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## LAW SCHOOL IN A DIFFERENT VOICE: LEGAL EDUCATION AS A WORK OF MERCY

PAMELA A. WILKINS\*

[W]e live in complex and deeply challenging times. Our society most often measures the value of a person by his or her productivity alone and discards the unproductive along the way.

We live in a society so mesmerized by its view of success that it considers real only that which can be touched, weighed, and measured, a culture in which human and spiritual values have almost vanished from its consciousness.

Whether it is our brothers and sisters living on the streets in this city of such great power [Washington D.C.], or the tens of millions of persons around the globe who have become refugees because of both political and economic violence; today there is such devastating human suffering and dehumanization.

The world's most notable Jesuit has spoken powerfully about this very reality. Addressing the Fortune-Time Global Forum last December, Pope Francis affirmed the "urgent need for more inclusive and equitable economic models." He has called for a "revolution of tenderness."

Today, more than ever, we need this "revolution of tenderness." This may be a strange message given the prestige of Georgetown University. However, I ask you to consider that our hearts are becoming hard.

Mary Scullion, May 20, 2017, Georgetown College (of  
Georgetown University) Commencement Address<sup>1</sup>

### I. INTRODUCTION

Sister Mary Scullion is a badass. Moved by a desire to alleviate suffering, she joined the Sisters of Mercy at age nineteen. One thing led to another, and pretty soon she found herself sleeping on the streets in solidarity with the

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\* Associate Professor of Law, University of Detroit Mercy School of Law. I would like to thank Sister Helen Marie Burns, RSM; Professor Linda Edwards, E.L. Cord Foundation Professor of Law (UNLV); and my Detroit Mercy colleagues Professor Andrew Moore and Professor Cara Cunningham Warren for reading and commenting upon earlier versions of this article.

1. The text of the Commencement Address may be found at Homeward: The Official Blog of Project Home, <https://projecthome.org/posts/2017/05/sister-mary-georgetown-grads-begin-revolution-tenderness> [<https://perma.cc/W4EL-U83X>] (May 18, 2017).

homeless.<sup>2</sup> This little act of solidarity—one week of wholly (holy!) voluntary homelessness—was “the hardest thing [Mary] ever did. [She returned] sick as a dog, really depleted.”<sup>3</sup> Hard as it was, her little act of solidarity gave her great empathy for people on the streets.

This empathy led to direct action and political advocacy. Her efforts have provided employment, education, healthcare, and housing (for more than 2,200 people) to the chronically homeless, including homeless mentally ill women, in Philadelphia.<sup>4</sup> She’s been recognized nationally and internationally.<sup>5</sup> She’s even been arrested.<sup>6</sup>

Dr. Margaret Farley is another badass. Of course she’s an intellectual badass with a formidable CV: Gilbert L. Stark Professor Emerita of Christian Ethics at Yale Divinity School; former president of both the Catholic Theological Society of America and the Society of Christian Ethics; prize-winning author of books and articles in the areas of medical and bioethics, feminist ethics, sexual ethics, and theological ethics; recipient of eleven honorary degrees.<sup>7</sup> But her acclaim—at times notoriety<sup>8</sup>—isn’t really the point. What’s remarkable is the flavor of her

2. See *Meet Sister Mary Scullion* (Modern Hero Prods. 2017), <https://www.youtube.com/watch?v=Z1NndaZFyH0> [<https://perma.cc/CU77-VPPEL>] (last accessed Aug. 18, 2018). Sisters of Mercy make annual retreats, and early in her days as a sister, Mary Scullion asked for her retreat to consist of a week on the streets.

3. See The Philadelphia Award, *Sister Mary Scullion, RSM*, <http://philadelphiaaward.org/sister-mary-scullion/> [<https://perma.cc/3J4C-DLCZ>] (last accessed Aug. 18, 2018) [hereinafter *Sister Mary Scullion, RSM*].

4. Project Home, *Leadership at Project Home*, <https://projecthome.org/about/leadership-project-home> [<https://perma.cc/7LAE-DMFA>] (last accessed Aug. 18, 2018).

5. *Id.*

6. See *Sister Mary Scullion, RSM, supra* note 3.

7. Yale Divinity School, *Margaret A. Farley*, <https://divinity.yale.edu/faculty-and-research/yds-faculty/margaret-farley> [<https://perma.cc/RNB4-ZHRT>] (last accessed Aug. 18, 2018).

8. Dr. Farley received the 2008 Grawemeyer Award in Religion for *Just Love*, her exploration of Christian sexual ethics. See <http://grawemeyer.org/2008-margaret-farley/> [<https://perma.cc/G9TN-2PHG>] (last accessed Aug. 18, 2018). However, the book also received a Notification from the Congregation for the Doctrine of the Faith, noting that it “affirms teachings that are in direct contradiction with Catholic teaching in the field of sexual morality.” See, e.g., BBC News, *Vatican Critical of U.S. Nun’s Book on Sexual Ethics*, <https://www.bbc.com/news/world-europe-18321830> [<https://perma.cc/6Q5S-QNE7>] (June 4, 2012) (describing Vatican’s criticism). Although she conceded that her work did not conform to current Catholic teaching on sexuality, Dr. Farley observed that the dispute actually reflected a dispute over the task of the theologian:

The issue is, finally, in our tradition, is it a contradiction to have power settle questions of truth? Or to say we all have a capacity to know what we ought to do? We can make mistakes, we can disagree—but is it the case that natural law is let go when we really only know the answers because of grace of office? This is a profoundly important question in our tradition today.

Joshua J. McElwee, *Vatican-criticized Nun Addresses Fellow Theologians*, Natl. Catholic Rptr. (June 10, 2012) (available at <https://www.ncronline.org/news/spirituality/vatican-criticized-nun->

work, which is characterized by a determination to include the experiences of women and of other once invisible persons in exploring age-old issues;<sup>9</sup> by an openness to insights from a wide variety of disciplines and cultures;<sup>10</sup> and by a concern for justice not simply in the abstract, but in the concrete reality of actual relationships.<sup>11</sup> And the work is motivated by compassion: when asked why she tackled controversial issues in *Just Love*, she said simply, “My reasons for thinking it’s important for everyone to think about these issues is because people are suffering. All over the place, people are suffering.”<sup>12</sup>

The two women are profoundly different—Mary Scullion is a quintessential activist, Margaret Farley a quintessential scholar—but they share the same spiritual DNA. They are both members of the Sisters of Mercy. And from this common charism arises a common commitment to a tough-minded and tender-hearted mercy, with a special concern for women and girls.

What might it mean for a law school to share this Mercy charism? More broadly, what would it mean for a law school to share the spiritual DNA of a *female* order, seeing the world from historically *female* perspectives and motivated by historically *female* concerns? More broadly still, in this #metoo<sup>13</sup> era, in which women make up the majority of American law students,<sup>14</sup> should it simply be business as usual at religiously affiliated law schools, or should we seize the opportunity to consider seriously, and in the light of faith, women’s perspectives on legal education, law, and justice?

This article is my attempt to grapple with these questions. My interest is, of course, personal. I am on the faculty at University of Detroit Mercy School of

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addresses-fellow-theologians?\_ga=2.181445092.2145393972.1519430676-469135285.1519430676 [https://perma.cc/FL3P-P9ES]) (including excerpts from a speech by Dr. Farley to the Catholic Theological Society of America).

9. See, e.g., Margaret A. Farley, *Just Love* 17 (Continuum Intl. Publg. Group 2006) (“[E]thical theory regarding sex . . . has been predominantly theory formulated by an elite group of men in any given society. Women’s experiences, beliefs, values, are unrecorded and, until recently, almost wholly inaccessible. The same is true for men who do not belong to a dominant class.”).

10. See generally *id.* at Pts 3 & 4.

11. See, e.g., *id.* at 200 *et seq.* (“A love is right and good insofar as it aims to affirm truthfully the concrete reality of the beloved.”).

12. See McElwee, *supra* note 8 (quoting Dr. Farley’s speech to the Catholic Theological Society of America).

13. The me too movement was founded in 2006 by Tarana Burke, and its original purpose was to “help survivors of sexual violence, particularly Black women and girls, and other young women of color from low wealth communities, find pathways to healing.” https://metoomvmt.org/about/#history [https://perma.cc/UDW3-RZUF] (last accessed Apr. 14, 2019). In recent years, through the viral hashtag #metoo, “[w]hat started as local grassroots work has expanded to reach a global community of survivors from all walks of life and helped to de-stigmatize the act of surviving by highlighting the breadth and impact of sexual violence worldwide.” *Id.*

14. See Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, NY Times (Dec. 16, 2016) (available at https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html [https://perma.cc/8YQ5-DUFL]).

Law. Our institution enjoys both a Jesuit and a Mercy identity.<sup>15</sup> The Jesuit brand of legal education is well known and has its own distinctive flavor—of that, more later.<sup>16</sup> But this school is the only Mercy law school in the United States and one of only two religiously affiliated law schools<sup>17</sup> sponsored by a female order. What might legal education be like, especially at Detroit Mercy, if we took our Mercy identity seriously? As a faculty member, a feminist, and a Christian, I believe our Mercy identity presents an opportunity to reimagine and reinvigorate legal education and law in ways that extend well beyond the walls of my own institution.

This article begins to imagine such an education. The preliminary sections examine the major sources that inform my vision for law school “in a different voice,”<sup>18</sup> that is, for legal education in the Mercy tradition. Parts II through IV explore the life and values of Catherine McAuley, founder of the Sisters of Mercy; the current values, priorities, and educational mission of the Mercy Institute within the United States; and scholarship on Mercy identity in higher education. Part V turns to religiously affiliated law schools, with a special focus on Jesuit identity in legal education. Each of these sources constitutes a building block for Part VI.

Part VI articulates my vision for legal education in the Mercy tradition. Such an education is defined by two special commitments: first, to mercifulness; second, to women and girls. Part VI explores what the two commitments mean within the context of legal education.

Briefly put, the commitment to mercifulness requires that the education we provide helps students first to see and “interiorize[], absorb[] in the innards,”<sup>19</sup> the suffering of others, that is, to see the crucified peoples of our society and world. This education also should help students to react with well-informed mercy, “to do everything . . . possible to bring [the suffering] down from the

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15. See <http://law.udmercy.edu/about-us/history.php> [<https://perma.cc/SF8Q-NY66>] (last accessed Aug. 18, 2018). The School of Law originally was part of the University of Detroit, a Jesuit university. In 1990, the University of Detroit merged with Mercy College, and since then, the Society of Jesus (Jesuits) and Sisters of Mercy have served as joint sponsors for the institution. See <http://www.udmercy.edu/about/history.php> [<https://perma.cc/CNG3-7QZ6>] (last accessed Aug. 18, 2018).

16. See *infra* Parts IV & V (discussing Jesuit universities and Jesuit legal education).

17. Barry University, which includes a law school, was founded by the Adrian Dominican sisters. See <https://www.barry.edu/law/about-us/> [<https://perma.cc/79ZS-6UTQ>] (last accessed April 3, 2018). Unlike the Mercy congregation, which was founded by women, the Dominican order began as a male order and later expanded to women religious.

18. This term is borrowed from the title of Carol Gilligan’s groundbreaking book. See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982).

19. JON SOBRINO, *THE PRINCIPLE OF MERCY: TAKING THE CRUCIFIED PEOPLE FROM THE CROSS* 17 (Orbis Books 1994).

cross.”<sup>20</sup> Work to bring crucified peoples down from the cross is *justice* work, but this urge to remedy injustice is motivated by *mercy*. How students work to alleviate suffering may vary—note the differences between Mary Scullion and Margaret Farley—but if human suffering is invisible to them or if they are indifferent to it, we have failed. Part VI describes, *inter alia*, how the law school curriculum might more effectively form lawyers who will be governed by a principle of mercy.

The commitment to women and girls is related to the commitment to mercifulness. It begins with the recognition that women and girls sometimes have been among the crucified peoples, and that our legal system has all too often aided and abetted the crucifiers. (To a degree, this is true even within the legal academy.) Thus, this commitment to women and girls requires that we help students understand and question many of the assumptions underlying American law, and examine whether such assumptions have harmed women and girls, not to mention any number of other vulnerable groups. I am thinking in particular of the radically individualistic conception of the human person that undergirds all too much of American law and of our perceptions of justice—a conception of the human person inconsistent with both feminist and Christian thought.<sup>21</sup> The commitment also requires work on behalf of women and girls. Finally, it also suggests working to replace the highly individualistic values prevalent within the law school culture itself with an ethos that prioritizes community.

A law school defined by core, spirit-meets-the-bone commitments to mercifulness and to women and girls would be a prophetic presence even among religiously affiliated law schools. Indeed, a deep commitment to a principle of mercy—to seeing and identifying the crucified, to taking them down from the cross—unmasks and confronts the idolatries that afflict legal education, especially the golden calf of status obsession. An institution embodying these commitments would be badass in the best sense: as fierce and tender as Mary Scullion; as intellectually disciplined and open to a variety of perspectives as Margaret Farley; as committed to women, the vulnerable, and justice as right relationship as both Scullion and Farley.

Let us begin.

## II. CATHERINE MCAULEY AND THE HOUSE OF MERCY

The first source for this vision of legal education is the life of the woman who founded the Sisters of Mercy.

The Mercy congregation could only have been born of a woman. A wealthy woman’s troubled midlife dreams of orphan children and destitute females gave birth first to the House of Mercy, a home dedicated to caring for and empowering poor women and children through education and job training; then to the Mercy

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20. *Id.* at 10.

21. *See infra* Part VI.B.

congregation itself, which carried this mission of care and empowerment throughout the world.

Catherine McAuley was that wealthy dreamer who went on to found the Sisters of Mercy.<sup>22</sup> Yet even as her wealth enabled her to realize her vision of a House of Mercy, her own inner sense of poverty was the source of the vision. Her concern for orphan children and destitute females was rooted not in a sense of noblesse oblige, nor in an abstract concern for justice, nor in a conventional piety, nor merely in compassion. Rather, Catherine *identified* with the orphans and the poor women. For like them—like virtually all women of 19th Century Dublin, and probably most other places and times—Catherine knew what it meant to be vulnerable, dependent, invisible. Her life story illumines both the reasons for Catherine’s identification and solidarity with orphan children and destitute females and her creative, graceful response to female vulnerability within a patriarchal society.

Catherine’s own experiences of loss, orphanhood, and vulnerability began early. Born in Dublin in 1778 to a Catholic family, Catherine lost her father when she was only four years old.<sup>23</sup> Her mother died in 1798, just as Catherine’s teenage years were ending.<sup>24</sup> The death of her father during her young childhood appears to have affected Catherine profoundly. First, and rather obviously—this early loss was both an emotional and material blow. Certainly her father’s death caused her strong identification with both orphans and vulnerable women. Second, and less obviously, the loss apparently intensified Catherine’s identification with her father. Her principal biographer credits Catherine’s early memories of her father providing religious instruction to poor children as a major influence on her later vocation.<sup>25</sup> Her deep Catholic faith also appears to stem from her identification with her father.

After her mother’s death, Catherine eventually went to live with a wealthy Quaker couple, William and Catherine Callaghan.<sup>26</sup> She served both as household manager and as surrogate daughter to the childless couple.<sup>27</sup> Although she enjoyed the social life typical of affluent Dubliners,<sup>28</sup> she displayed a noticeable depth of character. She was a “young woman of

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22. For an excellent biography of Catherine McAuley, see MARY C. SULLIVAN, *THE PATH OF MERCY: THE LIFE OF CATHERINE MCAULEY* (Catholic Univ. Press 2012). *The Path of Mercy* serves as the major source for my brief overview of Catherine’s life and work.

23. Mercy Intl. Assn., *Foundress: The Beginning*, <http://www.mercyworld.org/foundress/index.cfm?loadref=51> [<https://perma.cc/VQ5W-HZRG>] (last accessed Aug. 18, 2018) [hereinafter *The Beginning*].

24. *Id.*

25. SULLIVAN, *supra* note 22, at 19, 38.

26. *Id.* at 30.

27. *The Beginning*, *supra* note 23.

28. SULLIVAN, *supra* note 22, at 37 (describing Catherine’s love for music and dancing); 38 (describing Catherine’s living “in good style”).

remarkable charm and good looks . . . [but] was also a conscientious thinker, appreciative of the surfaces of daily existence, but not satisfied that they were all there was to human life.”<sup>29</sup>

Just as she identified with orphan children and destitute females, Catherine also identified with those who protected and cared for them. This identification began with her own parents (recall her memories of her father’s religious instruction to poor children) but it deepened during this period of her life. Mrs. Callaghan played the strongest role. Mrs. Callaghan’s Quaker spirituality included an appreciation of silence and an emphasis on charity to the poor, both of which were characteristic of Quakers in Ireland and elsewhere.<sup>30</sup> Mrs. Callaghan herself was involved with such charity, but as she aged, Catherine increasingly became her instrument of that charity.<sup>31</sup> Catherine provided instruction and counsel to the poor children of the neighborhood, and Mrs. Callaghan both approved of this and provided for it materially.<sup>32</sup> Of course, Mrs. Callaghan’s influence led to the independent influence of coming into contact and seeing the needs and privation of poor children and others afflicted by poverty.

During her time with Mr. and Mrs. Callaghan, Catherine’s identity as a caregiver grew, but, just as importantly, so did her actual caregiving skills. Mrs. Callaghan was bedridden for three years during her final illness.<sup>33</sup> Catherine, whose bedroom was adjacent, “learned what one learns to do for the sick by doing it.”<sup>34</sup> She read to Mrs. Callaghan and often slept on a couch in the room so that she could tend to her needs at all hours.<sup>35</sup>

During this period of caregiving, when she was “faced with a new and time-consuming form of mercifulness,”<sup>36</sup> Catherine began dreaming of orphan children and destitute women.<sup>37</sup> These dreams focused on empowerment for these vulnerable Dubliners: the destitute women of her dreams were “learning employable household skills.”<sup>38</sup>

Catherine’s dreams began to take concrete form after Mrs. Callaghan’s death. Catherine’s caregiving responsibilities had not diminished: she was caring for both the elderly and the very young.<sup>39</sup> Yet in the midst of these exhausting responsibilities, she envisioned a future in which she would rent out

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29. *Id.* at 32.

30. *Id.* at 40.

31. *Id.*

32. *Id.*

33. SULLIVAN, *supra* note 22, at 40-41.

34. *Id.* at 41.

35. *Id.*

36. *Id.* at 40.

37. *Id.* at 41.

38. SULLIVAN, *supra* note 22, at 41.

39. She cared for both Mr. Callaghan and the children of a cousin who had died. *Id.* at 53.



rooms and work with and for the poor: “Night after night she would see herself in some very large place where a number of young women were employed as laundresses or at plain-work, while she herself would be surrounded by a crowd of ragged children which she was washing and dressing very busily.”<sup>40</sup>

The dreams were realistic. Mr. Callaghan was a wealthy man, and when he died, Catherine inherited a fortune.<sup>41</sup> Catherine used her fortune to build and open the House of Mercy.<sup>42</sup> It served as a homeless shelter for women and girls, a school for poor girls, and a job training center for women.<sup>43</sup> Poor women and girls immediately flocked to it, and poverty-stricken parents soon found this free school for their daughters.<sup>44</sup> Within a year, Catherine and the lay women living at or assisting with the House of Mercy began visiting the sick in Dublin’s slums and wherever else the women could gain admission.<sup>45</sup>

Several features of the House of Mercy shed light on Catherine’s values. First, it was located in the heart of a fashionable, affluent area, where the poor would not be invisible to the rich.<sup>46</sup> Second, from the outset and prior to the founding of a religious congregation, Catherine McAuley and the House of Mercy were devoted to education, especially for poor women; to job training, again for poor women; and to compassion for and service to the sick, especially the poor. Catherine seems to have regarded education and job training, like visiting the sick, as forms of caregiving. Differently put, all of the initial ministries of the House of Mercy revolved around an ethic of care. Third, the House of Mercy served as a model of female agency: a woman conceived it and women ran it.<sup>47</sup> Finally, it was initially a *lay* house, perhaps much like Jane Addams’ Hull House or Dorothy Day’s original Catholic Worker House: “[T]he idea of founding a religious congregation never entered [Catherine’s] mind” at the time she built the House of Mercy.<sup>48</sup>

The founding of the Sisters of Mercy itself apparently was motivated in part by practical concerns—a belief that the mission would best be continued through

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40. *Id.* at 53.

41. In 2007 U.S. dollars (the date her biographer used), she inherited somewhere between \$1.78 and \$3.65 million, some of which was to be paid as an annuity. *Id.*

42. *Id.* at 66.

43. SULLIVAN, *supra* note 22, at 67.

44. *Id.*

45. *Id.* at 71.

46. *Id.* at 55, 68. Some of the wealthy residents of the area objected to the House of Mercy, preferring a neighborhood free of any inconvenient reminders of the grinding poverty of so many Dubliners. However, others—both Catholics and Protestants—saw the poverty that surrounded them and responded with generosity and compassion.

47. This, too, created grumbling in some circles. *See id.* at 68 (noting that some of the complaints about Catherine were “flavored with sexist overtones”); *See* SULLIVAN, *supra* note 22, at 88 (noting people’s objection to the resident lay women’s “mode of life”). Of course, many priests, clerics, and other men supported Catherine’s vision.

48. *Id.* at 65.

a religious congregation.<sup>49</sup> After its founding, the congregation expanded throughout Ireland and into England, and Catherine spent many years traveling across the countryside establishing convent houses dedicated to serving poor women.<sup>50</sup> Unfortunately, Catherine herself was sick with tuberculosis, and, worn out from her travels, died in late 1841.<sup>51</sup>

In the House of Mercy and the subsequent communities, the influence of Catherine's parents and of Mr. and Mrs. Callaghan is apparent. But the person of Jesus—both Catherine's identification with and understanding of him—also served as a model. Dr. Mary Sullivan describes the central strands of Catherine's faith and motivation. They include Catherine's belief "in the thoroughness of Jesus Christ's compassionate, even 'tender,' *identification* with the 'least'—with those who were poor and suffering."<sup>52</sup> The concept of self-bestowal, or giving of self to and for the sake of others, also figures prominently, with Jesus as the self-bestowal of God, his death on the cross as the "fullest human expression" of God's self-bestowal, and the gospels as an invitation to us to participate in this self-bestowal.<sup>53</sup> Finally, Catherine believed that human mercifulness is the "principal path . . . to those who are desirous of following [Jesus]."<sup>54</sup>

Part VI contains a more complete discussion of how Catherine's life and values should inform legal education in the Mercy tradition, but the following themes merit identification now:

- a) Vocation as a creative and skilled response to our vulnerabilities and wounds: Catherine's vocation appears to be rooted in the early loss of her father, which led to her identification and solidarity with orphans and poor women. During much of her early adulthood she acquired caregiving skills that she later used to care for and thereby empower orphans and poor women. Put more generally, for many of us, our professional vocation not only serves others, but also can fulfill our own need to heal our wounds. Differently put, our own suffering can open us to the suffering of others in ways that are life-giving for all.

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49. *Foundress: Foundation*, MERCY INTL. ASS'N., <http://www.mercyworld.org/foundress/index.cfm?loadref=52> [https://perma.cc/2SVW-FQJ2] (last accessed Aug. 18, 2018) [hereinafter *Foundation*].

50. *Foundress: Expansion*, MERCY INTL. ASS'N., <http://www.mercyworld.org/foundress/index.cfm?loadref=54> [https://perma.cc/MZW8-WBR5] (last accessed Aug. 18, 2018) [hereinafter *Expansion*].

51. *Foundress: Final Months*, MERCY INTL. ASS'N., <http://www.mercyworld.org/foundress/index.cfm?loadref=66> [https://perma.cc/7CEP-RNJH] (last accessed Aug. 18, 2018) [hereinafter *Final Months*].

52. SULLIVAN, *supra* note 22, at 159.

53. *Id.*

54. *Id.*

- b) Vocation as a response to and development of preexisting identifications: As described above, Catherine probably identified as a caregiver very early in life. This identity grew stronger during her early adulthood, as she learned from and cared for Mrs. Callaghan. Catherine's principal work in the world—her founding of the House of Mercy and then the Mercy congregation—was simply a continuation and expansion of an identity she had long ago claimed and developed. Differently put, professional identity formation usually begins well before one consciously selects a profession or life path.
- c) The centrality of an ethic of care: Catherine described mercifulness as the principal path for followers of Jesus. Her words and deeds reveal an ethic of care, meaning in part a conviction that caregiving is “an ethical activity, rather than . . . a strictly emotional—and hence morally arbitrary—response.”<sup>55</sup>
- d) The dignity and agency of women: Catherine clearly enjoyed a strong sense of self and of agency: she would not have founded a House of Mercy and placed it smack in the middle of a wealthy area of town if she lacked confidence in her own vision or ability to act. Moreover, the House of Mercy was devoted largely to uplifting poor women so that they and their children would enjoy some measure of dignity and autonomy.
- e) The Gospel call to self-bestowal: Catherine understood life as a spiritual journey centered in and toward God.<sup>56</sup> And throughout this journey, we are invited to follow and imitate Jesus through self-bestowal, or the giving of ourselves in service to others. Indeed, self-bestowal is our core and common calling.

Catherine McAuley's life and work were only the beginning of the Mercy congregation. As the next section will describe, the Sisters of Mercy spread to the Americas and founded both hospitals and colleges. They also preserved Catherine's original charisma while adapting it to new places and circumstances.

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55. ROBIN WEST, *CARING FOR JUSTICE* 23 (NYU Press 1997). Carol Gilligan, whose psychological research on children's moral development led to the term “ethic of care,” identifies the ethic of care as a “‘different voice’ . . . that join[s] self with relationship and reason with emotion.” Interview with Carol Gilligan, University Prof., New York University (June 6, 2011) (available at <https://ethicsofcare.org/carol-gilligan/> [<https://perma.cc/QF39-9AUF>]). Gilligan describes the ethic of care as grounded in voice and relationships, in the importance of everyone having a voice, being listened to carefully (in their own right and on their own terms) and heard with respect. An ethics of care directs our attention to the need for responsiveness in relationships (paying attention, listening, responding) and to the costs of losing connection with oneself or others. Its logic is inductive, contextual, psychological, rather than deductive or mathematical. *Id.*

56. SULLIVAN, *supra* note 22, at 159.

### III. THE SISTERS OF MERCY OF THE AMERICAS: DEVELOPMENT, CHARISM, AND CRITICAL CONCERNS

The second major source for a vision of Mercy legal education is the modern Mercy Institute, especially within the United States.

The core ministries of the Sisters of Mercy have remained the same despite the passage of both time and oceans.<sup>57</sup> At the time of Catherine McAuley's death in 1841, the Sisters of Mercy had been established in England and Ireland.<sup>58</sup> In 1843, the congregation made its way to the United States, at the invitation of the Bishop of Pittsburgh;<sup>59</sup> by 1854, it was present in major cities in every corner of the United States.<sup>60</sup> As was true in England and Ireland—and as remains true to this day—the Sisters of Mercy<sup>61</sup> performed works of mercy, focusing especially on education and healthcare and establishing schools and hospitals throughout the country.<sup>62</sup>

The Sisters of Mercy of the Americas also continue to be inspired by Catherine's core values, especially her concern for vulnerable women and children and her embrace of mercy as the principal path for following Jesus<sup>63</sup> However, the 21st century United States is profoundly different from 19th century Ireland, and the Mercy Institute naturally has evolved in order to embody its charism under new circumstances.

The Sisters of Mercy of the Americas have identified several core values, all of which were inspired by Catherine's life: spirituality, community, service, and social justice.<sup>64</sup> The Institute also is committed to the spiritual and corporal works of mercy<sup>65</sup> as a component of both service and social justice. The terms "spirituality," "community," "service," and "social justice" are defined consistently with Catherine's teachings and example. "Spirituality" is an active spirituality<sup>66</sup> in which members lead lives of service in the world, with prayer and contemplation reinforcing service and vice versa. For the Sisters of Mercy,

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57. *See infra* note 63 and accompanying text.

58. *Our History*, SISTERS OF MERCY, <https://www.sistersofmercy.org/about-us/our-history/> [https://perma.cc/6QHM-A32E] (last accessed Apr. 14, 2019).

59. *Id.*

60. *Id.*

61. Within North and South America, the proper name for the congregation is the Institute of the Sisters of Mercy of the Americas. However, for the sake of brevity, I will simply refer to the "Sisters of Mercy" or the "Mercy Institute" (or the "Institute").

62. *Id. See infra* Part IV (will address the Mercy educational ministry in greater detail).

63. *Cf. Mission and Values*, SISTERS OF MERCY, <https://www.sistersofmercy.org/about-us/our-history/> [https://perma.cc/AA4P-AHHL] (describing continued influence of Catherine McAuley and referring to core values, including social justice concerns) (last accessed Apr. 14, 2019).

64. *Mission and Values*, SISTERS OF MERCY, <https://www.sistersofmercy.org/about-us/mission-values/> [https://perma.cc/35G5-UE7G] (last accessed Aug. 19, 2018).

65. *Id.* (naming the works of mercy).

66. *Id.*

living in “community” “deepens our relationship with God, strengthens us for mission, and continually inspires us in our call to serve others.”<sup>67</sup> “Service” focuses on the alleviation of suffering, especially among the most marginalized within society.<sup>68</sup> Finally, service must include “social justice” work; that is, it includes not only direct service to alleviate suffering but also the work to change unjust systems that cause human suffering.<sup>69</sup>

The nature of the commitment to social justice best illustrates the Institute’s adaptation of its charism to the needs of our era. Recognizing “the immensity of this work [i.e., social justice work],”<sup>70</sup> the Sisters of Mercy of the Americas have identified a series of interrelated concerns, referred to as the “Critical Concerns,”<sup>71</sup> which guide the work of individual Sisters and the Institute as a whole during this era.

The five Critical Concerns are Earth, Immigration, Nonviolence, Anti-Racism, and Women.<sup>72</sup> The timeliness and urgency of these concerns is obvious. I would show how and why each concern is urgent (e.g., earth: death of the great barrier reef and much of ocean wildlife because of climate change; immigration: family separations; etc.), but the examples probably will proliferate exponentially by the time this article is published. The importance of these concerns is self-evident. In addition to the work of individual Sisters of Mercy, the Institute itself takes actions (through investments, formal declarations, new ministry initiatives) consistent with these concerns.<sup>73</sup>

The Institute’s core values and Critical Concerns should play important roles within a Mercy law school. However, before the article turns to those roles, Part IV will examine the Mercy mission within higher education more generally.

#### IV. MERCY HIGHER EDUCATION IN THE UNITED STATES: DEVELOPMENT, DISTINCTIVE FEATURES, AND VALUES

The third major source of my vision for Mercy legal education is Mercy higher education more generally, including both empirical information about Mercy colleges and universities and scholarly reflection on Mercy identity in higher education.

Education has been and continues to be a central ministry of the Sisters of Mercy. Of course, education is a core ministry of many of the active orders within the Roman Catholic Church, and Mercy education enjoys many

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67. *Id.*

68. *Id.*

69. *Mission and Values*, *supra* note 64.

70. *Id.*

71. *Id.*

72. *Id.*

73. *See generally What We Do*, SISTERS OF MERCY, <https://www.sistersofmercy.org/about-us/mission-values/> [<https://perma.cc/8D32-V4G2>] (pages describing various Institute ministries, including a socially responsible investment ministry) (last accessed Apr. 14, 2019).

commonalities with the other major “brands” within Catholic education. At the same time, Mercy higher education has its own distinctive flavor. This distinctiveness has two major sources: historical differences between the Sisters of Mercy and other major educational orders, as well as more recent scholarly efforts to define the Mercy educational mission. This section will first discuss the development and present status of Mercy higher education within the United States; here, a comparison of Mercy and Jesuit higher education will highlight Mercy education’s distinctiveness. The section will next examine scholarly analyses of Mercy identity in higher education.

A. *Mercy Higher Education in the United States: A Comparative Examination*

From the inception of the Sisters of Mercy, Mercy education has focused on providing poor girls and women with the practical skills necessary for making a living.<sup>74</sup> Accompanying this commitment to the poor is a more traditional educational mission: in both Ireland and the United States, alongside Mercy schools for poor children (especially girls) are what Catherine would have called “pension” schools—those where middle-class girls and others paid tuition for their education.<sup>75</sup> Operating alongside elementary and secondary schools are seventeen Mercy-sponsored colleges and universities within the United States, many of which initially were women’s schools but most of which are now coeducational.<sup>76</sup>

These colleges and universities share a history quite similar to that of other Catholic colleges and universities. In an earlier era, one of the unspoken missions of Catholic higher education was to provide educational opportunities and a pathway to the middle class for Catholics—especially Catholic immigrants.<sup>77</sup> Consistent with the original focus of the Sisters of Mercy but also consistent with expectations for women of the era in which they were founded,

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74. *See supra* Part II.

75. *See, e.g.,* *About Our Foundress The Educational Vision of Catherine McAuley*, ST. JOSEPH’S COLLEGE THEOLOGY BLOG (Aug. 2, 2015), <https://blogs.sjcme.edu/theology/about-our-foundress-the-educational-vision-of-catherine-mcauley/> [<https://perma.cc/7NZA-CRFA>].

76. *See Member Institutions*, CONFERENCE FOR MERCY HIGHER EDUCATION, <http://www.mercyhighered.org/member-institutions/index.html> [<https://perma.cc/GH4A-GHBY>] (last accessed Nov. 8, 2018). This website contains links to each of the institutions, and each institution provides its own history.

77. *See, e.g.,* 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, 589 (2011) (noting large number of Catholic immigrants and members of lower socioeconomic classes at Catholic institutions of higher education and asserting that the institutions “took seriously their commitment to the advancement of the underprivileged”).

most Mercy colleges focused on programs in healthcare (principally nursing) and education (principally teaching).<sup>78</sup>

In other respects, however, Mercy higher education has deviated from other Catholic education, especially the major “brand” for Catholic education in the United States, Jesuit education. The biggest differences concern reputation, wealth, and curriculum. Several Jesuit institutions are rich, elite, national universities,<sup>79</sup> enjoying billion-dollar endowments,<sup>80</sup> storied faculty and alumni,<sup>81</sup> affluent and well-prepared students, and considerable influence in American public life. In contrast, Mercy institutions today tend to be non-elite regional and local institutions with small endowments and less affluent students. Jesuit universities typically are comprehensive liberal arts universities with traditional professional schools (law, theology, medicine). Most Mercy colleges and universities are liberal arts institutions with longstanding professional programs in teacher education and nursing.<sup>82</sup>

These differences have deep roots, tracing back even to the early days of each Order. The first difference is gender: the Jesuits are a male order, and the Sisters of Mercy are a female congregation; the institutions sponsored by them began as all-male or all-female institutions. This difference alone explains many

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78. For example, my own institution, University of Detroit Mercy, was once two separate institutions: University of Detroit, a Jesuit institution, and Mercy College of Detroit, which was established in 1941 “to prepare young women for careers in nursing and teaching so that they might contribute intelligently and effectively to the welfare of society.” See *University History*, UNIVERSITY OF DETROIT MERCY, <http://udmercy.edu/about/history.php> [https://perma.cc/HXL3-T6SH] (last accessed Apr. 15, 2019). A search of the websites of other Mercy colleges and universities reveals similar origin stories.

79. For example, Georgetown University and Boston College are both Jesuit institutions.

80. As of 2017, Georgetown University, Boston College, and St. Louis University each had endowments exceeding one billion dollars. See *US & Canadian Institutions Listed by FY 2017 Endowment Market Value & Change in Endowment Market Value from FY 2016 to FY 2017*, NATL. ASS’N OF COLLEGE & UNIV. BUSINESS OFFICERS & COMMONFUND INSTITUTE (available at <https://www.nacubo.org/-/media/Nacubo/Documents/EndowmentFiles/2017-Endowment-Market-Values.ashx?la=en&hash=E71088CDC05C76FCA30072DA109F91BBC10B0290> [https://perma.cc/X9L8-LHAB]) (last accessed Nov. 26, 2018).

81. At Georgetown University, the Walsh School for Foreign Service alone has produced a US President (William Jefferson Clinton), a Solicitor General of the United States (Paul Clement), CEOs of major corporations, and a plethora of US ambassadors, members of the US Congress, and state legislators. See *Prominent Alumni*, GEORGETOWN UNIVERSITY WALSH SCHOOL OF FOREIGN SERVICE, <https://sfs.georgetown.edu/alumni/prominent-alumni/> [https://perma.cc/N84D-LSYS] (last accessed Nov. 8, 2018). Similarly, Boston College has produced United States Senators, high level cabinet officials, CEOs, and prominent athletes and entertainers. See *About BC: Notable Alumni*, BOSTON COLLEGE, <https://www.bc.edu/bc-web/about/notable-alumni.html> [https://perma.cc/SR6P-EKTV] (last accessed Nov. 8, 2018).

82. Note the relationship between gender, curricular differences, and institutional wealth. Mercy institutions trained women to be nurses and teachers, two occupations open to women. But teachers and nurses rarely get rich, become United States Senators, or create endowed chairs in academic departments.

of the wealth and status disparities that exist between Jesuit and Mercy colleges and universities.

Other differences also account for the divergent paths. Both the Jesuits and the Sisters of Mercy founded and operated schools almost from their beginnings.<sup>83</sup> However, Ignatius of Loyola and the early members of the Society of Jesus were educated at the University of Paris, probably the most elite educational institution of its day.<sup>84</sup> Although the Jesuits initially did not plan to be an educational order, at a certain point they “formally and professedly designated the staffing and management of schools a true ministry of the order, indeed its primary ministry.”<sup>85</sup> Moreover, such education was primarily intended for “boys and young men who envisaged a worldly career” rather than a career as a priest.<sup>86</sup> The schools quickly became institutions for the sons of the elite or for those who aspired to prominence.<sup>87</sup>

In contrast, though highly intelligent and literate, Catherine McCauley did not receive an elite education.<sup>88</sup> Moreover, as noted above, the early schools operated by the Sisters of Mercy were for girls—mostly *poor* girls—and the principal motivation for these schools was to provide girls and young women the *skills* necessary to support themselves and their children.<sup>89</sup> These girls were not being prepared for leadership positions in society but for subsistence. The pension schools for middle-class girls and the women’s colleges and universities did offer education in the liberal arts, but professional training was for occupations historically defined as female.

Another difference is rooted in the different personalities and motivations of Ignatius and Catherine. Ignatius of Loyola turned from his life as a soldier and minor nobleman when he read lives of the saints while recovering from a battle

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83. For an extremely brief description of the beginnings of Mercy-sponsored schools, *see supra* note 42-43 and accompanying text. For a fuller discussion of the beginnings of Jesuit-sponsored education, *see generally* John W. O’Malley, *How the First Jesuits Became Involved in Education*, in A JESUIT EDUCATION READER 43 (George W. Traub ed., Loyola Press 2008).

84. O’Malley, *supra* note 83, at 50 (“The original ten founding members of the [Jesuits] were, cumulatively, an extraordinarily learned group, all graduates of the University of Paris, which was still the most prestigious academic institution in Europe.”).

85. *Id.* at 44.

86. *Id.*

87. *Id.* at 55 (“[W]hile the Jesuits of course had no idea of what we today call ‘upward social mobility,’ the schools in fact acted in some instances as an opportunity for precisely that.”). O’Malley realizes this was never the intention of the early Jesuits, who operated tuition-free schools. However, the focus on liberal arts—Latin, Greek, literature, etc.—may have caused some less affluent parents to balk, preferring a “more ‘practical’ education in the trades or in commercial skills.” *Id.* at 54-55.

88. SULLIVAN, *supra* note 22, at 22.

89. *See supra* note 42-43 and accompanying text.



injury.<sup>90</sup> He grew to identify with the saints, but the nature of his identification had not changed: he moved from one *heroic* identification to another, from an identification with military heroes to one with heroes of the Christian faith.<sup>91</sup>

In contrast, Catherine identified with the marginalized themselves. To be sure, she also identified with caregivers, but this identification doesn't strike me as an heroic identification: Mrs. Callaghan's care for Dublin's poor was quiet and unobtrusive, not calling attention to itself. In other words, the focus was more on the needs of the cared for than on the ego needs of the caregiver. Both approaches have their merits—those who identify with heroes often accomplish heroic things—but one might imagine the universities of an Order founded in part out of a desire for the heroic would be elite institutions full of students with dreams of (intellectual, moral, artistic, etc.) heroism.<sup>92</sup> And one might imagine the colleges and universities of a congregation founded in part out of an identification with the destitute and their caregivers to be full of students who find gratification in caring for others.

The historical and current realities of Mercy higher education do not form an ending point for consideration of Mercy identity. Recent decades have seen a growing scholarly conversation regarding Mercy identity in higher education.

#### *B. Scholarly Reflection on Mercy Identity in Higher Education*

Only in recent decades has there been a systematic effort to identify the distinguishing features of Mercy higher education. The lack of such an effort in the past is hardly surprising: such institutions often were run largely by Sisters of Mercy whose own religious formation influenced the institutions both directly and indirectly.<sup>93</sup> Given that, introspection regarding the mission of Mercy institutions simply wasn't necessary.

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90. See, e.g., RONALD MODRAS, *IGNATIAN HUMANISM* 7-10 (2004) (describing Ignatius' conversion).

91. Ignatius appears to have moved beyond this heroic identification later in life. See, e.g., RON HANSEN, *THE PILGRIM: ST. IGNATIUS OF LOYOLA*, IN *THE IGNATIAN SPIRITUALITY READER* 40 (George W. Traub ed., Loyola Press 2008) ("Ignatius was then fifty and far different from the man he'd fantasized he'd be when he was a page to Spanish royalty, or a pilgrim to the Holy Land, or a philosopher at the Sorbonne. . . . Ignatius surely imagined a grander fate than that of fifteen years of grinding office and managerial work . . . . We hear no regret in his letters, however.").

92. Of course, this view considerably oversimplifies both Jesuit and Mercy institutions, not to mention the orders that sponsor them. Both Jesuits and Jesuit institutions have engaged in rigorous critique and revisioning of Jesuit colleges and universities. See, e.g., *A JESUIT EDUCATION READER* (George W. Traub ed., Loyola Univ. Press. 2008) (containing essays about how Jesuit colleges and universities might better fulfill their missions).

93. See Conference for Mercy Higher Education, *CMHE History* (Aug. 19, 2018), <http://www.mercyhigheered.org/history.html> [<https://perma.cc/P535-DNA7>] ("Until a short memory ago, the Mercy colleges and universities in the US were led, managed, and staffed in majority by Sisters of Mercy.").

This is a different era—one of fewer women religious (sisters),<sup>94</sup> more career options for women, and integration of Roman Catholics into mainstream American life. These changes prompted several existential questions for Mercy institutions of higher education: In what ways are we, or should we be, distinctive? How do we preserve this identity in an era characterized by less involvement from members of the congregation and by rising secularism within society?

This section focuses on three major efforts to characterize Mercy higher education: (1) a Discussion Paper by the Conference on Mercy Higher Education (the “CMHE”);<sup>95</sup> (2) a response paper by Dr. Mary Sullivan;<sup>96</sup> and (3) a short paper by Dr. Margaret Farley.<sup>97</sup>

The 2004 Discussion Paper by the CMHE, *Mercy Higher Education: Culture and Characteristics*, carries forward Catherine McAuley’s special concern for women and children. In fact, the “promotion of compassion and justice towards those with less, especially women and children”<sup>98</sup> is one of the four hallmarks of Mercy higher education.<sup>99</sup> Compassion and justice should be promoted both inside and outside the classroom, “through action and education.”<sup>100</sup> Neither action nor education can exist in isolation. Absent education, action can all too often be simple-minded and ineffective: “Catherine’s approach to social problems was two-fold: address the need as well as its root cause. *Ministering to those in need without the accompanying action, praxis, to seek remediation of the causes, however worthwhile, is not sufficient.*”<sup>101</sup> Accordingly, the Discussion Paper repeatedly emphasizes that Mercy institutions must treat as integral some form of “introduction to social analysis and skill development in social transformation.”<sup>102</sup> Moreover, skills in social analysis should be imparted to students early in their course of study so that they enjoy opportunities to exercise these skills.<sup>103</sup> Finally, the Discussion

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94. *Id.*

95. Conference for Mercy Higher Education, *Mercy Higher Education: Culture and Characteristics* (2004) [hereinafter *Discussion Paper*].

96. Mary C. Sullivan, *Catherine McAuley and the Characteristics of Mercy Higher Education*, 16 *The MAST Journal* 2, 18 (2006).

97. Margaret A. Farley, *Wisdom, Dignity, and Justice: Higher Education as a Work of Mercy* (last accessed Aug. 19, 2018) [www.mercyhighered.org/resources/ewExternalFiles/wdj.pdf](http://www.mercyhighered.org/resources/ewExternalFiles/wdj.pdf) [<https://perma.cc/3YPY-GCQ9>].

98. *Discussion Paper*, *supra* note 95.

99. The other identified hallmarks are regard for the dignity of the person, academic excellence, and education of the whole person. *Id.* at 1. These three hallmarks likely characterize (or are aspirational for) virtually all Catholic higher education and probably most broadly humanistic education. The commitment to women, children, and the poor is unique.

100. *Id.*

101. *Id.* at 5 (emphasis added).

102. *Id.* at 3.

103. *Discussion Paper*, *supra* note 95 at 15.

Paper gives service learning a privileged place, urging Mercy institutions to integrate it into the curriculum.<sup>104</sup>

The centrality of compassion and justice for women and children is distinctively Mercy. The very reason the Sisters of Mercy sponsor educational institutions is to “address their enduring concerns,”<sup>105</sup> and “Catherine McAuley’s preferential love for the poor and her special concern for women”<sup>106</sup> continue to enjoy privileged status within the congregation. More broadly, Mercy ministries focus on “all areas of human services from housing and homeless shelters, to hospitals and hospices, to pastoral ministries and diocesan offices.”<sup>107</sup> This close, tender focus on the human person and on care for the human person is, therefore, a defining characteristic of Mercy higher education.

Dr. Mary Sullivan has proposed three additional hallmarks beyond those articulated in the CMHE Discussion Paper:

- a) “Religious learning and spiritual development, through frequent courses in Christian theology and the Scriptures, courses in other religions, Catholic liturgical celebrations, and other religious events;”<sup>108</sup>
- b) Education in and a commitment to mercifulness, as revealed in the Mercy of God made manifest in Jesus Christ;”<sup>109</sup>
- c) “The strenuous effort to give good example, by modeling, personally and corporately, all the values it seeks to promote through its educational and other endeavors.”<sup>110</sup>

Each of these three hallmarks is rooted in Catherine McAuley’s own educational values, as expressed in her drafts of the original Rule of the Sisters of Mercy, as well as her letters and other writings. According to Dr. Sullivan, Catherine’s “enduring educational values”<sup>111</sup> include the “fundamental necessity of Christian learning and spiritual development,”<sup>112</sup> the “primacy to be always given to mercifulness and spiritual consolation,”<sup>113</sup> and the “demanding effort to ‘practice what we teach/preach,’ i.e., to be ourselves, personally and institutionally, insofar as humanly possible, examples of the Mercy heritage we claim to promote and transmit.”<sup>114</sup> Of course, these values exist alongside Catherine’s special commitment, which transcended education—to girls and

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104. *Id.* at 15-16.

105. *Id.* at 9.

106. *Id.* at 9-10 (citing the Constitutions of the Sisters of Mercy of the Americas ##5-7).

107. *Discussion Paper*, *supra* note 95, at 3.

108. *Sullivan*, *supra* note 96, at 24.

109. *Id.* at 25.

110. *Id.* at 26.

111. *Id.* at 18.

112. *Id.*

113. *Sullivan*, *supra* note 96, at 18.

114. *Id.*

women.<sup>115</sup> For Dr. Sullivan, the three additional proposed hallmarks of Mercy education follow from these enduring educational values.

First, Dr. Sullivan believes that Mercy institutions of higher education should emphasize religious learning and spiritual development, both inside and outside the classroom. Catherine McAuley believed the principal purpose of Mercy education was spiritual consolation. Yes, education should impart knowledge, develop students' intellectual skills, prepare students for the workplace, and so forth, but the primary purpose of education is to "comfort, encourage, and console [students] in the most thorough and lasting way possible."<sup>116</sup> Given this, religious learning and spiritual development are at the core of the Mercy educational mission.

An explicitly Christian identity and emphasis on religious learning and spiritual development exists in an atmosphere of openness to, welcoming of, and respect for those from other traditions. Dr. Sullivan recognizes—and believes Catherine McAuley would herself embrace—the "ecumenical and interfaith respect, aspirations, and understandings of the present time."<sup>117</sup> Nonetheless, Dr. Sullivan believes that Mercy institutions should not allow this respect and collaboration to "silence or diminish a courteous emphasis on and provision for explicitly Christian and, where necessary, Catholic religious education and experience."<sup>118</sup> Dr. Sullivan suggests this emphasis is possible through a variety of religion courses from various faith traditions, through frequent liturgical celebrations, and through opportunities for prayer.<sup>119</sup>

Second, Dr. Sullivan believes that Mercy institutions should be characterized by a commitment to mercifulness. She describes this principally as an institutional attitude that, while upholding high standards, values "forgiveness, gentleness, sensitivity, empathy towards distress, charity of mind and heart, sympathy, self-sacrifice for the sake of another's need, loving kindness, humility."<sup>120</sup> She also acknowledges that, at times, this focus on mercifulness will influence "the curricula, the content of courses, and again where appropriate, their methods and objectives."<sup>121</sup>

Finally, Dr. Sullivan asserts that Mercy institutions should be characterized by a strong commitment to modeling the Mercy values the institution seeks to transmit to students. In other words, faculty members and administrators—all employees—should strive to embody the Mercy charism. As Dr. Sullivan documents, Catherine believed that "the first means . . . to render us most useful

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115. *Id.* at 23.

116. *Id.* at 24.

117. *Id.*

118. Sullivan, *supra* note 96, at 24-25.

119. *Id.* at 25.

120. *Id.*

121. *Id.*

to others . . . is to give good example.”<sup>122</sup> Sullivan elaborates on the importance of this insight to the educational process:

The challenge these words present to Mercy educators may not have fully dawned upon us. We are to *be* and *do* what we *teach*. If we wish to teach mercifulness, we must speak and act mercifully toward others. If we wish to teach forgiveness, we must forgive others and ask for their forgiveness. . . . If we wish to teach others to serve and respect those who are economically poor, we must first serve and respect them ourselves. This is the primary principle and method of Mercy education as Catherine McAuley conceived and practiced it.<sup>123</sup>

In short, “[i]f students do not see evidences of the characteristics of a Mercy education in their teachers’ example, as well as in their words, such characteristics will be only half affirmed, if at all.”<sup>124</sup>

Feminist theologian and ethicist Dr. Margaret Farley approaches the question of Mercy higher education differently. Both the CMHE Discussion Paper and Dr. Mary Sullivan’s response examine Catherine McAuley’s life and the priorities of the Sisters of Mercy and derive from those sources defining attributes of Mercy higher education. Dr. Farley asks a different question: what is required for higher education to be a work of mercy?<sup>125</sup>

Dr. Farley asserts that higher education is a work of mercy when wisdom, dignity, justice, and mercy are held together.<sup>126</sup> Her starting point is that the “central goal of higher education is to grow in wisdom.”<sup>127</sup> Moreover, she considers all higher education a form of initiation into a culture. However, a focus on wisdom and on cultural initiation is not inconsistent with professional training and preparation, that is, with preparing persons to “advance the skills and services that a society needs.”<sup>128</sup> In her view, at the heart of real wisdom is learning—through a variety of disciplines—“about the interrelationships of all beings and the dignity at the heart of every person.”<sup>129</sup> This learning involves not merely a study of human achievements but also an encounter with human suffering.<sup>130</sup>

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122. *Id.* at 26.

123. Sullivan, *supra* note 96, at 23.

124. *Id.* at 26.

125. Farley, *supra* note 97, at 3.

126. *Id.*

127. *Id.*

128. *Id.* at 4.

129. *Id.*

130. Farley, *supra* note 97, at 4. (“Learning of human successes without learning of human pain, or learning about conquerors without learning about the exploited and the conquered, learning about leaders and their ideas without learning about the marginalized and the poor, led and still may lead to the estrangement of an educated elite from the lives of the desperate and from the worldwide phenomenon of human misery.”).

For Dr. Farley, the core wisdom concerning the “concrete reality of human persons” is that “all of us are ends in ourselves. . . . [and] are to be treated as ends, not only as means.”<sup>131</sup> We are ends in ourselves for two reasons: our freedom, that is, the notion that “our selves and our actions are in an important sense our own. . . . [and] we can determine the meaning of our own lives;”<sup>132</sup> and our relationality, that is, “our capacities to know and be known, love and be loved.”<sup>133</sup> This freedom and this relationality are interconnected:

Freedom and relationality, moreover, do not compete; they are intimately connected. Relationships make freedom of self-determination possible (for without them we cannot grow in freedom); but freedom is ultimately for the sake of choosing relationships—of choosing what and how to love. Herein lies the basis of human dignity and the requirement to grow in wisdom regarding what humans need.<sup>134</sup>

And out of this wisdom, this knowledge of human dignity, “arise imperatives of human justice.”<sup>135</sup> Finally—and as described more fully in Part VI, *infra*—justice requires mercy, just as mercy requires justice.<sup>136</sup>

These three scholarly reflections are necessary threads in the tapestry of legal education in the Mercy tradition. However, these threads do not speak directly to *legal* education. For that we must turn to a discussion of religiously affiliated law schools, focusing on Jesuit identity within legal education.

#### V. THE RELIGIOUSLY AFFILIATED LAW SCHOOL: REFLECTIONS ON JESUIT IDENTITY IN LEGAL EDUCATION

Any articulation of Mercy identity in legal education does not take place in a vacuum. Supplementing discussion of the Mercy charism in higher education is a lively literature concerning Jesuit identity at American law schools.<sup>137</sup> If course, this literature exists alongside broader discussions concerning Catholic law schools more generally and, indeed, concerning all religiously affiliated law

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131. *Id.* at 5.

132. *Id.*

133. *Id.*

134. *Id.*

135. Farley, *supra* note 97, at 5.

136. *Id.* at 7-8.

137. See, e.g., C. Michael Bryce, *Teaching Justice to Law Students: The Legacy of Ignatian Education and Commitment to Justice and Justice Learning in 21<sup>st</sup> Century Legal Education*, 43 GONZ. L. REV. 577 (2007) (arguing that clinical education and mentoring are best tools to promote justice within Jesuit law schools); Andrew Moore, *Contact and Concepts: Educating Students at Jesuit Law Schools*, 41 GONZ. L. REV. 459 (2006) (discussing best means within law school curriculum of “forming men and women for others”); Daniel J. Morrissey, *Bringing the Messiah Through Law: Legal Education at the Jesuit Schools*, 48 ST. LOUIS UNIV. L.J. 549 (2004) (examining the loss within Jesuit law schools of a connection to the Catholic cultural and intellectual tradition).

schools. Scholarship on Jesuit and other religiously affiliated law schools necessarily informs my thinking on Mercy legal education. This section considers two major, and contrasting, views of Jesuit legal education—those of Professors John Breen and Gregory Kalscheur.

A. *Professor John Breen, the Catholic Intellectual Tradition, and the Law School Curriculum*

Professor John Breen's vision for Jesuit legal education forms the starting point for contemporary discussion. Over the course of three articles, he makes a positive case for a renewed focus on traditional classroom study of substantive justice, including but not limited to understandings of justice gleaned from natural law and the larger Catholic intellectual tradition.<sup>138</sup>

Professor Breen's positive vision is an outgrowth of his critique of Jesuit legal education. He probably is foremost among the critics who charge that (a) Jesuit law schools lack any distinctive character, and (b) they try to cover their lack of distinctiveness by extolling the virtues of their clinical programs.<sup>139</sup>

This lack of distinctiveness begins with Jesuit schools' lack of attention to justice—an inattention that mirrors that of the rest of the legal academy. Professor Breen begins with an anecdote from his own Jesuit institution, Loyola University of Chicago School of Law. In a "moment of incredulous reflection" during a panel discussion, a third-year law student noted that "this was the first time in any of her classes that she could recall any meaningful discussion of justice."<sup>140</sup> The student found this absence of concerns of justice from the law school classroom "especially disappointing because she had attended a Jesuit university for her undergraduate studies where such discussions had regularly taken place, and . . . she had been attracted to Loyola's law school because of its Jesuit identity."<sup>141</sup> In short, Breen's starting point is the apparent invisibility of justice concerns in legal education generally.

He then identifies this lack of attention to substantive justice as a major cause of the well documented malaise afflicting the legal profession: "[T]he fundamental problem that confounds the legal profession today is that many

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138. See John M. Breen, *Justice and Legal Education: A Critique*, 36 LOY. CHI. L.J. 383 (2005) [hereinafter *Justice and Legal Education*]; John M. Breen, *The Air in the Balloon: Further Notes on Catholic and Jesuit Identity in Legal Education*, 43 GONZ. L. REV. 41 (2007) [hereinafter *Air in the Balloon*]; John M. Breen, *Action as the Fruit of Contemplation: A Reply to Bryce, Donnelly, Kalscheur, and Nussbaum*, 43 GONZ. L. REV. 645 (2007) [hereinafter *Action as the Fruit of Contemplation*].

139. See, e.g. *Air in the Balloon*, *supra* note 138, at 42-44 ("Jesuit legal education, as it is currently practiced in this country, must be judged as a failure based on the very standards of success set forth by the Society of Jesus. . . . [T]he claim of Jesuit distinctiveness in legal education simply cannot stand up to scrutiny.").

140. *Justice and Legal Education*, *supra* note 138, at 383.

141. *Id.*

lawyers no longer see a connection between the ordinary work they perform for clients and the virtue of justice.”<sup>142</sup> And he observes that law schools lay the foundation for this malaise and alienation by teaching students to divorce their own moral beliefs, including those about justice, from their understanding of law<sup>143</sup> and by (perhaps unwittingly) teaching students that “the practice of law requires a kind of agnosticism, and that the consummate professional is the consummate agnostic for whom all justice is relative.”<sup>144</sup>

Jesuit law schools are not exempt from this grim portrait of the state of American legal education. Jesuits’ “public statements of self-identity” indicate their hope and expectation that “graduates of Jesuit universities will gain a deep appreciation for and commitment to justice in the course of their Jesuit education.”<sup>145</sup> However, students’ actual experiences at Jesuit law schools contrast starkly with the Jesuits’ public proclamations about justice.<sup>146</sup>

In describing his positive vision for Jesuit legal education, Professor Breen traces the modern concern of the Jesuits, beginning with the leadership of Pedro Arrupe, with issues of social justice and with being men and women for others.<sup>147</sup> Graduates of Jesuit institutions should strive “to be an agent of change in society; not merely resisting unjust structures and arrangements, but actively undertaking to reform them.”<sup>148</sup> Indeed, for the Jesuits, the “promotion of justice and liberation of the oppressed is a constitutive element” of Christian mission.<sup>149</sup>

As Professor Breen observes, this concern for justice should be central to the Jesuit educational mission. For Jesuits, education—an “interplay between experience, reflection, decision and action”—is, at its heart, preparation for building a more just world.<sup>150</sup> According to Breen, law schools have demonstrated this concern for justice principally (perhaps exclusively) through the clinics they offer.<sup>151</sup>

This relegation of justice concerns to the law school clinics is, for Breen, simply inadequate. Some of the reasons he gives are now outdated: for example,

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142. *Id.* at 385.

143. *Id.*

144. *Id.*

145. *Justice and Legal Education*, *supra* note 138, at 387.

146. *Id.*

147. *Id.* at 387-91.

148. *Id.* at 388.

149. *Id.*

150. *Justice and Legal Education*, *supra* note 138, at 389-90.

151. *Id.* at 392-94. Professor Breen also notes that, apart from clinics, Jesuit law schools’ commitment to justice is principally rhetorical and is expressed through lip service in web and other promotional materials. *Id.* at 391-92.



he notes that most law students will not take a clinic, and that most law schools will not require clinics.<sup>152</sup> However, this is not his principal concern.

To be sure, “[t]he provision of legal services to the poor and disadvantaged undoubtedly makes a valuable contribution to a school’s Jesuit identity.”<sup>153</sup> But this contribution is “at best . . . [an] incomplete attempt to satisfy the Jesuit demand for the promotion of justice.”<sup>154</sup> Among other things, Professor Breen says, “clinical instruction does not teach students to *think* about justice. . . . [but] encourages an *affective* rather than an *analytical* approach to situations involving injustice. . . . [W]here any matter is in any way complicated, empathy is no substitute for critical thinking.”<sup>155</sup> In further support of his point, he states that a university is an intellectual endeavor and so “the Jesuit identity of a university must be manifest in the intellectual work that the university performs, namely, the dissemination of knowledge and the search for truth.”<sup>156</sup>

Professor Breen’s solution to this issue rests principally in additions to the standard law school curriculum. At the least, Jesuit law schools should teach students to think analytically about issues of justice by requiring first-year students to take “an introductory course in moral theory and jurisprudence,” then requiring upper level students to take some more advanced course (e.g., feminist legal theory).<sup>157</sup> The introductory course should include some form of “serious engagement with the Catholic intellectual tradition.”<sup>158</sup> This tradition often “challenge[s] the dominant conception of justice in American law.”<sup>159</sup> According to Professor Breen, the mainstream view within American law is that human beings are “radically autonomous individuals who create value through the exercise of individual choice” and that this view “has led to an impoverished discourse concerning the common good and an understanding of justice in law

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152. *Id.* at 396. All of his articles were written in the years prior to ABA Standard 303(a) (3), which requires all law students at ABA-accredited schools to take six experiential learning credits. See ABA SECTION OF LEGAL EDUCATION & ADMISSIONS TO THE BAR, 2018-2019 STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS 16 (2018), [https://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2018-2019ABAStandardsforApprovalofLawSchools/2018-2019-aba-standards-chapter3.authcheckdam.pdf) [https://perma.cc/Q7VG-WXYU].

153. *Justice and Jesuit Legal Education*, *supra* note 138, at 395.

154. *Id.*

155. *Id.* at 396–97 (“think” emphasized in original; other emphasis added).

156. *Id.* at 399. One might reasonably question Professor Breen’s condescending (in my view) assumptions about the intellectual value of clinics. Implicit (and sometimes explicit) in his critiques are assumptions that clinics engage students affectively but not intellectually, and that, though kind of sweet, the work of clinics is not part of the “real” intellectual work of a university. Admittedly I am exaggerating a bit. However, other critics agree that he underestimates the value of clinic education. See, e.g., Bryce, *supra* note 137 at 605–06 (discussing intellectual value of clinics).

157. *Justice and Legal Education*, *supra* note 138, at 401.

158. *Id.* at 405.

159. *Id.* at 407.

that is almost entirely procedural in nature.”<sup>160</sup> In contrast, the Catholic intellectual tradition takes the substantive stance that a legal system and, indeed, society as a whole, must be judged by how it treats its most vulnerable members.<sup>161</sup> Moreover, persons are understood not merely as rights-bearers, but as possessing both political and moral responsibilities; this means that justice requires not merely the recognition of rights, but also “the duty to support the common good of society.”<sup>162</sup> The introductory course in moral theory and jurisprudence would introduce students to this view of justice, along with several others.<sup>163</sup>

Other legal educators agree that Professor Breen’s concern for the mission and integrity of Jesuit law schools is “timely, welcome, and important,”<sup>164</sup> but reject his diagnosis and proposals for reasons both substantive and practical.<sup>165</sup> Professor Gregory Kalscheur is among Professor Breen’s foremost critics and has articulated an alternate view of Jesuit legal education.

#### B. Professor Gregory Kalscheur and Jesuit Legal Education as Formation

Professor Gregory Kalscheur, himself both a Jesuit and a law professor, takes issue with both Professor Breen’s conception of the Catholic intellectual tradition and his vision for legal education.<sup>166</sup> These critiques are related: a different understanding of the Catholic intellectual tradition results in a different conception of Jesuit legal education.

Professor Kalscheur first takes issue with Breen’s view of the Catholic intellectual tradition as a set of doctrines. “[I]t is a mistake to reduce justice and engagement with the Catholic intellectual tradition to a set of concepts to be talked about, rather than as virtues to be lived.”<sup>167</sup> Rather than being a body of doctrine, the Catholic intellectual tradition is a way of proceeding.

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160. *Id.* at 407–08.

161. *Id.* at 408.

162. *Justice and Legal Education*, *supra* note 138, at 408–09.

163. Throughout the three articles, Professor Breen never asserts that *only* the Catholic intellectual tradition should enjoy a place at the table. In fact, he argues strongly for exposing students to a variety of perspectives. For example, he points to Deborah Rhodes’ work on incorporating ethical perspectives across the curriculum. *See Air in the Balloon*, *supra* note 138, at 74.

164. Gregory A. Kalscheur, *Conversation in Aid of a “Conspiracy” for Truth: A Candid Discussion about Jesuit Law Schools, Justice, and Engaging the Catholic Intellectual Tradition*, 43 GONZ. L. REV. 559, 560 (2007).

165. *See, e.g.*, Kalscheur, *supra* note 164; *see also, e.g.*, Thomas More Donnelly, *The Leaven of the World: Serving the Poor is Neither the Air in the Balloon Nor the Cherry on the Sundae*, 43 GONZ. L. REV. 607 (2007) (arguing that clinics, not a ‘window-dressing’ course on jurisprudence, are the best starting point for teaching students about justice).

166. Kalscheur, *supra* note 164, at 562. Professor Kalscheur also notes that “the tone and style of engagement that one adopts with respect to this issue is critical.” *Id.*

167. *Id.* at 563.

The Catholic tradition of virtue ethics understands the moral virtues—including the virtue of justice—as matters of character. A virtue is a rightly ordered love involving an integration of head and heart, of intellect and affect. In other words, a virtue is a quality of character that disposes a person habitually to see the world in certain ways and to respond to the world in certain ways.<sup>168</sup>

According to Professor Kalscheur, the starting point for the Catholic intellectual tradition is a conviction “that reality is purposeful and imbued with meaning and that reality’s purpose and meaning are summed up in the unity of all things with God patterned on the unity between the divine and the human embodied in Christ.”<sup>169</sup> From this starting point follows an “intrinsically religious intellectual dynamism of all human inquiry toward ultimate questions of meaning, coherence, and truth.”<sup>170</sup>

He asserts that four traits characterize the Catholic intellectual tradition:

- 1) First, the “conviction that faith and reason are mutually illuminating and are united in the search for truth;”<sup>171</sup>
- 2) Second, a sacramentalism that recognizes that “the pursuit of truth in any discipline is a holy activity;”<sup>172</sup>
- 3) Third, “[o]penness to the “analogical imagination (a tendency to see things in terms of both/and rather than in terms of either/or);”<sup>173</sup> and
- 4) Fourth, reverence for human dignity and a commitment to justice and the common good.<sup>174</sup>

In short, Professor Kalscheur points to a *living tradition*, the substantive particulars of which may evolve as human knowledge develops.<sup>175</sup> Moreover, this tradition has and continues to develop “in dialogue with the full range of human cultures and intellectual traditions.”<sup>176</sup>

Just as Professor Kalscheur’s understanding of the Catholic intellectual tradition differs from that of Professor Breen, his notion of what this means for Jesuit legal education also differs. Although he expresses no objection to a course on jurisprudence, he does not consider such a course central to the Jesuit mission in legal education.<sup>177</sup> For Kalscheur, the cardinal virtues of a Jesuit law

168. *Id.* at 564.

169. *Id.*

170. *Id.* at 564-65.

171. Kalscheur, *supra* note 164 at 565.

172. *Id.*

173. *Id.* at 566.

174. *Id.*

175. *See id.* at 566 (“[T]he Catholic intellectual tradition is a dynamic, living, ongoing, not-yet-completed conversation and is not properly understood as a static body of knowledge.”).

176. Kalscheur, *supra* note 164 at 566.

177. *Id.* at 567 (“[T]he Jesuit law school does not promote justice and the common good solely, or even most effectively, by demanding that students learn about justice from a Catholic perspective as one component of a new required course.”).

school are both justice and “intellectual solidarity,” that is, “[t]aking other persons, societies, and cultures seriously enough to engage them in conversation and debate about what makes life worth living, including what will make for the good of the city and the globe.”<sup>178</sup>

But justice within the Jesuit context, says Professor Kalscheur, “is better understood as a way of living that promotes the common good.”<sup>179</sup> And that way of living is achieved through the process of *formation*: the goal of Jesuit legal education is to form a “certain kind of person committed to serving the common good of society.”<sup>180</sup> Therefore, the questions Jesuit law schools should ask in assessing whether they are fulfilling their mission are:

Do students leave our law schools more responsive to the needs of humanity or less so? What sorts of human beings do our students become during their time in our law schools? Do the students we educate come to embody a commitment to justice [to *doing* justice rather than merely *analyzing* it]?<sup>181</sup>

And the starting point for formation is knowing our students and ourselves:

If the law school hopes to prepare women and men who are moved to a constructive, responsible, and loving use of their knowledge, then we have to take seriously the hopes and desires that brought the students to us, as well as the hopes and desires that move their hearts as they encounter the human realities that lie at the heart of the legal enterprise. And if we hope to educate not just good lawyers, but lawyers who lead good lives, then all of us have to continually ask ourselves what kinds of people we are becoming as we immerse ourselves in the study and teaching and practice of the law.<sup>182</sup>

But formation also takes place through enculturation, and Professor Kalscheur sees Jesuit legal education as ideally embodying a set of cultural conditions that are conducive to formation of lawyers concerned for the common good. In his view, five cultural characteristics should predominate: (1) a humane culture in the classroom and in the larger law school community; (2) a culture faithful to the idea of a university—a place where all authentic human questions, including questions of faith, are part of the conversation; (3) a culture committed to promoting human dignity and the common good; (4) a culture of dialogue and intellectual solidarity, in which people with different life experiences and perspectives speak and listen to one another with the goal of discerning the common good; and (5) a culture of discernment and vocation, the notion that

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178. *Id.* (quoting David Hollenbach, Address at Loyola University Chicago, *The Catholic University and the Common Good* (Nov. 6, 2007) (available at <http://www.luc.edu/ccity/hollenbachtalk.html> [<https://perma.cc/T7D5-LWDC>])).

179. Kalscheur, *supra* note 164, at 567.

180. *Id.*

181. *Id.* at 568.

182. *Id.* at 570.

students are being formed to fulfill callings that arise from the deepest, holiest desires of their hearts.<sup>183</sup>

Professor Kalscheur's approach has the virtue of depth and nuance, and—perhaps necessarily given its virtues—lacks a certain clarity; Professor Breen's approach has the virtue of clarity, even if it risks a certain superficiality. Other participants in this conversation have taken issue with Professor Breen's characterization of clinics and have argued that clinics are the best starting point for thinking about justice, even if a course in jurisprudence or moral theory might be useful.<sup>184</sup> Still others, most notably my colleague Andrew Moore,<sup>185</sup> have suggested compromise approaches that address many of Professor Breen's concerns.

Debates about the character of religiously affiliated law schools extend well beyond Jesuit schools. For example, some have argued that Catholic law schools must be radically restructured to embody a preferential option for the poor, as opposed to the preferential option for the rich that virtually all American law schools currently embody.<sup>186</sup> Others take still more radical positions. For example, Thomas Shaffer has argued for “sectarian” law schools, meaning religiously affiliated law schools that stand separate from wider civil society in a variety of ways (think of the recent book *The Benedict Option* as applied to law schools!).<sup>187</sup> Though a full discussion of his thought is beyond the scope of this article, one of Shaffer's points merits mention: in contrast to American legal ethics and legal thinking, both religious ethics and feminist ethics are

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183. *Id.* at 574-75.

184. *See, e.g.*, Bryce, *supra* note 137.

185. Professor Moore is sympathetic to Professor Breen's concerns, but does not think a required jurisprudence course would effectively address those concerns. Instead, he proposes both a “justice across the curriculum” requirement and an integrative seminar focused on justice; this seminar would be a capstone experience following (and directly connected to) a clinical experience. *See* Moore, *supra* note 137, at 470-73 (describing proposals).

186. *See* William Quigley, *Seven Principles for Catholic Law Schools Serious about a Preferential Option for the Poor*, 1 U. St. Thomas L.J. 128, 129 (2003) (setting out principles by which Catholic law schools may begin to embody a preferential option for the poor). The preferential option for the poor is a well-established principle of Catholic social teaching. *See, e.g.*, Pope Francis, *Evangelii Gaudium* (2013) (available at [http://w2.vatican.va/content/dam/francesco/pdf/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20131124\\_evangelii-gaudium\\_en.pdf](http://w2.vatican.va/content/dam/francesco/pdf/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium_en.pdf) [<https://perma.cc/XH26-XMPP>]) (“Without the preferential option for the poor, ‘the proclamation of the Gospel . . . risks being misunderstood or submerged.’”).

187. *See* Thomas L. Shaffer, *Erastian and Sectarian Arguments in Religiously Affiliated Law Schools*, 45 Stan. L. Rev. 1859, 1869 (1993). Although Professor Shaffer's article is twenty-five years old, it presages contemporary social arguments about the Christian community more generally. *See, e.g.*, ROD DREHER, *THE BENEDICT OPTION: A STRATEGY FOR CHRISTIANS IN A POST-CHRISTIAN NATION* (2017) (proposing a “strategic withdrawal” from the world by Christians in order to preserve Christian values and culture).

communal.<sup>188</sup> I explore this insight more fully in the next section, which articulates my vision for legal education in the Mercy tradition.

#### VI. A VISION FOR LEGAL EDUCATION IN THE MERCY TRADITION

Two major themes emerge from the source materials. The first, not surprising given the name of the congregation, is the primacy of mercifulness: Catherine McAuley believed mercy is the principal path by which we know God, and she structured her life around that belief; the congregation's core values of compassionate service and social justice, as well as its articulation of the five Critical Concerns, attest to mercy's centrality; the major thinkers about Mercy higher education also emphasize mercy. Thus, to be Mercy, a law school should be deeply committed to mercifulness.

The second major theme is the centrality of women and girls. The Mercy congregation was founded in large part as a ministry to women and girls, and that mission has never changed. In short, an emphasis on women and girls is part of the Mercy charism, and any institution, including a School of Law, that exists under the sponsorship of the Sisters of Mercy should share that commitment.

Minor themes augment the major themes. The most significant of the minor themes concerns the importance of identification in the process of professional formation. Catherine McAuley's life work—the opening and operation of the House of Mercy—arose from her keen identification with poor women and girls, with those who cared for the poor, and with Jesus himself. Dr. Mary Sullivan points indirectly to the role of identification in formation when she asserts that an “effort to give good example” should define Mercy higher education; this statement recognizes that students will identify with us almost no matter what, so our own values and behavior—who we show ourselves to be—are as important to students' professional identity formation as are the subjects we teach. Finally, in writing about Jesuit legal education, Professor Kalschauer prioritizes personal and professional formation—who both we and our students become through the educational process. Given these sources, I believe another mark of a Mercy legal education is careful attention to professional identity formation and to the role that preexisting identifications play in that process.

What follows is a brief discussion of what these three commitments might mean within a law school. I have tried to resist the urge to address every question that may arise; this serves as a starting point.

##### A. *The Commitment to Mercifulness*

The first defining feature of a Mercy law school should be its commitment to mercy and mercifulness.

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188. Shaffer, *supra* note 187, at 1873.

Like the word *justice*, *mercy* is open to varying interpretations. A full discussion of the many interpretive debates concerning mercy is beyond the scope of this article. For purposes of examining the charism of a Mercy law school, mercy within the Christian tradition is the appropriate starting point, and, even here, my examination will be quite brief.

Within the Mercy universe,<sup>189</sup> Dr. Jayme Hennessy has argued that mercy as Catherine McAuley practiced it is “the love that strives to restore or preserve the dignity of the human person.”<sup>190</sup> Drawing on both Scripture and theological reflection,<sup>191</sup> Dr. Hennessy asserts that human dignity is rooted in our creation in the Image of God.<sup>192</sup> The mercy of Christ “restore[s] God’s image within the human person, and it [is] through works of mercy that this image of God [is] then reflected into the world.”<sup>193</sup> To early Church theologians, the failure to practice mercy “obscured or impaired the humanity of both the person who was suffering and the person who failed to love—and to act.”<sup>194</sup> In contrast, the practice of mercy—the active recognition of and love for the Image of God within another human—always requires the affirmation or restoration of human dignity.

According to Dr. Hennessy, Catherine McAuley identified as a disciple of the “*crucified* Christ,” that is, of a God who “entered into the chaos, vulnerability, and suffering of human life to restore in our humanity the Image of God.”<sup>195</sup> Catherine practiced this mercy by her care for and empowerment of destitute women and children, and by her care for those working alongside her.<sup>196</sup> The Mercy Institute has continued this work through its ministries in education and health care and through its work on the Critical Concerns.<sup>197</sup> Dr. Hennessy suggests that Mercy educational institutions can continue this work

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189. Dr. Hennessy is a professor at Salve Regina, a Mercy institution located in Rhode Island. See Salve Regina, *Dr. Jayme Hennessy*, <https://salve.edu/users/dr-jayme-hennessy> [<https://perma.cc/V94Z-NZJZ>] (last accessed Aug. 20, 2018).

190. Jayme Hennessy, *I Desire Mercy: The Theological Foundations for Examining the Role of Mercy in Higher Education*, in *Life Within the Stream of Mercy: Mission Development for Administration and Faculty* 13, 16 (Conference for Mercy Higher Education 2009). This document was self-published by the Conference for Mercy Higher Education; the author of this article has on file a copy of Dr. Hennessy’s article.

191. Dr. Hennessy’s sources are wide-ranging and include, *inter alia*, the Bible (both Hebrew Scriptures and New Testament), several papal encyclicals, and writings from early Church theologian John Chrysostom, doctor of the Church Thomas Aquinas, liberation theologian Jon Sobrino, and feminist theologian Margaret Farley. Of course, a full discussion of mercy within the Christian tradition would merit its own library. However, Dr. Hennessy’s article focuses on the concept of mercy for purposes of Mercy higher education, the relevance of which is obvious.

192. *Id.* at 16.

193. *Id.*

194. *Id.*

195. *Id.* at 17.

196. See *supra* Part I (describing Catherine’s work with poor women and children).

197. See *supra* Part III (describing Critical Concerns).

through a process of formation such that students' and employee' "senses, emotions, mind, and will are disposed toward perceiving, feeling, thinking, and acting mercifully."<sup>198</sup>

Dr. Margaret Farley has explored the relationship between mercy and justice. Her central argument is that mercy "both requires justice and makes it possible."<sup>199</sup> (Note the similarity to Professor Robin West's insight, *infra*, about the need for care to be just, and for justice to be caring.<sup>200</sup>) Describing mercy as a form of love, she notes that it can be helpful or harmful: what separates a helpful, *just* mercy from an unhelpful, *unjust* mercy is the "concrete reality of the beloved."<sup>201</sup> "[T]he requirement for true mercy is . . . the wisdom to understand well, insofar as we can, concrete realities, contexts, relationships, and the claims they make on us in justice."<sup>202</sup>

But just as mercy requires justice, mercy enables justice:

Precisely because mercy involves beholding the value of others and suffering with them in their need, it opens reality to the beholder; it offers a way of "seeing" that evokes a moral response—to alleviate pain, provide assistance in need, support in wellbeing. Mercy therefore illuminates justice and propels it to action.<sup>203</sup>

Finally, any discussion of mercy should include Jesuit theologian Jon Sobrino's powerful reflections. His starting point is the role of mercy in the life of Jesus: Sobrino asserts that mercy was the central principle around which Jesus' life was structured, and that, therefore, our lives should imitate that structure (if we wish to be fully human).<sup>204</sup> Mercy should be our starting and ending points. However, properly understood, *mercy* connotes more than compassion, more than mere sentiment, and certainly is not paternalism. Rather, mercy is a basic attitude toward the suffering of another, whereby one reacts to eradicate that suffering for the sole reason that it exists, and in the conviction that, in this reaction to the ought-not-be of another's suffering, one's own being, without any possibility of subterfuge, hangs in the balance.<sup>205</sup>

The call to mercy is unequivocal: there is nothing "that might relativize it or offer an escape from it."<sup>206</sup> And what mercy requires for the poor, the oppressed, and the outcast is radical: Jesus' "social theory" is guided by the principle that

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198. Hennessy, *supra* note 190, at 20.

199. Farley, *supra* note 97, at 13.

200. See *infra* Part VI.B.

201. Farley, *supra* note 97, at 16.

202. *Id.* at 17.

203. *Id.* at 18.

204. SOBRINO, *supra* note 19, at 15–16 ("What we wish to set forth . . . is that the principle that seems to us to be the most 'structuring' of all, as we examine Jesus' life, is the element of *mercy* in that life. Therefore it ought to be the 'most structuring' element of the life of the church, as well.").

205. *Id.* at 18.

206. *Id.*



massive unjust suffering must be pulled up by the roots.”<sup>207</sup> A church governed by the principle of mercy will have a “theoretical and practical obsession with indicating, and walking, effective paths to justice.”<sup>208</sup>

Three insights strongly inform my view of what a commitment to mercifulness means for legal education. The first is the understanding of mercy as a love that works to preserve or restore human dignity. The second is the insight shared by Jon Sobrino and Margaret Farley about the reciprocal relationship of mercy to justice, especially the notion that mercy serves as the impetus for persons to seek justice for others; in a sense, mercy precedes justice. The third is related to the second: justice and care are interdependent, that is, uncaring justice is unjust and unjust caring is uncaring.<sup>209</sup>

These insights imply the following for a law school: students must be able to *see* the crucified peoples of our society and world, that is, those whose dignity has been denied. Just as Catherine McAuley placed the House of Mercy in a wealthy area of Dublin, thus making the poor and their suffering impossible for the rich to ignore, so must we ensure that suffering—especially human suffering related directly to our legal system—is visible to our students. Seeing the crucified peoples, students also must *care*; this is an *affective* experience and, at times, an experience of identification. Finally, this *seeing* and *caring* should lead to *action*: students should work to take the crucified people down from the cross (which requires wisdom, education, and discernment).

Keeping these insights in mind, I offer some tentative and small suggestions for how a law school in the Mercy tradition might fulfill its core commitment to mercifulness.

### 1. Reform of the First Year Curriculum

Most importantly, formation in mercifulness should begin with the first-year curriculum. Recall Dr. Hennessy’s argument that Mercy education should form persons who are disposed to perceive, feel, think, and act mercifully. Students frequently are powerfully moved and deepened by their encounters with human suffering during their clinical and externship experiences. Students’ journals in externship courses bear witness to the profound influence of encounters with suffering, deprivation, and injustice:

My job site is in the . . . Hall of Justice where legal issues pertaining to . . . County Youth are adjudicated. I am not sure if you have ever been to the . . . Hall of Justice, but it is a pretty depressing place for a number of reasons. First, the building is almost entirely in disrepair . . . the air conditioning was out all week (with an indefinite repair date), the elevators do not work (another indefinite repair date), and I have yet to find a bathroom where at least one of

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207. *Id.* at 20.

208. *Id.* at 25.

209. *See infra* Part VI.B (describing the work of legal scholar Robin West).

the stall doors has not been kicked in. The second reason I found this place to be depressing is due to the reasons that people are there in the first place. Because this courthouse deals only in juvenile matters, it stands to reason that most of [the] people that are there because their family has hit rock bottom in one way or another. On my first day, one of the attorneys invited me down to observe her delinquency hearing. During the hearing, in marched two young boys (brothers). My heart broke for their mother who cried while listening to the bad things her sons had done.

This theme continued throughout the week. I observed a trial where a mother lost rights to her three-year old son. I was the representative . . . during case discussions for children on the mental health docket. I completed case intakes for two boys involved in the criminal justice system, but also have learning disabilities that have impeded their ability to complete school. After each of these experiences, I had to wonder if the disrepair of the courthouse had become of [sic] reflection of the desolation.<sup>210</sup>

This week one of the tasks I was asked to assist with was listening to multiple discs of jail calls and take notes of anytime the defendant (or the person he called) discussed his case. . . . At first listening to the calls was no big deal; however, as the calls progressed to later dates and more time elapsed since he had been incarcerated, the more stressed he sounded. What really got me though was after one of his court dates, he was talking to various people on the phone as to whether or not he should take the plea deal he was offered which would result in a minimum of 10 years of time versus rolling the dice with multiple . . . charges and a habitual offender. During one of the calls he started to cry and breakdown that if he took the plea he wouldn't be out until after his son (approx. 7 years old) graduated high school. He genuinely sounded devastated at the thought of this and it really broke my heart to hear, especially knowing that little boy would be going the rest of his life without his dad around and that the mother would be having to deal with all the repercussions of that. It really caused me to reflect on that criminals are still human beings, granted some of them are pretty messed up human beings with a whole host of issues that cause them to engage in the behaviors that they do but they are still people with emotions and feelings. It has to be hard to be a prosecutor and finding inner peace and a balance between seeking justice and being able to make tough decisions in doing their job. This guy was a "bad guy" with a really nasty history but at his core, he is still a dad to a little boy who was missing his dad, not understanding why he couldn't see him or when he was coming home. Two days later that defendant came into court and had decided to take the plea deal. As I sat and watched the proceeding, I couldn't help but feel a little sad for his family. Meeting the victim afterward was just as depressing when I heard that she had been turning to pills to cope with the mental anguish she had suffered for the last year and a half as a result

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210. Student Journal Entry, *Externship Course*, University of Detroit Mercy School of Law (Summer 2018) (on file with author).

of [the crime] . . . and that her pill use prevents her from being the mother she wants to be to her little girl.<sup>211</sup>

These confrontations with suffering can be painful, even wounding, but they deepen students' appreciation of the complexities and tragedies routinely encountered in legal practice. Both students and lawyers can grow callous, but with good guidance, the experiences can also result in greater humility, compassion, and commitment, not to mention a deeper understanding of the operation of law.

Some form of these encounters should be part of the first-year curriculum. For example, at least one of the required first-year courses each semester could incorporate some form of course-related service learning and guided reflection on the service learning experience. Service learning would attach human faces to the doctrines students learn in class: reading about unconscionability is one thing; doing an intake for an elderly, illiterate man on a fixed income who was targeted for a small loan at 300% interest gives the doctrine a fuller meaning. Students may overlook a crucified person in a case book; that's just part of the "facts" section of their brief for class. Students rarely will overlook a crucified person directly in their path. In short, service learning allows students to *see* those who are suffering. Placing these experiences within required courses, with faculty working side-by-side with students, models for students the virtue and care we wish to cultivate in them and ourselves. And such experiences take students outside themselves and thus may serve as a powerful corrective for the pathologies of the first year: the obsession with grades and status relative to peers, as well as the attendant anxiety and depression students too often suffer.

Other experiences during the first year also may cultivate students' mercifulness. Field trips to court, especially criminal court, are always powerful. Guest speakers—lawyers and judges, to be sure, but also parties to civil and criminal litigation—show students that legal disputes are *human* disputes involving real people worthy of their attention and compassion. And of course there are opportunities for one-day clinics—for example, our institution has one-day driver's license restoration clinics—and service days. All of these experiences nicely augment curricular service learning opportunities.

Opportunities for reflection should accompany service learning and related experiences. (Reflection should play a greater role in the law school curriculum more generally.) Among other things, guided reflection gives students tools for coping constructively with the emotional demands of direct encounters with suffering, need, and injustice, and allows students to see connections between their past experiences and who they are becoming professionally. Reflection is both cognitive and affective, and some focus on students' affective experiences may not only help develop students' capacity for both compassion and self-

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211. Student Journal Entry, *Externship Course*, University of Detroit Mercy School of Law (Winter 2018) (on file with author).

knowledge, but may also help students integrate their own emotional and moral compasses into their professional identities. One hopes this greater integration would, in turn, reduce the prevalence of substance abuse, anxiety, and depression among law students and within the world of practice.

There are two major objections to incorporating service learning into the first-year curriculum. The first is practical: there isn't enough time given all the material students must learn. The second echoes Professor Breen's concern about learning about justice merely by taking clinics: service learning may risk developing students with warm hearts but empty heads, with no real understanding of what justice requires in any particular situation.

I am sympathetic to the concern about time, but this concern always exists. Professors who teach courses in the first-year curriculum constantly must choose between breadth versus depth of coverage, and this is another version of that choice. If we want mercifulness to be part of students' professional identity formation, then such formation should begin during the first year, which most would say is the most transformative portion of students' formal legal education. Especially during the first year, students absorb our values and priorities, and relegating formation in mercifulness to upper level clinics represents a lost opportunity: too little, too late.

I am less sympathetic to the concern about warm hearts and empty heads. Frankly, the greater risk during law school is that we form lawyers with clever heads and cold hearts, or lawyers whose heads and hearts are alienated, operating on parallel tracks. Incorporating affectively-loaded experiences during the first year is a move in the right direction. Moreover, the incorporation of service learning into required courses addresses Professor Breen's concerns: students' service to others takes place within the context of in-depth examination of doctrine and of the justice of such doctrines. In fact, direct encounters with persons with legal difficulties spur deep thought about the operation of legal doctrines, in a way that too rarely happens when students learn doctrines as part of regular classroom instruction.

A commitment to mercifulness suggests other tweaks to the first-year curriculum. For example, criminal law professors may consider augmenting the standard discussion of retribution and deterrence with consideration of forms of restorative justice such as those practiced within some Native American communities. It also suggests alterations to the upper level curriculum, most notably a greater focus on alternative dispute resolution.

## 2. A Greater Focus on Alternative Dispute Resolution

A second way to fulfill the Mercy commitment to mercifulness is through an increased focus on alternative dispute resolution ("ADR"), especially mediation.

The assumption that litigation within an adversarial system is lawyers' principal method for addressing clients' problems is built into the very structure

of legal education. Students begin law school by learning to read cases—stories of disputes that were resolved only through litigation.

Of course, students learn soon enough that few cases go to trial, for reasons both healthy and problematic. In clinics, externships, and summer work experiences, they see how often cooperation and civility between lawyers is the norm, and they also see how often cases settle. They learn the costs—financial and emotional—that parties bear during scorched earth litigation.

A commitment to mercy does not necessarily *require* a focus on mediation, as litigation itself is sometimes necessary to restore a party to dignity, but such a focus is consistent with an orientation toward mercy. Restoration to dignity includes, when possible, reconciliation of relationships and mending of broken communities. This can happen through litigation, but mediation is a natural fit. An extensive discussion of this is beyond the scope of this article, but some upper-level experiences in ADR, whether through training in ADR skills or through consideration of issues in doctrinal classes through an ADR lens, would further students' formation as merciful lawyers. It is also consistent with a commitment to nonviolence, which is one of the Critical Concerns.

### 3. Concrete Work on the Critical Concerns

Finally, a commitment to mercy should include academic focus and community work on the Mercy Institute's Critical Concerns. Each concern seeks to address an area in which the recognition and restoration of human dignity is a matter of special urgency. The Sisters of Mercy have discerned that these concerns should shape their thought and social action. A School of Law under Mercy sponsorship needn't reinvent the wheel, as each subject presents rich opportunity for study and action. A distribution requirement would allow students to choose the concern of special interest and urgency to them (say, immigration law) and learn more deeply about the legal issues in that area.

But clinics and other courses aren't enough. For example, a course on Critical Race Theory cannot substitute for a larger institutional commitment to racial equity. This is true of gender as well, as the next section will discuss.

#### B. *The Commitment to Women and Girls*

A special commitment to the wellbeing of women, girls, and other vulnerable groups is a *sine qua non* for legal education in the Mercy tradition.<sup>212</sup> Moreover, this commitment is wide ranging and begins with curriculum.

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212. Notably, my research has not revealed any American law school whose Mission Statement or other statements of central commitments included a special commitment to the wellbeing of women and girls. A commitment to women and girls should not preclude a strong commitment to other groups that are as vulnerable as, or more vulnerable than, American women and girls (at least as a large and undifferentiated group). However, given the history and priorities of the Sisters of

## 1. Curriculum

First, the curriculum should reflect this commitment to women and girls. Of course, the curriculum should include courses like Feminist Legal Theory, Women and the Law, and so forth. More importantly, though, if faculty members share a deep commitment to women and girls, then traditional women's concerns likely will be visible in standard doctrinal courses. Is domestic violence, one of the society's most common crimes, taught in the Criminal Law course? Is rape, and if so, how?<sup>213</sup> Prostitution and sex work? Do courses in human rights include coverage of issues principally affecting women, such as female genital mutilation, human trafficking, etc.? And so forth.<sup>214</sup>

However, focusing on discrete issues disproportionately affecting women and girls is not enough. Rather, students also should be exposed to critiques of and challenges to the lens through which American culture, political institutions, and laws view such issues. As Robin West and others have recognized, the rules of the American legal system have failed to adequately protect women in large part because of the system's conception of the person:

The "connected individual" [connected as a caregiver, in an intimate relationship with a spouse, etc.] . . . is simply not the subject of modern political and legal thought any more than she is the subject of political and legal protection . . . . [M]ainstream liberal theory, as well as the liberal legalism which is its outgrowth in the legal academy, is premised upon an individual who prides himself on his autonomy and on his self-chosen life projects . . . . It is that profoundly

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Mercy, any Mercy institution, including a Mercy law school, should have an easily recognizable commitment to women and girls.

Many law schools, whether religiously affiliated or not, express commitments to specific groups or causes. For example, the Mission Statement of Howard University School of Law focuses (albeit not exclusively) on the rights of African-Americans and other minority groups:

Consistent with providing the professional leadership necessary to advocate and defend the rights of all, but *particularly of African-Americans and other minorities*, it is the Law School's mission to . . . [e]ngage as an institution in the active pursuit of solutions to domestic and international legal, social, economic and political problems *that are of particular concern to minority groups*.

*Our Mission*, HOW. UNIV. SCH. OF L., <http://law.howard.edu/content/our-mission> [https://perma.cc/3M82-EAXW] (last accessed Nov. 10, 2018) (emphasis added). A law school in the Mercy tradition might have a similar express commitment to women's rights.

213. All too often Criminal Law professors decline to teach the law of rape, largely out of discomfort with the subject matter and with the ambiguity of the law itself. See Jennifer M. Denbow, *The Pedagogy of Rape Law: Objectivity, Identity and Emotion*, 64 J. LEGAL EDUC. 16, 16–17 (2014) (discussing professors' omission of rape law and the reasons for that omission).

214. None of this is to suggest a limitation on faculty academic freedom. There can be principled reasons not to cover certain topics. However, all too often, the omission of topics from standard case books is a result of the invisibility or unfamiliarity of those topics to the drafters of the books, or perhaps an unexamined assumption that the topics simply aren't legally interesting or important. This article simply suggests that professors consider critically, and in the light of gender equity, their default settings about what should and shouldn't be covered.

disconnected individual which liberal societies, liberal politics, and liberal ideologies, including legal ones, are designed to protect.<sup>215</sup>

Differently put, although a greater emphasis on, say, domestic violence may be somewhat useful, the law's inadequate treatment of this issue will not simply change through more attention. Rather, for true reform to occur, American law's conception of the human person must broaden and abandon its radical individualism.

Many schools of thought—such as communitarianism—challenge the radically individualistic rights-oriented assumptions of American legal thought and doctrine. A Mercy-affiliated law school that is characterized by a special commitment to women and girls might (or *should*) consistently use the tools and insights of feminism/womanism/mujerista to critique and, at times, advocate for the reform of, American legal doctrine.

Of course, there are many schools of feminist and womanist thought.<sup>216</sup> The insights of relational feminism,<sup>217</sup> especially when combined with some of the insights of both radical and intersectional feminism, provide some of the most incisive feminist critiques of American law.

Relational feminism became prominent in the late 1970's and early 1980's within the fields of psychology and moral philosophy.<sup>218</sup> Lawrence Kohlberg's studies of moral decision-making had implied that girls' moral decision making was less developed than that of boys.<sup>219</sup> Psychologist Carol Gilligan studied Kohlberg's data, girls' and boys' explanations for their moral reasoning, etc., and ultimately concluded that many girls operate from a moral paradigm that Kohlberg simply had not recognized: an ethic of care, that is, a perspective that assumed as a starting point the connectedness of persons and the primacy of care for others as a moral value.<sup>220</sup> For Gilligan, this "ethic of care" represented a moral perspective that competed with, or was at least distinct from, the "ethic of justice" that served as Kohlberg's norm for moral thought.<sup>221</sup> Although men can

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215. WEST, *supra* note 55, at 4.

216. Just as obviously, some such schools of thought stand in direct contrast—even active opposition—to Catholic or even more broadly Christian precepts. This shouldn't matter at a university, especially given the emphasis within the Catholic intellectual tradition of engaging all voices and perspectives in the search for truth and the quest for justice.

217. This is also sometimes called cultural feminism. Catherine Albiston et al., *Feminism in Relation*, 17 WIS. WOMEN'S L. J. 1, 3 n.8 (2002).

218. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 1–2 (1982) (arguing that women's emotional and moral development have been ignored in psychological and other research).

219. *Id.* at 18 (“Prominent among those who thus appear to be deficient in moral development when measured by Kohlberg's scale are women, whose judgments seem to exemplify the third stage of his six-stage sequence. At this stage morality is conceived in interpersonal terms and goodness is equated with helping and pleasing others.”).

220. *Id.* at 173.

221. *Id.* at 173–74.

operate from an ethic of care and women from an ethic of justice, and people may operate from either at various times, Gilligan and other relational feminists posited that generally women are more likely than men to operate from this ethic of care.<sup>222</sup>

Within the legal academy, Georgetown professor Robin West is probably the most prominent voice for applying the insights of relational feminism to American law.<sup>223</sup> Her starting point is a conception of people not as wholly and radically autonomous individuals but as “connected selves:”

We know . . . that . . . connections to others and to our social worlds are important, and even central, to our identity. . . . Connections to others give us pleasure, they give our lives content, direction, and structure, and more than any other experience we share, they inform and constitute our “moral sense.”<sup>224</sup>

These connections are not invariably positive and can, in fact, be the source of some of our greatest harms: rape (including marital rape), domestic violence, and child abuse.<sup>225</sup> Some threats and harms to our connections are natural—physical illness, death—but, as Professor West and others recognize, many are culturally specific consequences of political and legal forces.<sup>226</sup> As described above, one great source of threat and harm is American law’s radically individualistic view of the human person, which, in the view of West and others, is “all a function of our sorry history of sexist exclusion: we have excluded women’s . . . interests and voices from our political and legal history, and thus have unsurprisingly failed to protect women from the harms they disproportionately suffer within damaging relations of connection.”<sup>227</sup>

Beyond her positions that the “connected individual” is essentially invisible within American law and that women, more than men, suffer from this invisibility, West’s feminist analysis of American law rests on two assumptions: first, that the “ethic of care” is a “principled moral stance, rather than an affective emotional response, and therefore [is] . . . of importance in *all* areas of life [including the political and legal spheres], and not just the familial;”<sup>228</sup> and

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222. *Cf. id.* at 173 (“Yet in the different voice of women lies the truth of an ethic of care, the tie between relationship and responsibility, and the origins of aggression in the failure of connection.”).

223. In a review of *Caring for Justice*, Michael Cahill described the book as a “provocative foray into new territory.” See Michael T. Cahill, *Book Review*, 96 MICH. L. REV. 1884, 1884 (1998).

224. WEST, *supra* note 55, at 1.

225. *Id.* at 2 (“Obviously, while some of the ‘connections’ that tie us to others are life-affirming, others are invasive and overpowering. They diminish rather than enlarge the individuals who participate in them.”).

226. *Id.* at 3.

227. *Id.* at 7.

228. *Id.* at 6 (emphasis added); see also *id.* at 9 (“[I]f it is true . . . that the act of caring for others to whom we are connected in some way is central to our moral lives, then our capacity for care should be at the center of our understanding of our public and legal, as well as private and personal, virtues, and specifically that it should be central to the meaning of legal justice.”).



second, that women's subordination within American culture is the principal cause of the invisibility of the connected self and of the public irrelevance of an ethic of care.<sup>229</sup> The invisibility of the "connected individual" and the exclusion of a moral "ethic of care" from public discussions has not merely harmed women. Rather, West proposes, the harm is also "to our law, our understanding of the nature of harm and sense of justice."<sup>230</sup>

Proceeding from these assumptions, West's thesis is jurisprudential: "Our justice is not just when it is not caring, and care is not caring when it is not just."<sup>231</sup> The first chapter of *Caring for Justice* is devoted to exploring and defending this claim.<sup>232</sup> (Professor West's thesis calls to mind Dr. Margaret Farley's argument that mercy both requires justice and makes justice possible.<sup>233</sup>)

A law school in the Mercy tradition may not *accept* relational feminism's<sup>234</sup> critique of American law, but, at the very least, it should engage feminist perspectives on law and on justice.

Furthermore, though not necessarily religious, the relational feminist perspective is at least a first cousin to much of Catholic social teaching and to the perspectives of Catholic social teaching on the human person. Often women are justifiably nervous when clerical types begin talking about gender—I sure as hell am!—but the insights of relational feminism are consistent with the starting point of Catholic social teaching: the common good.<sup>235</sup> Discussion of the

229. WEST, *supra* note 55, at 8.

230. *Id.* (emphasis in original).

231. *Id.* at 9.

232. *See id.* at 9, 22–93.

233. *See supra* Part VI.A.

234. Critics of relational feminism argue—correctly, I believe—that it is an essentialist position. In her Introduction to *Caring for Justice*, West addresses critics of the essentialist position, including those from the liberal and post-modernist schools of feminism. *See* WEST, *supra* note 55, at 12–13. Professor West is most persuaded by intersectional feminists, but argues that the problem highlighted by intersectionalists is white racism, not essentialism. *Id.* at 15. Differently put, "it doesn't follow from the differentiating experiences and interests of black women or lesbian women from white women or heterosexual women, that all women don't share some interests or experiences." *Id.* As to the liberal feminist critique of essentialism, West agrees with Carol Gilligan that the "burden of proof" should rest with those asserting the "no difference" position. *Id.* at 18–19.

235. The common good is a rich term within Catholic social teaching, and although it uses somewhat different language, it takes the "connected individual"—not the radically autonomous and separate self—as a given: "The human person cannot find fulfillment in himself, that is, apart from the fact that he exists 'with' others and 'for' others." Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Catholic Church* (2004) (available at [www.vatican.va/roman\\_curia/pontifical\\_councils/justpeace/documents/rc\\_pc\\_justpeace\\_doc\\_20060526\\_compendio-dott-soc\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060526_compendio-dott-soc_en.html)) (last visited Aug. 20, 2018). *Gaudium et Spes*, a seminal document of the Second Vatican Council, defines the common good as "the sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to

common good within Catholic social teaching reveals a focus on the “connected individual,” not the radically autonomous individual of American law.<sup>236</sup> Furthermore, the clear position of Catholic social teaching is that *all* persons—both women and men—are responsible for the health of public life, that is, for working to achieve the common good. Moreover, Pope John Paul II’s *Mulieris Dignitatem*<sup>237</sup> implies that women’s voices in law and government are *necessary* to achieve a balanced, healthy society.

Several possibilities exist for the incorporation of feminist critiques of American law. One is simply to incorporate such perspectives within the standard law school curriculum; indeed, this should happen. Another—with a nod to Professor Breen—is to include the materials in a jurisprudence course. Another might be through a distribution requirement that could include any number of courses (Jurisprudence, Feminist Legal Theory, even an externship). Yet another might be more organic: have some sessions for interested faculty members and let things develop as they will.

## 2. Institutional Culture

A Mercy law school’s curriculum and scholarship should reflect a serious commitment to the wellbeing of women and to the inclusion of their perspectives. However, the institution’s commitment to women’s wellbeing should not merely be intellectual. Our students may hear what we say, but they believe, absorb, and appropriate what we do. Therefore, the school’s institutional culture should genuinely value women, take affirmative steps to ensure gender equity, and question and ultimately dismantle institutional structures that disadvantage women. But how?

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their own fulfillment.” Pope Paul VI, *Gaudium et Spes* § 26 (1965) (available at [www.vatican.va/archive/hist\\_councils/ii\\_vatican\\_council/documents/vat-ii\\_const\\_19651207\\_gaudium-et-spes\\_en.html](http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_const_19651207_gaudium-et-spes_en.html)) (last visited Aug. 20, 2018). Every member of society bears responsibility for the common good: “[T]he obligations of justice and love are fulfilled only if each person, contributing to the common good, according to his own abilities and the needs of others, also promotes and assists the public and private institutions dedicated to bettering the conditions of human life.” *Id.* at § 30. The Bishops’ Conference of England and Wales notes this is not simple utilitarianism: “Because we are interdependent, the common good is more like a multiplication sum, where if any one number is zero then the total is always zero. . . . The common good is about how to live well together. It is the whole network of social conditions which enable human individuals and groups to flourish and live a full, genuinely human life. At the heart of the common good, solidarity acknowledges that all are responsible for all, not only as individuals but collectively at every level.” Bishops’ Conference of England and Wales, *Choosing the Common Good*, <http://www.cbcew.org.uk/download/34851/258839/file/choosing-the-common-good-2010.pdf> [<https://perma.cc/YN7W-7978>] (last visited Oct. 16, 2017).

236. See *supra* note 235.

237. Pope John Paul II, *Mulieris Dignitatem* (1988) (available at [https://w2.vatican.va/content/john-paul-ii/en/apost\\_letters/1988/documents/hf\\_jp-ii\\_apl\\_19880815\\_mulieris-dignitatem.html](https://w2.vatican.va/content/john-paul-ii/en/apost_letters/1988/documents/hf_jp-ii_apl_19880815_mulieris-dignitatem.html) [<https://perma.cc/A4M2-EBYH>]) (last visited Aug. 20, 2018) (describing men and women as sharing a common responsibility for the destiny of humanity).

Robin West's insights about the radical individualism of American law also apply to the cultures of American law schools. Just as American law "is premised upon an individual who prides himself on his autonomy and on his self-chosen life projects,"<sup>238</sup> so too are American law schools. And just as American law protects and values the radically autonomous individual self, not the connected self it hardly recognizes, American law schools principally value the radically autonomous individual self over the connected self. And all too often this means law schools overvalue the contributions of a select few radically autonomous, mostly male faculty members over other, often female faculty members who operate more as "connected selves"—connected to students and to the institution itself.

A Mercy institution should privilege its identity as a *community*, rejecting the highly individualistic "star system"<sup>239</sup> prevalent in American academia. This focus on law school as an intellectual and professional community is consistent with the promotion of women's wellbeing, with Catholic social teaching's commitment to the common good, and with the Mercy Institute's identification of community as one of its core values. But what does it mean to value community and to reject the star system, and why is this consistent with institutional justice toward women?

The star system influences all of legal academia, even modestly ranked law schools, and even in a post-crash era. Of course, all schools seek eminent scholars: such persons may benefit the institution in a variety of ways, most notably by increasing the reputation of a department. Schools should seek such persons, and, at times and to a limited extent, higher pay, course releases, and similar benefits may be appropriate means for recognizing high achievement and for allowing an especially talented scholar to focus on an important project.

However, this recognition of excellence is distinct from what is meant by the star system. The star system is characterized by "vast inequities in salary, other perks, and teaching loads,"<sup>240</sup> with "stars" who all too often see themselves as "individual entrepreneur[s] rather than member[s] of a community."<sup>241</sup>

An extreme version of the star system may be problematic at any institution. Some critics assert that although "stars" may serve as marketing tools for their institutions, they often teach relatively few students, so any actual direct

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238. WEST, *supra* note 55, at 4.

239. Cf., e.g., George Packer, *Daily Comment: America's Star System*, THE NEW YORKER (July 22, 2013) (available at <https://www.newyorker.com/news/daily-comment/americas-star-system> [<https://perma.cc/Y8Z6-RX8L>]) (last visited Aug. 20, 2018) (noting that "the star system, with wildly unequal rewards for relatively small differences in talent, holds sway in virtually every area of American society").

240. Heather Dubrow, *The Counteroffer Game*, Inside Higher Ed (Aug. 26, 2013), <https://www.insidehighered.com/advice/2013/08/26/essay-calling-end-counteroffer-strategies-academic-hiring> [<https://perma.cc/4ZCM-MMZH>] (last visited on Feb. 1, 2018).

241. *Id.*

educational benefit may be illusory or at least overstated.<sup>242</sup> In short, although stars may “bring visibility and luster[,] they also bring special deals, special—in the sense of privileged—rules of conduct, and discord, and jealousy.”<sup>243</sup> At its worst, the star system “is destructive of faculty morale and of the kind of community in which the satisfactory functioning of a college . . . depends.”<sup>244</sup>

However, beyond all of these criticisms, which could apply at any law school, the star system in its present form is fundamentally incompatible with the Mercy commitment to the wellbeing of women.<sup>245</sup> There are several reasons for this.

First, as an empirical matter, very few female faculty members, and even fewer who are also people of color, are identified as stars and receive the extraordinary privileges that accompany the star system. Take one example from Canada: In 2010, the Canadian government allowed several public universities to hire nineteen “academic stars,” none of whom were women; indeed, not even one of the thirty-six nominees on the shortlist were women.<sup>246</sup> The issue in the United States—and in American law schools—doesn’t appear to be very different.

This gender difference in “stars” seems likely to be, at least in part, a product of structural discrimination: some combination of implicit bias and old boy-ism. Professor Richard Delgado’s words, spoken in a slightly different context more than thirty years ago, still ring true:

It does not matter where one enters this universe; one comes to the same result: an inner circle of about a dozen white, male writers who comment on, take polite

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242. See Christopher Shea, *Academic Inequality and the Star System*, THE CHRONICLE OF HIGHER EDUC. (Apr. 14, 2014), <https://www.chronicle.com/article/Academic-Inequalitythe/145843> [<https://perma.cc/W9CQ-S4YN>] (last accessed Nov. 23, 2018).

243. HENRY ROSOVSKY WITH INGE-LISE AMEER, A NEGLECTED TOPIC: PROFESSIONAL CONDUCT OF COLLEGE AND UNIVERSITY TEACHERS, IN UNIVERSITIES AND THEIR LEADERSHIP 119, 124 (William G. Bowen & Harold T. Shapiro, eds., 2016).

244. RUDOLPH H. WEINGARTNER, THE MORAL DIMENSIONS OF ACADEMIC ADMINISTRATION 106 (1999) (available at <https://books.google.com/books?isbn=0847690970> [<https://perma.cc/9CYF-S8UV>]) (last accessed Nov. 23, 2018).

245. It is also inconsistent with Antiracism, one of the Critical Concerns of the Sisters of Mercy of the Americas. See *supra* Part III.

246. Patricia Rae, Mark Jones, et al., *Failed by the “Star” System*, BULLETIN, <https://bfixedulletin-archives.caut.ca/bulletin/articles/2010/06/failed-by-the-star-system> (last accessed Nov. 23, 2018); see also Sandra Jones, *The “Star” Academics are so often White and Male*, THE GUARDIAN (Apr. 22, 2013), <https://www.theguardian.com/education/2013/apr/22/university-jobs-not-being-advertised> [<https://perma.cc/KT44-YVUS>] (describing similar system in Great Britain) (last accessed Nov. 23, 2018).

issue with, extol, criticize, and expand on each other's ideas. It is something like an elaborate minuet.<sup>247</sup>

The research of Virginia Valian and others<sup>248</sup> shows how implicit bias results in the underrating of the intellectual contributions of women and the considerably lower odds that a woman will be identified as a rising or actual star. One sees signs of this throughout academia: a study of student evaluations shows that men are referred to as “smart” and women as “helpful.”<sup>249</sup> These biases are most influential when criteria for evaluation of work product are inherently unclear<sup>250</sup>—certainly the case in legal scholarship. In short, the star system harms women in part because, whatever the merits of their work, women are less likely to be identified and receive the benefits of the system.

Second, sexual harassment appears to be more prevalent in workplaces characterized by a star system, and sexual harassment obviously is inconsistent with a serious commitment to women's wellbeing. One reason that Bill O'Reilly, Matt Lauer, and other prominent media figures were allowed to get away with sexual harassment for years (with multiple targets and victims) is

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247. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 563 (1984) (describing the absence of voices of color within legal scholarship about civil rights).

248. VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (MIT Press 1999) (describing and synthesizing research on the barriers to women's professional achievement and advancement).

249. See Benjamin Schmidt, *Gender Bias Exists in Professor Evaluations*, NEW YORK TIMES (Dec. 16, 2015), <https://www.nytimes.com/roomfordebate/2015/12/16/is-it-fair-to-rate-professors-online/gender-bias-exists-in-professor-evaluations> [<https://perma.cc/GK7B-AJT5>] (last accessed Nov. 23, 2018) (describing a study of words used in Rate My Professor, in which men were forty percent more likely to be described as smart, seventy percent more likely to be described as brilliant, and 130% more likely to be described as a genius). For a fascinating look at the data, see *Gendered Language in Teacher Reviews*, [http://benschmidt.org/profGender/#%7B%22database%22%3A%22RMP%22%2C%22plotType%22%3A%22pointchart%22%2C%22method%22%3A%22return\\_json%22%2C%22search\\_limits%22%3A%7B%22word%22%3A%5B%22mean%22%5D%2C%22department\\_\\_id%22%3A%7B%22%24lte%22%3A25%7D%7D%2C%22aesthetic%22%3A%7B%22x%22%3A%22WordsPerMillion%22%2C%22y%22%3A%22department%22%2C%22color%22%3A%22gender%22%7D%2C%22counttype%22%3A%5B%22WordsPerMillion%22%5D%2C%22groups%22%3A%5B%22department%22%2C%22gender%22%5D%2C%22testGroup%22%3A%22D%22%7D](http://benschmidt.org/profGender/#%7B%22database%22%3A%22RMP%22%2C%22plotType%22%3A%22pointchart%22%2C%22method%22%3A%22return_json%22%2C%22search_limits%22%3A%7B%22word%22%3A%5B%22mean%22%5D%2C%22department__id%22%3A%7B%22%24lte%22%3A25%7D%7D%2C%22aesthetic%22%3A%7B%22x%22%3A%22WordsPerMillion%22%2C%22y%22%3A%22department%22%2C%22color%22%3A%22gender%22%7D%2C%22counttype%22%3A%5B%22WordsPerMillion%22%5D%2C%22groups%22%3A%5B%22department%22%2C%22gender%22%5D%2C%22testGroup%22%3A%22D%22%7D) [<https://perma.cc/N98X-5E8U>] (last accessed Aug. 20, 2018). Interestingly, the male advantage in teaching evaluations exists even for identical online courses in which the only difference is students' belief about the instructor's gender. See, e.g., Kristina M.W. Mitchell & Jonathan Martin, *Gender Bias in Student Evaluations*, 51-3 POLITICAL SCIENCE & POLITICS 648 (July 2018) (available at <https://www.cambridge.org/core/journals/ps-political-science-and-politics/article/gender-bias-in-student-evaluations/1224BE475C0AE75A2C2D8553210C4E27/core-reader>) (last accessed Nov. 23, 2018).

250. Virtually all of the research on implicit bias suggests its influence is strongest in the presence of unclear or ambiguous criteria.

precisely star culture.<sup>251</sup> Academia is not immune to this dynamic, as scandals at the University of California-Berkeley<sup>252</sup> and elsewhere show.

But the star system is not antithetical to a Mercy law school's commitment to women merely because of the paucity of female stars and a potentially increased risk of sexual harassment. Even if there were an equal gender distribution of perceived stars and even absent an increased risk of sexual harassment, the star system, at least in its exaggerated form, has no place at a Mercy institution.

The third reason a Mercy institution must reject the star system is, in fact, the most important. The central assumption of the star system is a radical individualism: as four Canadian professors have said, the "essence of the star system is to romanticize individual performers while (and by) underplaying the contributing role of their teams, institutions, and other support networks."<sup>253</sup> But this radical individualism runs counter not only to relational and most other schools of feminism by undervaluing the "connected self," but also to the Christian view of the person. A Mercy institution's Christian identity need not mean every student and employee accepts, say, the divinity of Jesus, but such an institution should operate out of a roughly Christian anthropology in which faculty members exist in community with one another, the administration, and students. A narcissism-infused celebrity culture—with an intellectual patina, no doubt, but devaluing an ethic of care—betrays Catherine McAuley's vision, which privileges community building over lone wolfing and self-bestowal over self-aggrandizement.

This statement of the value of community does not explain how to achieve such a community. Hiring for mission plays a role. Institutional incentives and standards play a role. Decanal modeling and commitment play a role.

Importantly, though, privileging community over individual stardom will not, by itself, ensure the wellbeing of women, people of color, and other vulnerable members of the institution. A law school committed to the wellbeing of women and girls will engage in continuous study and self-examination about its own policies and practices with regard to administrators, faculty, and

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251. Jena McGregor, *How Too Much Focus on "Superstar" Workers Enables Harassment*, WASHINGTON POST (Dec. 17, 2017), [https://www.washingtonpost.com/news/on-leadership/wp/2017/12/19/the-metoo-movement-is-a-warning-sign-about-the-star-system-at-many-companies/?utm\\_term=.dd22c2ff2e82](https://www.washingtonpost.com/news/on-leadership/wp/2017/12/19/the-metoo-movement-is-a-warning-sign-about-the-star-system-at-many-companies/?utm_term=.dd22c2ff2e82) [<https://perma.cc/39HK-YU5Y>] (last accessed Nov. 23, 2018).

252. See, e.g., Colleen Flaherty, *Another Berkeley Star Accused*, INSIDER HIGHER ED (March 24, 2017), <https://www.insidehighered.com/news/2017/03/24/berkeley-again-accused-protecting-reputation-star-professor-instead-acting-reports> [<https://perma.cc/4C9U-MY84>] (last accessed Nov. 23, 2018).

253. Patricia Rae, Mark Jones, Annette Burfoot, & Frank Burke, *Failed by the "Star" System*, WORD PRESS, <https://qufa.wordpress.com/2010/06/22/caut-bulletin-failed-by-the-'star'-system/> [<https://perma.cc/M339-SEVN>] (June 22, 2010) (last accessed Nov. 23, 2018).

students.<sup>254</sup> It is simply not enough to hire both women and men as administrators and faculty, or to admit female and male students to the school, and then assume everyone will rise or fall on their own merit. (Note the whole “rise and fall” notion is itself deeply individualistic.)

Such an assumption is belied by a considerable body of psychological, sociological, and organizational research. The more accurate assumption is that *unless* an institution takes affirmative steps, our defaults will disadvantage women and persons of color in important ways. This is true in part because most of us—whether male, female, or differently gendered—operate from preexisting schemas regarding male and female traits and roles. Without structures to correct for this bias, most of us will fall into patterns that hamper the professional development and minimize the professional contributions of women, especially women of color. Take just a few examples:

- a) *Service work*: Cassandra Guarino and Victor Borden—among others—have documented relatively large discrepancies in the amount of time female and male academics devote to service responsibilities.<sup>255</sup> Notably, women engage in considerably more internal institutional service work—recruitment of students and other significant committee work—than do men.<sup>256</sup> Although this service work is essential to the successful operation of an academic institution—it is what one might consider “connected self” work—the available research (not to mention what everyone kind of knows) indicates service work doesn’t matter much in tenure or promotion.<sup>257</sup>
- b) *Systematic Undervaluing of the Intelligence and Intellectual Potential of Female Faculty Members/Systematic Overvaluing of the Intelligence and Intellectual Potential of Male Faculty Members*: Basic research on implicit bias strongly suggests that men in the legal academy will be identified as smart and promising in a way that is far less likely for women.<sup>258</sup> And, in fact, the available research suggests this is exactly the case as regards a variety of metrics that play a major role in determining

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254. This should be true of race as well.

255. Cassandra Guarino, *Why Higher Education Needs to Get Rid of the Gender Gap for Academic Housekeeping*, THE CONVERSATION, <http://theconversation.com/why-higher-ed-needs-to-get-rid-of-the-gender-gap-for-academic-housekeeping-82135> [https://perma.cc/BGC4-ZY4K] (Sept. 27, 2017) (summarizing a study reported in the journal *Research in Higher Education*) (last accessed Nov. 23, 2018).

256. I do not know whether this is true at law schools, but I have no reason to believe law schools are any different from other segments of academia.

257. Guarino, *supra* note 255.

258. See VALIAN, *supra* note 248, at 128 (describing, *inter alia*, studies of ratings of CVs and of academic papers in which identical CVs and papers were rated more highly if the documents were attributed to a male).

the career trajectory of a legal academic.<sup>259</sup> A few examples will make the point:

- c) *Article Selection and Citation Count*: It is hardly news to anyone in legal academia that the process for selecting law review articles for publication is odd, even perverse. Indeed, law is virtually the only field in which apprentices—students—serve as gatekeepers for intellectual discourse within a discipline.<sup>260</sup> Research has already suggested that the selection process strongly privileges professors at more elite schools, without regard to the quality of work product: because student editors lack the background to understand which articles might make a major contribution, they use prestige—whether of a professor’s home institution, of the law school the professor attended, or of the prestige of those listed in the acknowledgements—as a proxy for the quality of the piece.<sup>261</sup> Now add to that what we know about implicit gender and racial bias, and one can see the problem. Research in a variety of fields has long shown that academic CVs are rated more highly when associated with a male name.<sup>262</sup> If this is true in the hard sciences, where criteria for quality are presumably clearer than in a field like law, then one should expect this to be even *more* true in law. And although the research is not complete, that appears to be the case: in his article describing implicit bias in article selection, Professor Higdon points to research by Professor Minna Kotkin suggesting female scholars are underrepresented in the “best” journals,<sup>263</sup> and there is other evidence of gender (and racial, although there is less research on that point) discrimination in the article

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259. If one prefers to avoid the language of careerism, as I myself do, one could instead say that this limits a legal academic’s ability to make and enjoy the full use of her gifts and to have her ideas achieve the influence they merit.

260. For a brief summary of criticisms of the selection process, see John P. Zimmer & Jason P. Luther, Essay, *Peer Review as an Aid to Article Selection in Student-Edited Legal Journals*, 60 S.C. L. REV. 959, 962-63 (2009). Notably, certain disciplines within law rely on peer review and other processes respected and commonly used within other academic disciplines. For example, the journals within legal research and writing—namely the Journal of the Association of Legal Writing Directors, the Journal of the Legal Writing Institute, and the Journal of Legal Communication and Rhetoric—all select articles through a process of peer review.

261. See, e.g., Michael J. Higdon, *Beyond the Metatheoretical: Implicit Bias in Law Review Article Selection*, 51 WAKE FOREST L. REV. 339, 341, 345 (2016) (describing the law review article selection process as a “recipe for implicit bias”); Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with All the Power—Student Editors*, 59 S.C. L. REV. 175, 188 (2007) (describing, *inter alia*, the effect of certain credentials on article selection, without regard to article quality).

262. Higdon, *supra* note 261, at 347-48.

263. *Id.* at 348 (quoting Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the “Top Ten” Law Reviews*, 31 WOMEN’S RTS. L. REP. 385, 387 (2010)).



selection process.<sup>264</sup> This matters for a variety of reasons. As Professor Higdon points out, the current selection process “discourages creativity[,] . . . undermines diversity of voice[,] . . . [and] marginalizes practical skills scholarship.”<sup>265</sup> More to the point, for my purposes, this state of affairs is bad for female faculty and administrators at law schools, bad for female students, and, in fact, bad for women outside the legal profession. The ways in which it is bad for female employees and students are obvious. As for women outside the legal profession, it is bad for them if one assumes that female law professors are more likely than are men to write about issues disproportionately affecting women. If this writing receives less attention, particularly in prominent journals, then legal and social reform benefitting women is less likely.

- d) *Student Evaluations*: As briefly described above, studies of student evaluations further a picture of good male professors as “brilliant” or “smart;” good female professors are “accessible” and “helpful.”<sup>266</sup> In particular, the available social science research suggests that women’s evaluations tend to be lower than men’s in large lecture-style classes, probably because men are merely expected to be agentic whereas women are also expected to be sensitive and nurturing.<sup>267</sup> In fact, most research on teaching evaluations shows that evaluations are based primarily on professors’ non-verbal behavior, rather than any material taught, and that the connection with learning outcomes is questionable at best.<sup>268</sup> Furthermore, all too many students use anonymous teaching evaluations as a “safe” forum to express their own conscious and unconscious racism and sexism.<sup>269</sup> Yet despite the strong evidence that standard student evaluations of teaching reflect gender and racial bias, especially in large classes, and despite the weak evidence of any correlation between strong teaching evaluations and student learning, these student evaluations are

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264. *Id.* at 348-49.

265. *Id.* at 350-51.

266. *See supra* note 246 and accompanying text.

267. *See, e.g.,* Lisa Martin, *Student Evaluations of Teaching are Probably Biased. Does It Matter?*, WASH. POST (October 2, 2013) (available at [https://www.washingtonpost.com/news/monkey-cage/wp/2013/10/02/student-evaluations-of-teaching-are-probably-biased-does-it-matter/?utm\\_term=.9775b6adb939](https://www.washingtonpost.com/news/monkey-cage/wp/2013/10/02/student-evaluations-of-teaching-are-probably-biased-does-it-matter/?utm_term=.9775b6adb939) [<https://perma.cc/PX37-K5W8>]) (last accessed Feb. 7, 2018).

268. *See* Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Learning*, 82 ST. JOHN’S L. REV. 235, 274 (2008) (summarizing brain research that shows that most modern teaching evaluation systems evaluate not student learning, but student response to professors’ nonverbal behavior, and that “some of those [cognitive] distortions specifically burden white women, faculty of color, and other traditionally disadvantaged groups”).

269. *See, e.g.,* Meera E. Deo, *A Better Tenure Battle: Fighting Bias in Teaching Evaluations*, 31 COLUM. J. GENDER & L. 7, 10 (2015) (describing study showing, *inter alia*, that “female law faculty and particularly female faculty of color are routinely challenged by students in the classroom and verbally attacked in (anonymous) course evaluations”).

used in decision making regarding tenure and promotion and in consideration for teaching awards and other awards for faculty excellence. Moreover, they both reflect *and shape* perceptions of faculty members' intellectual abilities.

Given what we know about our biased defaults, a law school with a commitment to women's wellbeing should take steps to minimize such bias. A Mercy law school should be on the cutting edge of these issues.

### 3. Student Services

A Mercy law school's special commitment to women, children, and the most vulnerable in society should be apparent in various policies related to admissions, financial aid, and student affairs.

As Brian Tamanaha and others have pointed out,<sup>270</sup> law schools' scholarship funds frequently are awarded to the most affluent students, who are more likely to have received the kind of education and enrichment that translate into higher LSAT scores and undergraduate grades. The practical result is that less affluent and academically more vulnerable students in effect subsidize the educations of wealthier, often academically better prepared students.<sup>271</sup>

I do not harbor utopian fantasies of a dramatic change in this state of affairs, particularly in an era of keen competition for strong students and at tuition-dependent institutions. However, fundraising for scholarships for a variety of vulnerable students—women and men in the first generation of their families to attend college or professional school, single parents, working parents, and so forth—should be a clear priority for both mission-related and practical reasons. Obviously such scholarships further the Mercy commitment to ensuring that women, children, and other vulnerable populations acquire skills that will allow them to be self-sufficient and to advocate for others. Moreover, such assistance is likely to increase such students' academic performance and professional prospects by alleviating a major source of stress, namely how to pay for school.

Similarly, a Mercy law school might seek ways to alleviate the burden of child care for its students. This could take a variety of different forms, ranging from grants to subsidize child care to partnerships with nearby child care providers that might provide a group discount to something involving an even greater commitment, such as operating a day care center on site. Again, the school's location, funds, and other practical factors would dictate what such an institution might be able to provide, but a commitment to family-friendly policies and practices should be apparent at the institution.

Student Affairs policies and practices should reflect a similar commitment. For example, some student affairs and career services programming might be devoted to the concerns of non-traditional students. A career services office

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270. BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 97-98 (Univ. of Chicago Press 2012).

271. *Id.*

might consider maintaining a clothing bank for those who lack money for appropriate interview attire. This is not intended to be prescriptive. Rather, the Mercy law school must discern the actual needs of its most vulnerable students, including but not limited to women, and build programming around those needs.

A special commitment to women and girls and a focus on mercifulness are the principal hallmarks of a law school in the Mercy tradition. However, a law school in the Mercy tradition also should be characterized by an emphasis on professional identity formation.

### C. *Professional Identity Formation*

A concern for professional identity formation is not limited to law schools in the Mercy tradition or, for that matter, to religiously affiliated law schools. Rather, professional identity formation—the process by which students appropriate for themselves the values of the legal profession at its best<sup>272</sup>—is a concern for all law schools. This has been clear since 2007, when the Carnegie Report<sup>273</sup> was published. The Carnegie Report identified three apprenticeships that should comprise part of legal education: a cognitive apprenticeship (“thinking like a lawyer”); a skills and practice apprenticeship (“acting like a lawyer”); and, finally, a normative apprenticeship (professional identity and values).<sup>274</sup>

Since the publication of the Carnegie Report, a steadily increasing number of scholars, especially those working in law school clinics, have explored professional identity formation in legal education.<sup>275</sup> In fact, the lead author of the Carnegie Report has argued that this focus on professional identity formation is a “harbinger[] of a developing social movement in higher education.”<sup>276</sup>

This social movement appears especially strong within some religiously affiliated law schools. Within the past five years, three religiously affiliated law schools—Regent, Mercer, and St. Thomas (Minnesota)—have held symposia on

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272. This view of identity formation is consistent with Professor Kalscheur’s view of the purpose of the Catholic intellectual tradition as the inculcation of virtues (habits of heart and mind). Rev. Gregory Kalscheur, *Key Task for Catholic Higher Ed*, Inside Higher Ed (November 29, 2011), <https://www.insidehighered.com/views/2011/11/29/essay-future-direction-catholic-colleges> [https://perma.cc/3FCN-ZANK].

273. See William L. Sullivan et al., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW (2007). This report is more commonly known as “the Carnegie Report.”

274. *Id.*

275. See, e.g., Susan L. Brooks, *Fostering Wholehearted Lawyers: Practical Guidance for Supporting Law Students’ Professional Identity Formation*, 14 U. ST. THOMAS L.J. 412, 414-415 (2018); Christine Cerniglia Brown, *Professional Identity Formation: Moving Backwards to Move the Profession Forward*, 61 LOY. L. REV. 313, 315 (2015).

276. William M. Sullivan, *Professional Formation as Social Movement*, 23 No. 1 PROF. LAW. 26, 27 (2015).

professional identity formation.<sup>277</sup> Moreover, the University of St. Thomas School of Law's Holloran Center is devoted specifically to the question of professional identity formation: its mission is to "provide innovative interdisciplinary research, curriculum development and programs focusing holistically on the formation of both students and practicing professionals into ethical leaders in their communities."<sup>278</sup>

A full exploration of the question of professional identity formation is beyond the scope of this article. I make only a few tentative points.

First, the obvious point that should go without saying: a Mercy law school must take seriously the professional identity formation of its students. In fact, just as Professor Kalscheur argued regarding Jesuit education,<sup>279</sup> the *first* responsibility of a Mercy law school is formation.

Second, professional identity formation at a Mercy law school should encompass more than one might typically imagine for lawyer professional identity formation. Recall the commitment of a Mercy law school to mercifulness, meaning, among other things, to an ethic of care and to the restoration to dignity of those whose dignity has been denied.<sup>280</sup> These commitments suggest that law students formed in this tradition should appropriate for themselves identities as reconcilers (not merely competent and ethical adversaries), healers, compassionate guides, and defenders of human dignity. As Margaret Farley observed, mercy and justice can co-exist; in fact, each requires the other.<sup>281</sup>

Third, professional identity formation at a Mercy institution should encourage students to understand any continuities or tensions between their preexisting identities and their developing professional identities. Catherine MacAuley's decision to create a Mercy house didn't emerge from thin air; rather, the seeds for this vocation were planted early in life and were watered regularly.<sup>282</sup>

Similarly, as part of formation, students should be encouraged to understand the ways in which their own wounds and vulnerabilities—their *painful* identifications—have shaped and can inform and enrich their professional

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277. Mercer University Law School, Ethics and Professionalism Symposia (November 11, 2018), <https://law.mercer.edu/academics/centers/lep/symposia.cfm> [<https://perma.cc/X68V-N3JC>]; Regent University Law School, Regent University Law Review Symposium Presenters (November 11, 2018), [https://www.regent.edu/acad/schlaw/student\\_life/studentorgs/lawreview/symposiumparticipants.cfm](https://www.regent.edu/acad/schlaw/student_life/studentorgs/lawreview/symposiumparticipants.cfm) [<https://perma.cc/4KRY-X22G>]; University of St. Thomas School of Law, Symposium/Workshop: The Next Steps of a Professional Formation Social Movement (November 11, 2018), <https://www.stthomas.edu/law> [<https://perma.cc/2JBJ-DPZQ>].

278. University of St. Thomas School of Law, *Holloran Center Mission*, <https://www.stthomas.edu/hollorancenter/about/mission/> [<https://perma.cc/AD3N-7MEP>] (last accessed July 13, 2018).

279. *See supra* notes 179-81 and accompanying text.

280. *See supra* Part VI.A.

281. *See supra* Part VI.A.

282. *See supra* Part II.

identities. Exploration and acknowledgment of wounds as part of professional identity formation is derived directly from the life of Catherine MacAuley: her deepest wound and her strong identification with the most vulnerable in society—destitute women and children—combined with her gifts to create an authentic and powerful vocation.

To be clear, I'm not proposing a law school model that encourages students to hold hands, cry, and sing kumbaya. I know better and would hate it myself. However, I also know of the anxiety, depression, and substance abuse endemic within the legal profession, beginning with law students;<sup>283</sup> the legal culture that extols strength and control while denying vulnerability and pain; and the relationship between legal culture's obsession with strength and the very real anxiety, depression, and social isolation of individual lawyers. Unlike the professions of social work, clinical psychology, and ministry,<sup>284</sup> the legal profession has not yet fully acknowledged the generative potential of wounds, pain, and vulnerability. Although it's not clear what this would look like in the context of professional identity formation within law schools, this is one contribution a Mercy law school might make to the broader profession. We are all wounded in some respects, and we all suffer. Even we lawyers can use our own suffering to help others. Even lawyers can embody mercy.

#### CONCLUSION

The journey ends where it began, with questions of identity. Seeing us, would Mary Scullion recognize us? Would Margaret Farley? Catherine McAuley? If our commitment to women and girls is both clear and sophisticated, and if we are people of mercy, then the education we provide will itself be a work of mercy to our students and to the clients they later serve.

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283. American Bar Association, *National Research on Lawyer Impairment: The Prevalence of Substance Abuse and Other Mental Health Concerns Among American Attorneys*, [https://www.americanbar.org/content/dam/aba/administrative/lawyer\\_assistance/ls\\_colap\\_hazel\\_den\\_research\\_infographic.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_hazel_den_research_infographic.authcheckdam.pdf) [<https://perma.cc/4K65-A9DL>] (summarizing findings of study) (last accessed Aug. 20, 2018).o09

284. See, e.g., HENRI J.M. NOUWEN, *THE WOUNDED HEALER* 87-88 (1972) (exploring how a caregiver's wounds and suffering can be a source of strength and healing when counseling others).