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Catholicism and Constitutional Law: More Than Privacy In the Penumbra

Bill Piatt

I. Introduction

Catholic law schools and Catholic law professors have multiple obligations to our students and to our communities. In order to comply with American Bar Association (ABA) accreditation standards, and thereby continue our teaching mission, we must prepare students to pass the bar exam.¹ Yet we fail as Catholic educators if we allow our students to ignore fundamental moral issues, leaving students to conclude that we view our role as only helping to supply the correct selection on a multiple choice bar exam.²

Some subjects lend themselves more easily to an introduction to Catholic values. When I teach Immigration Law, for example, I notice that the casebooks, although not explicitly citing Catholic social thought, tend to follow it. Students self-select into my immigration classes, generally with a predisposition to concern for the plight of immigrants. In Constitutional Law, however, casebooks and scholarship lean away from even discussing Catholic values in critical areas such as abortion. If Catholic legal education means anything, it should at least include an exposure to Catholic perspectives. The challenge will be to do so in a way that does not prevent our students from learning “the law,” nor

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¹ ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH., Standard 301(a) (2009-2010).

² Both the Multistate Bar Exam (MBE) and the Multistate Professional Responsibility Exam (MPRE) test in a multiple-choice format. NATIONAL CONFERENCE OF BAR EXAMINERS, THE MBE 2010 INFORMATION BOOKLET 3 (2010), available at http://www.ncbex.org/uploads/user_docrepos/MBE_2010.pdf; NATIONAL CONFERENCE OF BAR EXAMINERS, THE MPRE 2010 INFORMATION BOOKLET 15 (2008), available at http://www.ncbex.org/uploads/user_docrepos/MPRE_IB2010.pdf.

engender resentment. Other groups of scholars, such as Critical Legal Studies,³ make their perspectives known in discussions involving the relationship between government and the individual, and our voices should be heard as well.

In this article, I will suggest an approach to bringing Catholic social thought into Constitutional Law by discussing perhaps the most controversial issue: the debate surrounding abortion. Where the Supreme Court finds only privacy in the penumbras of a total eclipse (e.g., *Griswold v. Connecticut*,⁴ *Roe v. Wade*⁵), I will outline how we might help our students see something else there—the presence of the Divinity and an overarching set of moral values.

II. The Flow of Five Factors

In determining whether Catholic values can be integrated into law school discussions in any particular subject, the interaction of five factors seems to be at play. We will examine these briefly before analyzing how they might apply to our discussion.

The first factor is the Catholic values themselves. In some areas the values are clear. As discussed below, the Catholic Church views abortion as intrinsically evil. In others, there is general clarity with some nuances. The Church's view on the death penalty and immigration law, also discussed below, are the topic of much Church pronouncement and concern. In some other areas, there are no specific declarations. Secured Transactions comes to mind. Obviously, integrating Catholic values into a law school discussion will more likely occur where the topic is most directly tied to Catholic teaching on that subject.

The second relevant factor is the state of the law. Where the Catholic position and the law most neatly align, there will be ample and comfortable room to discuss this concurrence in a Catholic law school. Where they diverge, as in abortion, the law school discussion will likely be more strained. Where there is no relevant Catholic teaching, "Render to Caesar"⁶ might be the teaching norm.

³ Mark V. Tushnet, *Perspectives on Critical Legal Studies: Introduction*, 52 GEO. WASH. L. REV. 239, 239-42 (1984).

⁴ 381 U.S. 479, 484 (1965).

⁵ 410 U.S. 113, 152 (1973) (quoting *Griswold*, 381 U.S. at 484-85).

⁶ *Mark* 12:17.

Third, the perspective of the teaching materials is an important factor. Where these materials include Catholic perspectives, even if not identified as such, the flow will be smoother when discussing underlying moral values. When they do not, the flow might become a swim upstream.

The fourth factor is the pre-receptiveness of the students. Students enroll in Catholic law schools for a number of reasons, many of which have little to do with the expression of Catholic values in the classroom.⁷ Once in the Catholic law school, students are required to take some courses and have the right to select others. Whether students are receptive to even considering the Catholic approach to a topic is an important consideration in the integration of those topics.

The professor's willingness to present students with the Catholic perspective is the fifth and probably the most critical factor, particularly where the state of law and teaching materials do not satisfactorily address the Catholic view. The important moral pronouncements of the Church will likely not reach law students in the absence of professor's active involvement in teaching the course.

Some subjects seem to lend themselves to an easy flow of these factors. The probable result is that the majority of the students will accept the Catholic perspective or at least respect it as a legitimate approach to the subject. The area in this regard in which I am most familiar is immigration law. Examining how these factors interact in that subject serves as a backdrop to examining an approach to bringing respect for Catholic values into a discussion of constitutional law topics.

III. Catholic Values Mesh Well With Immigration law

The Catholic Church has made clear it is concerned not only for the rule of law, but also for the plight of immigrants. These concerns are outlined, for example, in a pastoral letter issued by the Catholic bishops of Mexico and the United States on January 22, 2003.⁸ The letter, entitled "Strangers No Longer; Together on the Journey of Hope," outlines the Catholic perspective which recognizes that both the right of sovereign nations to control their borders and the right of individuals to

⁷ Based upon my experience as Dean and in conversations with students at my law school and others, it appears that students primarily select law schools based on factors, which include the prestige of the school, location, and cost.

⁸ UNITED STATES CONF. OF CATHOLIC BISHOPS (USCCB) & CONFERENCIA DEL EPISCOPADO MEXICANO, STRANGERS NO LONGER: TOGETHER ON THE JOURNEY OF HOPE ¶ 33 (2003) *available at* <http://www.usccb.org/mrs/stranger.shtml> [hereinafter *Strangers*].

migrate with dignity should be afforded even to those without documentation.⁹ The bishops cite Pope John Paul II's "Ecclesia in America":

In its history, America has experienced many immigrations, as waves of men and women came to its various regions in the hope of a better future. The phenomenon continues even today . . . The Church is well aware of the problems created by this situation and is committed to spare no effort in developing her own pastoral strategy among these immigrant people, in order to help them settle in their new land and to foster a welcoming attitude among the local population, and the belief that a mutual openness will bring enrichment to all.¹⁰

More recently, on June 18, 2009, Cardinal Francis George of Chicago, writing on behalf of the United States Catholic Bishops gathered in San Antonio, Texas and urged President Obama and congressional leaders "to work together to fashion and enact comprehensive immigration reform before the end of the year."¹¹ The bishops wrote:

We urge respect and observance of all just laws, and we do not approve or encourage the illegal entry of anyone into our country. From a humanitarian perspective, however, our fellow human beings who migrate to support their families, continue to suffer at the hands of immigration policies that separate them from family members and drive them to remote parts of the American desert, sometimes to their deaths. This suffering should not continue.¹²

The bishops went on to note, "[o]ur society should no longer tolerate a status quo that perpetuates a permanent underclass of persons and benefits from their labor without offering them legal protections."¹³

In this regard, the position of the Church mirrors the essence of U.S. immigration law and policy and expected reforms of those laws and policies. For example, just as the bishops condemn a "permanent underclass" so too has the Supreme Court of the United States used the same language in proscribing the efforts of states to exclude undocumented children from the public schools.¹⁴

Moreover, the teaching materials in this area generally line up with this Catholic perspective. All casebooks, including this author's, include

⁹ *Id.* ¶¶ 33-39.

¹⁰ *Id.* ¶ 21 (quoting Holy Father John Paul II, *Ecclesia in America*, no. 65 (Jan. 22, 1999)).

¹¹ News Release, Cardinal Francis George, President, USCCB, *Bishops Ask President Obama, Congress to Enact Comprehensive Immigration Reform Before End of 2009* (June 18, 2009), available at <http://www.usccb.org/comm/archives/2009/09-142.shtml>.

¹² *Id.*

¹³ *Id.*

¹⁴ *Plyler v. Doe*, 457 U.S. 202, 218-19 (1982).

the twin perspectives of national sovereignty and respect for the rights of immigrants.¹⁵ My experience with the students I have taught in my Immigration law classes over the last three decades indicates that most of them are generally receptive to these dual concerns. Finally, based upon my own teaching experience and my contact with other immigration law professors, I am of the impression that virtually every Immigration Law class in the United States is taught from a perspective that mirrors Catholic values, whether or not those are identified as such.

IV. Ditto For the Death Penalty

As with Immigration Law, there is a close fit in most American law school classrooms between Catholic values and academic work regarding the death penalty. While the Catholic Church does not absolutely prohibit the imposition of the death penalty, it does conclude that its use should be rare. For example, Pope John Paul II announced that the death penalty should only be imposed in the rare circumstances when it would not otherwise be possible to defend society, noting: “[t]oday however, as a result of steady improvements in the organization of the penal system, such cases [where the death penalty is justified] are very rare, if not practically non-existent.”¹⁶ In the Catechism of the Catholic Church, while the death penalty is not viewed as an intrinsic evil, the taking of innocent life through an abortion or euthanasia is condemned as *always* evil.¹⁷ While the Catechism does not absolutely prohibit the death penalty, it also urges that the death penalty not be utilized if there are better ways to protect society: “[i]f, however, non-lethal means are sufficient to defend and protect people’s safety from the aggressor, authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person.”¹⁸

The current state of American law allows for a broader use of the death penalty than anticipated under the teachings of the Catholic Church. Thirty-five states and the federal government allow for the imposition of the death penalty.¹⁹ The Supreme Court of the United

¹⁵ See BILL PIATT, IMMIGRATION LAW: CASES AND MATERIALS (The Michie Co. 1994).

¹⁶ USCCB, THE CULTURE OF LIFE AND THE PENALTY OF DEATH 12 (2005), available at <http://www.usccb.org/sdwp/national/penaltyofdeath.pdf> (quoting POPE JOHN PAUL II, EVANGELIUM VITAE ¶ 56 (1995)).

¹⁷ UNITED STATES CATHOLIC CONF., CATECHISM OF THE CATHOLIC CHURCH, ¶ 2277 (2d ed. 1997) [hereinafter CATECHISM].

¹⁸ *Id.* at ¶ 2267.

¹⁹ See Bureau of Justice Statistics, Capital Punishment Statistics, available at <http://www.ojp.usdoj.gov/bjs/cp.htm> (last visited Aug. 3, 2009).

States has upheld its use.²⁰ The death penalty statutes apply in broader circumstances than only for the immediate protection of society. However, actual imposition of the sentence is relatively rare, and recent trends are toward limiting or eliminating it.²¹

Regarding the perspective of the teaching materials, virtually all of them present a critique of the death penalty that would be very much consistent with that of the Catholic Church. Students self select into death penalty defense clinics because they oppose the death penalty. Constitutional Law courses and Criminal Law courses which involve a discussion of the death penalty, however, are often required first year courses.

Regarding the fifth factor (teachers' perspectives) while I am unaware of specific studies in this regard, I would imagine that probably most law professors who teach in this subject present a critique of the death penalty very much consistent with the perspectives of the Catholic Church.

There are other examples of law school subjects, such as Elder Law, Public Assistance, and Labor Law, where although not a perfect fit, the presentation of Catholic values would probably mesh well. That is not to say that much work needs to be done to remind teachers and students alike of this important perspective. Having examined some relatively compatible areas of law and Catholic social policy, we turn now to what is perhaps the most controversial and yet one of the most necessary areas to examine: abortion law.

V. Dissonance: Catholic Values and Abortion Law

There might be no area where the dissonance between Catholic teaching and legal teaching is greater than in the area of abortion. The Catholic teaching in this regard is clear: abortion, unlike the death penalty is intrinsically evil.²² Pope Benedict XVI declared: "everyone must be helped to become aware of the intrinsic evil of the crime of abortion.

²⁰ See *Gregg v. Georgia*, 428 U.S. 153, 177 (1976) (holding in 7-2 decision that imposition of death penalty did not constitute cruel and unusual punishment as prohibited by Eighth and Fourteenth Amendments when statute is applied carefully and judiciously). The Court determined that the jury was given an objective criteria in sentencing the defendant and the defendant's personal record was carefully considered in the imposition of such punishment. *Id.* at 205-06.

²¹ See Death Penalty Information Center, *Limiting the Death Penalty*, <http://www.deathpenaltyinfo.org/part-ii-history-death-penalty> (last visited Aug. 3, 2009).

²² See CATECHISM, *supra* note 17, at ¶ 2271.

In attacking human life in its very first stages, it is also an aggression against society itself.”²³ The U.S. Conference of Catholic Bishops declares, “[a]bortion, the direct killing of an innocent human being is *always* gravely immoral; its victims are the most vulnerable and defenseless members of the human family.”²⁴

By contrast, the law does not recognize the existence of a human life from conception.²⁵ Instead, what the Catholic Church considers a human life, the Supreme Court considers “the life of the fetus that may become a child.”²⁶

Regarding the teaching material, anyone who hopes or expects that at least some attention will be given to the Catholic perspective that human life begins at conception and that abortion is intrinsically evil will be disappointed. What about student views? Constitutional Law courses are required at most American law schools. The students do not self select. If their views mirror those of the general public, it might even be that a slim majority of them are opposed to abortion, at least coming in to the class.²⁷ However, regarding the fifth consideration, I would suspect that it is rare, in American law schools, and perhaps even in Catholic law schools, to have teachers voice some moral concerns with *Roe v. Wade* and its progeny.

As law professors in Catholic schools, then, what are we to make of this situation? Should we await jurisprudence that will move closer to the recognition of the right to life of the “fetus”? Should we hope for a change in technology that will bring “viability” earlier into the pregnancy and therefore trigger greater right of state intervention?²⁸ Should we do nothing and present the material as it would be presented in any other law school classroom in the United States? After all, we try

²³ Pope Benedict XVI, *Address at a Meeting on Family and Life Issues in Latin America* (Dec. 3, 2005), available at http://www.vatican.va/holy_father/benedict_xvi/speeches/2010/january/documents/hf_ben-xvi_spe_20100111_diplomatic-corps_en.html.

²⁴ USCCB, *Select Quotations on Life Issues from Pope Benedict XVI & the USCCB* (citing *EVANGELIUM VITAE*, *supra* note 16, ¶ 57) (emphasis in original), <http://www.usccb.org/prolife/tdocs/popebquotes2008.shtml> (last visited Feb., 12, 2010).

²⁵ See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 914 (1992) (Stevens, J., concurring in part and dissenting in part) (“[T]he state interest in potential human life is not an interest *in loco parentis*, for the fetus is not a person.”).

²⁶ *Id.* at 846.

²⁷ See generally *Pollingreport.com*, *Abortion*, <http://www.pollingreport.com/abortion.htm> (last visited July 28, 2009).

²⁸ See *Casey*, 505 U.S. at 846.

to remain objective as teachers and we should not attempt to force our opinions on our students.²⁹

The difficulty is that if we really do believe in the teachings of the Catholic Church then we do not have the luxury of silence. Pope Benedict XVI tells us: “[a]s far as *the right to life* is concerned, we must denounce its widespread violation in our society . . . Abortion and embryonic experimentation constitute a direct denial of that attitude of acceptance of others which is indispensable for establishing lasting relationships of peace.”³⁰ The U.S. Conference of Catholic Bishops demands: “[i]t is imperative that those who are called to serve the least among us give urgent attention and priority to this issue of justice.”³¹

In most American law schools, immigration law professors are probably presenting a perspective on immigration law that is sympathetic to the immigrant and thereby consistent with Catholic social teaching. The same is true in the approach of many to the death penalty. If it is acceptable to express an opinion sympathetic to Catholic principles in these contexts, why should it be objectionable to express an opinion consistent with Catholic principles in the context of abortion? On the other hand, attempting to force a religious perspective on our students is probably going to be counterproductive. It will engender resentment against the individual teacher and against the basic and important moral principle that is being presented if not done in an appropriate fashion. And, of course, as teachers we have the obligation to prepare our students to be able to correctly respond to our exam questions and client concerns with an accurate statement of the current state of the law even as we hope to improve upon it. An approach to accomplishing these objectives is the topic of the next discussion.

VI. Waxing Astronomical

The Supreme Court of the United States used a curious analogy to expand rights of privacy, leading to the right to obtain an abortion; the

²⁹ See generally, Association of American Law Schools, AALS Handbook, Statement of Good Practices by Law Professors in the Discharge of their Ethical and Professional Responsibilities, http://www.aals.org/about_handbook_sgp_eth.php (last visited Aug. 3, 2009).

³⁰ Pope Benedict XVI, *Message for the Celebration of the World Day of Peace: The Human Person, The Heart of Peace* (Jan. 1, 2007), available at http://www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20061208_xl-world-day-peace_en.html.

³¹ USCCB, PASTORAL PLAN FOR PRO-LIFE ACTIVITIES: A CAMPAIGN IN SUPPORT OF LIFE (2001), available at <http://www.usccb.org/prolife/pastoralplan.shtml>.

astronomical analogy the court selected is that of a "penumbra."³² How this phenomenon was used to create the right to an abortion and how it can be used to illustrate the need to consider Catholic values in the abortion context follows.

In 1961, the Executive Director of the Planned Parenthood League of Connecticut, and another individual, a licensed physician who served as a professor at the Yale Medical School, were arrested for violating a Connecticut statute prohibiting the giving of information, instruction and medical advice to individuals, including married persons, as a means to prevent contraception.³³ The defendants, Griswold and Buckston, alleged that the statute as applied to them violated the Fourteenth Amendment.³⁴ They were found guilty and fined \$100.00 each.³⁵ Their convictions were affirmed and ultimately reached the Supreme Court of the United States.³⁶

In overturning the conviction, the Supreme Court found that the action of the state of Connecticut violated a constitutionally protected right to privacy.³⁷ The Court noted a number of cases where individuals were held to have rights that were not specifically mentioned in the Constitution.³⁸ These include the rights to educate a child in the school of the parent's choice,³⁹ the right to study the German language in a private school,⁴⁰ the freedom to teach and of the entire university community,⁴¹ among others. The Court concluded, "[t]he foregoing cases

³² See *infra* notes 34-51 and accompanying text.

³³ *Griswold*, 381 U.S. at 480.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 485-86.

³⁸ *Griswold*, 381 U.S. at 482-83 (1965).

³⁹ See *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (noting "the liberty of parents and guardians to direct the upbringing and education of children under their control").

⁴⁰ See *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (explaining that "[p]erhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution").

⁴¹ See, e.g., *Baggett v. Bullitt*, 377 U.S. 360, 369 (1964) (overturning, as vague, state statutes requiring teachers and state employees, as condition of employment, to take loyalty oaths); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (noting education as "constitutionally protected domain"); *Sweezy v. New Hampshire*, 354 U.S. 234, 249-50 (1957) (finding constitutional protected right to lecture and right to associate); *Wiemann v. Updegraff*, 344 U.S. 183, 195 (1952) (noting that by restricting educators' freedoms of speech and association there is "an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice").

suggest that specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance . . . Various guarantees create zones of privacy.”⁴²

In *Roe v. Wade*, the Supreme Court specifically referred to a right to personal, marital, familial, and sexual privacy protected by the Bill of Rights or its penumbras.⁴³ It concluded that the privacy right was broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.⁴⁴

This federal recognition of a privacy right to an abortion, located in the penumbras of the rights guaranteed by the Bill of Rights, was a dramatic departure from existing law at the time of the decision in *Roe v. Wade*.⁴⁵ The “essential holding” of *Roe*, including the recognition of the right of a woman to choose to have an abortion before viability and obtain it without undue interference from the state was upheld in *Planned Parenthood v. Casey*.⁴⁶ Since the time of the *Roe* decision, an estimated fifty million abortions have been performed in the United States.⁴⁷ What are these “penumbras” that have been employed to such dramatic affect?

If our students look up the word “penumbra” in the Merriam Webster online dictionary they will find that the word comes from the Latin “paene,” meaning “almost,” and “umbra,” meaning “shadow.”⁴⁸ The definition includes “a space of partial illumination (as in an eclipse) between the perfect shadow on all sides and the full light.”⁴⁹ Undoubtedly because of *Griswold*, the entry also includes, “a body of rights held to be guaranteed by implication in a civil constitution.”⁵⁰ A scientific explanation for the phenomenon of the eclipse, which gives rise to a penumbra is: “[w]hen you look up in the sky at the sun and the moon, you notice a strange coincidence—both look the same size in the sky.”⁵¹

⁴² *Griswold*, 381 U.S. at 484 (citation omitted).

⁴³ *Roe*, 410 U.S. at 129.

⁴⁴ *Id.* at 153.

⁴⁵ *Id.* at 119.

⁴⁶ 505 U.S. 833, 833 (1992).

⁴⁷ See Bob Unruh, *Abortion Memorial to Honor 50 Million Dead*, WORLD NET DAILY, Jan. 15, 2009, <http://www.wnd.com/index.php?fa=PAGE.view&pageId=86129> (last visited Feb. 13, 2010) (estimating 50 million abortions since 1973 decision of *Roe v. Wade*).

⁴⁸ Merriam-Webster Online Dictionary, *penumbra*. (on-line ed. 2009) <http://www.merriam-webster.com/dictionary/penumbra> (last visited Aug. 3, 2009).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Ron Hipschman, *Solar Eclipse, Why Eclipses Happen*, EXPLORATORIUM, <http://www.exploratorium.edu/eclipse/why/> (last visited Feb. 22, 2010).

If an observer on earth stands at the point where the moon appears to be covering the sun, or a total eclipse, that person would be standing in the “umbra.” If the person were standing slightly to the side where the moon only appeared to partially obscure the sun, that person would be standing in the “penumbra” of the eclipse. In this penumbra, the Supreme Court finds the right to privacy.

Now clearly, in teaching Constitutional Law, we are not teaching astronomy. In addition, in attempting to introduce a view of the Catholic teaching on abortion there are very clear and direct pronouncements by the Pope and by the United States Conference of Catholic Bishops (USCCB) on this point that we can present to our students. However, some students may resist a direct presentation of Catholic dogma. Probably all, or most, however, will be intrigued a bit by the further exploration of the “penumbra” phenomenon, particularly in this, the fortieth anniversary of the first moon landing. A law professor might use this approach to lead into a discussion of the Catholic teachings regarding abortion. In the context of immigration, for example, the USCCB uses a similar analogy:

The word of God and the Catholic social teaching it inspires illuminate an understanding—one that is ultimately full of hope—that recognizes the lights and shadows that are a part of the ethical, social, political, economic, and cultural dimensions of migrations between our two countries . . . These lights and shadows are seen in faith as part of the dynamics of creation and grace on the one hand, and of sin and death on the other, that form the backdrop of all salvation history.⁵²

And, of course, the ultimate expression of the theology of the “Light” can be found in John 8:12. One astronomer has noted:

There’s a striking convergence of rare properties that allow people on Earth to witness perfect solar eclipses. There’s no law of physics that would necessitate this. In fact, of the nine planets with their more than sixty-three moons in our solar systems, the Earth’s surface is the best place where observers can witness a total solar eclipse and that’s only possible for the ‘near term’ future. What’s really amazing is that total eclipses are possible because the sun is four hundred times larger than the moon, but it’s also four hundred times further away. It’s that incredible coincidence that creates a perfect match. Because of this configuration, and because the Earth is the innermost planet with a moon, observers on Earth can discern finer details in the sun’s chromosphere and corona than from any other planet, which make these eclipses scientifically rich.⁵³

⁵² *Strangers*, *supra* note 8, ¶¶ 22-23.

⁵³ LEE STROBEL, *THE CASE FOR A CREATOR* 185-86 (Zondervan 2004).

Solar eclipses have enabled scientists to learn the nature of stars, confirm Einstein's theory that gravity bends light and calculate changes in the Earth's rotation.⁵⁴

The configuration that allows for the only perfect solar eclipse in our solar system – our size and distance from the sun and the effect of the moon in stabilizing the Earth's tilt – enables life to exist on Earth.⁵⁵ Exploring the phenomenon of penumbras then, might offer a glimpse that there is indeed a Creator who signals his presence in many ways, including in the light and shadow of a solar eclipse. God doesn't have to write "Hi, I'm God" on the moon to signal His existence and presence to us. (English might not even be His first language). But the planetary configuration giving rise to solar eclipses and our lives do not appear to be coincidental. The Supreme Court sees the legal justification to abort within a penumbra. As Catholic educators, we can see the presence of the Divinity and the moral basis to protect human life in that same phenomenon.

If the penumbra discussion begins to feel a bit remote to our students, there is an effective way to bring the focus back to earth, back to the classroom, and back to the little human life whose continued existence is at issue. In the spring semester of 2009, one of my pregnant Constitutional Law students allowed me to display the sonogram of her baby taken during the baby's first trimester. Most of the students had never seen a sonogram and were stunned to see the baby's features, including the little hands, fingers, feet and toes. No words could add to that impression; no pronouncements about penumbras could detract from it.

VII. From the Shadows into the Light

As individuals, we will each need to decide whether and to what extent we should introduce Catholic values in our teaching, particularly in a Constitutional Law context, and even more specifically regarding the abortion cases. The first step, as in all other endeavors, should be a period of introspection and prayer. We might want to take a look at the writings of many others who express the importance of introducing Catholic values into the legal and legal education system.⁵⁶ We might

⁵⁴ *Id.* at 186.

⁵⁵ *Id.* at 187.

⁵⁶ See, e.g., Larry Cunningham, *Can a Catholic Lawyer Represent a Minor Seeking a Judicial Bypass for an Abortion? A Moral and Canon Law Analysis*, 44 J. CATH. LEG. STUD. 379 (2005); Daniel Gordon, *Ex Corde Ecclesiae: The Conflict Created for American Catholic Law Schools*, 34 GONZ. L. REV. 125 (1998-1999); Aloysius A. Leopold & Marie E.

do well to review Pope John Paul II's exhortation: "[t]he moral implications that are present in each discipline are examined as an integral part of the teaching of that discipline."⁵⁷ We might consider Rule 2.1 of the 2008 ABA Model Rules of Professional Conduct: "[i]n rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."⁵⁸ What better way to demonstrate this aspect of professional responsibility to our students than by opening their thoughts to moral factors involved in the abortion debate?

Then, on a practical level, we should prepare an approach to each of the five critical factors discussed at the beginning of this article. Regarding understanding the Catholic values, we, as educators, need to become educated. We should review the relevant pastoral letters, encyclicals, Catechism and other important documents. We might even encourage our schools and our colleagues to assist in this continuing Catholic education process by sponsoring gatherings, formal and informal, to discuss Catholic teaching. Regarding the state of the law in our writings, we are not just reporting the law; rather, we seek to shape it by our scholarship. Why not include the Catholic perspective in our writings in an attempt to influence the development of the law to adopt Catholic values? Regarding teaching materials, why not prepare our own texts, which include a perspective on Catholic values? In the short term, why don't we distribute the writings that we are preparing in order to influence the state of the law, to our students as part of our teaching materials?

Concerning the pre-receptiveness of students, we cannot and should not select students into our classes based upon their Catholic perspective or any other perspective. That is not to say, however, that at the admission stage in our law school we could not seek to include students who express an interest in learning Catholic values. In the classroom itself, we have to be careful. We do not want anyone who has had an abortion to feel singled out for criticism. We do not want those who have

Kaiser, *The Lord in the Law: Reflections on a Catholic Law School*, 25 ST. MARY'S L.J. 385 (1993); Michael R. Merz, *Conscience of a Catholic Judge*, 29 U. DAYTON L. REV. 305, 310 (2004); John P. O'Callaghan, *Sacred Monkeys and Seamless Garments: Catholics and Political Engagement*, 2 U. ST. THOMAS L.J. 352 (2005). For further examples, see the articles and papers published in the JOURNAL OF CATHOLIC SOCIAL THOUGHT, CATHOLIC UNIVERSITY LAW REVIEW, JOURNAL OF CATHOLIC LEGAL STUDIES, THE CATHOLIC LAWYER.

⁵⁷ POPE JOHN PAUL II, APOSTOLIC CONSTITUTION EX CORDE ECCLESIAE ON CATHOLIC UNIVERSITIES, ¶ 20 (1990) [hereinafter EX CORDE ECCLESIAE].

⁵⁸ MODEL RULES OF PROF'L CONDUCT RULE 2.1 (2008), available at http://www.abanet.org/cpr/mrpc/rule_2_1.html.

serious religious objections to the Catholic perspective to feel that they are being punished for those perspectives. Pope John Paul II observed, “Catholic teaching and discipline are to influence all university activities while the freedom of conscience of each person is to be fully respected.”⁵⁹ In addition to our classroom work, we can encourage and support student groups focusing on the implementation of Catholic values in our professional lives.

The last factor to consider is the professor’s willingness to present students with the Catholic perspective. Why wouldn’t a professor in a Catholic school want to do this? Perhaps the religious or political views of individual professors run contrary to Catholic values. Even then, could not those professors at least concede that the moral teachings of the Pope and church leaders, directing the spiritual lives of a billion human beings are worthy of being presented, however briefly, in a Catholic law school setting?

Not all Catholics share the same view in the abortion debate. That fact does not constitute an excuse to shy away from presenting this view. Catholic students might not know or embrace these values because they have never been adequately exposed to them. Non-Catholic students are even less likely to be aware of the extent of the Church’s view unless it is presented to them. Recent polls indicate that more people in the United States now believe that abortion is wrong than those who believe it is right.⁶⁰ The trend is in that direction—towards the position the Church has always held. Our students might be interested in learning why so many Americans are now concluding that abortion is wrong.

Introducing the Catholic perspective on abortion is going to be difficult. There is a real possibility that some of our students will not like teachers who present a perspective with which those students might not be familiar or with which they might strenuously disagree. But, we are teachers. Our job is to expose our students to material and perspectives that are unfamiliar to them. Is that not the essence of education? How much does a student learn after all, if what he or she hears in a

⁵⁹ EX CORDE ECCLESIAE, *supra* note 57, ¶ 4.

⁶⁰ See Associated Press, *Majority of Americans Now “Pro-Life,” Poll Says*, MSNBC, May 15, 2009, <http://www.msnbc.msn.com/id/30771408> (explaining that in May of 2009, a majority (51%) of Americans identified themselves as pro-life, as opposed to pro-choice, for the first time in the fifteen years that the Gallup poll has posed that question).

classroom is only a reinforcement of what he or she already knows or believes?

We can learn from the recent example of Pope Benedict XVI. On July 17, 2009, the Pope discussed, among other topics, the Church's teachings regarding abortion with a former Constitutional Law professor and current President of the United States Barack Obama. President Obama responded that he "would like to reduce the number of abortions in the United States."⁶¹

We can also learn from another example. Governor Bill Richardson of New Mexico, who is a Catholic and Democrat, had been a long time supporter of the death penalty.⁶² Archbishop Michael J. Sheehan of Santa Fe assisted in persuading the Governor to change his mind.⁶³ On March 18, 2009, Governor Richardson signed legislation abolishing the death penalty in New Mexico.⁶⁴ He attributed his decision, in part, to "the Archbishop and Catholic Church."⁶⁵ On April 15, 2009, Richardson was given a Papal audience and witnessed the illumination of the Colosseum in Rome to honor New Mexico's decision.⁶⁶

These examples illustrate that people of good faith can be influenced by the teachings of the Church. Those who suggest that it is impermissible to cite religious beliefs in opposition to abortion, or who believe that Catholic teaching should not influence legal decisions, can be reminded of the Richardson example regarding the death penalty.

VIII. Conclusion

As educators we are experienced at respecting student opinions on a number of subjects while still being able to introduce them to other

⁶¹ Hada Messia, *Vatican, White House: Abortion One Topic of Obama-Pope Chat*, CNN, July 10, 2009, available at <http://www.cnn.com/2009/WORLD/europe/07/10/obama.pope/index.html>.

⁶² See Cindy Wooden, *State's decision to abolish death penalty marked at Rome's Colosseum*, CATHOLIC NEWS SERV., Apr. 15, 2009, available at <http://www.catholicnews.com/data/stories/cns/0901704.htm> (noting Governor's former position on death penalty).

⁶³ See *id.* (explaining event).

⁶⁴ See *id.* (noting change in Governor Richardson's position).

⁶⁵ See *id.*

⁶⁶ See *id.* (noting recognition). See also Phil Stewart, *Richardson meets Pope over death penalty repeal*, THOMSON REUTERS, Apr. 15, 2009, <http://www.reuters.com/article/idUSTRE53E61J20090415>.

opinions and perspectives on that same subject. We say we value diversity. True diversity involves a willingness to tolerate and embrace opinions with which we might not agree. We must show respect to those who have concluded that there should be a right to an abortion; we should require that those same people respect the Church's position that the exercise of that legal right is morally wrong. What is ultimately required from us is the courage to patiently expose students to that concept, while at the same time ensuring that students learn the law sufficiently well to pass the necessary exams and to successfully practice law.

There still might be some discontent when we express the Catholic view on abortion. Yet disapproval of the Church's position shouldn't be sufficient reason in a Catholic law school to overlook that position. Our institutions, law schools, and universities need to stand ready to support these efforts by protecting the academic freedom of Catholic educators as we attempt to expose our students to a critical Catholic value—the sanctity of human life.