Justice Hugo Black, Harvard president James Bryant Conant and others).

76. Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2073 n.23 (1996) (citing James Lindgren, Presentation to National Association of Scholars: Measuring Diversity (Jan. 1996) (unpublished manuscript) (stating that although Catholics and Orthodox Christians make up 26% of the full-time working population they account for only 13.7% of law school faculty, whereas Jews account for only 2% of the population but make up 26.4% of law faculty). To be clear, I do not mean to suggest that these numbers tell the story of Jews excluding Catholics from legal academia based on their religious faith. Rather, at Catholic law schools, this overall pattern suggests either a strong indifference or hostility to the school’s stated mission. In turn, this translates into a lack of interest in candidates who might wish to see the mission fulfilled in a

come as no surprise given the latent but nevertheless real suspicion among academics of religious persons in general and of Catholics in particular,⁷⁷ the relative dearth of Catholic faculty at purportedly Catholic law schools should be surprising. It is explicable only in terms of a definite loss of a sense of mission where “mission” is understood in terms of the conviction that the Catholic intellectual tradition has something valuable to contribute to academic discourse concerning questions of law and justice, and the obvious need for faculty who are knowledgeable about this tradition and so able to participate in this discourse.

In this regard, let me briefly share my own anecdotal experience of faculty hiring at Loyola University Chicago School of Law, an institution that proudly identifies itself as one that embodies the “Jesuit tradition.”⁷⁸ I was hired as an assistant professor in 1996. At that time the faculty was made up of twenty-eight tenured and tenure-track faculty members. Today, in 2007, the Law School has thirty-three such positions. During this eleven year period, Loyola hired thirteen new faculty members on either a tenured or tenure-track basis.⁷⁹ Of these thirteen hires—approximately forty-percent of the Law School’s faculty—only two have been at least nominally Catholic. It is significant to note that the numbers would be even more skewed in this direction if tallies were made of all the candidates who were invited to interview at the Law School, and of prospective candidates to whom offers were made but who, for whatever reason, declined to accept.

What accounts for this seeming pattern in hiring decisions? Is it a matter of deliberate exclusion or just the result of an unfortunate happenstance of events? One way to answer this question is to look at what Loyola has and has not done. The Law School recruitment committee has not actively sought out Catholic intellectuals as possible faculty candidates by, for example, advertising faculty positions in *Commonweal*, *America*, or *First Things*, as some other Catholic law schools have done. Moreover, in the interviews with candidates and colleagues to which I have been privy, candidates have been readily assured that Loyola’s Catholic identity should not be a source of concern, and that its Jesuit identity simply reflects a special interest in “ethics” and “social justice.”⁸⁰ While it may well be the case that a

robust manner. See also David L. Gregory & Charles J. Russo, *Proposals to Counter Continuing Resistance to the Implementation of Ex Corde Ecclesiae*, 74 ST. JOHN’S L. REV. 629, 638 (2000) (asserting that “nominally Catholic law schools are, overtly or instinctively, doing their perverse best to reduce their number of Catholic faculty”).

77. See, e.g., PHILIP JENKINS, *THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE* 34-36 (2003).

78. See Loyola University Chicago School of Law Mission Statement, <http://www.luc.edu/law/about/mission.html> (last visited Oct. 15, 2007).

79. The absence of a larger net gain in the number of faculty during this period is due to the fact that many of these appointments were replacement hires for colleagues who retired, moved laterally to other schools, or who passed away.

80. See Breen, *supra* note 1, app. at 419-31 (appendix collecting self-descriptions of the fourteen Jesuit sponsored law schools, including many references to the respective schools’ interests

conscious decision to avoid creating a law school that is “too Catholic” for their taste may have informed the decision-making of some colleagues, I would be loathe to think that these results derive from some sort of anti-Catholic animus.⁸¹ At the same time, it would be wrong to describe these colleagues’ collective attitude toward Jesuit and Catholic identity as “benign indifference” since indifference is never benign where something truly important is at stake. Instead, I would suggest that the pattern derives precisely from the decision to relegate concerns about “mission” to the operation of clinical programs that serve the poor and disadvantaged. It may also reflect a decision on the part of those who serve on the committee to favor the candidate who has the slightly more prestigious clerkship, or the additional publication or who represents a desired form of diversity over the well-qualified candidate who lacks these characteristics but who might contribute to the mission of the school beyond the boundaries of the clinic.

Second, even if it is admitted that American Catholics are now generally well educated and enjoy some measure of success in the professions and other fields of expertise, it must also be admitted that they do not enjoy the same level of sophistication with respect to the faith they purport to profess. Although this appalling lack of knowledge seems to have escaped the notice of Father McBrien, the point has not been lost on John Cavadini, McBrien’s colleague at the University of Notre Dame and his successor as chairman of the theology department. Indeed, for Cavadini, “the religious [ignorance] of so many otherwise well-educated . . . Catholics is [almost] too familiar to bear mentioning again.”⁸² According to Cavadini, because “catechesis never developed much past the first post Vatican II ‘touchy-feely’ phase,”⁸³ one has come to expect “that even at elite Catholic colleges and universities, entering students will not know what is meant by the ‘Immaculate Conception,’” or the number of natures and persons in Christ and the Trinity, or what is meant by the phrase “Real Presence.”⁸⁴ Perhaps professional courtesy keeps Cavadini from observing that this profound ignorance exists not only in entering students, but in the graduates of elite Catholic colleges and universities, even the bright lights who were once entertained by Father McBrien’s classroom instruction.

in ethics and social justice as proof of their Jesuit identity).

81. I say this not only because living with the consequences of making such an accusation would be difficult, but because I do not believe it to be true. On the contrary, I consider myself blessed to serve with my colleagues at Loyola and I count many of them as good friends.

82. John C. Cavadini, *Ignorant Catholics: The Alarming Void in Religious Education*, COMMONWEAL, Apr. 9, 2004, at 12, 12.

83. *Id.*; see also, SALT OF THE EARTH, *supra* note 54, at 125 (“Our religion instructors rightly repudiated the idea that religious instruction is only information, and they rightly said that it is something else, that it is more, that the point is to learn life itself, that more has to be conveyed. But that led to the attempt to make people like this style of life, while information and content were neglected. Here, I think, we ought really to be ready for a change . . .”).

84. Cavadini, *supra* note 82, at 12.

Again, anecdotally, I can attest to this fact from my own experience of teaching a law school course in Catholic social thought over the past ten years. Although the course typically attracts students from a number of religious backgrounds, the majority of students who enroll tend to be Catholic. Invariably, I have found that these students take the course as much out of a desire to learn more about the content of the faith and the nature of the Church, as to study the Church's social doctrine and its relationship to law. Thus, I find that for some students the class functions as a sort of remedial course in basic catechesis. What makes this situation all the more troubling is that these are students who often attended Catholic parochial or high school, or who graduated from a Catholic college or university.

Thus, even as educated American Catholics are committed to some general notion of the Christian faith and to the community of believers who gather in Christ's name, they remain largely ignorant of both the content of that faith and the nature of the Church founded by Christ, directed toward the Father and sustained by the Holy Spirit. The Church is now, says Mary Ann Glendon, "paying the price for [a] three-dimensional disaster: formation, formation, and formation," that is, "formation of our theologians, of our religious educators, and thus of parents."⁸⁵ The absence of proper formation is in fact a species of malformation. Nature abhors a vacuum and so young Catholics tend to be formed by the culture that surrounds them. The results of this wide-spread malformation, as Glendon bluntly states, are that Catholics "no longer know how to talk about what they believe or why they believe it."⁸⁶

This is especially significant in that it was the willingness and ability to say *why*—to give an account of one's beliefs in a manner accessible to others—that made the faith such a potent source of cultural development. It was a desire to explain *why* the faith was true and *how* these truths connected to the wider world that gave rise to the Church's intellectual tradition in the first instance, a tradition that has included not only explicitly normative subjects such as ethics, politics, and law, but the graphic arts, music, architecture, literature and the natural sciences.⁸⁷

85. Mary Ann Glendon, *The Hour of the Laity*, FIRST THINGS, Nov. 1, 2002, at 23, 27.

86. *Id.* at 25. The situation is actually even worse than the passage in Glendon's article might suggest. That is, the person who no longer understands why the Church believes what she professes to be true may, nevertheless, remain active in the Church. Although the extent of such a person's commitment and participation may vary greatly (from nominal belief and infrequent reception of the sacraments to active involvement in the devotional and charitable life of a parish) it is discernable in some fashion. In fact, many young Catholics wrongly conclude that the Church's doctrine cannot be defended or that it is explicable only in terms of power exercised within a political institution. As a result, many abandon their practice of the faith altogether.

87. For a spirited and wide-ranging account of the crucial role of Christian inspiration in the development of these various arts and disciplines, see THOMAS E. WOODS, JR., *HOW THE CATHOLIC CHURCH BUILT WESTERN CIVILIZATION 1* (2005). See also WALTER KASPER, *THE GOD OF JESUS CHRIST 17* (Matthew J. O'Connell, trans., The Crossroad Publishing Company 1984) (1982) (arguing that the biblical faith in creation as distinguished from the numinous conception of the world in antiquity made science possible: "Only when the transcendence of God had been taken seriously did

The consequences of this colossal failure in catechesis⁸⁸ for Catholic legal education are enormous. Even assuming a desire on the part of Catholic law schools to fulfill their special mission (a somewhat dubious assumption), this failure in formation renders Catholic legal academics—who are otherwise well-educated and well-intentioned—ill-equipped to participate in the kind of cultural and intellectual engagement vitally needed in the academy today. Because they belong to the Saint Thomas More Society and attend the annual Red Mass, they may present a Catholic *face*, but they do not, as David Schindler has said, think with a Catholic *mind*.⁸⁹ They are ill-prepared to connect the content of the faith to the content of the law and legal profession, let alone make this connection in a rigorous and intellectually attractive way.

If, as Cavadini says, we believe “that Catholics should be effective agents of moral change, bearing witness to gospel values in the triple vocation of Jesus as ‘priest, prophet, king’” then “Catholics must have a vocabulary to articulate the values to which they bear witness, the world view and system in which such convictions make sense, [as well as] the reason [the Church] talk[s] about the dignity of human persons.”⁹⁰ As Glendon insists, “American Catholics need to rededicate themselves to the intellectual apostolate, not only for the sake of the Church’s mission, but for the sake of a country that has become dangerously careless about the moral foundations on which our freedoms depend.”⁹¹

The task of a Catholic law school is, of course, education—the passing on of knowledge from one generation of lawyers to the next. *Nemo dat qui non habet*⁹² is a maxim of the law that applies with equal force to legal education as it does to the law of property. Law professors who are unfamiliar with the Catholic intellectual tradition cannot be expected to lead their students in an examination of the meaning of that tradition as it relates to law. Thus, the long term solution to the problem of identity in Catholic law schools lies in hiring for mission—a difficult task that now requires an even more thoughtful and deliberate response precisely because of the

it become possible to experience the immanence of the world, and only after the world had been acknowledged simply as world could it become the object of objectifying scientific study and technical information.”).

88. Notwithstanding Father McBrien’s cheerful rhetoric concerning the laity’s knowledge of the faith, *supra* note 70, empirical studies have confirmed the less optimistic sorts of claims made by Cavadini and Glendon concerning the relative ignorance of Catholics with respect to the faith and their adherence to it. See generally DEAN R. HOGE, WILLIAM D. DINGES, MARY JOHNSON, S.N.D. & JUAN L. GONZALES, JR., *YOUNG ADULT CATHOLICS: RELIGION IN THE CULTURE OF CHOICE* (2001) (analysis of phone interviews of 848 adult American Catholics ages 20-39, plus select intense interviews and focus groups).

89. Cf. SCHINDLER, *supra* note 37, at 147 (“To have a Catholic university . . . it is necessary (also) to develop a Catholic *mind*.”).

90. Cavadini, *supra* note 82, at 12.

91. Glendon, *supra* note 85, at 28.

92. “No one gives who has not.” *BALLENTINE’S LAW DICTIONARY* 842 (3d ed. 1969).

failures in catechesis described above. Indeed, without a faculty committed to the project of Catholic legal education as such, any talk of Catholic identity is utter nonsense.⁹³

Obviously, the process of hiring for mission raises a whole host of issues that are beyond the scope of this essay.⁹⁴ As noted above, merely counting the heads of nominally Catholic faculty members misconstrues the point of hiring for mission and is discriminatory in a decidedly non-Catholic way. To exclude a person from consideration for a faculty position merely because he or she is Lutheran, Jewish, Muslim, or atheist would be contrary to Catholic principles concerning justice and the common good. Moreover, given the failures in catechesis outlined above, an approach which simply focused on a candidate's Catholic affiliation would in any case fail to build a faculty equipped to advance the mission of the school, properly understood. Suffice it to say that implementing a plan for hiring Catholics and non-Catholics⁹⁵ who are genuinely interested in the law school's mission as such, requires

93. The old saying about rearranging the chairs on the deck of the Titanic comes to mind, although the analogy fails in that the ship (i.e. the law school) will not necessarily sink—only its Catholic identity will be lost. The vessel may stay afloat in that the law school will continue to function, but with a crew that has no interest in the original destination. It will now sail in a very different direction.

One simply cannot have a genuinely Catholic university without Catholics, or more correctly, Catholic intellectuals. Without this intellectual presence—asking the questions prompted by the tradition and testing the answers that it presents—one may have a very fine university but it will not be a Catholic one. In the same way, one may have a very fine garden, full of many interesting fauna, but if no animals are present, then one will not have a zoological garden. Catholic intellectuals are the animals, as it were, that need to be present for a university to be genuinely Catholic.

Similarly, if one wants to assemble a successful baseball team one needs to recruit baseball players—people who not only possess the necessary physical skills, but people who know and love the game and are familiar with its traditions, in short, people who value baseball. If instead one chooses to recruit cricket players because they seem to know something about throwing and fielding a small, hard ball, and hitting that ball with a bat, and they appear to wear the uniform just as well, then one shouldn't be surprised at the results. That is, if one assembles a team of players who know very little about baseball and who do not see the value and enjoyment of baseball as a sport, then one shouldn't be surprised to find the players ignoring that game and playing a very different one, notwithstanding the fact that the club advertises itself as a baseball team.

94. See Amelia J. Uelmen, *An Explicit Connection Between Faith and Justice in Catholic Legal Education: Why Rock the Boat?*, 81 U. DET. MERCY L. REV. 921, 936 (2004) ("Finding law faculty who have the background, the interest, and the guts to draw out the intellectual connections—'hiring for mission'—is perhaps the most daunting task for any school that might consider defining their mission as described above.").

95. Although I have focused on the hiring of specifically Catholic faculty in most of the text above, as I stated in the original article, the goal of hiring for mission is not a mere assemblage of people who happen to share a common religious affiliation. See Breen, *supra* note 1, at 413-14. Instead, the goal is to gather a community of scholars—Catholic and non-Catholic alike—who recognize the value of the mission and who wish to advance it through their teaching and writing. In this regard, the formal characteristic of religious affiliation or church membership is insignificant compared to the substantive commitment to engage the tradition.

a willingness to candidly discuss that mission with those who seek to join the faculty. Where those responsible for faculty hiring are unable to engage in such a conversation and indeed to show genuine enthusiasm for the project of Catholic legal education,⁹⁶ then the exercise of leadership—meaning specifically the university president and provost or chief academic officer—will be crucial. Under the circumstances in which many Catholic law schools find themselves today, the exercise of such leadership is necessary to ensure that the mission of the school is not discarded *sub silentio*.

VII. INVITING AND ENABLING CURRENT FACULTY TO PARTICIPATE IN THE MISSION

Hiring is about the future. What about the present? What about the current faculty at law schools operating under Catholic auspices? Many, if not most of these colleagues are tenured and likely have been involved in some discussions concerning Catholic identity at some point in their careers. The legal constraints posed by tenure prevent even a newly converted, mission-driven school from simply dismissing these individuals, and doing so would be unjust in any case. As a fundamental matter, Catholic moral teaching prohibits treating persons as things, as objects that can be discarded. Rather, as persons, faculty members of all persuasions must be respected for who they are and the gifts they bring to the common enterprise of legal education. Thus, a reinvigorated Catholic and Jesuit identity must not mean that non-Catholic colleagues should be somehow less valued than their Catholic counterparts. Instead, the Catholic law school truly committed to fulfilling its mission must find some way of welcoming all faculty, regardless of religious background, to share in the conversation and invite them to collaborate in the mission. Doubtless in some cases this invitation will be met with rejection, but the effort must be made. Indeed, the risk of rejection has always accompanied the Christian as he or she has approached the world.⁹⁷ To fail to make the invitation would demonstrate a lack of fidelity to the mission on the part of the institution and would ensure perpetuation of the status quo.

What I propose is that the law school host a faculty seminar or colloquium to introduce faculty to the Catholic intellectual tradition and explore ways in which it might be introduced into the curriculum. Such a gathering could be jointly hosted by a group of Jesuit and Catholic law schools, across the country or within a given region, that are now seriously interested in recovering the heart of their identity, schools no longer swayed by the cheerful reply that Catholic identity is thriving on campus: “Just look at our enrollment in service projects!” Such a seminar or colloquium might be conducted in an intense fashion, during, for example, two or three weeks over the summer, or it might take place on a weekly basis over the course of one or two semesters.⁹⁸ Jesuit law schools state that their mission is the promotion

96. See *supra* notes 68-70 and accompanying text.

97. Cf. *Matthew* 10:11-14; *Acts* 13:48-52.

98. There is no established model for encouraging the kind of engagement suggested in this

of “justice” yet there are many perspectives on justice that differ radically from one another and from those found within the Catholic intellectual tradition. To fulfill their stated mission, and to make the seminar a rich, textured intellectual experience, as well as one more palatable to faculty hostile to Catholic identity, Jesuit law schools may wish to introduce the Catholic intellectual tradition alongside competing theories of justice. For example, selections from the work of Louis Kaplow, Steve Shavell, and Richard Posner⁹⁹ might be juxtaposed with Mark Sargent’s stinging critique of Law and Economics written from the perspective of Catholic social thought,¹⁰⁰ and a piece by William Eskridge or Andrew Koppleman¹⁰¹ in favor of same-sex marriage might be read along side an article by Gerry Bradley or Robert George.¹⁰² In this way, faculty may gain some exposure to contemporary Catholic legal thought and an appreciation for the wide variety of perspectives on questions of law and justice vying for attention within the academy.

essay. A program known as “Collegium,” begun by faculty at Fairfield University and now based at the College of the Holy Cross and affiliated with the Association of Catholic Colleges and Universities, was developed in response to the problem of maintaining mission given the difficulties many schools have encountered in attracting “new faculty who can both articulate and expand the vision of the Catholic intellectual tradition.” See Collegium: About the Program, <http://web.accunet.org/collegium/about.htm> (last visited Oct. 15, 2007). The program is undoubtedly well-meaning in that it genuinely welcomes faculty from all faith traditions, however, its presentation of the Catholic intellectual tradition is plainly inadequate. At best, what Collegium provides is not an introduction to the Catholic intellectual tradition, but only an introduction to an introduction. Indeed, given the very limited reading that the program requires of its participants, something more substantive, rigorous, and challenging is needed. Moreover, because it involves faculty from across all disciplines, Collegium lacks the focus necessary for any one faculty member to see the deep relevance of the tradition to his or her own work. Aside from Collegium, other efforts have tended to focus on the issue of faith in public life or the particulars of Ignatian spirituality. See, e.g., Uelmen, *supra* note 94, at 937 n.34 (describing Fordham Law School’s ongoing faculty colloquia on religion that began in 2001). Surely whatever new initiatives are begun that are designed to engage existing faculty in a more robust understanding of Catholic and Jesuit identity should build on what has already taken place without being restricted to past efforts. For a thoughtful collection of essays on the distinctive approach that Jesuits have traditionally brought to education, an approach that is distinct from but not exclusive of the contemporary emphasis on service, see MICHAEL J. BUCKLEY, S.J., *THE CATHOLIC UNIVERSITY AS PROMISE AND PROJECT: REFLECTIONS IN A JESUIT IDIOM* (1998).

99. See, e.g., Louis Kaplow & Stephen Shavell, *Fairness Versus Welfare: Notes on the Pareto Principle, Preferences and Distributive Justice*, 32 J. LEGAL STUD. 331 (2003); Richard A. Posner, *Values and Consequences: An Introduction to Economic Analysis of Law*, in CHICAGO LECTURES IN LAW AND ECONOMICS 189 (Eric A. Posner ed., 2000).

100. Mark A. Sargent, *Utility, the Good and Civic Happiness: A Catholic Critique of Law and Economics*, 44 J. CATH. LEGAL STUD. 35 (2005).

101. See, e.g., William N. Eskridge, Jr., *Equality Practice: Liberal Reflections on the Jurisprudence of Civil Unions*, 64 ALB. L. REV. 853 (2001); ANDREW KOPPLEMAN, *THE GAY RIGHTS QUESTION IN CONTEMPORARY AMERICAN LAW* (2002).

102. See, e.g., Gerard V. Bradley, *Same-Sex Marriage: Our Final Answer?*, 14 NOTRE DAME J.L. ETHICS & PUB. POL’Y 729 (2000); Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301 (1995).

In conducting such a seminar or colloquium, the effort must be made to connect these various perspectives on justice to the central doctrinal courses of the law school in much the same way that Deborah Rhode has shown how discussions of legal ethics can be introduced across the curriculum.¹⁰³ Indeed, the successful implementation of a “pervasive method” in which discussions of justice are integrated into substantive courses throughout the curriculum will be a necessary component of any serious attempt to fulfill the Jesuit mandate of promoting justice and forming “men and women for others.”¹⁰⁴ At the same time, the use of such a “pervasive method” cannot serve as a substitute for a required course in jurisprudence.¹⁰⁵ Indeed, the background provided by such a course is needed in order to make discussions of justice in substantive courses meaningful, thought-provoking and worthwhile—in order to elevate them above the casual, speculative chatter of college sophomores in late night bull sessions.

Obviously, conducting such a faculty colloquium will require good faith on the part of those colleagues who participate. Although a Catholic law school cannot prevent its faculty members from responding in bad faith to this invitation, it can do much to engender good will. Law professors know from experience and personal reflection that legal academics are independent by nature. Thus, if participation in such a seminar were required by the dean or university administration, faculty would likely respond with the same enthusiasm that third-year law students demonstrate in required third-year classes. People generally respond better to positive incentives than to coercive measures. Thus, to encourage a positive sense of collaboration, the school might consider linking participation in the seminar to course relief in the following semester, or to the award of a larger summer research stipend. The school might even consider hosting the summer seminar in a desirable location, away from the university, in much the same way that bar-sponsored continuing legal education programs are conducted. Although each of these approaches would come at some price to the law school, the cost of maintaining the status quo—the price of doing nothing while continuing to portray Jesuit legal education as distinctive in its promotion of justice—is the price of mendacity.

103. See, e.g., DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998) (setting forth materials for discussing questions concerning professional responsibility that can arise in civil procedure, contracts, property, tax, torts, corporations, family law, and criminal law).

104. See *supra* notes 5-7 and accompanying text.

105. See Breen, *supra* note 1, at 400-03. In the field of legal ethics, it is common knowledge that students at schools that claim to teach legal ethics by the “pervasive method,” but do not require a course devoted to professional responsibility, do not learn the subject.

VIII. CONCLUSION

During the past thirty years, legal education has undergone enormous change. Some of these changes have brought tremendous benefits to law students, to the practicing bar, and to the society that lawyers serve. However, this period has not been a time of unmitigated improvement. Chief among the negative changes that have taken place is the loss of law schools that are unapologetic about their Catholic identity. Although the work of the Society of Jesus was once known for its boldness,¹⁰⁶ in the post-Conciliar period, Jesuit legal education has been characterized by timidity, by an attempt to “fit in” with the academic mainstream, all the while claiming to provide a “distinctive” educational experience.¹⁰⁷ The new project of Catholic identity in legal education is not simply an effort to recover the past. Rather, it is an effort to make the future, to create a new kind of law school—one that not only offers students the opportunity to become competent lawyers through rigorous study, but one that challenges them to consider the nature of law and the fundamental premises of our legal order. It also invites them to imagine a legal order built on the premises of the dignity of the human person and the common good that emerge from an engagement with the Catholic intellectual tradition.

This project in particular and legal education in general would surely benefit from the leadership of the Society of Jesus and the law schools that operate in its name. Will the Society recover its roots? Will its members show the boldness that once typified all of their apostolic work including their educational apostolate? The call has been issued. What will be their answer?

106. See, e.g., JOHN W. O'MALLEY, *THE FIRST JESUITS* (1993); WILLIAM V. BANGERT, S.J., *A HISTORY OF THE SOCIETY OF JESUS* (2d ed. 1986).

107. See Barkan, *supra* note 2.

