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The Lord in the Law: Reflections on a Catholic Law School

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THE LORD IN THE LAW: REFLECTIONS ON A CATHOLIC LAW SCHOOL

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What is a Catholic law school?
At the very least it should not be anti-Catholic!

The pervasive attitude in today's Catholic law schools not only ignores the Catholic heritage, but also rejects the religious reasoning underpinning the law.[1] As a result, today's lawyers are robbed of a full understanding of the law and its origins. This understanding is critical to the future of law. No dispute exists that the law should be just, reflecting what is good and right. However, this task becomes insurmountable when those individuals who develop and shape the law, such as lawyers, judges, and legislators, lack the basic moral development necessary to understand what the law should reflect. Nurturing young lawyers' moral development should be the business of Catholic law schools to ensure a future of fair, equitable, and just laws.

This reflection piece will examine the history of the Catholic law school as well as the separation of Church and State. More importantly, this piece will analyze what morality is, its role in our laws, and why it should be incorporated into our law schools. Finally, this work will show methods in which Catholic attitudes should be incorporated with the black-letter law currently taught in law-school classes as well as incorporated into further courses reflecting morality that should be offered in a Catholic law school.

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1. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (finding that rights protected in America have been endowed by Creator).

The rise of universities dates back to the time of Charlemagne, when no line existed between Church and State.[2] When the people violated God's law they were punished gravely by the Benedictine Monks, who enforced the laws of the period. However, many of the guilty were unaware of the laws for which they were being convicted. After all, at that time, only educated priests and clergy were able to read the law of God. In an attempt to dispel needless heresies, Dominican preachers went out into the land to enlighten commoners with the word of the Lord.[3] Similarly, Franciscans went into the marketplace to educate the people.[4] As time passed,

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2. *See* JOHN H. NEWMAN, UNIVERSITY SKETCHES 144 (Michael Tierney ed., 1964) (discussing early universities and referring to them as schools of Charlemagne). The aim of this era "was to make the Empire Christian, not to revolutionize it; and, without a revolution of society, the typical form of a Christian polity could not have been given to the institutions of Rome." *Id.* at 145. Charlemagne sought to reconcile "Revelation" and "Reason," and, of this purpose, Newman states, "whether [Charlemagne's] school at Paris be called a University or not, he laid down principles of which a University is the result, in that he aimed at educating all classes . . . ." *Id.* at 146.

3. R.W. SOUTHERN, WESTERN SOCIETY AND THE CHURCH IN THE MIDDLE AGES 280 (1970).

> The origin of the Dominican organization goes back to a chance encounter in Montpellier in 1206 between a Spanish bishop returning from Rome and three Cistercian abbots whom Innocent III had charged with the task of combatting heresy in Languedoc. The Cistercian mission was having no success, and a member of the bishop's household, an Augustinian canon called Dominic, saw the reason: the three abbots were moving around with the heavy pomp of ecclesiastical dignitaries. These trappings . . . [were rejected by] people disposed to regard the whole establishment as an affront to the true religion, whatever that might be. To succeed (so Dominic saw) they must adopt a simpler, more "apostolic," life. . . . [In 1217] Dominic and his small band of preachers held a meeting at Toulouse from which they dispersed in all directions: four went to Spain, seven to Paris, four stayed in Toulouse, and Dominic himself went to Rome. . . . [S]omething of the world-wide scale of later operations was already envisaged in the wide scattering of the little band. Also, the high proportion sent to Paris shows an immediate appreciation of the role which the universities were to play in the recruitment and development of the new Order.

Id. at 279-80.

4. *Id.* at 281. The aim of St. Francis is less clear than that of Dominic, but "it seems to have consisted mainly of a call to total renunciation—selling everything, giving everything to the poor, giving up every form of worldly glory, wealth, aid, comfort, organization, everything, 'to live according to the form of the holy Gospel.'" *See id.* (quoting J.R.H. MOORMAN, SOURCES FOR THE LIFE OF ST. FRANCIS OF ASSISI 51-52 (1940)).

> [T]he Franciscans borrowed large parts of the Dominican organization and followed the Dominicans into the universities. The Dominicans on the other hand borrowed the Franciscan attitude to poverty which gave them much of their urban strength. In a large sense the Dominicans provided the intellect and the Franciscans the instincts which led to universal success. Without their rivals the Dominicans would perhaps have remained a relatively small order dedicated to a single task of combatting heresy;

centers for these instructions developed. Today's universities date back to these denominational centers of instruction as seen in Bologna, Oxford, and Paris.[5]

Eventually, these schools branched out into more secular fields of study. When the government and the Church made their final break in the thirteenth century, law schools ironically could no longer find room for religion or morality in their curricula. This occurrence was true even for the Catholic law schools. United States Supreme Court Justice Oliver Wendell Holmes, in his address, *The Path of the Law*, found that in the study of the law:

> The first thing . . . [that is needed is] a business-like understanding of the matter so as to understand its limits. . . . [T]herefore . . . it [is] desirable at once to point out and dispel a confusion between morality and law, which sometimes rises to the height of conscious theory, and more often and indeed constantly is making trouble in detail without reaching the point of consciousness. . . . [For the] learning and understanding [of] the law . . . you must definitely master its specific marks, and it is for that that I ask you for the moment to imagine yourselves indifferent to other and greater things. . . . I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by

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without the Dominican example the Franciscans might not have survived at all. Standing together against the rest of the world, while bitterly contesting every inch of the ground occupied by the other, they grew with astonishing speed.

Id. at 284.

5. *Id.* at 277.

By the beginning of the thirteenth century the universities of Paris and Bologna were the leading intellectual centres in Europe. They were the places where nearly all the new ideas in theology and law were to be found . . . . Oxford was just beginning to get an international reputation . . . and in the course of the century several new universities would be founded . . . especially in Italy, France and England. But apart from these places that could technically be called 'universities', there were many other schools with a high reputation . . . which provided organized teaching and a recognized test of performance in all the known areas of learning, [and] had decisively taken the place of monasteries as centres of intellectual effort and attainment by the beginning of the thirteenth century.

Id.

> ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.[6]

Holmes's language indicates that he thought law would best be understood if studied in its pure form, that the law became clouded only by religious theory and morality. Holmes's theory would require the teaching of law in a vacuum, disregarding its complexities, nuances, and effects. In reality, ignoring the complexities of the law for the sake of understanding the law is akin to discarding a Degas and keeping its frame in the name of understanding art. To do so eviscerates the law of its substance, essence, and applicability.

Holmes's works are deeply rooted in the theory of positivism, as are American laws.[7] Although the positivists find no inherent relationship between law and morality, Holmes recognized the relationship, but viewed it as an unavoidable process of history to be given little attention.[8] Nevertheless, Holmes's "morality"—defined by social mores, ethical standards practiced and believed by neighbors, and "fossil records of a good deal of history"—was the origin, at least in part, of American law.[9] Thus, Holmes did not view morality from a Catholic viewpoint; that is, a self-actualizing

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6. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458-59, 464 (1897); *see* Walter H. Bennett, Jr., *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45, 48-49 (1986) (quoting Holmes's philosophy under American law as example of legal positivism).

7. *See* James R. Elkins, *Moral Discourse and Legalism in Legal Education*, 32 J. LEGAL EDUC. 11, 32-34 (1982) (discussing effect of Holmes's argument that law should be separated from morality and theory of legal positivism on collective consciousness of legal professionals and educators).

8. *See* Walter H. Bennett, Jr., *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45, 50 (1986) (noting that Holmes treated relation between morality and law as unimportant issue for lawyers and as topic unworthy of study in law school); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("The law is the witness and external deposit of our moral life.").

9. *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459-64 (1897) (treating morality as ethical rules practiced by individuals within community); *see generally* ROSCOE POUND, LAW AND MORALS 1, 43, 89 (photo. reprint 1969) (1924) (reviewing history and analytical and philosophical views of law and morals); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 635-38 (1958) (discussing definition of morality); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 621-29 (1958) (supporting utilitarian view of separating law and morals).

viewpoint that focuses on becoming more human through protecting human rights given to us by God, not by the law.[10]

This concept of self-actualization can best be understood through Plato's ultimate plane. For Plato, reality was not in the world around us; rather, we were mere reflections of what was real. For example, imagine two men at a racetrack watching a horse race. "Lucky," the fastest horse in the state, sprints down the track to claim the trophy. One man turns to the other and says, "Wow, now that's a real horse." What he really means is that Lucky is as close to perfection as any horse in this world can be. The perfect horse, one as fast as the wind with perfect teeth, coat, and hooves, simply does not exist on this planet, but the closer one comes to emulating this image of the perfect horse, the more real the horse becomes.

Just as there are no perfect human beings, individuals become more and more human as they come closer and closer to that image of the perfect human being. The perfect human, as taught through the Catholic religion, is one who follows Jesus's mandate to "love your neighbor as yourself."[11] When performing this act of love, no room remains for discrimination or any other ill will toward others. The word of God directs us to love other *humans* as we would ourselves, because humans possess something innate given by God, above all other animals, which is to be respected. We will refer to this something as their "humanness." When we respect each other or another's "humanness," we become more human. However, we often fail to love our neighbors and respect these innate human qualities. By failing to treat others always as equals, we can never reach our ideal or, in other words, become the perfect human. We console ourselves by understanding that no person, except Jesus, could ever be perfect, and we continue the self-actualizing process, coming as close to the ideal as possible.

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10. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (stating that we "are endowed by . . . [the] Creator with certain unalienable Rights; that among these are Life, Liberty, and the pursuit of Happiness").

11. *Mark* 12:31 (Saint Joseph Edition of New American Bible). The problem with the world today is that we focus on ourselves rather than on our neighbor, and in order to self-actualize our planet, to make it a more perfect place, we must look to others, help the poor, the sick, and the needy while ridding ourselves of greed. *See* ROBERT N. BELLAH ET AL., HABITS OF THE HEART 290 (1985) (noting self-centered society in America).

This Catholic self-actualizing process, respecting one another and treating all people as equals regardless of wealth, race, national origin, sex, religion, or other characteristics, is paralleled in the laws of any democracy. But the laws, even those laws of a democracy, do not always perfectly parallel the Catholic self-actualizing morality. Without such moral analysis by lawyers, judges, and legislators, the legal system will suffer.

Holmes is justified in believing the study of law will be simplified if void of moral deliberation. But Catholics must ask if the consequence is worth the loss. The benefits of a deep moral discourse, which are lost in pure legal analysis, are illustrated in the novel about a young boy who labors to choose between protecting a friend's inherent human rights and respecting social norms and dictates of the law. This boy's name is Huckleberry Finn.

> And then think of *me*! It would get all around that Huck Finn helped [Jim, a slave] to get his freedom; and if I was ever to see anybody from that town again I'd be ready to get down and lick his boots for shame. . . . [I]t hit me all of a sudden that here was the plain hand of Providence slapping me in the face and letting me know my wickedness was being watched all the time from up there in heaven, whilst I was stealing a poor old woman's [slave] that hadn't ever done me no harm. . . . So I was full of trouble, full as I could be; and didn't know what to do. At last I had an idea; and I says, I'll go and write the [slave's owner and tell where he is]—and *then* see if I can pray. Why, it was astonishing, the way I felt as light as a feather right straight off, and my troubles all gone. So I got a piece of paper and a pencil, all glad and excited, and set down and wrote[.]
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> . . . .
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> I felt good and all washed clean of sin for the first time I had ever felt so in my life, and I . . . laid the paper down and set there thinking . . . over our trip down the river . . . and then I happened to look around and see that paper. *It was a close place. I took it up, and held it in my hand. I was a-trembling, because I'd got to decide, forever, betwixt two things, and I knowed it. I studied a minute, sort of holding my breath, and then says to myself:*
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> *"All right, then, I'll go to hell"—and tore [the letter] up.*[12]

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12. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 313-15 (Grosset & Dunlap 1982) (1884) (emphasis added); *cf.* Walter H. Bennett, Jr., *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45, 56-58 (1986) (emphasizing deeper level of individual conscience that exists between morality and law). The Bennett article quoted

Here, Huck's analysis of the law and community norms finds an importance in protecting his companion's human rights—rights that were not protected by the law at that time, but that were innate in Jim as a human being. As Huck begins to realize Jim's "humanness," while reflecting on their journey down the Mississippi, he feels naturally compelled to protect him.

Without knowing it, this young boy stumbled upon the true meaning of morality. The law today protects human rights without an examination of ethics; however, if Huck at that time had looked only to the law unclouded by morals for his answer, grave injustices would have been committed. While it is always easier to look at legal theory alone, unclouded by moral considerations, by doing so lawyers sacrifice what is good, perpetuate unjust laws, and stunt the moral growth of our society as a whole. Fortunately for Jim, Huck was not seduced by such effortless solutions.

Although Huck clearly owed a humanitarian duty to Jim to respect and promote his human rights, in his process, as in the law's process, Huck balanced these rights and duties against rights and duties owed to other individuals. Huck, as a moralistic individual, clearly chose the correct path. However, the law often stumbles when it seeks to choose between such paths, because often in the law the protection of one person's rights will infringe upon another's similarly valuable rights, as seen in affirmative action[13] and abortion cases.[14]

Huck Finn, but for a very different reason. Walter Bennett felt that social norms were a type of morality, distinguishable from natural-law morality, a point not taken in this essay.

13. *See* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 511 (1989) (striking down city affirmative action plan for awarding public contracts). In attempting to compensate African-Americans for past discrimination, the city of Richmond, Virginia, required construction contractors who had been awarded city contracts to subcontract at least 30% of the work to minority businesses. *Id.* at 477-78. The Supreme Court in *Richmond* found such set-asides to be unconstitutional as infringing on fundamental rights of others by violating the Equal Protection Clause. *Id.* at 511.

14. *See* Roe v. Wade, 410 U.S. 113, 129, 153 (1973) (finding right of privacy to be broad enough to encompass woman's decision of whether to terminate pregnancy). In balancing the fetus's right to life against the mother's right to have control of her body, the Court established that the mother's rights prevail over those of the fetus. *Id.* at 158-59. This result does not reflect the Catholic Church's teachings. The great controversies surrounding the abortion debate exemplify the deep moral analysis underpinning the law, and a shift in the Court's position to allow greater restrictions on abortion appears to be occurring. *See* Webster v. Reproductive Health Serv., 492 U.S. 490, 511 (1989) (holding state statutory ban on use of public employees and facilities for performance or assistance with nontherapeutic abortions to be constitutional). However, the Clinton administration,

Huck's analysis, in which he transcended the law of the time to find the correct path, fortunately is not foreign to the legal system; in fact, it is all part and parcel of the legal process—how "bad laws" are overturned and give rise to "good laws." "Bad laws" are, in this context, laws that denigrate human dignity by failing to protect innate human rights. The United States Supreme Court recognized one such "bad law" when overturning *Plessy v. Ferguson*[15] in *Brown v. Board of Education.*[16] Chief Justice Earl Warren in *Brown* noted that applying *Plessy's* "separate but equal" analysis to school segregation was "inherently unequal,"[17] in that "intangible considerations" affected the segregated students' mental state and resulted in poorer scholastic performance.[18] Although unable to describe what these "intangible considerations" were, the Court found them to degrade mentally the African-American children and, therefore, to affect their school work.[19] The Court further found that no room existed in the field of public education for such badges of inferiority,[20] in spite of strong contrary results in histori-

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seeking to preserve *Roe*, has brought the Freedom of Choice Act before the legislature. The Freedom of Choice Act of 1993 is designed to "protect the reproductive rights of women" by restricting states' ability to legislate against abortions. The purpose of the proposed legislation is to establish statutorily the same limitations as provided by *Roe*, including the strict scrutiny standard of review as applied by the Supreme Court from 1973 to 1988. H.R. 1068, 103d Cong., 1st Sess. (1993); S. 25, 103d Cong., 1st Sess. (1993).

15. 163 U.S. 537 (1896). The Court decided that separate railway cars were legal and that any feeling of inadequacy or oppression suffered by African-American passengers was solely attributable to themselves, for Caucasian passengers were equally prohibited from riding in railway cars reserved for African-Americans. *Id.* at 551-52. The Court blamed the victims for the violation, as purveyors of injustice often do—a tendency that continues today in rape and other assault cases. The basic fallacy in the *Plessy* Court's reasoning was its failure to recognize any badge of slavery.

16. 347 U.S. 483 (1954).

17. *Brown*, 347 U.S. at 495.

18. *Id.* at 493-94.

19. *Id.* at 493.

> In *Sweatt v. Painter* [338 U.S. 865 (1949)], in finding that a segregated law school for [African-Americans] could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school. . . ." Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a *feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.*

Id. (emphasis added).

20. *Id.* at 495; see *Plessy*, 163 U.S. at 551 (noting plaintiff's argument that forced separation by race stamped African-Americans with "badge of inferiority").

cal precedents.[21] The *Brown* Court did not look to the black letter of the law unclouded by moral conscience; its interpretation was not without recognition and respect of innate human rights, nor without protection of human dignity as legal positivists would have it. Rather, the Court focused on realizing the children's "humanness" and promoting their innate human rights. In its holding, the Court alluded to a type of dignity that every human possesses and, in its decision, aimed to protect this dignity, finding that an infringement on that dignity, as seen in *Plessy*, was wrong. A strict adherence to precedent, unclouded by moral analysis (that is, a legal interpretation without recognition of the self-actualizing morality instinctive to the law), would have precluded such rectifying decisions as *Brown* and the obliteration of "bad law" such as *Plessy*. Such a result would resound in the halls of *in*justice.

Clearly, the law must examine morality in light of the human person in order to develop sound, true, and just rules. Accordingly, students of the law must do the same. All too often the divorced-from-morality legal theory in law schools produces lawyers who are no more than legal Cyrano de Bergeracs[22] and who, time and time again, have made immoral choices in their practices.[23] This result is caused by American law schools' applying only an instrumental approach to the law with a "tough-minded" and analytical attitude toward legal tasks and professional roles. The schools believe that people, by the application of reason and the use of democratic processes, can make the world a better place. Students are taught to be no more than "hired guns" who are to be indifferent, detached, and insensitive to human character and

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21. *See, e.g.*, *Plessy*, 163 U.S. at 542, 552 (affirming lower court's opinion upholding segregated-railroad-car statute as constitutional); *United States v. Stanley*, 109 U.S. 3, 21 (1883) (stating that act of mere individual—owner of an inn, public conveyance, or place of amusement—refusing accommodations to African-Americans cannot be justly regarded as imposing badge of slavery or servitude); *Roberts v. City of Boston*, 59 Mass. (5 Cush.) 198, 210 (1849) (upholding state statute providing for race-based segregation of schools).

22. *See* Walter H. Bennett, Jr., *Making Moral Lawyers: A Modest Proposal*, 36 CATH. U. L. REV. 45, 47 (1986) (noting basic tenet of legal education system through Socratic method. "[L]aw school professors could turn unmolded neophytes into legal Cyrano de Bergeracs.").

23. *See* Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 LOY. L.A. L. REV. 81, 81 (1991) (finding that American legal system encourages immoral and unscrupulous behavior by attorneys); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 554 (1991) (stating that lawyers perform amoral and even immoral acts for clients that they would not perform otherwise).

human problems. Subsequently, these students may develop into social engineers lacking human concerns. As Karl N. Llewellyn once said, "Compassion without technique is a mess; and technique without compassion is a menace."[24] Those persons who are part of the Catholic community have a duty to society to abolish this menace and to equip novice lawyers with the tools to address complex moral issues. Such tools can best be crafted in the classroom. After all, although unrecognized by many legal scholars, morality does play a role in the history of our law.

Even H.L.A. Hart and Justice Oliver Wendell Holmes, adamant positivists, recognized that "[o]ur law is made by individuals conditioned by the Western moral tradition, which draws upon Judeo-Christian values . . . [and that] [l]aw as the principal means of governing relationships inevitably has substantial moral consent."[25] Public leaders have espoused this mentality since the beginning of our nation. George Washington, for one, in his Declaration of 1796, stated that religion and morality "were indispensable supports [of] all the dispositions and habits which lead to political prosperity."[26] This sentiment reflected the continuing potency of republican ideals at the end of the eighteenth century. "Washington and his listeners naturally looked to religion as a crucial source of this virtue" of morality.[27] Similarly, John Adams asserted that "we have no government armed with power capable of contending with human passions unbridled by morality and religion. . . . Our

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24. *See* Roger C. Cramton, *Beyond the Ordinary Religion*, 37 J. LEGAL EDUC. 509, 510 (1987) (quoting Karl N. Llewellyn, Cramton's mentor).

25. Paul G. Haskell, *Teaching Moral Analysis in Law School*, 66 NOTRE DAME L. REV. 1025, 1029 (1991); *see* H.L.A. HART, LAW, LIBERTY AND MORALITY 1-2 (1963) (stating that morals influenced development of law and suggesting that affirmative answer may also be given to converse question of whether law influenced development of morality). Despite recognizing morality's effect on the law, Hart views the relationship between law and morals quite differently. *Id.*; *see* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (recognizing connection between law's history and moral development of human race and emphasizing difference between law and morals for single purpose of learning and understanding law).

26. George Washington, *Farewell Address (1796)*, *in* 1 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 205, 212 (1897).

27. *See* Timothy L. Hall, *Religion and Civic Virtue: A Justification of Free Exercise*, 67 TUL. L. REV. 87, 87 (1992) (emphasizing role of religion and morality in republican ideals in late 1700s that shaped participatory democracy).

Constitution was made only for a moral and religious people. It is wholly inadequate for the government of any other."[28]

It is peculiar that a nation with its laws so firmly rooted in religion and morality would, years later, virtually prohibit any moral analysis in its laws or law schools. This phenomenon can most likely be explained by the First Amendment's constitutional provision that government shall not promote or infringe upon religion.[29] But the founders never intended that the government and laws be amoral. To the contrary, morality has been the foundational cornerstone of our Constitution. As John Adams noted, this moral consideration is intrinsic in the constitutional guarantees of "life, liberty, [and] property."[30] Similarly, the Constitution, by protecting individual rights in the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment, requires recourse to moral principles in order to determine the law.[31] Some people still think the founders of our nation never intended to involve moral discourse in our laws; however, it would be particularly bizarre that a country which founded its laws void of moral analysis would imprint upon every penny, nickel, dime, and bill the words "In God We Trust." Thus, it seems apparent from our history that law was created to reflect morals, but the question remains: what morals should it reflect?

Modern philosophers agree that morality is realized only when human dignity is preserved. Such preservation can be obtained through avoiding harm, helping others, keeping promises, telling the truth, and giving to each other what is due, also known as the giving of justice.[32] Such ideals are completely consistent with the

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28. JOHN ADAMS, *Letter to a Unit of the Massachusetts Militia (1798)*, *in* 9 THE WORKS OF JOHN ADAMS 229 (Charles F. Adams ed., 1854).

29. *See* U.S. CONST. amend. I (stating that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

30. *See* JOHN ADAMS, *Letter to a Unit of the Massachusetts Militia (1798)*, *in* 9 THE WORKS OF JOHN ADAMS 229 (Charles F. Adams ed., 1854) (discussing fusion between Constitution and morality); U.S. CONST. amend. V (providing that no individual can "be deprived of life, liberty, or property, without due process of law"); *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (proclaiming right to "Life, Liberty and the pursuit of Happiness," reflecting same human rights based on morality).

31. *See* H.L.A. HART, THE CONCEPT OF LAW 199-200 (1972) (asserting that Constitution, by incorporation of moral principles, makes morality relevant to determining law).

32. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 113, 346 (1971) (emphasizing distinction between moral duties and obligations); WILLIAM D. ROSS, THE RIGHT AND THE GOOD 21 (1930) (listing by prominent British philosopher of moral duties of benefiting and

Catholic message, and through application of these ideals to the law, the innate human rights of individuals will be moralistically respected, as intended by our Constitution. But none of these ideals is supreme; each must be weighed against the other to find the correct path. Recall not only Huck Finn's duty to promote Jim's dignity by helping him, but also Huck's duty to the law. He weighed the two, and helping Jim clearly weighed heavier, although at the time, as Huck said, "[I]t was a close place."[33]

Without balancing such moralistic considerations to reach the ultimate goal of respecting others' human rights, the laws would be amoral, as John Adams observed, causing a collapse of the Constitution itself.[34] One may interpret amoral laws—that is, laws which fail to respect human dignity—as not laws at all. This interpretation is well founded because the dignity of human beings springs from their nature; dignity is neither conferred by society nor merely produced by law or custom. Certain rights are inalienable. They may not be abridged or taken away by any person or any government. Long before the Christian era, sound philosophers reached this conclusion, however imperfectly. Human beings have souls. They have reason and free will. In the Christian tradition, this spiritual nature raises them to a unique place at the top of the animal kingdom, and even higher above lifeless matter. People are thus masters of the universe. Lesser things are made to serve their needs. People may use lesser things in accordance with the law of nature and that of their God. Human life is sacred, and the right to life is the most divine of rights. From this basic right flows such mundane human rights as the right to work, the right to subsistence, and the right to fair wages and equal employment. All these

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not injuring others); G.J. WARNOCK, THE OBJECT OF MORALITY 16, 26 (1971) (emphasizing British moral philosopher's opinion that general object of morality is contribution to betterment of human predicament). For agreement among contemporary moral philosophers, see ALAN DONAGAN, THE THEORY OF MORALITY 76-100 (1977) (stating view of duties of humans owed to themselves and others); BERNARD GERT, MORALITY 96-159 (1988) (examining rules of morality and attitude of "rational persons" towards such rules); P.F. STRAWSON, FREEDOM AND RESENTMENT 38 (1974) (noting that any moral system recognizes certain general obligations and virtues, such as justice, mutual aid, and honesty).

33. MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 313-15 (Grosset & Dunlap 1982) (1884).

34. *See* JOHN ADAMS, *Letter to a Unit of the Massachusetts Militia (1798), in* 9 THE WORKS OF JOHN ADAMS 229 (Charles F. Adams ed., 1854) (noting inadequacy of Constitution for governing amoral individuals).

rights and more become necessary to ensure the dignity that human beings demand. Immoral governments that fail to protect such rights will ultimately fall, for the people will eventually revolt.[35]

Any system which holds that human rights are conferred by the state, and that such rights may be modified or taken away at the whim of the government, is unnatural and grossly immoral. Whenever the state arrogates to itself supreme power, disregarding the law of God and the inalienable rights of human beings, a monstrosity contrary to all reason occurs. The position taken by positivist philosophers, such as Auguste Comte,[36] would promote grossly immoral rules solely because they emanate from the sovereign. History reveals that devastating results unfold when a sovereign follows such a philosophy, as seen in the examples of Nero and similar Roman emperors and, in more modern times, of Hitler, Stalin, and others who put no value on human life or God's law.

The freedom of our laws, indeed of America, ultimately is dependent on consent of the governed majority to respect human dignity and not to violate another's person or property; to honor intellectual and spiritual freedom; and to respect obligations and abide by the rule of the majority if it does not deny these rights and duties. The majority's consent derives from the belief that the law is fair and just. If the moral basis for consent becomes eroded, freedom under our law is jeopardized. If the system is no longer perceived as moral, an intrusive system of government is likely to replace it.[37] Father Neuhaus in his famous book, *The Naked Public Square: Religion and Democracy in America*,[38] finds that the "public square" of American democracy is naked or nearly naked to some form of totalitarian control. Father Neuhaus finds that this

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35. *See* Marie E. Kaiser & Anthony J. LaPorta, Note, *Sexual Harassment of Women in the Workplace: He Said, She Said*, 7 ST. JOHN'S J. LEGAL COMMENT. 627, 627 n.1 (1992) (noting Abigail Adams's and first feminist movement's threats to revolt against any laws that did not respect women's rights) (citing KATHLEEN W. PERATIS & EVE CARY, WOMEN AND THE LAW 1-2 (1977)).

36. *See generally* AUGUSTE COMTE, A GENERAL VIEW OF POSITIVISM (J.H. Bridges trans., 1865) (London, Trubner 1851) (asserting view of positivism as related to social and political practices).

37. Marvin E. Frankel, *Religion in Public Life—Reasons for Minimal Access*, 60 GEO. WASH. L. REV. 633, 633-34 (1992).

38. RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984).

state occurs because the country has lost sight of its historic religious roots. He further writes that Church-State relations were made more problematic when "it became the official doctrine that there is no moral consensus in American life, that ours is a secular society."[39] We have lost sight of how our basic political morality, including the commitment to freedom in our Bill of Rights, rests upon the biblical tradition or the Judeo-Christian tradition.[40] Such "moral legitimation" supplies the most vital and ultimate of needs by acting as a "final inhibition against evil."[41] Without moral legitimacy, no foundation exists for the democratic structure—no dispositive reason to prefer our rights and freedoms to any other political order.[42] And with the "public square" thus denuded, a vacuum exists that strips the "public square," leaving an empty space to be filled by some form of totalitarian control. Thus, without the moral foundation, the law and the study of law become unsturdy and meaningless.

A basic aspect of a democracy founded on liberty, equality, and justice is that the human dignity of each individual be promoted.[43] While this message is sent by Catholic bishops to the whole world, regardless of religion, Catholic institutions are particularly responsible for picking up the cross against a world of increasingly anti-Catholic values.[44] Christians have a duty to reinstill the message of loving your neighbor as yourself, with all of its meaning, back into our expandingly secular society.[45] To understand the meaning of liberty, equality, and justice, a task imposed upon law students, is to understand dignity and the Catholic message. We, as universities of the law that call ourselves Catholic institutions, must look to our Creator and His message. Although most of the secular world does not recognize the message from our Church and our bishops,

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39. *Id.* at 161.

40. *Id.* at 95, 144-46.

41. *Id.* at 261.

42. RICHARD J. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA 261 (1984).

43. *See generally* THE DECLARATION OF INDEPENDENCE (U.S. 1776) (proclaiming equality and fundamental rights of humankind).

44. *See* NATIONAL CONFERENCE OF CATHOLIC BISHOPS, THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE 10-11 (1983) (emphasizing key moral principles within law that affect welfare of entire human community).

45. *See id.* at 116 ("We must continually equip ourselves to profess the full faith of the Church in an increasingly secularized society.").

people who call themselves Catholics have a duty to promote this message. We may start out by using the Socratic method and other teaching devices to encourage students of the law to examine legal rights and their origins.

This method of emphasizing Christian beliefs can and should be used in our constitutional law classes. When discussing fundamental rights, Catholic law schools should consider the derivation of these rights. Discussions should include talk of human dignity emanating from human rights endowed by the Lord and not merely handed down from our forebears.[46]

When discussing cases like *Roe v. Wade*,[47] classes should not focus solely on the black letter of the law but also should address the Catholic message. For example, the Supreme Court in *Roe* held that a nonviable fetus has no rights, and, therefore, the mother's right to an abortion at these stages is superior.[48] Under the viability approach, a fetus is not human until considered to be viable, and the fetus therefore has no constitutionally guaranteed rights until such time.[49] Thus, when the fetus is in its nonviable stage, the decision to abort it is left to the mother. This decision is allowed by the law because, when weighing the fetus's nonexistent rights against the mother's right to control her body, the mother's right prevails. The result would be different under a Catholic interpretation.

The whole abortion issue pivots on the question "*When is a fetus a human being* entitled to our constitutional guarantees?" The Court in *Roe* answered that question with the viability approach.

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46. *Cf.* Alan Cowell, *Pope Challenges President's Stance on Abortion*, N.Y. TIMES, Aug. 13, 1993, at A1 (reporting Pope John Paul II's conversation with reporters in Denver, Colorado, on August 12, 1993, after private meeting with President Clinton, and Pope's speaking about dignity of human life). The Pope stated: "[T]he inalienable dignity of every human being and the rights which flow from that dignity—including the right to life and the defense of life—as well as the well-being and full human development of individuals and peoples, are at the heart of the church's message and action in the world." *Id.*

47. 410 U.S. 113 (1973).

48. *Roe*, 410 U.S. at 153-54.

49. *Id.* at 160-62. The Court in *Roe* has been criticized for its trimester approach to determine viability on the grounds that, as science becomes more advanced, the fetus will be considered viable earlier in the pregnancy. *Roe* has been characterized as being on a collision course with itself as technology becomes more advanced. *See* City of Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416, 458 (1983) (Rehnquist, C.J., White & O'Conner, JJ., dissenting) (commenting that *Roe* framework may allow viability to move towards conception as medical science advances).

The Catholic community believes that a person is a person at the time of conception because conception is the point at which the person is bestowed with an immortal soul.[50] The Catholic answer would change the result in *Roe* because the fetus, as a person, would then have constitutional rights. Therefore, the fetus's *right to life* would be paramount to the woman's right to control her body. This position is not meant to belittle the woman's right not to subordinate her body to another, an extremely important right. It is difficult to argue, however, that the woman's right to such control could ever override another's right to life, as the right to live is the most basic of rights from which all other rights flow. In other words, the right to life is paramount to all other rights, and from this right humans have dignity, the right to subsistence, the rights to freedom, liberty, property, and the pursuit of happiness, and all other basic rights.

Catholic law schools may fail to teach abortion cases from the Catholic as well as the secular viewpoint. It is a great injustice to the legal community and to the citizens governed by these laws for a Catholic law school to avoid such analysis.

In family law classes, the Catholic law school should implement a firm understanding of the roots of the marriage bond. The permanence and dignity of marriage itself were cultured and developed within the Catholic Church and other religions, and not until King Henry VIII broke from the Church so that he could remarry did marriage in the Christian sphere take on a more secular facade. A full understanding of the history of the Catholic Church and marriage should be studied along with recent changes. Family law is one area in which Catholic law-school courses are not totally devoid of reference to the Catholic influence on the law. However, the Catholic underpinnings of marital law could be offered as a separate course for a deeper analysis of the Catholic Church's reasoning for its matrimonial rules, rather than as a brief historical overview at the beginning of the semester.

In the Catholic law school, pornography should also be examined in light of the Catholic message. Today's law legalizes sexually explicit material that some may consider to be pornography

50. *See Roe*, 410 U.S. at 131 (noting that "[f]or the Pythagoreans . . . it was a matter of dogma. For them the embryo was animate from the moment of conception, and abortion meant destruction of a living being.").

while banning obscenity, and this position seems to be the extent of legal teaching regarding pornography. The law finds obscenity[51] to be that which offends one's sense of decency and is at war with morality, but the law fails to classify all but the most egregious examples of pornography as obscene.[52] This dichotomy clearly is not consistent with Catholicism. Further, pornography has been banned in some countries, such as Canada, the Supreme Court of which has declared pornography constitutionally unprotected because it harms women.[53] Some commentators have recognized that pornography not only degrades women but is at war with equality.[54] Students in a Catholic law school should be exposed to an examination of pornography in light of the way American law fails

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51. *See* Jacobellis v. Ohio, 378 U.S. 184, 191 (1964) (noting constitutional distinction between obscenity and material dealing with sex that advocates ideas or has literary, scientific, or artistic value). Justice Stewart, in his concurrence, emphasized that hard-core pornography, which falls within the ambit of obscenity, is not protected under the Constitution. *Id.* at 197. He further stated: "I shall not today attempt further to define the kinds of material I understand to be embraced within [hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. *But I know it when I see it . . . .*" *Id.* (emphasis added); *see also* Roth v. United States, 354 U.S. 476, 489 (1957) (articulating standard for obscenity as "whether to the average person, applying contemporary community standards, the dominant themes . . . as a whole appeal to prurient interest").

52. *See* Ronald K.L. Collins & David M. Skover, *Art vs. Obscenity—Drawing Distinctions*, THE CHRISTIAN SCI. MONITOR, Apr. 6, 1992, at 13 (noting argument that pornography degrades women's equality while obscenity offends humans' sense of decency and therefore contradicts morality). Professor Collins teaches law at the Catholic University of America in Washington, D.C., and Professor Skover teaches law at the University of Puget Sound in Tacoma, Washington. Both professors specialize in First Amendment law.

53. *See* Regina v. Butler, 89 D.L.R. 4th 449, 450 (Can. 1992) (holding that pornography is not constitutionally protected in Canada, and upholding criminal statute defining obscenity).

54. *See* Ronald K.L. Collins & David M. Skover, *Art vs. Obscenity—Drawing Distinctions*, THE CHRISTIAN SCI. MONITOR, Apr. 6, 1992, at 13 (stating that feminist Catherine MacKinnon's views that pornography degrades women have not yet been adopted by United States Supreme Court); American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 328-29 (7th Cir. 1985) (affirming district court decision that ordinance defining pornography unconstitutional), *aff'd*, 475 U.S. 1001 (1986). The Indianapolis ordinance defined pornography as "the graphic sexually explicit subordination of women." *Id.* at 324. The district court accepted the premise of the legislation to offer women equality; however, the court overturned the statute because such reasoning was not enough to permit governmental regulation of the freedom of speech. *Id.* at 328-30. The United States Supreme Court affirmed the decision without oral opinion. *See* Hudnut v. American Booksellers Ass'n, 475 U.S. 1001, 1001 (1986) (noting that Chief Justice Rehnquist and Justice O'Connor voted to set the case for oral argument). While "modern" pornography has stood equality on its head by expanding to degrade children and men as well as women, its exploitative nature remains the same.

to reflect the Catholic message and fails to understand that pornography strips women of their dignity, thereby undermining the morality upon which the law should be founded.

Similarly, civil rights law should be taught in the Catholic law school with an emphasis on human dignity, and the classes should examine not only the present law, but also how we as Catholics want the law to develop. Classes clearly should instruct students that the Catholic message, which strives to protect human dignity and equality in the purest form, is necessary to protect human rights. The previous analysis of *Plessy v. Ferguson* and *Brown v. Board of Education* should be used to examine the legal genesis of these rights and how we can work toward molding the law to protect these rights.

The course on professional responsibility should be taught to encourage the correct and moral path, rather than merely what lawyers are able to get away with legally, although unethically. The proposed course of conduct should be the high road and not the trail along the edge of the cliff.

We should further compare all of our Catholic law-school courses to God's message and see if they are fair reflections of this message. If not, we should encourage our students, the future developers of the law, to mold the law school's message in such a way that inherent human rights, equality, and justice are protected; in other words, to promote the word of the Lord. The Christian message can and should be touched upon in almost every Catholic law-school class.[55] And we should not only sculpt our present core classes with the Lord's theme, we should also offer additional classes and programs for those students who wish to develop further their understanding of Catholicism in the law.

Courses such as Canon Law should be offered in every Catholic law school, in which the Catholic message would be the focus rather than a peripheral aside. Seminars could be offered in poverty law, encouraging students to do pro bono work to protect the rights of persons who cannot afford legal services.[56] Catholic law

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55. *See* 1983 CODE c.807-14 (requiring institutions that bear name "Catholic University" to teach various disciplines "in light of [the] catholic doctrine").

56. *See* Jon C. Dubin, *Poverty, Pain and Precedent: The Fifth Circuit's Social Security Jurisprudence*, 25 ST. MARY'S L.J. 81, 82-83 (1993) (describing activities of Poverty Law Clinic at St. Mary's University School of Law).

schools should encourage the establishment of law clinics to assist the needs of the elderly and persons suffering civil rights violations.[57] Catholic defense clinics could be offered to protect and enrich the lives of others, thereby putting meaning in the word "Catholic" in the school title. Lectures on theological questions that deal with the law should be offered as well.[58] Furthermore, priests and nuns should be made available to assist students in their quest for spiritual as well as intellectual growth.[59]

Cardinal Newman, a Catholic author, recognizes that theology itself should be excluded *in extenso* of pure dogma in secular schools, such as schools of law, but he believes that any university which professes to contemplate Christian knowledge must have some understanding of its history, literature, and philosophy.[60] Reflecting Cardinal Newman's ideals, the Catholic law school should offer courses in all these areas. The basic understanding of Catholic principles should not be required necessarily from every student in Catholic law schools, but, at the very least, Catholic principles should be made available to those students who are interested in the Catholic underpinnings of the law.

Professors at Catholic law schools should not only be qualified in their fields, but should also exemplify the integrity of uprightness

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57. *See* ST. MARY'S UNIVERSITY SCHOOL OF LAW, 1994 APPLICATION BULLETIN 8 (1993) (describing immigration clinic and indigent defense clinic). At St. Mary's University School of Law, the Immigration Clinic involves students in the representation of indigent foreign nationals in various immigration proceedings, and the Indigent Defense Clinic lets students provide supervised legal services to indigent individuals of all ages who are charged with crimes. *Id.*

58. *See* 1983 CODE c.807-14 (advocating lectures by ecclesiastical authority). In the Catholic law-school setting, these lectures could focus on moral issues encompassed in abortion, privacy, equal rights, mercy killing, pornography, the death penalty, and other topics in the law.

59. *See id.* (mandating duty for bishops to ensure Canons relating to Catholic Universities are observed); *see also Encyclical Demands Loyalty from Clergy, Faithful*, SAN ANTONIO EXPRESS-NEWS, Oct. 6, 1993, at 7A (describing release of encyclical by Pope John Paul II). Entitled "Veritatis Splendor" ("The Splendor of Truth"), the encyclical concerns the teaching of morality. "The pope instructs bishops 'to be vigilant that the word of God is faithfully taught,' and tells them they may withdraw the title 'Catholic' from church-related schools and other institutions that fail to teach 'sound doctrine of faith and morals.'" *Id.*

60. *See* JOHN H. NEWMAN, THE IDEA OF A UNIVERSITY 306-07 (1976) (urging that lawyers, physicians, statesmen, merchants, and soldiers gain such Christian knowledge that would be practically useful in life).

of life.[61] For without such moral character, they will be unable to convey the Catholic message in their teachings. The symbiosis between the law and morality has played a major role in our universities since their formation and is critical to our moral and legal future. For each is dependent on the other, and an attempt to separate the two will seal the fate of our society as a whole.

Having a special duty to protect our society, the Catholic law school must make sure this symbiosis is never severed, but is fulfilled by incorporating relevant new courses and by teaching our present classes in light of the Catholic message. The Lord clearly has His place in the law, and the universities, as Catholic institutions, have a duty to preserve and protect His position.

61. *See* 1983 CODE c.810, § 1 (requiring teachers to be qualified beyond "scientific and pedagogical expertise").