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## Persons and the Point of the Law

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# PERSONS AND THE POINT OF THE LAW

RICHARD W. GARNETT<sup>†</sup>

## I.

I interviewed for a law-teaching position at Notre Dame Law School in the Fall of 1997. So far as I know, that visit to Our Lady's university and to lovely, cosmopolitan South Bend, Indiana, was my first. I had never attended a Catholic school at any level and was not much of a Fighting Irish fan. The circumstances and conversations that resulted in my being on campus for that interview were both unpredicted and unpredictable, although I know now they were providential.

In any event, what struck me most forcefully over that weekend—besides the freezing rain that persisted throughout the football game I attended<sup>1</sup>—was my now-colleagues' palpable enthusiasm for and excitement about what they were building. That is, the “Catholic law school project”—at that time, at Notre Dame—did not feel like and was not presented as an exercise in nostalgia, retrieval, or reaction. Instead, there seemed to be a widely shared sense that this “project” was something that had not really been tried before and that the goal was not to regain

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<sup>1</sup> Notwithstanding the bad weather, it was a great game. Notre Dame's Allen Rossum saved the 21–17 win by knocking Navy's Pat McGrew, who had somehow caught a long Hail Mary heave, out of bounds at the two-yard line as time expired. See Al Lesar, *Notre Dame 21, Navy 17*, SOUTH BEND TRIB. (Nov. 1, 1997), <https://und.com/sports-m-footbl-archive-97season-nd-m-footbl-game09sum-html/> [<https://perma.cc/KU7R-HNZP>].

something that had been lost but rather to work on something new, namely, an engaged and excellent law school that was meaningfully, distinctively, and therefore interestingly Catholic.<sup>2</sup>

I am grateful to Professors John Breen and Lee Strang for, among other things, confirming that I and my colleagues were—and, I hope, still are—right.

## II.

Professors John Breen and Lee Strang have performed a valuable service with their careful and engaging study of Catholic legal education in the United States, *A Light Unseen: A History of Catholic Legal Education in the United States*.<sup>3</sup> Their central and animating proposal is that “[a]ny plausible rationale for a Catholic law school must justify the focal case of the school, which is an academic institution and intellectual enterprise. . . . [A] Catholic law school must also possess an ‘intellectual architecture’ that sets it apart.”<sup>4</sup> I enthusiastically embrace this proposal and will consider some features of one such possible “architecture” below. But first, I will briefly underscore three points that are made or supported in *A Light Unseen* and that seem essential to understanding, and carrying on, the “Catholic law school project.”

First, and as was suggested above, this “project” today is not an effort to return to an imagined Golden Age of Catholic legal education during which the education and formation of lawyers was pervasively informed and deliberately shaped by the Church’s philosophical and intellectual resources and accomplishments. It is a new, creative effort.<sup>5</sup> As Breen and Strang show, “the

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<sup>2</sup> See Richard W. Garnett, *Whom Should a Catholic University Honor?: “Speaking” with Integrity*, 49 J. CATH. LEGAL STUD. 233, 234 (2010) (“[T]he University of Notre Dame is an important, interesting, and inspiring Catholic institution . . .”).

<sup>3</sup> John M. Breen & Lee J. Strang, *A Light Unseen: A History of Catholic Legal Education in the United States* (Jan. 20, 2020) (unpublished manuscript) (on file with the *St. John’s Law Review*).

<sup>4</sup> *Id.* at 22; see also, e.g., *id.* at 465 (“[W]e conclude that a genuinely distinctive Catholic identity must have an intellectual foundation. It must have an ‘intellectual architecture’ that provides a rational structure and sense of direction to the academic enterprise.”).

<sup>5</sup> See generally, e.g., Thomas L. Shaffer, *Why Does the Church Have Law Schools?*, 78 MARQ. L. REV. 401, 402–03 (1995) (exploring the mission of Catholic law schools as “one way to be a priestly people”); Thomas M. Mengler, *Why Should a Catholic Law School be Catholic?*, 7 J. CATH. SOC. THOUGHT 211 (2010) (discussing two principal reasons why Catholic law schools should be Catholic: “Indispensable Conviction” and Catholic moral formation as a “we”).

principal reason why Catholic colleges and universities created new law schools or acquired already existing ones was to provide the children of Catholic immigrants with the means of socio-economic advancement by becoming lawyers and gaining entry into the professional classes of American society.”<sup>6</sup> There were other reasons, too, and they are presented and discussed in the manuscript, but it seems clear that, with a few possible exceptions, “Catholic law schools in the United States were not founded with the goal of promoting a uniquely Catholic philosophy of law . . . or specifically Christian approach to legal education.”<sup>7</sup> Instead, “the specific goal of articulating a Catholic philosophy of law was clearly subordinate to other more practical, demographic, and institutional goals . . . .”<sup>8</sup>

Second, and relatedly, Breen and Strang document thoroughly their contention that, during the mid-to-late twentieth century, for a variety of reasons, Catholic law schools and their faculties came to a “new self-understanding of Catholic identity” and, as part of this process, whatever distinctive markers of Catholic character, mission, and ethos they might have possessed were—with some exceptions—muted, watered down, translated, or eliminated.<sup>9</sup> As a result, today, “[o]ther than the modifier ‘Catholic,’ [Catholic law] schools do not share many—if any—distinguishing characteristics. There is next to nothing about their faculty and faculty scholarship, their curricula and pedagogy, student bodies, culture, and aesthetics that set them apart from the mine-run of American law schools.”<sup>10</sup> And as Breen and Strang explain, most of the practices, programs, slogans, and symbols that are sometimes identified as evidence of continued, meaningfully Catholic character do not, on examination, establish the case.<sup>11</sup>

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<sup>6</sup> Breen & Strang, *supra* note 3, at 468.

<sup>7</sup> *Id.* at 42.

<sup>8</sup> *Id.* at 43.

<sup>9</sup> *Id.* at 437 ff.

<sup>10</sup> *Id.* at 464.

<sup>11</sup> *Id.* at 462 ff.; *see also, e.g., id.* at 479 (“A purely ornamental, decorative Catholicism is inadequate because it does not differentiate what occurs in the classroom or in scholarship, and a rhetorical Catholic identity claiming a special emphasis on social justice manifest, for instance, in legal clinics, is inaccurate.”).

Third, *A Light Unseen* reminds any readers who needed reminding that “personnel is mission” and mission is a decision.<sup>12</sup> The failure of most law schools—particularly during their rapid growth in the 1960s and 1970s—to hire faculty with “a strong sense of mission” is identified, correctly, as contributing to the fact that, “[a]t the close of this era, . . . Catholic law schools [were] virtually indistinguishable from their secular counterparts . . . .”<sup>13</sup> It is true as a general matter, of course, that the ability of a group, society, association, party, or institution to stand for something, to express something, to advocate for something, and to accomplish something depends crucially on the ability to identify, form, and manage their leaders and staff.<sup>14</sup> And this is true with a vengeance in the context of the project of building, enhancing, and preserving a Catholic law school’s distinctive character and mission. That is, any distinctiveness with respect to character and mission depends on personnel—administrators, staff, students, but especially faculty—who see that distinctiveness as something to be pursued, valued, and protected and not as an oddity to be hidden or an obstacle to be overcome.

During my twenty years at Notre Dame Law School, this necessity has been appreciated and embraced by the faculty community, even as healthy differences and disagreements regarding the entailments and implications of our distinctive Catholic mission have been worked out and worked through. But again: whatever the Catholic mission of a Catholic law school is, it will not be realized without a clear-eyed, intentional, and proactive focus on identifying, hiring, mentoring, forming, and retaining committed faculty—of all faiths and none.

### III.

Having highlighted these preliminary, but essential, points, I want to focus on what was identified above as Breen and Strang’s core claim: a Catholic law school must have an “intellectual architecture” that sets it apart. Recall, again, that—whatever else might have been, at various times, distinctive or unusual

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<sup>12</sup> *Id.* at 450; *see also, e.g., id.* at 21 (noting the “vital importance of intentionally hiring faculty who know and embrace the school’s Catholic mission”).

<sup>13</sup> *Id.* at 219.

<sup>14</sup> *Cf., e.g., Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–89 (2012); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572–73 (2000).

about them—most Catholic law schools in the United States did not and do not have such a setting-apart “intellectual architecture.” If only because of the discrimination practiced by other institutions, Catholic law schools had good numbers of Catholic students and faculty, but their aims and practices, and their understanding of the enterprise, were not innovative or distinctive in ways that are connected to their Catholic character. It is true that the schools aimed to facilitate access to the profession for people who for socioeconomic and other reasons were being kept out, and they later launched and developed programs (as all law schools did) that provided experiential and service opportunities to students and much-needed assistance to vulnerable clients who might otherwise be unable to afford it. No doubt, access and service to the marginalized and needy are good things and would resonate with and appropriately reflect a Catholic law school’s mission. Still, to paraphrase an observation once made by a former colleague of mine, America’s Catholic law schools were, and generally are, “public law schools in Catholic neighborhoods.”<sup>15</sup>

Breen and Strang believe, though, that Catholic law schools can, and should, be different in ways that go beyond demographics and that they can, and should, possess and display such an “architecture”: “For the adjective—Catholic—to be meaningful, what it modifies—legal education—must be different.”<sup>16</sup> They are referring, again, to a distinctiveness that involves more than providing clinics, teaching legal ethics, urging students to direct their talents and training to the needs of the vulnerable, and lifting up the importance of justice. They contend, again, that if there is any value to distinctiveness, it must be rooted in, and reflect, an “intellectual architecture.” They consider, and reject, the possibility that either a natural-law orientation or the body of post-nineteenth century “Catholic Social Thought” could do the trick. Instead, and following Alasdair MacIntyre,<sup>17</sup> they propose—and I agree—that the foundation and cornerstone of that architecture needs to be a

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<sup>15</sup> Alfred J. Freddoso, *Introduction* to CHARLES E. RICE, *WHAT HAPPENED TO NOTRE DAME?*, at xii (2009).

<sup>16</sup> Breen & Strang, *supra* note 3, at 493.

<sup>17</sup> See generally ALASDAIR MACINTYRE, *GOD, PHILOSOPHY, UNIVERSITIES: A SELECTIVE HISTORY OF THE CATHOLIC PHILOSOPHICAL TRADITION* (2011).

distinctively Christian moral “anthropology,” that is, an account of what it means to be human, why it matters that we are, and what it means for our lives together.<sup>18</sup>

In the interest of full disclosure, it should be conceded that the previous paragraph is an example of one author agreeing with other authors because the latter’s views so neatly reflect the former’s. A short, self-promotional anecdote will not, I hope, be out of place: about seventeen years ago, I cofounded a “blog” called “Mirror of Justice.” The blog proclaimed (and still proclaims) the goal of developing “Catholic legal theory.” Its contributors have included several dozen, mostly Catholic, law professors from a range of institutions, some Catholic and others not. In my very first post, “Law and ‘Moral Anthropology,’” I wrote the following:

One of our shared goals for this blog is to . . . “discover[ ] how our Catholic perspective can inform our understanding of the law.” One line of inquiry that, in my view, is particularly promising . . . involves working through the implications for legal questions of a Catholic “moral anthropology.” By “moral anthropology,” I mean an account of what it is about the human person that does the work in moral arguments about what we ought or ought not to do and about how we ought or ought not to be treated; I mean, in Pope John Paul II’s words, the “moral truth about the human person.”

The Psalmist asked, “Lord, what is man . . . that thou makest account of him?” This is not only a prayer, but a starting point for jurisprudential reflection. All moral problems are anthropological problems, because moral arguments are built, for the most part, on anthropological presuppositions. That is . . . , our attempts at moral judgment tend to reflect our “foundational assumptions about what it means to be human.”<sup>19</sup>

In any event, the point of this recollection is to agree with Breen and Strang about the importance, and the centrality of, the question: How might this idea of a distinctively Catholic

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<sup>18</sup> See, e.g., Breen & Strang, *supra* note 3, at 464 (“We argue that the Catholic intellectual tradition, focused on a Catholic anthropology of the human person, is the likely best candidate to justify and order Catholic legal education.”).

<sup>19</sup> Richard W. Garnett, *Law and Moral Anthropology*, MIRROR OF JUSTICE (Feb. 6, 2004) (citations omitted) (quoting *Psalms* 143:3 (Douay-Rheims American)), [https://mirrorofjustice.blogs.com/mirrorofjustice/2004/02/law\\_and\\_moral\\_a.html](https://mirrorofjustice.blogs.com/mirrorofjustice/2004/02/law_and_moral_a.html) [<https://perma.cc/Q5WE-ENG9>].

moral anthropology ground and sustain the distinctive, and distinctively Catholic, intellectual architecture of a present-day law school?

To answer this question—or, at least, to gesture towards an answer—I want to borrow from some thoughts that I have been imposing on first-year law students for several years. I begin these (what one student called) “dad talks” by suggesting that the study of law involves at least four levels, or layers. (“Layers” is better, I think, because it suggests that, as with a sphere, the deeper one goes, from wherever on the surface one starts, the closer one gets to the center.) I then take the students through a tour of these layers:

[On] Layer One, [we encounter—again, and again, and again—]the bare words of legal texts (statutes, constitutions, judicial opinions, regulations, etc.). At this level, the new law student encounters strange new terms like “replevin” and terms of art like “*mens rea*” that can play shibboleth-type functions at sports bars or provide proof-of-diligence to relatives at Thanksgiving. Certainly, what happens on Layer One is important. In law, [and not only to “textualists,]” words matter. Part of learning to be a lawyer is learning how to use them precisely, correctly, and [effectively].

Still, no legal education worthy of the name could stop here. The study and practice of law involve more than just performing utterances and producing words called “law.” The terms that make up legal questions and problems do not, generally speaking, assemble or select themselves. One has to go deeper.

As they reach Layer Two, then, law students study and learn about substantive legal doctrines (for example, the “*Lemon* test” and the “mailbox rule”), interpretive techniques, and canons of construction. They engage tests, standards, elements, and forms. They develop legal skills in research, writing, advocacy, counseling, and negotiation. They are pushed, in ways that can be jarring and unsettling, to “think like a lawyer.” That is, they become comfortable abstracting general principles from particular cases, drawing distinctions, and identifying analogies. They are challenged to read carefully, write clearly, and reason [expertly].

[S]ome (shallow) understandings of “what it means to study law and to be a lawyer” stop here, at Layer Two. Here, some would say, we have the practical, the useful, the real. All the rest—whatever might lie beyond (or beneath)—is just theory, policy, and the ivory-tower navel-gazing of the



frustrated or failed doctoral candidates who make up the law professoriate. Sure, one might need to peek beyond Layer Two for material to sprinkle over one's exam answers, but one shouldn't expect to find anything of any use or relevance in the trenches, in the "real world."

This is entirely wrong[, however, and the] study and practice of law involve more than terms and techniques. There is no reason to think that our coming robot overlords will not be able to function just fine at Layers One and Two. We must dig deeper.

[And so], at Layer Three, we roll up our sleeves and test, evaluate, and critique all the tools and terms we picked up at Levels One and Two. This is where we can demonstrate, one hopes, a comparative advantage over the robots. We ask, for example, whether legal doctrines, rules, tests, standards, and practices are consistent with the relevant history and whether or not it matters that they are. We ask whether they operate efficiently and produce desirable effects and incentives, and whether they align with or contradict moral commitments.

It turns out, interestingly, that when we pursue our study deeply enough to reach Layer Three, we start to see that many of the law's apparently discrete and distinct subject areas raise, on examination, similar questions, and are "about," in the end, the same things. In fact, they may all be about the same thing, singular: "How can we—how *ought* we—order our lives together and best achieve our common good so that we can all flourish?"

I am confident that, at most law schools[—public and private, religious and non-religious, Catholic and non-Catholic—]students are challenged to spend some time on Layer Three[, just as they are challenged to participate in clinics, to observe the rules of ethics, to promote access to justice, and so on. At] most law schools, it is at least proposed to students that they will not truly understand what's going on at Layers One and Two unless they have a sense of what's going on at Layer Three [and that what] happens below shapes what happens above. Layers One and Two look like they do because of what is going on at Layer Three. One can learn about legal doctrines, but one will not really understand them unless one appreciates the reasons why they are what they are.

[Layer Four, though, is—with] apologies to Douglas Adams[—]the "meaning of life, the universe, and everything" [l]ayer. Here, we ask not only about the "legislative intent" underlying a particular provision, but also about, for example, "who and what we are, what were we made for, and why it might matter." Layer Four is where we think about not only the most efficient default rules and the "cheapest cost avoiders,"

but also about the nature and destiny of the human person and the connection between our human nature and the legal enterprise. St. Augustine famously wrote that “you have made us for yourself, O God, and our hearts are restless until they rest in thee.” This is a fact about us. We need to ask, “What differences does this fact make?” What does it *mean* for the law, and for lawyering, that we have, as C.S. Lewis[—following Pascal, following Augustine, etc.—]suggested, a God-shaped hole [in us]?<sup>20</sup>

Back to Breen and Strang. As they observe, “law in the Catholic . . . tradition has a *point*”; it is an activity or enterprise with a purpose, that is, to advance the common good and thereby promote the authentic flourishing of human persons.<sup>21</sup> To understand the “point” of the law, then, in order to understand what human flourishing and human community are, one has to wrestle with who and what persons are and are *for*, with moral anthropology. The “intellectual architecture” that Breen and Strang identify as being an essential dimension of any account of a Catholic law school’s distinctiveness, then, must involve work at Layer Four.

At least four aspects of or things about human persons matter and are crucial to seeing and understanding the “point” of law. And a meaningfully Catholic law school should be willing to propose—indeed, should be enthusiastic about proposing—them to its students: persons—that is, we—are dependent, relational, rational, and loved.<sup>22</sup> To say that we are dependent is to say that we are not Promethean and fully autonomous. We exist in community and need others for our flourishing and formation. Similarly, we are relational. Social-contract theories that imagine otherwise, and that try to build accounts of politics or legitimacy on stories about self-sufficient individuals wandering nervously through forests, fail to capture this truth of moral anthropology. We are rational: we believe that we can get to the

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<sup>20</sup> These few paragraphs are adapted from Richard W. Garnett, *Some Thoughts for New Law Students*, PUBLIC DISCOURSE (Aug. 26, 2019) (first quoting DOUGLAS ADAMS, *LIFE, THE UNIVERSE, AND EVERYTHING* (1982); and then quoting GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (Yale Univ. Press 2008) (1970)), <https://www.thepublicdiscourse.com/2019/08/54611/> [<https://perma.cc/D8FK-AQ4T>]. See C.S. LEWIS, *THE PROBLEM OF PAIN* 133–35 (HarperCollins 2014).

<sup>21</sup> Breen & Strang, *supra* note 3, at 485.

<sup>22</sup> See generally ALASDAIR MACINTYRE, *DEPENDENT RATIONAL ANIMALS: WHY HUMAN BEINGS NEED THE VIRTUES* (Open Court Publ’g Co. 2011) (1999).

truth. It is possible for the human mind to find and grasp the right answer to the question posed.

Each of these aspects is, to understate things considerably, worth discussing in far more detail than is possible here. For present purposes, I want to dwell on “loved.” Like the Christian philosopher, Nicholas Wolterstorff, I have to come to think that what makes human dignity a fact, and what makes it the case that we *do* have dignity, and rights, a fact that has important implications for how we may and ought to treat each other, is that we are loved by God. It is not our capacities and abilities but our being-loved. Indeed, Christians believe that we are loved—created and sustained, yes, but also loved—by a God who *is* Love. That “God is love”<sup>23</sup> is, Pope Emeritus Benedict proposed in his first encyclical letter, the key to the “heart of the Christian faith,” namely, “the Christian image of God and the resulting image of mankind and its destiny.”<sup>24</sup> In other words, “‘God is love’ is not only the truth about God, it also carries and illuminates the truth about us.”<sup>25</sup> This truth provides a strong account, not only of the what, but also of the why, of dignity, of rights, and of justice—of the *point* of law.

Wolterstorff’s point echoes, I think, the beautiful children’s story, *The Velveteen Rabbit*. In that story, a tattered, lost, abandoned toy rabbit becomes, eventually, “real,” by virtue of having been deeply and unconditionally loved by a little boy. And as another of my Notre Dame colleagues, Paul Weithman, has explained, for Wolterstorff, similarly, “[n]atural human rights . . . inhere in the worth bestowed on human beings by that love” and “are what respect for that worth requires.”<sup>26</sup> The fact of our being loved by a God who is Love is the key fact for any Catholic legal theory or distinctively Catholic law school’s mission, and understanding this fact is essential to seeing, and then realizing, the “point” of the law.<sup>27</sup>

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<sup>23</sup> 1 *John* 4:16 (New American).

<sup>24</sup> BENEDICT XVI, ENCYCLICAL LETTER *DEUS CARITAS EST* ¶ 1 (2005).

<sup>25</sup> Richard W. Garnett, *Church, State, and the Practice of Love*, 52 *VILL. L. REV.* 281, 281 (2007).

<sup>26</sup> Richard W. Garnett, *Righting Wrongs and Wronging Rights*, *FIRST THINGS* (Oct. 2008) (quoting Paul Weithman), <https://www.firstthings.com/article/2008/10/003-righting-wrongs-and-wronging-rights> [<https://perma.cc/GC2B-PLVJ>].

<sup>27</sup> For an intriguing example of asking what a particular legal practice, criminal punishment, would look like if we regarded love (*agape*) as the first virtue of social and legal institutions, see Jeffrie G. Murphy, *Law Like Love*, 55 *SYRACUSE L. REV.* 15, 18 (2004).