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DO AMERICAN CATHOLIC LAW SCHOOLS HAVE A DISTINCTIVE PHILOSOPHY OF EDUCATION?

Whether man is aware of it or not, there is a philosophy implicit in everything he does. Theory underlies all practice. Man's ideas, his institutions, his entire way of life, if examined carefully, will reveal that his outlook toward life is, for example, either realistic, idealistic, or perhaps a composite of the two. One could spend countless hours attempting to determine the basic theories upon which man operates. Philosophers down through the centuries have striven to determine the fundamental theories of the universe. Through their efforts the science of philosophy has been established, which in studying the nature, origin, and purpose of the universe, has given man a greater perception of his own end, and so has supplied direction and motivation to his efforts. This article will not attempt to treat of those divisions of philosophy which deal with man or with the universe, but it will be confined to one limited and particular aspect: an examination of the philosophy of American Catholic legal education. This article shall consider the nature, origin, and purpose of this type of legal education.

Before examining the present status of American Catholic legal education, one must look first at the nature of American law—for that is the basic material with which American Catholic law schools have had to deal. American law had its immediate roots in the English Common Law. But what philosophy influenced the English Common Law and so, in turn, the American Common Law? It can be said that no schools of philosophy, such as the Idealistic School or the Realist School, had *direct* influence on the development of the Common Law either in England or America. The legists, in general, knew little philosophy as such, and the philosophers knew little law; hence, *formal*

philosophy of any kind made little direct contribution to the early Common Law.¹ However, haphazard selections from various philosophies were in evidence. The law grew more by chance and necessity than by plan:²

The common law at very least has been essentially a process of thwarting injustice rather than a system to inculcate justice. This was inevitable since it was allowed to grow out of necessity rather than to fashion that necessity. Its chronicle establishes that it was originally a very crude organism to wreak vengeance for injustice done and possibly to render unlikely a future malfeasance. . . . It developed "self-help" at first and communal retribution later.

Quite early in its history, the English Common Law found itself hampered by narrow forms of pleading and by lack of remedy. Thus the Common Law courts failed to satisfy the needs of the people. To meet these demands, another court system, Equity, arose. In the Equity courts the ecclesiastical chancellors, who were the judges, took the dictates of natural justice found in the Roman and Canon Laws and incorporated them into their decisions. Subsequently, these principles of Natural Law found their way into the Common Law, because the latter, jealous of Equity's usurping of its jurisdiction, extended itself to meet some of its former deficiencies. Many of the Common Law judges, while ignoring philosophy formally, yet were of the view that the law was concerned with what *ought* to be done; and so actually principles of ethics and metaphysics were presumed by these judges in making their decisions. Hence, a philosophical standard or norm, although never clearly stated, was presumed to exist. Thus the great anomaly of the English Common Law is that while ostensibly it ignored philosophy, yet it used many philosophical principles. This use of philosophy, however, was a species

¹ Dillon, *Philosophy in Law and Government*, 13 AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION PROCEEDINGS 3 (1937).

² Dillon, *Philosophy in the Common Law*, 9 AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION PROCEEDINGS 178 (1933).

of opportunism.³ The great influence of a Plato, an Aristotle or a Thomas Aquinas only sporadically or haphazardly made itself felt in the law. Of course, it was inevitable in an age and a civilization so largely dominated by that school of philosophy known as Scholasticism, that such influence would be felt.⁴ The dictates of natural justice emphasized in Scholasticism were intentionally used by the Equity judges, while the Common Law judges, as previously stated, often presumed the existence of these, if not expressly recognizing them as such. Their general formal ignoring of them is due to the fact that:⁵

While the Roman and Canon laws were being taught in the continental and British universities and were being consciously and deliberately molded by the Schoolmen and by lawmakers, under the impact of the ethics, psychology, theodicy, and metaphysics of scholasticism so as to fabricate a jural order which would strengthen Christian civilization, the study of the Common Law of England, focused at the Inns of Court at London, beyond the reach of Oxford and Cambridge, became the monopoly of an autonomous, self-governing, legal profession, or group, analogous to a guild or craft. From about the fourteenth to the middle of the eighteenth century, or until the introduction of the study of the Common Law into Oxford University by Sir William Blackstone, the English Bar maintained exclusive control over all education in the laws of England. Since the teaching and study of the Common Law and Equity in the English universities did not commence until well after the Reformation, there was no opportunity there for the genesis of a tradition of a scholastically guided ethico-socio-juristic synthesis.

Thus we see that because of historical accident, Scholastic Philosophy had no opportunity to walk hand in hand with the English Common Law; however, because of the influence of the Equity judges, and to a lesser extent because of the "sense of rightness" possessed by the Common

³ Dillon, *Philosophy in Law and Government*, 13 AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION PROCEEDINGS 4 (1937).

⁴ *Id.* at 6, 7.

⁵ Brown, *Catholic Education and the Law* in VITAL PROBLEMS OF CATHOLIC EDUCATION IN THE UNITED STATES 219 (Deferrari ed. 1939).

Law judges, some of Scholasticism's basic ideas, such as free will and the consequent personal responsibility for human acts, became fundamental in Common Law theory. The belief in the ability of the judge to decide cases on the basis of reason, the existence of rules and principles, the acknowledgment of God-given law, and a system of formal logic are other important Scholastic contributions to the Common Law.

When the English colonists arrived in this country, they brought with them and made effective that part of the English Common Law which was applicable to local conditions. The growing mistreatment of the colonists by the Crown and the simultaneous growth in the desire for independence resulted in a revolution which had not only military and political, but philosophical effects. Guided by the hand of Thomas Jefferson, the Declaration of Independence proclaimed to the world the existence of a Creator; that man was endowed by this Creator with certain rights; that these rights were inalienable; and that governments were instituted to secure these divinely endowed personal rights. Thus was born a nation that deliberately was guided toward the political vitalization of Christian concepts of law: ⁶

The written record leaves no doubt and permits of no discussion that our system of government and laws was grounded in the fundamental teachings of Christian philosophy. The Declaration of Independence—the first document emanating from any group having competence to speak for what subsequently became the United States of America—assumes and is predicated on a supernatural sanction and hypothesis and indubitably professes the Christian concept of society and man . . . The Constitution of the United States blueprints and sets up a political mechanism or device to give organic vitality to this philosophy, and as the Supreme Court of the United States has said, the Constitution “is but the body and the letter,” of which “the

⁶ Desveigne, *Philosophy and Order in Law*, 17 AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION PROCEEDINGS 130 (1941).

Declaration of Independence is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence." This is the accepted doctrine.

With such Christian theory as a basic characteristic of our American law, it would be expected that American Catholic law schools not only would be conscious of such heritage from the start, but would be active to ensure that American law remain Christian. There have been strivings in that direction, but unfortunately this ideal has been extremely difficult of achievement. The originating period of the Catholic law school, which extended from about 1869 to 1929,⁷ was devoted principally to the hard task of merely "existing and increasing." No single reason explains the birth of Catholic law schools; complex motives account for their existence.⁸ Most of them have been established in the great metropolitan centers where the need of training practicing lawyers had to be met. Some arose in response to the general urgings of a local bench and bar, who believed that a university type of legal education would raise the standards of such education. Others emerged from expanding Catholic universities. It must be kept in mind that during the early part of this originating period the American Bar was attempting to change over from the former haphazard system of training lawyers in law offices to the more systematic training that a law school could give. Hence, Catholic law schools as well as others were established, in part, to meet this need. One must not lose sight of the fact, also, that the American people favored that type of legal education which was content merely to prepare men to practice law in order that they might "earn a good living." With perhaps few exceptions, therefore, Catholic law schools were originated and developed with little, if any, thought to their juristic responsibilities

⁷ Brown, *The Place of the Catholic Law School in American Education*, 5 DETROIT L. REV. 4 (1941).

⁸ *Id.* at 5.

beyond making it possible for students to prepare for bar examinations and ultimately to make a living practicing law:⁹

In this first cycle, the general aim of Catholic law schools was to train for a profession which ought to be learned and cultured, but which is always necessarily vocational . . . These schools were Catholic in "spirit," "attitude," and "environment," but the positive law was generally taught for its own sake and the pedagogical functions were secularized. Perhaps only in exceptional instances was there the idea of giving expression and effect in the teaching processes to a distinctive philosophical tradition and sociological outlook.

There is little doubt that Catholic law schools from the outset taught the American and Christian doctrine of the inalienable rights of man in their Constitutional Law courses; but it is apparent, also, that generally they failed to analyze the Common Law in the light of Scholastic philosophical principles. They were too busy teaching their students the mechanical aspects of practicing law.

The second period of the Catholic law school might be said to have extended from 1929 to 1941.¹⁰ This has been called the "aspirant era," because it was during this time that many of these schools were engaged in obtaining an accredited standing from the two main accrediting agencies, the Association of American Law Schools and the American Bar Association. During this period there was, to some extent, a growing awareness that the schools must teach the student to scrutinize American law in the light of the moral law, as well as instruct such students in the mechanics of practice. Gradually these schools began to apprehend that this was a task especially suited for them, and was a duty to be carried out if they were to achieve their proper end as Catholic law schools. Little concrete progress was achieved, however. Some of the schools em-

⁹ *Ibid.*

¹⁰ *Ibid.*

phasized the religious facilities they provided for the development of the law students, but such facilities were confined within the field of religion and did not directly bring the moral law to bear upon the positive law as the students studied it in their courses.

The third or "retrenchment" period¹¹ existed during the Second World War. Faced with an acute shortage of students, Catholic law schools, as well as others, had to concentrate upon self-preservation. After 1945, the "G. I. Bill of Rights" brought such an avalanche of students to all law schools that acute "growing pains" developed. This initiated the fourth period of the American Catholic law school. In its commencement physical problems again became foremost to such schools. However, this immediate problem did not obliterate the continuing problem of a lack of Natural Law integration in the courses offered. It is true that most Catholic law schools presently offer, and have offered for sometime, courses in Legal Ethics, Jurisprudence, and the like, in which they attempt to impart a Scholastic concept of the law. Also, at least one law school, the College of Law of the University of Notre Dame, has found time and opportunity in the post-war era to inaugurate a series of annual Natural Law Institutes designed to revitalize the Scholastic concept of the Natural Law. While all such efforts are aimed in the right direction, little has been attempted, let alone accomplished, to point up the indispensable role of the moral law in each of the courses of the legal curriculum.

The thesis thus submitted, then, is that American Catholic law schools have not adequately attempted to integrate the moral law with the positive law courses. Instead they have relegated the teaching of the moral law to a separate course or two, thus keeping its existence in a vacuum apart from the life which it must help to mold or shape. In view

¹¹ *Id.* at 15.

of the Christian philosophy at the base of American law, the opportunity to integrate the moral with the positive law is great; in view of the great heritage of the Natural Law available in an especial way to Catholic law schools, the duty to do so is plain; and in view of the rise and development of generally well-meaning but incomplete and even false philosophies of law, the need is urgent.

Keeping in mind the underlying Christian concepts of American common law, and the evolution of American Catholic law schools, one must next examine the development of important philosophies of American law to understand more of the great difficulties with which Catholic Law schools have had to cope. Besides their problems relative to physical growth, self-preservation, and expansion, they have had to cope with very influential theories of the nature and function of law which were not always in accord with a Scholastic philosophy of law. In comparatively recent times, in both England and America, five dominant schools of jurisprudence have made themselves strongly felt: the Analytical, Historical, Sociological, Realist, and Philosophical schools. These schools have either contained only partial truth, and as a consequence failed to present the entire picture of the nature of law, or have contained elements of falsity which even more seriously have distorted law's true nature. The thinking generated by these schools has sprung primarily from a few important men, and has been espoused by enough followers to influence the law and legal education. Because the methods of the Catholic law schools have been largely imitative, the various philosophies of law emanating from these schools of jurisprudence have been taught in Catholic law schools, in part at least, without sufficient awareness of their deficiencies or distortions. The failure to realize all the implications of a given view of the nature of law has often resulted in an unwise assent by Catholic law school professors to fundamentally

objectionable laws. The lack of training in Scholastic Philosophy on the part of many of these professors also has played its part in engendering this uncritical approach.

A brief examination of some of the most elementary aspects of these five philosophies of law is necessary if one is to see the great stress that each of them places on some one particular aspect of the law. Several of the five originated in England and were transplanted to America through the Common Law. The Analytical School of Jurisprudence is one of these.

We have seen how the English Bar maintained exclusive control over legal education from the Fourteenth to the Eighteenth Century. The study of the Common Law of England was kept in the hands of the legal profession at the Inns of Court, out of reach of the English universities, and away from the influence of any unifying Christian philosophy. Following the Reformation, the previously unifying influence of Christian theology tended to give way. And so, when the Common Law and Equity jurisprudence finally found its way into the English universities, there was not sufficient reaction on the part of the university professors to resist the established precedents of the English Bar in legal education. Generally speaking, these universities adopted the analytical type of jurisprudence which existed at the Inns of Court and in the Common Law Courts:¹²

Insofar as the English universities departed from the scholastic tradition and relied upon an analytical jurisprudence, fostering the concept of law as a mere scientific arrangement of rules, the notion of law was torn from its context of life and the "legal man" was eventually made to dwell in a make-believe world, devoid of ethics, politics, and sociology.

The Reformation signaled the death of theology as the unifying factor in all knowledge. It likewise brought disagreement over Christian metaphysics and so in time les-

¹² Brown, *Legal Education in Philosophical Perspective*, 3 DETROIT L. REV. 183 (1940).

sened the influence of Christian philosophy on the law. This setting, together with the monopoly of the English Bar over legal education for four centuries, furnished a fertile soil for the growth of an analytical view of law. Analytical jurists tried to discover their theory and basic conception of law by a logical process, using as data merely existing legal rules, principles, and precedents. Lacking the influence of ethics and philosophy, these jurists envisioned law in too narrow a sense, devoid of the light which ethics and philosophy could throw upon the nature of law. Such a blindly logical system was more concerned with making its rules and court decisions consistent than with looking outside of the positive law for its basic principles, and considering *all* the facts in order to achieve justice. This theory found its way into the Common Law of America as well as of England. American law, too, became precedent-following, overly analytical and overly narrow, as well as too unconcerned with *justice*. Early court procedure in this country became so technical that many times a person's lawsuit was completely dismissed solely because of the lawyer's improper pleading. Catholic legal education, as well as non-Catholic, reflected this condition. As a consequence, when American universities first "taught law," following the period of law office training in colonial America: ¹⁸

. . . legal education consisted substantially in the communication of abstract, legal principles regarded more or less as eternal and unchangeable, and existent in a factual vacuum, by a teacher at lectures, or by reference to such secondary sources as textbooks and commentaries, intended to be memorized by the student. Emphasis was placed upon general principles, while the pursuit of facts was relegated to the occasional reading of a case report or statute by way of illustration.

The Historical School of Law prevailed in the Nineteenth Century, particularly in the latter half thereof. Savigny.

¹⁸ *Id.* at 185.

and the followers of this philosophy did not view law as something which had always been the same, but as something which had grown over the years. Instead of eternal and unchangeable rules, members of this school were overly impressed with the phenomenon of *growth* in the law. Legal generalizations were synthesized through the study of the evolution of legal rules and doctrines. These came to be regarded as universal conceptions, especially those derived from comparative studies of all legal systems. Thus, despite the changes evident in the law over the centuries, stability was found therein through establishing principles of growth. The Historical School found the ways in which growth had taken place and would continue to occur, and thus sought to unify stability and change by a combination of historical authority and a sort of philosophical history. The natural outgrowth of this viewpoint was the development of the "case method" of studying law. Because of a drift from principle to precedent, and because law was not codified, the Common Law could be found only by examining the reports of single cases which had been accumulating for eight centuries. The lack of a standard outside of the positive law, and the lack of a unifying philosophy within, bred illogical and contradictory decisions. The previous attempts of the Analytical jurists to be consistent brought fantastic distinctions, and wondrous fictions. Therefore, the only way fully to understand these confused Common Law rules, as Langdell, the author of the case system, noted, was to seek an explanation in history. To master these rules effectively, seeing all the limitations and extensions one would have to study the cases in which these rules were embodied. Begun in 1870, the case method was adopted by the majority of American law schools in the early 1900's. Among these were the Catholic schools.¹⁴

¹⁴ "The case method of classroom instruction by which the reports of actually adjudicated, selected cases are studied, analyzed and discussed by the class under the direction of the teacher, is used as the basic educative process

Because of the drift from principle to precedent, this system stresses the searching of cases for facts rather than concentrating attention upon principles. The deductive way of thinking formerly employed so extensively by the Analytical legal philosophers was replaced by an inductive approach. Instead of reasoning from principles to facts, the reasoning was from facts to principles. "Apparently a science of law was to emerge ultimately from legal fact accumulations."¹⁵

Since the Catholic law schools were largely imitative of the non-Catholic ones, one can conclude that they were not fully aware of the limitations inherent in both the analytical approach to the law and the case method approach. Possibly they were too concerned with training practicing lawyers in a narrowly technical sense only, or possibly they were too insecure to resist following. Had they possessed active awareness, they would have reacted more vigorously against the separation of law from philosophy, and especially from ethics. Undoubtedly, they would have rejected the narrow, logical view of the Analytical School, and would have been a powerful factor in bringing earlier reforms to the overly-technical and unjust Common Law pleading system which prevailed in our courts. Likewise, false conceptions of Natural Law (which considered it individualistic), perhaps would not have taken root. The wholesale adoption of the case method by most Catholic law schools indicates that they did not fully comprehend the road down which the system led. These schools began to over-emphasize the facts and to under-emphasize the principles. They attempted to build a science of the law merely by accumulating more and more facts. Induction was over-emphasized while deduction from moral postulates

in most Catholic law schools." Brown, *The Place of the Catholic Law School in American Education*, 5 DETROIT L. REV. 11, 12 (1941).

¹⁵ Brown, *Legal Education in Philosophical Perspective*, 3 DETROIT L. REV. 185 (1940).

was too often neglected. Forgotten was the realization that proper growth comes not only from a greater accumulation of facts but also from a greater insight into principles. Evidently these schools began to lose sight of the higher law by which all positive laws must be tested. Thus, the Catholic law schools joined the secular ranks of all American legal education to "religiously" follow the Analytical and Historical Schools.

The third stage in American legal education commenced in the middle twenties under the motivation of the Sociological jurists. The search for facts was now extended beyond the cases. As Robert Hutchins has said, there ". . . was an effort to follow the law in action, to find out the consequences of legal decisions, and what was actually going on in the legal world."¹⁶ The quest for facts was extended from the domain of law into the social sciences generally, and into economics, sociology, and politics particularly. The former, narrow notion of the Analytical School which limited law to a merely logical arrangement of rules was rejected. It was realized that law had been torn from other vital data that properly belonged to it. Data from economics, politics, sociology and the like were seen to be necessary to a more just solution of multiplying social problems stemming largely from the Industrial Revolution. Referring to the Sociological School, in lamenting the economic and moral crimes of the 1920's and 1930's one writer says:¹⁷

It is inaccurate to call it a school of thought. It is a psychic mass rebellion against conditions that were indubitably lamentable. It is a reaction to the cycle of legal oppression that accompanied capitalistic tyranny. It was fated that such a reaction would come, but it is a pity that it came in this way.

¹⁶ Hutchins, *Legal Education*, 4 U. OF CHL. L. REV. 357, 361, 362 (1937).

¹⁷ Dillon, *Philosophy in Law and Government*, 13 AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION PROCEEDINGS 9 (1937).

Natural Law concepts in American law had become twisted and distorted so as to unduly protect capital at the expense of labor, to allow a laissez-faire, overly-rugged individualism to flourish. Sociological jurisprudence made a valiant attempt to evaluate the conflicting claims of individuals and society, and to harmonize the individual's interests with the welfare of society. Fortunately, ideals and ethics were not cast aside. However, it has been stated that:¹⁸

. . . so far, this school of jurisprudence has devised no theory of values other than the shifting ideals of the epoch. Thus, sociological jurisprudence can do little more than correct deficiencies and limitations of existing law and check analytical and historical conceptions and those of other schools from a functional viewpoint. The philosophy of the school is pragmatic; it has faith in the improvement of law through judicial experience, trial and error, and the efficacy of effort . . . With the ends of law and delineation of interests derived as critiques, positive law is then interpreted so as to preserve the more important interests (usually regarded as the social interests) and to withhold recognition of such claims as are clearly immoral, unjust or impractical of enforcement. Herein a danger lurks in always giving precedence to social interests and in having no stabilizing philosophy of law to direct the evaluation of these conflicting individual and social claims. Stability of law must always be preserved in the face of misconceived and inadequate demands for change. Immediate ends derived pragmatically cannot satisfy the need for stability and predictability of law.

Such important men as Holmes, Cardozo, Brandeis, and Pound have contributed to this school of thinking. Great contributions to the growth of the law have resulted. Many implications learned from the development of the social sciences have found their rightful places in the law. The factual data taken from the social sciences have allowed a greater opportunity for the attainment of justice through law. More "real life" was reflected in the law. However,

¹⁸ De Sloovere, *Natural Law and Current Sociological Jurisprudence*, 17 AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION PROCEEDINGS 140 (1941).

one very important factor has been overlooked by this school. Law has been viewed as having no absolute standard: only a standard that changes with the changing epochs. Giving consideration to the social claims of the present will throw more light on what laws should be passed, but it will not determine if these claims are morally correct. In viewing the law as a force to bring about social good, this school of thought has a very laudable objective, provided that rightful individual interests are properly protected. A balance between individualism and socialism must prevail. Reforms brought about by this school have contributed tremendously to overthrow former conceptions of the law which allowed "rugged individualism" to flourish. Selfish individual interests had obtained a legal cloak under the protection of imperfectly understood "so-called natural rights." Important social reforms did much to re-aim the law toward the attainment of justice. But the growth of the law cannot stop here if justice is to be more fully realized. It is possible for the law to become too concerned with the social interests and not sufficiently concerned with individual interests. Important weaknesses in society as well as in the individual can easily result from such overemphasis. A proper evaluation of these conflicting social and individual interests can be secured only in the light of the moral law. Philosophy, particularly ethics, is as necessary as the social sciences to set the limits beyond which social interests may not defeat individual interests, and vice versa. Unfortunately, Catholic law schools have made only sporadic attempts to examine the law in the light of the moral law, or Scholastic Philosophy. And such an approach to the law has gained few followers among lawyers or the public. If Catholic law schools and law professors had fully realized that they were inheritors of a theory of values which did not shift with the changing times, they could have supplied the normative stand-

ard of the moral law to aid the Sociological jurists in their search for greater justice.

The fourth school of jurisprudence influencing American Law today is that of Realism. In describing this philosophy of law, Walter B. Kennedy has said: ¹⁹

There is abroad today an American philosophy of law which contests free will, denies the power of reason, scoffs at the ability of a judge to decide the cases dispassionately, questions the permanency and even the existence of rules and principles, denies responsibility of man for willful acts and derides a God-given law . . . The movement assumed formidable proportions about a decade ago and originated in certain law schools in this country. It is essentially American in its origin and personnel, and its adherents are drawn largely from the younger groups in the law schools and in the legal profession.

The realists are strong on facts and dislike abstractions. Judicial opinions, for them, are not based upon reason, judgment and examination of cases. These are merely cloaks to hide the true reasons for judicial decisions. What the judge had for breakfast that morning, or his mental disposition when he left home is emphasized as the important consideration. Watson and Freud are the favorite psychologists of the extreme realists. "Bias, prejudice, environment, emotions, hunches, and indigestion are the raw materials out of which law is fashioned."²⁰ Speaking analogously, the realists in law take a view of law much like the realists in literature take a view of life. For the latter, life is a sordid and filthy mess. There are no people with ideals. There is no spiritual beauty in the world. Life is merely a physical struggle of one person against another. Life is hard and painful. The realists in law see no principles based on a higher law. They magnify the weaknesses in man's ability to attain justice and enlarge his evil

¹⁹ Kennedy, *Current Attacks Upon and Suggested Methods of Preserving Neo-Scholastic Jurisprudence*, 13 AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION PROCEEDINGS 186, 187 (1937).

²⁰ *Id.* at 188.

nature. Yet there is just enough truth in some of their assertions to attract followers. People who have had unfortunate experiences with the law or who have adopted a negative outlook on life are fertile soil for the development of such a view of law. Because Realism embodies such a head-on conflict with Christian thought, it is doubtful if this type of thinking has made much influence on Catholic legal education. Indeed in some respects, it has not made enough! The realists' views, as has been indicated, have not been completely erroneous. Some of their opinions on the practical plane have been extremely cogent. Many law schools, whether Catholic or not, have prepared students to practice law in an atmosphere of unreality. It has taken realists to point out the necessity for training in legal drafting of instruments, for more trial court work, and for more personal, supervised contact with litigation processes. Thus, while their philosophy has been fallacious, the Realists have shown the way to some worthwhile, practical reforms in present-day legal education.

The struggle of Catholic law schools to achieve a properly integrated law curriculum, in the face of these four divergent philosophies of law, has been made easier by the recent reorganization of legal studies at the University of Chicago. There, in accordance with Christian principles, the relationship of the rational sciences to law is specifically recognized. Under Hutchins and Adler there has been a reflection of Aristotelian concepts. While not completely scholastic in its choice of moral starting points, legal education is thought of in teleological terms.²¹ Principles rather than facts have been considered as of the greatest importance. There is a realization that facts do not arrange themselves into a science.²² Deduction has been employed as well as induction.

²¹ Brown, *Legal Education in Philosophical Perspective*, 3 DETROIT L. REV. 188, 189 (1940).

²² Hutchins, *Legal Education*, 4 U. OF CHI. L. REV. 357 (1937).

In concluding the study of the nature of American law, the origin and development of American Catholic legal education and the philosophies of law which have influenced that education, one becomes aware of the diverse and conflicting materials which are taught in Catholic law schools. An awareness by law students of these diverse views of the law is highly desirable. A critical appraisal of them would do much to promote constructive efforts to achieve just laws in our society. Lawyers taught to view laws in relation to the various philosophies of law are more quick to realize the shortcomings or advantages of such laws. For example, lawyers who are familiar with the influence of the Sociological school of law should more readily see the necessity of passing laws to attain the greater good of society, while a concurrent knowledge of the Scholastic view of law should enable them to realize the necessity of a proper balance between the interests of society and those of the individual. The broad and basic thinking entailed in studying the philosophy of law would aid lawyers to become better leaders in their communities and better legislators in their state and federal governments. Unfortunately, few law students have appreciated the worth of such a far-sighted view of the law as contrasted with the "more practical" aspects of the law; few law teachers have had the training to see that deeper things lie in their teaching than they have suspected; and few law schools have insisted that their students understand these philosophies of law and their immediately practical effects on our laws. It would appear that Catholic law students, law teachers, and law schools are as guilty as others of these deficiencies. Insufficient knowledge of the philosophy of law has become a characteristic of American Catholic legal education. Few Catholic law school students take courses in this field and few Catholic law school professors are interested in it. It is true that a study alone of these diverse philosophies of the law would not be completely sufficient to insure better

lawyers and better laws, but it certainly would be an important aid toward that end.

The study of legal philosophies must, of course, be conducted in the light of an objective normative critique—a standard outside of the positive law itself. The moral law and the principles of ethics and politics derived therefrom would go far in fulfilling this need. Catholic law schools, as inheritors of a Scholastic philosophy of law and the Scholastic concept of Natural Law, could provide such a standard by which to appraise positive law. The establishment of such a standard would answer the title question—whether there is a distinctive philosophy of American Catholic legal education—in the affirmative.

But can it be said that there is a philosophy of American Catholic legal education in reality apart from theory? As a consequence of the influence of these divergent and even conflicting philosophies of law upon Catholic law schools, and because of this type of school's imitateness of other law schools in the wholesale adoption of the case method of studying law, the arrangement of courses and the like, there are many who have questioned whether there is such a reality as a truly Catholic law school. One writer has classified these schools as at best only non-sectarian.²³ Another has commented that there is no such thing as a distinctly Catholic law school. He points out that it takes its curriculum and charter from the state, and trains in the Common Law, statutes, and procedure. He argues there is no difference between the Catholic and non-Catholic law school so far as teaching Catholic Philosophy is concerned.²⁴ However, William F. Clark, formerly Dean of the University of DePaul Law School, believes that too great zeal has prompted this false idea that there is no distinctly Catholic law school. The simple fact that all schools teach

²³ Kane, *Our Colleges and the Law*, 27 AMERICA 549 (1922).

²⁴ Curran, *Catholic Law Schools*, Truth Magazine, Mar., 1933, p. 3.

the same courses is not the complete answer, he argues, for it ignores the obvious fact that courses can be taught from different viewpoints. The moral aspects of the law can be and are stressed in some Catholic law schools. Likewise, Catholic contributions to Equity and Trusts Law can be and sometimes are taught. Finally, he points out that the course in Legal Ethics can be and sometimes is made a powerful force in teaching a Catholic practice of law.

The question still remains: Are there truly Catholic law schools? To find out, one must formulate a definition as to what a truly Catholic law school is, and then ascertain if any of the Catholic law schools conform to this definition. To obtain it, one need reflect upon the views of St. Thomas Aquinas, who instead of looking merely at every law problem in the light of the specific situation, viewed these problems in relation to a Higher Law. Unification resulted from knowing things in their higher causes. Hence, a truly Catholic law school can be defined as one that views the positive law in the light of the eternal law. This does not mean that the school can offer a course in Legal Ethics or Jurisprudence or the Philosophy of Law along with the other technical courses with the thought that the mere offering makes it a Catholic law school. Rather it requires that the *entire* law school training in the positive law be viewed in the light of the eternal law. In each course, wherever the moral law affects the positive law, its relationship must be seen and its implications felt. Only in such manner will man's laws be kept subject to God's laws. Thus the great contribution of Christianity to law, namely the subjection of man's laws to a Higher Law, will be fulfilled. Pope Pius XI in his great encyclical "The Christian Education of Youth," wherein he defines a truly Catholic school, subscribes to much the same viewpoint as St. Thomas Aquinas. He says: ²⁵

²⁵ Pope Pius XI, *Christian Education of Youth* in FIVE GREAT ENCYC-
LICALS 30 (Paulist Press ed. 1939).

It is necessary that all the teaching and the whole organization of the school, and its teachers, syllabus and text-books in every branch, be regulated by the Christian spirit, under the direction and maternal supervision of the Church; so that religion may be in very truth the foundation and crown of the youth's entire training.

One must not imply that a truly Catholic law school must be so concerned with the Higher Law of God that there will not be sufficient time spent on man's positive laws. Man must work out his destiny on this earth, and hence it is his own laws which he must put in order. Our Catholic law teachers will have to exhibit that integration of the supernatural and the natural which alone is fully Catholic. Affirmation of the spiritual aspect of law alone will be insufficient. The acute problem is how to hold the spiritual and temporal together; for it is only together that each can come into its own. The very idea of university education demands such unification.²⁶ All the light obtainable from *every* field of knowledge needs to be brought to bear upon the development of the law. And such is a continual process ever enlarging our knowledge of the law. Happily, the Scholastic view of the law, based as it is on the dualism of matter and spirit, is able to absorb knowledge from such diverse sources as the rational, social, and physical sciences, as well as all other fields of study. By using the moral law as its standard and by recognizing that man's law must contain both the eternal and the finite, a Scholastic philosophy of law can absorb and arrange in orderly fashion the truthful elements from all the various philosophies of law which we have analyzed—including even Realism. Thus a truly Catholic law school employing a neo-Scholastic philosophy of law would not offer a purely ethereal, idealistic approach to law, nor one overly realistic, but rather one that recognizes and combines both the spir-

²⁶ Clark, *The Problem of the Catholic Law School*, 3 DETROIT L. REV. 169 (1940).

itual and material elements in the law. Law would be viewed both as a science and as an art.

Keeping the above-formulated definition in mind, are there any truly Catholic law schools purportedly in existence today? The information available on this is not complete; however, two surveys have been made in recent years. One grew out of the Philosophy of Law section of the American Catholic Philosophical Association, and the second was authorized by the National Catholic Welfare Conference. In the first survey over 300 questionnaires were sent to Church, law school deans and professors (including two non-Catholic, church law schools), and only twenty-two replies were received! Only thirteen deans answered. The article which published the results of this survey rightly asked: "Does this indicate a tendency toward considerable lethargy, in the church legal educational world, with respect to problems involving juridical ideals?"²⁷ The survey dealt with the jurisprudential aims of Church law schools in the United States. The general conclusion drawn was that there is no unanimity concerning these aims. Fourteen out of twenty-two answered affirmatively the question:²⁸

Should the faculty members of law schools which constitute parts of universities established by religious orders, or by clerics, obviously for the purpose of giving a specific type of education, undertake at the present time to develop and present, in some degree, a legal culture produced by relating law to the other social sciences, under the influence of a neo-scholastic philosophy?

Such a step, it was contemplated, would point out, with concrete examples, where there was essential harmony or discord between the positive law and Scholastic principles, and would trace the influence of Scholasticism on positive

²⁷ Brown, *Jurisprudential Aims of Church Law Schools in the United States*, 13 NOTRE DAME LAWYER 166 (1938).

²⁸ *Id.* at 167.

law in the past as well as indicate the ideal of the future. The second question in this survey asked: ²⁹

Should the courses in the undergraduate legal curriculum, such as contracts, torts, and the like, be taught in church law schools, in exactly the same manner in which they are presented in non-church law schools?

Most replies said there should not be identity of teaching method. A majority approved an explanation in every course of the moral background of underlying principles or a warning against positivism or a suggestion of a connection between the positive law and Scholasticism. A minority thought jurisprudential critique should be given in certain courses only, believing that in some others there was nothing contrary to Catholic Ethics.

The fifth question asked in this survey was an interesting one. It read "What, if anything, are you doing in the particular courses which you teach to give them a distinctive tone with reference to church scholarship?" ³⁰ This question was asked with the idea of making available for the benefit of all legal educators the specific activities of those who were infusing a scholasticized jurisprudence into their law courses. A few answers stated that the writers did nothing in their classes to bring out the distinctively Scholastic aspects of the subject taught, because they did not favor such a procedure or because their school was said to be non-sectarian, "thus confusing theology and philosophy." ³¹ Some expounded Scholastic ethics in legal ethics courses, or integrated law and Scholastic Philosophy. Some emphasized the importance of the Church in legal history, while others unfolded the doctrine of natural rights or brought out the sound philosophy at the root of the Common Law. Some pointed out that Natural Law was basic to International law, while others raised certain specific ethical questions regarding particular legal rules and cases.

²⁹ *Id.* at 171.

³⁰ *Id.* at 181.

³¹ *Id.* at 182.

And teachers of Equity mentioned the influence of the great Ecclesiastics.

In drawing conclusions from this survey, it was stated that:³²

. . . the success of the Scholastic jurisprudence movement depends upon replacing the general with the specific. Some of the replies demonstrate that this can be done, and that there is a capacity, coupled with a willingness, on the part of at least some of the educators in church law schools to evolve a masterful jurisprudence, molded by scholasticism. Should not the next step be a collaboration by such teachers?

It is evident from the lack of replies to this survey, nevertheless, that far too little interest exists in developing a philosophy of American Catholic legal education.

The second survey was authorized by the Department of Education of the National Catholic Welfare Conference. Questionnaires were sent to all the deans of Catholic law schools; also, an analysis of the catalogues of these schools was made. The survey seems to indicate the concern of the N. C. W. C. that the technical and vocational characteristics of Catholic law schools may be overshadowing the Catholic purposes of legal education. The conclusions reached from this study are as follows:³³

. . . among those institutions which seek to effectuate definite jurisprudential aims, much diversity exists as to the proper manner of presenting a philosophy of law. The majority method of accomplishing this was by a special course, or a few formal lectures given to first year students. The minority alternative technique was by introducing a quantity of scholastic jurisprudence into all the positive law courses.

Evidently the majority of Catholic law schools do not think it necessary or have not yet found it feasible to analyze the law taught in each of their positive law courses in the light of the moral law. It is encouraging to find that at

³² *Id.* at 185.

³³ Brown, *The Place of the Catholic Law School in American Education*, 5 DETROIT L. REV. 11 (1941).

least some do adopt that approach. It is to be expected that those Catholic law school professors and deans who are not familiar with the great Scholastic tradition are unaware of what it has previously contributed to the law and what it can contribute in the future.

There have been other important reasons for the failure to develop more extensively Catholic law schools possessing a distinctive philosophy of legal education. This same survey revealed that, "The chief reasons given for failure to make a greater contribution to the science of law were heavy teaching schedules, absence of research assistance, and inadequacy of library."³⁴ In speaking of another important reason, Dr. Brendan Brown, author of the article which published the results of the survey, has this observation to make:³⁵

Retardation in the unfolding powers of Catholic law schools to fulfill their supreme destiny as master-architects of professional standards and a regime of jurisprudence under the sway and ethical discipline of the philosophical and juridical ideal of re-examined and re-formulated scholastic thought has been due in no small measure to lack of financial encouragement and endowment. To effect an equilibrium between the duty of Catholic wealth to foster the Catholic system of legal education and the obligation of this system to supply the correct educational objectives, to entrench itself upon an eleemosynary plane, and to supplement technical functions with processes which will transform Catholic law schools into dynamic centers for the promotion of the scholastic interest constitutes a major problem. Upon its adequate solution depends the success of Catholic legal education in its march toward the lofty peaks of enduring achievement in the pedagogical, scientific, and spiritual spheres.

The investigation that we have made in this paper to determine if there is a philosophy of American Catholic legal education would not be complete without noting that in recent years there has been a revival of Natural Law in

³⁴ *Id.* at 10.

³⁵ *Id.* at 3.

the theo-philosophical or Scholastic sense, especially among Catholic philosophers, and also there has been a movement started among Catholic law and philosophy professors under the auspices of the American Catholic Philosophical Association for the development of a Neo-Scholastic philosophy of law. This movement began in December, 1932, and constituted an innovation for Catholic philosophers and jurists in this country. Excepting the war years, this group has had almost annual meetings, at which time papers have been given and discussions held on Neo-Scholastic philosophy of law. In 1937 the movement recognized the need of a textbook on jurisprudence in general and on Neo-Scholastic philosophy of law in particular, suitable for the law students of today. However, to date no book has been published; nor have any really cooperative efforts been made to develop a Neo-Scholastic philosophy of law. Miriam Theresa Rooney, the scholarly chronicler of the organization, has said: "The movement for a Neo-Scholastic Philosophy of Law in America . . . has a real function to perform in contemporary culture, but . . . its achievements so far have not yet attained major worth."³⁸

While there is in the legal world a considerable quantity of contemporary literature on the philosophy of the positive law, and a fair amount of it is written by Catholic philosophers and jurists, yet there is a terrific paucity of literature concerning the topic of this paper and the development of a Neo-Scholastic philosophy of law. The numerous articles on the Natural Law are a great help, but still leave much to be desired with respect to implementation with the positive law. That not enough has been done is a cogent indication of the enormity of the job. Sporadic movements towards the accomplishment of this great task have been made by Catholic law school professors, deans,

³⁸ Rooney, *The Movement for a Neo-Scholastic Philosophy of Law in America*, 18 AMERICAN CATHOLIC PHILOSOPHICAL ASSOCIATION PROCEEDINGS 201 (1942).

and the schools themselves. Fortunately, Scholastic philosophy, on which Catholic legal education can draw to develop its philosophy of law, has probed deeply into human relations, into the nature of man, his origin, and his end. It is an ancient and yet ever modern repository of wisdom, and stands ready to guide Catholic legal education to prudent answers to the grave social, economic, political and moral problems that confront the law. It can point the way in preventing legislatures from manifesting utilitarian attitudes; it can help lawyers to think of themselves as agents of the court for the attainment of justice, as in truth they are; it can exert an effective influence to prevent the practice of law from becoming merely a game of wits and sharp dealings; in short, it can truly help to attain a better administration of justice. Catholic law schools, fortified with the basic Christian philosophy of American law, are in a singular position to protect the inalienable rights of man. With more vision and energy, Catholic legal education can go far in “. . . molding the plastic clay of the positive law so that it will reveal the image of a jurisprudence expressive of all the great scholastic truths relating to man in society with his manifold relationships.”³⁷

Thus concludes our analysis of the nature, origin, and purpose of American Catholic legal education. The answer to our question—whether there is a distinctive philosophy of American Catholic legal education—can be answered at least partially in the affirmative. But the philosophy is clearly in its embryonic stage. Its practical realization lies ahead.

Bernard J. Feeney

³⁷ BROWN, *The Place of the Catholic Law School in American Education*, 5 DETROIT L. REV. 18 (1941).