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# The Road Not Taken: Catholic Legal Education at the Middle of the Twentieth Century.

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# The Road Not Taken: Catholic Legal Education at the Middle of the Twentieth Century

by JOHN M. BREEN\* AND LEE J. STRANG\*\*

## I. INTRODUCTION

One would expect that law schools identifying themselves as “Catholic” would evince a Catholic mission. Of the 199 American Bar Association-approved law schools in existence today,<sup>1</sup> twenty-nine operate under Catholic auspices.<sup>2</sup> Catholic law schools enroll 23,231 full-time equivalent J.D. law students, a figure that represents 17 percent of all full-time equivalent J.D. law students enrolled in ABA-accredited schools. With numbers like these, one would expect to find that Catholic law schools, *as such*, are a vibrant part of American legal education.

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<sup>1</sup> ABA-LSAC OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 2011 (2010).

<sup>2</sup> The names of these schools are listed in an appendix to this article, together with the year in which each school was founded, when it was approved by the American Bar Association (ABA), the year it was accredited by the Association of American Law Schools (AALS), the year in which it received the Order of the Coif, and the year in which it first published a student-edited law review.

All law schools, of course, share a common mission in that they are all centers of professional training. Regardless of whether a school is sponsored by the state or by a private institution, whether it sees itself as a place devoted to scholarly research or oriented toward the day-to-day concerns of practicing lawyers, on a fundamental level every American law school is dedicated to teaching the basic skills of legal analysis and argument, and the basic contours of legal doctrine, while introducing students to the core values of the legal profession.<sup>3</sup>

There are, however, a number of routes that a law school can follow in reaching this common destination. One would expect to find schools overtly identifying themselves as “Catholic” to follow a distinctive path. By drawing upon the riches of the Catholic intellectual tradition<sup>4</sup>—including a two millennia-long reflection on the meaning of justice, the nature of law, the interpretation of texts, and the workings of legal institutions—and inspired by a religious tradition that teaches love of neighbor<sup>5</sup> and dedication to public service in support of the common good<sup>6</sup>—within the parameters common to all law schools, one would expect to find Catholic law schools marking their own path.

What one finds instead is that Catholic schools are followers of a large and overwhelmingly homogenous pack of institutions—a group that seldom strays from the course set by those law schools considered to be among the elite.<sup>7</sup> Moreover, in walking this well-

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<sup>3</sup> American Bar Association, *Standards and Rules of Procedure for Approval of Law Schools* §302 (2010-2011).

<sup>4</sup> See, e.g., ALASDAIR MACINTYRE, *GOD, PHILOSOPHY, UNIVERSITIES: A SELECTIVE HISTORY OF THE CATHOLIC PHILOSOPHICAL TRADITION* (2009) (providing an overview of the Catholic intellectual tradition).

<sup>5</sup> See 1 John 4:21 (“For this commandment we have from God, that he, who loveth God, love also his brother.”); II-II ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Q. 25, a. 1 (English Dominican trans., Benziger Bros. ed., 1946) (“[T]he habit of charity extends . . . to the love of our neighbor.”).

<sup>6</sup> See ST. THOMAS, *supra* note 5, at II-II, Q. 58, a. 5 (describing, as one facet of justice, supporting the common good).

<sup>7</sup> The Harvard Law School has served as the dominant model for law school education since the latter half of the nineteenth century. This model included standards regarding the length of law school, requirements for admission, innovations concerning curriculum and pedagogy, and expectations concerning the teaching and scholarly abilities of faculty. See, e.g., ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 39 (1983) (“Harvard had taken the lead in

trod path, virtually all of the law schools operating under Catholic auspices have allowed their Catholic identity to languish as a near-forgotten historical artifact. Like most Catholic colleges and universities,<sup>8</sup> Catholic law schools have devoted their energies to mimicking their secular peers—in the courses and programs they offer, the students they seek to attract, and the faculty they hire. The vestiges of Catholic identity that do remain are largely symbolic or ornamental in nature—the celebration of a Red Mass to begin the academic year, or the well-placed portrait of St. Thomas More in the school library. Almost without exception, however, the intellectual life of these institutions—the questions raised and the lines of inquiry pursued by faculty and students alike—is indistinguishable from that of their secular peers.<sup>9</sup>

This need not have been the case. A forgotten episode from the history of American legal education shows that Catholic law schools could have traveled down a very different road—a road that, had it been followed, could have profoundly changed the face of legal education, and with it the legal profession.

In the late-1930s and early-1940s, a number of Catholic law professors concluded that Catholic law schools had not fully realized their potential. The kind of education provided by these schools was, in all material respects, the same as that offered at non-Catholic law schools. While attaining the same level of achievement of other schools certainly represented a positive accomplishment, this “sameness” also constituted a failure. To remedy this failure, these reform-minded scholars proposed that Catholic legal educators “develop a distinctively Catholic law school.”<sup>10</sup> By drawing on the patrimony of

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the creation of a new method of teaching, the new structural standards, and the new type of educator thought to be needed in American legal education. . . . The size and influence of Harvard was such that almost all university affiliated schools were only too anxious to emulate its developments.”).

<sup>8</sup> See generally, JAMES TUNSTEAD BURTCHAELL, *THE DYING OF THE LIGHT: THE DISENGAGEMENT OF COLLEGES AND UNIVERSITIES FROM THEIR CHRISTIAN CHURCHES* 557-716 (1998) (discussing the loss of Catholic identity at three representative Catholic colleges).

<sup>9</sup> See, e.g., John M. Breen, *The Air in the Balloon: Further Notes on Catholic and Jesuit Identity in Legal Education*, 43 GONZ. L. REV. 41, 43 (2008) (“[I]t is entirely possible for a student to graduate from one of these institutions without ever having been asked to think seriously and rigorously about the nature of justice and its meaning in law.”).

<sup>10</sup> James Thomas Connor, *Some Catholic Law School Objectives*, 36 CATH. EDUC. REV. 161, 165 (March 1938).



Catholic legal and philosophical thought, and riding the crest of the Neo-Thomistic revival, the proponents of this call for reform believed that such a law school could challenge the novel legal and philosophical ideas then gaining adherents in the legal academy,<sup>11</sup> while charting a “desirable future of the common law”<sup>12</sup> and exerting a “potent influence upon legal thought” in the minds of lawyers and judges.<sup>13</sup>

The impetus for this proposal was a clear-eyed recognition of the conceptual and real-world threat posed by the rise of totalitarianism, as well as the challenge to traditional understandings of law being made by the newer schools of jurisprudence. A number of Catholic legal scholars saw contemporary legal movements, such as Legal Realism, as symptomatic of a deep intellectual malaise in Western thought. In response to this challenge, they sought to build Catholic legal education around a rigorous study and exposition of the metaphysics and natural law theory of St. Thomas Aquinas.

In the Article that follows, we describe the events that precipitated the call for the establishment of a distinctively Catholic form of legal education, the tepid reception given to this proposal, and its eventual, *de facto* rejection by law schools affiliated with Catholic universities. In Part II, we describe the founding of four representative Catholic law schools and the characteristics that defined Catholic legal education up through the 1950s.<sup>14</sup> We conclude that the precipitating purposes of Catholic law schools included a desire to provide local Catholic populations with the opportunity for advancement into a respected profession and entry into the middle class, while raising the standing of the host university in the academic community and creating a source of additional revenue.

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<sup>11</sup> *Id.* at 170.

<sup>12</sup> Brendan F. Brown, *Jurisprudential Aims of Church Law Schools in the United States, A Survey*, 13 NOTRE DAME LAW. 163, 169 (1938) [hereinafter Brown, *Jurisprudential Aims*].

<sup>13</sup> William F. Clarke, *The Catholicity of the Law School: Catholicity in Legal Training Simply and Forcefully Discussed*, 6 J. RELIGIOUS INSTRUCTION 700 (April 1936) [hereinafter Clarke, *Catholicity*].

<sup>14</sup> Whereas twenty-nine law schools today operate under Catholic auspices, twenty such schools were in operation at the time of the proposal in the late 1930s and early 1940s. Given the large number of Catholic law schools, a comprehensive study of the subject is not feasible in the format of a law review article. We hope to provide such a complete study in a future book.

In Part III, we set forth in detail the proposal that Catholic law schools distinguish themselves from their secular counterparts via a thorough-going reform of the curriculum and increased scholarship centered on the study of Neo-Thomistic philosophy. Although the proponents of this reform included a number of prominent figures in the world of Catholic legal education, the proposal failed to gain acceptance—even at the schools headed by deans who championed its adoption. As we make clear, however, the proposal did manage to enjoy some modest institutional success in the establishment of several journals and an academic institute. Aside from these few remnants, nothing today remains of this proposal for the reform of Catholic legal education.

In Part IV we explore the reasons that together account for this failure. Briefly put, we argue that the ultimate rejection of the proposal was closely related to the fact that the reasons behind the establishment of Catholic law schools were practical and not jurisprudential in nature.

First, Catholic law schools were founded to enhance the academic reputation of their host universities and to serve the professional ambitions of their natural constituencies. Financial and market-driven considerations were responsible for the creation of these institutions and not a special sense of mission. The proposal for reform thus represented something new.

Second, because the proposal was something new, Catholic law schools encountered numerous practical obstacles to realizing a distinctively Catholic approach to legal education. Most prominently, institutional inertia and the difficult task of identifying and hiring faculty qualified to carry out the proposal impeded the effort to augment Catholic identity.

Third, the proponents of reform failed to convince the broader academy and, more importantly, the faculties at Catholic law schools, that their proposal was philosophical and jurisprudential—not theological and religious—in nature.

Fourth, at the time the proposal was made, Catholic law schools had a strong incentive to conform to the practices of their secular peers. That is, the goal of first acquiring and then maintaining accreditation from professional bodies such as the ABA pressured Catholic law schools not to vary from the acceptable path of legal education then being established.

Fifth, the intellectual challenges that had once made the immediate need for lawyers trained in Neo-Thomistic thought so readily apparent at the time of the proposal were, only a few years later, no longer so pressing or so obvious. The new jurisprudence of Legal Realism waned in importance and was supplanted by a far less threatening process-oriented understanding of law and legal institutions.

Sixth, the once looming threat posed by the totalitarian powers had been soundly defeated on the battlefields of Europe and the Pacific, making the need for an intellectual response to the understanding of law advanced by these regimes less urgent. Moreover, a perceived, tacit acknowledgement of the truth of natural law was part of the post-war consensus as reflected in the Nuremberg Trials and the Universal Declaration on Human Rights.

Seventh, Neo-Scholasticism, and specifically the study of the thought of St. Thomas Aquinas as the unifying intellectual force within Catholic higher education, faltered and ultimately failed. The proposal presumed that reform of Catholic legal education would be coherent because it would be structured according to the then-dominant Neo-Thomistic revival in philosophy. In the 1950s, however, Thomism fractured into competing camps leaving the proposal without a unifying center.

We conclude the Article by briefly discussing the aftermath of the failure of the proposal to find a home at even one Catholic law school and by outlining our plans for future scholarly work in this area.

## II. CATHOLIC LEGAL EDUCATION FROM THE FOUNDING PERIOD THROUGH THE PROPOSAL

A comprehensive study of the founding and development of each of the twenty-nine ABA-approved law schools operating under Catholic sponsorship would far exceed the scope of a single law review article.<sup>15</sup>

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<sup>15</sup> This article is part of a larger project: a book-length study of the history of Catholic legal education that will include (1) the founding period, (2) the period of proposed reform (both of which are discussed in the present article), (3) the period leading up to the Second Vatican Council and the quarter century that followed the close of the Council, and (4) the period from the issuance of Pope John Paul II's Apostolic Constitution *Ex Corde Ecclesiae* to the present day. We intend for this book to be genuinely comprehensive, drawing upon archival sources in surveying all law schools affiliated with Catholic universities. In the present text, we have largely, though not exclusively, relied on secondary sources in retelling the histories of Catholic law schools.

What follows is a brief history of the founding of *four* Catholic law schools in the United States: Notre Dame Law School, the Catholic University of America Columbus School of Law, Fordham University Law School, and the University of San Francisco School of Law. The selection of these four schools is intended to reflect the strength of Jesuit sponsorship in legal education,<sup>16</sup> as well as the fact that Catholic schools were especially numerous on the East Coast and in urban areas, while also recognizing the presence of some schools in smaller towns and in the West.<sup>17</sup>

As will be seen, a number of common themes emerge from this survey of the founding of Catholic law schools that are wholly unrelated to the jurisprudential goals of the reform proposal. Instead, these abbreviated histories show the practical motivations and the concrete circumstances that gave rise to the founding of each school and how each of them construed its mission as a Catholic institution of legal study both prior to and following the proposal outlined above.

#### A. *The History of Catholic Law Schools: Four Examples*

##### 1. *Notre Dame Law School (1869)*

The University of Notre Dame du Lac was founded in 1842 in the heart of the northern Indiana wilderness by a French priest, Father Edward Frederick Sorin, C.S.C. Sorin came to America with a handful of vowed religious Brothers of St. Joseph at the invitation of the

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<sup>16</sup> Fourteen American law schools operate under Jesuit sponsorship. These include: Boston College School of Law, Creighton University School of Law, Fordham University Law School, Georgetown University Law Center, Gonzaga University School of Law, Loyola University Chicago School of Law, Loyola University New Orleans School of Law, Loyola Los Angeles School of Law, Marquette University School of Law, Seattle University School of Law, Santa Clara University School of Law, St. Louis University School of Law, the University of Detroit-Mercy School of Law, the University of San Francisco School of Law. See John M. Breen, *Justice and Jesuit Legal Education: A Critique*, 36 *LOY. U. CHI. L.J.* 383 (2005) (listing the fourteen Jesuit law schools and quoting from their mission statements and homepages).

<sup>17</sup> Fordham is an urban law school in the East founded by the Jesuits; Notre Dame, founded by the Congregation of the Holy Cross, is a non-urban school located in the Midwest; San Francisco is another urban school, also founded by Jesuits, located in the West; Catholic University, also an urban law school in the East, is not sponsored by a religious order but is part of a pontifically chartered institution. As explained below, CUA is *sui generis* in its founding mission.

French-born bishop of the Diocese of Vincennes, Celestine de la Hailandiere.<sup>18</sup> During a trip to France, Bishop de la Hailandiere had sought the assistance of Father Basil Moreau, C.S.C., the founder of the religious order that would later become known as the Congregation of the Holy Cross ("Congregation Sainte Croix" or "C.S.C."). De la Hailandiere visited Moreau in Le Mans in the hope of obtaining four religious brothers, under the direction of a priest, who would come to America and teach in the schools of the Vincennes diocese.<sup>19</sup> Sorin and his companions arrived in southwestern Indiana in October, 1841.<sup>20</sup>

After a dispute over money and a failed attempt to establish a college in Vincennes, de la Hailandiere allowed Sorin and the brothers to take possession of 524 acres on the northern border of his diocese on condition that Sorin establish a college there within two years. On November 26, 1842, Sorin and his companions took possession of the land that would become the campus of the University of Notre Dame.<sup>21</sup> At that time, the property was almost entirely undeveloped. It contained only three log buildings, including a chapel that Father Stephen Badin had constructed as a mission to serve the Catholic settlers and Pottawatomie Indians in the area. The remainder of the land was composed of two spring-fed lakes, forest, and uncleared countryside. Buoyed by Sorin's enthusiasm, ambition, and faith, by June, 1844, the community had completed a new log chapel and a four-story college building, made of brick.<sup>22</sup>

The initial, driving force behind the establishment of a law school at Notre Dame was Sorin's desire to attract more students and revenue to the fledgling institution, as well as his ambition to make it into a place that could rightly be called a university.<sup>23</sup> Indeed, the

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<sup>18</sup> ARTHUR J. HOPE, C.S.C., *NOTRE DAME — ONE HUNDRED YEARS 11-12* (1943).

<sup>19</sup> JOHN THEODORE WACK, *THE UNIVERSITY OF NOTRE DAME DU LAC: FOUNDATIONS 1842-1857* (1967), available at <http://archives.nd.edu/wack/wack.htm>.

<sup>20</sup> HOPE, *supra* note 18, at 22-23.

<sup>21</sup> *Id.* at 30-35.

<sup>22</sup> WACK, *supra* note 19, at 19; see also THOMAS J. SCHLERETH, *THE UNIVERSITY OF NOTRE DAME: A PORTRAIT OF ITS HISTORY AND CAMPUS 3-12* (1976).

<sup>23</sup> In January, 1844, only a few months after the first students arrived to begin their studies among the modest collection of buildings and huts, the Indiana Legislature granted a charter to Notre Dame not as a college, "but as a full university, with the power to grant all degrees." WACK, *supra* note 19, at 19 (chap. 2).

available literature suggests that the Law School more reflected Sorin's embrace of the American entrepreneurial spirit than a specific design for legal education.<sup>24</sup> Thus, Notre Dame's catalogue indicates that Father Sorin actually contemplated adding a "Department of Law" as early as 1854.<sup>25</sup> It was not, however, until October of 1868 that "the board of trustees decided on the establishment of a law department, and on February 1, 1869, the first law class was taught."<sup>26</sup> As such, the Notre Dame Law School can claim to be the nation's oldest Catholic law school in continuous operation given that Georgetown University, the closest contender for that title, did not begin offering courses in law until the following year, 1870.<sup>27</sup>

Those who have recorded the history of the Notre Dame Law School have been keen to portray the institution as being distinctively Catholic from its inception in the kind of education that it sought to provide to its students. For example, Arthur J. Hope, C.S.C., claims in his centenary history of the University that, from the start, Notre Dame had sought "[t]o raise the standards of the law . . . to impress her students with the intimate relation between law and religion."<sup>28</sup> Notre Dame, says Hope, "boldly assailed the practice of making a lawyer out of anyone would could buy a few books and study in a lawyer's office while running errands for his would-be mentor."<sup>29</sup>

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<sup>24</sup> This is not to suggest that Father Sorin was somehow opposed to idea of natural law or the idea of a law school dedicated to the producing graduates inspired by Catholic sensibilities. Sorin was by all accounts a faithful and devoted priest.

<sup>25</sup> WACK, *supra* note 19, at 19 (chap. 7); PHILIP S. MOORE, C.S.C., *A CENTURY OF LAW AT NOTRE DAME 2* (1970). Both of these sources cite the *University Catalogue* for 1854-55. There can be little doubt that this plan was grossly premature as one future faculty member wrote to Notre Dame's third president, Father William Corby, C.S.C., in 1867, that Notre Dame was "not successful" as a college, that it was at best a prosperous high school. MOORE, *supra* at 2.

<sup>26</sup> MOORE, *supra* note 25, at 2.

<sup>27</sup> Francis E. Lucey, S.J., *The Story of Georgetown Law School*, 3 *CATH. LAW.* 129 (1957). St. Louis University established the first law school in the United States under Catholic auspices in 1843. However, the school ceased operations in 1847 following the death of Judge Richard Buckner, and did not resume operations again until 1908. See EDWARD J. POWER, *A HISTORY OF CATHOLIC HIGHER EDUCATION IN THE UNITED STATES* 223 (1958). Some texts mistakenly date the beginning of St. Louis University School of Law to 1842. John E. Dunsford, *St Louis - Pioneer Catholic Law School*, 3 *CATH. LAW.* 237 (1957).

<sup>28</sup> HOPE, *supra* note 18, at 151.

<sup>29</sup> *Id.*

Hope is surely correct in that, by hosting a law school, Notre Dame was providing would-be lawyers with a new means of obtaining a legal education—a method that stood in contrast to the training and formation that a young attorney would traditionally have received in the office of an experienced lawyer. His discussion of the founding of the Law School, however, and the institution's subsequent curricular offerings contain little to suggest that legal education at Notre Dame included a distinctive emphasis on the relationship between law and religion.

Likewise, in his single-volume history celebrating the hundredth anniversary of the Notre Dame Law School, Philip S. Moore, C.S.C.,<sup>30</sup> claims that “[i]n its teaching of the positive substantive law” the School did “not differ from other American law schools” but that, as part of a Catholic university, “it ha[d] from its beginning aimed to integrate the teaching of the positive law with a natural law philosophy or to ground its teaching of the positive law in a natural law philosophy.”<sup>31</sup> In support of this contention, Moore cites to the Law School's Bulletin for 1951-1952 stating that “[t]he Natural Law has been an integral part of the training of a Notre Dame lawyer since the first law courses were established in 1869,” and that the School “carries on the basic Natural Law philosophy of the American Founding Fathers and seeks not merely to set forth the abstract concepts of the Natural Law but also to correlate them with the various courses of the Positive Law.”<sup>32</sup>

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<sup>30</sup> Father Moore was a learned medievalist who studied at the Catholic University of America and the Ecole des Chartes in Paris. Moore was instrumental in establishing Notre Dame's acclaimed Institute of Medieval Studies. See HOPE, *supra* note 18, at 453-53, 478.

<sup>31</sup> MOORE, *supra* note 25, at 99.

<sup>32</sup> *Id.* at 100 (citing *Bulletin of the College of Law* 1951-52 at 18). In a similar vein, in an article profiling the School in 1956, Notre Dame faculty member Edward Barrett claimed that “[l]ike its sister ‘Catholic’ law schools, the Notre Dame Law School, since its beginning, ha[d], of course, offered instruction in the traditional Natural Law philosophy of law, and ha[d] remained faithful to this original ‘American Jurisprudence’ through the decades which saw it displaced in the secular law schools, by Positivism, Pragmatism, Materialism, and Relativism.” Edward F. Barrett, *The Notre Dame Experiment*, 2 CATH. LAW. 294, 295 (1956). In his essay, Barrett refers to a one semester, one credit-hour course in “Natural Law” and ponders how the course may have influenced doctrinal classes and the practice of law by graduates of the School. *Id.* at 296. Likewise, Douglas Kmiec, a former faculty member who spent nearly twenty years at Notre Dame Law School, wrote that it “is difficult to fully trace the extent of Natural Law teaching in the law school” back to its origin.

Other commentators have placed greater emphasis on Notre Dame's ability to meet the secular academy's standards. For example, in his essay in the *Notre Dame Lawyer* recalling the Law School's sixty-year history and celebrating the School's then recently dedicated new facility, Dean Thomas Konop makes no mention of the Law School's religious character or special jurisprudential mission.<sup>33</sup> Although Konop cheerfully notes the personality of one of his predecessors,<sup>34</sup> the School's improving admission standards,<sup>35</sup> growing faculty,<sup>36</sup> approval by the American Bar Association's Section on Legal Education and membership in the Association of American Law Schools,<sup>37</sup> he does not mention the School's Catholic identity or how this identity might be reflected in the School's curriculum.<sup>38</sup>

What actually took place in the law school classrooms at Notre Dame since 1869 is, apart from course listings and descriptions, difficult to reconstruct. Indeed, although Moore provides details as to the law courses listed in Notre Dame's *Annual Catalogue* for 1868-1969<sup>39</sup> and 1882-1883,<sup>40</sup> and the Law School's *Bulletin* for 1904-1905,<sup>41</sup> no course mentioned suggests a special interest in or dedication to the teaching of legal philosophy or the traditional understanding of law located within the Catholic intellectual tradition.<sup>42</sup> The closest

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Douglas W. Kmiec, *The Higher Law Background of the Notre Dame Law School*, 37 AM. J. JURIS. 213, 220 (1992).

<sup>33</sup> Thomas F. Konop, *History of the Notre Dame College of Law*, 6 NOTRE DAME LAW. 5, 12-17 (1930) (discussing Dean William "Colonel" Hoynes). A similar description of Dean Hoynes can be found in Hope, *supra* note 18, at 205-07.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 10, 18.

<sup>36</sup> *Id.* at 18.

<sup>37</sup> *Id.* at 18.

<sup>38</sup> Arguably, the only mention of this identity—which, if present is oblique at best—is the fact that the Law School's original faculty included "Rev. E.P. Battista, Professor of Ethics and Civil Law," *id.* at 7, and reference to "Ethics" as a course announced by the Law School in 1870, *id.* at 10, as well as a passing reference to "church services." *Id.*

<sup>39</sup> MOORE, *supra* note 25, at 4.

<sup>40</sup> *Id.* at 19, 21.

<sup>41</sup> *Id.* at 37.

<sup>42</sup> It is, of course, possible to offer students a natural law perspective on the positive law without requiring them to take a course devoted to jurisprudence in general or to the natural law in particular. Nothing, however, in the almost one-hundred pages of Moore's text preceding this statement lends any support to his contention. Moore notes that the courses required for the master's degree in law included a course in "Jurisprudence" in the *University Bulletin* for 1915-16. *Id.* at 28.



is a one-hour, one semester course entitled “Fundamental Law” listed in the 1946-1947 *Bulletin*.<sup>43</sup>

Still, changes in the Law School’s required curriculum did take place with an eye towards satisfying certain pedagogical objectives related to the School’s Catholic identity. These objectives included inculcation of “a deep sense of moral responsibility, a pride in the legal profession and fierce partisanship for justice.”<sup>44</sup> By 1953, under the leadership of Dean Joseph O’Meara, the Law School required students to take not only a first year course in the “History of the Legal Profession,” but a “Natural Law Seminar” in the second year, and a third year course in “Jurisprudence.”<sup>45</sup>

Even before this revision of the curriculum in 1953, however, the explicit orientation of the Law School toward the study of natural law influenced the character of student activities outside of class. For example, the Law School *Bulletin* for 1949-1950 stated that the aim of the *Notre Dame Lawyer* (the legal academic journal published by Notre Dame law students) was “to fulfill the idea of a ‘Christian Law Review’ and express[] the doctrines of the natural law.”<sup>46</sup> Similarly, the *Bulletin* for 1950-1951 listed the “Natural Law Institute,” a forum for the discussion of natural law principles (described in greater detail below),<sup>47</sup> and “Student Natural Law Debates” among the activities sponsored by the Student Law Association.<sup>48</sup>

Notre Dame Law School’s Catholic identity was, on a certain level, conspicuously present from the time it was founded—being, as it was, part of a university named for the Blessed Virgin Mary and founded by an order of Catholic priests from France. Nevertheless, the Law School’s self-identification as an institution with an overtly

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<sup>43</sup> The *University Bulletin* for 1919-1920, MOORE, *supra* note 25, at 58, and for 1929-1930, *id.* at 70, each lists “Legal Ethics” among the Law School’s required courses, a requirement that may have included some jurisprudential component. Regardless of its content, however, ten years later, in 1940-1941, the course was no longer included in the Law School’s offerings. *Id.* at 70-71. *But see* Kmiec, *supra* note 32, at 221 (referring to an unnamed course in the Law School’s 1907 *Bulletin* which listed a course that Kmiec construes as offering a natural law perspective).

<sup>44</sup> MOORE, *supra* note 25, at 119.

<sup>45</sup> *Id.* at 117-119.

<sup>46</sup> *Id.* at 77.

<sup>47</sup> *See infra* notes 352-64, and accompanying text.

<sup>48</sup> *Id.* at 79-80.

Catholic educational mission, reflected in the substance of the School's course of study—and not merely as an ornamental feature of the School's "religious atmosphere"—was a decidedly later development. Indeed, the record suggests that this form of identity did not take place until the 1940s and early-1950s, when the Neo-Scholastic revival was well under way. The changes outlined above in fact constituted Notre Dame's response to the proposal for a distinctively Catholic form of legal education—a proposal that was itself a product of the renewed interest in the thought of Thomas Aquinas that began in the nineteenth century.<sup>49</sup>

As significant as these measures were, however, Notre Dame did not achieve the kind of comprehensive approach contemplated by the proposal according to which Neo-Thomism was to serve as an integrating theme across the curriculum. Moreover, the strides taken in this direction dissipated when the Neo-Scholastic revival lost momentum. Thus, for example, by 1968 Notre Dame replaced the "Natural Law Seminar" in the second year and "Jurisprudence" in the third year with a single course,<sup>50</sup> and in 1969 the *Natural Law Forum*, a periodical at the Law School dedicated to the exploration of natural law, changed its name to the *American Journal of Jurisprudence*.<sup>51</sup>

## 2. Catholic University of America Columbus School of Law (1895)

What is now known as the Catholic University of America Columbus School of Law is, as such a lengthy title would suggest, part of much larger project.<sup>52</sup> The Catholic University of America ("CUA") was the brainchild of Bishop John Lancaster Spalding, of Peoria, Illi-

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<sup>49</sup> See *infra* notes 234-39, and accompanying text.

<sup>50</sup> MOORE, *supra* note 25, at 117, 119, and 146.

<sup>51</sup> John T. Noonan, Jr., *Foreword*, 14 AM. J. JURIS. v (1969).

<sup>52</sup> As the text that follows makes clear, the Catholic University of America School of Law was founded in 1897. In 1954 CUA absorbed the Columbus University School of Law, a school sponsored by the Knights of Columbus, a fraternal Catholic men's organization. CUA's law school was then renamed the "Columbus School of Law" and relocated from the CUA campus to property acquired from Columbus University in downtown Washington, D.C. C. Joseph Nuesse, *The Thrust of Legal Education at the Catholic University of America, 1895-1954*, 35 CATH. U.L. REV. 33, 74-76 (1985); see also *About CUA Law*, available at <http://www.law.edu/about/index.cfm> (giving a brief history of the School).

nois. He proposed the establishment of a national Catholic university at the Third Plenary Council of Baltimore in 1884.<sup>53</sup> Under the proposal the new school would follow the model of German universities as an institution oriented toward research and graduate education, but would be governed by the American episcopate.<sup>54</sup> This goal and the close relationship between CUA and American Catholicism<sup>55</sup> would influence the School of Law at CUA and set it apart from all other Catholic law schools.

CUA's focus was initially theology,<sup>56</sup> but it soon added philosophy and the study of law to its curriculum, together with offerings in the arts and sciences.<sup>57</sup> The School of Social Sciences, established in 1895, included a law department.<sup>58</sup> Three years later, however, a separate School of Law was created both in recognition of law's status as an independent discipline, and as a means of raising the University's prestige.<sup>59</sup>

Keeping with the University's aspiration toward graduate education, the law school focused its energies on graduate legal education<sup>60</sup> by offering master and doctor of laws degrees,<sup>61</sup> in addition to the more practically oriented bachelor of laws degree. This emphasis set CUA apart from other Catholic law schools and was reflected in the school's curriculum which included Roman law, civil law, national legal systems, English and American jurisprudence, and natural law.<sup>62</sup> CUA's identification with the American Catholic hierarchy and

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<sup>53</sup> POWER, *supra* note 27, at 356-59; *see also* PETER GUILDAY, *A HISTORY OF THE COUNCILS OF BALTIMORE (1791-1884)* 236-37 (1932); Nuesse, *supra* note 52, at 36-37 (describing the creation of Catholic University).

<sup>54</sup> POWER, *supra* note 27, at 356, 359; Nuesse, *supra* note 52, at 36.

<sup>55</sup> *See* Nuesse, *supra* note 52, at 39 (noting that the law school's board was uninterested in most facets of the school's life except for "the Catholicity of the faculty"); *id.* at 40-41 (noting University attempts to maintain its Catholic character).

<sup>56</sup> POWER, *supra* note 27, at 363.

<sup>57</sup> *Id.* at 365.

<sup>58</sup> *Id.*; Frederick H. Jackson, *William C. Robinson and the Early Years of the Catholic University of America*, 1 *CATH. U.L. REV.* 58, 58 (1950).

<sup>59</sup> *Id.* at 228; *see also* Nuesse, *supra* note 52, at 36 (1985) (noting that the University's Rector, Bishop John Joseph Keane, considered a law school "an indispensable department of every well organized university").

<sup>60</sup> Nuesse, *supra* note 52, at 43.

<sup>61</sup> POWER, *supra*, note 27, at 228.

<sup>62</sup> Nuesse, *supra* note 52, at 48.

its establishment as a pontifically chartered institution<sup>63</sup> similarly marked the law school as relatively distinct from other schools under Catholic sponsorship. The law school also emphasized its religious mission in faculty hiring, though the University faced significant difficulty in finding qualified Catholic professors.<sup>64</sup>

Emphasis on graduate education *and* on Catholic legal education found a true supporter in the School of Law's first dean, William C. Robinson.<sup>65</sup> As University Rector, Bishop John Keane recruited Robinson from a comfortable position at Yale Law School to oversee the University's School of Social Sciences.<sup>66</sup> Robinson was a convert to Catholicism,<sup>67</sup> and he accepted Bishop Keane's invitation to lead the University's new law department as a vocation<sup>68</sup> despite the many obstacles it presented.<sup>69</sup>

Dean Robinson envisioned Catholic University's law school as primarily a center of advanced legal study<sup>70</sup> with "scholastic philosophy" at its heart.<sup>71</sup> However, like other Catholic law schools, CUA's School of Law repeatedly faced dire financial circumstances that threatened its existence.<sup>72</sup> As a consequence, Robinson was often the law school's only full-time faculty member.<sup>73</sup> More importantly, these financial difficulties pushed the law school to relinquish its graduate orientation and admit more students for the undergraduate LL.B. degree.<sup>74</sup> Although these financial woes continued such that the School of Law was unable to improve the financial condi-

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<sup>63</sup> POWER, *supra*, note 27, at 359.

<sup>64</sup> Nuesse, *supra* note 52, at 40.

<sup>65</sup> For a review of Dean Robinson's life and tenure at Catholic University, see Jackson, *supra* note 58.

<sup>66</sup> Nuesse, *supra* note 52, at 37; Jackson, *supra* note 58, at 58.

<sup>67</sup> See Jackson, *supra* note 58, at 58 (briefly describing Robinson's change from the Methodist Church to his service as an Episcopal minister, followed by his conversion to Catholicism); see also Nuesse, *supra* note 52, at 41.

<sup>68</sup> *Id.* at 58, 60-61.

<sup>69</sup> *Id.* at 58, 60-62 (noting some of the obstacles Dean Robinson faced).

<sup>70</sup> Nuesse, *supra* note 52, at 38, 43-44, 47.

<sup>71</sup> *Id.* at 41.

<sup>72</sup> *Id.* at 41 (explaining the difficulty Dean Robinson had in attracting faculty because of the low salary he was forced to offer); *id.* at 33 ("It is only since 1954, in its third generation, that the school has found materially firmer prospects.").

<sup>73</sup> *Id.* at 50.

<sup>74</sup> *Id.* at 51-53.

tion of the University, by the time that Rev. Robert White began serving as dean in 1937, the ongoing existence of the School was no longer in question.<sup>75</sup>

The succeeding deans from Robinson to Brendan Brown (who assumed the post in 1949) all worked to ensure the School's Catholic character.<sup>76</sup> Indeed, many of the leading proponents of Catholic legal education such as Brown and Walter B. Kennedy, found themselves at the CUA's School of Law for some period of time.<sup>77</sup> Throughout the 1930s and 1940s, CUA was the school that most consistently engaged in a broad-based attempt to implement the call for reform.<sup>78</sup> Writing in 1930, Dean John McDill Fox announced that the School of Law hoped to "stress[] wherever possible Scholastic Philosophy and Neo scholasticism" and to do so in an integrated fashion "rather than segregate the subject matter."<sup>79</sup> By 1958, however, Fox's successor, Dean Vernon X. Miller could only say that while the faculty "do not all think alike on political questions or legal issues . . . they do have in common an appreciation of the profound implications and soundness of Catholic philosophy, particularly as it relates to social questions."<sup>80</sup>

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<sup>75</sup> *Id.* at 66, 76.

<sup>76</sup> See Nuesse, *supra* note 52, at 56 (describing Dean Thomas Carrigan's plan to have students develop a consciousness of the law as Catholics); *id.* at 61 (describing Rector James Hugh Ryan's belief that, with the leadership of Dean John McDill Fox, the Law School would again "be on the road . . . to produce a learned, scholarly, and cultured Catholic bar"); *id.* at 62 (describing Fox's plan of "stressing whenever possible Scholastic Philosophy and Neo scholasticism"); *id.* at 67-68 (describing Dean Rev. Robert White's "Religious Round Table for Law Students and Lawyers that was led each year on a series of Sunday mornings by invited apologists" and his insistence that CUA would ensure "the effective influence of Catholic philosophy and ethics in molding the minds and character of young Catholic men who plan to enter the legal profession"); *id.* at 73 (describing Dean Brendan Brown's decision to enforce the University requirement that Catholic students who did not graduate from a Catholic college take a course in religion); *id.* at 56 (detailing Dean Carrigan's efforts to preserve the school's Catholic identity).

<sup>77</sup> Nuesse, *supra* note 52, at 55, 62.

<sup>78</sup> As we detailed earlier, in Part II.A.1, Notre Dame responded to the reform proposal as well through, for example, its annual natural law symposia.

<sup>79</sup> Nuesse, *supra* note 52, at 62 (quoting a Oct. 16, 1930 letter from Dean Fox to Prof. Joseph Beale of Harvard).

<sup>80</sup> Vernon X. Miller, *The Law School of the Catholic University of America*, 4 CATH. LAW. 333, 337 (1958).

Although the original design for CUA's School of Law was to found a center for graduate legal education dedicated to the philosophical examination of law along Neo-scholastic lines, this vision was not realized. The reasons for this failure included the School's chronic financial problems and the difficulties involved in finding qualified faculty members willing to take up the project.<sup>81</sup> Accordingly, although CUA maintained a somewhat stronger sense of Catholic identity than most of its peers, due to a lack of manpower, CUA was unable to generate the kind of programmatic changes in curriculum and faculty scholarship called for by the proposal.

One reason why CUA was able to maintain a stronger sense of mission than many of its fellow Catholic schools was the influence of Brendan Brown.<sup>82</sup> Brown began teaching at CUA in 1926, and served as the School's dean from 1947-1954.<sup>83</sup> He attempted to move the Law School to embrace a distinctively Catholic identity in a number of ways. For example, Brown was instrumental in establishing the *Catholic University Law Review*, in 1950, which he envisioned as "not just another periodical, but rather the voice of The School of Natural Law Jurisprudence in America."<sup>84</sup> Brown led by example in that his own scholarship exemplified the kind of engagement with the Neo-Scholasticism for which he hoped CUA would become known. Brown also encouraged the growth of the St. Thomas More Society both at CUA and nationally.<sup>85</sup>

Although these efforts were significant, after Brown left Washington, D.C., for Loyola-New Orleans School of Law in 1954,<sup>86</sup> CUA's reform momentum dissipated. As Professor C. Joseph Nuesse neatly summarized in a lecture commemorating Brown, the six decades of

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<sup>81</sup> There is little reason for historian Robert Stevens to dismiss CUA's jurisprudential ambitions as mere "pretense," since he acknowledges that the failure of this proposal was due to the difficulty of attracting qualified instructors and paying them an adequate salary. See STEVENS, *supra* note 7, at 40. Standing alone, failed ambition is not a sign of pretense.

<sup>82</sup> See Nuesse, *supra* note 52, at 72-77 (describing Brown's deanship at Catholic).

<sup>83</sup> OLIVER B. POLLAK, *TO EDUCATE AND SERVE: THE CENTENNIAL HISTORY OF CREIGHTON UNIVERSITY SCHOOL OF LAW, 1904-2004*, at 146 (2007). Brown pursued a doctorate in philosophy at Oxford during the years 1928-1931. Nuesse, *supra* note 52, at 34.

<sup>84</sup> Brendan F. Brown, *Foreword*, 1 CATH. U.L. REV. xiii, xiv (1950); see also Nuesse, *supra* note 52, at 73-74 (describing this event as "Brown's most significant innovation").

<sup>85</sup> Nuesse, *supra* note 52, at 73.

<sup>86</sup> POLLAK, *supra* note 83, at 147.

CUA Law School's existence prior to 1954 were "characterized by the numerous contrasts that they provided between declarations of ideals and lived actualities."<sup>87</sup> The gulf between stated ambitions and lack of permanent success was emblematic of the enormous challenges facing reform proponents across the Catholic legal academy.

### 3. *Fordham University School of Law (1905)*

Fordham University was founded in 1841, and the Society of Jesus assumed administration of the University from the Archdiocese of New York in 1846.<sup>88</sup> The Law School was established in 1905 at the direction of "the University's president, Rev. John J. Collins, S.J., who envisioned Fordham as a major urban university."<sup>89</sup> As this purpose suggests, the primary focus of the Law School was professional excellence, while its Catholic identity was tangential.

Fordham Law School's curriculum, modeled after Harvard's, advanced the school's focal mission by giving its students competence in the day-in-and-day-out law they would practice as lawyers.<sup>90</sup> The curriculum consisted entirely of practical law courses, with the exception of one course entitled "Legal Ethics and Natural Law."<sup>91</sup>

The faculty, like other Catholic law school faculties in their infancy, consisted largely of part-time adjuncts each of whom maintained a full-time practice.<sup>92</sup> The full-time faculty also continued to practice law. All the school's instructors primarily focused on imparting the practical skills their students would need to succeed in the legal market.<sup>93</sup>

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<sup>87</sup> Nuesse, *supra* note 52, at 75.

<sup>88</sup> ROBERT I. GANNON, S.J., *UP TO THE PRESENT: THE STORY OF FORDHAM* 34-37 (1967). A forthcoming book on the history of Fordham Law School has detailed information on Fordham's history. ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* (Fordham University Press forthcoming 2011).

<sup>89</sup> Robert M. Hanlon, Jr., *A History of Fordham Law School*, 49 *FORDHAM L. REV.* xvii, xvii (1980).

<sup>90</sup> *Id.* at xix.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*; see also William R. Meagher, *A Long Association with Fordham*, 49 *FORDHAM L. REV.* xlv, xlv (1980) ("In 1924, when I entered Fordham Law School in the Woolworth Building, it was a part-time school, with a part-time faculty and a part-time student body.").

<sup>93</sup> Lucille P. Buell, *Fordham in the Forties*, 49 *FORDHAM L. REV.* xxxvi, xxxvii (1980).

Like many other Catholic law schools, Fordham began as a night-school serving mostly working-class people aspiring to move up the socio-economic ladder.<sup>94</sup> Because these students often exerted a tremendous effort in order to succeed in their legal studies,<sup>95</sup> this often left them with little time for extracurricular activities that did not practically advance their life goals.<sup>96</sup>

Fordham Law School's drive toward to professional achievement did not preclude the enjoyment of some sense of Catholic identity. The Jesuit administration maintained a fairly firm hand on the school's life.<sup>97</sup> As noted above, the curriculum contained a course on jurisprudence which Father Thomas Shealy, S.J. taught from the natural law perspective.<sup>98</sup> There was also at least one Catholic student group<sup>99</sup> and some religious activities.<sup>100</sup> Perhaps most importantly, Walter B. Kennedy, one of the leaders of the Catholic legal education reform movement, taught at Fordham for many years, exerting significant influence on the school.<sup>101</sup>

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<sup>94</sup> More precisely, it was a late-afternoon school with classes running from 4:30 to 6:30 p.m. See Hanlon, *supra* note 89, at xviii. Another indication of the law school student body's working-class background is the fact that the law school did not require a college degree for admission until 1946. William Hughes Mulligan, *The Fiftieth Anniversary of Fordham University School of Law*, 2 CATH. LAW. 207, 211 (1956).

<sup>95</sup> See Louis J. Lefkowitz, *Evening Classes at Fordham Law School: 1922-1925*, 49 FORDHAM L. REV. xlii (1980) (describing the tremendous sacrifices the author made to succeed in law school).

<sup>96</sup> See *id.* at xlii ("Unfortunately, a student who attended school in the evening had very little time for student or school activities.").

<sup>97</sup> See Hanlon, *supra* note 89, at xx-xxi (relating the process leading to the creation of an evening division which included the University Rector, Father McCluskey's, edict that it occur); see also Mulligan, *supra* note 94, at xxxiv, xxxv (describing the dean as an "absolute monarch by Divine Right").

<sup>98</sup> KACZOROWSKI, *supra* note 88, at 213; Mulligan, *supra* note 94, at 210; see also Buell, *supra* note 93, at xxxvii-xxxviii (stating that the jurisprudence course was "thinly disguised Jesuit philosophy").

<sup>99</sup> See Malcolm Wilson, *Law School at Rose Hill*, 49 FORDHAM L. REV. xxxix, xl (1980) (noting the existence of the St. Thomas Aquinas Sodality).

<sup>100</sup> See *id.* (describing semi-regular "Communion Breakfasts").

<sup>101</sup> One small example of Kennedy's influence is the annual award given in his honor. See Awards Determined Through Essay Writing or Nomination, Walter B. Kennedy Award, at <http://law.fordham.edu/office-of-student-affairs/16978.htm> (visited July 29, 2010).



Although Fordham Law School experienced some financial challenges,<sup>102</sup> these did not significantly threaten the School except during the two World Wars<sup>103</sup> when it nearly closed because of low enrollment.<sup>104</sup> Generally, however, Fordham Law School did well financially.<sup>105</sup> Following the Second World War, Fordham faced the challenge of increased competition from other law schools in New York City, along with increasing costs caused by an inadequate physical plant, more rigorous and expensive accreditation requirements, as well as the continuing diversion of resources by the University, among other issues.<sup>106</sup>

Into at least the late-1950s, Fordham Law School's Catholic identity continued to play some role in the life of the School.<sup>107</sup> For instance, while Fordham gladly hired non-Catholic faculty, it refused to hire nonreligious faculty.<sup>108</sup> Moreover, during this period, two of Fordham's part-time professors were Jesuits who taught the jurisprudence course.<sup>109</sup> Nevertheless, whatever beneficial effect this Jesuit presence and involvement had on Fordham Law School, it was not deemed significant enough for the dean to mention, even in passing, in published remarks celebrating the Law School's centenary.<sup>110</sup>

#### **4. University of San Francisco School of Law (1912)**

Before there was a University of San Francisco, there was St. Ignatius College. Founded as St. Ignatius Academy in 1855 by Father Anthony

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<sup>102</sup> In particular, the University consistently utilized Law School income to fund other aspects of the University. KACZOROWSKI, *supra* note 88, at 241.

<sup>103</sup> See Hanlon, *supra* note 89, at xxvi.

<sup>104</sup> *Id.* at xxii-xxiii.

<sup>105</sup> See Mulligan, *supra* note 94, at 211 (describing the dramatic growth of the law school's student body).

<sup>106</sup> See KACZOROWSKI, *supra* note 88, at 264-319 (describing Fordham's many challenges); see also Hanlon, *supra* note 89, at xxvii (describing the task before Dean Mulligan, in 1956, as "putting Fordham into the ranks of the nationally recognized great law schools").

<sup>107</sup> See Mulligan, *supra* note 94, at 212 (describing the Law School's Fiftieth Anniversary celebration which included an address by John Courtney Murray, S.J.).

<sup>108</sup> KACZOROWSKI, *supra* note 88, at 312. When long-serving Dean Wilkinson died in 1953, Professor George W. Bacon was appointed acting dean, but he could not become permanent dean because he was Protestant. *Id.* at 320.

<sup>109</sup> *Id.* at 336.

<sup>110</sup> Joseph M. McLaughlin, *The Future of Fordham Law School*, 49 *FORDHAM L. REV.* xvii, xlvi-xlvii (1980).

Maraschi, S.J., the school was located in the heart of San Francisco.<sup>111</sup> Granted a charter by the State of California in 1859, St. Ignatius conferred its first bachelor's degree in 1863.<sup>112</sup> With the addition of the schools of law and engineering in 1912, St. Ignatius College became known as the University of St. Ignatius.<sup>113</sup> The name of the institution was changed to the University of San Francisco ("USF") in 1930, on the occasion of the school's diamond jubilee.<sup>114</sup>

The motivation behind the establishment of the USF School of Law was partly a matter of religious identity, partly out of demand from the local community for such an institution, and partly out of a desire to create opportunities that would not otherwise be available to Catholics in the Bay Area. By creating the opportunity for advancement into the practice of law, USF "sought to meet the needs of an urban, middle-class constituency aspiring to professional status."<sup>115</sup> Like many of her sister Catholic law schools founded during this same era, the University of San Francisco School of Law began as an evening school taught by part-time faculty that catered to the local ethnic, immigrant, Catholic community.<sup>116</sup> In San Francisco, this group was predominantly Irish. Indeed, "[t]he St. Ignatius alumni who were involved in the creation of the law school were conscious of their ethnic identity and extremely loyal to the institutions of their Irish-Catholic community."<sup>117</sup>

The School of Law was established in 1912 with Matthew I. Sullivan, later Chief Justice of the California Supreme Court, serving as

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<sup>111</sup> *The University of San Francisco: A Brief History*, available at [http://www.usfca.edu/catalog/usf\\_history.html](http://www.usfca.edu/catalog/usf_history.html).

<sup>112</sup> *Id.*

<sup>113</sup> ERIC ABRAHAMSON, *THE UNIVERSITY OF SAN FRANCISCO SCHOOL OF LAW: A HISTORY 1912-1987*, at 16 (1987).

<sup>114</sup> *Id.* at 34. The name change was in fact the source of some controversy as some Bay Area residents regarded it as an attempt by a "sectarian institution" to appropriate the name of the City in the hopes of obtaining public funds. See JOHN BERNARD MCGLOIN, S.J., *JESUITS BY THE GOLDEN GATE: THE SOCIETY OF JESUS IN SAN FRANCISCO 1849-1969*, at 153-54 (1972). It is unknown whether the author of these remarks recognized the irony of his statement.

<sup>115</sup> *Id.* at 29. Beginning in the late 1880s, "part-time [law] schools began to spring up in cities with heavy immigrant populations." STEVENS, *supra* note 7, at 74. From an early stage, these immigrant groups "saw the importance of both education and law in America as well as the need and advantage of being a lawyer." *Id.*

<sup>116</sup> ABRAHAMSON, *supra* note 113.

<sup>117</sup> *Id.* at 24. Abrahamson also notes that the Irish made up "nearly one-third of the city's population by the late 1880s." *Id.* at 13.

its first dean.<sup>118</sup> He oversaw a group of instructors who practiced law full-time during the day and taught law in the evening. All the men listed in the University's bulletin for 1912-13 as lecturers in law were Catholic, and all but one were "the progeny of Irish parents."<sup>119</sup> Moreover, through the 1910s and 1920s, "[w]ith few exceptions, the students continued to come from Irish-Catholic families—most of them the sons of first- or second-generation immigrants."<sup>120</sup> Even in the years immediately after World War II, which saw an enormous rise in enrollments, fifty-seven percent of USF's law student population remained Roman Catholic, many of whom were natives of the Bay Area and graduates or former students of USF.<sup>121</sup>

With respect to religious identity, many Jesuits believed that the state university system in California, "an institution which had its roots in the Protestant reform movement of the 1850s," worked "to effectively exclude the graduates of Catholic institutions from the university's professional schools by requiring a course in evolution as a standard of undergraduate education."<sup>122</sup> Henry Woods, S.J., a Jesuit at St. Ignatius, argued that preserving the faith of Catholics interested in professional degrees justified the establishment of Catholic professional schools. He warned that the Church had not foreseen "how serious would be the losses incurred by the Church through the attendance of her children at non-catholic professional schools that have in the process of time become positively anti-christian."<sup>123</sup>

The embodiment of what the Jesuits most feared was Benjamin Ide Wheeler, president of the University of California from 1899 to 1919. They regarded Wheeler as a proponent of "rationalistic and atheistic philosophy" who was "not merely indifferent, but also bitterly hostile to revealed religion."<sup>124</sup> Indeed, Father Woods "decided

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<sup>118</sup> *Id.* at 16-17.

<sup>119</sup> *Id.* at 19.

<sup>120</sup> *Id.* at 23.

<sup>121</sup> *Id.* at 68.

<sup>122</sup> *Id.* at 15-16.

<sup>123</sup> *Id.* at 16 (quoting Henry J. Woods, S.J., *The Necessity of Establishing Professional Schools in Connexion with Our Colleges in California*, at 4, 1004-VI, ARCHIVUM ROMANUM SOCIETATIS IESU [hereinafter Woods, *Establishing Professional Schools*]).

<sup>124</sup> *Id.* at 47 (quoting Woods, *Establishing Professional Schools*, *supra* note 123, at 5-6). Although distinct, the tension between Wheeler and the Jesuits of USF

the moral environment at the University of California where coeducation fostered immorality, fraternities parodied the rites of the church, and libraries were full of dangerous books.”<sup>125</sup> Woods recognized the prominent role that lawyers and physicians played in influencing American society. In opposition to the graduates of secular schools, Jesuit institutions would offer the country “a body of professional men and professors imbued with right principles.”<sup>126</sup>

The primary means for forming legal professionals “imbued with right principles” was not curricular. When the School of Law was founded in 1912 “[n]o course in religion, philosophy, or ethics was listed in the law school curriculum.”<sup>127</sup> Instead, a number of Jesuits offered evening classes on ethics and philosophy.<sup>128</sup> Thus, rather than a specific course of study, the method that Woods and his fellow Jesuits believed would produce lawyers qualitatively different from the graduates of secular law schools was the “atmosphere of faith” at the heart of the Jesuit school’s environment—an environment that would “inculcate and support a moral, civically minded, Catholic perspective.”<sup>129</sup>

In the *Bulletin of the School of Law* for 1936-1937, for example, USF stated that the purpose of the School of Law was “to train students in the principles of the Common Law” and also “to break away from an insularity which in America has resulted in lawyers having little legal philosophy not predicated upon the Common Law.”<sup>130</sup>

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seems not unlike the tension between Harvard’s president, Charles W. Eliot, and the Jesuits of Boston College. See BURTCHAELL, *supra* note 8, at 568-573 (describing Harvard Law School’s exclusion of all but one Jesuit school from its list of approved institutions whose graduates would qualify for admission, Eliot’s criticism of the “uniform prescribed education found in the curriculum of the Jesuit colleges” in an *Atlantic Monthly* article, and Boston College president Timothy Brosnahan, S.J.’s response).

<sup>125</sup> ABRAHAMSON, *supra* note 113, at 47.

<sup>126</sup> *Id.* at 48 (quoting Woods, *Establishing Professional Schools*, *supra* note 123, at 8).

<sup>127</sup> *Id.* at 48.

<sup>128</sup> *Id.* (noting that Dennis J. Mahony, S.J., was listed as a “Special Lecturer on Philosophy” in the Law School and the recollection of older alumni of “a Thursday night course in ethics and philosophy, taught by Fathers Foote, Cunningham, and—the great orator himself—Cavanaugh, which was required for all students who were not enrolled in the day program of the college”).

<sup>129</sup> *Id.* at 48.

<sup>130</sup> *Id.* at 51.

This oblique criticism of Legal Positivism reflects the view that the quality that makes a given law authoritative—what renders it binding on the conscience and deserving of respect—is something other than the fact that a sovereign law-making body declared it to be authoritative and binding.

How this view may have influenced the work of faculty and the experience of students in the USF law school classroom is uncertain.<sup>131</sup> Law school historian Eric Abrahamson remarks that, in the early days of the School of Law, in addition to a standard array of doctrinal courses, “Jesuit fathers offered instruction in oratory, logic, psychology, parliamentary law, and ethics.”<sup>132</sup> He also notes that, with the standards and processes of accreditation by the ABA and AALS firmly in place, the “atmosphere of faith” championed by the Jesuits “began to dissipate” and “[t]he influence of the religious community on the curriculum diminished.”<sup>133</sup> If the Jesuit community influenced the curriculum prior to this time, other than by way of the occasional jurisprudence class, however, Abrahamson does not say how.<sup>134</sup>

A 1960 exposé of the School of Law, written by a Jesuit member of the faculty and published in the *Catholic Lawyer*, noted that the USF student bar association sponsors “a semi-annual Communion Breakfast and an annual closed retreat.”<sup>135</sup> More importantly, the article forthrightly states that the School of Law believes that law “has a sacred purpose”<sup>136</sup> and that it “adheres to the Christian principle that the truth shall make men free” and “the equally valid principle” that the truth is not always “knowable.”<sup>137</sup> With respect

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<sup>131</sup> Abrahamson notes that Edward A. Hogan, Jr., dean of USF School of Law from 1939 to 1951, was a critic of the Legal Realists and that he expressed this criticism, in part from a Catholic point of view, in his published work. See Edward A. Hogan, Jr., & Edward C. Menager, S.J., *Philosophy and Legal Thinking*, SAN FRANCISCO Q. (Spring–Summer 1940); Edward A. Hogan, Jr., *St. Thomas More in the World of Today*, SAN FRANCISCO Q. (Winter 1941); Edward A. Hogan, Jr., *The Fifth Decade of Federal Legislation in the Field of Labor Disputes*, 28 GEO. L. J. 343 (1939).

<sup>132</sup> ABRAHAMSON, *supra* note 113, at 34.

<sup>133</sup> *Id.* at 94.

<sup>134</sup> *Id.* (noting that Father Vachon, S.J., “took his LL.B. in the late 1950s and then pursued a masters degree in law while teaching jurisprudence”).

<sup>135</sup> Richard A. Vachon, S.J., *The University of San Francisco School of Law*, 6 CATH. LAW. 221, 222 (1960).

<sup>136</sup> *Id.* at 222.

<sup>137</sup> *Id.* at 223.

to curriculum, the article touts a third-year seminar in Jurisprudence which “demands the active participation of each member of the class in the exhausting work of analyzing the ‘just’ in a going system of law”—a course which builds upon the earlier basic courses in law “in each of which the professor has worried and stirred his students by indicating points of cross-reference between legal theory and philosophical, theological, and ethical problem areas.”<sup>138</sup>

To the extent that this course reflected a genuine effort to provide students with the kind of distinctive Catholic legal education that had been called for in the decades that preceded this article in the *Catholic Lawyer*, it was short lived. “By 1962 USF was apparently like almost any other law school in the country” such that the “atmosphere of faith,” once thought to be the distinguishing feature of Jesuit legal and professional education, “was more elusive.”<sup>139</sup> Although the faculty grew, in 1964 “six of sixteen had degrees from USF” and “[t]he three-to-two ratio of Catholics to non-Catholics remained fairly constant.”<sup>140</sup> While few faculty were truly capable of drawing upon the Catholic tradition in teaching a philosophy of law, the faculty asserted that the School’s Jesuit identity “manifested itself in the large proportion of graduates who turned to careers in the public sector, recognizing the time-honored, Jesuit-inspired value placed on service.”<sup>141</sup>

By the end of the decade Catholics no longer made up a majority of the student body.<sup>142</sup> In 1971, USF decided to conduct a national search for a new dean without regard for the candidate’s religious beliefs.<sup>143</sup> The candidate who was selected, C. Delos Putz, Jr., subscribed to the view that the role of a Catholic law school was not the “inculcation of religious doctrine” but the special obligation to be “socially conscious.”<sup>144</sup>

Given this rather bland understanding of Catholic and Jesuit identity, it is difficult to share in Abrahamson’s conclusion that “to teach

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<sup>138</sup> *Id.*

<sup>139</sup> ABRAHAMSON, *supra* note 113, at 93.

<sup>140</sup> *Id.* at 97.

<sup>141</sup> *Id.* at 94.

<sup>142</sup> *Id.* at 102.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 103.

law in an atmosphere of faith will forever remain a greater challenge than to teach it simply as a trade.”<sup>145</sup> Indeed, such a thin understanding of identity hardly poses any challenge at all since it makes few if any demands on the faculty and administration—the people primarily responsible for carrying the mission of the law school forward. By contrast, it is easy to agree with Abrahamson’s conclusion that USF’s “tradition of faith will always be a part of the law school’s heritage”<sup>146</sup> so long as “heritage” is understood in a strictly historical sense.

### *B. Common Themes Present in the Establishment of Catholic Law Schools*

Abstracting from the specific circumstances surrounding the founding of the four law schools detailed above, and building on the experiences of the twenty-nine law schools that operate under Catholic auspices today, we here briefly summarize the reasons behind the creation of Catholic law schools. These reasons are presented in what we believe is a rough order of frequency and importance. In point of fact, and as one would expect, a plurality of reasons influenced the decision of Catholic university administrators to establish law schools at their respective institutions.

#### **1. To Provide an Avenue for the Advancement of Catholics in American Society**

The most frequently raised purpose served by the founding of Catholic law schools in the United States was to aid the country’s burgeoning, and largely immigrant, Catholic population as its members strove to ascend the ranks of American society. Although Catholics participated in the nation’s founding<sup>147</sup> and were present in the territory of the United States from its inception, particularly in Maryland,<sup>148</sup> it was not until the mid-nineteenth century that the country began to enjoy a significant Catholic population.<sup>149</sup> Begin-

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<sup>145</sup> *Id.* at 119.

<sup>146</sup> *Id.*

<sup>147</sup> See generally, DAVID L. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS* (2006).

<sup>148</sup> See PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 55-61 (1997) (describing the settlement of Maryland).

<sup>149</sup> See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 202 (2002) (describing the impact of mid-nineteenth century Catholic immigration).

ning with the large influx of Irish fleeing the Great Famine,<sup>150</sup> the United States soon hosted unprecedented numbers of Catholic citizens of European extraction, often in concentrated, urban areas.<sup>151</sup> Although the specific sources of Catholic immigration varied throughout the remainder of the nineteenth and early-twentieth centuries, the volume of new arrivals became a veritable tidal wave.<sup>152</sup>

Most Catholic immigrants were people of humble origin who brought few economic resources with them from their home countries.<sup>153</sup> Moreover, the America to which they had ventured was at that time a self-consciously Protestant nation.<sup>154</sup> This meant that much of the culture, habits, and expectations of these new American citizens did not fit well with that of the host nation. It also meant that Catholics were unwelcome in many economic and social settings.<sup>155</sup> These factors led many Catholic immigrants to seek employment in farming and industry.<sup>156</sup>

Public education was not always available to new immigrants and, where it was available, many Church leaders feared exposing the faithful to Protestant influence and secularism.<sup>157</sup> At the same time, Catholics soon recognized that education was the path to socio-

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<sup>150</sup> See KERBY A. MILLER, *EMIGRANTS AND EXILES: IRELAND AND THE IRISH EXODUS TO NORTH AMERICA* (1988).

<sup>151</sup> JOHNSON, *supra* note 148, at 288-89, 303-05.

<sup>152</sup> *Id.* at 513-14, 666-70.

<sup>153</sup> See SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE* 773 (1965) (“[T]he Catholic Church in the United States was one of recent immigrants, and therefore poor.”).

<sup>154</sup> *Id.*; JOHNSON, *supra* note 148, at 40.

<sup>155</sup> MORISON, *supra* note 153, at 481.

<sup>156</sup> William Guthrie, *Migration*, in *THE CATHOLIC ENCYCLOPEDIA* (1911), available at <http://www.newadvent.org/cathen/10291a.htm>.

<sup>157</sup> See JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 7-42 (2003) (describing how use of the King James version of the Bible and the Protestant version of the Ten Commandments in “common schools” in the second-half of the nineteenth century led to “Catholic control of Catholic institutions, as opposed to Catholic participation in state institutions”); see also Orestes A. Brownson, *Catholic Schools and Education*, 3 *BROWNSON’S Q. REV.* 66 (Jan. 1862), reprinted in WALTER A. KOLESNIK & EDWARD J. POWER, *CATHOLIC EDUCATION—A BOOK OF READINGS* 3, 11, 16 (1965) (noting that Catholic bishops and clergy “tell us . . . that, if the children of Catholics are educated in the common schools of the country, they will lose their religion and grow up Protestants, or at least non-Catholics” and urging a reform of Catholic schools that embraces the best of American civilization while preserving orthodoxy and so as to produce “men of large minds, of liberal studies, and generous aims”).



economic advancement in their new homeland. This led Catholic dioceses across the country to create parallel systems of primary and secondary education that stood as an alternative to public schools.<sup>158</sup> It also prompted the members of religious orders to found colleges for men and women who sought the new opportunities for advancement made possible by education.<sup>159</sup> The addition of law schools and other professional degree programs reflected this same pattern of growth. As historian Philip Gleason notes, this trend “represented a response to both the galloping professionalization of one aspect of American life after another, and to the mobility aspirations of American Catholics, increasing numbers of whom perceived the connection between higher education and enhanced life chances.”<sup>160</sup>

## 2. To Support the Academic Reputation and Financial Standing of the Host University

The second most common reason behind the founding of Catholic law schools was the perceived value these schools brought to their

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<sup>158</sup> See PHILIP GLEASON, *The School Question: A Centennial Retrospective*, in KEEPING THE FAITH: AMERICAN CATHOLICISM PAST AND PRESENT 115-135 (1987) (setting forth the context surrounding the decision by the Third Plenary Council of Baltimore mandating the construction of parochial schools at churches and the attendance of Catholic children at those schools).

<sup>159</sup> J.C. FURNAS, *THE AMERICANS: A SOCIAL HISTORY OF THE UNITED STATES 1587-1914*, at 749 (1969); HAMBURGER, *supra* note 149, at 219-29; JOHNSON, *supra* note 148, at 303-05; MORISON, *supra* note 153, at 532. The motives for establishing Catholic colleges changed from colonial times to the period following 1850. “Three motives—seminary preparation, missionary labor, and moral formation—were apparent in the establishment of every pre-1850 Catholic college, although moving from one to another college foundation we find fluctuations in their precedential orders.” POWER, *supra* note 53, at 57. Most of these early schools also tended to be located in “sparsely settled rural surroundings” rather than in urban areas. *Id.* at 60. More than three-quarters of them failed. The great number of these schools exceeded the ability of “a thin, impoverished Catholic population” to support them. *Id.* at 61-62. In the latter half of the nineteenth century Catholics “sensed a need to participate in the mainstream of American life and envisioned the colleges as convenient steppingstones in this desirable direction.” *Id.* at 62. Thus, “from 1860 to 1900 we find Catholic colleges following blazed trails in higher learning and introducing professional and scientific courses to the curriculum, disposing of archaic nomenclatures designating student progress through course of study, and abandoning their secondary school-college affiliations, on the one hand, and their pre-seminary-collegiate and seminary divisions, on the other.” *Id.* at 63.

<sup>160</sup> PHILIP GLEASON, *CONTENDING WITH MODERNITY: CATHOLIC HIGHER EDUCATION IN THE TWENTIETH CENTURY* 96 (1995) [hereinafter GLEASON, *CONTENDING*].

host institutions. This value was of two varieties. First, the leaders of Catholic universities saw the establishment of law schools as a means of enhancing the prestige and academic standing of their institutions. Indeed, as historian Edward Power observes, what Catholic administrators “wanted most of all from the professional schools they encouraged as part of their own administrative and academic structures . . . was the prestige of having their undergraduate curricula associated with the more honorific courses leading to the traditional learned professions.”<sup>161</sup>

Second, Catholic universities frequently saw the addition of a law school as a new source of revenue for the university’s other endeavors. Many Catholic colleges “entered the field of professional teaching when it was fairly easy to do so,” before the establishment of formal standards.<sup>162</sup> Because “legal training was one of the least expensive kinds of professional training . . . Catholic colleges looked over their balance sheets and decided they could afford law schools.”<sup>163</sup> Moreover, even if a law school failed to contribute to the host university’s financial well-being, as was sometimes the case, it could at least sustain itself without taking resources away.<sup>164</sup>

### 3. To Fulfill the Needs of the Local Community and Bar

A less common reason behind the creation of Catholic law schools was the need for more or better trained attorneys. Depending on the state and the specific community in which a Catholic university was located, the creation of a law school may have been a response to the felt need to enhance the legal profession.

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<sup>161</sup> POWER, *supra* note 27, at 205; *see also* TODD F. SIMON, BOSTON COLLEGE LAW SCHOOL AFTER FIFTY YEARS: AN INFORMAL HISTORY, 1929-1979, at 4 (1980) (listing as factors behind the creation of Boston College’s law school, Boston College president Rev. James Dolan, S.J.’s desire for the college to attain real university status by hosting a spectrum of graduate programs, and the fact that former Georgetown president and dean of graduate studies at Boston College, Rev. John Creeden, S.J., was “acutely aware of the prestige a law school brings to a university”).

<sup>162</sup> POWER, *supra* note 27, at 205.

<sup>163</sup> *Id.* at 221.

<sup>164</sup> Nuesse, *supra* note 52, at 76 (noting that even by its fifth decade, when the existence of CUA’s law school was assured, “[i]ts survival . . . did not bring about any significant change in the financial posture of the university”); GANNON, *supra* note 88, at 126 (“Given a good location in a large city, with a good faculty, and a reasonably good library, any law school can take care of itself.”).

For example, the University of San Francisco School of Law was founded not only to give the Irish of San Francisco an opportunity for professional advancement outside of the secularizing influence of the state university. It was also the product of civic-minded San Franciscans interested in eliminating corruption and ensuring professional competence. Thus, the lawyers who helped establish the new USF School of Law were active in “the Mission Relief Association, which fed and sheltered thousands of homeless Mission residents” after the 1906 Earthquake.<sup>165</sup> They supported the reform politics of Mayor “Sunny Jim” Rolph and more generally “the interests of municipal reform, the bar, and the Irish-Catholic community.”<sup>166</sup> The St. Ignatius alumni involved in the creation of the USF School of Law “were often the most active and outspoken champions of the city as a whole and deeply committed to its general growth and development”<sup>167</sup> which included an institution in their community dedicated to the formation of new lawyers. Indeed, these men “established a fraternity and a perspective that not only helped many a young lawyer find work, but powerfully influenced the shape of city government and municipal justice in San Francisco well into the 1960s.”<sup>168</sup>

A concern for the community and the local bar was an even more explicit in the founding of several Catholic law schools other than the four discussed above. For example, Creighton University was founded in 1878 in Omaha, the largest city in the State of Nebraska.<sup>169</sup> Both the city and state were growing quickly, and local leaders saw a need for a more professional bar.<sup>170</sup> Creighton responded by establishing its law school in 1904.<sup>171</sup>

Likewise, the origins of Gonzaga University School of Law can be found in 1912 when “professional legal personnel in Spokane asked

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<sup>165</sup> ABRAHAMSON, *supra* note 113, at 18.

<sup>166</sup> *Id.* at 19-20.

<sup>167</sup> *Id.* at 24.

<sup>168</sup> *Id.* at 20.

<sup>169</sup> For a history of Creighton University, see DENNIS N. MIHELICH, *THE HISTORY OF CREIGHTON UNIVERSITY* (2006).

<sup>170</sup> *Id.* at 78-79.

<sup>171</sup> *Id.*; see also POLLAK, *supra* note 83, at 13-60 (describing the early days of Creighton’s law school, and focusing on the efforts of University President Michael P. Dowling, S.J., and major University benefactor, Count John A. Creighton).

Gonzaga's Jesuit fathers to establish a law school."<sup>172</sup> The concern of these local attorneys was "to satisfy demands of those 'who, owing to day employment or other circumstances, are not in a position to attend institutions away from the City of Spokane.'"<sup>173</sup> These same local lawyers also "[v]olunteer[ed] themselves as teachers" and so became Gonzaga's first law faculty.<sup>174</sup>

Similarly, at Boston College, a large number of alumni "wanted to see the university start a law school."<sup>175</sup> They recognized that in Boston "the only law schools with American Bar Association accreditation were Harvard and Boston University."<sup>176</sup> Since neither of these had a night school, individuals "who had families or who worked" and who wanted to enter the legal profession would have to attend one of the inferior, unaccredited schools in Massachusetts.<sup>177</sup> Accordingly, because the top law schools simply "could not keep up with the demand" for legal education, and because of the enthusiasm among Boston College graduates for such a project, Boston College decided to found a law school that would offer night classes while rigorously observing the standards for accreditation.<sup>178</sup>

In responding to the calls of alumni and civic leaders to establish a law school at their institution, Catholic universities were in a sense responding to market forces. They were demonstrating their dedication to the university's supporters and to the wider community. They were not, however, seeking to promote a jurisprudence inspired by Catholic reflection on law.

#### 4. To Promote a Distinctively Catholic Philosophy of Law

In the United States and around the world, the Catholic Church operates numerous hospitals, schools, and universities. She also runs homeless shelters, refugee services, AIDS hospices and a vast array of other social service organizations.<sup>179</sup> The Church does not

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<sup>172</sup> Guy F. Smith, *Gonzaga University School of Law*, 7 CATH. LAW. 121 (1961).

<sup>173</sup> *Id.* (quoting a university catalogue).

<sup>174</sup> *Id.*

<sup>175</sup> SIMON, *supra* note 161, at 4.

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 4-5.

<sup>178</sup> *Id.*

<sup>179</sup> See United States Conference of Catholic Bishops, *The Catholic Church in the United States at a Glance*, available at <http://www.usccb.org/comm/catholic-church-statistics.shtml> (visited Aug. 4, 2011) (describing the Church's many ministries in the United States).

engage in this sort of work simply to alleviate suffering or satisfy certain practical needs. Nor can the Church's motivation for these projects be reduced to what is only a humanitarian sentiment or philanthropic urge, no matter how laudable. Instead, the Church understands each of these activities as an "apostolate"—a form of work inspired by the Gospel and oriented toward the life of grace.<sup>180</sup>

From this perspective, the founding of Catholic colleges and universities and their attendant law schools was always a corporate religious practice. As such, sponsoring these institutions was ineluctably Catholic. The various religious orders that started these schools did not set to found institutions that eschewed Catholic identity. At the same time, with the exception of the CUA School of Law, the histories recounted above show that Catholic law schools were not founded with the goal of promoting a particular philosophy of law. Although the law schools at Notre Dame, CUA, Fordham, and USF each offered courses in legal philosophy and natural law in their early years, jurisprudence was, at best, a subsidiary concern. The idea of presenting American law in a way that (with few exceptions) was consonant with the Catholic intellectual tradition was taken for granted, while the specific goal of articulating a Catholic philosophy of law was clearly subordinate to the other more practical, demographic, and institutional goals outlined above. Thus, the idea of promoting a Catholic way of thinking about law asserted itself only when it was consistent and not otherwise in tension with these other goals.

Only Catholic University of America had, as its distinct founding mission, education and dissemination of Catholic legal thought. As recounted above, however, practical realities impeded CUA's ability to fulfill its foundational purpose.

### *C. Characteristics of Early Catholic Legal Education*

Although circumstances varied from school to school, certain aspects of Catholic legal education made for a common experience across institutions. These common features are summarized in the following section.

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<sup>180</sup> JOHN A. HARDON, S.J., *MODERN CATHOLIC DICTIONARY* (2000).

## 1. The Pedagogy and Curriculum of Catholic Law Schools

Catholic law schools generally followed the academic trends of their secular counterparts. In practical terms, this meant that Catholic law schools in the late-nineteenth century utilized the traditional lecture method wherein the law teacher delivered a formal presentation on a subject and then quizzed the students on the topics addressed.<sup>181</sup> By the beginning of the twentieth century, Christopher Columbus Langdell's "case method"<sup>182</sup> of instruction had begun to gain wide acceptance in the legal academy, including at Catholic law schools.<sup>183</sup> Although some Catholic schools resisted the case law approach, claiming that it concealed the fallacy of legal positivism<sup>184</sup>—

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<sup>181</sup> Lucey, *supra* note 27, at 131 (describing the original use of the lecture-quiz method at Georgetown and its final elimination by 1933).

<sup>182</sup> For an account of the development of the case law method of instruction at Harvard and its triumphant proliferation throughout the legal academy see STEVENS, *supra* note 7, at 36-39, 51-64; see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 468-72 (3d ed. 2005) (providing an overview of the introduction and spread of the case method).

<sup>183</sup> See, e.g., MOORE, *supra* note 25, at 24-27 (noting that the traditional form of instruction at Notre Dame had been lecture accompanied by quizzes, with the case method introduced, to some limited extent, beginning in the 1890s, but that "[b]y 1905 the case method had won the day"); POWER, *supra* note 27, at 225 (stating that "[b]y the time Georgetown entered the business of legal education, the case-study method was fairly well established . . . [so that] the professors at Georgetown taught their students in the way they themselves had been taught, and this meant using the case method"); ABRAHAMSON, *supra* note 113, at 39-40 (quoting a State Bar of California report complimenting the USF faculty for seeking to apply "the same means of presentation to the case system of study"); Nuesse, *supra* note 52, at 56-57 (quoting Dean Thomas Carrigan's report describing the case method as "the prevalent method of teaching" at CUA in 1915); Hanlon, *supra* note 89, at xviii (stating that Fordham used the lecture method and that students were tested by a "Quiz Master," though soon thereafter the post was abandoned and the case method was introduced); Mulligan, *supra* note 94, at 209 (noting that Professor Ralph Gifford who "had been a student of Ames at Harvard . . . introduced the case system at [Fordham] replacing the "lecture and quiz" method which had originally been employed"); SIMON, *supra* note 161, at 10 (noting that Boston College Law School had a "Harvard flavor" from the day it opened which included the use of "the Langdellian case method of instruction" which even in the 1920s "was still a subject of controversial debate among law teachers").

<sup>184</sup> Cf. Harold Berman, *Secularization of American Legal Education in the Nineteenth and Twentieth Centuries*, 27 J. LEGAL EDUC. 382, 384 (1976) (arguing that "with Langdellian legal education, the older idea that law is ultimately dependent on divine providence, that it has a religious dimension, gradually receded, and . . . has ultimately almost vanished").

that “the law” is whatever the sovereign declares it to be, regardless of content<sup>185</sup>—by the 1920s, nearly all Catholic law schools had adopted it as a method of instruction.<sup>186</sup>

Substantively, Catholic law school curricula were near-carbon copies of their non-Catholic counterparts.<sup>187</sup> One exception to this was the regular offering of a course in jurisprudence. These kinds of courses were dedicated to showing the superiority of the natural law tradition over other conceptions of law, and they were often taught by a priest who belonged to the religious order sponsoring the school.<sup>188</sup>

The presence of these courses is, nevertheless, a source of irony. While these natural law-focused courses could be viewed as a distinguishing feature of Catholic law schools, they could also be seen

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<sup>185</sup> Leonard J. Nelson, III, *God and Man in the Catholic Law School*, 26 CATH. LAW. 127, 131 (1980).

<sup>186</sup> See *id.* at 131-32 (“Although there was strong resistance initially to Langdell’s innovations, American law schools, including the Catholic schools, eventually adopted Langdell’s teaching methods.”); see also Hanlon, *supra* note 81, at xviii (stating that Fordham adopted the case method before 1910); Nuesse, *supra* note 52, at 50-51 (stating that Catholic adopted the case method early in the twentieth century).

<sup>187</sup> For examples of course listings see MOORE, *supra* note 25, at 4, 27-28, 37, 58, 70-71, 93-94; ABRAHAMSON, *supra* note 113, at 34; SIMON, *supra* note 161, at 8 (listing courses); *id.* at 10 (noting that at Boston College “[t]he three year course [of study] was largely copied from the Harvard Law School course”).

<sup>188</sup> See, e.g., ABRAHAMSON, *supra* note 113, at 34 and 48 (referring to ethics and philosophy courses taught by Jesuits); Robert Q. Kelly, *DePaul University College of Law*, 6 CATH. LAW. 287, 289 (1960) (noting that Rev. John Richardson, C.M., had “conducted a course in philosophy of law for all law students” at DePaul for many years); THOMAS M. HANEY, *THE FIRST 100 YEARS: THE CENTENNIAL HISTORY OF LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW 20-21* (2009) (describing the “Logic, Philosophy, and Sociology” course offered from the beginning of Loyola Chicago’s law school and taught by Rev. Edward Gleeson, S.J., and later by Rev. Frederic Siedenbug, S.J., and Patrick Mullens, S.J.); *id.* at 71 (noting that various Jesuits taught jurisprudence in the years following World War II).

No doubt that in many instances these courses had a profound effect on the students who took them. More than thirty years after graduating from law school, Lucille Buell, a 1947 graduate of Fordham and later New York State judge remarked that “[n]o current course in professional ethics can hope to approach an understanding of the moral, ethical, and human values demanded of the legal profession” as the “Jurisprudence” course she took, “a required course, [that] was, in fact, thinly disguised Jesuit philosophy.” Buell, *supra* note 93, at xxxviii. Buell further remarked: “I learnt the tremendous ethical responsibility placed upon the bar and bench and that what I stood for throughout my professional life would affect my community and profession far longer than it would affect me.” *Id.*

as an abdication of the responsibility to be distinctively Catholic. In relegating “the cultivation of Catholic legal thought . . . to the hazardous effect of a course in legal ethics (a course commissioned to communicate the best ideals of Catholic legal philosophy), being handled by a clerical professor of moral philosophy,” Catholic law schools in effect ignored “the best motive” for their creation in the first instance.<sup>189</sup> They neglected the potential influence of Catholic thought on standard doctrinal courses, the “actual classroom instruction in legal principles and techniques” conducted by “a faculty of laymen.”<sup>190</sup>

## 2. The Students and Faculty of Catholic Law Schools

Students at Catholic law schools were predominantly Catholic, though not exclusively so.<sup>191</sup> Like their peers at non-Catholic schools, these students were primarily interested in the opportunities for socio-economic advancement made possible by entry into the legal profession.<sup>192</sup> While the Catholic character of Catholic law schools may have been an attractive feature for some, the most important reason students chose to enroll in these schools was to gain the human capital necessary to become lawyers.

As noted earlier, the creation of Catholic law schools and the attendance of large numbers of Catholics at these schools was a function of Catholics having fewer opportunities for advancement in the profession.<sup>193</sup> It was also due to the fact that most Catholics lacked sufficient human capital to attend elite law schools. For example, in 1921, the ABA only required two years of college work as a standard for admission to an accredited law school, and it did not require three years of college study until 1950.<sup>194</sup>

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<sup>189</sup> POWER, *supra* note 53, at 222.

<sup>190</sup> *Id.*

<sup>191</sup> See, e.g., ABRAHAMSON, *supra* note 113 at (noting that in 1964 “[t]he ratio of three-to-two Catholics to non-Catholics remained fairly constant”); HANEY, *supra* note 188, at 40 (reporting that, according to a student questionnaire, in 1931 74% of students were Catholic, 18% Protestant, and 8% Jewish, and that by 1940 the figures were 67% Catholic, 30% Protestant, and 8% Jewish); *id.* at 53 (reproducing a letter from Law School Dean Francis J. Rooney to President Joseph Egan, S.J., July 10, 1943, noting that “Loyola’s student body has been predominantly Catholic, usually 75% to 80%”).

<sup>192</sup> Nelson, *supra* note 185, at 129-30.

<sup>193</sup> *Id.* at 129.

<sup>194</sup> Robert Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSP. AM. HIST. 493, 507 (1971); see also STEVENS, *supra* note 7, at 172.



By contrast, the entrance requirements of elite schools were more demanding. Harvard began requiring graduation from college as a prerequisite for admission to law school in 1909 followed by Pennsylvania in 1916, Northwestern in 1919, and Stanford, Columbia, Yale, and Western Reserve by 1921.<sup>195</sup> Because most American Catholics were of modest means,<sup>196</sup> the majority of them could not afford the time, expense, and loss of income represented by a four-year college degree making impossible admission to one of these elite schools.<sup>197</sup> Indeed, many continued to work during the day to support themselves and their families such that studying law at night was the only means available for them to become lawyers. Since “immigrant groups early saw the importance of both education and law in America,” it was not by accident that “in the late 1880s part-time schools began to spring up on cities with heavy immigrant populations.”<sup>198</sup> Elite law schools did not offer evening programs, and state schools that aspired to elite status discontinued them, often giving rise to such programs at Catholic and proprietary schools.<sup>199</sup> By the 1930s, schools such as Yale, Columbia and later Harvard began to adopt admissions policies that made their schools even more selective<sup>200</sup> putting these schools even further out of reach for working class Catholics.

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<sup>195</sup> Stevens, *supra* note 194, at 431-32, 498. The latter four schools did not require a college degree if the student had been enrolled in the same university.

<sup>196</sup> Nelson, *supra* note 185, at 130.

<sup>197</sup> See, e.g., William Kelly Joyce, Sr., *The University of Detroit School of Law*, 7 CATH. LAW. 41 (1961) (noting that at Detroit “in a typical year before Pearl Harbor, about one-third of the student body would have had a Bachelor of Arts degree, or its equivalent, and another third would have completed three years of pre-law college work”). It may be that Catholic University was aberrational in this regard. See Nuesse, *supra* note 52, at 46 (noting that “according to a statistical compilation of alumni made in 1933, sixty-eight percent of the first professional degree students entering during Robinson’s deanship [1895-1911] already had college degrees”).

<sup>198</sup> STEVENS, *supra* note 7, at 74.

<sup>199</sup> *Id.* at 79 (discussing how the “Harvardization” of the University of Wisconsin gave rise to Marquette Law School “which traded in ‘practicality’ and served mainly immigrants and the poor” and how the University of Minnesota’s decision to end its night program led to the creation of two proprietary schools and the flourishing of a third). Stevens notes how the requirement of college graduation even affected the elite schools. For example, after Yale began to require two years of college work in 1909-1910 and four years in 1911-1912. Yale’s enrollment dropped precipitously, from 438 in 1908-1909 to 133 in 1914-1915. *Id.* at 106, n. 33.

<sup>200</sup> *Id.* at 160-61.

As one might expect, students at Catholic schools were frequently immigrants or the descendants of recent immigrants, with ethnic surnames from countries that were historically Catholic.<sup>201</sup> Catholic law schools in urban centers also often had fair numbers of non-Catholic students from the lower socio-economic strata of society including women and minorities. Thus, USF proudly claims the first Asian-American member of the California bar as a graduate of the Law School,<sup>202</sup> and Loyola Chicago boasts of granting the first LL.M. degree to an African-American woman.<sup>203</sup> Fordham began admitting women students in 1918<sup>204</sup> whereas Harvard did not begin doing so until 1950.<sup>205</sup> The history of admissions indicates both that Catholic law schools were open and attractive to non-Catholics and that they took seriously their commitment to the advancement of the underprivileged. It also shows that Catholic universities were sensitive to market forces.<sup>206</sup>

Like many of their students, most faculty members at Catholic law schools were also Catholic. They were also often products of the very same law schools where they taught or the undergraduate college with which that school was affiliated.<sup>207</sup> Catholic law schools also sometimes sought to recruit the Catholic graduates of elite law schools to serve as faculty.<sup>208</sup> A number of factors explain these

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<sup>201</sup> See, e.g., Nuesse, *supra* note 52, at 51 (noting that in the early years at CUA “[e]thnically, the students appear to have been predominantly of Irish descent”); ABRAHAMSON, *supra* note 113, at 13-24 (discussing how the Irish of San Francisco played a dominant role in creating, lecturing at, and enrolling in USF School of Law).

<sup>202</sup> ABRAHAMSON, *supra* note 113, at 31 (profiling Chan Chung Wing, class of 1918).

<sup>203</sup> HANEY, *supra* note 188, at 37 (summarizing the career of Edith Sampson who received the LL.M. degree in 1927).

<sup>204</sup> Hanlon, *supra* note 89, at xxiii.

<sup>205</sup> STEVENS, *supra* note 7, at 84.

<sup>206</sup> See W. HUTCHINSON, *THE WOMEN OF FORDHAM LAW 1918-9-1993-4*, at 3 (1995) (noting that Fordham began admitting women in 1918 “[f]or reasons unknown, but likely no more interesting than the rule of simple economics”).

<sup>207</sup> ABRAHAMSON, *supra* note 113, at 97 (noting that, in 1964, still six of sixteen faculty members had degrees from USF).

<sup>208</sup> As noted above, CUA pulled William Robinson away from Yale to serve as the Law School’s first dean. See *supra* notes 65-69, and accompanying text. Other prominent examples of Catholic schools attracting Catholic faculty with degrees from elite institutions include deans Lewis Cassidy, Charles Kinnane, and Edward Hogan at USF, ABRAHAMSON, *supra* note 113, at 41, 51, 60; John Cushing Fitzgerald at Loyola Chicago, HANEY, *supra* note 188, at 35, 57. Boston College had the virtue of location in this regard such that “[m]ost of the first faculty members held law

practices. First, regardless of how scrupulous a man was in his personal religious observance, one could generally expect that someone who was Catholic shared the cultural outlook of which the host university was the embodiment. A truly pious person would see his teaching position not only as a source of income but as a vocation. At a minimum, a school could safely assume that a Catholic who wished to teach at a Catholic school would not mislead students or bring the school into disrepute by teaching in a way inconsistent with Catholic beliefs.

Second, those faculty who were themselves graduates of the law school or its host college had an affinity for the institution. Thus, loyalty to the school and gratitude for the opportunities already received would help ensure a dedicated faculty. Further, the stability and continuity provided by hiring teachers who were also graduates of the school helped to forge an identity, anchoring the school to the past as it made its way moving forward to an uncertain future.

Most Catholic law schools began with only one or two full-time faculty members offering classes in the evening.<sup>209</sup> The bulk of the law school's instructors came from the practicing bar.<sup>210</sup> Many Catholic

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degrees from Harvard." SIMON, *supra* note 161, at 10. These included Cornelius Moynihan and Henry Foley. *Id.* at 10, 13.

<sup>209</sup> See Nuesse, *supra* note 52, at 50 (describing Dean Robinson's challenges recruiting full time faculty).

<sup>210</sup> For example, Loyola Chicago began in 1908 as an evening law school with only two full-time teachers (one of whom was the dean) such that "the great majority of the curriculum was taught by 'lecturers,' part-time faculty members." HANEY, *supra* note 188, at 21. Loyola instituted a full-time day division in 1921. *Id.* at 31. By the early 1920s, the law school had three full-time faculty in addition to the dean. *Id.* at 33. By 1937, it had seven full-time teachers. *Id.* at 43. USF School of Law began in 1912 as an evening program. It did not have any full-time law faculty or a daytime law program of instruction until 1931. ABRAHAMSON, *supra* note 113, at 39. In 1932, Boston College Law School had four full-time faculty in compliance with the ABA standards for accreditation. SIMON, *supra* note 161, at 12. At Boston College in 1929, "[a]part from the dean's post, there was only one full-time faculty member." *Id.* at 7. Boston College began as an evening school to give students a chance to obtain a degree from a law school affiliated with four-year college. *Id.* at 5. Although the idea of discontinuing the evening section surfaced when William Kenealy, S.J., became dean and when the school moved into its new building, it was not dropped until 1963. *Id.* at 24, 33, 38. During the early years of CUA, "the dean was often the only full-time professor." Nuesse, *supra* note 52, at 50. Duquesne Law School began in 1911 as an evening school, while a day division was not established until 1958. Edward F. C. McGonagle, *Duquesne University School of Law*, 6 CATH. LAW. 137, 138, 140 (1960); see also Warren P. McKenney, *Santa Clara University College of Law*, 5 CATH. LAW. 61 (1959) (noting that Santa

law schools that pursued the goal of a Catholic faculty faced the challenge of finding qualified teachers.<sup>211</sup> As historian Edward Power notes:

Frequently this meant appointing non-Catholic teachers to the law faculty and then living with the anomaly intrinsic in such a practice: the school was founded, all the announcements said, to teach law in the Catholic tradition of equity, justice, and humaneness, in other words to promote a Catholic philosophy of law and graft it to the precedents from the case books; but in its day to day operations the school's character was determined by its wisest and most prominent teachers who were hardly ever equipped either intellectually or emotionally to carry out this commission.<sup>212</sup>

The problem was perhaps most acute at Catholic University of America, in part because CUA had adopted a formal policy that provided that “[o]rdinarily, the professors shall be Catholics” and that non-Catholics who are hired “should make a formal promise, as men of honor, not to antagonize in any way the doctrines of the Church.”<sup>213</sup> The difficulty in finding suitable faculty led CUA's dean, Robinson, to propose “that priests be trained for faculty positions” since qualified laymen would be able to command a salary far greater than the law school could afford to pay.<sup>214</sup>

In fact, one distinguishing feature of many Catholic law schools was that at least one faculty member was a priest, typically a member of the religious order that sponsored the host university. Although many of these men did not possess an American law degree, they made use of their training in philosophy or theology in teaching jurisprudence courses.<sup>215</sup> In addition, it was the “custom in Jesuit universities” that “[w]hen a college or school within the university

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Clara began as an evening school in 1912, but “was reorganized as a full-time day school” in 1929).

<sup>211</sup> Nuesse, *supra* note 52, at 45 (quoting CUA rector Bishop Keane that “the Medical and Law Schools of Georgetown are not really Catholic in the personnel of their faculty”).

<sup>212</sup> POWER, *supra* note 27, at 222.

<sup>213</sup> Archives of the Catholic University of America, Keane Papers, School of Philosophy (second draft of the faculty senate committee's report on the organization of new schools), *cited in* Nuesse, *supra* note 52, at 40, n. 31.

<sup>214</sup> Nuesse, *supra* note 52, at 50.

<sup>215</sup> Regrettably, these teachers' unfamiliarity with the details of American law meant that their jurisprudence courses were relatively abstract and not tailored to American law or legal practice.

had a lay person as dean, the regent acted as an intermediary.”<sup>216</sup> Jesuits who served in this administrative capacity often wielded enormous influence in the governance of the law school.<sup>217</sup>

### 3. The Cultural Life of Catholic Law Schools

Perhaps more than any other characteristic, the religious atmosphere of Catholic law schools distinguished them from their non-Catholic peers. This atmosphere was evident in several ways. Christian symbols and iconography, such as crucifixes, images of St. Thomas More and St. Ives, were commonplace. When they first began, most Catholic law schools occupied space in an office building that was near the courts and law offices of the host city.<sup>218</sup> Thus, the architecture of their facilities did not reflect a particular religious identity. When universities subsequently constructed new buildings to house their law schools on campus, they often incorporated a religious aesthetic into the design.<sup>219</sup>

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<sup>216</sup> SIMON, *supra* note 161, at 5.

<sup>217</sup> See, e.g., ABRAHAMSON, *supra* note 113, at 42-45 (discussing the struggle between the regent, Rev. Raymond Feely, S.J., and USF Law School dean Lewis Cassidy, resulting, ultimately, in the latter’s dismissal); *id.* at 38-39 (noting that, as regent, Rev. Charles Carroll, S.J., was responsible for hiring full-time faculty, soliciting donations, instituting a day program, and admitting women); SIMON, *supra* note 161, at 5 (stating that former Georgetown president, Rev. John Creeden, S.J., served as Boston College Law School’s first regent); HANEY, *supra* note 188, at 31 (describing Loyola Chicago’s Law School regent, Rev. Frederic Siedenburger, S.J., as the person who inspired the establishment of a day division and the addition of full-time faculty, the creation of new facilities, and the diversification of the student body).

<sup>218</sup> See, e.g., Mulligan, *supra* note 94, at 210-11 (picturing Fordham Law School’s prior locations in the Woolworth Building and at 302 Broadway); SIMON, *supra* note 161, at 5, 14, 21 (picturing Boston College School of Law’s prior locations at 11 Beacon Street, 441 Stuart Street, and 18 Tremont Street); HANEY, *supra* note 188, at 6, 35 (picturing Loyola Chicago School of Law’s prior locations in the Ashland Block and at 28 N. Franklin Street); ABRAHAMSON, *supra* note 113, at 12 (picturing USF Law School’s original location at Seventh and Market Streets); McGonagle, *supra* note 210, at 138 (noting that Duquesne Law School “hop-scotched about Pittsburgh” from 1911 until 1932 when it settled in “the Fitzsimons Building in the very heart of the business district of Pittsburgh’s Golden Triangle”).

<sup>219</sup> See MOORE, *supra* note 25, at 72-74 (photograph and description of Notre Dame’s gothic-style Law School building from 1930); SIMON, *supra* note 161, at 32-33 (picturing the then new Boston College Law School building near the main campus, St. Thomas More Hall, dedicated in 1954); Harold Gil Reuschlein, *Villanova—Newest of the Catholic Law Schools*, 3 CATH. LAW. 15, 20-21 (1957) (picturing and describing Villanova Law School’s new modern-gothic home in Garey Hall including statues of St. Ives and St. Thomas More). Of course some Catholic law schools con-

As noted above, students were predominantly Catholic, though not exclusively so.<sup>220</sup> Still, the fact that many students shared a common theological and cultural outlook<sup>221</sup> meant that they also enjoyed a foundation for learning. Moreover, the schools often hosted regular religious services. These ranged from Masses offered at the beginning of the school year and during the school week, to a formal convocation at the beginning of the academic year, to annual retreats and other seasonal devotional practices.<sup>222</sup> Students themselves also initiated groups with a religious focus that related to their lives as students, such as the group dedicated to St. Thomas Aquinas at Fordham,<sup>223</sup> or the study of the law, such as the societies and clubs

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structured new facilities and failed to incorporate a religious aesthetic into the architecture. See McKenney, *supra* note 210, at 61-63 (picturing and describing Santa Clara College of Law's Bergin Hall); Mulligan, *supra* note 94, at 213 (depicting the then proposed Fordham Midtown Center).

<sup>220</sup> See, e.g., ABRAHAMSON, *supra* note 113, at 97 (noting that in 1964 "[t]he three-to-two ratio of Catholics to non-Catholics remained fairly constant"); HANEY, *supra* note 188, at 53 (reproducing letter from Law School Dean Francis J. Rooney to President Joseph Egan, S.J., July 10, 1943, noting that "Loyola's student body has been predominantly Catholic, usually 75% to 80%").

<sup>221</sup> See Kenneth L. Woodward, *Memories of a Catholic Boyhood: Growing Up in the Parallel Culture of the Church in the 1950s*, FIRST THINGS MAGAZINE (April, 2011) (describing 1950s Catholicism as a "vast parallel culture").

<sup>222</sup> Vachon, *supra* note 135, at 222 (referring to USF Law School's "semi-annual Communion Breakfast and an annual closed retreat"); *Boston College Law School*, 4 CATH. LAW. 153, 156 (1958) ("A regular spiritual program conducted by the student St. Thomas More Society includes an annual retreat, periodic talks and the daily rosary under the guidance of Father John A. Tobin, S.J."); Dunsford, *supra* note 27, at 239 (noting that "the Reverend Carroll M. Boland, S.J., student counselor, is available throughout the semester to advise the students on personal problems, and closed retreats at Hazelwood, the Jesuit retreat house near St. Louis, are offered to the Catholic students"); Smith, *supra* note 172, at 124 (discussing Gonzaga's first Red Mass); Joyce, *supra* note 197 at 44 (discussing Detroit's revival of the Red Mass); McKenney, *supra* note 210, at 62 (referring to Santa Clara's quarterly Communion Breakfast on the university campus "where lectures are given by prominent Catholic lawyers and members of the clergy concerning the application of Christian philosophy to current legal problems"); Miriam T. Rooney, *Seton Hall University School of Law*, 5 CATH. LAW. 305, 308 (1959) (stating that at Seton Hall "each class is begun with the recitation of the Lord's Prayer; each academic year is begun with a Mass invoking the assistance of the Holy Spirit; and at all times spiritual guidance is available through the presence of the Very Reverend Regent, Monsignor Thomas R. Reardon, in his office at the Law School each day"); Lucey, *supra* note 27, at 135 (stating that annual retreats, and Mass and Communion breakfasts have been hosted at Georgetown at least since the 1920s).

<sup>223</sup> Wilson, *supra* note 99, at xl.

dedicated to St. Ives or the St. Thomas More Society at various schools.<sup>224</sup>

### III. THE CRISIS OF IDENTITY IN CATHOLIC LEGAL EDUCATION: THE PROPOSAL FOR A DISTINCTIVELY CATHOLIC LAW SCHOOL

#### A. *The Social and Intellectual Context of the Proposal*

In 1930, Catholic universities could boast of sponsoring twenty-one law schools throughout the United States.<sup>225</sup> As the representative histories of the four Catholic law schools provided above make clear, these schools were not founded for the purpose of correcting some perceived defect in the legal education offered by secular schools so much as for providing a nurturing environment in which the children of Catholic immigrants could pursue their professional ambitions. These schools also provided a measure of academic prestige and a welcome source of revenue for their host institutions.

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<sup>224</sup> See, e.g., Joyce, *supra*, note 197, at 44 (discussing “a student-operated housing unit . . . appropriately named the Inn of St. Ives”); Antonio E. Papple, *The Law School of Loyola University, New Orleans*, 5 CATH. LAW. 219, 222-223 (1959) (referring to Loyola New Orleans’ St. Thomas More Law Club and “the St. Ives law sodality open to all Catholic students in the School of Law”); James N. Castleberry, Jr., *St. Mary’s University School of Law*, 6 CATH. LAW. 49, 50 (1960) (referring to the St. Thomas More Club at St. Mary’s); Kelly, *supra* note 188, at 289 (mentioning the image of St. Thomas More in the chapel where DePaul’s Law School is located and the annual celebration of the Red Mass); Vincent F. Vitullo, *Loyola University School of Law—Chicago*, 7 CATH. LAW. 305, 306 (1961) (discussing the original hand-carved statue of St. Thomas More given to the law school by the Student Bar Association); Owen G. Fiore, *Loyola University School of Law*, 9 CATH. LAW. 219, 221 (1963) (noting that “the St. Thomas More Law Society is active at Loyola and has recently presented several programs designed to emphasize the importance of professional responsibility in a lawyer’s career”); McKenney, *supra* note 210, at 62 (noting that the St. Thomas More Society was established during the 1955-56 academic year at Santa Clara).

<sup>225</sup> Paul L. Blakely, S.J., *Fifty Catholic Professional Schools*, AMERICA, March 29, 1930, at 599 (listing the twenty-one Catholic law schools). Some of these schools did not continue into the 1940s. Xavier University in Cincinnati once hosted a School of Law that no longer exists. The University of Dayton School of Law opened in 1922 and closed in 1935, only to reopen again in 1974. Similarly, the University of St. Thomas in St. Paul, Minnesota operated a law school from 1923-1933, and reopened the school again in 2001.

By 1930, however, the world was a vastly different place from the one in which these schools had been founded. The Great War had come to pass and with it a savagery and blood-letting previously thought unimaginable.<sup>226</sup> Bolshevism was no longer merely a theory but the sole ruling power in Russia,<sup>227</sup> while Fascism was on the rise in Europe.<sup>228</sup> The world economy had collapsed in the Great Depression demonstrating the interdependence and fragility of modern capitalism.<sup>229</sup>

In the American legal academy, Legal Realism was ascendant, exerting a growing influence on the national conversation concerning the source and nature of law. Although a complex phenomenon that does not lend itself easily to summary, at a broad level of generality “Legal Realism”<sup>230</sup> may be described as a movement among

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<sup>226</sup> See, e.g., JOHN KEEGAN, *THE FIRST WORLD WAR* (2000).

<sup>227</sup> See, e.g., ROBERT GOLDSTON, *THE RUSSIAN REVOLUTION* (1966).

<sup>228</sup> R.R. PALMER, *A HISTORY OF THE MODERN WORLD 800-16* (1960).

<sup>229</sup> See, e.g., ROBERT S. McELVAINE, *THE GREAT DEPRESSION: AMERICA 1929-1941* (1993).

<sup>230</sup> The meaning and significance of this label is contested as is the composition of the group and its status as a “movement” or “school of thought” in American jurisprudence. This was a point discussed by the Realists themselves. See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) (insisting that “[t]here is no school of realists.”); see also WILLIAM L. TWining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973) (stating that that Legal Realism was akin to the Bloomsbury Group in that it “consisted of a loosely integrated collection of interacting individuals, with a complex network of personal relationships and an almost equally complex family of related ideas, given some coherence, perhaps, by a shared dissatisfaction, not always properly diagnosed, with the existing intellectual milieu of law in general and legal education in particular”); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 169 (1992) (“Legal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood.”); ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 77 (1998) (“[I]t is difficult to discuss realism because it is difficult to define who the realists were and when they wrote.”); Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 733 (2009) (arguing that “beneath the label there was nothing distinctive—nothing unique or unifying—about the Legal Realist[ ]” label); Wilfrid E. Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORNELL L. REV. 986, 988 (1980) (arguing that “one can discern certain tendencies in the work of men generally acknowledged to be legal realists”). Contemporary Catholic legal scholars recognized the multifarious nature of Legal Realism. See, e.g., Walter B. Kennedy, *Realism, What’s Next?*, 7 FORDHAM L. REV. 203, 203 n.2 (1938) (“As the years go by, it is becoming increasingly evident that realism, the leftist movement in the law, is itself divisible into left, center, and right groups.”).



a group of legal scholars at the nation's elite law schools who "challenge[d] a picture of America law as an integrated system of abstract, relatively static, legal principles that were applied by the courts to decide cases."<sup>231</sup> In place of the "Formalism" of prior generations, the Realists saw the law not as neutral, but as a political choice, lacking true analytical rigor and often indifferent to logic. They saw legal rules as indeterminate, requiring judges to exercise discretion in the resolution of individual cases as a matter of course. Eschewing and even ridiculing the metaphysics of ages past, the Realists championed the pragmatic resolution of legal problems by making use of the emerging social sciences.<sup>232</sup> In exercising their discretion, Realists urged judges to mold the law into conformance with the changed circumstances of a modern, urban, industrial society.<sup>233</sup>

At the same time, Catholic intellectual life the world over was enjoying a renaissance. Neo-Scholasticism or Neo-Thomism<sup>234</sup> was a

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<sup>231</sup> TWINING, *supra* note 230, at 36 (describing specifically the work of Author Linton Corbin and Walter Wheeler Cook).

<sup>232</sup> See generally, STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* (2000); JAMES HERGET, *AMERICAN JURISPRUDENCE 1870-1970* (1990). For what may be the best narrative account of the rise of Legal Realism and the response it engendered see EDWARD A. PURCELL, JR. *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* (1973).

<sup>233</sup> See Horwitz, *supra* note 230, at 187 ("All Realists shared one basic premise—that the law had come to be out of touch with reality.").

<sup>234</sup> The terms are often used interchangeably. Strictly speaking, "scholasticism" refers to the method employed by the thirteenth century theologians at the universities of Paris, Oxford, and Cologne in framing, discussing, and resolving disputed issues in theology. See GERALD A. MCCOOL, *THE NEO-THOMISTS* 3-4 (1994) [hereinafter MCCOOL, *NEO-THOMISTS*]. "Neo-Scholasticism" refers to the nineteenth century revival in the thought of a number of medieval thinkers including St. Bonaventure, Duns Scotus, William of Ockham, St. Albert the Great, and St. Thomas Aquinas. See GERALD A. MCCOOL, S.J., *NINETEENTH-CENTURY SCHOLASTICISM: THE SEARCH FOR A UNITARY METHOD* 243 (1977) [hereinafter MCCOOL, *SCHOLASTICISM*] (noting that there is "in reality an unbridgeable diversity" between the thought of Aquinas, Bonaventure, and Duns Scotus that is not appreciated in Leo XIII's encyclical *Aeterni Patris*). The proponents of Neo-Scholasticism "wanted to bring back to life . . . a philosophy and a scientific method which they considered to be the common property of all the mediaeval scholastics and of their successors in the scholastic revival before and after the Council of Trent." MCCOOL, *NEO-THOMISTS*, *supra*, at 33.

"Neo-Thomism," by contrast, refers more narrowly to the nineteenth century effort to recover the authentic thought of St. Thomas Aquinas. The goal of this recovery was not a mere replication of the Middle Ages. Rather, the proponents of Neo-Thomism "envisioned the creation of a contemporary philosophy which, while taking its inspiration from the wisdom of the Angelic Doctor, would make its own

movement begun in Europe that was part of the revival of Catholic intellectual life and culture in the wake of the devastating effects of the French Revolution and the Napoleonic Wars. The aim of this movement in philosophy and theology was the recovery of the thought of St. Thomas Aquinas and the application of Thomas' thought to the modern world.<sup>235</sup> Although it was well underway by 1850, in 1879 Pope Leo XIII gave the revival of Thomism the prestige of pontifical endorsement in his encyclical *Aeterni Patris*.<sup>236</sup> With this encyclical "[t]he highest authority in the Catholic Church . . . directed her official institutions to effect their apostolic approach to the modern world through the rediscovery, purification, and development of St. Thomas' philosophy and theology."<sup>237</sup> Soon, Neo-Scholasticism began serving as the intellectual center and unifying force in Catholic colleges and universities.<sup>238</sup> By the first-half of the twentieth-century it was promoted as "the most appropriate cognitive foundation for the culture of a whole society, with natural law playing an especially important role in the culture-shaping process."<sup>239</sup>

Catholic legal scholars utilized the resources offered by the Neo-Scholastic revival to evaluate and constructively criticize Legal Realism. The dominant theme running throughout Catholic commentary was that Legal Realism was substantively wrong in many of its basic claims, and that its errors could be corrected only by embracing the

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contribution to the integration of European culture." McCool, *NEO-THOMISTS*, *supra*, at 2. "Neo-Scholasticism" was often used by proponents of the reform of American Catholic legal education when in fact they meant "Neo-Thomism" since in Catholic legal academic circles interest in medieval philosophy, as it related to law, usually did not extend beyond St. Thomas.

<sup>235</sup> McCool, *THE NEO-THOMISTS*, *supra* note 234, at 1; see also Russell Hittinger, *Introduction to* HEINRICH A. ROMMEN, *THE NATURAL LAW* XXIV (1998) (describing the "two main traits" of Neo-Thomism as, first, "scholarly attention to the original texts, which in turn led to fresh interpretations of the premodern natural law traditions," and second, "a lively interest in making the old traditions relevant to contemporary political and legal problems").

<sup>236</sup> POPE LEO XIII, *ENCYCLICAL LETTER AETERNI PATRIS* (1879), available at [http://www.vatican.va/holy\\_father/leo\\_xiii/encyclicals/documents/hf\\_l-xiii\\_enc\\_04081879\\_aeterni-patris\\_en.html](http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_04081879_aeterni-patris_en.html).

<sup>237</sup> McCool, *SCHOLASTICISM*, *supra* note 234, at 236.

<sup>238</sup> See Fayette Breaux Veverka, *Defining a Catholic Approach to Education in the United States, 1920-1950*, 88 *REL. EDUC.* 523, 525 (1993) ("Catholic educators throughout this period were united in their conviction that Catholicism's scholastic intellectual tradition represented a unique and definitive perspective on education.").

<sup>239</sup> GLEASON, *CONTENDING*, *supra* note 160, at 119-120.

natural law tradition. For example, building on the work of St. Thomas and responding to the Realist claim that law is the result of political choice, Brendan Brown argued that natural law was distinct from positive law and that, to the extent positive law corresponded with natural law, it was neutral and objective.<sup>240</sup>

In this new intellectual and social environment, Rev. Paul Blakely, S.J., an editor in the Jesuit magazine *America*, could confidently write that there was a “need” for Catholic law schools that could be “discerned in the replacement of objective ethical and moral standards by purely subjective norms, which, in practice, meant that anything is licit which is not explicitly banned by statute.”<sup>241</sup> He bemoaned the fact that leading American law schools now promoted a “mongrel Hegelianism which makes the citizen little better than a pawn in the game of politics and which, logically, rejects the proposition that the individual has any rights whatever.”<sup>242</sup>

Writing at the same time, Rev. Linus Lilly, S.J., the regent at the St. Louis University School of Law, saw the merits of a Catholic law school as primarily religious. Such a school, he said, provides “[t]he stimulus of Catholic environment and the guidance of Catholic faith” such that “Catholic practices may be best encouraged and the spirit of Catholic loyalty best maintained.”<sup>243</sup> At the same time, Lilly asserted that a student at a Catholic law school would “learn that human enactments derive their force from the eternal law which the Author of nature has written in the hearts of men.”<sup>244</sup> Having been given “the firm and reliable foundations of genuine legal knowledge,” the graduate of a Catholic law school could then contribute to society as “a competent lawyer, a good citizen, a loyal Catholic, and a noble man.”<sup>245</sup>

Writing a year later, also in *America*, Rev. Francis Shalloe, S.J., defended Catholic legal education by quoting Chesterton who quipped that “[t]here is a Catholic way of teaching the ABC’s.”<sup>246</sup> The corner-

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<sup>240</sup> Brendan F. Brown, *Natural Law and the Law-Making Function in American Jurisprudence*, 15 NOTRE DAME L. REV. 9, 9, 13 (1939).

<sup>241</sup> Blakely, *supra* note 225, at 600.

<sup>242</sup> *Id.*

<sup>243</sup> Linus A. Lilly, S.J., *The Catholic Law School*, AMERICA, April 12, 1930, at 18.

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> Francis J. Shalloe, S.J., *Why Catholic Law Schools?*, AMERICA, June 13, 1931, at 233.

stone of all legal education is a "definition of law" and the source of this definition may be "Aquinas, perhaps, or Suarez, or Bellarmine," or it may be "Kant, or Spencer, or Hobbes, or Spinoza."<sup>247</sup> The difference that Catholic legal education provides is "in the course of jurisprudence where it touches and establishes an objective standard of right and wrong."<sup>248</sup> The difference can also be found in the actual classroom discussion of cases whether the subject be charitable trusts, the invocation of the statute of limitations to avoid a known debt, or divorce. "Where else can [a law student] be expected to learn a true philosophy of law, a Catholic sense in his work, a Catholic knowledge of his duties and the law of his Church? All these things are not taught in the school where he learns only the technicalities of civil law."<sup>249</sup>

Also writing in 1931, William Moyles noted the proliferation of law schools and the growth of the legal profession and the various palliative measures suggested "for the alleged moral and mental bankruptcy of the bar and of the students."<sup>250</sup> For Moyles, however, "[t]he fundamental cause of existing difficulty is the law school itself, its theory of jurisprudence and its curriculum."<sup>251</sup> Whereas the "[t]he theory of jurisprudence most generally accredited in non-sectarian law schools is sociological, pragmatic, and materialistic," the proponents of an "ethical" theory of jurisprudence "are found mostly in the Catholic law schools."<sup>252</sup> While the sociological approach "totally disregards and rejects the theory of natural right, and moral responsibility to a Supreme Being" contrary to "the letter and spirit of our Constitution and institutions," the ethical approach "is based on an appreciation of the spiritual, an acceptance of Divine sanction, of natural law, of moral responsibility, and fundamental principles of morality" consonate with the intent of the American Founders.<sup>253</sup> As such, Catholic law schools "have a very real vindication for their existence, and a very solemn and important duty to perform."<sup>254</sup>

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<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 234.

<sup>250</sup> William P. Moyles, *Our Law Schools*, AMERICA, Cot. 3, 1931, at 616.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 617.

The jurisprudential rationale for Catholic law schools that Blakely, Lilly, Shalloe, and Moyles announced soon became the dominant theme in public discussion concerning the vision of Catholic legal education. Catholic legal scholars riding the Neo-Scholastic wave, discussed below, recognized that the challenges presented by Legal Realism, and the new social and political order taking shape in a world heaving with change, called for more than a reiteration of natural law theory—it called for a change in pedagogy.

*B. The Proposal for Reform: Connor, Brown, and Clarke*

The clarion call for providing “a program whereby something like a distinctly Catholic Law School [might] be established”<sup>255</sup> came from James Thomas Connor, dean of the Loyola University School of Law in New Orleans. Writing in the *Catholic Educational Review* in 1938, Connor began by noting the “well-founded suspicion” that law schools in general “are not producing the kind of lawyers that [they] . . . should develop” and questioning whether Catholic law schools in particular “are properly fulfilling their duty and obligation” to educate their students.<sup>256</sup> For Connor, the critical atmosphere of the day, in which so many traditional legal principles had been “threatened with extinction,” presented an opportunity

for a school of Catholic Lego-Philosophical thought i.e., a restatement of Scholastic Philosophy in the light of modern development in the positive law, to supply a criterion and a standard of value to guide those who are making an attempt to delve into the philosophy of the positive law.<sup>257</sup>

Although Connor discerned the advantages of reorganizing the standard case materials “with a view of giving them a distinctive Catholic philosophical background,” he also saw such an approach as “uneconomical and virtually impossible of attainment.”<sup>258</sup> The standard subjects would still be taught so as to produce competent graduates capable of passing the bar examination and entering the legal profession. Instead, Connor suggested that Catholic law schools retain faculty who would be “equipped and disposed to inject into [their] lectures a sound and consistent exposition of the true norm of

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<sup>255</sup> Connor, *supra* note 10, at 161.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 162.

morality and to emphasize that . . . the parties act from a sense of moral responsibility and not from a fear of the state militia.”<sup>259</sup> A faculty member “well grounded in his Christian ethics and his faith” would be well disposed to give an answer to the positivist claim that “[t]here are no rights except *legal* rights” and that “might is right!”<sup>260</sup>

In order to provide students with a thorough grounding in the scholastic analysis of law, Connor believed that they needed more than a discussion of natural law principles in doctrinal classes. Thus, in addition to the standard curriculum, he recommended that Catholic law schools devote, as a prerequisite to graduation, “a minimum of five hours . . . to specific courses in the Philosophy of Law some time after the first year.”<sup>261</sup>

He did not suggest that Catholic law schools ignore the challenges presented by Legal Realism.<sup>262</sup> On the contrary, Connor recommended that these class hours “be devoted to a consideration of the various schools which have had some currency in any age of the law” but that they should then be “round[ed] off with an apologia for the need of and the adequacy of scholastic principles in any attempt to interpret and understand the function of the Positive Law.”<sup>263</sup>

Connor plainly saw the burden of providing the distinctive kind of legal education he envisioned as resting on the shoulders of qualified faculty willing to take up the project. Indeed, he particularly stressed the “first-rate importance”<sup>264</sup> of pulling together a faculty suited to the task at hand. Connor did not think it necessary for each faculty member to be Catholic, but each “ought at least to be sympathetic with Catholic tradition, and Catholic thought.”<sup>265</sup> Signifi-

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<sup>259</sup> *Id.*

<sup>260</sup> *Id.* at 163. Indeed, for Connor, “[t]he impression that a particular law or ordinance must be *right* because it is *legal* is one of the most treacherous doctrines that has been promulgated in modern society!” *Id.* at 170.

<sup>261</sup> *Id.* at 163.

<sup>262</sup> *Id.* at 168.

<sup>263</sup> Connor was not altogether critical of the New Jurisprudence. Although he found things to criticize in the work of Pound, Cardozo, Llewellyn, and Frank, he also acknowledged that their writings “offer[ed] a challenge worthy of the mettle of the best minds.” *Id.* at 163. Moreover, he was keen, if somewhat overstated, to conclude that “the best considered writings coming from the pen of contemporary legal philosophers have very much in them that is in entire accord with scholastic principles.” *Id.*

<sup>264</sup> *Id.* at 165.

<sup>265</sup> *Id.*

cantly, Connor did not favor the use of priests as the faculty assigned to teach courses in legal philosophy “[u]nless the particular cleric has been trained in the Positive Law.”<sup>266</sup> Because the lawyer’s “mind is not satisfied by generalities,” in order to “offer sound and convincing arguments in defense of scholastic principles,” the classroom teacher must be able to “formulate the problems of the Positive Law as they appear to the lawyer.”<sup>267</sup> Thus, the teacher must be “familiar with the philosophical systems which have had influence in the legal order” and be “conversant with Scholasticism and its restatement, and . . . with the Positive Law and its technicalities.”<sup>268</sup>

Aside from their work in the classroom, Connor saw the principal responsibility of faculty as remedying the acknowledged “dearth of writing and research on legal subjects from a distinctly scholastic point of view.”<sup>269</sup> It was, he concluded, “the duty of the Catholic law schools to accept their rightful position in the vanguard of Legal Writing predicated upon the principles of neo-scholasticism.”<sup>270</sup> In taking up this task, Connor recognized that faculty at Catholic law schools must engage “the best considered writings coming from the pen of contemporary legal philosophers.”<sup>271</sup> Although Connor saw some merit in the New Jurisprudence and points of agreement between it and the natural law,<sup>272</sup> he also ominously warned that people “are entitled to know the ugly and sinister intellectual and social revolution that is threatening in the western world.”<sup>273</sup>

Connor’s article also contained two salient predictions. First, Connor confidently predicted that without the kind of positive engagement with Catholic mission on the part of faculty called for by his proposal, “the complete secularization of Catholic law schools will soon be accomplished”<sup>274</sup>—a claim that proved sadly prescient in the decades that followed. Second, Connor held that it was “indisputable that the program herein outlined is one of long-time con-

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<sup>266</sup> *Id.* at 164.

<sup>267</sup> *Id.*

<sup>268</sup> *Id.* at 164-65.

<sup>269</sup> *Id.* at 166.

<sup>270</sup> *Id.* at 171.

<sup>271</sup> *Id.* at 168.

<sup>272</sup> *Id.* at 168-69.

<sup>273</sup> *Id.* at 169. Connor’s warning was a common theme among reform proponents.

<sup>274</sup> *Id.* at 163.

summation”—a project that could not be “accomplished in a year or even two years” but one that would reach “into the considerable future.”<sup>275</sup> Connor did not, however, know and perhaps could not predict that that future would as yet be unrealized over seventy years out.

Brendan Brown, professor and later dean of the Catholic University of America Columbus School of Law, provided perhaps the most elaborate articulation and defense of the proposal that Catholic schools provide their students with a distinctive kind of legal education. In a pair of articles that made use of data gathered from two questionnaires sent to Catholic law schools, Brown sought to both explain and critique Catholic law schools’ self-understanding of mission and their efforts to fulfill that mission.

In the first article, published in the *Notre Dame Lawyer* in 1938, Brown began by contrasting law office training with legal education in a university setting. For Brown, the only respect in which the university law school provides a clearly superior form of education is in the “jurisprudential exposition of law.”<sup>276</sup> Thus, the reason why legal education was brought out of the law office and the free-standing law school, the reason why “legal studies [were brought] into the university curriculum was the presentation of law in its jurisprudential phases i.e., its relation to the social and philosophical sciences.”<sup>277</sup>

With respect to philosophy, however, Brown says that one would expect to find “a difference between the jurisprudential approaches to the study of law in church law schools and non-church law schools respectively.”<sup>278</sup> Brown submitted a survey of five questions to thirteen religiously affiliated law schools in order “to ascertain the opinions of legal educators in church law schools on the subject of the jurisprudential aims of such institutions.”<sup>279</sup> The questions were designed to discover

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<sup>275</sup> *Id.* at 166.

<sup>276</sup> Brown, *Jurisprudential Aims*, *supra* note 12, at 163.

<sup>277</sup> *Id.* Although Brown’s thesis is entirely reasonable, it is also, perhaps, somewhat, naive. That is, he overlooks the more cynical explanation that legal studies were brought into the university not in order to improve the quality of the education provided but in order to exercise control and influence over an important social institution and to obtain a welcome means of revenue.

<sup>278</sup> *Id.* at 164.

<sup>279</sup> *Id.* at 165. Brown refers to “church law schools” rather than Catholic law schools because the thirteen schools to whom the questionnaire was sent included



whether it was the opinion of teachers in church law schools that the jurisprudential goal of this type of school should be identical with that of the non-church law school; if not, whether they were now willing to cooperate in working out scientifically a distinctive legal culture, by an examination of the positive law in relation to scholastic philosophy and the social sciences, including history, so as to produce materials which would be critical and interpretive of the common law, and which might be so introduced . . . and whether they had any suggestions to make as to how the distinctive jurisprudential aims of church law schools might be realized in the classroom.<sup>280</sup>

Brown received only twenty-one responses to over three-hundred questionnaires,<sup>281</sup> so the value of the article derives less from the empirical data it presents and more from Brown's thoughts on the subject matter reflected in both the questions themselves and his accompanying remarks.

Brown was interested in the establishment of a "legal culture . . . under the influence of a neo-scholastic philosophy."<sup>282</sup> By legal culture, Brown "did not mean philosophy alone, or courses in 'pure jurisprudence' and legal ethics . . . or the occasional reference in class to the moral goodness or badness of a particular legal principle."<sup>283</sup> Instead, Brown had in mind a literature that would "show how scholasticism has influenced judge and legislator," point out the "essential harmony" and points of disagreement between the common law and scholasticism, borrow "[t]he appropriate conclusions of a theo-philosophic sociology," and contribute toward a better understanding of legal history, while charting "[t]he scholastically desirable future of the common law."<sup>284</sup> Brown reported that most of the responses favored the establishment of such a legal culture though "[t]here was a difference of opinion . . . as to the extent to which this should be carried out at the present time."<sup>285</sup>

The respondents to Brown's survey were decidedly more modest in their vision of religiously sponsored legal education. While the

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two non-Catholic law schools in addition to eleven Catholic schools, *viz.*, Southern Methodist University and Tulane University. *See id.* at 165, n. 2 and 166, n. 3.

<sup>280</sup> *Id.* at 165-66.

<sup>281</sup> *Id.* at 166.

<sup>282</sup> *Id.* at 167.

<sup>283</sup> *Id.* at 167-68 (footnotes omitted).

<sup>284</sup> *Id.* at 169.

<sup>285</sup> *Id.* at 170.

respondents indicated that the same course should not be taught in precisely the same way in church-sponsored and non-religious law schools, there were "various attitudes . . . as to the means by which the method of the church law school might be made distinctive."<sup>286</sup> Most "approved an explanation of the moral background of underlying principles, or a warning against positivism, or the suggestion of the connection between positive law and the favored scholastic development."<sup>287</sup> Perhaps expressing a more commonly held opinion, one respondent candidly stated that it was "an inauspicious time in which to initiate a difference between the church law school and the non-church law school" and that the teaching should be the same at each "at least for the present."<sup>288</sup>

A minority of responses suggested that the jurisprudential perspective be confined to courses with an obvious moral component such as domestic relations, legal ethics, and equity, while others recommended separate jurisprudential courses that "would inter-relate all courses on the positive law."<sup>289</sup> Brown plainly favored a more comprehensive approach since he asked rhetorically: "But is it not true that every course on law, necessarily because of the nature of the positive law itself, offers some possibilities for such critique?"<sup>290</sup>

Brown anticipated "the possibility that some [respondents] might justify the continuance of church law schools even though such institutions merely utilized the materials and thought processes" found in secular schools.<sup>291</sup> The reason offered by those who rejected scholastic jurisprudence as the justification for and animating feature of church sponsored schools was the claim "that the religious atmosphere of the church law school, apparently some intangible element over and above classroom influences, was, in itself, a sufficient reason for church laws schools."<sup>292</sup>

Brown was fully supportive of giving students the opportunity to practice their faith (particularly at law schools with a residential

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<sup>286</sup> *Id.* at 172.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 173, n. 22.

<sup>289</sup> *Id.* at 173.

<sup>290</sup> *Id.*

<sup>291</sup> *Id.* at 166.

<sup>292</sup> *Id.* at 174.

campus),<sup>293</sup> but he dismissed the claim that a church sponsored law school was justifiable *as such* because it served the needs of a particular community or because it had attained a high level of prestige. Such an institution may have “a right to exist as a law school” but this does not “justify ecclesiastical participation in the matter of legal education.”<sup>294</sup> Instead, for Brown, “[t]he true mission of the church sponsored law school” was the preparation of “an adequate *juris ratio studiorum*, which will convince the modern mind of the eternal sufficiency of thirteenth century Thomism to solve ever changing problems.”<sup>295</sup> Indeed, according to Brown, “[a] law school which does not recognize this ideal should not be part of a church university.”<sup>296</sup>

In his second article, published in the *University of Detroit Law Journal* in 1941, Brown drew upon the data collected in another survey. Here, however, the survey was directed only to the deans of the nation’s Catholic law schools. Brown also reviewed the course catalogues published by these institutions. Whereas the survey discussed in Brown’s earlier article had the support of the American Catholic Philosophical Association,<sup>297</sup> Brown’s second questionnaire was distributed under the auspices of the Department of Education of the National Catholic Welfare Conference, the predecessor to the United States Conference of Catholic Bishops.<sup>298</sup> Brown was quick to construe this episcopal involvement as “decisive action [which] in effect proclaims that the technical and vocational characteristics of Catholic law schools must not be allowed to overshadow their simultaneous Catholic purposes or becloud the important sociological and philosophical stake which all American Catholics, hierarchy and laity, have in the success, prestige, scope and function of these institutions.”<sup>299</sup> These schools must be answerable to the wider Catholic community if they neglect their “duty as an agency for the perpetuation of the Catholic juristic tradition.”<sup>300</sup>

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<sup>293</sup> *Id.* at 174-75.

<sup>294</sup> *Id.* at 176.

<sup>295</sup> *Id.* at 179.

<sup>296</sup> *Id.* at 177.

<sup>297</sup> *Id.* at 165, n. 1.

<sup>298</sup> Brendan F. Brown, *The Place of the Catholic Law School in American Education*, 5 U. DETROIT L. J. 1, 2 (1941) [hereinafter Brown, *The Place*].

<sup>299</sup> *Id.* at 3.

<sup>300</sup> *Id.* at 3.

Brown organized his discussion of Catholic identity and mission around a brief history of Catholic law schools in the United States, a history which he divided into three periods: the “originating period” from roughly 1869-1929, the “aspirant era” from 1929-1941, and the “period of retrenchment” which Brown saw taking shape at the time the article was written. During the originating period, the “dominant problem of each school was the very basic one of survival.”<sup>301</sup> Thus, during this time, “the majority activity of the Catholic law school was to exist and to increase itself rather than to discipline itself by adherence to rigorous requirements,” a trait they shared with non-Catholic schools as well.<sup>302</sup> As a general matter, the genesis of Catholic law schools founded at this time derived from “the determination of the local, organized bar to achieve improvement in the field of legal education, coupled with the attendant ambition of Catholic universities to extend their influence into the professional realm.”<sup>303</sup> Put concretely, some institutions “deemed it essential to incorporate a school of law to reach university status.”<sup>304</sup> The schools of this era were, said Brown, “Catholic in ‘spirit’, ‘attitude’, and ‘environment’, but the positive law was generally taught for its own sake and the pedagogical functions were secularized.”<sup>305</sup>

During the subsequent aspirant era, Catholic law schools focused on “compliance with the admission requirements of the accrediting agencies,”<sup>306</sup> the Association of American Law Schools and the American Bar Association’s Section on Legal Education and Admission to the Bar. The beginning of this era was defined by a diversity of approaches with respect to curriculum, teaching methods, and administration, not only in Catholic law schools but throughout American legal education. Though often “not entirely a matter of free choice,” this pluralism dissipated with the “tendency among Catholic law schools to conform to the standards of the accrediting agencies.”<sup>307</sup> Thus, the movement away from pedagogical and institutional diver-

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<sup>301</sup> *Id.* at 17.

<sup>302</sup> *Id.* at 4.

<sup>303</sup> *Id.* at 5.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *Id.* at 9.

sity and toward standardization in teaching, curriculum, facilities, requirements for admission, and faculty was brought about through “[s]trong, external pressure, sometimes perhaps in the form of a potential threat to existence itself.”<sup>308</sup>

Brown contended that during this aspirant phase, “there emerged a growing consciousness that the Catholic law school had a distinctive mission to provide education in the domain of normative critique.”<sup>309</sup> “[T]here was,” he said, “an awareness to some extent as to responsibility in the matter of supplementing the teaching of the positive law with a concomitant expression of Thomistic historico-philosophical criterion.”<sup>310</sup> This interest in scholastic philosophy was not brought about by “ecclesiastical intervention” but was “mostly intrinsic” in origin.<sup>311</sup>

At the same time, Brown acknowledged that this was a later development: “It is true that Catholic law schools, with perhaps a few exceptions, were established and developed with little, if any, thought to their juristic responsibilities beyond making it possible for students to prepare for bar examinations and ultimately to make a living” in the profession.<sup>312</sup> Moreover, during the era, Brown saw an ongoing process of “secularization in a jurisprudential sense” notwithstanding the fact that all the Catholic law schools “emphasize[d] collateral opportunities for the religious and spiritual development of law students” in their catalogues.<sup>313</sup>

In the third period of Catholic legal education—the period of retrenchment—Brown predicted shrinking student bodies and decreasing financial assistance in response to the demands of the war effort. He insisted, however, that this retrenchment “need only be material, not spiritual.”<sup>314</sup> For Brown, the “supreme destiny” of Catholic law schools was to promote “professional standards and a regime of jurisprudence under the sway and ethical discipline of the

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<sup>308</sup> *Id.* at 17. For a detailed discussion of this historical movement toward standardization and roles played by the both AALS and ABA in bringing this about, see STEVENS, *supra* note 194, at 405.

<sup>309</sup> Brown, *The Place*, *supra* note 298, at 9.

<sup>310</sup> *Id.* at 5.

<sup>311</sup> *Id.* at 17.

<sup>312</sup> *Id.* at 9.

<sup>313</sup> *Id.* at 10.

<sup>314</sup> *Id.* at 16.

philosophical and juridical idea of re-examined and re-formulated scholastic thought.”<sup>315</sup> Even in an era of modest resources, Brown claimed that in this “cultural domain, Catholic law schools can and ought to assume leadership” by asserting “their traditional inheritance of normative value and juristic vision” precisely because “they are not handicapped by the philosophical confusion which prevails even in the ‘elect’ schools.”<sup>316</sup>

William F. Clarke, dean of DePaul University College of Law, likewise addressed the desirability of Catholic law schools and the steps necessary to achieve a meaningful Catholic identity. In one article, published in the *Journal of Religious Instruction* in 1936, Clarke openly declared that “there is little or no point in the bestowal of the appellation *Catholic* upon any institution the actions of which do nothing to set it apart from those which lay no claim to that title.”<sup>317</sup> For Clarke neither “mere existence,” nor proprietary and financial justifications, would suffice “since the primary reason for operation of a privately established and maintained school system is the propagation of an active Catholicity among Catholic youth.”<sup>318</sup> The goal for Catholic law schools, said Clarke, is a state of affairs where each is “a potent influence on legal thought.”<sup>319</sup> They could achieve this by “engraft[ing] upon the tree of the law a branch which might very well become the root of a new jurisprudence” through “the principles of justice contained in the philosophy of neo-scholasticism.”<sup>320</sup>

Clarke made clear that the “one indispensable element” in building and maintaining a Catholic law school is “the existence of a group of men and women well versed in the theory and practice of law, and imbued besides with the principles of Catholic philosophy.”<sup>321</sup> Even in teaching the same curriculum available at non-

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<sup>315</sup> *Id.* at 3

<sup>316</sup> *Id.* at 17.

<sup>317</sup> Clarke, *Catholicity*, *supra* note 13, at 700.

<sup>318</sup> *Id.* at 701.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.* at 701-02; *see also id.* at 706 (urging that the Church should expand existing Catholic law schools and found new ones giving them “faculties of competent and scholarly Catholic men, adequately paid to devote their entire time to the teaching and, what is more important, to the study of law”).

Catholic law schools, faculty so equipped could “exert the utmost influence toward the development of the practice of law which shall be in conformity with the principles of natural justice.”<sup>322</sup> The difference, for Clarke was “not what you teach but how you teach it.”<sup>323</sup>

In a second article, published in the *University of Detroit Law Journal* in 1940, Clarke confidently asserted that university education in general and legal training in particular cannot be neutral. He insisted that “behind all this training there must be a philosophy which can give reason and direction to study,” and all too often in place of a genuine philosophy one finds only an ideology.<sup>324</sup> While acknowledging that Christianity makes “extraordinary claims,” Clarke also maintained that these claims stood upon the “common ground” of reason—a philosophy, a “metaphysics which any man may be supposed to employ.”<sup>325</sup>

Like Connor and Brown, Clarke maintained that Catholic law schools should take up the project of the revival of natural law jurisprudence. Without something more, however, Clarke believed that Catholic law schools would fail to fulfill their mission since the study of natural law “alone does not distinguish us as Catholic.”<sup>326</sup> Catholic institutions must be on guard “against the secularism which creeps into the training given in our schools,”<sup>327</sup> but more than this, they must “exhibit that integration of the supernatural and the natural which alone is truly and fully Catholic.”<sup>328</sup>

Clarke suggested that one way in which this might be brought about was for Legal Ethics to be more than one additional course

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<sup>322</sup> *Id.* at 703.

<sup>323</sup> *Id.* at 705.

<sup>324</sup> William F. Clarke, *The Problem of the Catholic Law School*, 3 U. DETROIT L. J. 169 (1940) [hereinafter Clarke, *The Problem*].

<sup>325</sup> *Id.* at 170. Clarke’s reading of this metaphysics, as it concerned law and human conduct was, however, somewhat confined. He chose to construe Llewellyn’s remarks regarding the “urge for right, or decency, or justice,” Karl N. Llewellyn, *One “Realist’s” View of Natural Law for Judges*, 15 NOTRE DAME LAW. 3 (1939), as almost a repudiation of the natural law rather than the tentative comments of a potential ally. Clarke, *The Problem*, *supra* note 324, at 171. Moreover, Clarke insisted that the natural law was “not something yet to be discovered” nor was it “a notion that admits of eight different interpretations.” *Id.* at 172.

<sup>326</sup> *Id.* at 173-74.

<sup>327</sup> *Id.* at 174.

<sup>328</sup> *Id.* at 174 (quoting Robert C. Pollock).

added to the curriculum—for it to be “an influence felt throughout the student’s whole training.”<sup>329</sup> Indeed, Clarke found it “hard to believe that the spirit can be renewed merely by the inclusion of one or two courses which have to do with philosophy and morals.”<sup>330</sup> For Clarke, “mere addition of courses is not a remedy,” rather “[t]he remedy is found in the engendering of the old university attitude” of integration.<sup>331</sup>

Catholic legal scholars, led by Connor, Brown, and Clarke, who were part of the Neo-Scholastic revival, saw Legal Realism and international totalitarianism as related threats to American law and civilization. In response, they issued a call to reform Catholic legal education that was both wide and deep. They sought a comprehensive restructuring of Catholic legal education—its faculty, curriculum, and pedagogy—with the goal of producing lawyers and legal scholarship that, rooted in the natural law tradition, would answer the intellectual and practical challenges posed by the advent of Legal Realism at home and the rise of totalitarianism abroad.

### C. Institutional Support for the Proposal

Beyond the call for the reform of Catholic legal education set forth by individual commentators, an effort to provide Catholic law professors with the intellectual space they needed to develop the theoretical groundwork for the proposal was given institutional form in at least three prominent instances. The first of these came not from any law school or even the discipline of law, but from philosophy.

From its inception in 1926, the American Catholic Philosophical Association (“ACPA”) served as a platform for the exploration of questions involving moral<sup>332</sup> and political<sup>333</sup> philosophy, including

<sup>329</sup> *Id.* at 176 (italics deleted).

<sup>330</sup> *Id.* at 178.

<sup>331</sup> *Id.* at 180.

<sup>332</sup> See, e.g., Charles C. Miltner, *Neo-Scholastic Ethics and Modern Thought*, 1 PROC. AM. CATH. PHIL. ASSN. 57 (1926); John A. Ryan, *The Basis of Objective Judgments in Ethics*, 2 PROC. AM. CATH. PHIL. ASSN. 95 (1926); William F. Roemer, *St. Thomas and the Ethical Basis of International Law*, 3 PROC. AM. CATH. PHIL. ASSN. 102 (1927); Charles C. Miltner, *Some Types of Recent Ethical Theory*, 4 PROC. AM. CATH. PHIL. ASSN. 20 (1928); Virgil Michel, *The Metaphysical Foundations of Moral Obligation*, 4 PROC. AM. CATH. PHIL. ASSN. 29 (1928).

<sup>333</sup> Political philosophy was the topic of all the papers delivered at the ACPA’s Seventh Annual Meeting. See 7 PROC. AM. CATH. PHIL. ASSN. 45-181 (1931).



the challenges posed by American pragmatism, the philosophical progenitor of Legal Realism.<sup>334</sup> In 1932, the ACPA first agreed to host a round table discussion on the "Philosophy of Law."<sup>335</sup> As a consequence of this proposal, the Association's Annual Meeting in 1933 included a paper on philosophy and the common law.<sup>336</sup> This interest in the relationship between law and philosophy led Brendan Brown, in 1934, to seek the assistance of the ACPA in helping the Catholic University of America School of Law and, "any other of the law schools under the direction of Catholic colleges which might care to join [it] in this regard," to "build up a Catholic philosophy of law along Scholastic lines."<sup>337</sup>

The 1935 Report of the newly created Standing Committee on Philosophy of Law reflected the unanimous agreement of the members that "the time was opportune for launching a movement to develop a Neo-Scholastic philosophy of law, and to work out means of applying it in the work of Catholic Law Schools."<sup>338</sup> To that end, the Committee sent out a survey that later became the basis of Brown's first article on Catholic legal education, discussed above.<sup>339</sup> In the years that followed, the Committee on Philosophy of Law regularly hosted round table discussions at the Association's annual meeting that addressed the challenges posed by new trends in legal philosophy.<sup>340</sup>

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<sup>334</sup> J. F. Finnegan, *Remarks Concerning Certain Phases of the Moral Philosophy of John Dewey*, 6 PROC. AM. CATH. PHIL. ASSN. 130 (1930).

<sup>335</sup> 8 PROC. AM. CATH. PHIL. ASSN. 130 (1932).

<sup>336</sup> William T. Dillon, *Philosophy in the "Common Law"*, 9 PROC. AM. CATH. PHIL. ASSN. 175 (1933).

<sup>337</sup> American Catholic Philosophical Association, *Minutes of Meeting of Executive Council*, 10 PROC. AM. CATH. PHIL. ASSN. 173 (1934).

<sup>338</sup> Reports of Standing Committees, 11 PROC. AM. CATH. PHIL. ASSN. 201 (1935).

<sup>339</sup> *Id.* at 202; see also Brown, *Jurisprudential Aims*, *supra* note 12, at 165 n. 1.

<sup>340</sup> See, e.g., Linus Lilly, *Possibilities of a Neo-Scholastic Philosophy of Law in the United States Today*, 12 PROC. AM. CATH. PHIL. ASSN. 111 (1936) (paper serving as basis for round table discussion); Walter B. Kennedy, *Current Attacks Upon and Suggested Methods of Preserving Neo-Scholastic Jurisprudence*, 13 PROC. AM. CATH. PHIL. ASSN. 186 (1937) (paper serving as basis for round table discussion). Much of the ensuing discussion at the 1937 Annual Meeting suggests the widely held view that Catholic law schools were failing to provide their students with anything different—let alone a distinctive philosophy of law—from the education received by students at non-Catholic schools. As one commentator remarked, many graduates of Catholic law schools "feel there is a lack in their own training, in what they should have received from Catholic Law Schools." *Id.* at 203.

Writing in 1942, ten years after the ACPA's first foray into law, Miriam Teresa Rooney, an independent scholar and later dean of Seton Hall Law School,<sup>341</sup> summarized the history of the Committee as having inaugurated a "movement for a Neo-Scholastic Philosophy of Law in America."<sup>342</sup> Rooney believed that one of the principal components of this movement was a "study of the Scholastic, and especially the Thomistic, principles intrinsic in the Common Law."<sup>343</sup> Moreover, she argued that the United States was "the logical place to find such a program undertaken [because of] the existence here of law schools under the auspices of Catholic educational institutions—a situation which is apparently unique in the English-speaking world."<sup>344</sup>

She observed, however, with some concern, that "the strongest of [the American Catholic law schools] have scarcely yet glimpsed the special function which is theirs in the construction of a distinctly American jurisprudence."<sup>345</sup> As a practical matter, Rooney stressed the "immediate need" for publications, bibliographies, and "guides to places where Neo-Scholastic principles of law can be studied" as well as "for more critiques of invalid juridical postulates in current jurisprudence" and a text-book on jurisprudence that Catholic law professors "can turn to quickly to supply them with compact and accurate information about the movement, its aims, its principles, and its sphere within the law school curriculum."<sup>346</sup>

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<sup>341</sup> Miriam Theresa Rooney was a philosopher with a Ph.D. from CUA who wrote extensively about Legal Realism, the nature of law, and the Neo-Thomistic movement. See, e.g., MIRIAM THERESA ROONEY, *LAWLESSNESS, LAW AND SANCTION* (1937); Miriam T. Rooney, *Relativism in American Law*, 21 *PROC. AM. CATH. PHIL. ASSN.* (1945); Miriam Theresa Rooney, *Law as Logic and Experience*, 15 *THE NEW SCHOLASTICISM* 1 (1941). During the period of much of her scholarly writing, however, Rooney did not have the benefit of a formal academic appointment. She later became the chief law librarian at CUA under Dean Brendan Brown, see Nuesse, *supra* note 52, at 73, and in 1951 the inaugural dean at Seton Hall University School of Law. See *The History of Seton Hall University School of Law: 1951-Present*, available at [http://law.shu.edu/About/history\\_of\\_seton\\_hall\\_law.cfm](http://law.shu.edu/About/history_of_seton_hall_law.cfm); Rooney, *supra* note 222, at 305.

<sup>342</sup> Miriam Theresa Rooney, *The Movement for a Neo-Scholastic Philosophy of Law in America*, 18 *PROC. AM. CATH. PHIL. ASSN.* 185, 186 (1942) [hereinafter Rooney, *Movement*].

<sup>343</sup> *Id.* at 187.

<sup>344</sup> *Id.* at 188.

<sup>345</sup> *Id.* at 189.

<sup>346</sup> *Id.* at 201.

Notwithstanding her celebratory view of the work of that had already been accomplished by the Committee in advancing the project of Neo-Scholasticism in law, what is most notable about Rooney's retrospective is her frank recognition of all the work that had yet to be done. James Thomas Connor had predicted that the reform of Catholic legal education would be a program "of long-time consummation" that would not be "accomplished in a year or even two years" but one that would reach "into the considerable future."<sup>347</sup> Still, even though ten years had passed since the ACPA had first lent its support to the Neo-Scholastic impulse in Catholic legal education, there was no developed jurisprudential literature, or textbook, or even bibliography to assist the Catholic law professor in teaching his courses in light of the principles of Neo-Thomism. While Rooney expressed great optimism concerning the project of jurisprudential and pedagogical reform,<sup>348</sup> a dispassionate observer might have seen the absence of these concrete measures as auguring serious doubts as the project's future success.

The ACPA's Committee on Philosophy of Law began with the potential and goal of serving as an engine for the Neo-Scholastic revival in law and legal education. Nevertheless, by 1950 the project had sunk so low that Brendan Brown wrote to the Executive Council of the Association "urging the revival of a Philosophy of Law Section of the Association" and that it "meet in the city where the American Bar Association meets each year."<sup>349</sup> Although the Council approved the proposal in principle, it demanded "much more details as to the manner of the arrangement" before granting final approval.<sup>350</sup> The subsequent *Proceedings* of the ACPA make no mention of Brown's proposal. As the ACPA's appetite for carrying the Neo-Scholastic project forward in the context of legal education waned, the hopes of establishing a "legal culture . . . under the influence of a neo-scholastic philosophy"<sup>351</sup> also faded.

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<sup>347</sup> Connor, *supra* note 10, at 166.

<sup>348</sup> Rooney, *Movement*, *supra* note 342, at 203 (musing as what the content of the ACPA report would be on their efforts ten years later).

<sup>349</sup> *Minutes of Executive Council Meeting*, 24 PROC. AM. CATH. PHIL. ASSN. 166 (1950).

<sup>350</sup> *Id.* at 166-67.

<sup>351</sup> Brown, *Jurisprudential Aims*, *supra* note 12, at 167.

A second and more significant institutional response to the proposal for the reform of Catholic legal education was the creation of the Natural Law Institute at Notre Dame Law School.<sup>352</sup> Created to serve as an academic platform “to re-examine and re-state the doctrine of the Natural Law in the light of modern times and changing situations,”<sup>353</sup> it began modestly enough in 1943 as a series of “Great Books” seminars for students, similar to those at St. John’s College at Annapolis and championed by Mortimer Adler at the University of Chicago.<sup>354</sup> The seminars were conducted by Father John J. Cavanaugh, C.S.C., later president of the University, Notre Dame Law School dean Clarence Manion, and Illinois Appellate Judge Roger Kiley.<sup>355</sup>

To go beyond the conversations begun in these seminars, “to explain the meaning of the natural law in terms of actual statutes, actual court decisions, and actual legal principles in our American legal system,”<sup>356</sup> the Law School hosted the first Natural Law Institute in December, 1947.<sup>357</sup> This initial gathering featured a number of prominent speakers and was attended by over six hundred lawyers, judges, and law students.<sup>358</sup> The papers delivered at this convocation and at the subsequent Institutes hosted by the Law School from 1948 to 1951 were published in monograph form as the *Natural Law Institute Proceedings*.<sup>359</sup> In 1956, the Institute dis-

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<sup>352</sup> See *supra* notes 47-48, and accompanying text.

<sup>353</sup> MOORE, *supra* note 25, at 100 (quoting a pamphlet entitled *Notre Dame’s College of Law* published in 1952).

<sup>354</sup> See generally OTTO A. BIRD, *SEEKING A CENTER: MY LIFE AS A GREAT BOOKIE* (1991); CHARLES NELSON, *RADICAL VISIONS: STRINGFELLOW BARR, SCOTT BUCHANAN AND THEIR EFFORTS ON BEHALF OF EDUCATION AND POLITICS IN THE TWENTIETH CENTURY* (2001).

<sup>355</sup> MOORE, *supra* note 25, at 99-100; Barrett, *supra* note 32, at 297.

<sup>356</sup> John J. Cavanaugh, C.S.C., *Introduction*, 1 NAT. L. INST. PROC.—1947, at 2 (1949).

<sup>357</sup> The Notre Dame Natural Law Institute was successful enough to produce other institutes. For example, a group of mostly-Catholic lawyers and judges, with the support of the Archbishop of Los Angeles, held the First Natural Law Institute of Los Angeles in 1950. Normal Elliott, *The Los Angeles Natural Law Institute*, AMERICA, Dec. 9, 1950, at 305-06.

<sup>358</sup> Barrett, *supra* note 32, at 298.

<sup>359</sup> NAT. L. INST. PROC.—1947 (1949); NAT. L. INST. PROC.—1948 (1949) (addressing the history of natural law); NAT. L. INST. PROC.—1949 (1950) (addressing the place of natural law in common law, constitutional law, canon law and international law); NAT. L. INST. PROC.—1950 (1951) (addressing natural law and natural rights); NAT. L. INST. PROC.—1951 (1953) (discussing natural law in various religious traditions).

continued these annual convocations and established a peer-edited journal, the *Natural Law Forum*, permitting the Institute to “function effectively on a year-round basis.”<sup>360</sup> The *Forum* was founded to promote “a serious and scholarly investigation of natural law in all its aspects.”<sup>361</sup> The *Forum* did not seek to “defend[] any established point of view” and was open even to “contributions which are basically opposed to the whole conception [of natural law].”<sup>362</sup>

By 1969, however, the climate of academic discourse had changed, and the *Natural Law Forum* adapted to these new circumstances by changing its name to the *American Journal of Jurisprudence*. The editors expressed the view that the old title “put off those who might otherwise have read the magazine or written for it” since the term “natural law” was “too readily identified with a particular pat formulation, too easily taken as a slogan.”<sup>363</sup> While the move may have reflected a prudent desire to correct a “mistaken apprehension” regarding the nature of the journal and the scope of its content,<sup>364</sup> it also reflected a Catholic desire for relevance outside of Catholic circles along with a striking lack of confidence in the concept that had been central to the proposal to change Catholic legal education a generation earlier.

The third institutional response to the call for a distinctively Catholic legal education came at the end of the period here under examination and, in an ironic twist, represented a recognition of the failure of the project to date. In 1955, St. John’s University School of Law established the *Catholic Lawyer*. The founding of this journal represents the end of an era—an era that never reached its fulfillment. That is, the *Catholic Lawyer* was the last significant institution in American Catholic legal education that was created in response to the proposal that Catholic law schools provide students with a distinctive kind of legal education and that they produce lawyers qualitatively different from their secular counterparts.

The *Catholic Lawyer* was founded in recognition of the fact that “[t]he lawyer is a leader in his community” and that the Catholic

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<sup>360</sup> Joseph O’Meara, *Foreword*, 1 Nat. L.F. 1 (1956).

<sup>361</sup> *Statement of Policy*, 1 Nat. L.F. 3 (1956).

<sup>362</sup> *Id.*; see also Barrett, *supra* note 32, at 298-305.

<sup>363</sup> John T. Noonan, Jr., *Foreword*, 14 AM. J. JURIS. V (1969).

<sup>364</sup> *Id.*

lawyer is often asked to share his views not only on “legal and secular matters” but “on matters of canon law, theology, morals, or church history which he is ill-equipped to discuss.”<sup>365</sup> The desire of the editors was to provide material on each of these subjects in a way that “best serve[s] the interests of Catholic attorneys.”<sup>366</sup> As such, the editors of the *Catholic Lawyer* sought to satisfy a need for content not filled by the general law reviews of the various Catholic law schools, and to reach a wider audience than that of the Natural Law Institute at Notre Dame.<sup>367</sup> By providing a forum for the discussion of these and related issues, the editors of the *Catholic Lawyer* sought “to encourage and assist the Catholic lawyer in the continuance of his professional and religious education and to provide him with a permanent and easily accessible source of information, comment and other pertinent material.”<sup>368</sup> Implicit within this effort to continue the intellectual formation of Catholic lawyers was the recognition that this formation had been lacking in their education, including the education that many of them had received at Catholic law schools.

#### IV. THE PATH NOT CHOSEN: WHY THE PROJECT TO REFORM CATHOLIC LEGAL EDUCATION FAILED

Putting to one side the discreet, institutional exceptions outlined above, it seems plain that the project for the reform of Catholic legal education proposed by Connor, Brown, Clarke and others failed. Like many ambitious plans never brought to fruition, the failure to remake Catholic legal education into something distinctive was not a failure of execution, but a failure even to take up the proposal in the first instance. What G.K. Chesterton famously said of Christianity<sup>369</sup> could likewise be said of Catholic legal education: It has not been tried and found wanting. It has been found difficult and left untried.

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<sup>365</sup> Joseph T. Tinnelly, C.M., *The Catholic Lawyer—An Idea and a Program*, 1 CATH. LAW. 3 (1955).

<sup>366</sup> *Id.* at 5.

<sup>367</sup> *Id.* at 5-6.

<sup>368</sup> *Id.* at 7.

<sup>369</sup> G.K. CHESTERTON, WHAT'S WRONG WITH THE WORLD 37 (1910) (“The Christian ideal has not been tried and found wanting. It has been found difficult, and left untried.”).

The fact that the call to develop a distinctly Catholic kind of legal education was left untried—indeed, that it was all but ignored by the vast majority of Catholic law schools—merely poses an antecedent question: What accounts for this neglect? Why was the proposal never taken up in earnest? Why did Catholic law schools instead choose to follow the path taken by their secular counterparts and not the road suggested by leading Catholic legal academics of the day? In the sections that follow, we set forth what we believe were the seven primary factors that led Catholic law schools to follow a route other than the one proposed in the 1930s and 1940s. The factors are discussed in what we believe are their relative order of importance.

*A. The Call for a Robust Catholic Intellectual Culture Was Something New*

The proposal for a distinctly Catholic intellectual environment at Catholic law schools went against the idea that animated the creation of these schools in the first instance. These schools were not founded with an eye toward creating centers of Catholic legal thought. As Brendan Brown noted in 1941, “Catholic law schools, with perhaps few exceptions, were established and developed with little, if any thought to their juristic responsibilities beyond making it possible for students to prepare for bar examinations and ultimately make a living at the bar in specialized techniques.”<sup>370</sup> As such, the founding of Catholic law schools, like the modernization of Catholic colleges and universities in the first quarter of the twentieth century in general, “represented a response to both the galloping professionalization of one aspect of American life after another, and to the mobility aspirations of American Catholics, increasing numbers of whom perceived the connection between higher education and enhanced life chances.”<sup>371</sup> American law schools of Catholic affiliation were founded to meet the practical needs of the Catholics who aspired to entry into the legal profession and the socio-economic benefits that came with it.

The histories of Catholic law schools summarized above bear this out. Thus, the Notre Dame Law School, the nation’s oldest Catholic

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<sup>370</sup> Brown, *The Place*, *supra* note 298, at 9.

<sup>371</sup> GLEASON, *CONTENDING*, *supra* note 160, at 96.

law school in continuous operation, began offering classes in 1869.<sup>372</sup> Although some might regard the early founding of a law school on the edge of the Indiana wilderness as somewhat premature, perhaps even quixotic, this was not the case with Notre Dame's founder and first president, Rev. Edward Sorin, C.S.C. The creation of a law school reflected Father Sorin's desire to attract more students and revenue to the fledgling institution and his ambition to make it into a place that could rightly be called a "university"—a title that the State of Indiana had bestowed on Notre Dame in 1844, only a few months after the first students arrived for classes at what was then little more than a high school.<sup>373</sup> Indeed, Notre Dame's catalogue indicates that Father Sorin actually contemplated adding both a medical school and a "Department of Law" as early as 1854.<sup>374</sup> Thus, it seems that the Law School more reflected Sorin's embrace of the American entrepreneurial spirit than a specific design for legal education.<sup>375</sup>

Likewise, the University of San Francisco School of Law was founded in 1912 "to meet the needs of an urban, middle-class constituency aspiring to professional status."<sup>376</sup> The local Catholic population feared that their sons would be discriminated against in applying to state universities like the University of California at Berkeley, which worked "to effectively exclude the graduates of Catholic institutions from the university's professional schools."<sup>377</sup> The USF School of Law was not founded as a center for Catholic legal thought as such but as a way around both the real and perceived impediments to Catholics seeking professional advancement.

In the same manner, Fordham University established a law school in 1905 to help it become a "major urban university."<sup>378</sup> As this stated

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<sup>372</sup> See *supra* notes 23-27, and accompanying text.

<sup>373</sup> WACK, *supra* note 19, (chap. 1).

<sup>374</sup> *Id.* (chap. 7); MOORE, *supra* note 25, at 2. Both sources cite the *University Catalogue* for 1854-55.

<sup>375</sup> This is not to suggest that Father Sorin was somehow opposed to idea of natural law or the idea of a law school dedicated to the producing graduates inspired by Catholic sensibilities. Father Sorin was by all accounts a faithful and devoted priest.

<sup>376</sup> ABRAHAMSON, *supra* note 113, at 29.

<sup>377</sup> *Id.* at 16 (stating that the discrimination would be effected "by requiring a course in evolution as a standard of undergraduate education").

<sup>378</sup> Hanlon, *supra* note 89, at xvii.



goal suggests, Fordham Law School was primarily focused on professional excellence, and its Catholic identity was tangential to the school's mission. Fordham's curriculum was modeled after Harvard's and sought to advance the School's primary aim by giving its students competence in the day-in-and-day-out law they would practice as lawyers.<sup>379</sup> Like many of her sister schools, Fordham Law School was a night-school serving primarily working-class people aspiring to move up the social and economic ladders of American society.<sup>380</sup>

The Catholic University of America might be regarded as an exception to these examples, since the impetus behind the establishment of CUA's School of Law was a desire to explore the philosophical and theological dimensions of law.<sup>381</sup> That is, the goal was not so much to train professionals for the practice of law as to found a center for the study of jurisprudence on a graduate level. In this respect, however, CUA's Law School shared something with its more practical peers in that the Law School was founded to serve the ambitions of its host institution to attain full university status.<sup>382</sup> Moreover, notwithstanding the ambitions of its founders, CUA's Law School eventually adopted the practical model of other Catholic law schools. It could not support itself financially let alone contribute to the financial well-being of the University unless it focused its attention on the more mundane task of preparing students for the practice of law.<sup>383</sup>

Many more schools could be added to this list.<sup>384</sup> In each case the pattern is the same. The driving force behind the founding of one

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<sup>379</sup> *Id.* at xix.

<sup>380</sup> More precisely, it was a late-afternoon school with classes running from 4:30 to 6:30 p.m. *Id.* at xviii. Another indication of the law school student body's working-class background is the fact that the law school did not require a college degree for admission until 1946. Mulligan, *supra* note 94, at 211.

<sup>381</sup> See generally Nuesse, *supra* note 52.

<sup>382</sup> See *supra* notes 61-64, 70-71, and accompanying text.

<sup>383</sup> See *supra* notes 72-74, and accompanying text.

<sup>384</sup> Thus, the founding of the DePaul University College of Law likewise reflects the institutional ambitions of the host university's first generation of leaders. The DePaul College of Law came into existence when the University acquired Howard Ogden's financially troubled Illinois College of Law in 1912. Lester Goodchild, *American Catholic Legal Education and the Founding of DePaul's College of Law*, 37 DEPAUL L. REV. 379, 397-98 (1988). Reverend Francis McCabe, C.M., DePaul's then-

or another Catholic law school was the ambition of its host institution to obtain greater financial resources, attain true university status, and to serve as a means for Catholics and other immigrants seeking entry into the legal profession. Most of these schools offered something by way of a course on jurisprudence or legal ethics.<sup>385</sup> These course offerings manifested the self-conscious belief, or at least a tacit understanding, that Catholic legal education ought to be distinctive in substance. Still, it would be wrong to see these modest curricular adjustments as the animating force behind the creation of Catholic law schools. As such, the proposal set forth by Connor, Brown, Clarke, and others represented something new and different that required a substantial change both in an institution's self-understanding and in its day-to-day operations.

#### *B. Institutional Inertia and the Problem of Personnel*

The task of implementing the neo-Thomistic revival at Catholic colleges and universities presented a number of practical difficulties, foremost among which was the need to attract and retain interested faculty suited to the task. That is, the program of introducing Thomism to large numbers of *undergraduate* students—not only in philosophy and theology, but elsewhere in the curriculum—meant that “many teachers were needed, not all of whom were equally well prepared or effective, and teaching loads were quite heavy.”<sup>386</sup>

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president, wanted to make the University a place of “liberal, professional and graduate learning” following the model of the University of Chicago. *Id.* at 395. Indeed, given that DePaul's first president, Reverend Peter Byrne, C.M., defined DePaul's Catholic character merely “as a university conducted under Catholic auspices,” *id.* at 396, the College of Law plainly was not established to further a specifically Catholic intellectual mission.

<sup>385</sup> See MOORE, *supra* note 25, at 100 (citing the Notre Dame Law School's *Bulletin* for 1951-1952 and stating that “[t]he Natural Law has been an integral part of the training of a Notre Dame lawyer since the first law courses were established in 1869” and that the School “carries on the basic Natural Law philosophy of the American Founding Fathers and seeks not merely to set forth the abstract concepts of the Natural Law but also to correlate them with the various courses of the Positive Law”); Mulligan, *supra* note 94, at 210 (noting that the curriculum at Fordham Law School contained a course on jurisprudence which was taught by Rev. Thomas Shealy, S.J., from the natural law perspective); ABRAHAMSON, *supra* note 113, at 34 (noting that, in the early days of the University of San Francisco School of Law, in addition to a standard array of doctrinal courses, “Jesuit fathers offered instruction in oratory, logic, psychology, parliamentary law, and ethics”).

<sup>386</sup> GLEASON, *CONTENDING*, *supra* note 160, at 299.

This, in turn, led to an “undue reliance on textbooks, too much use of objective tests, and complaints from students that philosophy was simply ‘memory work.’”<sup>387</sup> Moreover, because the kind of education envisioned was thought to involve a presentation and lived example of an integral Catholic worldview:

It rapidly became evident . . . that developing the right kind of faculty would be a problem—and one that almost guaranteed a high level of institutional inbreeding, for where else could teachers be found who not only knew their specialties but also how to integrate them with religion and philosophy?<sup>388</sup>

The proposal for the reform of Catholic *legal* education presented similar difficulties with respect to the make-up of faculties at Catholic law schools. When anything new is proposed with respect to how a given organization will identify itself and carry forward its operations, some degree of resistance frequently results. Such a reaction is even more likely where the organization in question is an academic institution since faculty—the people primarily responsible for carrying forward the teaching and scholarly enterprise—are accustomed to defining that enterprise rather than having it defined for them. Such resistance is likely to be even greater when the proposal for change contains at least a tacit criticism of current faculty—when it suggests that they are somehow inadequate for the task at hand. Each of these sources of resistance was likely a significant factor in the failure of Catholic law schools to embrace the proposal for the reform of Catholic legal education.

Proponents of the reform, like Brendan Brown, believed that “[t]he logical custodians of a scholasticized category of natural law and its accompanying jurisprudence are the faculties of Church law schools.”<sup>389</sup> Indeed, “[t]he undertaking of making understandable the full meaning of the category of scholastic natural law in the

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<sup>387</sup> *Id.* (footnote omitted).

<sup>388</sup> PHILIP GLEASON, *KEEPING THE FAITH: AMERICAN CATHOLICISM PAST AND PRESENT* 145 (1987) [hereinafter *GLEASON, KEEPING*]. This last possibility—that of hiring faculty who were themselves the product of scholastic training at a Catholic college or university—was not a viable strategy in the hiring of law faculty at Catholic law schools since no existing Catholic law school provided the kind of education that the proposal sought to provide. The Catholic University of America was sensitive to the desirability of hiring Catholic faculty early on. See Nuesse, *supra* note 53, at 39-41.

<sup>389</sup> Brendan F. Brown, *Natural Law and the Law-Making Function in American Jurisprudence*, 15 *NOTRE DAME L. REV.* 9, 25 (1939) [hereinafter *Brown, Natural Law*].

every day workshop of the Common lawyer and judge” would be possible “only if legal educators endeavor to gain a better knowledge of natural law and make it the starting point in their everyday pedagogy.”<sup>390</sup> What was needed, according to Brown, was for Catholic law schools to attract faculty who would have the time to write<sup>391</sup> about the law in a way that would “demonstrate[e] . . . the recognition of the validity of many scholastic principles by the common law,” and chart “[t]he scholastically desirable future of the common law.”<sup>392</sup> According to Brown, what was needed was the preparation of texts that would assist lawyers and judges in fashioning legal solutions to contemporary problems based on the principles of scholastic jurisprudence.

Brown clearly recognized that the “revival of natural law jurisprudence in the theo-philosophical sense will be short lived unless it is enforced by the active support of the faculties at Church law schools.”<sup>393</sup> He knew that the “success [of the project] depend[ed] upon the spirit and the will of the personnel of American church law schools.”<sup>394</sup> Dean Connor likewise warned that “[i]f some effort is not put forth by the individual teacher to infuse his lectures and comments with sound philosophical observations, the complete secularization of Catholic law schools will soon be accomplished.”<sup>395</sup> William Clarke likewise saw as “indispensable . . . the existence of a group of men and women well versed in the theory and practice of law, and imbued besides with the principles of Catholic philosophy.”<sup>396</sup> Yet Clarke openly wondered:

[h]ow many of our teachers . . . “could exhibit that integration of the supernatural and the natural which alone is truly and fully Catholic?” For that matter, how many could or would point out in a class in law (when the op-

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<sup>390</sup> *Id.* at 21-22.

<sup>391</sup> Brown, *The Place*, *supra* note 298, at 10 (observing the relative paucity of Catholic contributions to legal scholarship and noting the responses to his survey of Catholic law schools that “[t]he chief reason given for failure to make a greater contribution to the science of law were heavy teaching schedule, absence of research assistance, and inadequacy of library”).

<sup>392</sup> Brown, *Jurisprudential Aims*, *supra* note 12, at 169.

<sup>393</sup> Brown, *Natural Law*, *supra* note 389, at 21.

<sup>394</sup> Brown, *Jurisprudential Aims*, *supra* note 12, at 189.

<sup>395</sup> Connor, *supra* note 10, at 163.

<sup>396</sup> Clarke, *Catholicity*, *supra* note 13, at 701-02.

portunity is given) that there is what is natural, what is unnatural and what is supernatural?<sup>397</sup>

The problem, then, was not simply the paucity of teaching materials addressing various legal subjects from a scholastic point of view. The problem was also the short supply of qualified faculty and a lack of interest among existing faculty at Catholic law schools, a point that was apparent even in the limited responses Brown received to his survey of church-sponsored schools.<sup>398</sup> Indeed, some responses from existing faculty openly questioned the justification for the existence of church-sponsored law schools as such,<sup>399</sup> while others defended the continued existence of such schools even in the absence of any distinctively Catholic features.<sup>400</sup>

Thus, the problem was also the absence of a strategy for identifying and attracting prospective faculty who could carry out the project, and then convincing current faculty to hire this new breed of legal academic. Indeed, the practical task of identifying and successfully recruiting such faculty proved to be frustrating even to those committed to the project. Dean Robinson complained to CUA officials that "it is a very difficult matter to obtain candidates such as you desire for the law school of the University" especially "at the meager salary we are able to pay."<sup>401</sup> As Connor made clear, the law teacher needed to be "familiar with the philosophical systems which have had influence in the legal order, he must be conversant with Scholasticism and its restatement, and he must be conversant

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<sup>397</sup> Clarke, *The Problem*, *supra* note 324, at 174 (quoting the remarks of Robert C. Pollock at the National Catholic Alumni Federation conference in 1939).

<sup>398</sup> For example, some responses expressed misgivings "as to the extent to which [the reform] should be carried out at the present time." Brown, *Jurisprudential Aims*, *supra* note 12, at 170. Others said that "a scholastic critique should be confined to certain courses." *Id.* at 173. One reply stated that "busy practitioners, even though part time lecturers in church law schools, should not be asked to waste time on an indefinite and aimless jurisprudence." *Id.* at 171.

<sup>399</sup> Many responses stated "that the religious atmosphere of the church law school, apparently some intangible element *over and above classroom influences*, was *in itself*, a sufficient reason for church law schools." *Id.* at 174. Others openly admitted that there was no justification for church sponsored law schools. *Id.* at 176, n.28. Some schools offered no justification for its existence as such. *Id.* at 188, n.85.

<sup>400</sup> *Id.* at 185, n.70.

<sup>401</sup> STEVENS, *supra* note 7, at 40 (quoting PETER E. HOGAN, *THE CATHOLIC UNIVERSITY OF AMERICA 1896-1903*, at 51 (1949)).

with the Positive Law and its technicalities."<sup>402</sup> Brown knew that "[c]ooperation, not discord, among teachers in church law schools [was] essential if the movement toward a scholastic jurisprudence is to succeed"<sup>403</sup> but he was unable to find the means to overcome the already existing discord and unwillingness among Catholic law schools to change.

### C. Faculty Misgivings and the Difference Between Philosophy and Theology

Catholic legal academics produced a robust body of scholarly literature that both defended traditional natural law theory and challenged the premises underlying Legal Realism.<sup>404</sup> Yet, as historian Edward Purcell bluntly concluded, "[t]heir arguments . . . simply were not convincing to most American intellectuals."<sup>405</sup> According to Purcell, the reason for this failure was that "[t]he almost inextricable intertwining of their rational philosophy with their particular theology raised doubts as to where the one began and the other left off."<sup>406</sup> James Herget likewise found that "by the late 1950s it

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<sup>402</sup> Connor, *supra* note 10, at 164-65.

<sup>403</sup> Brown, *Jurisprudential Aims*, *supra* note 12, at 167.

<sup>404</sup> For a representative sampling of this literature see Brown, *Natural Law*, *supra* note 389; Walter B. Kennedy, *A Review of Legal Realism*, 9 *FORDHAM L. REV.* 362 (1940); Francis E. Lucey, S.J., *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 *Geo. L.J.* 493 (1942). For an overview of the debate between Legal Realists and Catholic legal scholars in the 1920s-1940s, see John M. Breen & Lee J. Strang, *The Forgotten Jurisprudential Debate: Legal Realism and Catholic Legal Thought's Response* (forthcoming 2012).

<sup>405</sup> PURCELL, *supra* note 232, at 169; cf. GLEASON, *CONTENDING*, *supra* note 160, at 116 (noting that "Non-Catholic thinkers tended to dismiss the whole system as a mere adjunct to religion rather than being a philosophy proper").

<sup>406</sup> *Id.* Gleason says almost precisely the same thing. GLEASON, *CONTENDING*, *supra* note 160, at 257 (noting that "philosophy's role in the Thomistic synthesis as 'handmaid to theology' actually linked the two so closely that it was hard to tell where one left off and the other began"). At the same time, it is also true, however that many Non-Catholic would-be interlocutors made no effort to discern the difference between philosophy and theology in the work of their Catholic counterparts. They preferred instead to subtly play upon an age-old prejudice. Thus, it was a common Realist trope to refer derisively to formalist or traditional legal analysis as "theology" or religious "dogma." See, e.g., THURMAN ARNOLD, *SYMBOLS OF GOVERNMENT* 59-71 (1935); JEROME FRANK, *LAW AND THE MODERN MIND* 57-68, 196-203 (1931). Some saw this strategy for what it was. Morris Cohen regarded the trope as perhaps "[r]hetorically effective" but as "simply an appeal to anti-theologic prejudice." Morris Cohen, *Book Review*, 31 *ILL. L. REV.* 411, 418 (1936).

was clear that the Thomists were talking to themselves."<sup>407</sup> For Herget, this one-sided conversation was due to the fact that "[t]o accept the medieval doctrine of natural law one had to accept the other trappings"<sup>408</sup> of Catholicism, including the fact that it "had historically justified a feudal system, slavery . . . and an ultra-authoritative, anti-democratic church structure."<sup>409</sup> Thus "Thomistic natural law was unconvincing unless a scholar was willing to see the world through its accompanying and reinforcing metaphysics, epistemology and perhaps theology."<sup>410</sup> Because most American academics were unwilling to undertake such an intellectual conversion and spiritual leap of faith, Thomism was destined to remain largely an insular Catholic concern.

The distinction between philosophy and theology—as well as the related distinctions between reason and faith, nature and grace, the secular and the religious—have been recurring themes and sources of continuing reflection throughout the two millennia of the Christian intellectual tradition. Each of these distinctions is important in helping to advance the Church's self-understanding of her own identity and role in the world. With respect to university education, however, the distinction between philosophy and theology is foundational. It is the distinction between the process of reflection within a religious community in light of the commitments of the faith to which it subscribes, and the process of reflection in the absence of those commitments.<sup>411</sup>

The failure of non-Catholic legal academics to grasp the distinction between philosophy and theology—between, on the one hand, those methods of thought and reflection which regard certain texts and events in history as authoritative sources of divine revelation

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<sup>407</sup> HERGET, *supra* note 232, at 238.

<sup>408</sup> *Id.*

<sup>409</sup> *Id.* at 238-39.

<sup>410</sup> *Id.* at 238.

<sup>411</sup> Aquinas addressed the distinction at the very beginning of his master work. See ST. THOMAS AQUINAS, *supra* note 5, at I-I, Q. 1, aa. 1-10. For a set of contemporary essays exploring the distinction between philosophy and theology, and the relationship between faith and reason see REASON AND THE REASONS OF FAITH (Paul J. Griffiths & Reinhard Hutter eds., 2005); see also Patrick Neal, *Political Liberalism, Public Reason, and the Citizen of Faith*, in NATURAL LAW AND PUBLIC REASON 171-201 (Robert P. George & Christopher Wolfe eds., 2000) (describing and criticizing John Rawl's conception of public reason).

and, on the other hand, those that do not—while regrettable, is perhaps understandable. By contrast, it is difficult to excuse the failure of Catholic legal academics to grasp this same distinction and appreciate its significance. It was, however, precisely the failure of Catholic law professors to understand that the proposal for a distinctively Catholic kind of legal education was not a call for theological training in law school that led to the proposal being left untried. As Brendan Brown noted in commenting on his first survey of faculty at church-sponsored law schools, “[t]here was evidence among the replies to indicate that there is some doubt as to the essentially philosophical character of the suggested project.”<sup>412</sup> Some objected to the use of scholastic jurisprudence in teaching law courses because “their church law school was said not to be sectarian.” As Brown noted, however, this objection “confus[ed] theology and philosophy.”<sup>413</sup>

The failure, therefore, to articulate in a convincing fashion the operative significance of the distinction between philosophy and theology in the context of jurisprudence, was one of the reasons that Catholic law schools declined to embrace the proposal for a new kind of Catholic legal education. Plainly, Brown and the other proponents of reform did not suggest “that the development and presentation of a scholastic legal culture should supersede and exclude from the church law school the expounding of law as it exists in statute and case”<sup>414</sup> nor deny that “a proper balance between positive rule and jurisprudence must be maintained in the classroom.”<sup>415</sup> Nevertheless, faculty members simply were not persuaded that the reform they were being asked to undertake was truly philosophical in nature. The fear was that “scholastic jurisprudence” was religious faith dressed up in philosophical garb—a fear that may have been fed by the rhetoric of some proponents of reform.<sup>416</sup> From this perspective, to implement the proposal would be to trans-

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<sup>412</sup> Brown, *Jurisprudential Aims*, *supra* note 12, at 189.

<sup>413</sup> *Id.* at 183.

<sup>414</sup> *Id.* at 168.

<sup>415</sup> *Id.* at 170.

<sup>416</sup> Clarke, *The Problem*, *supra* note 324, at 172 (“The thing of consequence is not whether there be a revival of interest in the ‘lawyer’s’ natural law but whether there shall be a return to *the* natural law as the first law of the Supreme Lawgiver.”).



form schools of professional training operating under Catholic auspices into Catholic seminaries for laymen who wished to practice law.

*D. Standardization and the Incentive Not to Change*

As noted above, the proposal set forth by Connor, Brown, Clarke and others was far-reaching in its aspirations. It would have required Catholic law schools to change their operations, their pedagogical approach, and even their personnel. In addition to the myriad practical challenges outlined above, Catholic law schools had other strong incentives not to change.

Both the formal apparatus of institutional accreditation and the informal process of peer recognition and reputation within the legal academy strongly discouraged the development of a distinctive kind of legal training. Indeed, the whole point of accreditation among law schools, as elsewhere in education, was to ensure a qualified uniformity through standardization—to establish a baseline experience that any student at any accredited school could expect to find.<sup>417</sup> This discouragement was even more pronounced where educational innovations were associated with a particular religious tradition—and in particular, the tradition of a religious minority that had been the target of animus by large numbers of social elites and ordinary citizens.<sup>418</sup>

Most of the Catholic law schools in existence at the time the proposal was issued already enjoyed accreditation from the Association of American Law Schools and the Section on Legal Education and Admission to the Bar of the American Bar Association.<sup>419</sup> This sequence of events suggests that the decision on the part of these schools not to pursue the vision of scholastic jurisprudence in Catholic legal education was not made in order to obtain accreditation.

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<sup>417</sup> See STEVENS, *supra* note 7, at 93 (noting that “[a]t its first meeting in 1879, the ABA Committee on Legal Education and Admissions to the Bar not only urged national comity for lawyers of three years standing—its original chore—but it began the crusade for an expansive program for standardization”).

<sup>418</sup> For an overview of anti-Catholicism in American history, see MARK S. MASSA, S.J., *ANTI-CATHOLICISM IN AMERICA: THE LAST ACCEPTABLE PREJUDICE* (2003); PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE 201-19* (2002).

<sup>419</sup> See Appendix attached hereto listing the various Catholic law schools, the respective years in which they were founded, when they received ABA accreditation, AALS accreditation, and when they began publishing a scholarly law journal.

Although fear of denial of accreditation cannot, in any direct sense, account for the tepid response to the proposal by Catholic law schools that were already accredited, the accreditation process may help explain this response in a more subtle way. As Brendan Brown noted in an article summarizing the history of Catholic legal education, the “tendency among Catholic law schools to conform to the standards of accrediting agencies was not entirely a matter of free choice” because “[t]he moral authorities of these agencies became so influential.”<sup>420</sup> Plainly, if a Catholic school desired to be held in high regard by its peer institutions and by members of the bar who were graduates of these institutions, it would have made little sense to have adopted a pedagogical program that differed markedly from what these other schools were doing. Indeed, it seems likely to have been the case that the accreditation process established a homogenized version of legal education as the norm in a way that dissuaded law schools from giving serious consideration to innovations in legal pedagogy, including the proposal for a curriculum centered on scholastic jurisprudence.

#### *E. The Eclipse of Legal Realism in Post-War America*

With the advent of post-war America, Legal Realism was an exhausted project. Although it had succeeded in displacing the widely-held belief in the objective, moral foundation of law in the minds of many, the Realists had “fail[ed] to provide a normative dimension to their thinking.”<sup>421</sup> They had failed to provide an alternate account of the legitimacy of law and legal decision-making. While the Realists may have “agreed in conceding the importance of moral ideals in any society . . . they disagreed on its foundations, whether natural law, community standards, the scientific method, or simple humanitarian sentiment.”<sup>422</sup> In this, says Stephen Feldman, Legal Realism encountered an “epistemological crisis” in “the recognition that foundational knowledge might be unattainable, regardless of the pretensions of rationalism and empiricism, the subject might never bridge the chasm between itself and the external world.”<sup>423</sup>

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<sup>420</sup> Brown, *The Place*, *supra* note 298, at 9.

<sup>421</sup> HERGET, *supra* note 232, at 192.

<sup>422</sup> PURCELL, *supra* note 232, at 175.

<sup>423</sup> FELDMAN, *supra* note 232, at 115.

In the decade that immediately followed the end of the Second World War, mainstream legal theory did not dwell on the uncertainty of law or the search for the ultimate foundation of ethical judgment. These questions, which had been such a source of intellectual anxiety in need of urgent and careful answer to the scholars of the 1920s and 1930s, were no longer seen as pressing. Instead, American elites and the wider public seemed content with a deep-seated conventionalism according to which the foundational questions of social life could be deferred.<sup>424</sup>

While some legal academics maintained their faith in scientific naturalism, others turned to the “*constitutive or procedural* understandings . . . about how questions . . . are to be settled.”<sup>425</sup> These questions need not be answered in a definitive manner so long as a broad social consensus supported the institutions that had historically defined American life: democratically elected representative government, the Rule of Law, constitutionally guaranteed civil and political rights overseen by an independent judiciary that utilized reasoned analysis, and a market economy subject to regulation generated by a combination of professional expertise and popular input.<sup>426</sup> This conventionalism—this socially entrenched way of muddling through the otherwise irresolvable question of value—was captured in *The Legal Process* materials assembled by Henry Hart and Albert Sacks at the Harvard Law School.<sup>427</sup> Although problematic in its own right, Legal Process did not present the same threat to the intellectual underpinnings of the Catholic world-view as did Legal Realism precisely because it did not call into question the institutions of democracy, the Rule of Law, and faith in reason that Catholics had so forcefully defended.

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<sup>424</sup> See JOHNSON, *supra* note 148, at 837-40 (describing deep social conformity during the Eisenhower decade); see also BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 108 (2006) (“The legal process school was the manifestation in legal academia of the consensus view that saturated American intellectual thought and popular culture in the golden 1950s.”).

<sup>425</sup> See HORWITZ, *supra* note 230, at 254 (quoting HENRY HART & ALBERT SACKS, *THE LEGAL PROCESS* 3-4 (tent. ed. 1958)).

<sup>426</sup> *Id.* at 251, 253-55; TAMANAHA, *supra* note 424, at 104-08.

<sup>427</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William J. Eskridge, Jr. & Philip P. Frickey eds., 1994); see also William M. Wiecek, *American Jurisprudence after the War: “Reason Called Law”*, 37 *TULSA L. REV.* 857 (2002) (describing the rise, tenets, and decline of the Legal Process School).

### F. *The Defeat of Fascism and the Perceived Practical Triumph of Natural Law*

A great deal had changed in the intervening years between the giddy debut of Legal Realism in the 1920s and the liberation of Auschwitz in 1945. Prior to the cataclysmic events of the Second World War, Catholic legal scholars had warned that the innovations introduced by the newer jurisprudence could be used to legitimize the rise of totalitarian legal regimes. Indeed, prior to the war, Catholic legal scholars noted, without controversy, that legal positivism insisted upon the analytic separation of law from morality.<sup>428</sup> Beyond this, however, they argued that this separation neutered jurists and lawyers in nations infected with totalitarian ideologies. Focusing their energies on Germany and, to a lesser extent, the Soviet Union, Catholic scholars noted that significant portions of those nations' legal establishments blithely—and often enthusiastically—supported totalitarianism.<sup>429</sup> In the same way, Catholic legal scholars argued that Legal Realism's abandonment of a necessary tie between law and morality<sup>430</sup> laid open the possibility that American law could become an instrument of oppression.<sup>431</sup> The horrors revealed in the aftermath of the War led some Realists to respond in a way that was defensive, even humble.<sup>432</sup>

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<sup>428</sup> This is generally known as the separation thesis. See H.L.A. HART, *THE CONCEPT OF LAW* 185 (2d ed. 1994) ("Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality.").

<sup>429</sup> See, e.g., Lucey, *supra* note 404; Francis E. Lucey, S.J., *Jurisprudence and the Future Social Order*, 16 *SOCIAL SCIENCE* 213 (July 1941); Robert I. Gannon, S.J., *What Are We Really Fighting?*, 11 *FORDHAM L. REV.* 249, 253 (1942); John C. Ford, S.J., *The Fundamentals of Holmes' Juristic Philosophy*, 11 *FORDHAM L. REV.* 255 (1942); Paul L. Gregg, S.J., *The Pragmatism of Mr. Justice Holmes*, 31 *GEO. L. J.* 262 (1943); Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 *A.B.A.J.* 569 (1945); Brown, *Natural Law*, *supra* note 389, at 23-24.

<sup>430</sup> SEBOK, *supra* note 230, at 116.

<sup>431</sup> Kennedy, *supra* note 404, at 373. Although rejecting an ultimate jurisprudential link between positivism and totalitarianism, more recent scholars have affirmed the link between Legal Realism and positivism. See, e.g., Kent Greenawalt, *Too Thin and Too Rich: Distinguishing Features of Legal Positivism*, in *THE AUTONOMY OF LAW: ESSAYS ON LEGAL POSITIVISM 2* (Robert P. George ed., 1996).

<sup>432</sup> Laura Kalman criticizes the Realists for assuming this defensive posture. LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 268, n.101 (1986).

For example, in the “Preface to the Sixth Printing” of his Realist tome *Law and the Modern Mind*, Jerome Frank affirmed the natural law foundations of the legal order—something that would have been unthinkable when he first published the book in 1930. “I do not understand,” Frank declared, “how any decent man today can refuse to adopt, as the basis of modern civilization, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas.”<sup>433</sup>

In an ironic turn of events, the defeat of the racist ideologies in Nazi Germany and Imperial Japan on the battlefield actually undermined efforts to implement the proposal for the reform of Catholic legal education. That is, with the Allies’ victory over the totalitarian Axis powers and the waning of Legal Realism as a vibrant intellectual movement in the United States, the impetus for a distinctively Catholic form of legal education was no longer immediate. In fact, the world that emerged after the war *seemed* to embrace the natural law perspective advocated by Catholics. Indeed, the Nuremberg and Tokyo Military War Crimes Tribunals could be seen as a vindication of the natural law,<sup>434</sup> on a practical if not theoretical level, insofar as the defendants were tried for crimes against humanity—an offense not recognized in the positive law of any operative jurisdiction at the time the acts were committed.<sup>435</sup> This practical if not theoretical endorsement of the natural law was further underscored by the creation<sup>436</sup> and widespread adoption of the United Nations’ *Universal Declaration of Human Rights*.<sup>437</sup> Each

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<sup>433</sup> JEROME FRANK, *Preface to the Sixth Printing of LAW AND THE MODERN MIND* xxxii (1948).

<sup>434</sup> Rodger D. Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, the Revival of Natural Law, and the Development of Legal Process Theory*, 2006 MICH. ST. L. REV. 385 (2006).

<sup>435</sup> See, e.g., Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT’L CRIM. JUST. 830 (2006); R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 MIL. L. REV. 25 (1995); see also Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119 (2008).

<sup>436</sup> See C.M.A. McCauliff, *Cognition and Consensus in the Natural Law Tradition and in Neuroscience: Jacques Maritain and the Universal Declaration of Human Rights*, 54 VILL. L. REV. 435, 435-36, 461-62, 472-77 (2009) (describing Jacques Maritain’s role in the drafting and adoption of the Universal Declaration of Human Rights).

<sup>437</sup> Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1 (1999).

of these developments could be seen as a reason why it was unnecessary for Catholic law schools to swim against the tide of American legal education by altering their curricula and pedagogies to serve as a vehicle for scholastic jurisprudence.

### G. *The Fragmentation of Neo-Thomism*

The Neo-Thomistic revival was enormously successful in the United States. Philosophy and theology were taught in nearly every Catholic college and university in the country according to Thomistic methods and principles.<sup>438</sup> The revival led to the creation of a number of scholarly publications including the *Modern Schoolman*, the *New Scholasticism*, the *Review of Metaphysics*, *The Thomist*, and *Theological Studies*.<sup>439</sup> In sum, the movement served as the unifying theme and vision of Catholic higher education in the second quarter of the twentieth century.<sup>440</sup>

Proponents of the reform of Catholic legal education rode the crest of this Neo-Thomistic wave. Indeed, Neo-Thomism was the animating intellectual force behind the proposal they set forth. Thus, Dean Connor heralded the future of Catholic legal education in terms of “a restatement of Scholastic Philosophy in light of the modern development in the positive law,”<sup>441</sup> while Brendan Brown insisted that Catholic law schools had a duty to teach “the positive law with a concomitant expression of Thomistic historico-philosophical criterion.”<sup>442</sup>

Yet, even at the time the proposal for reform was first set forth, there were already “counter-indications of restlessness, a growing sense that the Neo-scholastic framework had become too confining.”<sup>443</sup> Indeed, by the end of the 1950s, “the ideal of a ‘Thomistic synthesis’ had sunk far below the horizon of live options in American Catholic higher education.”<sup>444</sup> Many Catholics took to heart John Tracy Ellis’ indictment of Catholic intellectual life for its “failure to

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<sup>438</sup> See GLEASON, *CONTENDING*, *supra* note 160, at 297 (describing Thomism’s “hegemonic position” in American Catholic higher education).

<sup>439</sup> *Id.* at 86, 135, 297.

<sup>440</sup> *Id.* at 163-66, 297-98.

<sup>441</sup> Connor, *supra* note 10, at 161.

<sup>442</sup> Brown, *The Place*, *supra* note at 298, at 5.

<sup>443</sup> GLEASON, *CONTENDING*, *supra* note 160, at 298.

<sup>444</sup> *Id.*

produce national leaders and to exercise commanding influence in intellectual circles.”<sup>445</sup> Although Ellis supported the Neo-Scholastic movement,<sup>446</sup> those who bristled under the hegemony of Thomism seized on Ellis’ criticism as an opportunity to call for change.<sup>447</sup>

Perhaps most important of all, change was already present in Neo-Thomism itself. By the time of the proposal for the reform of Catholic legal education, “three irreducibly distinct Thomisms [had] emerged: the traditional Thomism of Maritain, the historical Thomism of Gilson, and the transcendental Thomism of Marechal.”<sup>448</sup> In this new climate of philosophical pluralism, legal educators could no longer propose Neo-Thomism as a singular approach to the study and critique of law.<sup>449</sup>

## V. CONCLUSION

The proposal for the reform of Catholic legal education set forth in the 1930s and 1940s succeeded in garnering support at a number of law schools and from several prominent leaders in the field of Catholic legal education. This support was more than lip service. It

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<sup>445</sup> John Tracy Ellis, *American Catholics and Intellectual Life*, 30 *THOUGHT* 351 (1955).

<sup>446</sup> See GLEASON, *CONTENDING*, *supra* note 160, at 289.

<sup>447</sup> *Id.* at 290-95.

<sup>448</sup> McCool, *Scholasticism*, *supra* note 234, at 263.

<sup>449</sup> For Alasdair MacIntyre, the fragmentation of neo-Thomism was inevitable given that “[t]he single most important influence upon the drafting of *Aeterni Patris*” was Joseph Kleutgen, S.J. ALASDAIR MACINTYRE, *THERE RIVAL VERSIONS OF MORAL INQUIRY* 73 (1990). According to Fergus Kerr, O.P., Kleutgen was “probably the most influential Catholic theologian of the nineteenth century” having not only influenced Pope Leo’s encyclical promoting the study of St. Thomas, but earlier having “had a hand in drafting the decrees of the First Vatican Council.” FERGUS KERR, *AFTER AQUINAS: VERSIONS OF THOMISM* 216, n. 3 (2002). According to MacIntyre, Kleutgen charted an epistemological path for the reading of Thomas such that he succeeded in generating “a number of different and rival Thomisms.” MACINTYRE, *supra*, at 73. Once the epistemological approach was established, Thomism was doomed to follow the course of fragmentation since “the fate of all philosophies which give priority to epistemological questions [is] the indefinite multiplication of disagreement. There are just too many alternate ways to begin.” *Id.* at 75. By reading Aquinas as focusing on questions of epistemology, understood in a post-Cartesian world, Neo-Thomism then “proceeded to reenact the disagreements of post-Cartesian philosophy” generating in turn “a number of systematic Thomisms, each in contention *both* with whatever particular erroneous tendencies in modern secular philosophical thought *that* particular Thomism aspired to confront and overcome *and* with its Thomistic rivals.” *Id.* at 75-76.

led to the creation of a number of journals and academic platforms for the discussion of legal and philosophical issues in light of the Catholic intellectual tradition. What the proposal failed to do was bring about programmatic, institutional change at even one of the nation's Catholic law schools. The reformers' goal of having Catholic law schools "build up a Catholic philosophy of law along Scholastic lines"<sup>450</sup> was never realized.

The consequences of this failure were momentous for the future of Catholic legal education as the 1950s came to a close. Law schools that understood their Catholic identity as only the mere fact of religious affiliation and the ethnic and cultural identity of their early graduates, were ill-prepared to address the enormous changes that would soon take place in the size and composition of law school student bodies.<sup>451</sup> To meet the swelling ranks of law students in the 1960s and 1970s, Catholic law schools by and large simply looked to hire the "best" candidate for a faculty position without regard for how the individual might contribute to the mission of the school as a Catholic center of learning.<sup>452</sup>

Without a firm sense of identity rooted in the Catholic intellectual enterprise—as evidenced in a school's curricular requirements and the scholarly pursuits of its faculty—Catholic law schools were ill-equipped to respond to the tumultuous events that would soon engulf American society and the Church. The anguish caused by the war in Vietnam, the outcry over racial injustice and gender inequality, and the cultural upheaval brought on by the sexual revolution, challenged American society, law, and legal institutions in profound ways. At the same time, the advent of the Second Vatican Council and the changes it brought—both to the Church's theological perspective on the modern world, and to the liturgy and devotional practices that affected the self-understanding of ordinary Catholics—were of enormous consequence. The effect of these changes was like "a spiritual earthquake" that left many Catholics with "the overall impression . . . of demoralization and collapse."<sup>453</sup>

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<sup>450</sup> Minutes of Meeting of Executive Council, American Catholic Philosophical Association, 10 PROC. AM. CATH. PHIL. ASSN. 173 (1934).

<sup>451</sup> See STEVENS, *supra* note 7, at 235-236 (discussing the enormous growth in the number of law students nationwide from 68,562 in 1962 to 114,800 in 1973).

<sup>452</sup> Nelson, *supra* note 185, at 134, 136.

<sup>453</sup> PHILIP GLEASON, KEEPING THE FAITH: AMERICAN CATHOLICISM PAST AND PRESENT 137, 139 (1987).



We live in an era in which law schools are now “homogenous in program and differentiated largely by the social origins and employment destinations of their students.”<sup>454</sup> Catholic law schools are, in the main, no different from their non-Catholic counterparts. In future works, we will explore how, in the decades that followed the failure of the proposal for reform, Catholic law schools continued down the road of standardization by following the curricular trends and markers of success set by non-Catholic schools. By the 1980s, all that remained were a few outward symbols of Catholic identity, a rhetoric of “public service” and a banal call to “social justice.”<sup>455</sup> Only with the advent of John Paul II’s *Ex Corde Ecclesiae*<sup>456</sup> would this trend be challenged and the conversation over Catholic identity begun anew.

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<sup>454</sup> Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833, 834 (1982).

<sup>455</sup> See generally Breen, *supra* note 16, at 383; Breen, *supra* note 9, at 41.

<sup>456</sup> POPE JOHN PAUL II, APOSTOLIC CONSTITUTION *Ex Corde Ecclesiae* (1990), available at [http://www.vatican.va/holy\\_father/john\\_paul\\_ii/apost\\_constitutions/documents/hf\\_jp-ii\\_apc\\_15081990\\_ex-corde-ecclesiae\\_en.html](http://www.vatican.va/holy_father/john_paul_ii/apost_constitutions/documents/hf_jp-ii_apc_15081990_ex-corde-ecclesiae_en.html).

## APPENDIX

Law School	AALS Accreditation	ABA Accreditation	Year Founded	Year Law Review
Ave Maria		2002	1999	2000
Barry	2006	2002	1993	1997
Boston College	1937	1932	1929	1959
Catholic University of America	1921	1925	1897	1950
Creighton University	1907	1924	1904	1968
University of Dayton	1984	1975	1922-35/1974 (opened, re-opened)	1974
University of Detroit-Mercy	1934	1933	1912	1931
DePaul University	1924	1925	1897, became affiliated with DePaul in 1912	1951
Duquesne University	1964	1960	1878	1963
Fordham University	1936	1936	1905 (as St. John's), 1907 (as Fordham)	1914
Georgetown University	1902	1924	1870	1912
Gonzaga University	1977	1951	1912	1966
Loyola University Chicago	1924	1925	1908	1970  (continuous publication)
Loyola Law School (Loyola Marymount University)	1937	1935	1920	1968
Loyola University New Orleans	1934	1931	1914	1920, 1941
Marquette University	1912	1925	1908	1916
University of Notre Dame	1924	1925	1869	1925
Pontifical Catholic University of Puerto Rico		1967	1961	1967
St. John's University	1946	1937	1925	1926
Saint Louis University	1924	1924	1843	1915
St. Mary's University	1949	1948	1934	1969
St. Thomas University (Florida)	2001	1988	1984	1988
University of St. Thomas (Minnesota)		2003	2001	2003
University of San Diego	1966	1961	1949	1964
University of San Francisco	1937	1935	1912	1966
Santa Clara University	1940	1937	1911	1961
Seattle University	1974	1994	1972	1977
Seton Hall University	1959	1951	1951	1967
Villanova University	1957	1954	1953	1956

