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THE CATHOLIC TRADITION

THOMAS L. SHAFFER*

If you stand in the road near one of the on-campus Roman Catholic university law schools in the United States, you can probably see a church spire. You can squint past whatever fire wall or battlement or gothic tower there is on the law building and see the campus church. You can do this at Notre Dame, St. Louis, Creighton, San Francisco, Boston College, and San Diego. If you go inside one of these law buildings, you may find crucifixes, chapels, holy-water fountains, or a statute of Thomas More. But none of these things will tell you what those law schools are about and have been about — not any more than chaste Protestant crosses at Boston University, Mercer, Duke, Richmond, Denver, Southern California, or Southern Methodist will tell you about the law schools at those universities.

What is needed for an understanding of Catholic legal education is another and more ironic picture, an altogether prosaic picture, the picture of a nice Jewish girl from Brooklyn, working in the Woolworth Building in New York City: Fanny Holtzmann, twenty-year-old middle daughter in a large immigrant family, is going to law school. She will be a celebrated American lawyer, one of the first women lawyers in New York City, a sensitive, compassionate leader in the causes of American Jewry, a faithful daughter, and a professional model to other lawyers.

But this is a picture taken in 1920, and Fanny is going to law school, on the twenty-eighth floor of the Woolworth Building. This is where one of the busiest of America's Roman Catholic schools is doing business: the law school of Fordham University, one of a network of colleges and universities set up in the United States by the Green Berets of the Catholic Reformation, the Society of Jesus, the Jesuits.

Fanny is poor. Both of her parents are Eastern European immigrants; their house is full of children; her maternal grandfather, a Hasidic rabbi, lives with the family. He conducts his *bet din* court in the kitchen. Fanny works all day in a law office on one of the lower floors of the Woolworth Building. She takes the elevator to law school at the end of the day. The

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elevator is a symbol of what she is doing — going up, going up to law school, and through law school, going up in America. If she used the stairs, she would be, in W.H. Auden's phrase, trudging on time to a tidy fortune.¹

There were at the time twenty-some American law schools under Roman Catholic auspices. Most of them were doing what Fordham was doing — providing a vehicle of vertical mobility for the children of the late immigrants: the Irish, Italians, Poles, Slavs, and Eastern European Jews. They had evening divisions (a mark of low status among law schools, then and now). Their physical facilities were removed from their liberal-arts campuses; their libraries were minimal; most of their faculty were part-time. They were sending graduates not only into practice but also into the urban political machines the immigrants supported — to share in the power being assembled by Mayor Curley in Boston, by the immigrants' political machine in New York, and by the predecessors of Mayor Richard Daley in Chicago.

I am talking about the three Loyolas, Santa Clara, Seton Hall, DePaul, Georgetown, Marquette, St. John's, Duquesne, Villanova, Detroit, and Catholic University. Fanny Holtzmann went to such a school, not because it was run by Roman Catholics, but because she had to work her way through law school. That would not have been easy to do in day-division schools at Columbia or Harvard or Yale — even if those schools would have accepted an under-educated Jewish woman.

These were Catholic law schools in the sense that Catholics went to them, and went with a sense of being involved in the common enterprise of getting a share of the aristocratic power that American lawyers enjoy. Students in them were not learning about their faith; they were getting ahead. They were not studying Aquinas or Augustine or Pope Leo's encyclical on social justice; they were studying casebooks, written at Harvard, Yale, and Columbia, just like everybody else. If these educational communities were religious, it was because they sometimes provided convenient religious services for their Catholic students and, occasionally, a chaplain to talk to.

They prospered and held themselves together in the 1930s and during World War II. They were ready and waiting in 1945 when the grandsons of the late immigrants had government help and came to law school full time. The G.I. Bill had more economic effect on Catholics in America than any other event in our history: what it did, in reference to the Catholic families that supported Mayor Daley and had supported Mayor Curley and their counterparts in other cities, was to move Catholics from being among the poor to being in the suburbs, to join those who look out (or down) and see

1. T. BERKMAN, *THE LADY AND THE LAW* (1976); Harriman, *Miss Fixit*, *THE NEW YORKER*, Jan. 30, 1937, at 21; Feb. 6, 1937, at 22, in T. SHAFFER, *AMERICAN LEGAL ETHICS* 624 (1985).

the poor.

After the G.I. Bill ran out, Catholic law schools again held themselves together and were ready for the flood of law students who came to us in the 1960s and 1970s, when all law schools expanded in size, evening divisions filled the classrooms, new buildings were put up, and private law schools began making money for their universities. Our clerical masters began to notice in those years that legal education is cheap; it is, for one example, operated on student-faculty ratios that are three or four times those in Roman Catholic liberal arts colleges and ten times those in church-related medical schools.

American Catholic law schools did not seriously look at themselves as religious in any of these three generations. Nor did they self-consciously consider the fact that their sponsorship and most of their enrollment represented an American Roman Catholic (largely immigrant) culture that was worth study, explication, and preservation.

In retrospect, you would have to say that Roman Catholic law schools in America have an important, interesting, and even unique story, but that story has not been about Roman Catholicism and the law or about being a Catholic and a lawyer in America. There are exceptions, and they are indicative of what might have been and of what might come to be: I think of my friend and mentor, Robert E. Rodes, of Notre Dame, whose scholarship and teaching has included a rendition of traditional natural law that is faithfully Catholic, and deep, and creative.² Rodes' historical scholarship explicates the medieval Catholic roots of the relationship between church and state as that has been formulated by English-speaking lawyers;³ his most recent work is an American lawyer's attempt to understand and make a jurisprudence out of the insights of Latin American liberation theology (largely, although not exclusively, an enterprise of Roman Catholics).⁴ Rodes has done and is doing what few scholars in law schools in Catholic universities have done. Among scholars and teachers in Roman Catholic law faculties, Rodes is an exception.

There is also an impressive and American body of Roman Catholic thought about the law, a cultural deposit that is interesting and well disciplined, that is tended to by scholars in non-Catholic schools. I think of John T. Noonan, Jr., who, before he ascended to the bench, had done monumental work on the history of moral and legal issues in Catholicism.⁵ He had

2. R. RODES, JR., *THE LEGAL ENTERPRISE* (1976).

3. R. RODES, JR., *ECCLESIASTICAL ADMINISTRATION IN MEDIEVAL ENGLAND* (1977); R. RODES, JR., *LAY AUTHORITY AND REFORMATION IN THE ENGLISH CHURCH* (1982). A third volume is in process.

4. R. RODES, JR., *LAW AND LIBERATION* (1986).

5. J. NOONAN, JR., *THE SCHOLASTIC ANALYSIS OF USURY* (1957); J. NOONAN, JR.,

developed an influential personalist jurisprudence.⁶ He made steady explorations in canon law and in procedure in the church courts — the sort of thing a good lawyer can do well.⁷ He made promising inquiry into legal ethics — not much of it published⁸ — that I hope his judicial duties will not keep him from completing. Noonan, a Boston Irish Catholic, did his early work on usury at Catholic University. He wrote one of his books at Notre Dame.⁹ But — and this just *has* to be significant — he did most of his work at the University of California.

A Roman Catholic law school might now provide a place for the new Noonans and Rodeses. It might provide them more than a tolerant secular university can provide; it might honor and promote and even glory in their work, more than secular or nominally church-affiliated law schools can do. The law schools in this country that have been identified as following a Roman Catholic tradition now give about the same amount of encouragement to such work as they give to scholarship on the rule against perpetuities.

I am fond of an example I mentioned earlier — the phenomenon of the late immigrants. I see them as an opportunity for legal scholars in Roman Catholic universities, an opportunity to exploit the special heritage that American Catholic law schools have and ought to claim: the way Eastern and Southern European immigrants have affected law and lawyering in America. I mean the peculiar, enduring, vital sense of community that the Italians, Irish, Jews, and Poles have had since they settled into American cities — and that they still have. You can find some tentative, preliminary description of this moral force in the sociology of religion — notably in a couple of essays by Michael Novak.¹⁰ You can find it in some of our lawyers' stories; I think particularly of George V. Higgins' Jerry Kennedy stories,¹¹ which have in them a poignant sense of Irish Catholicism in a mod-

CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS (1965 & reprint 1986) [hereinafter J. NOONAN, JR., CONTRACEPTION]; J. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES (1979); J. NOONAN, JR., BRIBES (1984).

6. J. NOONAN, JR., PERSONS AND MASKS OF THE LAW (1976).

7. *E.g.*, J. NOONAN, JR., POWER TO DISSOLVE: LAWYERS AND MARRIAGES IN THE COURTS OF THE ROMAN CURIA (1972).

8. *E.g.*, Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); Noonan, *Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227 (1981).

9. J. NOONAN, JR., CONTRACEPTION, *supra* note 5.

10. M. NOVAK, IN PRAISE OF CYNICISM (OR) WHEN THE SAINTS GO MARCHING OUT (1977); Novak, *Churches and Power*, NOTRE DAME MAG., Feb. 1980, at 12. Both of these are excerpted in T. SHAFFER, *supra* note 1, at 594. See also Shaffer, *The Legal Ethics of Belonging*, forthcoming in OHIO ST. L.J. [hereinafter Shaffer, *Belonging*].

11. G. HIGGINS, KENNEDY FOR THE DEFENSE (1980); G. HIGGINS, PENANCE FOR JERRY KENNEDY (1985). Both of these are discussed in T. SHAFFER, FAITH AND THE PROFESSIONS,

ern criminal-defense practice in Boston. Louis Auchincloss, who is the principal legal story teller of our day, wrote one story about an Italian-American lawyer in New York.¹² And you can make guesses about law and lawyers from biographical material on the immigrant political bosses (Curley, Daley, and the others); from stories about American Jewish lawyers — the Fanny Holtzmans — who stayed close to their families, and who were often educated in Catholic schools; and from social histories of immigrant groups.

I have played with this material a bit and I think I find in it an ethic and a jurisprudence that is entirely alternative to the WASP ethic that has dominated both our codes of legal ethics and our discussions of law and morality. Our standard American scholarship treats the world of these immigrant lawyers as shabby and inferior, because our dominant professional world is measured by the Calvinist standards that have governed the Bar in America. I think of the way Ephraim Tutt compared his law practice with what he called the “philanthropy” of John D. Rockefeller. “I’m a retailer,” Mr. Tutt said.¹³

In this way, or by tending to the implications of Rodés’ scholarship in liberation theology, or in some other way, the future in Catholic law schools might be a future that tends to the immediate issues of social justice in which the Catholic tradition is recently prominent. I think particularly of the pastoral letter on the American economy, issued in November, 1985, by the United States Catholic Conference and called *Economic Justice for All*.¹⁴ That project drew on an impressive array of materials in my tradition — from papal statements that date from the 1890s; from a Catholic political theology fashioned by American scholars who were careful to honor the liberal-democratic tradition in America; and from liberation-theology economists who claim a radical loyalty to the Gospel as seen through the particular memory of Roman Catholicism.

* * *

The story of Roman Catholic law schools in America tells about a respectable mission those schools no longer have. The church no longer needs to furnish a ladder for Poles and Italians. America does not need any more law schools, and particularly does not need any more that are like all the rest; but American Roman Catholics have a specific theological memory, some of it legal, much of it legalistic, which informs, explains, and gives

ch. 5 (1987).

12. Auchincloss, *The Fabbri Tape*, in T. SHAFFER, *supra* note 1, at 599. See Shaffer, *Belonging*, *supra* note 10.

13. A. TRAIN, *YANKEE LAWYER: THE AUTOBIOGRAPHY OF EPHRAIM TUTT* (1943).

14. United States Catholic Conference, *Economic Justice For All*, 16 ORIGINS 409 (1986).

warning to a modern legal practitioner. My religious tradition bears witness in and before the law; our bishops are doing that, and our lawyers could: we could use a Roman Catholic university law school.