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Catholic Law School

John T. Noonan Jr.

Essay

A Catholic Law School

John T. Noonan, Jr.[*]

What is a Catholic law school? An old conundrum. After all, the law studies are the same whatever the denominational label of the school: the opinions of the Supreme Court, the Uniform Commercial Code, the casebooks do not change their texts to fit a Catholic context. The essential disciplines of question and argument, distinction-making and reasoning to a conclusion do not depend upon any religion. Over a century and a half ago Tocqueville observed that the lawyers of America naturally constitute a body "not by any previous understanding, or by an agreement that directs them to a common end; but the analogy of their studies and the uniformity of their methods connect their minds as a common interest might unite their endeavors."[1] The lawyers of America are a body, or party, although not a political one. Their minds are connected by the uniformity of their studies. And their being a body and a party does not depend upon the institution where they studied. Having taught at Boston College, Boston University, Southern Methodist, Stanford, Notre Dame, Harvard, and Berkeley, I can say from experience that the legal culture of the country is common to all these schools. The common character of legal institutions runs against any specific religious flavoring of the curriculum. The lawyers' party is not one of believers and nonbelievers; it is the party of lawyers.

Nonetheless, there are at least three intellectual aspects of a Catholic law school's origins and activity that make it different. First, there is its connection with the history of the law. The mother of all law schools is Bologna, the splendid creation of the religious and cultural revival of the twelfth century. The Bolognese method of collecting authorities, critically comparing them, and

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* Judge, United States Court of Appeals for the Ninth Circuit; A.B., 1947, Harvard; Ph.d., 1951, Cath. Univ.; LL.B., 1954, Harvard; LL.D.

1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 1, 273 (Henry Reeve trans., 3d ed. 1838).

challenging their conclusions was the preferred approach of that nascent and vigorous Catholic culture. The first great legal casebook is Master Gratian's *Harmony of Unharmonious Canons*, a work that proceeds by hypotheticals as boldly outrageous as any of Professor Rodes' and then arranges the authorities pro and con on each question, creating space for Gratian to provide his own resolution of the matter.[2] Every law teacher learns this secret: respect the authorities but leave room to give your own view of what the result should be.

The same spirit was alive nearly 400 years later when Thomas More answered a monk who had attacked More's friend Erasmus by citing against him the undivided authority of the Fathers of the Church. "Do you not know," More asked him, "that Jerome contradicts Augustine on these points and Augustine contradicts Jerome, and Ambrose disagrees with Augustine, and all of them denied the Immaculate Conception of Mary, which is now generally accepted? There will be no end," More exclaims, "if I try to set out all the things in which these very learned and very holy men erred."[3] As we look at Gratian's ancient casebook that remained in use in the Church for about 800 years and as we look at More's letter of 1520, we cannot but feel that the kinship that unites us with Gratian and More has Catholic roots in a respect for authority that is yet not above question and not above the examination and the distinctions, in other words the challenges and the reasoning of law school.

The method of Bologna is, of course, a common Anglo-American patrimony, whatever our special sense of Catholic linkage. From a closer look at history one can also find linkage between Anglo-American law and the work of Catholic priests. The common law in its beginnings consisted almost entirely in the decisions of judges, who were clerics, paid in part by the king, but supported largely by benefices awarded to them as Catholic clergy. Judge-made law in the thirteenth century was law made by churchmen-judges. The greatest of them was William Ralegh, the parish priest of Sumborn and treasurer of Exeter Cathedral, who with his beneficed law clerk, Henri de Bratton, produced that great original treatise on the common law, *De legibus et consuetudinibus*

2 GRATIAN, CONCORDIA DISCORDANTIUM CANONUM (Friedberg ed., 1879-1891).

3 Letter from Thomas More To a Monk, *in* THE CORRESPONDENCE OF THOMAS MORE 165, 171 (Elizabeth Frances Rogers ed., 1947) [hereinafter More] (translated by author).

Angliae.[4] Ralegh thought being bishop of Norwich preferable to being Chief Justice of England. However, before he moved to the episcopal bench, he left a permanent stamp on the common law as a law built up by cases. He laid the foundations of this extraordinary enterprise that has continued from 1230 to the present. Like the masons of a great cathedral, each judge has contributed to the edifice; analogizing the common law to a cathedral is not inappropriate because it demonstrates the religious devotion with which each kind of enterprise began.

As for equity, everyone knows that equity was the creation of the chancellor's conscience, and that virtually all of the chancellors before the Reformation were Catholic churchmen. The greatest chancellor, of course, was a layman, Thomas More. Like Ralegh-Bratton's book and like equity itself, Thomas More is part of the common Anglo-American patrimony. Every lawyer can appreciate More's stand for conscience—his refusal to take the king's command as the measure of his duty. A Catholic law school, assuredly, can look in a most particular way to More as an exemplar for its students and professors. Killed for the Church and Pope and motivated by the love of Christ, More was a lawyer and a saint.

Dealing with a subject whose methods were made and whose foundations were laid by fellow believers, with the example of a learned lawyer and judge who was also a martyr, a Catholic law school must be conscious that Anglo-American law is not alien to faith; such a school must indeed be aware of its roots in faith if it is to be aware of its own vocation. If, as Holmes so accurately observed, experience is the life of the law, these centuries of Catholic experience are to be cherished. It is a sign of Notre Dame Law School's Catholic character that there should come from the school such a distinguished historical enterprise as Robert Rodes' legal account of the Church in England. Rodes' unmatched insight into legal experience that is also a reflection of theological experience, his double mastery of legal reasoning and ecclesiological theory, and his deep empathy for lawyers and for churchmen are the marks of a scholar in a school appropriating its heritage and turning it to present account.[5]

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4 On Ralegh's authorship, see 3 DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, III, XXXVI (Samuel Thorne ed., 1977). On the proper spelling of Bratton, see *id.* at 79. On Ralegh's positions, see C.A.F. Meekings, *Introduction* to 15 CURIA REGIS ROLLS XXVIII (1972).

5 *See* ROBERT E. RODES, JR., ECCLESIASTICAL ADMINISTRATION IN MEDIEVAL ENGLAND:

History is philosophy teaching by example, but philosophy in its own right also has its place in any law school. In a Catholic law school philosophy is, or should be, of unchallenged importance. Jurisprudence, the philosophy of law, is an art that does not attract every law student, and its masters are not many. But that law depends on ideas more extensive than law—ideas such as intention and causation, individual and corporate responsibility, guilt and justice; that the legal concepts may be affected by such nonlegal concepts as repentance, forgiveness, and charity; and that the most fundamental of legal concepts, that of the person, has metaphysical dimensions—all of these inputs of jurisprudence need both integration in the curriculum and their own specific examination. Integration and examination have been the case in a Catholic law school like Notre Dame.

In particular, I want to commemorate the work of Dean Joseph O'Meara and his colleagues in fostering the *Natural Law Forum*. Both "natural" and "law" are, to be sure, terms with multiple meanings, and the number of possible meanings is increased when the terms are combined. Natural law has never been restricted to an univocal meaning. But the basic idea—that there is a measure beyond the command of the sovereign—is common to natural law thinkers. Natural law, historically, had implications for the use of power. It has been an idea capable of checking arbitrary civil power and arbitrary papal power. Natural law was the rallying point for those nineteenth century Americans who opposed slavery, as it became a way of criticizing Nazi law and other abominations in this century.

"Why are you Catholics so interested in natural law?" Circuit Judge Calvert Magruder demanded of me when I was editor of the *Natural Law Forum*. Oddly, what was meant to appeal to all persons of good will has sometimes been seen in this way as a Catholic monopoly or peculiarity. It is not, but it is true that Notre Dame Law School played a major part in making natural law relevant to modern America.

In the initial issue of the *Natural Law Forum* in 1956, Dean O'Meara eschewed what he called with characteristic bluntness "the meat-cleaver approach to natural law," that is, "assuming the rectitude of one's own position and concentrating on the decapita-

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THE ANGLO SAXONS TO THE REFORMATION (1977); LAY AUTHORITY AND REFORMATION IN THE ENGLISH COURTS: EDWARD I TO THE CIVIL WAR (1982); LAW AND MODERNIZATION IN THE CHURCH OF ENGLAND: CHARLES II TO THE WELFARE STATE (1991).

tion of all who disagree."[6] In contrast, he endorsed the view that "'we must start from scratch and think every problem through from its very premises to its last implications. We must never rest with what we have achieved, we must never rest lazily on any given "truth".'"[7] In such a restless, inquisitive spirit the *Natural Law Forum* was launched. Its first editor was Spanish, its second, German; and its editorial board included the leading jurisprudents of the United States, among them Edward Levi, Myres DcDougal, and the greatest, Lon Fuller. Ecumenical in the composition of its board and in the variety of articles it published, the *Natural Law Forum* was Catholic in its inspiration, concerns, and commitment to the fusion of morality and law and the rule of reason in morality.

Joe O'Meara was interested in natural law because he believed that "natural law can be made to serve practical ends in the legal order."[8] An interest in natural law led easily to questions of ethics. Here again Joe O'Meara was a leader. He instituted a course—a course that was mandatory for first year students—in professional ethics. He was a decade or so ahead of most other law schools. When I arrived at Notre Dame in the fall of 1961 I had never had such a course nor seen one taught. With great confidence in a lawyer's ability to pick up ideas quickly, Dean O'Meara asked me to teach the course. One did not easily refuse a request from Dean O'Meara. I took the plunge and was rewarded by finding a subject that in thirty years of teaching has not exhausted its excitement for me. More importantly, it is fair to say that Dean O'Meara's initiative and the ethos of the law school led to the work of a national leader in the field of legal ethics, Thomas Shaffer. Who else could have addressed the difficult, delicate, possibly dichotomous subject, "On Being A Christian and A Lawyer"?[9] Where else could a law professor have come to the conclusion that law faculties must be specialists in morals and prophets to boot.

To mention Shaffer's work is to come to a dimension beyond the philosophical. He does not avoid the theological. He invokes Scripture. He invokes the example of Jesus. He turns to prayer. I

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6 Joseph O'Meara, *Forward*, 1 NAT. L.F. 1 (1956).

7 *Id.* (quoting Romano Guardini).

8 *Id.*

9 THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER: LAW FOR THE INNOCENT (1981).

do not see a secular law school encouraging such a fusion of the responsibilities of the lawyer and the love of Christ.

It is no accident that Shaffer's work reflects collaboration with a theological ethicist, Stanley Hauerwas. It is no accident that Rodes has had a long association with Notre Dame's John Dunne. To add a note of personal reminiscence, when I was a member of the faculty the common luncheon table was one shared by law school faculty and theological faculty. We were, we lawyers mischievously declared, keeping the theologians orthodox; and, it may be supposed, they thought they were enlarging our horizons and leading us from the letter to the spirit.

The relation of law and theology in Catholic experience has always been symbiotic, the living together of two dissimilar organisms in a mutually beneficial relation. From law, theology took, for example, its notion of what constituted the marriage that theology then declared indestructible. From theology, law took, for example, its notion that marriage was a personal commitment not to be thwarted by the state or coerced by the family. It is easy for the symbiosis to continue in a law school physically part of a university where theology is a vital discipline and with a law school faculty in actual communication with the theologians next door. Interchange of this kind is indispensable for a Catholic law school to flourish. When there are also members of a religious order who are members of the law school faculty, as is the case at Notre Dame, and when these persons are experienced lawyers and theologically sophisticated, as is the case at Notre Dame, the interchange can even be internal to the school.

The greatest debt of law to theology is the idea of the person—a concept that can be philosophically defended, but which historically developed under theological auspices, with human beings understood by analogy to the divine persons.[10] Only in terms of a destiny that transcends death can the full measure of human personhood be taken. Only as images of God can the full dignity of human persons be acknowledged. Lawyers must deal with the common good. It is the common good, not of animals, but of persons whose spiritual characteristics make transcendent, nonmaterial values part of the good that the law must preserve. Hence, not only the preservation of order, but the preservation of human dignity became part of that legal enterprise Bob Rodes has

10 Marcel Mauss, *Une Categoire de L'Espirit Humain: La Notion de Personne, Celle de "Moi"*, 68 J. ROYAL ANTHROPOLOGICAL INST. 263, 263-82 (1938).

so penetratingly described. Sensitivity to that dignity must animate the civil rights work of Father Bill Lewers. Those human creatures whose destiny and therefore dignity transcend death include even the smallest and youngest among us, as Edward Murphy and Charles Rice have so vigorously maintained.

As I speak of the place of persons in the law, I cannot but think of failures as well as triumphs. When Ralegh-Bratton composed their great treatise on law they recognized that persons must be free, but went right on to accept the law that created slavery.[11] This failure of the jurists and the theologians was to infect the European and American worlds for six hundred years. A failure of equal magnitude by both jurists and theologians was the denial of religious freedom—a denial based on a failure to give substance to their recognition that the conscience of a person could not be coerced; the denial was fully rectified only in 1965 by the Second Vatican Council.[12]

A Catholic law school is a good place to recall these failures, which were those of our predecessors. Are we similarly blind? In a country where aliens have a precarious second-class citizenship, where the governmental putting to death of major criminals is popular, and where the incarceration of over one million persons is the accomplishment of our legal system, we cannot be complacent or content.

Nor can we be complacent about the place of law in the international world of which we are a part, of which we are specially a part as Catholics, tied by a common faith to believers everywhere. In one year, 1988-89, throughout the world over 145 lawyers and judges were seriously harassed, over thirty-five percent of these were murdered.[13] I wonder if there is any other profession, except perhaps that of missionaries, whose members are so perceived as dangers to the powerful and so ruthlessly attacked. The Center for the Independence of Judges and Lawyers, located in Geneva, gives the annual assessment. In the past decade from Chile to China, from the Philippines to South Africa, the role of lawyers and judges has been critical to the cause of liberty and

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11 DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, *supra* note 4, at 2, 30 ("How Slaves Are Made").

12 Second Vatican Council, *Declaratio De Libertate Religiosa*, 58 ACTA APOSTALICAE SEDIS 929 (1965).

13 Center For The Independence of Jurists, *The Harassment and Persecution of Judges and Lawyers, January 1988—June 1989*, 22 CENTER INDEPENDENCE JUDGES LAW. BULL. 64 (1988).

risky for the bench and bar.[14] A Catholic law school cannot be indifferent to the perils of fellow practitioners of the profession wherever they may practice.

The supranational dimension of modern law has been emphasized in a positive way by the creation of the European Court of Human Rights. National infringements on human dignity can now be indicted before that tribunal. The court has passed judgment on the flogging of a schoolboy on the Isle of Man and on the stifling of the freedom of the London *Sunday Times* by the House of Lords.[15] When even Britain's highest court can be made accountable and Britain itself made liable for damages for the violation of human rights, one knows that the Anglo-American experience of law has been enormously enlarged. A Catholic law school cannot be insensitive to this new international forum in which the dignity of the person receives recognition and protection. It is characteristic of a Catholic law school such as Notre Dame that its international reach is such that Professor Bauer directs second-year and graduate programs in London, that Professor John Attanasio is the director of the Institute for International Peace Studies, and that Dean Link has extended leave to be the founding president of a new Catholic university in Australia.

So far, I have dwelt on subjects for teaching, research, and scholarly publication, and the recurrent theme has been the relation of law to persons, a relation that implicates religion, specifically the Catholic religion. But what of the persons who are to be participants in this process? What of the students and faculty of a Catholic law school? Must they be Catholics, too?

My answer is, not all, but enough to give substance to the claim of the school to be a Catholic law school. I have known, and you could no doubt name them, law schools attached to institutions that are Catholic, but which have at most one or two Catholics on the faculty. I have even known law schools whose nominal heritage was Catholic, but a number of whose faculty were hostile or contemptuous of Catholic values, schools whose whole tone was less open to religion than avowedly secular institutions. I see no point in pretending that it does not make a difference what religion the faculty professes.

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14 *See, e.g.*, Amnesty International, *Philippines: The Killing and Intimidating of Human Rights Lawyers*, 22 CENTER INDEPENDENCE JUDGES LAW. BULL. 40 (1988).

15 The Sunday Times Case, 30 Eur. Ct. H.R. (ser. A) (1979).

At the same time, one should be aware of how hateful and divisive it would be if active membership in the Church were made a condition for continuing employment, and the sanction of loss of one's job was the way the Catholic identity of the school was maintained. A Catholic law school that had trials for heresy would be a laughing stock in our profession.

The real issue is recruitment. A law school wants the best faculty it can find. Does a Catholic law school want only the best Catholic faculty it can find? Experience suggests that it is necessary to answer this question affirmatively, but not rigidly. The main attraction of a Catholic law school should be the historical, jurisprudential, and ethical dimensions I have indicated. There are Protestants and Jews and agnostics who would be attracted to such a school. It would be a mistake to exclude them. It would equally be a mistake to ignore the likelihood that only a body the core of which is Catholic will have the concerns and commitments that perpetuate the connection with theology, philosophy, and history that constitute the school's Catholic character.

As for students, much the same is true, *mutatis mutandis.* A Catholic law school should never exclude a student on account of religion. A good Catholic law school will attract students who seek a Catholic identity. A school that claims to be Catholic and obtains students on that basis, while knowing in fact no Catholic character, practices a form of misrepresentation, which if probably not actionable, is morally objectionable. Access to mass, observance of feast days, the availability of theological counsel, the practice of public prayer, and the presence of Catholic action groups are adjuncts that are far from superfluous in maintaining a Catholic character.

So far, I have spoken as though an accredited American law school could draw the lines that it liked. Such may not be the case. The American Bar Association has declared in Standard 211 for accreditation: "The law school shall not use admission policies that preclude a diverse student body in terms of race, color, religion, national origin or sex;" and employment of faculty shall be without discrimination "on grounds of race, color, religion, national origin or sex."[16] This blunt equation of religious discrimination

16 AMERICAN BAR ASSOCIATION, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS (1990) (Standard 211); *see also* Leonard J. Nelson, III, *Religious Discrimination, Christian Mission and Legal Education: The Implications of the Oral Roberts University Accreditation Controversy,* 15 CUMB. L. REV. 663 (1985).

with race or gender discrimination is then qualified to permit "a preference for persons adhering to the religious affiliations and purposes of the law school," but only to the extent that such preferences "are protected by the United States Constitution."[17] The Association of American Law Schools ("AALS"), the other relevant agency, also outlaws by executive committee regulation any discrimination on the basis of religion, adding a proviso permitting religious preferences so long as they do not result "in a lack of sufficient intellectual diversity," do not limit the number of persons on religious grounds, and do not violate any other regulations of the AALS's executive committee.[18]

How much freedom does a school have to remain accredited and Catholic in the core of its faculty and students? None at all under these rules. The AALS regulation, awkwardly drafted as it is, appears to forbid a school from seeking to establish the hegemony of any one religion on its faculty or in its student body. The regulation also arrogates to the executive committee the power to decide that the vague criterion of intellectual diversity has not been met. The ABA Standard 211 gives the Catholic school no more leeway than the First Amendment.

If the 1990 decision of the Supreme Court in *Employment Division v. Smith* remains the law, the religion portion of the First Amendment is no help at all; for *Smith* holds a claim of free exercise of religion will not prevail against a general law, that is, a law which does not purposefully discriminate against a religion.[19] The ABA general rule says religious discrimination is like race or gender discrimination; it is a bad practice. Under *Smith* I do not see that a Catholic law school can contend that the general rule unconstitutionally invades its free exercise of religion.

What the ABA may do, however, is to threaten to violate the Catholic law school's freedom of speech. The orgainzation may impose upon a Catholic law school the sponsorship of ideas which the school does not believe in. The organization has power as an accrediting agency of the state to enforce, or threaten to enforce, its standards so that a Catholic or Jewish or Mormon or Pentecostal law school must speak like a secular law school. Yet no one supposes that Oral Roberts Law School is indifferent to whether a

17 AMERICAN BAR ASSOCIATION, *supra* note 16.

18 ASSOCIATION OF AMERICAN LAW SCHOOLS, ASSOCIATION HANDBOOK 34 (1991) (Executive Committee Regulation 6.17; "Law Schools with a Religious Affiliation or Purpose").

19 Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

faculty member is an Orthodox Jew or an Evangelical Protestant. No one supposes that it is an accident that Brigham Young Law School has more Mormons than Catholics on its faculty. No one believes that it is merely what the Free Exercise Clause permits that has enabled Notre Dame Law School to be the preeminent Catholic law school. It is a "fixed star in our constitutional constellation . . . that no official, high or petty, can prescribe" what we must profess.[20] That freedom from censorship, from prescribed words or symbols of compliance with authority, is a freedom of our institutions as much as a freedom of individuals. It is a freedom from state agents such as an accrediting agency. We have lived with this kind of hostile, dogmatic, secularizing power; so far we have been spared any effort on its part to enforce its demands.

In celebrating Notre Dame's sesquicentennial, I have emphasized some things that have made Notre Dame Law School special, some things that have made it stand out, nationally and internationally, as a Catholic law school. I have not mentioned all the excellences it shares with the best of secular schools, and yet, it would be silly to slight the importance of these qualities. To have a faculty with wide experience in government and in private practice, to have a remarkably sensitive admissions process and a student body drawn from a broad range of colleges, to have an outstanding library and librarians, to have a low ratio of students to faculty, to run the National Institute for Trial Advocacy, the Institute for Urban Studies, the Center for Civil and Human Rights, the White Center on Law and Government, the *Notre Dame Law Review*, the *Journal of Law, Ethics, and Public Policy*, the *Journal of Legislation*, and the *Journal of College and University Law*—all of these activities that are so well done at Notre Dame, although they could be well done elsewhere, are essential to the school being a good school.

I have in mind the words of our exemplar Thomas More in the same letter of 1520 I have already quoted. He is commenting on the preference each one has for what is private to that person, in foolish disregard of what is shared with all. So the monk prefers his own prayers and devotions to those of the monastery's, of the monastery's to the order's, of his order to those that are common to all Christians. Yet, what is more important are the faith,

20 West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

hope, and charity that are common to all.[21] So too, though we may prize the special attributes of the Catholic law school, the qualities common to all excellent schools must be its first and amplest boast.

21 More, *supra* note 3, at 196.