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INTRODUCTION: WHOM SHOULD A CATHOLIC LAW SCHOOL HONOR?

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INTRODUCTION

In the spring of 2009, the University of Notre Dame invited President Obama to deliver the May 2009 commencement address and receive an honorary doctor of laws degree. The invitation followed a particularly heated campaign season in which many Catholic communities experienced lacerating divisions over the question of whether a Catholic could vote for a “pro-choice” politician—namely, Senator Barack Obama. To put it mildly, the decision to honor President Obama sparked an intense, nationwide controversy.

The president of Notre Dame, Holy Cross Father John I. Jenkins described the rationale for the choice:

We will honor Mr. Obama as an inspiring leader who faces many challenges—the economy, . . . immigration[,] and education reform—and is addressing them with intelligence, courage[,] and honesty. It is of special significance that we will hear from our first African-American [P]resident, a person who has spoken eloquently and movingly about race in this nation. Racial prejudice has been a deep wound in America, and Mr. Obama has been a healer.¹

Others, however, focused on Mr. Obama’s legacy as a “pro-abortion legislator.”² Writing to Father Jenkins “to protest this egregious decision,” Archbishop Nienstedt of St. Paul and

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¹ Father John I. Jenkins, CSC et al., *Statements on Notre Dame’s Invitation of President Obama to Speak at Graduation*, 38 *ORIGINS* 693, 693–94 (2009) [hereinafter *Statements on Notre Dame’s Invitation*].

² *Id.* at 697 (statement of Archbishop John C. Nienstedt).

Minneapolis expressed his concern that Mr. Obama “has indicated, especially since he took office, his deliberate disregard of the unborn by lifting the ban on embryonic stem-cell research, by promoting the Freedom of Choice Act agenda and by his open support for gay rights throughout this country.”³

In their critiques of the invitation, several bishops indicated that a 2004 statement of the United States Conference of Catholic Bishops, *Catholics in Political Life*, should have provided fairly straightforward guidance—at least on the question of whom *not* to honor. The relevant portion of the statement reads: “The Catholic community and Catholic institutions should not honor those who act in defiance of our fundamental moral principles. They should not be given awards, honors[,] or platforms which would suggest support for their actions.”⁴

Bishop John M. D’Arcy of Fort Wayne-South Bend, Indiana, the diocese in which the University of Notre Dame is located, quoted the 2004 directive in his letter informing Father Jenkins of his decision not to attend the graduation ceremony: “[T]he measure of any Catholic institution is not only what it stands for, but also what it will *not* stand for.”⁵ Bishop Thomas G. Doran of Rockford, Illinois also wrote to express his “dismay and outrage” to an invitation which “flies in the face of the expressed directive of the U.S. Conference of Catholic Bishops in the year 2004 that Catholic institutions not so honor those who profess opposition to the church’s doctrine on abortion and embryonic stem-cell research.”⁶ Similarly, Bishop Thomas J. Olmstead of Phoenix defined the invitation as “a public act of disobedience to the bishops of the United States.”⁷

³ *Id.*

⁴ U.S. CONFERENCE OF CATHOLIC BISHOPS ET AL., *Catholics in Political Life*, <http://www.usccb.org/bishops/catholicsinpoliticallife.shtml> (last visited July 28, 2011) [hereinafter *Catholics in Political Life*] (emphasis omitted).

⁵ *Statements on Notre Dame’s Invitation*, *supra* note 1, at 694.

⁶ *Id.* at 698.

⁷ *Id.* at 695 (quoting Letter from Bishop Thomas J. Olmsted, Diocese of Phx., to Reverend John I. Jenkins, President of the Univ. of Notre Dame (Mar. 25, 2009), available at <http://the-american-catholic.com/2009/03/26/bishop-olmsted-accuses-president-jenkins-of-disobedience/>).

The question of the extent to which schools run by religious orders owe direct “obedience” to a statement by the U.S. Conference of Catholic Bishops—interesting, but far beyond the scope of this introduction.

The authors of this Symposium write two years after the Notre Dame controversy, somewhat removed from its intense heat and blinding spotlights. In this Symposium, two law professors⁸ and two philosophers,⁹ each on faculties at four different catholic universities, take to heart the United States Bishops' 2004 statement, and explore the implications of the question whom should a Catholic law school honor. The sections below explore some of the themes that weave throughout the various essays.

I. CONSIDERING INSTITUTIONAL CONTEXT

Catholics in Political Life refers generally to whom “the Catholic community and Catholic institutions” should not honor.¹⁰ Professors Baur and Garnett both grapple with general definitions of what it means to be a university, and in particular a Catholic university. Professor Baur draws on the insights of now-Blessed John Henry Cardinal Newman to note the contrast between a university and other places of human formation. Newman describes the university as a place where questions can be “ventilated and turned over and over again,” such that inquirers may have some comfortable distance from “supreme and final” authority, “watching every word,” or making “signs of assent or dissent to each sentence, as [it is] uttered.”¹¹ As distinguished from a convent or a seminary, a university is “a direct preparation for this world[,] . . . a place to fit men of the world for the world.”¹² As such, a university should also prepare its students for the inevitable complexities of the world.

⁸ Robert K. Vischer is a professor of law at the University of St. Thomas School of Law in Minneapolis, Minnesota. See Robert K. Vischer, *Whom Should a Catholic Law School Honor? If Confusion Is the Concern, Context Matters*, 49 J. CATH. LEGAL STUD. 243 (2010). Richard W. Garnett is a professor of law at Notre Dame University School of Law. See Richard W. Garnett, *Whom Should a Catholic University Honor?: “Speaking” with Integrity*, 49 J. CATH. LEGAL STUD. 233 (2010).

⁹ Karen Stohr is a professor of philosophy at Georgetown University. See Karen Stohr, *Honors, Awards, and the Catholic Moral Tradition*, 49 J. CATH. LEGAL STUD. 277 (2010). Michael Baur is a professor of philosophy at Fordham University. See Michael Baur, *The Authority To Interpret, the Purpose of Universities, and the Giving of Awards, Honors, or Platforms by Catholic Universities: Some Thoughts on Catholics in Political Life*, 49 J. CATH. LEGAL STUD. 253 (2010).

¹⁰ See *Catholics in Political Life*, *supra* note 4.

¹¹ Baur, *supra* note 9, at 269 (quoting JOHN HENRY CARDINAL NEWMAN, *APOLOGIA PRO VITA SUA AND SIX SERMONS* 341–42 (Frank M. Turner ed., 2008)).

¹² *Id.* at 268 (quoting NEWMAN, *supra* note 11, at 160).

We cannot possibly keep [students] from plunging into the world, with all its ways and principles and maxims, when their time comes; but we can prepare them against what is inevitable; and it is not the way to learn to swim in troubled waters, never to have gone into them.¹³

Many would acknowledge that these are the principles that should inform how we imagine the space for academic discussion and debate in a university. The sticking point is whether troubled waters should overflow into decisions about whom the institution itself should honor.

Working from another angle, Professor Garnett probes the qualifier “Catholic.” He highlights and contests the tendency to presume that the descriptor “Catholic” necessarily involves “tak[ing] something away” from the enterprise that is a “university”—“To get a ‘Catholic’ university, in other words, one subtracts from a ‘university’ those things that are not consistent with its being a ‘Catholic’ university,” so the argument goes.¹⁴ What if, he queries, the “misshapen” notion of university lies not in the “Catholic” modifier, but in the supposed norms and touchstones of the secular models that define what it means to be a “university”?¹⁵ According to Professor Garnett, if “Catholic” is defined as a positive identity rather than a subtraction, it might help us to imagine how whom a Catholic university honors might be an expression of its distinctive contribution to education and academic life.

Another aspect of institutional context considers the fact that schools also have different institutional histories, emphases, and approaches to education. For those run by religious orders, their varying charisms shape their approach to education and their engagement with the culture and with social problems. One might query how these distinct emphases would be reflected in policies for whom to honor. For example, Professor Vischer asks whether Xavier University in New Orleans—the only historically Black Catholic college in the Western Hemisphere—should be precluded from inviting Donna Brazile, the first African American to lead a national presidential campaign, to speak at commencement because she is pro-choice.¹⁶

¹³ *Id.* (quoting NEWMAN, *supra* note 11, at 160).

¹⁴ Garnett, *supra* note 8, at 237.

¹⁵ *Id.* at 240.

¹⁶ See Vischer, *supra* note 8, at 249–50.

A second aspect of institutional context is the extent to which varying components of a university call for nuances in the analysis of whom to honor. Catholic law schools, for example, hold together a variety of values—including respect for legal process and the rule of law. On certain crucial issues, aspects of the rule of law are in direct tension with fundamental principles of Catholic morality. For example, how should Catholic law schools evaluate the actions of lower-court judges who consider themselves bound by the rule of the law of *Roe v. Wade*?¹⁷ The role of precedent in judicial decision-making was one of the complex questions that permeated the discussion regarding Fordham Law School's decision to grant an ethics award to Justice Stephen Breyer in 2008, notwithstanding his authorship of *Stenberg v. Carhart*.¹⁸

If the constraints of various professional roles should not be considered in the analysis of whom to honor, then it would be important for Catholic law schools to also broach the practical implications of the resulting bar—namely, the portion of the judiciary which could in effect be excluded from Catholic law school campuses, and the extent to which speakers and honors policies communicate a clear message of withdrawal. As Professor Stohr reflects, “The principle of cooperation recognizes the fact that keeping one’s hands perfectly clean in the messy business of real life is not always an option. Sometimes, the choice is between dirty hands and total withdrawal. Church teaching does not specify a priori which choice must be made.”¹⁹

A final question regarding institutional context: What aspects of a “Catholic institution” call for intense scrutiny—only honors bestowed by the university in its official capacity, such as an honorary degree, or should it also extend to the various sub-communities within the institution? For example, in a law school context, can the student-run public interest organization, which raises money to support summer internships, honor at their

¹⁷ 410 U.S. 113 (1973).

¹⁸ 530 U.S. 914, 921–22 (2000) (striking down Nebraska’s “partial birth” abortion ban). See generally Gregory A. Kalscheur, S.J., *Catholics in Public Life: Judges, Legislators, and Voters*, 46 J. CATH. LEGAL STUD. 211, 244 (2007).

¹⁹ Stohr, *supra* note 9, at 290. One could also argue that it would be enough to find ways to engage in conversation without bestowing an honor. For many schools, this conversing would entail a significant shift in academic culture in which engagement with high level public figures tends to include some kind of honor such as an honorary degree—but it might be one approach well worth further exploration.

annual fund-raising dinner the work of an anti-death penalty advocate who also happens to be pro-choice? If so, at what point might intense scrutiny at every level of campus conversation interfere with academic freedom, and the kind of cultural engagement which, as Newman described, prepares future professionals to respectfully engage a complex world? Or are these precisely the “practices” that will help Catholic universities find their unique voice and contribution to the academic landscape?²⁰

II. DEFINING “DEFIANCE”

Considering the *Catholics in Political Life* phrase “those who act in defiance,” the context of the 2004 statement suggests two additional layers of complexity.²¹ First, how does one define “defiance” of Church teaching if the speaker in question is not Catholic?²² Some suggest that because Church teaching on “fundamental moral principles” is expressed in terms accessible to non-Catholics, and is directed at our society as a whole, it is clear that “defiance” should be given a general application.²³ Others, including Father Jenkins, read “defiance” in the context of one’s relationship to Church authority.²⁴

Professor Baur’s analysis is especially helpful for parsing the multi-layered question of authority to interpret definitions in a church document. As Professor Baur explains, the meaning of a word within a church document, such as a statement from the Bishop’s conference, is to be settled by the local bishop:

²⁰ See Garnett, *supra* note 8, at 237.

²¹ *Catholics in Political Life*, *supra* note 4.

²² See *id.*

²³ See Vischer, *supra* note 8, at 244 (noting that because the Church’s teaching is addressed to people of good will, especially the teaching on abortion, “defiance” should be read as disagreement with the truths proclaimed in the teaching, not as a battle with an authority to which one is bound by one’s own identity as Catholic).

²⁴ See Kathleen Gilbert, *Leaked: ND Prez Comment on USCCB Document Prohibiting Honoring Pro-Abortion Politicians*, LIFESITENEWS.COM (Apr. 8, 2009), <http://www.lifesitenews.com/news/archive/ldn/2009/apr/09040808> (quoting *Catholics in Political Life*, *supra* note 4) (statement of Father Jenkins) (“Because the title of the document is ‘Catholics in Political Life,’ we understood this to refer to honoring Catholics whose actions are not in accord with our moral principles. This interpretation was supported by canon lawyers we consulted, who advised us that, by definition, only Catholics who implicitly recognize the authority of Church teaching can act in ‘defiance’ of it.”).

Thus, if the bishop of the diocese of Fort Wayne-South Bend declares that the word “defiance,” as contained in the bishops’ statement, pertains to both Catholics and non-Catholics, then that declaration is the correct one and ought to be followed by anyone seeking to understand the bishops’ statement as it applies within the diocese of Fort Wayne-South Bend.²⁵

Definitions of terms, however, do not mark the end of the inquiry. Professor Baur distinguishes the authority to define terms from the authority to determine how those terms apply in particular circumstances. The local bishop does not have unique and exclusive authority to determine whether or not these terms refer to particular actions in the natural world, for that is the world about which we—as rational beings—may all reasonably discourse.²⁶

Considering the specificity of a law school context, the definition of “defiance” might also be informed by the contours of one’s professional or social role. For example, one might distinguish between politicians who are called to take a precise stand on particular issues as recorded by their voting records—although this, too, is complex—and those who serve other functions, whose positions on controversial issues may be less evident and may have less impact. In the legal profession, one might also distinguish between judges who are required to follow the rule of law and advocates who choose to hone in on particular issues. Many potential honorees are in the “messy middle.” Professor Stohr suggests that we have a particularly hard case “where the person has not taken on abortion rights advocacy as a major commitment but has also not explicitly rejected or opposed abortion rights.”²⁷

Others are in the messy middle to the extent that they can be honored for some but not all aspects of their life or their work. Where should one start drawing the line on the demand for consistency with Church teaching? If the potential honoree is Catholic, how should an institution evaluate aspects of one’s personal life? For example, if Rudy Giuliani were pro-life, should his marital status as being divorced and remarried preclude him from receiving an honor for his public accomplishments at a Catholic university? If the demand for complete integrity is

²⁵ Baur, *supra* note 9, at 259.

²⁶ *Id.* at 259–62.

²⁷ Stohr, *supra* note 9, at 288.

taken to an extreme, at what point would the answer to the question “whom should a Catholic university honor?” be “nobody”?²⁸ Yet for institutions that claim to educate the “whole person,” at what point is a decision to bifurcate public and private—honoring only certain aspects of a person’s life, while expressing a certain distance on other aspects—a sad surrender of an important ideal?

The Catholic philosophical and theological tradition does provide some equipment for beginning to navigate these questions. As Professor Stohr explains, one of the primary concerns at stake is the question of whether a Catholic institution gives “scandal” to the faithful.²⁹ Technically, she explains, “[s]candal is an attitude or behavior which leads another to do evil.”³⁰ She argues that the danger is not so much that the honor will have an “actual[] deleterious effect[]” on the beliefs or actions of those who witness the honor—such as a weakening of moral convictions, or an increase that one would engage in immoral behavior.³¹ Her concern is with scandal in a less technical and slightly more attenuated sense—grounded in the moral importance of distancing oneself from the actions properly regarded as wrong.³²

Professor Vischer adds an additional layer of complexity to the concern about “scandal.” He notes that the Bishops’ 2007 guide, *Forming Consciences for Faithful Citizenship* identifies not one but two “temptations” in public life.³³ The first is to consider the evil of the “‘direct and intentional destruction of . . . human life’” as just one issue among many.³⁴ The second is to misuse “‘these necessary moral distinctions as a way of dismissing or ignoring other serious threats to human life and dignity.’”³⁵ For Professor Vischer, scandal, in its broader and less technical usage, is a two-way street: On one hand, one must

²⁸ See Garnett, *supra* note 8, at 234.

²⁹ Stohr, *supra* note 9, at 280.

³⁰ *Id.* (quoting CATECHISM OF THE CATHOLIC CHURCH ¶ 2284 (2d ed. 1997)).

³¹ *Id.* at 281.

³² *Id.*

³³ Vischer, *supra* note 8, at 248 (quoting U.S. CONFERENCE OF CATHOLIC BISHOPS, *Forming Consciences for Faithful Citizenship* 9 (2007) [hereinafter *Forming Consciences*], available at <http://www.usccb.org/faithfulcitizenship/FCStatement.pdf>).

³⁴ *Id.* (quoting *Forming Consciences*, *supra* note 33).

³⁵ *Id.* (quoting *Forming Consciences*, *supra* note 33).

be aware of the potential for certain honors to generate confusion about church teaching on matters of the utmost moral importance for our culture today.³⁶ On the other hand, one must also keep in mind the risk of “a different sort of scandal by portraying the culture-transforming scope of Church teaching in misleadingly narrow terms.”³⁷

Professor Baur zeroes in on another philosophical and theological resource: the principle of “double effect”—the question of “the moral difficulties that arise when our pursuit of [the] good is bound up with [the] causing [of] evil,” as St. Thomas Aquinas recognized.³⁸ Professor Baur suggests that this doctrine might be helpful in parsing whether there might be proportionate reasons for granting honors in some circumstances, notwithstanding the consequent evil.³⁹

III. TIMING AS ALMOST EVERYTHING?

As noted above, timing was an important aspect of the Notre Dame crisis. The decision to honor President Obama was announced within a fairly short time after Catholic communities across the nation had experienced intense polarization over whether Catholics could in good conscience vote for Barack Obama in spite of his pro-choice positions. Although much less in the limelight, the critique of Fordham’s decision to honor Justice Stephen Breyer almost certainly gained particular traction in light of the award’s timing, in the heat of the 2008 presidential campaign.

Professor Vischer discusses timing—both historically and in cultural context—within the stretch of a particular person’s life. He queries:

Would a Catholic law school’s decision to honor pro-choice President Carter in 1977 pose a different risk of confusion than honoring pro-choice President Obama in 2009? . . . Would honoring pro-choice President Carter pose a different level of

³⁶ *Id.* at 251.

³⁷ *Id.* See also John R. Quinn, *The Public Duty of Bishops*, AMERICA, Aug. 31, 2009, at 18, 19 (Archbishop emeritus describing how a “strategy of condemnation” risks “communicat[ing] several false and unintended messages to much of American society”).

³⁸ Baur, *supra* note 9, at 272.

³⁹ See *id.* at 275.

concern than honoring—still pro-choice—former President Carter, now known widely for his post-Presidency work promoting affordable housing?⁴⁰

Whether an honor should be considered as suggesting “support” for actions in defiance of fundamental moral principles invites a highly contextual analysis. Timing is an important and, in some circumstances, a defining feature of that context.

CONCLUSION

As each author admits, what emerges from these reflections is not a series of answers, but a set of further questions. We hope these analyses will be helpful in the continuing discussion on the principles that should inform decisions about commencement speakers and other honors in Catholic law schools and Catholic universities.⁴¹

⁴⁰ Vischer, *supra* note 8, at 249.

⁴¹ See generally Daniel R. Suhr, *Lessons for Law School Deans Regarding Catholics in Political Life*, 8 GEO. J.L. & PUB. POL'Y 395 (2010).