

Catholic Moral Teaching and Natural Law: Changing the Way We Think About and Teach Professional Legal Ethics

*Peter P. Meringolo**

Lawyers have had a hand in virtually every financial scandal in recent news. These lawyers are hired to advise clients about how to structure hedge funds, financial products, and financial transactions. Because global economies are becoming more interconnected, when large and risky financial transactions fail, they shake the stability of markets around the world.

The “hired gun” mentality is prevalent throughout the legal profession. In this mindset, lawyers believe that because they are engaged by a client, they must do their client’s bidding, and must be singularly focused on their client’s sole interests. Can we do anything to encourage lawyers to consider not only the interests of their individual clients, but also the ramifications of their actions on the common good?

A lawyer’s conduct is deemed “unethical” if it fails to meet standards set forth in the professional ethics rules of the states in which they practice. If the bar association of any state wants to deter additional forms of conduct, the mechanism in place today would require the enactment of higher statutory standards.

Our society and our profession should demand more than the present overly narrow focus on the individual good of the client, especially where such focus has serious negative repercussions on the good of society. We should demand that lawyers act not only as competent legal professionals, but also as good citizens and morally upright human beings. On this score, our Catholic moral tradition—which teaches that human flourishing comes through the development of good moral

* Attorney at Law, Graduate of the University of Notre Dame (B.A. 1991) and the University of California, Hastings College of Law (J.D. 1998). Thank you to Fr. Edward Krasevac, Professor of Theology at the Dominican School of Philosophy and Theology, and my cohorts in the M.T.S. Program, for their inspiration and comments on this Article. Thanks also to the editors of the *Loyola University Chicago Law Journal*, especially Matt Costello, Editor-in-Chief, for his hard work and substantive input.

character—has much to offer to the discussion of legal ethics. If our Catholic faith aids in our moral development as human beings, should it not also affect the way we view and exercise our chosen profession?

Now is the time for Catholic lawyers and law schools to take a leadership role in cultivating moral judgment and good character in lawyers. Academics are uncovering the historical efforts to change Catholic legal education. Moral theologians are reformulating thirteenth-century natural law principles and the tradition of virtue ethics that underpins them so that they may be usefully applied to modern realities. Building upon these recent developments, this Article argues that Catholic law schools should educate their pupils in the moral tradition of natural law, and Catholic lawyers should seek to integrate this tradition into their day-to-day practice, especially in the area of professional ethics. In other words, Catholic lawyers and Catholic law schools are uniquely positioned to help in the renewal of the ethical principles of our profession, and have an obligation to change the way we think about and teach professional legal ethics.

INTRODUCTION

Lawyers play an important and very visible role in American society. We write laws, interpret laws, and apply facts to laws. We help people to protect rights, resolve disputes, and seek justice. We write and interpret contracts, leases, and patents. We are the means through which people access the court system. We are judges, mediators, arbitrators, counselors, and confidantes. We prosecute and defend people accused of crimes. We act as agents for our clients.

Given the ubiquity of lawyers in America, lawyers undoubtedly have been involved in the financial scandals headlining the news. One can imagine lawyers advising clients about how to structure mortgage-backed securities, set up trading schemes, including deals that lead to billion dollar losses and shake the foundation of world economies,¹ and arrange offshore tax shelters for their client's wealth. We have seen lawyers advise presidents about the use of torture and drone assassinations.² Lawyers certainly were involved in advising the federal government about the legalities of allowing guns to "walk" to

1. See generally Sewell Chan, *Financial Crisis Was Avoidable, Inquiry Finds*, N.Y. TIMES, Jan. 25, 2011, at A1 (summarizing key aspects of the 2008 financial crisis in the U.S.); NAT'L COMM'N ON THE CAUSES OF THE FIN. & ECON. CRISIS IN THE U.S., THE FINANCIAL CRISIS INQUIRY REPORT 27–353 (2011) (describing conduct, deals, and schemes that caused the 2008 great recession).

2. Charlie Savage, *Secret U.S. Memo Made Legal Case to Kill a Citizen*, N.Y. TIMES, Oct. 9, 2011, at A1.

2013] *Changing the Way We Think About and Teach Legal Ethics* 1069

Mexico in the recent so-called “fast and furious” federal operation.³

As lawyers, we are duty bound to act ethically. Over 100 years ago, the American Bar Association (ABA) adopted the Canons of Professional Ethics, and later, the Model Rules of Professional Conduct,⁴ which set forth professional standards that serve as models of the regulatory law governing the legal profession in the fifty states. We are taught these standards in law school, and they are featured prominently on the bar examination that most every lawyer is required to pass before being admitted to practice law in the United States.

Simply following these ethics rules, which have been in place since 1908, is not enough to ensure that lawyers will act ethically. For example, Professor Katherine Franke of Columbia Law School, in light of lawyers’ complicity in recent financial scandals, argues that legal educators must teach “students that being a ‘good lawyer’ . . . include[s] the cultivation of responsible moral judgment.”⁵ She aptly advocates for more rules:

Just as lawyers’ roles in the Watergate scandal forced the profession to review and revise its ethics canon, so too lawyers’ collaboration in today’s financial scandals ought to provoke consideration of new and higher ethical standards of professionalism. In important respects, these ethics would signal a return to Brandeis’[s] notion of lawyers as public citizens, and would discourage lawyers from being no more than handmaidens to the purely self-seeking opportunism and strategic behavior of their clients. Instead, the integrity of our profession should oblige us to convince our clients that deceptive, fraudulent or

3. Charlie Savage, *Documents Reveal Reactions to Disputed A.T.F. Investigations in Arizona*, N.Y. TIMES, Nov. 1, 2011, at A17. Operation Fast and Furious was a federal investigation by federal agents into a gun trafficking ring in the U.S. that was providing weapons to a Mexican drug cartel. *Id.*

4. MODEL RULES OF PROF’L CONDUCT preface (2012). To date, California is the only state that has not adopted the format of the ABA Model Rules of Professional Conduct. See *State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR. ASS’N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Mar. 15, 2013). Thus, this Article uses the term “rules of professional conduct” to refer generally to the ethics rules that govern the legal profession.

5. Katherine Franke, *Occupy Wall Street’s Message for Lawyers*, NAT’L L.J., Nov. 21, 2011. As Justice Brandeis put it, “the counsel selected to represent important private interests possesses usually ability of a high order, while the public is often inadequately represented or wholly unrepresented. Great unfairness to the public is apt to result from this fact.” LOUIS DEMBITZ BRANDEIS, *BUSINESS—A PROFESSION* 324–25 (1914). See also MODEL RULES OF PROF’L CONDUCT pmb1., para. [6] (“As a *public citizen*, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.” (emphasis added)).

illegal practices are neither in their own self-interest nor in that of the larger public.⁶

Professor Franke's call for "new and higher ethical standards of professionalism" raises certain fundamental questions. Would the existence of higher standards discourage lawyers from acting unethically? Would new standards oblige lawyers to counsel clients away from committing fraud, in a way that the old standards did not? Is an act unethical because the law, or some other authority, deems it so? Is simply acting in conformity with higher standards of professionalism enough for a lawyer to fulfill his or her ethical obligations? Notably, the rules of professional conduct themselves acknowledge that they do not "exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile activity can be completely defined by legal rules."⁷

I agree with Professor Franke that law schools must cultivate responsible moral judgment in lawyers. However, to do so, there needs to be a fundamental shift in how law schools teach, and how lawyers apply, professional ethics rules. Certainly, moral and ethical judgment requires more than the memorization of a series of standards. Currently, the rules of professional conduct regulate lawyer conduct through deterrence. If a lawyer violates an ethical duty, she is potentially subjected to disciplinary action and malpractice claims.⁸ As a result, some lawyers act merely to avoid malpractice, rather than in accordance with what is "right" or "good."

Professional ethics should provide an incentive for a lawyer to do what is right *and* what is good. To this end, Catholic thought has much to offer. As Catholics, we are guided to be and do good by a rich tradition. A crucial aspect of Catholic moral teaching is that "an evil act does its greatest damage to the one who performs it."⁹ Although this aspect "has been in grave danger of being eclipsed" in contemporary ethics, there has been a "renewal of virtue ethics, which emphasizes the manner in which an agent's actions shape his or her character."¹⁰

6. Franke, *supra* note 5.

7. ILL. RULES OF PROF'L CONDUCT pmbll., para. [16] (2010).

8. CAL. RULES OF PROF'L CONDUCT R. 1-100(A) (2013). In Illinois, the "[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process." ILL. RULES OF PROF'L CONDUCT pmbll., para. [19].

9. M. Cathleen Kaveny, *Appropriation of Evil: Cooperation's Mirror Image*, 61 THEOLOGICAL STUD. 280, 281 (2000) [hereinafter Kaveny, *Appropriation*].

10. *Id.* Virtue Ethics denotes an "approach to moral philosophy or moral theology that focuses not on particular actions, but rather on the person who is acting. More specifically, virtue ethics is concerned with the person's 'character,' his or her moral identity." Charles Skriner, *The Distinctiveness of Christian Legal Ethics*, 24 GEO. J. LEGAL ETHICS 921, 927 (2011) (footnote

2013] *Changing the Way We Think About and Teach Legal Ethics* 1071

Catholic law schools are uniquely qualified to develop ethical lawyers and to cultivate a lawyer's character and moral judgment. Catholic law schools would do well to teach the Catholic moral tradition and natural law principles to aspiring lawyers so that they can apply this tradition and those principles during their professional careers. This call is hardly new. In the 1930s and 1940s, several prominent leaders of Catholic legal education sought to change the curriculum of Catholic law schools in order to "build Catholic legal education around a rigorous study and exposition of the metaphysics and natural law theory of St. Thomas Aquinas."¹¹ These leaders rode the crest of the Neo-Thomism movement that began in Europe. Although the efforts failed, another Thomistic movement is occurring today, and the reasoning behind the proposal advanced by the leaders of the past is instructive.

The purpose of this Article is to suggest that now is the time for legal professional ethics rules to account for a broader vision of the common good and to assure that such rules aid the moral development of a lawyer's character. Works by academics, such as Professors John Breen and Lee Strang, provide a renewed focus on Catholic legal education.¹² Moral theologians, such as Professor Jean Porter, are renewing and developing Aquinas's theory of natural law in a way that allows it to reliably guide the actions of all Catholics, including Catholic lawyers.¹³

Part I briefly discusses important ethical frameworks set forth in the rules of professional conduct, using the California and Illinois rules as a template. Next, Parts II and III depict a theory of natural law espoused by Jean Porter, and the categories of cooperation with, and appropriation of, evil. Part IV then analyzes hypothetical situations of legal representation based upon real life examples using the legal ethics and natural law frameworks. Following, Part V reviews the historical efforts to amend Catholic legal education. The Article concludes by advocating for Catholic law schools to play a significant role in supplementing ethics rules by equipping Catholic lawyers with the tools and skills necessary to engage the rules of professional conduct in a dialogue with Catholic moral teachings and the natural law.

omitted).

11. John M. Breen & Lee J. Strang, *The Road Not Taken: Catholic Legal Education at the Middle of the Twentieth Century*, 51 AM. J. LEGAL HIST. 553, 556 (2011). See *infra* Part V (discussing this period in which Catholic leaders called for a renewed emphasis on Catholic teachings in law school).

12. See generally Breen & Strang, *supra* note 11; John M. Breen, *The Air in the Balloon: Further Notes on Catholic and Jesuit Identity in Legal Education*, 43 GONZ. L. REV. 41 (2007).

13. See *infra* Part II.

I. THE RULES OF PROFESSIONAL CONDUCT

The conduct of lawyers is regulated by each state's rules of professional conduct (as well as by other applicable law).¹⁴ Every lawyer admitted to a state's bar is responsible for observing these rules.¹⁵ This brief introduction to legal ethics rules covers lawyer discipline, integrity, honesty, and a lawyer's relationship with her client.

The rules make plain that they are intended to regulate a lawyer's conduct through discipline.¹⁶ A lawyer must refrain from knowingly violating ethics rules.¹⁷ Legal ethics rules are intended to shield the public from misconduct and foster confidence in lawyers' ability to uphold the law and promote justice.¹⁸ Because lawyers play a vital role in "preserving and serving society," ethics rules are intended to define the relationship of lawyers to the legal system.¹⁹

The rules of professional conduct embody integrity in the legal profession. By and large, the rules prohibit dishonesty and purposeful deception. For example, lawyers may not make false statements to a state bar or to third parties in certain situations, such as on the application for admission to the state bar or to a jury or judge during trial.²⁰ A lawyer is also prohibited from "further[ing] an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to character, education, or other relevant attributes."²¹ Furthermore, a lawyer cannot solicit a third party for business if the lawyer has no personal or professional connections to the prospective client.²² Lawyer solicitations may not contain false

14. For the purpose of this Article, I predominantly focus on the rules of professional conduct from Illinois and California.

15. *See, e.g.*, ILL. RULES OF PROF'L CONDUCT pmb1., para. [12] (2010).

16. CAL. RULES OF PROF'L CONDUCT R. 1-100(A) (2013). In Illinois, the "[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process." ILL. RULES OF PROF'L CONDUCT pmb1., para. [19].

17. *See* CAL. RULES OF PROF'L CONDUCT R. 1-120 ("A member shall not knowingly assist in, solicit, or induce any [ethical] violation . . ."); ILL. RULES OF PROF'L CONDUCT R. 8.4(a) (similar language).

18. *See* CAL. RULES OF PROF'L CONDUCT R. 1-100(A) (explaining the purpose and function of the rules of professional conduct). *See also* Ames v. State Bar, 506 P.2d 625, 629 (Cal. 1973) (explaining that the ethics rules "are intended not only to establish ethical standards for members of the bar, but are also designed to protect the public").

19. ILL. RULES OF PROF'L CONDUCT pmb1., para. [13].

20. *See, e.g.*, CAL. RULES OF PROF'L CONDUCT R. 1-200(A) ("A [lawyer] shall not knowingly make a false statement regarding a material fact or knowingly fail to disclose a material fact in connection with an application for admission to the State Bar."). *See also* ILL. RULES OF PROF'L CONDUCT R. 3.3, 4.1 (dealing with truthfulness and material nondisclosures to judges and third parties).

21. CAL. RULES OF PROF'L CONDUCT R. 1-200(B).

22. *See id.* R. 1-400(C). *See also* ILL. RULES OF PROF'L CONDUCT R. 7.3(a)(2).

2013] *Changing the Way We Think About and Teach Legal Ethics* 1073

information or statements that would service to mislead the public.²³

Legal ethics rules also govern the relationship between lawyer and client—the seminal rule being that a lawyer must not disclose a client’s confidential information.²⁴ As numerous ethics rules explain, a lawyer’s duty to maintain client confidentiality is of vital importance to promoting open and honest communication between the lawyer and her client, even as to embarrassing or legally damaging subject matter.²⁵ As the Ninth Circuit has expressed, “Our legal system is premised on the strict adherence to [the] principle of confidentiality There are few professional relationships involving a higher trust and confidence than that of attorney and client, and few more anxiously guarded by the law, or governed by sterner principles of morality and justice.”²⁶

The ethical duty of confidentiality is broader than the attorney-client privilege. While the privilege applies in “judicial and other proceedings in which a [lawyer] may be called as a witness or be otherwise compelled to produce evidence concerning a client,”²⁷ the duty of confidentiality prevents a lawyer from revealing the client’s confidential information even when not confronted with such compulsion.²⁸ This duty of confidentiality applies to all matters communicated during the attorney-client relationship, regardless of its source.²⁹

There are rare occasions when disclosure of client information is explicitly mandated by ethics rules. For example, in Illinois, a lawyer must disclose information when she reasonably believes that doing so

23. See CAL. RULES OF PROF’L CONDUCT R. 1-400(D). See also ILL. RULES OF PROF’L CONDUCT R. 7.1(a) (“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.”).

24. CAL. RULES OF PROF’L CONDUCT R. 3-100; ILL. RULES OF PROF’L CONDUCT R. 1.6(a). See Rachel Vogelstein, Note, *Confidentiality vs. Care: Re-evaluating the Duty to Self, Client, and Others*, 92 GEO. L.J. 153, 158 (2003) (“Of all the rules established to ensure professional ethics in the legal arena, perhaps the most important is the ‘confidentiality’ provision . . .”).

25. See, e.g., CAL. RULES OF PROF’L CONDUCT R. 3-100 discussion, para. [1] (“Preserving the confidentiality of client information contributes to the trust that is the hallmark of the client-lawyer relationship.”); ILL. RULES OF PROF’L CONDUCT R. 1.6 cmt. [2] (similar language). See also *United States v. Frederick*, 182 F.3d 496, 500 (7th Cir. 1999) (“The attorney-client privilege is intended to encourage people who find themselves in actual or potential legal disputes to be candid with any lawyer they retain to advise them.” (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981))); *In re Jordan*, 400 P.2d 873, 879 (Cal. 1972) (“[T]he protection of confidences and secrets is not a rule of mere professional conduct, but instead involves public policies of paramount importance . . .”).

26. *McClure v. Thompson*, 323 F.3d 1233, 1242 (9th Cir. 2003) (internal citations and quotations omitted).

27. CAL. RULES OF PROF’L CONDUCT R. 3-100 discussion, para. [2]. See also MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. [3] (2012) (mirroring the language in paragraph [2] of the Discussion section of California Rules of Professional Conduct Rule 3-100).

28. CAL. RULES OF PROF’L CONDUCT R. 3-100 discussion, para. [2].

29. See ILL. RULES OF PROF’L CONDUCT R. 1.6 cmt. [3].

would prevent substantial bodily harm or death;³⁰ in California, however, a lawyer *may*, but is not required to, reveal confidential information in such circumstances.³¹ In fact, in California, unlike other states, the *only instance* in which a lawyer may reveal a client's confidential information is to prevent reasonably certain death or bodily harm.³² Even in such a situation, before revealing the confidential information, a lawyer must make a good faith effort to persuade the client from committing the crime or to pursue a course of conduct that will prevent the threatened death or substantial bodily harm.³³ The "overriding value of life" permits disclosure of confidential information under this exception.³⁴ Moreover, although a lawyer is "not permitted to reveal confidential information concerning a client's past, completed criminal acts, the policy favoring the preservation of human life that underlies this exception to the duty of confidentiality . . . permits disclosure to prevent a future or ongoing criminal act."³⁵ The comments to the Illinois Rules of Professional Conduct provide an example:

[A] lawyer who knows from information relating to a representation that a client or other person has accidentally discharged toxic waste into a town's water must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.³⁶

Yet, even where the preservation of life is at stake, the disclosure of confidential information must be limited to that which is necessary to prevent the harmful act.³⁷

Some states permit disclosure of a client's confidential information in other narrow circumstances. For example, the Illinois Rules of

30. ILL. RULES OF PROF'L CONDUCT R. 1.6(c).

31. CAL. RULES OF PROF'L CONDUCT R. 3-100(B).

32. Many states, including Illinois, New York, and Florida, model their confidentiality rule on Rule 1.6 of the Model Rules of Professional Conduct, which allows lawyers to reveal confidential information to prevent death or bodily harm; to prevent the client from committing a crime that would result in financial injury to a third party; to secure legal advice about lawyer compliance with the ethics rules; to establish a claim or defense in a legal malpractice suit; or to comply with a judicial order. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(7) (2012).

33. CAL. RULES OF PROF'L CONDUCT R. 3-100(C). *See also* ILL. RULES OF PROF'L CONDUCT R. 1.6(c) cmt. [14].

34. CAL. RULES OF PROF'L CONDUCT R. 3-100 discussion, para. [3]; ILL. RULES OF PROF'L CONDUCT R. 1.6(c) cmt. [6].

35. CAL. RULES OF PROF'L CONDUCT R. 3-100 discussion, para. [3].

36. ILL. RULES OF PROF'L CONDUCT R. 1.6(c) cmt. [6].

37. CAL. RULES OF PROF'L CONDUCT R. 3-100(D). *See also* ILL. RULES OF PROF'L CONDUCT R. 1.6(c) cmt. [14].

2013] *Changing the Way We Think About and Teach Legal Ethics* 1075

Professional Conduct allow disclosure to thwart a client from committing fraud that is reasonably certain to cause substantial injury to the financial interests or property of a third party.³⁸ “Fraud” is defined as the highest form of deceit—it does not encompass “negligent misrepresentation or negligent failure to apprise another of relevant information.”³⁹ However, a lawyer may disclose such confidential information only if the client has used, or is using, the lawyer’s services in furtherance of the crime or fraud.⁴⁰

The rules of professional conduct also place some—albeit, minimal—limitations on how a lawyer represents his client. For instance, a lawyer

shall not seek, accept, or continue employment if the member knows or should know that the objective of such employment is to bring an action, conduct a defense, assert a position in litigation, or take an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person.⁴¹

A lawyer also is not permitted to pursue a cause of action or defend a proceeding without proper legal basis—that is, if the attorney cannot assert a good-faith argument on the merits of the action.⁴² A lawyer is prohibited from “threaten[ing] to present criminal, administration, or disciplinary charges to obtain an advantage in a civil dispute.”⁴³ Ethics rules also require that a lawyer, in presenting matters to the court,

38. ILL. RULES OF PROF’L CONDUCT R. 1.6(b)(2).

39. *Id.* R. 1.0 cmt. [5].

40. *Id.* R. 1.6(b)(2). Rule 1.6(b) lists other permissive, but not mandatory circumstances, in which a lawyer may reveal confidential information:

(1) to prevent the client from committing a crime . . . (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services; (4) to secure legal advice about the lawyer’s compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or (6) to comply with other law or a court order.

Id. R. 1.6.

41. CAL. RULES OF PROF’L CONDUCT R. 3-200(A).

42. ILL. RULES OF PROF’L CONDUCT R. 3.1. *See also id.* cmt. [2] (explaining the differences between frivolous and non-frivolous actions).

43. *Flatley v. Mauro*, 139 P.3d 2, 20 (Cal. 2006) (quoting CAL. RULES OF PROF’L CONDUCT R. 5-100(A)). *See also* ILL. RULES OF PROF’L CONDUCT R. 1.2(e) (Illinois’s comparable provision). As the Court said in *Flatley*, “a threat that constitutes criminal extortion is not cleansed of its illegality merely because it is laundered by transmission through the offices of an attorney.” *Flatley*, 139 P.3d at 21.

exercise such “means only as are consistent with truth.”⁴⁴ In other words, in the course of representation, a lawyer may not make a false statement of material fact or law to a judicial officer, jury, or third party.⁴⁵

II. THE NATURAL LAW

Whereas the rules of professional conduct are concerned with the external consequences of a lawyer’s acts and public policy considerations (e.g., “respect and confidence in the legal profession”⁴⁶), the natural law is concerned with the internal character development of a human being and the broader common good. Below is a brief synopsis of a natural law theory in the tradition of Aquinas that has been, and continues to be, developed by Professor Jean Porter.

The natural law is an “internal disposition toward what is good and perfective” of an agent.⁴⁷ It is humans’ capability to distinguish between what is good and what is evil—a power that emanates from the teleology of human nature.⁴⁸ Every creature is oriented towards a specific form of goodness. At the most fundamental level, a human being is oriented “to stay alive, to remain healthy, . . . to enjoy unimpeded functioning in accordance with one’s basic capacities for action,”⁴⁹ to reproduce, to function in society, to seek knowledge, and to worship God.⁵⁰ These “prerational” aspects of human nature are intelligible and good—as Jean Porter puts it, prerational human

44. CAL. RULES OF PROF’L CONDUCT R. 5-200(A). *See also* Douglas R. Richmond, *Lawyers’ Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249, 283 & n.300 (2009) (explaining that the duty of honesty to judges is demanding and requires attorneys to be completely forthright).

45. CAL. RULES OF PROF’L CONDUCT R. 5-200(B). *See also* ILL. RULES OF PROF’L CONDUCT R. 3.3(a) (“A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”).

46. CAL. RULES OF PROF’L CONDUCT R. 1-100(A). As the Fifth Circuit stated (referring to Louisiana’s legal ethics rules), certain ethics rules are intended to

protect the public from unethical forms of lawyer[ing]. . . . [T]he court [has] reiterated the legislature’s concerns that [certain] lawyer [conduct] had “become undignified and pose[d] a threat to the way the public perceives lawyers.” It also stated that it had adopted [certain] new rules “to preserve the integrity of the legal profession, to protect the public from unethical and potentially misleading lawyer[ing], and to prevent erosion of the public’s confidence and trust in the judicial system.”

Pub. Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 220 (5th Cir. 2011).

47. THOMAS S. HIBBS, VIRTUE’S SPLENDOR, WISDOM, PRUDENCE, AND THE HUMAN GOOD 70 (2001).

48. JEAN PORTER, NATURE AS REASON 13 (2005) [hereinafter PORTER, NATURE AS REASON].

49. *Id.* at 119.

50. *Id.* at 121.

2013] *Changing the Way We Think About and Teach Legal Ethics* 1077

inclinations are “‘nature as nature.’”⁵¹

But a human being’s natural orientation to the good is more expansive than her prerational inclinations. These inclinations are “mediated through the rational intellect, which is capable of forming judgments about what counts as good, and directing action accordingly.”⁵² As Porter says, “‘nature as nature,’ stemming from prerational aspects of our nature, informs ‘nature as reason,’ that is to say, the moral exigencies of a distinctively human natural law.”⁵³ The prerational inclination of reproduction provides an example:

[Reproduction] can be interpreted and expressed in terms of one’s contributions to a community or an ideal apart from actual physical procreation, [similar to] the fundamental inclination to continue in existence [means] . . . sacrificing one’s individual life to a greater whole. Furthermore, even taken in its most literal sense, human reproduction goes beyond physical procreation to include the education and socialization of one’s children⁵⁴

Virtues, or normative ideals that stem from, and are ultimately molded by, our natural predispositions and wants, play a significant role in mediating nature and reason. For Aquinas, “morality of the virtues” teaches people to act morally when their acts are oriented towards charity and prudence, not because of the imposition of commandments and obligations.⁵⁵ Virtues “provide us with a point of connection between an account of human nature, considered as intelligible and good—‘nature as nature’—and natural law precepts considered as expressions of human rationality—‘nature as reason.’”⁵⁶ The virtue of prudence is the sole guarantor of the goodness of human action, because prudence helps “to form right judgment concerning individual acts, exactly how they are to be done here and now.”⁵⁷

51. *Id.* at 178.

52. *Id.* at 120. Porter further explains that “[t]his capacity creates a consensual space for distinctively moral judgments and assessments, because it opens up the possibility of acting in pursuit of lesser, partial, or seeming goods, in spite of greater, more comprehensive, or genuine goods.” *Id.*

53. *Id.* at 210.

54. *Id.* at 121.

55. THE PINCKAERS READER 330 (John Berkman & Craig Steven Titus eds., Sr. Mary Thomas Noble, O.P., et al. trans., 2005).

56. PORTER, NATURE AS REASON, *supra* note 48, at 178.

57. JOSEF PIEPER, THE FOUR CARDINAL VIRTUES 27–28 (1966) (quotations omitted). As Robert John Araujo, S.J., puts it,

Virtue contributes to the building of a person’s character—a character that is disposed not only to furthering the interests of one’s self but of those whom one must call his or her fellow human beings. Virtues, in short, form the person so that one’s rights and duties are simultaneously pursued for the furtherance of the common good, which is the good of each, and, simultaneously, the good of all.

Virtues are the key to human happiness. That is, happiness involves the constant practice of the acquired virtues, such as temperance, fortitude, justice, and prudence.⁵⁸ As Porter argues,

it would be a mistake to think of a life of basic well-being as something that could be envisioned or pursued—much less, actually enjoyed—apart from . . . a set of ideals of virtue [T]he life of virtue *is* the life of well-being in its fullest and most proper form, and for that very reason the practice of virtues cannot be regarded as an instrumental means to the attainment of well-being.⁵⁹

True happiness “is a matter of character, through which the individual expresses her distinctive identity as a moral being.”⁶⁰ Alisdair MacIntyre puts it like this: “The good life for man is the life spent seeking for the good life for man, and the virtues necessary for the seeking are those which will enable us to understand what more and what else the good life for man is.”⁶¹

Yet, human happiness cannot be attained by individual pursuits alone. A human being is most essentially “a political animal, naturally oriented towards the free yet orderly pursuit of common goals.”⁶² Because of these common goals, the common good “is a value to be pursued for its own sake.”⁶³ Indeed, “a key aspect of the common good can be described as *the good of being a community at all*—the good realized in the mutual relationships in and through which human beings achieve their well being.”⁶⁴

Under a natural law theory, the laws and practices of society exist not as a deterrent of behavior, but as a means to render its subjects virtuous.⁶⁵ Such laws and practices must be structured and ordered according to some standard of “reasonableness, meaning[,] and value more comprehensive than the life of the individual.”⁶⁶ When done so, the law surely promotes virtuous acts—not by inspiring individual

Robert John Araujo, S.J., *John Courtney Murray, S.J., The Meaning of Justice in Catholic Social Thought*, 44. LOY. U. CHI. L.J. 331, 334 (2012).

58. See JEAN PORTER, *MINISTERS OF THE LAW: A NATURAL LAW THEORY OF LEGAL AUTHORITY* 154 (2010) [hereinafter PORTER, *MINISTERS*].

59. PORTER, *NATURE AS REASON*, *supra* note 48, at 178.

60. *Id.* at 154.

61. ALISDAIR MACINTYRE, *AFTER VIRTUE* 219 (3d ed. 2007).

62. PORTER, *MINISTERS*, *supra* note 58, at 141.

63. *Id.* at 149 (quoting DAVID HOLLENBACH, *THE COMMON GOOD AND CHRISTIAN ETHICS* 81–82 (2002)).

64. *Id.* (emphasis added). Cf. Araujo, *supra* note 57, at 334 (“[S]ocial justice must be preceded by the virtuous person and, then, the community of virtuous persons which is the foundation and framework of social justice.”).

65. PORTER, *MINISTERS*, *supra* note 58, at 140.

66. *Id.* at 141.

2013] *Changing the Way We Think About and Teach Legal Ethics* 1079

behavior, but rather “by sustaining the fundamental structures of meaning without which the virtues could not emerge.”⁶⁷ Indeed, “a community functioning in good order manifests distinctively human forms of perfection in a more complete way than any individual could do, and for that very reason, participation in communal life is itself a fundamental aim of human life.”⁶⁸ To be sure, human action is best embodied in moral interactions—the relationships between and among “concrete persons.”⁶⁹

Religious belief plays a vital role in the natural law. Some believe that natural law is simply a “universal morality”—that is, accessible to all persons regardless of theoretical or religious loyalties—and thus, properly studied through a philosophical lens.⁷⁰ This conception of natural law misses the target. Attempts to formulate such “universal” morality, without reference to religious belief, fall short because these formulations are either “so indeterminate as to be nearly vacuous and of little practical use, or specific enough to be of practical use but also therefore substantive enough to be” contested.⁷¹ Rather, religion and our faith in God shape natural law reasoning.

Porter cites historical evidence that shows how theological reflection buttresses the natural law. For example, Cicero presents an early philosophical account of natural law, but he also hints at a theological grounding. Cicero refers to “right reason corresponding to nature.”⁷² This conception evidences how historical accounts of natural law have often been linked with “specific and contestable scientific and metaphysical accounts of nature.”⁷³ Cicero further states that God “is the author, the promulgator, and the judge of this law.” As Porter points out, these comments “do not fit comfortably with a purely philosophical approach to the natural law, at least as such an approach would be understood by most of our contemporaries.”⁷⁴

Just because there is a theological component to natural law does not limit its application to believers. Romans 2:14 says “when Gentiles, who do not possess the law, do instinctively what the law requires, these, though not having the law, are a law to themselves.”⁷⁵ The

67. *Id.*

68. *Id.* at 155.

69. Martin Rhonheimer, *The Moral Point of Veritatis Splendor*, 58 THOMIST 24 (1994).

70. PORTER, NATURE AS REASON, *supra* note 48, at 1.

71. William C. Mattison, III, *The Changing Face of Natural Law: The Necessity of Belief for Natural Law Norm Specification*, 27 J. SOC’Y OF CHRISTIAN ETHICS 260 (2007).

72. PORTER, NATURE AS REASON, *supra* note 48, at 3.

73. *Id.*

74. *Id.*

75. *Romans* 2:14.

Ordinary Gloss, a twelfth century running commentary on Scripture, analyzes this passage as follows: “Even if one does not have the written law, one nonetheless has the natural law, by which one understands and is inwardly conscious of what is good and what is evil, what is vice insofar as it is contrary to nature, which in any case grace heals.”⁷⁶ The Ordinary Gloss understands natural law as a scriptural doctrine. “Scripture provides both a warrant of affirming the existence of the natural law and a theological context within which it is rendered meaningful. The natural law is grounded in creation and represents one aspect of the human reflection of the divine Image.”⁷⁷ That is to say, natural law is a “capacity or power for moral discernment rather than “essentially or primarily a set of rules of right conduct.”⁷⁸

For Porter, the “scholastic approach to the natural law has much to offer, particularly seen from the standpoint of theological ethics. It suggests a way of thinking about the natural law that is distinctively theological, while at the same time remaining open to other intellectual perspectives, including those of the natural sciences.”⁷⁹

III. CATHOLIC MORAL THOUGHT

Natural law does not set forth an enumerated system of ethical norms. Instead, it offers a theological method of reflecting on the marvel of human morality.⁸⁰ Natural law finds expression in the elemental concept of the Golden Rule: do unto others as you would have them do unto you. Natural law also is embodied in the two great commandments: love God and love thy neighbor. From this perspective, the natural law includes not only explicit moral standards, but also “a fundamental capacity for moral judgment.”⁸¹

Catholic moral thought, such as under the categories of cooperation with evil and appropriation of evil, adds structure to this reflection. Professor M. Cathleen Kaveny posits the issue this way: “[Sometimes] we are deeply troubled by the prospect of a connection between our action and the action of another agent because we judge the other’s action to be morally objectionable in some respect.”⁸²

The category of cooperation with evil deals with the situation where the action of an agent will be “taken up and incorporated into the

76. PORTER, NATURE AS REASON, *supra* note 48, at 4 (citation omitted).

77. *Id.*

78. *Id.*

79. *Id.* at 5.

80. *See id.* at 5–6.

81. *Id.* at 14.

82. Kaveny, *Appropriation*, *supra* note 9, at 280.

2013] *Changing the Way We Think About and Teach Legal Ethics* 1081

morally objectionable plans of another agent.”⁸³ Simply stated, cooperation with evil is accord with another person in sin. The more difficult situations occur when the two agents are not equal participants in the provocation and implementation of morally objectionable pursuit.⁸⁴ Instead, one agent must confront a situation in which her act will subordinately contribute to a morally deplorable action designed and controlled by another.⁸⁵ The “core issue raised by cooperation with evil is the effect the action of the wrongdoer has on the person whose act is being controlled, especially when she knows (in some sense) that her acts are to be taken up and incorporated by the will of a wrongdoer.”⁸⁶

The key issue when analyzing cooperation with evil is whether the cooperator intends—either as a means or an end—the wrongdoing calculated by the principal agent.⁸⁷ Intentional furtherance of the illicit activity is called formal cooperation and is always prohibited. Unintentional, or material cooperation, is not always prohibited, but rather, is analyzed on a case-by-case basis based on a variety of factors, including how and to what degree the action of the cooperator intersects with and contributes to wrongdoing, the severity of the loss that would be suffered by cooperator if she fails to cooperate, the type of evil action(s) planned, and the risk of causing scandal to third persons.⁸⁸

The category of appropriation of evil deals with the situation where an agent “is considering whether or not to take up and incorporate the fruits or byproducts of someone else’s illicit action into his or her own activity.”⁸⁹ The key consideration “is whether the appropriator intends to ratify the auxiliary agent’s wrongful act in making use of that act’s fruits or byproducts.”⁹⁰ In other words, does the appropriator “adopt” the illicit actions by making use of the fruits of those actions as if they were the appropriator’s own actions? If not adopted, one must analyze to what degree the “dangers of seepage and self-deception” are present to determine whether the action has become part of the appropriator’s moral identity or whether the appropriator has become self-deluded about her intentions.⁹¹ The key inquiry here is the “way in which the

83. *See id.* at 281.

84. *Id.*

85. *Id.*

86. M. Cathleen Kaveny, *Complicity with Evil*, 42 *CRITERION* 20, 29 (2003), available at http://divinity.uchicago.edu/martycenter/publications/criterion/autumn_03.pdf.

87. Kaveny, *Appropriation*, *supra* note 9, at 284.

88. *Id.* at 284–85.

89. *Id.* at 281.

90. *See id.* at 305–07.

91. *Id.* at 306, 308.

appropriator's action is related to the illicit act of the auxiliary agent."⁹² Would the appropriator have obtained the ill-gotten gains by the same means and for the same purpose as the wrongdoer? The closer the overlap, the more morally reprehensible are the acts of the appropriator.

IV. APPLICATION OF ETHICAL FRAMEWORKS

This Article began with a reference to the problem that certain lawyers and law firms have been complicit in recent financial scandals. The questions remains: how can such unethical lawyer conduct be deterred? One solution is to demand that state legislatures enact higher standards of professional ethics. A better and more lasting solution, however, is to develop the moral character of lawyers early in their careers. This latter solution can be accomplished through the teaching of Catholic moral principles in the context of the natural law tradition. In order to analyze how, in practice, a natural law theory and Catholic moral thought could influence professional ethical conduct, the following Sections analyze two hypothetical situations (based upon real life events).

A. *Hypothetical No. 1: Public Berating of a Witness*

A married woman with a small child has an affair. The man with whom she is having an affair feels guilty and ends the illicit relationship. Ultimately, the woman gets a divorce. She tries to rekindle the relationship with her lover, to no avail. She is emotionally distraught and decides to commit suicide. Because she does not want to leave her child without a mother, she also decides to kill her child. She sedates her child, turns on the gas stove, and sits with her child in the kitchen. The woman survives, but her child dies.

Despite her clear guilt, the woman wants a trial, primarily to get even with her ex-lover. To humiliate him in public, the woman insists that her lawyer question him about the embarrassing details of their sexual encounters, overindulgent alcohol use, and private emails. The lawyer goes along with her, believing that if he can paint the ex-lover as a person of ill-repute, perhaps it would shift some blame from her to the ex-lover. Although the strategy is a long shot, the lawyer nonetheless grills her ex-boyfriend for two days in a public forum. The man is distraught and visibly shaken by the public flogging. In the end, the cross examination had no impact on the outcome of the trial—the woman is found guilty and sentenced to life in prison.

The lawyer probably did not violate the rules of professional conduct.

92. *Id.* at 308.

2013] *Changing the Way We Think About and Teach Legal Ethics* 1083

Even if his client told him that she wanted to humiliate her ex-lover, he had no right to disclose such confidential information. The goal of cross-examining the witness was humiliation, not death or substantial bodily harm. Under the rules, the lawyer was not required to convince his client to take an alternative course of conduct. Although the prohibition to represent a client where the objective is to harass a person presents a potential ethical pitfall, the circumstances probably do not require the lawyer to terminate representation.⁹³ The main *objective* of his employment was to defend his client, including by using the ex-lover as a possible scapegoat, and not to conduct a defense “without probable cause” and for the sole purpose of harassing or maliciously injuring the woman’s ex-lover. As a result, the actions of the lawyer were likely neither frivolous nor in violation of ethics rules.

Analysis of the lawyer’s conduct under natural law principles is more difficult. On the one hand, the ex-lover, by himself undertaking morally reprehensible conduct, arguably bore some guilt for the woman’s actions. If so, the lawyers’ actions may not be morally improper and are justified. On the other hand, it is difficult to see a common good objective from the lawyer’s actions. The woman already caused much misery to her family and community. The ex-lover already had guilty feelings due to his inability to see warning signs that the woman was capable of this heinous crime. Perhaps the right and good thing to do as a lawyer would have been to counsel his client to enter into a plea agreement and vigorously defend her by negotiating the most humane terms for her prison sentence. Instead, the lawyer’s actions caused even more misery to the community. If the lawyer continues to act in this way, and employ a “scorched earth” or “win at all costs” defense strategy, his actions would undoubtedly negatively impact his character. Therefore, the lawyer’s conduct likely did not comport with natural law principles.

The lawyer’s actions may also be considered illicit under a “cooperation of evil” analysis. The lawyer surely intended, in accordance with the client’s plan, to humiliate the ex-lover. To be sure, the lawyer intended this wrongdoing as a means to her defense, but he intended it nonetheless. This conduct would appear to be formal cooperation and strictly prohibited. The lawyer also, in some ways, appropriated the wrongdoing of his client, in that he used the

93. See MODEL RULES OF PROF’L CONDUCT R. 1.16(a)(1) (2012) (explaining that a lawyer *must* end the representation if the continued representation would result in a violation of the Rules of Professional Conduct); *id.* R. 1.16(b)(2) (providing that a lawyer *may* end the representation if “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent”).

information that she disclosed to him for the same purpose: humiliation.

B. Hypothetical No. 2: Unscrupulous Acts of Energy Trading Company

An energy trading company is sued in a civil class action for causing an energy crisis. The company hires internationally reputable lawyers to defend it against the class. The lawyers meet with company executives and review corporate documents. During the course of the review, the lawyers find evidence that traders in the company engaged in criminal conduct, and, perhaps, were continuing to engage in such conduct. The evidence shows that the traders knew that the conduct would make them very wealthy and at the same time cause rolling blackouts. Documents explicitly show that the traders had an intentional disregard for the health and safety of the people affected by the traders' actions.

The lawyers inform corporate executives of the results of their investigation and counsel them to stop the illegal conduct. Their counseling includes delivering a memorandum outlining crimes that may have been committed by the traders. The lawyers, however, make no effort to ascertain if, in fact, the company stopped the illegal conduct. The lawyers also fail to notify any governmental authorities about the illegal conduct. Instead, the lawyers keep their findings confidential until they are required to disclose this information, if at all, during the course of the litigation.

The lawyers likely did not violate the rules of professional conduct. The lawyers were prohibited from disclosing the information they learned from their client. Although a crime was committed, there was no indication of a present and substantial risk of life-threatening injury. As such, the lawyers had no reason to believe that disclosure of this information would prevent a death or substantial bodily harm (unlike the example of the accidental release of toxins in a town's water supply⁹⁴). And there was no indication that the client was attempting to use the lawyers' services in furtherance of committing fraud. Here, the lawyers appropriately reported "up the corporate ladder" regarding the company's illicit conduct,⁹⁵ but they were not required under the ethics

94. See *supra* note 36 and accompanying text.

95. See MODEL RULES OF PROF'L CONDUCT R. 1.13(b) ("If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted

2013] *Changing the Way We Think About and Teach Legal Ethics* 1085

rules to report the conduct to third persons outside the corporate hierarchy.⁹⁶

An analysis under natural law principles may lead to a different outcome. Clearly, acts that cause an energy crisis are against the public good. Prudence and a concern for the community may have required the lawyers to investigate whether such acts continued once they reported the illegal conduct to the company and, perhaps, to report the past acts to the governmental authorities. Given the pendency of the civil litigation matter, the lawyers knew that the facts would soon be revealed. However, under the circumstances, withholding information from the government and failing to investigate further likely cuts against natural law teachings. That is to say, the lawyers probably did not fairly balance their duties as lawyers and human beings whose actions should be aimed towards the common good.

The lawyers most likely did not cooperate or appropriate the evil done by the traders. The company's actions likely occurred before the lawyers' involvement in the case and without the lawyers' knowledge. In other words, they did nothing to further the cause of the acts, and they did not use the fruits of the traders' ill-gotten gains. That being said, the lawyers should be vigilant that their legal advice or actions do not provide some sort of cover for the traders' continued actions. If they were to continue, the public would be harmed—perhaps not *certain* serious bodily injury or death, but clearly harmed by the lack of energy. In such a case, prudence may require the lawyers to act to protect the common good.

V. THE ROLE OF CATHOLIC LAW SCHOOLS BEYOND PROFESSIONAL ETHICS

Assuming that Catholic moral teaching and natural law principles can aid in the moral development of lawyers, a practical question remains: Who and/or what institution should teach these principles? Without a doubt, the Catholic moral tradition is rich. Unfortunately, it remains largely locked away in academic books and journals. Presumably, a small percentage of lawyers encounter some of this tradition in their undergraduate and graduate studies. Some lawyers may even have

by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.” (emphasis added)).

96. *See id.* R. 1.13(c) (explaining that, if “reporting up the corporate ladder” fails to generate any action on the part of the company to mitigate potential harm (presumably to stockholders or the general public), *and* the lawyer reasonably believes that the ongoing conduct will cause substantial injury to the company, then the lawyer *may*, but is not required to, reveal such information to outside parties).

obtained advance degrees in philosophy or theology before law school. It is far more likely, however, that the vast majority of Catholic lawyers have not had an opportunity to engage these fundamental teachings of our faith.

Catholic law schools have an opportunity to fill this education gap. To do so, they must heed lessons from the past. The University of San Francisco (USF) School of Law opened in 1912.⁹⁷ In discussing the reasons for founding the USF School of Law, Henry Woods, S.J., reasoned that “preserving the faith of Catholics interested in professional degrees justified the establishment of Catholic professional schools.”⁹⁸ Woods cautioned that “the Church had not foreseen ‘how serious would be the losses incurred by the Church through the attendance of her children at non-[C]atholic professional schools that have in process of time become positively anti-Christian.’”⁹⁹ Woods and other Jesuits believed that Catholic law schools would produce lawyers who were “qualitatively different” than lawyers from non-Catholic schools,¹⁰⁰ largely because Catholic law schools have an “‘atmosphere of faith’ . . . that . . . ‘inculcate[s] and support[s] a moral, civically minded, Catholic perspective.’”¹⁰¹

By the 1920s, Catholic law schools, including USF, were virtually identical to non-Catholic law schools. Many schools maintained courses in jurisprudence, often taught by priests and devoted to illustrating the superiority of natural law over other legal theories.¹⁰² Yet, even then, many saw these jurisprudence courses as an “abdication of the responsibility to be distinctively Catholic.”¹⁰³ By relegating the nurturing of Catholic legal thought to essentially clerical professors of moral philosophy, Catholic law schools “neglected the potential influence of Catholic thought on standard doctrinal courses, the actual classroom instruction in legal principles and techniques conducted by a faculty of laymen.”¹⁰⁴

During the 1930s, James Thomas Connor, Reverend Francis Shalloe, S.J., William P. Moyles, Brendan Brown, and William F. Clarke (among others) championed a proposal to teach Catholic thought in law

97. Breen & Strang, *supra* note 11, at 573.

98. *Id.* at 574.

99. *Id.* (quoting ERIC ABRAHAMSON, THE UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW: A HISTORY 1912-1987, at 16).

100. *Id.* at 575.

101. *Id.* (quoting ABRAHAMSON, *supra* note 99, at 48).

102. *Id.* at 586.

103. *Id.* at 586-87.

104. *Id.* at 587 (internal quotation marks omitted) (citation omitted).

2013] *Changing the Way We Think About and Teach Legal Ethics* 1087

classes. During this time, a Neo-Thomism movement began in Europe. The goal of this theological and philosophical movement was to rediscover the ideas of St. Thomas Aquinas and apply his teachings to contemporary society.¹⁰⁵ Reverend Linus Lilly, S.J., the Regent at the St. Louis University School of Law, pronounced a clear statement of the goal of Catholic law schools:

[A] student at a Catholic law school [should] “learn that human enactments derive their force from eternal law which the Author of nature has written in the hearts of men.” Having been given “the firm and reliable foundations of genuine legal knowledge,” the graduate of a Catholic law school could then contribute to society as “a *competent lawyer, a good citizen, a loyal Catholic, and a noble man.*”¹⁰⁶

During this period, James Thomas Connor, former Dean of the Loyola University New Orleans College of Law, saw an opportunity “for a school of Catholic Lego-Philosophical thought[—]i.e., a restatement of Scholastic Philosophy in the light of modern development in the positive law.”¹⁰⁷ To meet this opportunity, Connor believed Catholic law schools should retain faculty members who were well versed in Christian ethics and faith in order to facilitate the discussion of natural law principles in doctrinal classes.¹⁰⁸ Connor also recommended that law schools require its students, as a graduation requirement, to take at least five hours in elective courses on the legal philosophy.¹⁰⁹

Reverend Shalloe argued that the difference between Catholic and non-Catholic legal education came in the classroom discussion of cases, no matter the subject: “Where else can [students] be expected to learn a true philosophy of law, a Catholic sense in his work, a Catholic knowledge of his duties and the law of his Church? All these things are not taught in the school where he only learns the technicalities of civil law.”¹¹⁰

William Moyles observed a “moral and mental bankruptcy” of law students and the legal bar.¹¹¹ To combat this bankruptcy, Moyles

105. *Id.* at 597.

106. *Id.* at 598 (quoting Linus A. Lilly, S.J., *The Catholic Law School*, AMERICA, Apr. 12, 1930, at 18 (emphasis added)).

107. *Id.* at 600 (quoting James Thomas Connor, *Some Catholic Law School Objectives*, 36 CATH. EDUC. REV. 161, 161 (1938)).

108. *Id.* at 601 (quoting Connor, *supra* note 107, at 163).

109. *Id.*

110. *Id.* at 599 (quoting Francis J. Shalloe, S.J., *Why Catholic Law Schools?*, AMERICA, June 13, 1931, at 234).

111. *See id.* at 599 (quoting William P. Moyles, *Our Law Schools*, AMERICA, Oct. 3, 1931, at 616).

advocated for Catholic law schools to adopt an ethical approach to jurisprudence, grounded in

an appreciation of the spiritual, an acceptance of Divine sanction, of natural law, of moral responsibility, and fundamental principles of morality consonant with the intent of the American Founders. As such, Catholic law schools have a very real vindication for their existence, and a very solemn and important duty to perform.¹¹²

Brendan Brown, who would become Dean of the Catholic University of America Columbus School of Law, strongly believed that Catholic law schools should provide a distinctive curriculum as compared to non-Catholic schools. For Brown, the mission of a Catholic law school was to prepare “an adequate *juris ratio studiorum*, which will convince the modern mind of the eternal sufficiency of thirteenth[-]century Thomism to solve ever changing problems.”¹¹³ According to Brown, a law school that does not acknowledge and appreciate this ideal should not align itself with the Church.¹¹⁴

William F. Clarke, former Dean of DePaul University College of Law, shared Brown’s views. Clarke believed that there was “little or no point in the bestowal of the application of *Catholic* upon any institution the actions of which do nothing to set it apart from those which lay no claim to that title.”¹¹⁵ To Clarke, Catholic legal training should be an essential component of a law student’s education, not merely an elective course.¹¹⁶ Like Connor, Clarke understood the need for faculty who were both well versed in the law and instilled with the principles of Catholic philosophy (e.g., Catholic social and moral thought).¹¹⁷ Such faculty would influence the practice of law in conformity with the principles of natural justice. For Clarke, the emphasize in legal education for Catholic law school faculty should not be on “*what* you teach,” but rather “*how* you teach it.”¹¹⁸

Despite influential advocates, Catholic law schools did not develop a distinctive Catholic way of teaching law. Instead, they continued to become more akin to all other law schools. Professors Breen and Strang

112. *Id.* (citations and quotations omitted).

113. *Id.* at 606 (quoting Brendan F. Brown, *Jurisprudential Aims of Church Law Schools in the United States, A Survey*, 13 NOTRE DAME LAW 163, 177 (1938)).

114. Brown, *supra* note 113, at 177.

115. *Id.* at 609 (quoting William F. Clarke, *The Catholicity of the Law School: Catholicity in Legal Training Simply and Forcefully Discussed*, 6 J. RELIGIOUS INSTRUCTION 700 (Apr. 1936)).

116. *Id.* at 610–11. To Clarke, Catholic legal ethics are an “influence felt throughout the student’s whole training.” *Id.* at 611 (quoting William F. Clarke, *The Problem of the Catholic Law School*, 3 U. DETROIT L.J. 169, 176 (1940)).

117. *Id.* at 609.

118. *Id.* at 610 (emphasis added) (quotations omitted).

2013] *Changing the Way We Think About and Teach Legal Ethics* 1089

trace several reasons why this transformation occurred, including financial and market forces, institutional hurdles in hiring a Catholic faculty, the influence of legal realism, and the lack of a coherent Thomistic approach.¹¹⁹ Yet, there are similar and powerful reasons why Catholic law schools ought to challenge themselves to attain the vision of Brown, Clarke, and others. Because of a yearning for morally grounded lawyers, the need for Catholic law schools to be “distinctively Catholic” remains strong, if not stronger, today.

CONCLUSION

In her article, *Appropriation of Evil: Cooperation's Mirror Image*, Professor Kaveny briefly discusses the “manualist” approach to moral theology.¹²⁰ According to Kaveny, the manualists assumed an externalist view point that “emphasized the physical structure and causal consequences of action.”¹²¹ The manualists “ascribed intentions to agents based on external descriptions of their actions.”¹²²

For Kaveny, the external emphasis of the manualists loses sight of a key aspect of Catholic moral teaching: “an evil act does its greatest damage to the one who performs it.”¹²³ The rules of professional conduct seem to have the same deficiencies—the focus in the rules is on the physical structure and consequences of actions, rather than on an “agent-centered, virtue-oriented view of human action.”¹²⁴ For example, California only wants lawyers of a certain “character,” and, thus, its ethics rules prohibit a lawyer from “further[ing] an application for admission to the State Bar of a person whom the member knows to be unqualified in respect to *character*, education, or other relevant attributes.”¹²⁵ The rules also recognize “the overriding value of life,” which is the only “policy” that trumps the almost ironclad duty of confidentiality.¹²⁶ And, the rules identify a public policy “of paramount importance”—trust that is the hallmark of the client-lawyer

119. See generally *id.* at 617–34 (explaining why Catholic law schools failed to reform their curriculum).

120. Kaveny, *Appropriation*, *supra* note 9, at 288.

121. *Id.*

122. *Id.*

123. *Id.* at 281.

124. *Id.* at 288.

125. CAL. RULES OF PROF'L CONDUCT R. 1-200(B) (2013) (emphasis added). The rule, however, fails to define an “unqualified” character.

126. *Id.* R. 3-100 discussion, para. [3]. See also ILL. RULES OF PROF'L CONDUCT R. 1.6(c) cmt. [6] (recognizing the “overriding value of life and physical integrity” in requiring disclosure to prevent reasonably certain death or substantial bodily injury).

relationship.¹²⁷

These references to character, the value of life, and public policy present an opportunity, especially for Catholic lawyers and Catholic law schools, to help supplement the scope of professional legal ethics. The hypotheticals discussed in Part IV above show why supplementation may be necessary, and the possible results in doing so. Because our Catholic faith and belief system shape our moral and natural law reasoning, as Catholic lawyers, we bring this faith and belief system to our profession. If the “Catholic” qualifier in Catholic law schools is to have a meaning, then these law schools have a significant role—indeed, an obligation—in developing lawyers with good, moral character grounded in the deepest commitment to Catholic social teachings.

The efforts made in the 1930s to change Catholic legal education should be debated anew. Is there a “moral bankruptcy” among lawyers? Can thirteenth-century Thomism, especially as reformulated by Jean Porter, help arrive at solutions to ever-changing social and legal problems? Should Catholic law schools take a more vocal leadership role in bettering the legal profession? The Catholic Church operates hospitals, schools, universities, homeless shelters, and many other social service organizations not simply to alleviate suffering or for humanitarian or philanthropic reasons, but also because each of these activities are “a form of work inspired by the Gospel and oriented toward the life of grace.”¹²⁸ Catholic law schools should be operated for similar mission-driven reasons.

Guided by the Catholic faith and its traditions, Catholic law schools are uniquely positioned to aid the legal profession. Obviously, these schools have an obligation to train virtuous lawyers. Less obvious, perhaps, is the following contention: If we want more virtuous, public-minded lawyers, Catholic law schools should equip its students (i.e., its future lawyers) with the tools to put a Catholic moral teaching and natural law theory, with an emphasis on character and the common good, into dialogue with the rules of professional conduct.

On one level, a Catholic reflection on moral judgment would add complexity and texture to the rules of professional conduct. As lawyers, we act as agents for our clients. Sometimes, our clients ask us to perform morally objectionable acts on their behalf; other times, our clients do bad acts themselves, which they disclose or we discover

127. CAL. RULES OF PROF'L CONDUCT R. 3-100 discussion, para. [1]. See also ILL. RULES OF PROF'L CONDUCT R. 1.6 cmt. [2].

128. Breen & Strang, *supra* note 11, at 584 (citing JOHN A. HARDIN, S.J., MODERN CATHOLIC DICTIONARY (2000)).

2013] *Changing the Way We Think About and Teach Legal Ethics* 1091

during the course of our factual investigation. While the legal ethics rules may require us to act one way, reflection of our role as agent under the moral theological categories of cooperation with evil and appropriation of evil may counsel us to act another.

On a more profound level, natural law principles can provide guidance about the development of a lawyer's character. Under Catholic moral theory, good character is acquired through habit formed by the practice of virtue. Catholic moral thought "conducts its analysis of human action from the perspective of the agent who performs the action, not from the perspective of those who suffer its consequences."¹²⁹ Indeed, our actions mold "our very moral identities by building up or eroding the good and bad habits commonly known as virtues and vices."¹³⁰

A framework of professional legal ethics should promote virtuous activity in lawyers. As Porter discusses, a coherent order of rules and structures is necessary.¹³¹ But this order must be refereed "to something beyond themselves, some standards of reasonableness, meaning and value more comprehensive than the life of the individual—which is to say, by standards constituting a particular culture."¹³² The rules of professional ethics should serve to sustain and express these standards in order to promote virtue, "not so much by encouraging virtuous behavior on the part of individuals, or punishing vices, but by sustaining the fundamental structures of meaning without which the virtues could not emerge."¹³³

The legal education that would be imparted by a truly "Catholic" law school *and* the legal education envisioned by Professor Franke are fundamentally the same: the development of a competent lawyer, a good citizen, and a noble person.¹³⁴ As Catholic lawyers and human beings, we are part of a community, which is a fundamental aim of human life.¹³⁵ The rules that govern our professional lives, just like the rules that govern all human life, should acknowledge and serve this fundamental aim. And this fundamental aim should guide our Catholic law schools in the education of new lawyers.

129. Kaveny, *Appropriation*, *supra* note 9, at 302.

130. *Id.*

131. *See* PORTER, MINISTERS, *supra* note 58, at 140.

132. *Id.* at 140–41.

133. *Id.* at 141.

134. Breen & Strang, *supra* note 11, at 600.

135. *See* PORTER, MINISTERS, *supra* note 58, at 155 ("A community functioning in good order manifests distinctively human forms of perfection in a more complete way than any individual could do, and for that very reason, participation in communal life is itself a fundamental aim of human life.").