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A LIGHT UNSEEN?

KATHLEEN M. BOOZANG[†]

A Light Unseen is an incredibly important work of scholarship that has given me an opportunity to be introspective, to give order to what perhaps has been too intuitive, and to be inspired to think about how to better define, pursue, and measure progress in achieving the mission of being a Catholic law school.

My undergraduate experience at Boston College, where I majored in theology, nurtured my spiritual development but also inspired the idea to pursue a legal career in Catholic healthcare. I believe in the power of a Catholic education—it set the chart for my life and has been a continuing touchstone. Uniquely, the inspiration I found at Boston College actually came to fruition. I have maintained a foot in Catholic healthcare throughout my career, either as an attorney or by serving on a hospital board. While I believe passionately in the ministry of Catholic healthcare, not every hospital lives up to what I consider to be Catholic. I represented a rural hospital where the entire medical staff comprised three physicians, an urban safety net children’s hospital, and a very wealthy suburban hospital where a stuck elevator full of “private pay” patients prompted a call to the lawyer. My advice? “Get them out.”

As a law professor, I have served for close to fifteen years on boards of urban hospitals whose payor mix is, in ranked order, uninsured, Medicaid, and Medicare. I am inspired by this ministry—the healing ministry of Jesus Christ. On my current board, we start every meeting with a prayer and a reflection on the values that animate our ministry. We are the largest provider of charity care in the state and one of the busiest emergency departments in the country. Unlike so many decrepit urban hospitals that might as well have a sign on the front door saying “hospital of last resort,” our facilities are modern and impeccable.

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Catholic health care, when done right, embodies Christ. We care for the underserved without regard to personal characteristics or character, we don't garnish the wages of those unable to pay, and we seek to care for the whole person. We evangelize by living the gospel. The charism of this ministry is that every person is treated with dignity and respect—that is, every person is treated as a child of God.

It is against this background that I came to Catholic higher education as an adult twenty-nine years ago. I initially found the transition to be jarring. Seton Hall Law School was living the history so vividly recounted by Professors Breen and Strang. There were those original Catholic faculty who clung to Miriam T. Rooney's vision of the Catholic law school that would call upon philosophical realism to counter the inadequacies of emerging legal and philosophical theories. And there were those who sought to invite faculty who would open the law school curriculum up to new intellectual trends and ideas. In retrospect, the conversation was often warped by the false premise that a law school had to choose between being Catholic and being intellectually rigorous. At the time, I didn't feel an affinity for either team in this too-often contentious debate. In this Essay, I ask whether the problem was, and maybe still is, in the definition of what constitutes a Catholic law school, or the execution of the vision, or both.

From a more personal perspective, the second reason the transition from Catholic healthcare to academia was difficult for me is that I couldn't see how academia was a ministry. Fast forward almost thirty years later, and my self-conception is that I am a pastor with a very fulfilling ministry. I believe we have, and are every day nurturing, an ethos whereby we are bringing the gospel alive on earth, preparing future lawyers to do the same. The law is a perilous profession. We have a responsibility to care for the whole person during the time our students are with us and to arm them with the skills for spiritual and emotional health throughout the entirety of their careers. This is a ministry. But we also have this incomparable opportunity to provide students with the underpinnings for a vision of justice and the common good that at least some of them will be able to

influence during their time in our Center for Social Justice¹ and, more importantly, throughout their careers. Thus, my hope is that we produce lawyers who subscribe to the Catholic intellectual tradition; to me, that is the opportunity presented by the privilege of leading a Catholic law school—that if we live lives and teach values that are sufficiently compelling, we can form lawyers who give witness to the gospel and live the tenets of Catholic social teaching, no matter their faith tradition.

Much of what we do at Seton Hall Law School does resemble the vision articulated by Professors Breen and Strang. The substantive aspects of Seton Hall Law's One L orientation, developed by Professors Michael Ambrosio and Brian Sheppard, two students of natural law jurisprudence, are built around a theme of justice. The book by that title—Michael Sandel's *Justice*²—is assigned as summer reading, and our new law students are broken up into small groups moderated by our faculty and chaplain to begin playing with alternative jurisprudential theories to determine which outcomes satisfy the prerequisites of justice. The goal is that, for the rest of the One L year, the faculty invoke the themes of justice to which the students were introduced during orientation. Most students conclude their tenure with us by participating in a clinic in our Center for Social Justice.

But I believe that there are alternative paths to actualizing the charism of forming lawyers who will engage in the work of the gospel. I want to spend the remainder of this Essay making four points in response to the outstanding work that is *A Light Unseen*. First, my vision of a Catholic law school is one founded upon the Catholic intellectual tradition embraced by a diverse community of faculty, staff, and administration—I aspire to magnify our impact beyond those who are faithful Catholics. My byword is *transformation*. Second, a Catholic law school can accomplish this pervasive embrace of our intellectual tradition by both indirect and direct inculcation. Third, my vision for Seton Hall Law is that we serve as an intellectual hub for the Church. We make ourselves available as a center of service that supports the Church in addressing the pragmatic legal challenges that come from its interface with civil society. Finally, and at this

¹ Seton Hall Law School's Center for Social Justice comprises clinics in Health Justice, Family Law, Immigrants' Rights, International Human Rights, Civil Litigation and Practice, Criminal Justice, and Equal Justice.

² MICHAEL SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* (2009).

point I am going to really start sounding like a dean, I fear that the business model of today's law schools cannot support schools that adopt the vision urged by *A Light Unseen*. Thus, my conclusion is that there are alternative paths to realizing the charism of forming lawyers who will engage in the work of the gospel. These paths need not focus exclusively on education by or of Catholic lawyers.

My first two points significantly overlap and can be briefly summarized—the universality of our intellectual tradition and our values is such that they can and should be appealing well beyond those who are Catholic. As lawyers, as people training lawyers, our opportunity is to create a society and legal system that translate these values into justice on the ground. We seek to define and create a society in pursuit of the common good. While I believe it is essential to have a core group of faculty who are well educated in the Catholic intellectual tradition, one need not be Catholic to embrace or teach from this tradition. A school simply needs a critical mass to create an ethos and to influence the intellectual exchange. The authors of *A Light Unseen* emphasize the importance of a faculty composed of a “critical mass of practicing Catholics.”³ I have never thought that this criterion guarantees mission success, but I also don't have a solution that does. I have met many whom I consider to be Catholic intellectuals who subscribe to the tradition though not Catholic, or who are no longer practicing. One of the most influential labor and employment scholars in the country was Michael Zimmer—while I do not believe he was religious as an adult, there was never any question in my mind that his scholarship and work with the American Law Institute was heavily influenced by his seminary training. He was intellectually of the Catholic intellectual tradition, even if he was not a religious Catholic. And, of course, I have seen hires at a number of Catholic law schools influenced by the fact of the candidates' Catholicism who, to my mind, did not advance the Catholic mission. But that conclusion raises an equally difficult problem—who am I to judge and by what criteria?

³ John M. Breen & Lee J. Strang, *A Light Unseen: A History of Catholic Legal Education in the United States* 526–27 (Jan. 20, 2020) (unpublished manuscript) (on file with the *St. John's Law Review*).

This leads to my second point, which is that we can teach through the prism of the Catholic intellectual tradition without naming it Catholic in the classroom. The economics of today's law school market do not give most of us the luxury of intentionally recruiting a student body that is predominantly Catholic. Nor do I think that this is a good idea. The value of the Catholic intellectual tradition is such that we should seek to teach it beyond those who self-identify as Catholic. As teachers, we know that to be effective requires us to meet the students halfway. While I do ask students whether right to die jurisprudence should embrace the concept from the Ethical and Religious Directives that life-sustaining treatment not "impose excessive expense on the family or the community,"⁴ I do not go into any particular detail about the source of the Principle of Double Effect or Virtue Ethics. Ultimately, we want to be effective teachers. We want to produce students who aspire to a just society and the common good, as conceptualized by the Catholic intellectual tradition and Catholic social teaching. It is about what we teach, how we teach, and which questions we press our students to consider.

My third point: some Catholic law schools might choose to be an intellectual hub for the Church. I have found my Catholic and non-Catholic colleagues alike to be very supportive of projects that guide the Church in negotiating the pragmatic legal challenges that come from its interface with society. For purposes of this discussion, I shall refer to this work as "service scholarship." It is important that Catholic law schools lend their intellectual assets to the service of the Church to help the Church negotiate its own legal challenges and to aid the Church in resolving uncertainties or conflicts that arise when there exist actual or potential conflicts between our faith and civil law. These include an openness to changes that do not undercut core Catholic values.

⁴ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Directive 56*, in ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES 21 (6th ed. 2018), <http://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf> ("A person has a moral obligation to use ordinary or proportionate means of preserving his or her life. Proportionate means are those that in the judgment of the patient offer a reasonable hope of benefit and do not entail an excessive burden or impose excessive expense on the family or the community.") [<https://perma.cc/A7C4-AJ6C>].

Most of my initial forays into this area have come out of my career-long involvement with Catholic healthcare—as an academic, as well as a participant. My most successful scholarly project explored whether and how the civil law should make room for Catholic hospitals’ adherence to the Ethical and Religious Directives even when their implementation conflicted with civil law.⁵ I wrote these companion pieces during the first contraction of the healthcare market when Catholic healthcare systems were acquiring secular hospitals, thereby affecting women’s access to healthcare services,⁶ and it later informed conversations about how Catholic managed care might be structured to comply with state requirements for women’s health services⁷ and then about conscience clauses involving pharmacies.⁸ My scholarship about nonprofit governance addressed the question about whether religious members of a nonprofit board qualify as independent directors.⁹ Seton Hall Law hosted the first published symposium on the intersection of canon and bankruptcy law,¹⁰ an educational

⁵ Kathleen M. Boozang, *Developing Public Policy for Sectarian Providers: Accommodating Religious Beliefs and Obtaining Patient Access to Care*, 24 J.L. MED. & ETHICS 90, 90 (1996); Kathleen M. Boozang, *Deciding the Fate of Religious Hospitals in the Emerging Health Care Market*, 31 HOUS. L. REV. 1429, 1430–31 (1995).

⁶ See generally Elizabeth Sepper, *Taking Conscience Seriously*, 98 VA. L. REV. 1501 (2012).

⁷ See generally William W. Bassett, *Private Religious Hospitals: Limitations upon Autonomous Moral Choices in Reproductive Medicine*, 17 J. CONTEMP. HEALTH L. & POL’Y 455 (2001).

⁸ See, e.g., Kent Greenawalt, *Objections in Conscience to Medical Procedures: Does Religion Make a Difference?*, 2006 U. ILL. L. REV. 799, 822–23; Leslie C. Griffin, *Conscience and Emergency Contraception*, 6 HOUS. J. HEALTH L. & POL’Y 299, 299 (2006).

⁹ Kathleen M. Boozang, *Does an Independent Board Improve Nonprofit Governance?*, 75 TENN. L. REV. 83, 85–86 (2007).

¹⁰ Kathleen M. Boozang, Introduction, *Bankruptcy in the Religious Non-Profit Context*, 29 SETON HALL LEGIS. J. 341, 341 (2005) (“As a Catholic institution, Seton Hall University School of Law has a unique obligation and opportunity to address legal issues that are of special concern to religious entities. The continuing financial distress, including bankruptcies, of several Catholic dioceses and hospitals implicates an intersection of legal issues largely unaddressed by United States jurisprudence.”); see, e.g., Nicholas P. Cafardi, *The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis*, 29 SETON HALL LEGIS. J. 361 (2005); Angela C. Carmella, *Constitutional Arguments in Church Bankruptcies: Why Judicial Discourse About Religion Matters*, 29 SETON HALL LEGIS. J. 435 (2005); Christina M. Davitt, *Whose Steeple Is It? Defining the Limits of the Debtor’s Estate in the Religious Bankruptcy Context*, 29 SETON HALL LEGIS. J. 531 (2005); Melanie DiPietro, *The Relevance of Canon Law in a Bankruptcy Proceeding*, 29 SETON HALL LEGIS. J. 399 (2005); Catharine Pierce Wells, *Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy*, 29 SETON HALL LEGIS. J. 375 (2005); Mark A. Sargent, *The Diocese After Chapter 11*, 29 SETON HALL LEGIS. J. 427 (2005); David A. Skeel, Jr.,

program for Catholic Charities' leadership on separate incorporation to protect corporate assets, and performed work on the conflict between some bishops' interpretation of the Ethical and Religious Directives and civil law requirements on the emergency care of rape survivors.

Myriad interesting questions merit consideration by Catholic legal scholars: how might Church entities, especially Chanceries, create the position of compliance officer consistent with Canon law? Should statutes allowing for the corporation sole be repealed as insufficient to ensure adherence to fiduciary duties? How does a Catholic hospital negotiate malpractice law in the situation faced by St. Joseph's Hospital in Phoenix, whose bishop interpreted the Ethical and Religious Directives as precluding a life-saving intervention of a pregnant woman that resulted in fetal death?¹¹ Different views about the treatment of ectopic pregnancies might raise similar conflicts.¹² And responsive scholarship from non-Catholic scholars will enhance the conversation.

Catholic law school faculty are uniquely positioned to engage in service scholarship. It is what we are uniquely placed to offer the Church. But obstacles exist that must be overcome. And I begin with the language in *A Light Unseen* that addresses academic freedom. The suggestion that Catholic scholars should pursue only areas of "reasonable debate and discussion"¹³ does not provide the assurance that should be vested by academic freedom to enable unfettered consideration of hard questions, especially by untenured faculty. We live in a Church and society

"Sovereignty" *Issues and the Church Bankruptcy Cases*, 29 SETON HALL LEGIS. J. 345 (2005).

¹¹ See generally Barbara Bradley Hagerty, *Nun Excommunicated for Allowing Abortion*, NPR (May 19, 2010, 3:00 PM), <https://www.npr.org/templates/story/story.php?storyId=126985072> [<https://perma.cc/ULQ8-V2JB>].

¹² Directive 48 of the Ethical and Religious Directives for Catholic Healthcare Facilities states: "In case of extrauterine pregnancy, no intervention is morally licit which constitutes a direct abortion." ETHICAL & RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES, *supra* note 4, at 19. Providers are divided over how this directive intersects with Directive 47 that does allow "[o]perations, treatments, and medications that have as their direct purpose the cure of a proportionately serious pathological condition of a pregnant woman" under certain circumstances. *Id.* See generally Angel M. Foster et al., *Do Religious Restrictions Influence Ectopic Pregnancy Management? A National Qualitative Study*, 21 WOMEN'S HEALTH ISSUES 104 (2011) (reporting the spectrum of approaches taken by physicians working in Catholic hospitals as compared with non-Catholic facilities in the management of ectopic pregnancies).

¹³ See Breen & Strang, *supra* note 3, at 529, 529–30.

riven by ideological differences; what's "reasonable" is in the eye of the beholder. My scholarship arguing that civil law should accommodate the Catholic hospitals' pursuit of their ministry consistent with religious tenets,¹⁴ which was posted on the Archdiocese of New York's web page as a reference for Catholic hospitals, became an issue in my tenure review—clearly the critics hadn't read my work, but they knew I was a female law professor writing about Catholic hospitals.

Beyond a robust commitment to academic freedom, deans at Catholic law schools need to think about the incentives we create for scholarship. I would venture to say that service scholarship is less likely to place in a "top journal." It might even be less valued by our colleagues during the rank and tenure process. In short, our reward system potentially discourages service scholarship.

Finally—the economics of law schools. I do not think that the law school market will support more than a handful of schools that adhere to the model suggested by our very thoughtful and earnest colleagues. While a core number of Catholic students will unquestionably be drawn to the kind of Catholic law school the authors describe, I do not believe a sufficient number of students qualified for success in law school and on the bar exist to support the over twenty law schools the authors urge to subscribe to this model. Few of today's aspiring law students are sufficiently rigorously educated in their faith to thrive at law schools that adopt the model advanced. And all of this transformation would occur as law schools and their universities respond to the economic cataclysm brought on by COVID-19, and they begin to position themselves for the demographic cliff.

I also doubt that a sufficient number of Catholic aspiring academics exist to staff all of the Catholic law schools in the country. The book itself reflects the paucity of professors at critical times, including the early history of Seton Hall Law, where the founding Dean Miriam T. Rooney's efforts to create a law school of the kind envisioned by *A Light Unseen* were handicapped by that reality. Candidates would have to be not only Catholic, familiar with the Catholic intellectual tradition, but also qualified for whatever subject matter needs the particular law school has at the time of the search. Finally, *A Light*

¹⁴ See sources cited *supra* note 5.

Unseen addresses the economic model of law schools, imagining a better world in which Catholic law schools charged lower tuition or awarded more need-based scholarships. As dean of a Catholic law school, I would absolutely like to base our discounting solely on need, lower our tuition, or increase our discount rates, but the business model does not support such moves. That being said, we do behave differently because we are Catholic. As readers will recall, the Seton Hall Law faculty voted themselves a pay cut in 2012 to enable the retention of untenured faculty despite the effects of the 2008 crash. To me, that was a decision by a faculty dedicated to its mission as a Catholic law school. And today, every single one of those untenured faculty have tenure, and they are now faculty leaders and associate deans.