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The Forgotten Jurisprudential Debate: Catholic Legal Thought's Response to Legal Realism

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THE FORGOTTEN JURISPRUDENTIAL DEBATE: CATHOLIC LEGAL THOUGHT'S RESPONSE TO LEGAL REALISM*

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LEE J. STRANG***

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I. INTRODUCTION

Jerome Frank was one of the leading lights of Legal Realism and also one of its most extreme proponents.¹ He stunned the American legal academy with the publication of his 1930 seminal Realist text,² *Law and the Modern Mind*.³ Utilizing a Freudian perspective,⁴ Frank argued that the existing legal profession and academy sought an unattainable⁵ legal certainty.⁶ In doing so, the legal profession deceived the public and itself⁷ because it was playing out an emotional need for permanence and stability, seeking an authoritative father figure:

The Law . . . inevitably becomes a partial substitute for the Father-as-Infallible-Judge. That is, the desire persists in grown men to recapture, through a rediscovery of a father, a childish, completely controllable universe, and that desire seeks satisfaction in a partial, unconscious, anthropomorphizing of Law, in ascribing to the Law some of the characteristics of the child's Father-Judge. That childish longing is an important element in the explanation of the absurdly unrealistic notion that law is, or can be made, entirely certain and definitely predictable.⁸

1. See, e.g., EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 81–82, 85 (1973) (describing Frank as “one of the most extreme realists” who, nonetheless, “had an immediate impact”); see also Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 269 (1997) (describing two phenomena—first, “the now dominant tendency to treat Jerome Frank’s particular interpretation of the Core Claim as identical to Realism,” and second, the idea that “Frank’s view represented a particular sort of extreme”).

2. See Bruce A. Ackerman, *Law and the Modern Mind by Jerome Frank*, 103 DAEDALUS 119, 119, 121–22 (1974) (“Jerome Frank’s book, *Law and the Modern Mind*, . . . is probably the most comprehensive Realist effort to expose the fallacies involved in the Classical effort to state legal rules clearly and to systematize them around fundamental legal principles.” (footnote omitted)).

3. JEROME FRANK, *LAW AND THE MODERN MIND* (1930).

4. *Id.* at 326 n.1 (discussing Freud). Frank had undergone six months of psychoanalysis. Walter E. Volkmer, *Frank, Jerome N. (1889–1957)*, in THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 201, 201 (Roger K. Newman ed., 2009).

5. See FRANK, *supra* note 3, at 6 (“The law always has been, is now, and will ever continue to be, largely vague and variable.”).

6. See *id.* at 7 (“Lawyers do not merely sustain the vulgar notion that law is capable of being made entirely stable and unvarying; they seem bent on creating the impression that, on the whole, it is already established and certain.”).

7. *Id.* at 9.

8. *Id.* at 18; see also *id.* at 203 (claiming that “the continued craving for excessive legal stability” can be found in the “undisposed of childish longings for a father-substitute, longings

Frank's critique of existing legal perspectives was based on a deep-seated skepticism concerning the existence of moral absolutes.⁹

Thus, Frank devoted an entire chapter to deriding the “blighting medieval prepossession” of “Scholasticism.”¹⁰ According to Frank “[i]n no other field of human thought [was] that prepossession to be found in a more exaggerated and persistent form” than in legal thinking.¹¹ Frank rejected the “vague, abstract, sky-swelling, super-experiential principles and rules of law” that constitute “Absolutism” and “Fundamentalism” in legal thought.¹²

However, fifteen years later, Frank published *Fate and Freedom*, where he reversed some of his earlier views:

The word “Scholasticism” is sometimes used to indicate a patronizing attitude towards the aridity of the subjects to which the Scholastics devoted themselves. The charge of aridity is not too well founded, for many of these scholars busied themselves with matters of government and economics, often, as in the case of Thomas Aquinas, in a distinguished manner. Moreover, they achieved skills in the techniques of analytic thinking for which we moderns are still much in their debt. And, through them and otherwise, the medieval Church fostered the ideal of social solidarity and a “sense of the community”—values which were subsequently too much neglected.¹³

Frank continued to express his newfound admiration for natural law, which culminated with his admonition, “I do not understand how any decent man today can refuse to adopt, as the basis of modern

which play their part in religion as in law”); *id.* at 252 (“Modern civilization demands a mind free of father-governance. To remain father-governed in adult years is peculiarly *the* modern sin. *The modern mind is a mind free of childish emotional drags, a mature mind.* And law, if it is to meet the need of modern civilization must adapt itself to the modern mind.”).

9. *See id.* at 17–20, 69–83; *see also id.* at 93 (“Consider, for instance, the case of Plato himself. Before his time Greek science had made rapid strides. Relativism and healthy skepticism were developing, men were being freed from bondage to authority . . .”).

10. *Id.* at 57–68 (quoting Herman Oliphant & Abram Hewitt, *Introduction* to JACQUES RUEFF, *FROM THE PHYSICAL TO THE SOCIAL SCIENCES*, at ix, x (1929)).

11. *Id.* at 63 (quoting Oliphant & Hewitt, *supra* note 10, at x) (internal quotation mark omitted).

12. *Id.* at 57.

13. JEROME FRANK, *FATE AND FREEDOM: A PHILOSOPHY FOR FREE AMERICANS* 99 (1945) (footnote omitted); *see also* PURCELL, *supra* note 1, at 173 (“Frank had always been committed to . . . [democracy], and during the early forties he looked increasingly for its moral justification and seemed to find it in the Thomistic concept of natural law.”).

civilization, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas.”¹⁴

What accounts for Frank’s about-face, his near-180 degree turn toward natural law, in such a short period of time? Undoubtedly, a number of factors influenced Frank’s and others’ reappraisal of the natural law position.¹⁵ For example, the shattering effect of World War II could partially explain Frank’s re-evaluation of Realism,¹⁶ but it cannot account for his turn toward a Thomistic conception of natural law. Instead, as we detail in this Article, Frank may have been prompted to reconsider his views by the widespread and thoughtful intellectual response to Legal Realism set forth by leading Catholic legal scholars during the 1920s–1940s.

Although the scholarship on the Legal Realist movement is voluminous, this literature has either ignored, or casually dismissed, the contributions of these contemporary critics.¹⁷ This gap is surprising because, as we show, the critiques offered by Catholic legal scholars constituted the single largest body of criticism directed at Legal Realism.¹⁸ This gap is doubly surprising because the arguments offered by these scholars were generally thoughtful and nuanced, in large measure because they built on the worldwide revival of the thought of St. Thomas Aquinas then taking place.¹⁹ This Article provides a more balanced account of what these authors said and thereby reintroduces their critiques into the still ongoing conversation concerning Legal Realism and its legacy.

In doing so, we describe these Catholic legal scholars as a jurisprudential movement, similar to their Legal Realist interlocutors. We describe some of the major figures in this movement and how their work drew upon, reflected, and facilitated the revival of Thomistic philosophy known as Neo-Thomism or, more broadly, Neo-Scholasticism. Like other intellectual movements, these scholars sought

14. Jerome Frank, *Preface to Sixth Printing* of JEROME FRANK, *LAW AND THE MODERN MIND*, at viii, xx (Anchor Books ed. 1963).

15. See PURCELL, *supra* note 1, at 172–74 (describing a number of Realists who moved toward natural law).

16. See John M. Breen & Lee J. Strang, *The Road Not Taken: Catholic Legal Education at the Middle of the Twentieth Century*, 51 AM. J. LEGAL HIST. 553, 629–33 (2011) (describing some of the reasons that Realism faltered).

17. See *infra* Part II.

18. See *infra* Part III.

19. See *infra* Part III.B.4.

to solidify and perpetuate their contributions to the scholarly conversation by giving their movement institutional form in various ways. As we illustrate, their ultimate failure to do so helped lead to their movement's eclipse and subsequent collapse in the late 1950s.²⁰

In Part II of this Article, we begin by portraying the received wisdom: that Legal Realism vanquished all of its adversaries from the field of intellectual combat. The conventional story is that the Realists encountered little, if any, cogent intellectual resistance and that their arguments carried the day.

In Part III, we argue that this nearly universally accepted picture leaves out the single-biggest source of criticism: Catholic legal scholars writing as part of the Neo-Scholastic revival. These scholars drew on the Thomistic natural law tradition to powerfully critique Realist claims while, at the same time, acknowledging Realist insights.²¹ Significantly, Catholic legal scholars did not suggest restoration of the formalism against which the Realists powerfully rebelled. Like any other intellectual movement (including Realism itself), Catholic legal scholars made use of their own conceptual apparatus to present their arguments. Unlike the formalists, however, they denied that there was "an ideal system of human positive law, springing from reason and existing external, immutable, and equally applicable to all times and places."²²

In Part IV, we suggest why later historians have failed to either acknowledge or appreciate the contributions made by Catholic legal scholars during this period. We argue, based on these historians' own statements and other circumstances, that this absence is best explained by the marginal place of Catholicism in American intellectual life, as well as the historians' own differing philosophical, jurisprudential, and religious commitments.

20. See *infra* Part III.B.5.

21. In Breen & Strang, *supra* note 16, we tied this movement in Catholic legal thought to the contemporaneous widespread call for reform of Catholic legal education.

22. Brendan F. Brown, *Natural Law and the Law-Making Function in American Jurisprudence*, 15 NOTRE DAME LAW. 9, 13 (1939).

II. THE RECEIVED WISDOM IN AMERICAN LEGAL HISTORY: WE'RE ALL REALISTS NOW, AND RIGHTLY SO

A. *The Dominant Narrative: The Triumph of Legal Realism*

The received wisdom in American legal history is that Legal Realism arrived, swept the field of formalist adversaries, and permanently transformed American law, legal practice, and legal education. Professor Brian Tamanaha has nicely summarized this familiar narrative:

Perspectives on judging in the United States are dominated by a story about the formalists and the realists. . . . [T]he legal realists discredited legal formalism, demonstrating that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for almost every legal rule or principle, and that legal principles and precedents can support different results.²³

With few dissenting voices,²⁴ scholars of jurisprudence and American legal history chronicle the same basic tale of “classical orthodoxy” and its demise.²⁵ Legal formalism, with a few prominent exceptions,²⁶ dominated American legal thought from the post-Civil War era until the 1920s.²⁷ Then—or so the story goes—building on the insights of a handful of earlier, path-breaking thinkers,²⁸ a relatively unorganized

23. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* 1 (2010); *see also* BRIAN LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, in *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* 15, 16 (2007) [hereinafter *NATURALIZING JURISPRUDENCE*] (describing the “Received View of Realism”).

24. Professor Tamanaha is the most prominent dissenting voice from this narrative. TAMANAHA, *supra* note 23, at 3. Tamanaha argued that the dominant narrative is a post-hoc invention of progressive legal scholars in the 1970s seeking to legitimate their own jurisprudential claims. *Id.* at 6, 107, 200–02. For a moderately critical review of Tamanaha’s book, *see* Brian Leiter, *Legal Formalism and Legal Realism: What Is the Issue?*, 16 *LEGAL THEORY* 111 (2010).

25. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY* 156–57 (1992).

26. The most frequently cited is Justice Oliver Wendell Holmes, Jr. *See, e.g., id.* at 109–43 (describing Justice Holmes’s evolution into the intellectual father of Legal Realism).

27. *See id.* at 9–31, 169–212.

28. The most frequently cited, in addition to Justice Holmes, is Dean Roscoe Pound. *See, e.g., id.* at 169–71.

movement of legal scholars began to develop in the 1920s,²⁹ centered at Columbia and Yale Law Schools.³⁰ These scholars criticized the then-regnant formalism³¹ according to which the state was a neutral arbiter that avoided “taking sides in conflicts between religions, social classes, or interest groups.”³² The law was “a system of processes and principles that could be shared even in the absence of agreed-upon ends,”³³ and legal decision-making involved deduction and analytical reasoning that manifested “certainty and logical inexorability.”³⁴ In its place, the Realists offered an alternative jurisprudential approach that fundamentally changed American legal thought to such an extent that³⁵ it is a cliché to say, “We are all realists now.”³⁶

B. The Nonexistent or Weak Rejoinder to Legal Realism by Catholic Legal Scholars

In the standard historical account, the Legal Realists overcame all challengers in the jurisprudential field, with little—at least little *cogent*—critical response.³⁷ According to most legal histories of the period,³⁸ the opponents of Realism faced the insurmountable task of overcoming the theoretical,³⁹ sociological,⁴⁰ professional,⁴¹ and political⁴²

29. *Id.* at 169.

30. *Id.*; see also LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986) (describing Realism’s prominence at Yale).

31. See HORWITZ, *supra* note 25, at 170 (“[A]bove all, Realism is a continuation of the Progressive attack on the attempt of late-nineteenth-century Classical Legal Thought . . .”).

32. *Id.* at 19.

33. *Id.* at 16.

34. *Id.*

35. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 92 (1995).

36. KALMAN, *supra* note 30, at 229; see also WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* 382 (1973) (saying that the “uncontroversial nature of the core of realism” is reflected in “a well-known incantation: ‘Realism is dead; we are all realists now’”).

37. See, e.g., JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 3 (1995) (describing “criticism of Realism” as “often, . . . really awful” and “often, . . . really frivolous”).

38. Again, TAMANAHA, *supra* note 23, is a prominent exception to this claim.

39. See DUXBURY, *supra* note 35, at 69, 79–82 (“American legal realism . . . was nurtured under the wing of the social sciences . . .”); *id.* at 127–30 (tying realism to pragmatism); STEPHEN M. FELDMAN, *AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE* 109–10, 113 (2000) (citing the rise of empirical social science as a reason for the rise of realism); JAMES E. HERGET, *AMERICAN JURISPRUDENCE, 1870–1970: A HISTORY* 1 (1990) (“There is no doubt that from 1870 to 1940 the principal motivation for most theorists was to make scholarly work in law

changes—advances, in the scholars’ eyes⁴³—that Realism reflected and furthered. Critics who did not embrace the move toward a naturalized, theoretical perspective were either ignored⁴⁴ or marginalized by historians.⁴⁵ And some scholars both ignored and marginalized the contributions of Catholic legal scholars.⁴⁶

The prominent role played by Catholic legal scholars in the jurisprudential debates of the 1920s–1940s is conspicuously absent from most historical accounts, dismissed out of hand in others, and, at best, given short-shrift in a few.⁴⁷ For example, in his description of post-World War II legal thought, Morton Horwitz devotes all of half of one

‘scientific.’”); HORWITZ, *supra* note 25, at 157, 181–82, 210 (tying Realism to the rise of modern social sciences and rejection of natural law/natural rights); *id.* at 140 (tying Justice Holmes’s early Realism to adoption of legal positivism); PURCELL, *supra* note 1, at 159 (“Into that traditional field [of law] a scientific naturalism had entered, first as sociological jurisprudence and then as legal realism.”); SCHLEGEL, *supra* note 37, at 4–5 (arguing that the Realists tried to utilize empirical science as a model for law).

40. See DUXBURY, *supra* note 35, at 94 (“Early realist social thought was inspired by the experience of the Civil War and the powerful nationalist sentiments which it aroused, and also by escalating industrialism . . .”); FELDMAN, *supra* note 39, at 109 (identifying “laissez-faire capitalism and mass industrialization”); HORWITZ, *supra* note 25, at 65, 80–85, 95, 131, 188 (citing to the “enormous upsurge of social change and class struggle in the late nineteenth century”).

41. See DUXBURY, *supra* note 35, at 116; HORWITZ, *supra* note 25, at 188 (citing to the “enormous similarities between the changes in the governing premises of philosophy, history, economics, and other social sciences”); SCHLEGEL, *supra* note 37, at 38–80.

42. See DUXBURY, *supra* note 35, at 116; FELDMAN, *supra* note 39, at 109–10 (tying Legal Realism to progressivism and the New Deal); HORWITZ, *supra* note 25, at 169–70 (tying Realism to “the reformist agenda of early-twentieth-century Progressivism” and the New Deal).

43. See BRIAN LEITER, *Postscript to Part I: Interpreting Legal Realism, in NATURALIZING JURISPRUDENCE*, *supra* note 23, at 103, 107 & n.20 (describing Catholic legal scholars’ critical engagement with Realism as “Catholic lawyers enacting one of the many iterations of the Church’s resistance to modernity” (citing Ben W. Palmer, *Hobbes, Holmes and Hitler*, 31 A.B.A. J. 569 (1945))).

44. See, e.g., FELDMAN, *supra* note 39, at 105–23 (describing Legal Realism’s rise and demise, including criticisms of Realism, without noting Catholic legal scholars’ critiques).

45. See, e.g., Neil Duxbury, *The Reinvention of American Legal Realism*, 12 LEGAL STUD. 137, 169–70 (1992).

46. Compare DUXBURY, *supra* note 35, at 212–23 (describing the critical response to Realism, without noting Catholic legal scholars’ similar critiques), with Duxbury, *supra* note 45, at 144–49 (describing “anti-realists,” including negative citation to Catholic legal scholars).

47. See generally David H. Burton, *Justice Holmes and the Jesuits*, 27 AM. J. JURIS. 32 (1982) (describing the role of American Jesuits in the 1940s–1950s who criticized Justice Holmes and, in doing so, undermined his reputation and sparked a decades-long debate over Justice Holmes’s legacy). Burton’s article touches primarily on only one facet of the Catholic legal scholar–Realist debate: Catholic criticism of Justice Holmes.

sentence to the Catholic legal scholars' critiques and then quickly leaves them behind.⁴⁸ Similarly, John Schlegel's otherwise informative survey of Realist thought begins by derisively noting that critics of Realism existed, including Catholic legal scholars.⁴⁹ He then dismisses the contributions of these scholars in a single sentence: "[C]atholic critics of Realism . . . were so far out of the mainstream of American legal education as to be essentially irrelevant to the debate over Realism."⁵⁰

The lengthiest treatment paid to Catholic legal scholars' contributions appears in a 1992 article, *The Reinvention of American Legal Realism*, by Neil Duxbury.⁵¹ However, Duxbury's judgment is unstintingly harsh. Using labels like, "outbursts,"⁵² "hysteria,"⁵³ and "diatribe,"⁵⁴ to depict Catholic legal scholars' responses to Realism, Duxbury summarizes their efforts as "little more than crude attempts at proselytisation."⁵⁵ Duxbury's description of Catholic legal scholars' claims is also, at best, uncharitable. For Duxbury, the "message" of these authors was that "natural law was the embodiment of the good and Legal Realism the epitome of evil."⁵⁶ Given his one-dimensional portrait of Catholic legal scholars as crude moralizers,⁵⁷ it is not surprising to see Duxbury petulantly remark that mere "repetition of the argument . . . hardly blessed [these scholars'] collective labours with an air of sophistication."⁵⁸

Two historical accounts stand out as partial exceptions to the tendency of legal historians to ignore or dismiss out-of-hand the Catholic legal scholars' critique of Legal Realism. The first is Edward Purcell's masterful book, *The Crisis of Democratic Theory*.⁵⁹ Purcell

48. See HORWITZ, *supra* note 25, at 250 ("While one school of thought, mainly Catholic, sought to blame moral relativism for the spread of a 'might makes right' philosophy, others wished to show instead that an absolutist mindset was actually more conducive to the growth of totalitarianism.").

49. SCHLEGEL, *supra* note 37, at 3.

50. *Id.* at 6.

51. Duxbury, *supra* note 45, at 162-73.

52. *Id.* at 163.

53. *Id.*

54. *Id.* at 164.

55. *Id.* at 170.

56. *Id.* at 168.

57. See *id.* at 173 (describing the "majority" of Catholic legal scholars as "repetitive[] and . . . sanctimonious[]").

58. *Id.* at 170.

59. PURCELL, *supra* note 1.

powerfully argues that the rise of scientific naturalism in the nineteenth century precipitated crises in many areas of American intellectual life, including law.⁶⁰ After describing Realism, Purcell reviews prominent criticisms and critics, beginning with Roscoe Pound and Lon Fuller, followed by a review of Catholic legal scholars.⁶¹ Purcell fairly describes the contributions of some of the major Catholic writers, their connection to the then-flourishing worldwide Neo-Scholastic movement, their core claims, and their attempts at institution building.⁶²

However, when Purcell turns to an evaluation of Catholic legal scholars' claims, he lapses into caricature. Purcell's appraisal hinges on characterizing Catholic legal scholars as being immunized from the crisis of democratic theory by their "deepest articles of religious faith and emotional conviction."⁶³ Purcell claims that Catholic legal scholars' arguments failed because of the "inextricable intertwining of their rational philosophy with their particular theology," which "raised doubts as to where the one began and the other left off."⁶⁴ Unlike other American intellectuals whom Purcell regards as more mature,⁶⁵ Purcell contends that American Catholics "never faced the crisis of democratic theory" because "they had a ready justification for democracy . . . based on theology, philosophy, and simple religious faith."⁶⁶ As such, Catholic legal scholars simply were not capable of experiencing the anxiety of the age.⁶⁷ Instead, they were like "the great majority of Americans who

60. *Id.* at 5.

61. *Id.* at 159–78.

62. *Id.* at 164–78.

63. *Id.* at 169.

64. *Id.*

65. Perhaps ironically, one of the key Catholic legal scholars during this period, Francis E. Lucey, S.J., experienced similar claims made against him. Burton, *supra* note 47, at 40–42. Lucey saw his critics objecting that he was not a fit participant in the debate over Justice Holmes's legacy: "For some unknown reason theologians are supposed to be incompetent witnesses. It is suggested that their minds are warped by preconceived and misconceived ideas. They suffer from fixations. They live in a cloud of misty abstractions. They have not reached the psychoanalysts, *adult stage*. They are not realists." Francis E. Lucey, S.J., *Holmes—Liberal—Humanitarian—Believer in Democracy?*, 39 GEO. L.J. 523, 558 (1951) (responding to critics, including Mark DeWolfe Howe).

66. PURCELL, *supra* note 1, at 169.

67. *Id.*

simply accepted democracy as an ethical good on grounds of tradition, faith, habit, and necessity.”⁶⁸

The most sustained and judicious historical account of Catholic legal scholars’ contributions to the debate is found in James Herget’s book, *American Jurisprudence*.⁶⁹ After briefly noting the contributions by prominent Catholic legal scholar Walter B. Kennedy, during the 1920s–1930s,⁷⁰ Herget devotes approximately ten pages to several Catholic authors prominent in the 1940s–1950s.⁷¹ He identifies the debt that American Catholic legal scholars owed to international Neo-Scholastics, such as Jacques Maritain and Heinrich Rommen,⁷² and the efforts of these legal scholars to institutionalize their movement, including the founding of the *Catholic Lawyer* at St. John’s University and Notre Dame’s Natural Law Institute.⁷³ Herget also correctly identifies the development of “relativism and scientism,” the rise of totalitarianism, and the horrors of World War II as factors that contributed to the

68. *Id.* Professor Dan Ernst suggested, in a brief blog post commenting on an earlier version of this Article, that our characterization of Purcell’s treatment of Catholic legal scholars was inaccurate. Dan Ernst, *Breen and Strang on the Forgotten Catholic Legal Response to Legal Realism*, LEGAL HIST. BLOG (Mar. 28, 2014, 10:30 AM), <http://legalhistoryblog.blogspot.com/2014/03/breen-and-strang-on-forgotten-catholic.html>, archived at <http://perma.cc/K76P-ZNEE>. Professor Ernst argued that “‘simple’ doesn’t mean ‘simple-minded.’” *Id.*

Without attributing any ill-will to Purcell, we do not believe Ernst’s description fits Purcell’s argument. Purcell’s argument hinged on the characterization of Catholic legal scholars as—unlike their Realist interlocutors—having a “particular theology,” “religious faith,” “their religious faith,” “simple religious faith,” “faith,” and “deepest articles of religious faith.” PURCELL, *supra* note 1, at 169. That characteristic alone, according to Purcell, distinguished them from “other American intellectuals.” *Id.* Furthermore, we believe that, when one scholar describes another scholar as having “a ready justification” for some disputed point(s), the description is not flattering. Instead, “ready” has the connotation of unthinking or simple-minded. *Id.*

Ernst suggested that Purcell argued that Catholic legal scholars did not experience the crisis of democratic theory because of their “Thomist rationalism.” Ernst, *supra*. We believe that accurately describes Catholic legal scholars. However, we do not believe that was Purcell’s description. Instead, Purcell claimed that, because of the “inextricable intertwining of their rational philosophy . . . [and] their particular theology,” as well as “the close union between their religious faith and their philosophical training,” it was, in Purcell’s mind, the Catholic legal scholars’ “simple religious faith” that prevented them from perceiving the crisis their non-Catholic peers experienced. PURCELL, *supra* note 1, at 169.

69. HERGET, *supra* note 39.

70. *Id.* at 175–76, 180.

71. *Id.* at 230–39.

72. *Id.* at 235–36.

73. *Id.* at 237–38.

relatively warmer reception received by Catholic legal scholars during this later period, in contrast to the 1920s–1930s, when Realism first emerged.⁷⁴

Despite his fair and relatively robust treatment of Catholic contributions to the debate, Herget's narrative nevertheless remains thin. First, Herget focuses much of his treatment on only one book by one relatively minor Catholic scholar.⁷⁵ The most prominent scholars (discussed in Part III.B, below) are either not mentioned or are noted only in passing.⁷⁶ Second, Herget fails to show Catholic legal scholars' broad and deep engagement with Realist claims. Instead, Herget identifies two failed strategies that Catholic legal scholars futilely employed: "Holmes-bashing" and the "rewriting of history," in which these scholars recast America's Founding Fathers as Thomistic natural lawyers.⁷⁷

Third, Herget's explanation for Catholic legal scholars' ultimate failure is an exceedingly brief and shallow account of the phenomenon it purports to explain. For example, Herget argues that Neo-Scholasticism failed because it advanced "a doctrine . . . that had historically justified a feudal system, slavery (in Aristotle's time), and an ultra-authoritative, antidemocratic church structure."⁷⁸ Putting to one side the descriptive accuracy of Herget's claims, there are many plausible countervailing reasons that Herget did not entertain. For example, Herget cannot account for the intellectual "conversions" to the natural law tradition by prominent Legal Realists such as Robert Maynard Hutchins⁷⁹ and Jerome Frank (which were not religious conversions).⁸⁰ Surely Herget does not mean to suggest that, in coming to embrace the natural law tradition, these thinkers also came to embrace slavery and reject democracy.

74. *Id.* at 229–30.

75. *See id.* at 232–35 (discussing one book by Karl Kreilkamp). Kreilkamp was a philosophy professor at the University of Notre Dame and later at George Mason University.

76. *Id.* at 230–39.

77. *Id.* at 236–39.

78. *Id.* at 238–39.

79. *See* KALMAN, *supra* note 30, at 42, 104–15.

80. *See, e.g.,* Frank, *supra* note 14, at xix–xx ("I do not understand 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."); *see also* Karl L. Llewellyn, *One "Realist's" View of Natural Law for Judges*, 15 NOTRE DAME LAW. 3, 8 (1939) ("[T]his 'realist' welcomes the modern Natural Law movement . . .").

By contrast, the historical treatment accorded those non-Catholic scholars who accepted modernity, yet criticized Realism without endorsing the natural law tradition, has been favorable. For example, Horwitz repeatedly identifies Lon Fuller as a cogent critic of Realism, a critic whose comments were “extraordinarily perceptive,” in part because Fuller agreed with many of the Realists’ premises.⁸¹ Similarly, Stephen Feldman singles out Fuller as exemplary of the legal process school of thought, a post-Realist phenomenon that accepted the dominant intellectual trends and worked within them to ground the rule of law and democracy.⁸² Likewise, according to Duxbury, “[o]nly Lon Fuller, of all the anti-Realists of the 1930s and 1940s, attempted to take Realism seriously as a set of jurisprudential premises.”⁸³

As we demonstrate below, these historians’ accounts—including Purcell’s and Herget’s—do not do justice to the multifaceted, complex, nuanced, and generally thoughtful arguments wielded by numerous Catholic legal scholars during this period.⁸⁴ Indeed, the Catholic legal scholars’ critiques were powerful enough to elicit several thoughtful responses and even to bring about a change of mind on the part of several prominent Realists toward a natural law perspective.⁸⁵ But this and other evidence is inexplicable on Herget’s and Purcell’s historical accounts and simply unintelligible from Duxbury’s perspective.⁸⁶

81. HORWITZ, *supra* note 25, at 183–84, 202, 211.

82. FELDMAN, *supra* note 39, at 119–20, 122–23; *see also* DUXBURY, *supra* note 35, at 223–32.

83. Duxbury, *supra* note 45, at 149.

84. *See infra* Part III.

85. Duxbury, *supra* note 45, at 173–75.

86. Duxbury notes these movements but fails to provide an explanation other than “bridge-building” and “lip-service,” *id.* at 173–75, and Duxbury dismisses Jerome Frank’s “conversion” to natural law by suggesting that Frank later in life repudiated his earlier conversion, *id.* at 174–75. Our reading of the cited source, Jerome N. Frank, *Some Reflections on Judge Learned Hand*, 24 U. CHI. L. REV. 666, 704 (1957), is not that “Frank was candid enough to confess that he had never, in fact, placed much store in the Thomist critique of realism,” Duxbury, *supra* note 45, at 175, even assuming that a later repudiation of an earlier conversion would establish that the earlier conversion did not, in fact, occur.

III. THE RISE OF LEGAL REALISM AND CATHOLIC LEGAL THOUGHT'S RESPONSE

A. *The Rise of Legal Realism*

The natural law tradition was the consensus jurisprudence prior to the sixteenth century.⁸⁷ This tradition was the product of a long and distinguished pedigree in Western thought, stretching back to Plato, Aristotle, and Cicero, and extending through Augustine, Aquinas, and Suarez, among others.⁸⁸ Following the Reformation and through the Enlightenment, the classical understanding of natural law continued, albeit modified by a new line of thought that emphasized natural rights and combined with a form of contractarianism.⁸⁹ It was this jurisprudence that, as interpreted by Locke, greatly influenced the American Founders.⁹⁰

By the close of the nineteenth century, however, natural law of all stripes had suffered a remarkable collapse, such that, at least in the eyes of elites, it was no longer “seriously entertained.”⁹¹ Its influence waned

87. See ALASDAIR MACINTYRE, *AFTER VIRTUE* 117 (2d ed. 1984) (“[I]t was because a moral tradition of which Aristotle’s thought was the intellectual core was repudiated during the transitions of the fifteenth to seventeenth centuries that the Enlightenment project of discovering new rational secular foundations for morality had to be undertaken.”); see also JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 7 (1991) (“By the mid-eighteenth century . . . philosophy had lost its hold on the schools and on educated people alike.”); HERGET, *supra* note 39, at 8 (“Theories of natural law . . . were dominant in Europe down to the end of the eighteenth century . . .”); BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* 1, 11–12, 20–23 (2006) (describing the dominance and then decline of Aristotelian natural law).

88. See FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 7 (1985); JEFFRIE G. MURPHY & JULES L. COLEMAN, *THE PHILOSOPHY OF LAW: AN INTRODUCTION TO JURISPRUDENCE* 14 (1984); Geoffrey Sayre-McCord, *Introduction: The Many Moral Realisms*, in *ESSAYS IN MORAL REALISM*, at 1 (Geoffrey Sayre-McCord ed., 1988).

89. See Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 *YALE L.J.* 907 (1993).

90. See McDONALD, *supra* note 88, at 3, 7 (describing the large body of Enlightenment political theory as one of four factors that guided and limited the Framers and referring specifically to David Hume, James Harrington, John Locke, Montesquieu, and Blackstone).

91. HERGET, *supra* note 39, at 31, 229 (stating that, in the United States by 1870, “the moral paradigm was not seriously entertained”); HORWITZ, *supra* note 25, at 156 (stating that, “by the late eighteenth century [Thomistic natural law] . . . had been largely marginalized by English jurists”); Russell Hittinger, *Introduction* to HEINRICH A. ROMMEN, *THE NATURAL LAW*, at xi, xv (1998) (“[I]n the first decades of this century, American thinkers had given relatively little attention to natural law.”); see also Neil MacCormick, *Natural Law and the Separation of Law and Morals*, in *NATURAL LAW THEORY*:

until, by the advent of the twentieth century in the United States, natural law was practically nonexistent,⁹² except in Catholic circles.⁹³ The causes of this decline were multifarious, involving broad intellectual, religious, and social movements of enormous consequence. These included the Protestant Reformation⁹⁴ and the rise of modern science,⁹⁵ including, perhaps most importantly, evolutionary theory.⁹⁶ The various instantiations of Enlightenment thought—the epistemological skepticism of Descartes and Hume, Kant’s reinvention of metaphysics and his deontological ethics, Bentham’s utilitarianism, Mill’s theory of liberty based on the harm principle, and Nietzsche’s proclamation of the death of God and his purported move beyond good and evil—profoundly challenged the intellectual foundation and certainty of classical metaphysics and virtue ethics.

The United States was the ultimate Protestant nation, a creature born of the Enlightenment.⁹⁷ It was, after all, a country founded by groups of Christian reformers who had themselves broken from an established Protestant church. It was founded by people steeped in and upon the Enlightenment ideas of equality and individual liberty, the innate power of human reason, and the promise of democratic government.⁹⁸ The country was later heavily influenced by the practical

CONTEMPORARY ESSAYS 105, 105 (Robert P. George ed., 1992) [hereinafter NATURAL LAW THEORY] (stating that natural law theory, prior to the 1980s, was “dismissed as an ancient and exploded fallacy kept alive only as the theological dogmatics of an authoritarian church”).

92. See sources cited *supra* note 91.

93. See LEO STRAUSS, NATURAL RIGHT AND HISTORY 7 (1953) (“The issue of natural rights presents itself today as a matter of party allegiance. Looking around us, we see two hostile camps, heavily fortified and strictly guarded. One is occupied by the liberals of various descriptions, the other by the Catholic and non-Catholic disciples of Thomas Aquinas.”).

94. HERGET, *supra* note 39, at 228.

95. *Id.*

96. MACINTYRE, *supra* note 87, at 39–50, 53–55, 110–14, 165; MURPHY & COLEMAN, *supra* note 88, at 15 (“We now, of course, live in the post-Darwinian world and are accustomed to viewing nature (even human nature) in terms of mechanistic causation, and thus we are generally inclined to view teleological worldviews as quaintly pre-scientific. The modern mind finds it difficult to accept that people have ends or purposes other than those they have set or accepted for themselves.”).

97. See PAUL JOHNSON, A HISTORY OF THE AMERICAN PEOPLE 20, 38–41, 108–17 (1997).

98. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27 (1967); GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 5 (1969); see also AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 243 (2005)

accomplishments of scientific innovation and technology,⁹⁹ and the loss of a sense of permanence and teleological certainty brought on by Darwin's theory of evolution.¹⁰⁰ Furthermore, the vision of the expanding nature of the cosmos and a universe in constant flux revealed through modern astronomy led many "to doubt the existence of eternal, universal, and unchanging natural law principles."¹⁰¹ The jurisprudential ideas that filled the gap left by the abandonment of natural law theory in the United States¹⁰² became the focus of criticism by Catholic legal educators.

The roots of the ideas that go under the banner "Legal Realism," to which Catholic legal educators responded beginning in the 1920s and 1930s,¹⁰³ are complex and contested.¹⁰⁴ Here we set them out in abbreviated form. Although the label usually attached to these ideas is "Legal Realism," the significance of the label is disputed, as is its accuracy.¹⁰⁵ This is in part due to the fact that the movement in American law known as Legal Realism was a disparate collection of legal figures¹⁰⁶ united around common themes.¹⁰⁷ They constituted "a

(describing a "general commitment to Enlightenment values" in the Constitution); JOHNSON, *supra* note 97, at 25 (recounting John Locke's influence in the Mayflower Compact).

99. See HERGET, *supra* note 39, at 11–12, 228 (arguing that natural law theories declined because "[t]hey are nonempirical, unscientific, and carry with them unwanted metaphysical baggage").

100. See sources cited *supra* note 96.

101. FELDMAN, *supra* note 39, at 90.

102. See HERGET, *supra* note 39, at 9 ("With the exception of sporadic expositions of the Thomistic version by scholars at Roman Catholic institutions, the old moral paradigm did not really receive any intellectual support in American jurisprudence until around 1940.").

103. ANTHONY J. SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE 77 (1998).

104. For a small sampling of works focusing on American jurisprudence, including Legal Realism, see DUXBURY, *supra* note 35; HERGET, *supra* note 39; SCHLEGEL, *supra* note 37; SEBOK, *supra* note 103; TAMANAHA, *supra* note 23; see also SCHLEGEL, *supra* note 37, at 1–2 ("The questions of who were the Realists and what was Realism are not trivial and are still contested.").

105. See SEBOK, *supra* note 103, at 77 ("[I]t is difficult to discuss realism because it is difficult to define who the realists were and when they wrote."); see also Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 733–34 (2009) (arguing that "beneath the label there was *nothing* distinctive—nothing unique or unifying—about the Legal Realist[]" label).

106. HORWITZ, *supra* note 25, at 169 ("Legal Realism was neither a coherent intellectual movement nor a consistent or systematic jurisprudence. It expressed more an intellectual mood . . .").

107. See *id.* at 170 (arguing that the central theme of Realism was a critique of Classical Legal Thought's "attempt . . . to create a sharp distinction between law and politics and to

loosely defined group of judges, lawyers, and scholars, who marked the difference between the ‘law in action’ and the ‘law in books’ and formulated early versions of what is now called ‘the indeterminacy thesis.’”¹⁰⁸ Catholic legal scholars recognized the multifarious nature of this phenomenon.¹⁰⁹

Persons commonly identified as prominent Legal Realists¹¹⁰ include Karl Llewellyn, Benjamin Cardozo, Louis Brandeis, Jerome Frank, Walter Wheeler Cook, Arthur L. Corbin, Thurmond Arnold, Underhill Moore, William O. Douglas, and Felix Cohen.¹¹¹ Many regard Oliver Wendell Holmes, Jr.,¹¹² and Roscoe Pound¹¹³ as the movement’s two most formative scholarly influences.

Justice Holmes’s influence on American legal thought was and continues to be tremendous.¹¹⁴ Although he penned many scholarly

portray law as neutral, natural, and apolitical”); *see also* Wilfrid E. Rumble, *The Legal Positivism of John Austin and the Realist Movement in American Jurisprudence*, 66 CORNELL L. REV. 986, 988 (1981) (arguing that “one can discern certain tendencies in the work of men generally acknowledged to be legal realists”).

108. Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2465 (2014) (reviewing LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* (2013)) (footnotes omitted) (quoting Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462 (1987)).

109. *See* Walter B. Kennedy, *Realism, What Next?* (pt. 1), 7 FORDHAM L. REV. 203, 203 n.2 (1938) [hereinafter Kennedy, *Realism, What Next?*] (“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.”).

110. Many of the figures in this grouping are frequently given related labels such as “pre-realists.” SEBOK, *supra* note 103, at 77.

111. Given the lack of consensus on what constituted Legal Realism, it is not surprising that there is similarly “no universal standard for determining who is a legal realist.” Rumble, *supra* note 107, at 987.

112. *See* HERGET, *supra* note 39, at 37 (stating that Justice Holmes “offered a clearer and fuller expression of some new jurisprudential ideas”).

113. *See id.* at 147 (describing Pound as the “person most instrumental in welding this new view of the legal world into a whole and of developing it further”).

114. *See* ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 1* (2000) (concluding that Justice Holmes, “more than any other individual, shaped the law of the twentieth century”); LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 117 (1940) (citing Justice Holmes’s “enormous influence”); Harry W. Jones, *Legal Realism and Natural Law, in THE NATURE OF LAW: READINGS IN LEGAL PHILOSOPHY* 261, 262 (M.P. Golding ed., 1966) (describing Justice Holmes as the “hero figure of the” Realists); *see also* CATHERINE DRINKER BOWEN, *YANKEE FROM OLYMPUS:*

tracts and hundreds of judicial opinions, perhaps his most influential work was *The Path of the Law*, a speech Holmes delivered that was later published as a law review article in 1897.¹¹⁵ Indeed, some regard *The Path of the Law* as “the single most important essay ever written by an American on the law.”¹¹⁶

Here Holmes set forth in germ form many ideas that would become Legal Realism’s core tenets.¹¹⁷ Justice Holmes began by offering his famous court-centered definition of law: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”¹¹⁸ This pragmatic definition of law corresponded to Holmes’s consequentialist test for judging the law,¹¹⁹ namely the attainment of “social advantage.”¹²⁰ For Holmes, the law was out of step with the rapidly changing society because it was too tied to its historical origins.¹²¹ Given this court-centered jurisprudence¹²² and his contention that the law was indeterminate,¹²³ Holmes counseled judges to use modern empirical science to mold legal doctrine to fit current societal conditions.¹²⁴ For Holmes, the future lawyer would be “the man of statistics and the master of economics,” not the lawyer who slavishly followed precedent because “it was laid down in the time of Henry IV.”¹²⁵ As we describe below, Holmes became a special target of Catholic legal scholars following the posthumous release of his private correspondence.¹²⁶

Roscoe Pound articulated, in the early twentieth century, a school of thought known variously as Sociological Jurisprudence or Progressive

JUSTICE HOLMES AND HIS FAMILY (1944) (providing an early hagiographical portrait of Justice Holmes).

115. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

116. Sanford Levinson, *Strolling Down the Path of the Law (and Toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1228 (1991) (book review).

117. Holmes, *supra* note 115, at 457; *see also* Levinson, *supra* note 116, at 1228.

118. Holmes, *supra* note 115, at 461.

119. *Id.* at 466–67.

120. *Id.* at 467–68.

121. *Id.* at 468–69.

122. *Id.* at 457.

123. *Id.* at 465, 467.

124. *Id.* at 465–66, 469–70, 474.

125. *Id.* at 469.

126. *See, e.g.*, James Thomas Connor, *Some Catholic Law School Objectives*, 36 CATH. EDUC. REV. 161, 162–63 (1938) (criticizing the Holmesian conception of law).

Jurisprudence. Pound's tremendous prestige in the academy, owing to his position as dean of the Harvard Law School and his prodigious scholarly output, exerted immense influence on American legal thought.¹²⁷ In his famous law review article titled *Mechanical Jurisprudence*, published in 1908, Pound laid the groundwork for his own and Legal Realism's agenda.¹²⁸ For Pound, the time had come to accomplish "the same task in jurisprudence that has been achieved in philosophy, in the natural sciences and in politics," namely, "to rid ourselves of . . . legality and to attain a pragmatic, a sociological legal science."¹²⁹

Pound critiqued the received legal practice as "mechanical jurisprudence," wherein "[c]onceptions are fixed" and "premises are no longer . . . examined," where "[e]verything is reduced to simple deduction from them" and "[p]rinciples cease to have importance," so that law becomes a mere "body of rules."¹³⁰ A judge deciding a case in a "mechanical" fashion disposes of the matter by making use of legal categories "used, not as premises from which to reason, but as ultimate solutions" such that they "cease to be conceptions and become empty words."¹³¹ Behaving in this fashion, courts and legislatures continued to parrot the previous generation's legal conclusions despite their patent inconsistency with modern social realities.¹³²

127. See HORWITZ, *supra* note 25, at 171 (characterizing Pound as "the only world-class American legal thinker since Holmes").

128. Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908) [hereinafter Pound, *Mechanical Jurisprudence*]. In a series of three articles published in 1911 and 1912, Pound fleshed out his claims. Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence* (pts. 1 & 2-3), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140, 489 (1911-1912). After laboriously cataloguing different jurisprudential schools that, he claimed, were merging into sociological jurisprudence, Pound gave six characteristics for sociological jurisprudence. *Id.* (pt. 3) at 513-16. The most significant difference from *Mechanical Jurisprudence* is Pound's explicit suggestion that judges have and should exercise discretion "to meet the demands of justice." *Id.* at 515. Pound's belief in judicial discretion was present, however, in *Mechanical Jurisprudence* in the form of his criticism of American judges for choosing to abide by a sterile "jurisprudence of conceptions." Pound, *Mechanical Jurisprudence, supra*, at 611.

129. Pound, *Mechanical Jurisprudence, supra* note 128, at 609. According to one commentator, Pound's jurisprudential writings had four overarching themes: (1) jurisprudential focus on the courts; (2) philosophical pragmatism; (3) a belief in interest-group politics; and (4) emphasis on social sciences supplying at least part of the data upon which judges decide cases. HERGET, *supra* note 39, at 148.

130. Pound, *Mechanical Jurisprudence, supra* note 128, at 612.

131. *Id.* at 620-21.

132. *Id.* at 606-07, 612-14.

In its place, Pound proposed what has become known as Sociological Jurisprudence, a philosophy of law that would adjust “principles and doctrines to the human conditions they are to govern rather than to assumed first principles.”¹³³ It would, he said, “make rules fit cases instead of making cases fit rules.”¹³⁴ Sociological Jurisprudence recognized that law is not independent of its host society.¹³⁵ Under this approach, whether a legal regime or doctrine is appropriate is measured by the “results it achieves” and the “practical utility” it exhibits in adapting to “human needs.”¹³⁶ Finally, lawmakers, especially legislators, must take account of sociological facts and construct a “jurisprudence of ends” to ameliorate the disjunction between law as currently practiced and society’s needs.¹³⁷

Informed by the earlier critical work of men like Holmes and Pound, a number of legal scholars in the 1920s–1940s began to think and write about law in a new way.¹³⁸ Again, although the exact composition of the Legal Realist movement is contested, the Realists’ core claims are commonly understood to be as follows: (1) the law is neither neutral with respect to the good nor independent of politics;¹³⁹ (2) the law should be judged based on its consequences;¹⁴⁰ (3) the law in its current form is grossly out of touch with social reality so that it is often morally

133. *Id.* at 609–10.

134. *Id.* at 613; *see also* James A. Gardner, *The Sociological Jurisprudence of Roscoe Pound* (pt. 1), 7 VILL. L. REV. 1, 9 (1961) (arguing that Pound understood law as “an instrument of social control, backed by the authority of the state, and the ends towards which it is directed and the methods for achieving these ends may be enlarged and improved through a consciously deliberate effort,” and that sociological jurisprudence was not a legal philosophy but “a method which attempts to use the various social sciences to study the role of the law as a living force in society and seeks to control force for social betterment”).

135. Pound, *Mechanical Jurisprudence*, *supra* note 128, at 609–10.

136. *Id.* at 605, 609.

137. *Id.* at 609, 611–14, 621–22.

138. HORWITZ, *supra* note 25, at 169–71.

139. *Id.* at 170, 189–90; *see also* K.N. LEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 12–13 (1951) (“And so to my mind the main thing is seeing what officials do, do about disputes, or about anything else; and seeing that there is a certain regularity in their doing—a regularity which makes possible prediction of what they and other officials are about to do tomorrow.”).

140. *See* HORWITZ, *supra* note 25, at 200 (“Just as pragmatism had attacked the essentialist claims of philosophical idealism . . . , so did the Realists treat the value of concepts and categories in terms of the results that they produced.”); Pound, *Mechanical Jurisprudence*, *supra* note 128, at 605; Rumble, *supra* note 106, at 992 (describing the Realists as “pragmatic” and “instrumentalists”).

perverse;¹⁴¹ (4) the law is indeterminate, hence factors other than, or in addition to, the law resolve legal disputes;¹⁴² and (5) judges should utilize non-legal sources, especially modern, empirical, social sciences, to aid them in deciding cases.¹⁴³

One of the key unifying themes of Legal Realism was its opposition to what has become known as legal orthodoxy, legal formalism, or Classical Legal Thought (CLT).¹⁴⁴ In American legal history, the period beginning roughly in the 1880s up to 1937, is commonly regarded as the era of CLT.¹⁴⁵ One of the main characteristics of CLT, through which its proponents sought to achieve the rule of law, was the separation of law from politics.¹⁴⁶ A second characteristic that showed CLT aspiring to the rule of law was the model of law as science.¹⁴⁷ To work in a “scientific” fashion, however, CLT had to ensure that the resolution of concrete disputes was law-determined: that the neutral law, and not one of the contested visions of the good (employed through a judge’s exercise of discretion), determined the outcome of the dispute.¹⁴⁸

The first part of the Realist critique of CLT was that law was not neutral between competing visions of the good.¹⁴⁹ Instead, law was a product of the society in which it existed and should reflect the social realities facing it.¹⁵⁰ For instance, then-Judge Benjamin Cardozo argued that the law “is not found, but made,” and that judges and legislators have “analog[ous]” functions.¹⁵¹ The Realists argued that the substance of American law was the result of substantive policy decisions.¹⁵² When

141. See HORWITZ, *supra* note 25, at 187 (“All Realists shared one basic premise — that the law had come to be out of touch with reality.”).

142. *Id.* at 170, 176–78, 189–90; Rumble, *supra* note 107, at 997, 999; see also FRANK, *supra* note 3, at 18–19 (arguing that the fear of uncertainty hindered many from correctly perceiving the discretion wielded by judges).

143. HORWITZ, *supra* note 25, at 209.

144. Professor Tamanaha argued that there was no such thing as Classical Legal Thought. TAMAHANA, *supra* note 23, at 4–6.

145. HORWITZ, *supra* note 25, at 9–10.

146. *Id.* at 9.

147. See *id.* at 10 (“[T]he orthodox view that law is a science and that legal reasoning is inherently different from political reasoning.”).

148. See *id.* at 9–10.

149. *Id.* at 170, 189–90.

150. *Id.* at 187–88.

151. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 115, 119 (1921).

152. See HORWITZ, *supra* note 25, at 200 (“Realists . . . insisted that legal classifications and categories were not natural but social constructs. The way to determine whether a legal

those policies no longer served society well, new legal doctrines should be substituted.¹⁵³

Second, beginning with Oliver Wendell Holmes, Jr.,¹⁵⁴ Realism tended to take a pragmatic approach to legal questions.¹⁵⁵ “Most Realists seemed content to borrow from early twentieth-century pragmatism[ts],” such as John Dewey.¹⁵⁶ According to the Legal Realists, when faced with the frequent indeterminacy of legal doctrine, a judge should ask: What rule or result would produce the most desirable effects?¹⁵⁷

Third, Legal Realists, like their Progressive Era forerunners, argued that the legal system was significantly unjust.¹⁵⁸ In this they were responding to tremendous societal changes including urbanization, industrialization, wealth concentration, and economic complexity.¹⁵⁹ Thus, for example, Karl Llewellyn worked to “unhorse” the law of sales—“to bring it forward from the face-to-face bargains struck with cash in hand over a cracker barrel at the general store, to the faceless, impersonal, credit-driven, transcontinental, industrial transactions of modern day.”¹⁶⁰ The Realists claimed that the legal system had not kept

classification was good or not depended on the purposes for which the category was created.”).

153. See *id.* at 200, 209.

154. *Id.* at 182; Rumble, *supra* note 107, at 992; see also FELIX S. COHEN, *Transcendental Nonsense and the Functional Approach*, in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 33, 62 (Lucy Kramer Cohen ed., 1960) (“A good deal of fruitless controversy has arisen out of attempts to show that [a] . . . definition of law . . . is either true or false. A definition of law is useful or useless.” (emphasis omitted) (footnote omitted)).

155. See HORWITZ, *supra* note 25, at 200 (“Just as pragmatism had attacked the essentialist claims of philosophical idealism . . . , so did the Realists treat the value of concepts and categories in terms of the results they produced.”); see also ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 157 (1923) (“[T]he essence of good is simply to satisfy demand.”).

156. SEBOK, *supra* note 103, at 116.

157. *Id.*; see also CARDOZO, *supra* note 151, at 102 (“This means, of course, that the juristic philosophy of the common law is at bottom the philosophy of pragmatism.”).

158. See HORWITZ, *supra* note 25, at 187.

159. *Id.* at 188.

160. John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOYOLA L.A. L. REV. 263, 313 (2000) (citing K.N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725 (1939); K.N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873 (1939)).

pace with this change, and hence a dramatic disparity between social reality and legal norms had developed, often resulting in injustice.¹⁶¹

The fourth part of the Realist critique was that judges possessed discretion in the application of law.¹⁶² Legal doctrine did not itself determine the outcome of concrete disputes—certainly not as often or in the way portrayed by CLT. Instead, factors other than, or in addition to, legal doctrine moved judges to make decisions.¹⁶³ Realists, like their CLT antagonists, still sought to show American law reaching its aspiration to the rule of law.¹⁶⁴ Instead of legal doctrine alone, however, the Realists often argued that judges should use social science to guide their discretion to the result that would advance the best social policy.¹⁶⁵

Fifth, the Realists also attempted to incorporate the techniques of the early social sciences into law.¹⁶⁶ Building on Justice Holmes's influential aphorism that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law,”¹⁶⁷ the Realists sought to employ the techniques of empirical science to achieve accurate prediction of court action and hence an accurate knowledge of the “law.”¹⁶⁸ Walter Wheeler Cook stated, “As lawyers we are interested in knowing how certain officials of society—judges, legislators, and others—have behaved in the past, in order that we may make a prediction of their probable behavior in the future.”¹⁶⁹

161. A major instance of the Realist, and before it the progressive, challenge to the substance of American law was in the context of economic relations. HORWITZ, *supra* note 25, at 194. Realists argued that legal doctrines governing economic relations did not fit the facts of an increasingly stratified society. *Id.* Assumptions of equal bargaining power between employer and employees, for instance, failed to recognize the dramatic disparity between a large-scale industrial employer and low-skilled laborers. *See id.* at 15, 195 (noting how Realist critics of CLT argued that the market was not natural and neutral, and that instead “the organization of the market [was an] . . . entirely debatable social choice[] that could not be justified in scientific terms”).

162. *Id.* at 176–78, 190; *see also* FRANK, *supra* note 3, at 18–19 (arguing that the fear of uncertainty hindered many from correctly perceiving the discretion wielded by judges).

163. *See* HORWITZ, *supra* note 25, at 176–78, 190.

164. *See id.* at 4, 208–09.

165. *Id.* at 209; *see also* LLEWELLYN, *supra* note 139, at 13 (“And so to my mind the main thing is seeing what officials do, do about disputes, or about anything else; and seeing that there is a certain regularity in their doing—a regularity which makes possible prediction of what they and other officials are about to do tomorrow.”).

166. HORWITZ, *supra* note 25, at 181.

167. Holmes, *supra* note 115, at 461.

168. SCHLEGEL, *supra* note 37, at 1.

169. Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 475 (1924).

The Realists also urged judges to employ the modern empirical social sciences as aids in choosing which legal rule or doctrine to employ in a particular case. Benjamin Cardozo, for example, argued that judges should employ “the method of sociology” to help them utilize their discretion in the manner that best advances “the welfare of society.”¹⁷⁰ The Realists “employed social scientific methods to describe and explain those regularities to enhance the predictability of the law.”¹⁷¹

B. Catholic Legal Thought’s Response to Legal Realism

1. The Forgotten Jurisprudential Debate

By the 1930s, Legal Realism had come into its short-lived adulthood. Similarly, Catholic legal education was completing its formative stage and coming to maturity.¹⁷² The intellectual challenge posed by Realism was recognized by a significant number of Catholic legal academics and their colleagues in philosophy and political theory.¹⁷³ A major component of the overall opposition to Legal Realism originated in the ranks of faculty at Catholic law schools.¹⁷⁴ These Catholic legal educators saw themselves as protecting, preserving, and expounding an accurate understanding of law, as set forth in the Neo-Scholastic natural law tradition.¹⁷⁵ At the same time, they challenged Legal Realist claims about the law because they believed these claims were erroneous.¹⁷⁶ Often just as important, however, Neo-Scholastic scholars rebutted Legal Realism because they believed that it was the jurisprudential symptom of the West’s deeper philosophical malaise, an illness that led to the rise of totalitarian ideologies and, ultimately, the horrors of World War II.¹⁷⁷

170. CARDOZO, *supra* note 151, at 66–67.

171. STEVEN J. BURTON, *JUDGING IN GOOD FAITH* 5 (1992).

172. See Brendan F. Brown, *The Place of the Catholic Law School in American Education*, 5 U. DET. L.J. 1, 4 (1941) (describing the year 1929 as approximately the year when Catholic legal education ended its formative stage and began maturity).

173. See ROBERT J. KACZOROWSKI, *FORDHAM UNIVERSITY SCHOOL OF LAW: A HISTORY* 145–47 (2012).

174. See *id.* at 146–49.

175. See *id.* at 144–46.

176. *Id.* at 146.

177. See Connor, *supra* note 126, at 161 (“In a day when so many fundamental legal and governmental principles have been placed on trial and have been threatened with extinction, a splendid opportunity is presented for a school of Catholic Lego-Philosophical thought, i.e., a restatement of Scholastic Philosophy in light of modern development . . .”).

2. Three Major Catholic Legal Scholars

The three most prominent Catholic legal scholars to challenge Legal Realism were Brendan F. Brown, Walter B. Kennedy, and Miriam Theresa Rooney. According to the dominant narrative in American history, the Legal Realists were “an exceptionally brilliant group” who could “have run intellectual rings around” the lesser lights at Catholic schools.¹⁷⁸ Yet, these Catholic thinkers were able opponents of Realism, with significant jurisprudential learning, keen minds, educational attainment, prodigious scholarly output, and, occasionally, wit. Of course, there were many others, both Catholic¹⁷⁹ and non-Catholic,¹⁸⁰ in and outside of the legal academy, who disputed Realist claims and advocated a natural law perspective.¹⁸¹ We briefly detail the lives and careers of Brown, Kennedy, and Rooney to provide a representative flavor of the people involved.

a. Brendan F. Brown

Brendan F. Brown was a luminous star in the Catholic legal educational firmament for nearly half a century. He was educated by and wrote in the heart of Catholic legal education. Brown received his A.B. and LL.B. from Creighton University in 1921 and 1924, respectively, and from there, he went to Catholic University, where he received his LL.M., J.U.L., and J.U.D. He received his D.Phil. in Law

178. KALMAN, *supra* note 30, at 267–68 n.101.

179. Other Catholic legal scholars, who contributed, to a lesser degree, to the vigorous jurisprudential debate over Legal Realism, included Anton-Hermann Chroust, Professor of Law, Philosophy, and History at the University of Notre Dame; William F. Clarke, Dean of DePaul University College of Law; James Thomas Connor, Dean of Loyola New Orleans School of Law; Frederick J. DeSloovere at N.Y.U. School of Law; Bernard J. Feeney, Instructor at Notre Dame Law School; Karl Kreilkamp, Professor of Philosophy at Notre Dame; Paul L. Gregg, S.J., Regent and Professor at Creighton Law School; Linus A. Lilly, S.J., Regent at Saint Louis University School of Law; and Francis E. Lucey, S.J., Regent and Professor at Georgetown University School of Law. *See also* John C. Ford, S.J., *The Fundamentals of Holmes' Juristic Philosophy*, 11 *FORDHAM L. REV.* 255, 275 (1942) (criticizing Justice Holmes from the perspective of a professor of moral theology).

180. *See* Brown, *supra* note 22, at 20 (acknowledging the contributions made by scholars outside the Catholic legal academy, such as Mortimer Adler).

181. Perhaps the most prominent non-Catholic in the legal academy to challenge Legal Realism was Lon Fuller. *See, e.g.*, FULLER, *supra* note 114; *see also* Mortimer J. Adler, *Legal Certainty*, 31 *COLUM. L. REV.* 91 (1931) (contributing to a symposium dedicated to Jerome Frank's *Law and the Modern Mind*); Lon L. Fuller, *American Legal Realism*, 82 *U. PA. L. REV.* 429 (1934). Non-Catholic critics of Realism also included Morris Cohen and Philip Meacham.

from Oxford University in 1932.¹⁸² Brown taught at Catholic University from 1926 to 1954,¹⁸³ where he was dean from 1949 to 1954, and Loyola University New Orleans from 1954 to 1973.¹⁸⁴ Memorial lecture series at Catholic University and Loyola New Orleans, named in Brown's honor, are a testament to his influence at these institutions.¹⁸⁵

Brown's two related foci were Catholic legal education and natural law.¹⁸⁶ He saw a connection between the two, arguing that church-sponsored law schools should undertake "to develop and present . . . a legal culture . . . under the influence of Neo-Scholastic philosophy."¹⁸⁷ Brown's work on natural law included two books¹⁸⁸ and numerous articles.¹⁸⁹ It is clear that Brown saw himself as an apologist for the natural law tradition because the bulk of his writing attempted to present a clear picture of Thomistic natural law to an audience unfamiliar with the tradition and often hostile to it.¹⁹⁰

Brown wrote *Natural Law and the Law-Making Function in American Jurisprudence* in 1939, during the heart of the natural law criticism of Realism.¹⁹¹ There, Brown challenged the core Realist claims. First, building on St. Thomas' insights, Brown argued that natural law was distinct from positive law and that natural law was neutral, objective, and independent of human will.¹⁹² Brown claimed

182. Oliver B. Pollak, *The Professors: Pages from the Law School's Centennial History*, CREIGHTON MAG., Winter 2004, at 13; see also A.E. Papale, *A Tribute to Dr. Brendan F. Brown*, 21 LOY. L. REV. 803 (1975) (reviewing Brown's life).

183. With an absence for his studies at Oxford between 1927 and 1932. See Papale, *supra* note 182, at 803–04.

184. Pollak, *supra* note 182, at 13.

185. *Id.*; *Special Lecture Series*, CATH. U. AM., <http://www.law.edu/Announcements/SpecialLectureSeries.cfm> (last visited Mar. 25, 2015), archived at <http://perma.cc/5LKP-43TM>.

186. See Papale, *supra* note 182, at 804.

187. Brendan F. Brown, *Jurisprudential Aims of Church Law Schools in the United States, A Survey*, 13 NOTRE DAME LAW. 163, 167 (1938) (emphasis omitted). Indeed, Brown recognized that the "revival of natural law jurisprudence in the theo-philosophical sense will be short lived unless it is reinforced by the active support of the faculties of Church law schools." Brown, *supra* note 22, at 21. See generally Breen & Strang, *supra* note 16.

188. BRENDAN FRANCIS BROWN, AROUND THE WORLD IN SEVENTY DAYS ON THE BEAM OF THE NATURAL LAW, A PROGRAM FOR PEACE (1976); THE NATURAL LAW READER (Brendan F. Brown ed., 1960).

189. See, e.g., Brown, *supra* note 22; Brown, *supra* note 172; Brown, *supra* note 187.

190. For example, Brown repeatedly argued that Thomistic natural law is not the erroneous "natural law" that its critics rightly rejected. Brown, *supra* note 22, at 12–14, 18.

191. Brown, *supra* note 22.

192. *Id.* at 9, 13.

that the non-Thomistic “natural law” that the Legal Realists—rightfully—criticized was an ersatz natural law, not the “Thomistic–Aristotelian” natural law that he and others sought to defend.¹⁹³ The baleful result of the prominence of this counterfeit natural law, Brown agreed with the Realists, was that “judges began to speak of the absolute rights of property, freedom of contract, [and] exemption from taxation.”¹⁹⁴ Brown also argued that injustice had resulted from the failure to use natural law as the metric by which to judge current legal practice.¹⁹⁵

That being said, Brown believed that the American legal system was, at its core, just.¹⁹⁶ Like the Realists, Brown acknowledged that the positive law was open-textured.¹⁹⁷ Unlike the Realists, however, whom he characterized as “moving toward nowhere” and “fall[ing] into . . . error,” he believed that “an adequately comprehensive teleological idealism” would supply the necessary judicial guidance.¹⁹⁸

b. Walter B. Kennedy

Walter B. Kennedy was, during this period, the most prolific proponent of Thomistic natural law in the American legal academy¹⁹⁹ and one of Legal Realism’s most tenacious critics.²⁰⁰ Kennedy was born

193. *Id.* at 13.

194. *Id.* at 14 (footnote omitted).

195. *Id.* at 16.

196. *Id.* at 11–12, 18.

197. *Id.* at 22.

198. *Id.*

199. He was also the Catholic legal scholar-critic of Realism most frequently noted by historians. It is unclear whether this is the result of the power of Kennedy’s arguments or, as we think is more likely, a combination of the quantity of Kennedy’s scholarship in relatively accessible—to legal scholars, at least—law reviews and some level of path dependence created by earlier scholars’ citations to Kennedy’s work, particularly in PURCELL, *supra* note 1, at 165 (describing Kennedy as “perhaps the most widely respected Catholic legal scholar in the country”).

200. Kennedy wrote at least seventeen article-length pieces of scholarship advocating natural law, critiquing Legal Realism, or doing both. Walter B. Kennedy, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 145 (1941) [hereinafter Kennedy, MY PHILOSOPHY OF LAW]; Walter B. Kennedy, *Another Job for Jurisprudence*, 8 MOD. L. REV. 18 (1945); Walter B. Kennedy, *The Bethlehem Steel Case—A Test of the New Constitutionalism* (pt. 1), 11 FORDHAM L. REV. 133 (1942) [hereinafter Kennedy, *Bethlehem Steel*]; Walter B. Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 FORDHAM L. REV. 272 (1936) [hereinafter Kennedy, *Functional Nonsense*]; Walter B. Kennedy, *Law Reviews “As Usual”?*, 12 FORDHAM L. REV. 50 (1943); Walter B. Kennedy, *Men or Laws*, 2 BROOK. L. REV. 11 (1932) [hereinafter Kennedy, *Men or Laws*]; Walter B.

in 1885 and reared in Massachusetts.²⁰¹ He received his A.B. and A.M. from Holy Cross College in Worcester, Massachusetts, in 1906 and 1912, respectively, and his LL.B. from Harvard Law School.²⁰² After three years of private practice in Worcester, Kennedy joined the faculty of Catholic University of America School of Law, where he taught for eleven years.²⁰³ Beginning in 1923, Kennedy then spent a long career at Fordham Law School,²⁰⁴ including a stint as acting dean.²⁰⁵ Today, he is remembered at Fordham with an annual award in his name.²⁰⁶

Kennedy created a significant body of work in which he critically appraised Legal Realism.²⁰⁷ In part because his scholarly output was tremendous, Kennedy was an effective and, increasingly over time, aggressive critic of Legal Realism, and a passable exponent of the natural law tradition.

Kennedy, *More Functional Nonsense—A Reply to Felix S. Cohen*, 6 FORDHAM L. REV. 75 (1937) [hereinafter Kennedy, *More Functional Nonsense*]; Walter B. Kennedy, *The New Deal in the Law*, 68 U.S. L. REV. 533 (1934) [hereinafter Kennedy, *The New Deal in the Law*]; Walter B. Kennedy, *Portrait of the New Supreme Court* (pts. 1 & 2), 13 FORDHAM L. REV. 1, 14 FORDHAM L. REV. 8 (1944–1945) [hereinafter Kennedy, *Portrait*]; Walter B. Kennedy, *Pragmatism as a Philosophy of Law*, 9 MARQ. L. REV. 63 (1924) [hereinafter Kennedy, *Pragmatism*]; Walter B. Kennedy, *Principles or Facts?*, 4 FORDHAM L. REV. 53 (1935) [hereinafter Kennedy, *Principles or Facts?*]; Walter B. Kennedy, *Psychologism in the Law*, 29 GEO. L.J. 139 (1941); Walter B. Kennedy, *Realism, What Next?* (pts. 1 & 2), 7 FORDHAM L. REV. 203, 8 FORDHAM L. REV. 45 (1938–1939); Walter B. Kennedy, *A Review of Legal Realism*, 9 FORDHAM L. REV. 362 (1940) [hereinafter Kennedy, *A Review of Legal Realism*]; see also Walter B. Kennedy, *The Scientific Approach in the Law*, 70 U.S. L. REV. 75 (1936); Walter B. Kennedy, Comment, *The Cult of the Robe: A Dissent*, 14 FORDHAM L. REV. 192 (1945) [hereinafter Kennedy, *Cult of the Robe*].

Kennedy's scholarly output was especially pronounced relative to the time period and the paucity of resources with which Catholic law faculty contended.

201. *Walter B. Kennedy (1885–1945)*, 15 FORDHAM L. REV. 1, 1 (1946).

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

206. *Awards*, FORDHAM UNIV., www.law.fordham.edu/office-of-student-affairs/16978.htm (last visited Mar. 26, 2015), archived at <http://perma.cc/394Z-ETVH>.

207. This is in addition to his significant scholarship in the areas of labor law and property law. *E.g.*, WALTER B. KENNEDY, *CASES ON THE LAW OF PERSONAL PROPERTY* (1932); Walter B. Kennedy, *Garnishment of Intangible Debts in New York*, 35 YALE L.J. 689 (1926); Walter B. Kennedy, *Law and the Railroad Labor Problem*, 32 YALE L.J. 553 (1923) [hereinafter Kennedy, *Law and the Railroad Labor Problem*]; Walter B. Kennedy, *The Schneiderman Case—Some Legal Aspects*, 12 FORDHAM L. REV. 231 (1943).

When Kennedy began writing about Legal Realism in the early 1920s,²⁰⁸ his initial appraisal of the nascent movement had a tone of appreciative yet critical engagement.²⁰⁹ Later, especially after the rise of totalitarian regimes, Kennedy came to view Legal Realism—at least in some of its radical manifestations—as a totalitarian fellow traveler,²¹⁰ though he continued to acknowledge its valuable contributions.²¹¹

Kennedy tended to focus his critical attention on the negative results that followed from adoption of Legal Realism as the regnant legal philosophy. For instance, Kennedy tied the Supreme Court's sudden rejection of broad swaths of precedent during the New Deal to Realism's embrace of pragmatism.²¹² Kennedy argued that Realism's embrace of legal pragmatism led its adherents on the Court to an unprincipled and poorly justified rejection of traditional legal doctrines along with the hasty adoption of new ones.²¹³ In another piece, Kennedy maintained that the rule of law was a casualty of the Realists' excessive emphasis on law's indeterminacy.²¹⁴ Legal Realism therefore called into question the relative certainty and stability of the legal system, which, as an aspect of the common good, Catholic legal theory held was a core purpose of law.²¹⁵

c. Miriam Theresa Rooney

Miriam Theresa Rooney has the most interesting personal story of the three Catholic legal scholars we detail. Though she came from modest origins in Boston's working-class Irish neighborhood, Rooney

208. Kennedy, *Pragmatism*, *supra* note 200, at 63.

209. *See id.* at 64 (“The truth is that this criticism of the law [by Realists], while often intemperate and extreme, contains a degree of validity.”).

210. Kennedy, *A Review of Legal Realism*, *supra* note 200, at 373 & nn. 48–50; *see also* 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) (providing an unsympathetic description of Realism).

211. Kennedy, *A Review of Legal Realism*, *supra* note 200, at 363 (“I do not deny that Realism has made many worthwhile contributions to the science of law.”); *see also id.* at 373 (“Out of the commendable beginning of realism with its objective of true scientific research came forth increasing doubt as to the utility of the rule of law, now terminating in absolute despair of a juristic order.”).

212. Kennedy, *Portrait* (pt. 1), *supra* note 200, at 1, 13.

213. *Id.* at 13–14.

214. Kennedy, *A Review of Legal Realism*, *supra* note 200, at 372–73.

215. *See id.* at 370, 373–74.

excelled academically at Boston's Girls' Latin School.²¹⁶ After Rooney's mother passed away,²¹⁷ she pursued higher education while doing clerical work for the State Department in Washington D.C.²¹⁸ She received her A.B., her M.A.,²¹⁹ and her Ph.D. from Catholic University. In 1937, Rooney succeeded in publishing her dissertation as a book, *Lawlessness, Law, and Sanction*.²²⁰

In this book, Rooney made extensive use of the writings of St. Thomas Aquinas.²²¹ Writing self-consciously as part of the Neo-Scholastic revival,²²² Rooney argued in favor of the Thomistic conception of legal obligation—that law was binding on the conscience when it was an ordinance of reason, promulgated by legitimate authority, and directed toward the common good.²²³ This theory of obligation was, she said, better than competing, contemporary conceptions that relied on the threat of force, while also meeting the needs of a modern legal system.²²⁴ In *Lawlessness, Law, and Sanction*, Rooney also compared and contrasted the thought of St. Thomas Aquinas with that of Justice Oliver Wendell Holmes, Jr.,²²⁵ demonstrating both keen analysis and a thorough knowledge of each writer.²²⁶

Rooney's dissertation exemplified the Neo-Scholastic approach during this period. First, Rooney identified a problem: the breakdown of the rule of law caused, she claimed, by an inadequate conception of legal obligation which, in turn, was the result of an incorrect conception

216. Interview by Lee J. Strang with Michael Risinger, John J. Gibbons Professor of Law, Seton Hall Law School (Aug. 6, 2013) (on file with author) [hereinafter Interview by Lee J. Strang with Michael Risinger]. The authors thank Professor Risinger for his valuable assistance gathering information on Dr. Rooney's life.

217. Rooney cared for her mother after high school and before college. *Id.*

218. *Id.*

219. *Id.*

220. MIRIAM THERESA ROONEY, *LAWLESSNESS, LAW, AND SANCTION* (1937).

221. *See id.* at 20–58 (relying almost exclusively on St. Thomas to articulate Rooney's conception of sanction).

222. *Id.* at 8; *see also id.* at 6 (quoting a passage from *Aeterni Patris* on the need for Scholastic philosophy).

223. *Id.* at 13–14.

224. *Id.* at 7–8.

225. *Id.* at 114–36

226. It appears that Rooney utilized her own translations of St. Thomas' and others' Latin writings.

of legal sanction.²²⁷ “In such moments of bewilderment as we live in, Scholastic philosophy presents an unmistakable, clear, strong voice which may well be listened to if we are to solve the problem of the sanction of law, to reduce lawlessness, and to maintain peace and preserve civilization.”²²⁸ Second, she restated, for a modern audience, the—correct—Scholastic conception of legal obligation and sanction, emphasizing St. Thomas’ writings.²²⁹ Rooney argued that “the Scholastic concept of sanction . . . marks the highest point civilization has attained in solving the problem of extending the reign of law.”²³⁰ Third, Rooney described a falling-away over the centuries, giving rise to Justice Holmes’s influential claims.²³¹ *Lawlessness, Law, and Sanction* culminates in Rooney’s summary of how replacing malformed, modern conceptions of sanction with the Neo-Scholastic conception would restore the rule of law, along with specific recommendations of how to make that happen.²³²

Though her Ph.D. and scholarship opened some doors, primarily in Catholic philosophical circles, she was unable to obtain an academic appointment. Rooney then went to law school, graduating from George Washington University Law School in 1942.²³³ After graduation, Rooney returned to the State Department, this time working as a lawyer.²³⁴

Finally, in 1948, Rooney secured a position as an Associate Professor of Law and Librarian at Catholic University under the deanship of Brendan Brown.²³⁵ During her time at Catholic, Rooney publicly worked for the fuller realization of distinctively Catholic legal education in her scholarship²³⁶ and in work contributing to various institutions.²³⁷

227. *Id.* at 11–12, 17–18.

228. *Id.* at 19.

229. *Id.* at 20–76.

230. *Id.* at 18.

231. *Id.* at 77–136.

232. *Id.* at 137–147.

233. Herma Hill Kay, *Women Law School Deans: A Different Breed, or Just One of the Boys?*, 14 *YALE J.L. & FEMINISM* 219, 222 (2002).

234. Interview by Lee J. Strang with Michael Risinger, *supra* note 216.

235. Kay, *supra* note 233, at 222.

236. For instance, Rooney advocated for the production of curricular materials grounded in the Neo-Scholastic tradition. See, e.g., Miriam Theresa Rooney, *The Movement for a Neo-Scholastic Philosophy of Law in America: Special Report of the Committee on the Philosophy of Law and Government—1932 to 1942*, 18 *PROC. AM. CATH. PHIL. ASS'N* 185 (1942).

Rooney also privately thought and planned how to construct a distinctively Catholic law school.²³⁸ Her opportunity came in July 1950, when the President of Seton Hall University, Monsignor John McNulty, met with Rooney about starting a law school.²³⁹ At that meeting, Rooney agreed to become the founding dean of Seton Hall School of Law²⁴⁰—and the first woman dean of an ABA-approved law school.²⁴¹ Wishing the law school to be distinctively Catholic, Rooney planned it from the ground up, including the school's curriculum, faculty hiring,²⁴² ABA accreditation, and student recruitment and placement.²⁴³ She successfully led the school for over a decade.²⁴⁴

Rooney was as productive scholar. In addition to her published dissertation, Rooney frequently published articles in legal,²⁴⁵ philosophical,²⁴⁶ and other outlets.²⁴⁷ However, Rooney's major

237. For instance, Rooney continued her work on the Jurisprudence Section in the American Catholic Philosophical Association. *Id.* She was also an associate editor of *The New Scholasticism*, from 1945–1948. *See, e.g.*, Miriam Theresa Rooney, *Law as an Instrument of Social Policy—The Brandeis Theory*, 22 ST. JOHN'S L. REV. 1, 52 (1947) [hereinafter Rooney, *Law as an Instrument*].

238. Interview by Lee J. Strang with Michael Risinger, *supra* note 216.

239. *Id.*; *The History of Seton Hall University School of Law: 1951–Present*, SETON HALL L., http://law.shu.edu/About/history_of_seton_hall_law.cfm (last visited Mar. 27, 2015), archived at <http://perma.cc/75EB-CFNB>.

240. *See The History of Seton Hall University School of Law: 1951–Present, supra* note 239.

241. *First Woman Dean Was at Seton Hall*, SYLLABUS, Mar. 1985, at 3.

242. *The History of Seton Hall University School of Law: 1951–Present, supra* note 239. Rooney's major hire was Dr. John C.H. Wu. Interview by Lee J. Strang with Michael Risinger, *supra* note 216; *see also* John C.H. Wu, *The Natural Law and Our Common Law*, 23 FORDHAM L. REV. 13, 13 (1954) (indicating that Professor Wu was on the Seton Hall law faculty).

243. Interview by Lee J. Strang with Michael Risinger, *supra* note 216.

244. *Id.* Among other post-decanal roles, Rooney was Professor of Law at the Center of Comparative Law, in Saigon, South Vietnam, 12 NAT. L.F. iii (1967), and part of the office of the Vatican's United Nations observer, Interview by Lee J. Strang with Michael Risinger, *supra* note 216.

245. *E.g.*, Miriam Theresa Rooney, *Law and the New Logic*, 4 U. DET. L.J. 126 (1941); Rooney, *Law as an Instrument, supra* note 237; Miriam Theresa Rooney, *Law Without Justice?—The Kelsen and Hall Theories Compared*, 23 NOTRE DAME LAW. 140 (1947); Miriam Theresa Rooney, *Natural Law Gobbledygook*, 5 LOY. L. REV. 1 (1949); Miriam Theresa Rooney, *Planning Law and the New Frontier*, 25 NOTRE DAME LAW. 52 (1949).

246. *E.g.*, Miriam Theresa Rooney, *Law as an Instrument of Social Policy: The Brandeis Theory*, 22 NEW SCHOLASTICISM 34 (1948); Miriam Theresa Rooney, *Pluralism and the Law*, 13 NEW SCHOLASTICISM 301 (1939); Miriam Theresa Rooney, Book Review, 21 NEW SCHOLASTICISM 343 (1947); Miriam Theresa Rooney, Book Review, 16 NEW SCHOLASTICISM 102 (1942); Miriam Theresa Rooney, Book Review, 16 NEW

contribution was her efforts to institutionalize the movement of Catholic legal scholars.²⁴⁸ Before Rooney served as the founding dean of Seton Hall, she worked to institutionalize Neo-Scholasticism in the American legal academy.²⁴⁹ Most prominent was her role in the leadership of the American Catholic Philosophical Association's Section on Law,²⁵⁰ the goal of which was to advance "a Neo-Scholastic Philosophy of Law in America."²⁵¹ Through her efforts, the Section sponsored a forum for the presentation of papers and roundtable discussions, which provided those interested in the Neo-Thomistic project with an opportunity to dialogue.²⁵² Later, Rooney served on the editorial board for the *Natural Law Forum*, when it was launched in 1956.²⁵³

Rooney is remembered today²⁵⁴ with endowed scholarships at Catholic University,²⁵⁵ and a named professorship²⁵⁶ and award at Seton Hall.²⁵⁷

d. Clergy Serving on Catholic Law Faculties

The foregoing discussion of Brown, Kennedy, and Rooney was designed to introduce some of the more prominent figures who featured

SCHOLASTICISM 99 (1942); Miriam Theresa Rooney, Book Review, 16 NEW SCHOLASTICISM 86 (1942); Miriam Theresa Rooney, Book Review, 15 NEW SCHOLASTICISM 394 (1941); Miriam Theresa Rooney, Book Review, 15 NEW SCHOLASTICISM 291 (1941).

247. E.g., Miriam T. Rooney, *The Philosophy of Natural Law of St. Thomas Aquinas*, 2 CATH. LAW. 22 (1956).

248. See Rooney, *supra* note 236, at 186.

249. See *id.* at 185.

250. The Section on Law went by a number of different labels over the years, including the Section on Legal Philosophy, the Section on Jurisprudence, and the Committee on the Philosophy of Law.

251. Rooney, *supra* note 236, at 185–86.

252. *Id.* at 185–203.

253. *Editorial Board*, 1 NAT. L.F. iv (1956).

254. As with both Brown and Kennedy, contemporary Catholic legal education and scholars most frequently do *not* remember Rooney. In fact, our research on the biographies of these leading lights of Catholic legal education in the early to mid-twentieth century was challenging because so little is remembered about them.

255. THE CATHOLIC UNIV. OF AM., ENDOWED LAW SCHOOL SCHOLARSHIPS, <http://sba.law.edu/res/docs/committees/graduation/giftdesignation.pdf>, archived at <http://perma.cc/E G28-BLFY>.

256. Timothy P. Glynn, *Miriam T. Rooney Professor of Law and Director of US Healthcare Compliance Certification Program*, SETON HALL L., http://law.shu.edu/Faculty/fulltime_faculty/Timothy-Glynn.cfm (last visited Mar. 27, 2015), archived at <http://perma.cc/AC8 A-ME6W>.

257. Interview by Lee J. Strang with Michael Risinger, *supra* note 216.

in the Catholic Neo-Scholastic response to Legal Realism. Such an introduction would be incomplete, however, if mention were not made of the various Catholic priests who wrote in the area of jurisprudence. Virtually every law school operating under Catholic auspices at this time had a priest on the faculty (who may or may not have been a lawyer) who taught a jurisprudence course in the Thomistic natural law tradition.²⁵⁸ Typically, these priests were members “of the religious order that sponsored the host university.”²⁵⁹ The written contributions of these men, particularly members of the Society of Jesus, were an important component of the Catholic legal scholars’ movement during this period.

Of the total quantity of Catholic legal scholars engaged in jurisprudential debates from the 1920s–1940s,²⁶⁰ members of religious orders were close to a majority. Most of these Catholic legal scholars’ initial training had been in theology or philosophy, which, at the time, strongly reflected Neo-Scholastic thought.²⁶¹ Some of them, like Francis Lucey, S.J. and Paul Gregg, S.J. later acquired an LL.B. or LL.M, which helped make them more conversant in American civil law.²⁶² Most of these scholarly contributions reflected the backgrounds and interests of their authors, so they tended to be relatively abstract and philosophical in nature,²⁶³ unlike, for example, Kennedy’s mixture of the abstract and the concrete.

e. Summary of the Catholic Respondents to Realism

The prominent Catholic legal scholars introduced above brought to their scholarship a shared perspective that reflected both their

258. See Breen & Strang, *supra* note 16, at 586, 591; see, e.g., KACZOROWSKI, *supra* note 173, at 17.

259. See Breen & Strang, *supra* note 16, at 586, 591.

260. Here, broadly conceived to include scholars who taught outside of the legal academy but who commented on jurisprudential issues. E.g., Ford, *supra* note 179.

261. See GERALD A. MCCOOL, S.J., FROM UNITY TO PLURALISM 5 (1989) (“Neo-Thomism acquired . . . [a] privileged place . . . in Catholic thought and education until the Second Vatican Council.”).

262. For example, Fr. Paul Gregg, S.J.’s initial education was an A.B., and A.M., followed by an LL.B. and LL.M. Paul L. Gregg, S.J., *The Pragmatism of Mr. Justice Holmes*, 31 GEO. L.J. 262, 262 (1943); Lucey, *supra* note 210, at 493.

263. See, e.g., *id.* at 262–63. Of course, much scholarship by members of religious orders also bridged the abstract with the concrete. See, e.g., Francis E. Lucey, S.J., *Liability Without Fault and the Natural Law*, 24 TENN. L. REV. 952 (1957) (arguing that liability without fault was compatible with the natural law tradition).

backgrounds and common conception of law. Each received some or all of his or her education in Catholic institutions, which, during the period of their education, offered a relatively standard—though distinct from other American educational institutions—educational program.²⁶⁴ They were well educated, with advanced degrees. Each also was—and perceived himself or herself to be—a relative outsider in the American legal academy. The most important commonality, discussed immediately below, is that Brown, Kennedy, and Rooney drew upon, advocated, and furthered the Neo-Scholastic renaissance then occurring around the globe.

3. The Architectonic Role of the Neo-Scholastic Revival

The core jurisprudential perspective of Catholic critics of Legal Realism was the natural law tradition.²⁶⁵ Beginning in the late-nineteenth century, through the early decades of the twentieth century, and into the 1940s, there was a widespread, well-known, and influential revival in the thought of St. Thomas Aquinas, often labeled the Neo-Scholastic or Neo-Thomistic revival, of which natural law was a key component.²⁶⁶ Catholic legal scholars at work in the field of jurisprudence universally embraced the natural law tradition. They sought to defend it and articulate its claims, and they urged its desirability over its jurisprudential rivals.²⁶⁷

264. PHILIP GLEASON, *CONTENDING WITH MODERNITY: CATHOLIC HIGHER EDUCATION IN THE TWENTIETH CENTURY* 4–6, 16–17, 49, 51–61, 105–23, 136–66 (1995); *see also* JAMES TUNSTEAD BURTCHAELL, C.S.C., *THE DYING OF THE LIGHT: THE DISENGAGEMENT OF COLLEGES AND UNIVERSITIES FROM THEIR CHRISTIAN CHURCHES* 577 (1998) (“The undergraduate curriculum at Boston College was stamped with another Jesuit hallmark, one borne by the professional programs as well. This was the intensive study of scholastic philosophy. Philip Gleason has shown persuasively how Neo-Thomist philosophy served as the sturdy armature on which American Catholic higher education found its distinctive intellectual shape in the first half of this century.”).

265. *See, e.g.*, Brendan F. Brown, *Foreword*, 1 *CATH. U. L. REV.* ix, ix–xii (1950) (stating that the *Catholic University of America Law Review* would emphasize “scholastic jurisprudence”); *id.* at x (stating that the law review would be the “voice of The School of Natural Law Jurisprudence in America”); Rooney, *supra* note 236, at 185–86 (detailing the goals, successes, and failures of the efforts by Catholic legal scholars to advance Neo-Scholasticism in American law).

266. *See* GERALD A. MCCOOL, *THE NEO-THOMISTS* 9–11, 31–45, 151–57 (1994) [hereinafter MCCOOL, *THE NEO-THOMISTS*] (describing the worldwide revival in natural law); MCCOOL, *supra* note 261, at 209–30 (same); Hittinger, *supra* note 91, at xv–xxiv (same); *see also* Brown, *supra* note 22, at 19 (tying the revival of natural law scholarship in the legal academy to the broader revival in Thomism).

267. *See* Connor, *supra* note 126, at 161 (promoting “Scholastic Philosophy”).

The depth of these critics' knowledge of the natural law tradition was generally good, though their sophistication varied. One of the most sophisticated Catholic legal scholars in this area was Francis E. Lucey, S.J. Father Lucey led the Law School at Georgetown University as its regent²⁶⁸ for three decades.²⁶⁹ He was an outspoken advocate of natural law and a critic of Legal Realism.

In *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, Father Lucey offered an erudite exposition of natural law.²⁷⁰ After reviewing the history of American jurisprudential thought, including Legal Realism, Lucey described the natural law tradition²⁷¹ and explained the various relationships between natural and positive law.²⁷² Most positive law, said Lucey, is what St. Thomas labeled *determinatio*, a specific rule or ordinance that varied with time and place.²⁷³ Consequently, lawmakers must utilize their judgment to determine how best to meet the challenges presented by their particular circumstances through positive law.²⁷⁴

Kennedy's knowledge of Neo-Scholastic thought appears to have been less robust.²⁷⁵ He had read and cited to the canonical texts and to

268. The regent was a position at the Jesuit law schools—and some others, such as Seton Hall, as well—held by a cleric. The regent was an intermediary between the law school's dean—usually a layman—and the university's president, usually a cleric. Our research indicates that the specific role and duties of the regent varied fairly dramatically by school and time period, based on factors such as the regent's personality, education in American civil law, relationship with the university's president, and the dean and faculty's expectations. See Breen & Strang, *supra* note 16, at 591–92 & n.217.

269. See THE FIRST 125 YEARS: AN ILLUSTRATED HISTORY OF THE GEORGETOWN UNIVERSITY LAW CENTER 71–72, 93–138 (1995) [hereinafter THE FIRST 125 YEARS] (describing Father Lucey's impact on the school).

270. Lucey, *supra* note 210, at 493.

271. *Id.* at 493–524.

272. *Id.* at 524–25.

273. *Id.* at 525.

274. See *id.* (stating that lawmakers will have to “resort to experimentation[and] trial and error, to see what will best conform with the common good”); see also Brown, *supra* note 22, at 9 (making this same distinction).

275. See generally *supra* note 200 and accompanying text. This judgment is an inference from Kennedy's scholarship, which, as we describe below, most frequently utilized the tools of American legal practice and, relative to Fr. Lucey, infrequently explicitly deployed arguments from Neo-Scholastic thought. Of course, Kennedy's knowledge of the natural law tradition may have been as robust as Fr. Lucey's, and he may have prudently declined to utilize arguments that, he judged, may have been too foreign to his interlocutors and American legal scholars more generally.

contemporary Neo-Scholastic scholarship, to describe his own jurisprudential perspective. In his 1941 contribution to the collection *My Philosophy of Law*, Kennedy described a “struggle . . . emerging between two polar and antithetical theories of law[:] . . . Scholasticism . . . [and] Realism,”²⁷⁶ and referred to St. Thomas and Pope Leo XIII.²⁷⁷ The bulk of his scholarship responding to the Realists did not, however, expressly utilize Neo-Scholastic sources.

Kennedy’s most significant contribution, however—displayed across two decades of scholarship—was his ability to vault the chasm separating most Neo-Scholastics and most Realists. The jurisprudential architecture within which he worked was Neo-Scholasticism, but his training and education as an American civil lawyer enabled him to constructively engage with Realist claims in a way that other—especially clerical—Catholic legal scholars found more challenging.

Despite the natural law foundation of much of Catholic legal scholars’ critiques, a significant portion of their criticism of Realism was not particularly Catholic in nature. Instead, these scholars utilized, in addition to analyses at home in the natural law tradition, the tools common to American jurists of the era.²⁷⁸

Kennedy is the best example of this. For instance, he pointedly criticized the Realists for harboring a “fact-fetish.”²⁷⁹ The Realists emphasized the importance of “tangible” and “observable” facts over “the vaporous abstraction of principle or rule” so that law could be “divorced from the vice of metaphysical catch-words and airy ideas.”²⁸⁰ In commenting on this theme in the work of many Realists, Kennedy noted that, through their rhetoric, the Realists were often guilty of reifying facts in the same way formalists of the late-nineteenth century had reified legal rights, duties, and concepts.²⁸¹ As Kennedy observed, facts could be “just as elusive and nimble as principles and rules,” and

276. Kennedy, *MY PHILOSOPHY OF LAW*, *supra* note 200, at 147.

277. *Id.* at 148, 159.

278. See, e.g., Kennedy, *Cult of the Robe*, *supra* note 200, at 192–93 (1945) (critiquing then-Judge Frank’s call for judges to cease wearing robes, and utilizing standard legal arguments, such as precedent).

279. Kennedy, *Principles or Facts?*, *supra* note 200, at 58, 63.

280. *Id.* at 58–59.

281. See *id.* at 58.

merely “[l]abelling [something] . . . ‘observable’ or ‘tangible’ does not make . . . [it] so.”²⁸²

Forsaking the conceptualism of CLT, against which the Realists rebelled, Kennedy saw the Realists as embracing a conceptualism of science. According to Kennedy, the Realists failed to “recall that science has its competing *theories* which are real even in the face of very simple *facts*.”²⁸³ Thus, Kennedy thought that the Realists were guilty of being “addicted to science-worship”²⁸⁴ and of naively believing in “the infallibility of scientific methods.”²⁸⁵

Moreover, as Kennedy made clear, facts do not present themselves to the human mind in pristine form, untouched by “the human element of research.”²⁸⁶ Even if the distorting effects of personal feeling and bias are largely eliminated from the facts accumulated in the fact-finding process, Kennedy noted, “some norm or standard must be applied to these facts, however neatly piled.”²⁸⁷ Indeed, at the very least, the judge “must have a weighing machine with which to evaluate such definitely found facts.”²⁸⁸ As Philip Mechem, a non-Catholic critic of the Realists likewise observed in curt fashion, “[f]acts will not evaluate themselves.”²⁸⁹

The corpus of Kennedy’s work stands out as well-researched, written, and argued, as the work of an American academic lawyer, and not the work of a philosopher, or a theologian, or someone unfamiliar with American legal practice. The subjects of Kennedy’s scholarship fit squarely within American legal scholarship and included labor relations,

282. *Id.* at 59. Kennedy shared this criticism with philosopher Morris Cohen, who similarly remarked, “it is . . . necessary to be on guard against the easy assumption that any proposition becomes true when someone labels it natural science.” Morris R. Cohen, Book Review, 22 CORNELL L.Q. 171, 177–78 (1936) (reviewing EDWARD STEVENS ROBINSON, *LAW AND THE LAWYERS* (1935)).

283. Kennedy, *Principles or Facts?*, *supra* note 200, at 61–62. As Morris Cohen similarly noted, it is “obvious that without some guiding principle, idea, or theory as hypothesis, we cannot even determine what facts to look for.” Morris R. Cohen, Book Review, 31 ILL. L. REV. 411, 412 (1936) (reviewing THURMOND W. ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935)).

284. Kennedy, *Principles or Facts?*, *supra* note 200, at 70.

285. *Id.* at 62. This is what Cohen described as a “naive faith in the popular myth that science consists in observing the facts and ignoring theories.” Cohen, *supra* note 282, at 412.

286. Kennedy, *Principles or Facts?*, *supra* note 200, at 61.

287. *Id.* at 63.

288. Kennedy, *A Review of Legal Realism*, *supra* note 200, at 368.

289. Philip Mechem, *The Jurisprudence of Despair*, 21 IOWA L. REV. 669, 678 (1936).

the New Deal, Legal Realism, the Supreme Court, stare decisis, and even law reviews.²⁹⁰ Kennedy's writing shows that he was well-acquainted with the bread-and-butter of American law—cases and legal doctrines²⁹¹—and that he utilized the wide range of arguments that all American legal scholars would and could utilize.²⁹²

The scholarly engagement of Brown, Rooney, Lucey, and Kennedy was complimented by contributions from many other strong Catholic legal scholars.²⁹³ Much of this other scholarship was of similarly high quality, though some was less powerful, and for two main reasons: first, as discussed above, some of the Catholic legal scholars who participated in the debate were not trained primarily or initially as American civil lawyers²⁹⁴; and second, like all schools of thought, some Catholic legal scholars involved in the debate over Legal Realism were simply not as good in their scholarship as others.²⁹⁵

Though the Catholic legal scholars discussed above were able representatives of the natural law tradition, they were not major players in the worldwide Neo-Scholastic revival.²⁹⁶ Instead, they relied on a handful of primary sources—in particular, St. Thomas' *Summa Theologica*—and the commentary of leading Neo-Scholastics, for the concepts, arguments, and claims used in their critique of American Legal Realism.²⁹⁷ For instance, Kennedy cited to St. Thomas and contemporary Neo-Scholastics, though much less frequently than he

290. See the titles of Kennedy's articles cited *supra* note 200.

291. For example, in *The Bethlehem Steel Case—A Test of the New Constitutionalism*, Kennedy evaluated the New Deal Court's modifications of its case law and how those modifications impacted a recent case by delving into that case law. Kennedy, *Bethlehem Steel* (pt. 1), *supra* note 200, at 133. Kennedy regularly cited to and discussed cases, statutes, and other legal materials, including prodigious footnotes. See, e.g., Kennedy, *Law and the Railroad Labor Problem*, *supra* note 207 (citing to a wide array of sources in his first law review article).

292. See Kennedy's articles cited *supra* note 200.

293. See, e.g., George W. Constable, *Natural Law Jurisprudence and the Cleavage of Our Times*, 39 GEO. L.J. 365 (1951) (providing a constructively critical evaluation of American Catholic legal scholars' efforts up to that point).

294. See *supra* notes 259–60 and accompanying text (noting that the scholars, especially the members of religious orders, were trained primarily as philosophers and theologians).

295. See Richard O'Sullivan, *The Bond of Freedom*, 6 MOD. L. REV. 177 (1943) (arguing that the English common law was consistent with natural law and that common law countries should re-embrace their uniquely Christian common law heritage).

296. See MCCOOL, *THE NEO-THOMISTS*, *supra* note 266, at 50–152 (describing the contributions of the major Neo-Scholastic thinkers of the twentieth century).

297. See *id.* at 67, 117–52.

cited to standard American legal sources.²⁹⁸

This lack of creativity is not a criticism of the work they produced. Rather, it shows that these scholars utilized their legal training as a bridge between the high-level philosophical work of Neo-Scholasticism and the jurisprudential debates in American legal thought. Their role was not cutting edge research within a discipline outside of law like philosophy, economics, or physics. Instead, like many legal scholars today, Catholic legal scholars in the 1920s–1940s utilized the resources of other disciplines to help them elucidate the law.²⁹⁹

4. Catholic Legal Scholars' Critique of Legal Realism

Catholic legal scholars presented a host of arguments against the Legal Realists. Most fundamentally, they contended that Legal Realism was substantively wrong and that its errors could be corrected only through adoption of the natural law tradition.³⁰⁰ Their critique focused on five points: (1) the natural law – the basis of positive law – is neutral and independent;³⁰¹ (2) the positive law should be judged based on its correspondence, or lack thereof, to the natural law;³⁰² (3) the current American legal system, though flawed, was fundamentally sound;³⁰³ (4) although the law is not fully determinate, it is significantly so;³⁰⁴ and (5) judges should utilize natural law norms and prudence to decide, or as aids in deciding, underdetermined cases.³⁰⁵ We will review each of these contentions in turn.

298. See, e.g., Kennedy, MY PHILOSOPHY OF LAW, *supra* note 200, at 148; Kennedy, *Men or Laws*, *supra* note 200, at 21 n.88 (citing to one Neo-Scholastic source among many other standard sources).

299. Perhaps the most successful example of this phenomenon is the law and economics movement, whose initial advocates, and many today, were and are not trained economists, such as Richard Posner. Another prominent example is the Critical Legal Studies movement, whose advocates were academic lawyers who utilized the tools of philosophy, history, and religion to advance their claims, such as Duncan Kennedy.

300. See, e.g., *infra* notes 301–305 and accompanying text.

301. HERGET, *supra* note 39, at 230.

302. Kennedy, *Portrait* (pt. 1), *supra* note 200, at 11–15.

303. Kennedy, *Pragmatism*, *supra* note 200, at 64–65.

304. Brown, *supra* note 22, at 22.

305. *Id.*

By way of introduction, however, we believe that Catholic legal scholars generally presented a nuanced evaluation of Legal Realism³⁰⁶ and that their response was not solely a critique. They also acknowledged what they saw as the valuable contributions made by the Realists.³⁰⁷ For example, Catholic legal scholars agreed with Realist claims that social science was a valuable tool in the analysis of the consequences of legal doctrine.³⁰⁸ “No one can deny,” wrote James Thomas Connor, Dean of Loyola University New Orleans School of Law, “the vast erudition, the painstaking research, and the genuine intellectual power of the [Realists].”³⁰⁹ Kennedy, especially, appreciated Realist contributions.³¹⁰ In *The New Deal in the Law*, Kennedy critiqued Realism as undermining stare decisis and the rule of law.³¹¹ Nevertheless, he began by acknowledging the basic truth behind the Realist claims: “Judges are human beings and subject to the failings of mankind. Law is to a considerable degree changing and certainty of prediction is impossible in all cases.”³¹²

That being said, with the rise of communism and Nazism, and especially with the onset of World War II, some Catholic legal scholars utilized intemperate rhetoric.³¹³ They also sometimes focused on what they perceived as the most radical of the Realists and their claims.³¹⁴ Kennedy, in 1938, described the arrival of what he labeled the

306. See Kennedy, *Realism, What Next?* (pt. 1), *supra* note 109, at 203 n.2; Kennedy, *A Review of Legal Realism*, *supra* note 200, at 363 (“Realism has made many worthwhile contributions to the science of law.”).

307. Indeed, on occasion they sounded like Realists themselves. See Brown, *supra* note 22, at 12 (noting that natural law rhetoric was used “as an instrument of economic oppression and social injustice”); see also *id.* at 13 (arguing that courts used natural law rhetoric to “prevent the alteration of the common law categories of contractual ability by legislation”).

308. Kennedy, *Pragmatism*, *supra* note 200, at 66.

309. Connor, *supra* note 126, at 168; see also *id.* (“The simple fact is 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.”).

310. See Kennedy, *The New Deal in the Law*, *supra* note 200, at 533–35.

311. *Id.* at 534.

312. *Id.*

313. See, e.g., Kennedy, MY PHILOSOPHY OF LAW, *supra* note 200, at 151–52 (describing Realism, in an otherwise moderate essay, as a “goose-step philosophy”); see also SCHLEGEL, *supra* note 37, at 2 (describing the increasingly hostile reception of Realism during this period); Duxbury, *supra* note 45, at 139 (same).

314. See, e.g., Kennedy, *Functional Nonsense*, *supra* note 200.

“surrealist[s]” who “question[ed] the validity and utility of reason and principles, moral or legal, as worthwhile guides in the shaping of law.”³¹⁵

Catholic legal scholars took advantage of the newly available private papers of Justice Holmes, who was frequently cited and praised by Legal Realists.³¹⁶ They argued that Holmes’s less attractive characteristics, for the first time fully available, reflected the logical conclusions of Legal Realism.³¹⁷ For example, Kennedy argued that the New Deal Court’s dramatic shift in jurisprudential perspective was, in large measure, due to Holmes’s influence.³¹⁸ Kennedy endeavored to show that “[a]n inspection of the philosophical fields in which [Justice Holmes] . . . labored discloses that the seeds of skepticism, cynicism and ‘can’t-helps’ which he planted are now producing a bumper crop of current doubts, despair and pessimism, tilled, cultivated and harvested by his devoted followers.”³¹⁹ Father Lucey likewise relied on numerous citations to Justice Holmes’s personal papers to build his case against Realism.³²⁰

Returning to their critique of Legal Realism, first, Catholic legal scholars maintained that positive law—to merit the label law—must be connected to natural law.³²¹ If the positive law—statutes, administrative actions, executive orders, and judicial decisions—accurately reflected

315. Kennedy, *Realism, What Next?* (pt. 1), *supra* note 109, at 203–04; *see also* Kennedy, *Men or Laws*, *supra* note 200, at 12 n.3a (focusing on Jerome Frank’s relatively more robust Realist claims).

Father Robert I. Gannon, S.J., president of Fordham University, cited “the peculiar horror and universal destruction of this atheistic war.” Robert I. Gannon, S.J., *What Are We Really Fighting?*, 11 *FORDHAM L. REV.* 249, 253 (1942). Hitler, he said, was “simply showing the world in his own inimitable way the logical conclusions of his atheistic premises.” *Id.* at 251. This same line of thought had been smuggled into the United States by students who sat “at the feet of German professors in schools of philosophical sabotage.” *Id.* at 252. These men, as university professors and jurists, were intellectual “saboteurs” having “adopted as their philosophy, principles of rationalism and positivism which by eliminating the Divine Law and objective truth, eliminated all solid grounds for condemning” wrongful conduct. *Id.* In America, however, Gannon said that people were “beginning to recognize as a nation that the real enemy of democracy is Atheism, whether it be adorned with a black swastika, a red star or a Ph.D.” *Id.* at 254; *see also* Palmer, *supra* note 43, at 573 (providing a similar example).

316. *See, e.g.*, Kennedy, *Portrait* (pt. 1), *supra* note 200, at 10.

317. *See* G. Edward White, *The Rise and Fall of Justice Holmes*, 39 *U. CHI. L. REV.* 51, 65–68 (1971).

318. Kennedy, *Portrait* (pt. 1), *supra* note 200, at 8.

319. *Id.* at 10.

320. Lucey, *supra* note 210, *passim*.

321. HERGET, *supra* note 39, at 230.

natural law, these scholars argued, then it was just.³²² Positive law that comported with the natural law also satisfied the basic demand of justice—that each be given his due.³²³ In this way, even if positive law was the product of competing interest groups negotiating and doing battle in the political arena, it remained neutral between contending persons, classes, and other societal relationships.³²⁴ Positive law that met the requirements of distributive and commutative justice was therefore appropriately neutral.³²⁵

According to Catholic legal scholars, the natural law tradition emphasized that positive law was the product of reason *and* human will, not solely will.³²⁶ Therefore, though acknowledging that human legislators and judges are shaped by their particular backgrounds—their class, religion, and race, for example—Catholic legal scholars contended that judges and legislators possessed the ability to utilize their rational faculties to create and articulate legal norms independent of their individual circumstances.³²⁷ As Kennedy summarized:

True it is that scholasticism has faith in traditional law, in man, in his power to reason, in his free will, and in the capacity of the judge to decide legal problems according to rules and principles. Scholasticism does not contend that man is free from prejudice or emotion; that he never acts instinctively. Far from it. But the scholastic jurist believes that it is within the nature of mankind generally to subordinate these emotional factors.³²⁸

As alluded to earlier, Catholic critics often argued that Realism was of-a-piece with the jurisprudential thought that paved the way for the rise of totalitarian regimes.³²⁹ Catholic scholars connected Realism to

322. *Id.* at 230–39.

323. 3 ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* Pt. II-II, Q. 58, Art. 1, at 1434 (Fathers of the English Dominican Province trans., Benzinger Bros. ed. 1947).

324. *See* Brown, *supra* note 22, at 15 (arguing that positive law tied to natural law will create an “equilibrium between the whole and its parts and between the constitutive parts.”).

325. *See id.* at 9 (“Right and justice were based upon the harmony or fitness involved in the nature of things.”).

326. *See* Kennedy, *MY PHILOSOPHY OF LAW*, *supra* note 200, at 148 (“Scholasticism strongly believes in the power of man to reason and to judge impartially in accordance with his freedom of will.”).

327. *Id.* at 151.

328. *Id.* at 153–54.

329. *See* Kennedy, *Portrait* (pt. 1), *supra* note 200, at 3 (explaining that the New Deal Court’s dramatic rate of overrulings was caused by “the full sweep of extreme jurisprudential

totalitarianism³³⁰ via legal positivism.³³¹ They contended that Realism was a manifestation of positivism.³³²

Specifically, these scholars argued—uncontroversially—that positivism was defined by its analytic separation of law from morality.³³³ This separation neutered jurists and lawyers in nations infected with totalitarian ideologies.³³⁴ 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.³³⁵ In the same way, Catholic legal scholars argued, Realism’s abandonment of a tie between law and morality³³⁶ opened the possibility that American law would be used for wicked ends.³³⁷

Catholic critics were not alone in drawing this connection. Lon Fuller, one of the most prominent American legal scholars of the twentieth century, engaged in a sustained criticism of Realism.³³⁸ Fuller, like his Catholic counterparts, argued that Realism was a manifestation of positivism.³³⁹ In his 1940 book, *The Law in Quest of Itself*, Fuller first

isms parading the American scene”); Kennedy, *A Review of Legal Realism*, *supra* note 199, at 373 & nn. 48–50.

330. ROONEY, *supra* note 220, at 114–36.

331. In keeping with then-contemporary terminology, Catholic legal scholars typically referred to legal positivism as the “Analytic School.” Connor, *supra* note 126, at 169. For one perspective on the connections between legal positivism and Realism, see Rumble, *supra* note 107, at 986–89.

332. Kennedy, *A Review of Legal Realism*, *supra* note 200, at 373. Modern scholars have speculated that, though it does not appear that prominent Realists themselves were versed in positivist jurisprudence, they indirectly received knowledge of the school via Justice Holmes. Rumble, *supra* note 107, at 988–89 & n.13.

333. This is generally known as the separation thesis. See H.L.A. HART, *THE CONCEPT OF LAW* 185–86 (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.”).

334. See *id.* at 207–09.

335. Brown, *supra* note 22, at 23–24.

336. SEBOK, *supra* note 103, at 116.

337. See Kennedy, *A Review of Legal Realism*, *supra* note 200, at 373. Although rejecting an ultimate jurisprudential link between positivism and totalitarianism, more-recent scholars have affirmed the link between Realism and positivism. See, e.g., LEITER, *Legal Realism and Legal Positivism Reconsidered*, in *NATURALIZING JURISPRUDENCE*, *supra* note 22, at 59, 67, 72 (emphasis omitted) (arguing that Realist claims “presupposed . . . Hard Positivism”).

338. See, e.g., FULLER, *supra* note 114; Fuller, *supra* note 181.

339. FULLER, *supra* note 114, at 51–52, 62.

briefly traced the intellectual history of legal positivism.³⁴⁰ He then argued that Realism was a “modern positivistic theor[y]”³⁴¹ because it held that the “criterion of the existing law . . . [is] the field of fact”³⁴² found in “judicial behavior.”³⁴³

Second, Catholic scholars challenged the Realists’ pragmatic orientation of law.³⁴⁴ Realists argued that the law should reflect “what works,” that law should be tested by its results.³⁴⁵ Catholic critics, by contrast, argued that the Realists lacked a standard by which to measure whether or not the law “worked.”³⁴⁶ “What test or standard of value does pragmatic jurisprudence offer,” Kennedy asked rhetorically, “to enable us to weigh the clashing ‘claims’ and wants”?³⁴⁷ One cannot decide whether one legal norm rather than another leads to better consequences, Catholic scholars argued, unless one has identified what qualifies as better or worse.³⁴⁸ Catholic scholars challenged that the Realists elided this point³⁴⁹ and so left the law unmoored from a normative foundation.³⁵⁰

Catholic scholars argued that natural law provided the needed metric.³⁵¹ Positive law, they argued, must be consistent with natural law.³⁵² Determining whether a positive law norm is consistent with natural law is more or less difficult depending on the context.³⁵³ Some natural law norms are clear, making it relatively easy to determine

340. *Id.* at 16–41.

341. *Id.* at 46.

342. *Id.* at 52.

343. *Id.* at 53; *see also id.* at 60–62 (summarizing Realism).

344. *See* Kennedy, *Portrait* (pt. 1), *supra* note 200, at 11–15.

345. *See id.* at 12–13.

346. *See* Brown, *supra* note 22, at 25 (“Devotion to this cause [(the natural law tradition)] will not only serve the ends of truth, but will contribute to the wide-spread socialization of the law by supplying a definitive authority—the absence of which is perhaps the greatest weakness in the sociological and realist movements.”); Kennedy, *Portrait* (pt. 1), *supra* note 200, at 13; Kennedy, *A Review of Legal Realism*, *supra* note 200, at 374.

347. Kennedy, *Pragmatism*, *supra* note 200, at 71.

348. *See* Brown, *supra* note 22, at 22; Kennedy, *Portrait* (pt. 1), *supra* note 200, at 13.

349. Brown, *supra* note 22, at 22.

350. *Id.* at 24–25; Kennedy, *Pragmatism*, *supra* note 200, at 71.

351. *See* Connor, *supra* note 126, at 169; Kennedy, *A Review of Legal Realism*, *supra* note 200, at 373; *see also* HERGET, *supra* note 39, at 229–30.

352. *See* Brown, *supra* note 22, at 9 (stating that natural law provided the “norm with which to criticize positive law”).

353. *Id.* at 22.

whether positive law norms conform to them.³⁵⁴ Natural law does not give clear guidance, however, for a significant portion of practical life that is governed by positive law.³⁵⁵ In these areas, legislators and judges must use prudential judgment to determine the best legal norm.³⁵⁶

Since meeting the requirements of natural law left ample room for prudential judgment, Catholic scholars advocated use of the tools of analysis promoted by the Realists.³⁵⁷ There was, therefore, significant agreement between the two camps on this point.³⁵⁸ Catholic scholars acknowledged that the tools identified by Realists, such as social science data, were important to make accurate prudential judgments.³⁵⁹ However, even in the context of prudential judgment, natural law continued to provide a standard for judgment: the flourishing of human beings.

Relatedly, Catholic legal scholars argued that, in seeking to banish the concept of natural law and natural rights from legal theory, Legal Realism did not fit the American legal tradition.³⁶⁰ Catholic legal scholars frequently wrote that the Declaration of Independence and the Constitution, along with sizeable portions of positive law, were significantly influenced by and reflected the natural law tradition.³⁶¹ Realists, who rejected natural law, were therefore swimming against the current of American law in its deepest channels.³⁶²

Third, Catholic legal scholars largely agreed with the Realists that American law needed reform.³⁶³ There was, however, clearly a difference in emphasis. While many of the most prominent Realists focused their scholarship on remedying law that was out of step with

354. *Id.*

355. *Id.* at 15–16, 22.

356. *Id.* at 16.

357. *Id.* at 22.

358. *See id.* at 17 (“A law which ceased to grow could not be used as a means to achieve contemporary social objectives.”).

359. Kennedy, *Pragmatism*, *supra* note 200, at 66.

360. *See Brown*, *supra* note 22, at 11–12, 18.

361. Kennedy, *Pragmatism*, *supra* note 200, at 67–69. Catholic legal scholars overstated their case when they suggested that the American Founders “sought to base the new American government on Thomistic principles.” HERGET, *supra* note 39, at 237.

362. *See Brown*, *supra* note 22, at 23 (arguing that the “sweeping condemnation of the natural law basis of most of our public law . . . must ultimately lead to the repudiation of our traditional political order itself, because it was the natural law concept which molded and gave contour to the American State”).

363. *See Kennedy*, *Pragmatism*, *supra* note 200, at 64–65.

social reality, Catholic legal scholars tended to affirm the fundamental soundness of American law.³⁶⁴ For example, Walter Kennedy readily agreed that the recent and rapid industrialization and urbanization of American life made modification of labor law to fit these new social relationships an important goal.³⁶⁵ That being said, Catholic legal scholars pushed back against some of the more robust Realist claims that the American legal system was fundamentally out of step and hence unjust.³⁶⁶

Fourth, Catholic legal scholars, though acknowledging openness in the law, rejected some Realists' claims of more radical legal indeterminacy.³⁶⁷ For example, James Thomas Connor agreed that there is often "uncertainty in the outcome of judicial investigation."³⁶⁸ He argued, however, that legal indeterminacy was not thoroughgoing or systemic.³⁶⁹ According to Catholic legal scholars, legal reasoning operated to constrain judicial decision making.³⁷⁰ In fact, one of the most disturbing symptoms of Legal Realism, identified by Catholic scholars, was the judicial attitude that the law is relatively open—that judges were relatively unconstrained by traditional modes of legal reasoning³⁷¹—resulting in an erosion of *stare decisis*.³⁷²

Fifth, having recognized the limited openness of law, Catholic legal scholars emphasized that lawmakers—judges and legislators—should utilize their practical wisdom in those areas of openness.³⁷³ Among other benefits, Catholic legal scholars noted that grounding legal decisions in the natural law would "endow our basic social institutions

364. See *id.* at 67–69 (lauding the Declaration of Independence and the amended Constitution, and arguing that Legal Realism threatened this inheritance).

365. See Kennedy, *Law and the Railroad Labor Problem*, *supra* note 207, at 555–56 (addressing the "present labor problems" in the railroad context and proposed legal responses); see also *id.* at 557 (criticizing "the historical school of jurisprudence" for "its failure to view contemporaneous changes").

366. See Kennedy, *More Functional Nonsense*, *supra* note 200, at 75–76 (lauding "Our Lady the Common Law"); Kennedy, *Pragmatism*, *supra* note 200, at 76–77.

367. Brown, *supra* note 22, at 22.

368. Connor, *supra* note 126, at 168.

369. *Id.*

370. Kennedy, *Portrait* (pt. 1), *supra* note 200, at 3–4.

371. Kennedy, *A Review of Legal Realism*, *supra* note 200, at 367.

372. See Kennedy, *Portrait* (pt. 1), *supra* note 200, at 3 (arguing that Realism had caused the decline of *stare decisis* because it eroded traditional modes of legal reasoning).

373. Brown, *supra* note 22, at 22.

with relative stability.”³⁷⁴ Once again, these legal scholars found common ground with the Realists in urging the utilization of social science and other tools to aid judicial and legislative judgment.³⁷⁵ However, they were relatively more cautious in their assessment of how much social science could contribute to legal reasoning.³⁷⁶

Catholic legal scholars were, to an extent, on the sidelines of the major jurisprudential debates occurring at the time in the American legal academy. Evidence for this includes the fact that most of their articles appeared in Catholic law school journals, while the Legal Realists’ work regularly appeared in top-tier law school journals.³⁷⁷ When the Realists at elite institutions did occasionally engage with Catholic legal scholars, they would attempt to rhetorically marginalize their would-be interlocutors.³⁷⁸ Further, many of the major jurisprudential debates occasioned by Realist claims occurred without the participation of Catholic legal scholars.³⁷⁹ Thus, while Catholic legal scholars attempted to play the role of the Socratic gadfly, they failed to attract the same attention that Socrates managed to attain.

That being said, Catholic legal scholars did garner some recognition from their Realist counterparts. Their impact was exemplified by the exchange between Walter Kennedy and Felix S. Cohen. Cohen published his seminal piece, *Transcendental Nonsense and the Functional Approach*, in 1935 in the *Columbia Law Review*.³⁸⁰ There,

374. *Id.* at 23.

375. Kennedy, *Pragmatism*, *supra* note 200, at 66.

376. Kennedy, *More Functional Nonsense*, *supra* note 200, at 88; Kennedy, *A Review of Legal Realism*, *supra* note 200, at 364–65.

377. See THE FIRST 125 YEARS, *supra* note 269, at 118 (“[A]s long as [Catholic scholars such as Father Lucy] . . . published in the legal periodicals of Catholic universities, elite law professors felt free to ignore them.”). Although Catholic law schools strove to provide their students with a strong legal education, none of these schools was then widely considered to be among the nation’s best. See Breen & Strang, *supra* note 16, at 555, 633–34. Most Catholic law schools were not founded as legal centers of academic learning and scholarship; instead, they were primarily institutions of vocational training for the children of immigrants seeking entry into the professional classes of American society. *Id.* at 578–84.

378. See THE FIRST 125 YEARS, *supra* note 269, at 118 (describing Mark DeWolfe Howe’s dismissive characterization of Father Lucey’s arguments as typical of a “Jesuit” and at base theological). Unfortunately, contemporary scholars have continued to caricature and marginalize Catholic legal scholars’ criticism of Legal Realism. See Duxbury, *supra* note 45, at 169–70 (maligning the Catholic legal scholars’ criticisms of Realism as “little more than crude attempts at proselytisation”).

379. See THE FIRST 125 YEARS, *supra* note 269, at 118.

380. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

Cohen attacked what he characterized as the reigning jurisprudential regime mired in “supernatural terms.”³⁸¹ The following year, Kennedy responded in the same provocative vein with an article creatively titled *Functional Nonsense and the Transcendental Approach*, published in the *Fordham Law Review*.³⁸² In *Correspondence*, also published in the *Fordham Law Review*, Cohen attempted to rebut Kennedy’s primary claims.³⁸³ The prolific Kennedy once again took up the gauntlet with an article challenging Cohen’s reply and rearticulating his claims.³⁸⁴

The *Columbia Law Review*, which had published Cohen’s original article, declined to publish Kennedy’s piece,³⁸⁵ but plainly Cohen believed that Kennedy’s criticisms warranted a serious and thoughtful response. Still, the pecking order and degree of exposure was set. Cohen, the Realist, published an article in an elite law journal, while the Catholic scholar, Kennedy, played the role of respondent in a non-elite journal published by his home institution. Lastly, following a short piece by Cohen, Kennedy again published a longer piece, again in a Catholic law school journal.³⁸⁶ So, while Kennedy’s claims did attract serious attention, he was clearly the “outsider looking into” the debate.

Another reason that Catholic legal scholars were outsiders to the jurisprudential debate was that their jurisprudential perspective was new to American legal discourse. Although a version of natural law had been the dominant perspective a century before, the Neo-Scholastic natural law tradition was a recent import to American shores via, primarily, Catholic immigration and the renewal of interest in Thomistic thought spurred on by Pope Leo XIII.³⁸⁷ Most of the non-Catholic participants in the jurisprudential debates of the 1930s and 1940s had little or no exposure to Thomistic natural law during their education.³⁸⁸ Thus, most members in the American legal academy regarded Catholic legal scholars’ perspective as foreign, unorthodox, and presumptively outside the bounds of conventional academic discourse.

381. *Id.* at 811.

382. Kennedy, *Functional Nonsense*, *supra* note 200.

383. Felix S. Cohen, *Correspondence*, 5 FORDHAM L. REV. 548 (1936).

384. Kennedy, *More Functional Nonsense*, *supra* note 200.

385. *See, e.g.*, Kennedy, *Functional Nonsense*, *supra* note 200, at 272.

386. *See, e.g.*, Kennedy, *More Functional Nonsense*, *supra* note 200.

387. J. DARYL CHARLES, RETRIEVING THE NATURAL LAW: A RETURN TO MORAL FIRST THINGS 130 (2008); Kennedy, MY PHILOSOPHY OF LAW, *supra* note 200, at 159–60.

388. *See* CHARLES, *supra* note 387, at 65.

Relatedly, non-Catholic American legal scholars discounted Catholic legal scholars and their natural law perspective because of their affiliation with the Catholic Church. For a variety of reasons, the Catholic Church was frequently viewed by Americans as either being or holding views incompatible with American values.³⁸⁹ For instance, Mark DeWolfe Howe, in a 1951 law review article, snidely remarked that the Catholic critics of Justice Oliver Wendell Holmes, Jr., were “so firmly grounded in the Catholic philosophy of law” that, if he were to attempt to address their criticisms directly, he “should find [himself] quickly engaged in a theological controversy beyond [his] competence to discuss.”³⁹⁰ According to Howe, given that John C. Ford and Francis E. Lucey were “members of the Jesuit Order,” their opposition to Justice Holmes was “almost inevitable” because of the fact that Justice Holmes was “a skeptic in matters of religion” who “denied the existence of that law of nature upon which the Catholic philosophy of law is based.”³⁹¹

5. The Attempted Institutionalization of Catholic Legal Thought’s Response

In addition to their prodigious scholarship, Catholic legal scholars also utilized other outlets to rebut Realist claims and propound the natural law tradition. Like other intellectual movements, these scholars recognized that Catholic legal thought would have a much greater chance of lasting success if they invested their movement with institutional forms of expression.

Two mechanisms of attempted institutionalization merit some discussion. First, many Catholic law schools either initiated or, more frequently, redoubled their curricular commitments to natural law.³⁹² Second, Catholic legal educators attempted to build academic fora through which the natural law tradition would be expounded.³⁹³

389. This view is now, once again, in vogue among some elites. See Ronald A. Lindsay, *The Uncomfortable Question: Should We Have Six Catholic Justices on the Supreme Court?*, HUFFINGTON POST (June 30, 2014, 6:03 PM), http://www.huffingtonpost.com/Ronald-a-lindsay/supreme-court-catholic-justices_b_5545055.html (last updated August 30, 2014, 5:59 AM), archived at <http://perma.cc/W2W-R556> (criticizing the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and questioning “the compatibility between being a Catholic and being a good citizen”).

390. Mark DeWolfe Howe, *The Positivism of Mr. Justice Holmes*, 64 HARV. L. REV. 529, 530 (1951).

391. *Id.* at 530–31.

392. See Connor, *supra* note 126, at 164.

393. See Brown, *supra* note 172, at 10.

Most Catholic law schools required students to take a course in jurisprudence and, in most instances, this course focused on Neo-Scholastic natural law.³⁹⁴ Beginning in the 1930s, many Catholic schools expanded their curricular focus on natural law.³⁹⁵ They did so to promote natural law and to combat the growth of Legal Realism.³⁹⁶

One of the major challenges to this curricular reform was the absence of suitable instructional materials. From the beginning of their reform effort, Catholic legal scholars called for the creation of materials that brought together natural law and American civil law in a way that was suitable for use in a modern law school classroom.³⁹⁷ These goals, however, were never realized. For example, when serving as chairman of the American Catholic Philosophical Association's Section on Jurisprudence in 1942, Miriam Theresa Rooney lamented the lack of such law school texts.³⁹⁸ In fact, the problem was doubly bad because, as Rooney noted, "we have not yet produced enough monographs based on original research to supply much of the data we need for the adequate text-book projected in 1937."³⁹⁹

Catholic legal scholars ultimately met with little success, outside of the field of jurisprudence, where they fashioned a modest amount of instructional materials. Though even here, there was not an overabundance of options. In 1924, Francis P. LeBuffe, S.J., a faculty member at Fordham Law School, organized and published his lecture notes as a jurisprudence text entitled *Outlines of Pure Jurisprudence*.⁴⁰⁰

394. See Connor, *supra* note 126, at 164 (referring to "those schools which offer" jurisprudence courses, indicating that some Catholic law schools did not offer such courses).

395. See Brown, *supra* note 172, at 5, 9–10 (noting that some Catholic law schools were starting to "hold themselves out in their [course] catalogues as presenting a specific [Scholastic] legal philosophy").

396. See JOHN P. NOONAN, S.J., *PRINCIPLES OF LAW AND GOVERNMENT* 3–4 (1936) (stating that this book on jurisprudence was written to combat "Pragmatism," "Materialism[,] and Hegelian Evolutionary Pantheism," and because an earlier jurisprudence textbook was out of print); Brown, *supra* note 172, at 10.

397. *Current Attacks Upon and Suggested Methods of Preserving Neo-Scholastic Jurisprudence*, 13 *PROC. AM. CATH. PHIL. ASS'N* 186, 196–201 (1937) (comments of Professor Franklin F. Russell).

398. Rooney, *supra* note 236, at 201, 203.

399. *Id.* at 202.

400. FRANCIS P. LEBUFFE, S.J., *OUTLINES OF PURE JURISPRUDENCE* (1924); see also KACZOROWSKI, *supra* note 173, at 144–45 (describing the origins and publication of Fr. LeBuffe's texts). The text was published again in revised form in 1938 and 1947. FRANCIS P. LEBUFFE, S.J. & JAMES V. HAYES, *THE AMERICAN PHILOSOPHY OF LAW: WITH CASES TO ILLUSTRATE PRINCIPLES* (4th ed. rev. & enlarged 1947); FRANCIS P. LEBUFFE, S.J. & JAMES

This text remained, in subsequent revised editions, the best Catholic jurisprudence text for law schools⁴⁰¹ until the publication of Dr. John C.H. Wu's jurisprudence casebook in 1958.⁴⁰² By that time, however, the Neo-Scholastic wave had crested, Thomism no longer served as the unquestioned center of Catholic identity in higher education, and the impetus for natural law in legal education was on the wane.

During this same time period, Catholic legal educators also attempted to create institutions in which natural law discourse could flourish. Two prominent examples of this were the Natural Law Institute at Notre Dame Law School⁴⁰³ and the previously mentioned Section on Legal Philosophy within the American Catholic Philosophical Association.⁴⁰⁴ The goal of these institutions, together with several legal academic journals founded at this time,⁴⁰⁵ was to create a space that encouraged Catholic legal scholars to articulate natural law theory and to engage other schools of thought.⁴⁰⁶

One of the most successful efforts to institutionalize the Catholic legal scholars' Neo-Scholastic perspective was the Notre Dame Natural Law Institute. It began as a conference in 1947 and then became an annual conference that published its proceedings.⁴⁰⁷ As it evolved, the Institute's annual conference was replaced by an annual lecture on

V. HAYES, JURISPRUDENCE: WITH CASES TO ILLUSTRATE PRINCIPLES (3d ed. rev. augmented 1938). For a critical review of the 1938 edition, see Miriam Theresa Rooney, Book Review, 13 NEW SCHOLASTICISM 196 (1939).

401. See Miriam T. Rooney, *Jurisprudence—A Teaching Problem*, 4 CATH. LAW. 172 (1958) (describing the lack of jurisprudence texts generally and from the perspective of Catholic legal thought).

402. JOHN C.H. WU, CASES AND MATERIALS ON JURISPRUDENCE (Erwin N. Griswold ed., 1958).

403. See David C. Bayne, S.J., *Notre Dame's Natural Law Institute*, 82 AMERICA 433, 433–34 (1950).

404. *Minutes of Meeting of December 30–31, 1935*, 11 PROC. AM. CATH. PHIL. ASS'N 194 (1935); see also Brown, *supra* note 172, at 10 (noting the extensive participation of Catholic legal scholars in the Section's work); Brown, *supra* note 265, at x (describing the Section's origin and purpose).

405. For instance, the Catholic Lawyers Guild of New York established an annual Natural Law Conference in 1954. See Rooney, *supra* note 247, at 22 (publishing an address to the third annual Natural Law Conference).

406. Then-Dean Brendan Brown at Catholic University established a law review in 1950 with the stated goal of institutionalizing scholarship from the natural law tradition. Brown, *supra* note 263, at ix–x.

407. See Breen & Strang, *supra* note 16, at 615.

natural law and a journal, the *Natural Law Forum*.⁴⁰⁸ Both the lecture and journal (under another name) continue today and are well-respected.

Other efforts met with limited success. The Section on Jurisprudence floundered in the reform efforts that initially motivated it. The Neo-Scholastic revival began to crack in the mid-to-late-1950s, giving way to internal divisions.⁴⁰⁹ Since Neo-Scholasticism formed the backbone of the Catholic legal scholars' reform efforts, its exhaustion as an intellectual movement signaled the expiration of the coherence of the Catholic legal scholars' reform efforts.⁴¹⁰ The vigorous debate between Legal Realists and Catholic legal scholars, described above, both precipitated and structured the reform proposals of leading Catholic legal scholars.⁴¹¹ With the decline of Realism as a potent force in the legal academy, and other factors, such as the end of World War II, the perceived need for reform—the perceived need for distinctively Catholic law schools that carried forward the Neo-Thomistic natural law project—diminished. This had the effect of undercutting the institutionalization of Catholic legal scholars' Neo-Scholastic perspective.

C. Summary of the Catholic Response to Realism

In sum, beginning in the 1930s, Catholic legal scholars engaged in a vigorous, sophisticated, and nuanced critique of Legal Realism. These Catholic legal scholars drew upon and advanced the contemporary Neo-Scholastic revival. Ultimately, like their Realist interlocutors, the Catholic legal scholars faded from the scene as a coherent movement in the 1950s. Unlike their Realist counterparts, however, the critical work of these Catholic scholars is now all but forgotten. Below, we suggest why the standard histories of this period ignore or fail to appreciate the contributions made by these critical writers.

408. See Joseph O'Meara, *Foreword*, 1 NAT. L.F. 1 (1956) (describing the origins and evolution of the *Natural Law Forum*); Bayne, *supra* note 403 (describing the origin and evolution of the Natural Law Institute); Edward F. Barrett, *The "Catholic" Law School and the Natural Law—The Notre Dame Experiment*, 56 HOMILETIC AND PASTORAL REV. 904 (1956) (same).

409. See Duxbury, *supra* note 45, at 175.

410. Similarly, a Natural Law Institute at Loyola New Orleans Law School, initiated by Brown after he moved there in 1954, exists today as an annual lecture.

411. See *supra* Part III.

IV. THE UNTOLD STORY:
EXPLAINING THE ABSENCE OF CATHOLIC LEGAL THOUGHT IN THE
HISTORIES OF AMERICAN LEGAL REALISM

Given the robust response by Catholic legal scholars to Legal Realism described above, the question must be asked: Why is there a gap in the standard historical narrative? Why did most accounts of American legal history ignore the single largest body of criticism directed at Legal Realism? Why did those accounts that acknowledged the critical response of Catholic legal scholars to Realism do so only in passing or dismiss the efforts of these scholars as *religious* and therefore both unpersuasive and incapable of informing American law?

In raising these questions, we are not claiming that, on the merits, Catholic legal scholars had the better of the debate with the Realists. Nor is it our view that Legal Realism is un-deserving of the attention it receives in the standard telling of American legal history. Plainly, Realism had an enormous impact on the development of American law and legal culture. Instead, we are making the more limited claim that Catholic legal scholars presented widespread and plausible critiques of many Realist positions. If that is true, then why did subsequent scholars fail to take note of their contributions entirely? Or, in other cases, dismiss these contributions in a derisive manner?

In the Part that follows, we consider three reasons that might be offered to explain the lack of attention paid to Catholic legal scholars' critical response to Legal Realism (discussed at length above): (1) the relatively low number of Catholic legal scholars who critiqued Legal Realism compared to the number of its proponents; (2) the good faith exercise of historical judgment concluding that Catholic criticisms of Realism were not historically significant; and (3) the rejection of natural law theory by contemporary legal academics, combined with the mistaken view that natural law is necessarily religious, and the still powerful presence of anti-Catholicism in American society and academic culture.

*A. The Relatively Insubstantial Amount of Catholic Legal Scholarship
Published in Response to Legal Realism*

Reading contemporary legal histories in a charitable light, the relative inattention devoted to the Catholic response to Legal Realism might be due to the relatively small amount of scholarship produced by Catholic legal scholars compared to the volume amassed by their Realist counterparts. Moreover, what scholarship they did produce might have

escaped the notice of historians given the relatively un-prestigious Catholic journals in which they published, in contrast to the elite law reviews where Realist scholarship appeared.

Legal Realism was a major movement in American law, one that holds a special place in the imagination of American lawyers. Putting to one side the contested claim as to whether the Realists constituted a “school” of thought,⁴¹² no one disputes that a large number of legal academics, lawyers, and judges took up the Realist project. Again, although the contents of the list are disputed,⁴¹³ in his article, *Some Realism About Realism—Responding to Dean Pound*, Karl Llewellyn lists twenty law professors, judges, and lawyers whom he identifies as Realists.⁴¹⁴ Clearly, others might be added to this number,⁴¹⁵ but if Llewellyn’s list of twenty names is taken as a baseline, it exceeds the number of Catholic legal scholars writing in response to the Realist charge.⁴¹⁶

Even here the sheer number of authors writing in each camp fails to tell the whole story. Every law school faculty has some members who are more productive in terms of their scholarly output, and others less so. Generally speaking, the larger a school’s faculty, the more likely it is that the overall number of papers published will be substantial. Further, greater productivity might also be expected at a school where teaching loads are lighter and student–faculty ratios are lower.

The relatively small size of most Catholic law school faculties made it far less likely that they would produce scholarship of any kind, let

412. See *supra* notes 103–06 and accompanying text.

413. See HORWITZ, *supra* note 25, at 180–81 (stating that, of those listed, “only eight or nine can be regarded as having been at the forefront of legal thought” and that, in Horwitz’s judgment, “six were not sufficiently important or distinguished as scholars even in 1931 to have made the list”).

414. Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1226 n.18 (1931). In addition to himself, Llewellyn counts the following among the Realists: Walter Bingham, Ernest Lorenzen, Charles Clark, Walter Wheeler Cook, Arthur Linton Corbin, Underhill Moore, Thomas Reed Powell, Herman Oliphant, Jerome Frank, Leon Green, Max Radin, Joseph Hutcheson, Samuel Klaus, Wesley Sturges, William O. Douglas, Joseph F. Francis, Edwin Patterson, Leon Tulin, and Hessel Yntema. *Id.*

415. For a discussion of those whom Llewellyn might have included but left out, see HORWITZ, *supra* note 25, at 182–83.

416. Broadly interpreted, Catholic legal scholars critical of Legal Realism writing in legal periodicals included Walter Kennedy, Miriam Theresa Rooney, Brendan Brown, Francis Lucey, S.J., Paul Gregg, S.J., John Ford, S.J., William Kenealy, S.J., Karl Kreilkamp, Anton-Hermann Chroust, William Clarke, James Thomas Connor, Edward Hogan Jr., Ben Palmer, and Harold McKinnon.

alone scholarship that specifically took up the Neo-Thomistic project and engaged Legal Realism. For example, in 1950 Fordham Law School had seven full-time faculty members and a student body of 656, and Georgetown Law School had thirteen full-time faculty and 888 students.⁴¹⁷ By contrast, in 1950 Yale Law School had twenty-six full-time faculty members and a student body of 548, and Columbia Law School boasted twenty-one full-time faculty members and 650 students.⁴¹⁸

More than this, the culture of Catholic law schools during this time was not oriented toward the regular production of legal scholarship. Rather, these institutions saw themselves primarily as schools of professional training designed to prepare men for the practice of law by providing them with a scientific understanding of law and the acquisition of basic lawyering skills. A faculty member at a Catholic law school conceived of his role primarily as that of a classroom teacher. Many faculty at these schools used what free time they had to maintain a law practice. Moreover, when academic legal scholarship was produced at Catholic law schools, it was a relatively new thing. Formal standards that required faculty candidates for tenure to compile a substantial record of scholarly publications simply had not yet been widely adopted.

To see what this meant in practice, it is perhaps helpful to compare individuals. Walter Kennedy was by far the most prolific of the Catholic authors noted above.⁴¹⁹ No one else approaches Kennedy in terms of the number of law review articles published by him during the period in question. Yet several Legal Realists—Karl Llewellyn, Jerome Frank, Walter Wheeler Cook, Felix Cohen, and Thurman Arnold, not to mention Roscoe Pound—easily match or exceed Kennedy's scholarly output.⁴²⁰

417. AM. BAR ASS'N, LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS IN THE UNITED STATES: 1950 REVIEW OF LEGAL EDUCATION 7, 11 (1950), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/standardsarchive/1950_review.authcheckdam.pdf, archived at <http://perma.cc/9A4U-3AU2>.

418. *Id.*

419. *See supra* note 200.

420. From 1920–1940, Kennedy published at least seventeen law review articles and book reviews. *See supra* note 200. During this same time, Llewellyn published at least twenty-eight articles, Frank published at least thirty-five articles, Felix Cohen published at least twenty articles, Cook published at least thirty-seven articles, Arnold published at least sixty-five articles, and Pound published at least one hundred twelve articles. *See DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM* 339–42 (2007); J. MITCHELL ROSENBERG, *JEROME FRANK:*

Even when Catholic legal scholars did publish, their work was not as widely disseminated as the work of their Realist counterparts. This lack of exposure within the wider legal academy was in part due to the inability of these writers to publish in more prestigious and more widely read, non-Catholic law journals. As one commentator noted, “[a]s long as [Catholic scholars] . . . published in the legal periodicals of Catholic universities, elite law professors felt free to ignore them.”⁴²¹ Thus, for the most part, the Realists and their Catholic natural law critics were not true interlocutors. They were merely verbal adversaries, one of whom labored in the relative obscurity of the pages of Catholic law reviews.

The fact that Catholic critics published fewer articles than their Realist counterparts, and the fact that their work appeared in less prestigious journals, might help explain why the Catholic response to Realism has been overlooked in the standard accounts of American legal history. However, this explanation seems unlikely. The materials at issue are widely available and can be found with basic historical research techniques. Although less voluminous than the Realists’ own scholarly output, the work of Catholic legal scholars remained substantial. Discovering these works does not require research that is especially rigorous or astute. Moreover, quite obviously, a few legal historians — Duxbury, Herget, Purcell — have discovered these materials and discuss them to some extent in their historical accounts.⁴²² Purcell’s book is especially significant in this regard in that it was first published in 1973 and is widely read. As such, it predates those historical accounts that ignore or give virtually no attention to the Catholic response to Realism — Kalman (1986), Horwitz (1992), Schleigel (1995), Feldman (2000) — by a substantial number of years. Complete ignorance of the Catholic response to Realism is not a plausible explanation for its absence in most accounts of American legal history.

JURIST AND PHILOSOPHER 165–67 (1970); FRANKLYN C. SETARO, A BIBLIOGRAPHY OF THE WRITINGS OF ROSCOE POUND 22–76 (1942); TWINING, *supra* note 36, at 555–59 (select bibliography of Llewellyn’s works); WALTER E. VOLKOMER, THE PASSIONATE LIBERAL: THE POLITICAL AND LEGAL IDEAS OF JEROME FRANK 229–31 (1970); SPENCER WEBER WALLER, THURMAN ARNOLD: A BIOGRAPHY 207–10 (2005) (listing the principal writings of Thurman Arnold); Cook, *Walter Wheeler*, HEINONLINE, http://heinonline.org/HOL/AuthorProfile?collection=journals&base=js&search_name=Cook,%20Walter%20Wheeler (last visited Mar. 30, 2015), archived at <http://perma.cc/8MJ4-U85M>.

421. THE FIRST 125 YEARS, *supra* note 269, at 118.

422. See Duxbury, *supra* note 45; see also HERGET, *supra* note 39; PURCELL, *supra* note 1.

It is worth noting that the description set forth here — that Catholic legal scholars produced a smaller amount of scholarship relative to the Realists and that their written work received comparatively little exposure, largely confined to the parochial audience of Catholic periodicals—contradicts what others have said. For example, Neil Duxbury acknowledges the existence of Catholic criticism of Realism but dismisses it as unscholarly.⁴²³ The work of these Catholic critics was, he says, “highly subjective” and “unsophisticated.”⁴²⁴ Duxbury doubts that few people outside of Catholic law schools would have been “persuaded by the repetitiveness and the sanctimoniousness of the majority of the Catholic detractors,” but he claims that “the Catholic critique did, after a fashion, make its mark on realism.”⁴²⁵ Indeed, he contends that “the cumulative effect of the various critiques put forward” — Catholic and otherwise— “was to strip realism of its vitality and its multi-dimensionality.”⁴²⁶ Under the influence of this “anti-realist” campaign, “[r]ealism was subjected . . . to an essentially negative assessment” and even “caricatured.”⁴²⁷

For Duxbury, the Catholic contribution to this process was not due to the salience of any of its critiques but to its sheer volume. “So much of this literature was written that even legal realists who had departed from academia could not but notice at least some of it.”⁴²⁸ The description provided above does not support this contention. Even Duxbury seems aware that it is not fully accurate. Thus, he notes that “most of the natural lawyers’ attacks on realism were published in the Catholic law school journals and were unlikely to have made much of an impact in wide legal circles,”⁴²⁹ and that much of this criticism “failed to penetrate the mainstream of American legal scholarship.”⁴³⁰ Moreover, Duxbury — an Englishman, writing in 1992 and 1995 — overlooks the fact that, at this point in American history, Catholics and Catholic institutions did not enjoy the kind of full and equal status that they do today. The influence of Catholic periodicals was largely confined to a

423. See Duxbury, *supra* note 45, at 168–70.

424. *Id.* at 175.

425. *Id.* at 173.

426. *Id.* at 175.

427. *Id.* at 176.

428. *Id.* at 173.

429. *Id.*

430. *Id.* at 175.

Catholic audience.⁴³¹ If few people read the Realist tracts contained in the pages of the *Columbia Law Review*, even fewer people read the Catholic criticism of Realism contained in the *University of Detroit Law Review*, let alone the *Proceedings of the American Catholic Philosophical Society*.

In sum, the relative paucity of scholarship, and the relatively marginal journals in which Catholic legal scholars published, cannot account for the lacuna in most legal historians' accounts. The historical evidence was easily available, and a few historians did locate and describe Catholic legal scholars' contributions.

B. The Good Faith Exercise of Historical Judgment

A more likely explanation is that the authors of these standard histories simply determined that the Catholic response to Realism was insignificant and therefore undeserving of attention. In setting forth a historical narrative, every author must make editorial decisions. Every writer of history must decide which aspects of the story are deserving of emphasis and which aspects may be downplayed, or even ignored, without distorting the truth. Moreover, in reviewing a particular historical era or movement, it is the task of historians to attempt to explain the causes and effects of historical phenomena—to account for the fact that events turned out as they did and why.

Following an honest assessment of the historical record, it would be plausible for a historian to conclude that the Catholic response to Realism had little effect upon the wider jurisprudential debate.⁴³² The embrace of natural law by some Realists, such as Robert Hutchins and Jerome Frank (with whom this article began),⁴³³ might be dismissed as aberrational and in no way indicative of American legal academic culture as a whole. Indeed, it would be plausible for an historian to conclude that the relative paucity of Neo-Scholastic authors and tracts indicates that Neo-Scholasticism simply was not convincing to the vast majority of American legal academics. The relatively small volume of

431. *Id.* at 173.

432. *See id.* (“It is significant, too, that most of the natural lawyers’ attacks on Realism were published in the Catholic law school journals and were unlikely to have made much of an impact in wide legal circles.”).

433. *But see id.* at 175 (claiming that the Realists only “paid lip-service” to natural law but that “[n]ever did they embrace it” and that Frank “had never, in fact, placed much store in the Thomist critique of realism”).

articles produced by Catholic legal scholars and, indeed, the failure of the Neo-Scholastic movement to transform even Catholic legal education (as its most vocal proponents had urged), suggests that Neo-Scholasticism was unable to persuade even its ideal audience—namely, fellow Catholic law professors—let alone those outside the fold.

Indeed, although we have described the efforts of Catholic legal scholars to articulate the Neo-Thomistic understanding of law as a “movement,” the history recounted above shows that it ultimately was a failed movement. The proponents of Neo-Scholasticism in law failed to create the institutions necessary to sustain it. No Catholic law school succeeded in developing “a legal culture . . . under the influence of a Neo-Scholastic philosophy” as Brown had envisioned it.⁴³⁴ The teaching materials that Rooney and others said were essential for the success of the project⁴³⁵ were never generated. Moreover, although the proponents of Neo-Scholasticism in the law knew that the “revival of natural law jurisprudence in the theo-philosophical sense w[ould] be short lived unless it [was] enforced by the active support of the faculties of Church law schools,”⁴³⁶ Catholic law schools were unable to fill the ranks of their faculties with teachers and scholars who had the desire or ability to bridge the gap between American law and Thomistic natural law, both in the classroom and in their written work.⁴³⁷

Similarly, based on the lack of serious interaction between the Realists and their Catholic critics, it might be plausible for an historian to conclude that the Catholic response was of no consequence. The one episode thought to stand in contrast to this general lack of interaction—the exchange between Felix Cohen and Walter Kennedy recounted above⁴³⁸—is not to the contrary. An historian might reasonably read Cohen’s response to Kennedy in the *Fordham Law Review* as Cohen describes it, namely, as an effort “to decline all responsibility” for certain ideas that Kennedy “erroneously ascribes” to Cohen.⁴³⁹ Thus, judging simply by its effects—the impact it had on jurisprudential

434. Brown, *supra* note 187, at 167–68 (emphasis omitted). See generally Breen & Strang, *supra* note 16.

435. Rooney, *supra* note 236, at 201.

436. Brown, *supra* note 22, at 21.

437. See Breen & Strang, *supra* note 16, at 621–25.

438. See *supra* notes 380–86 and accompanying text.

439. Cohen, *supra* note 380, at 548.

commentary—a responsible historian might judge that the Catholic response to Realism was of no great moment.

Aside from the exchange between Cohen and Kennedy, on those few occasions when Realist authors did respond to the criticisms posed by Catholic scholars, they did so only belatedly and not in the manner typical of academic debate. For example, in 1942, three Jesuits—Francis Lucey, Paul Gregg, and John Ford—each published a critique of Justice Holmes,⁴⁴⁰ whereas Mark DeWolfe Howe's and Fred Rodell's responses⁴⁴¹ did not appear until 1951, almost a decade later. Although Howe and Rodell acknowledged Lucey's and Ford's published works, they did not engage the substance of the Jesuit scholars' criticisms in a meaningful way. Instead, the focus of their retort was Lon Fuller's criticisms of Justice Holmes.⁴⁴² Moreover, some believe⁴⁴³ that it was only Ben W. Palmer's provocatively titled essay *Hobbes, Holmes and Hitler*,⁴⁴⁴ published in the *ABA Journal*, that prompted the responses from Howe and Rodell.⁴⁴⁵ Absent this high profile essay, Lucey and Ford's work may have gone almost entirely unnoticed. Even when Howe and Rodell did respond, they did so more out of desire to defend Justice Holmes than a felt need to respond to intelligent criticism. Indeed, Rodell's response—a magazine article, republished in the *Yale Law Journal*—was little more than a heart-felt defense of Justice Holmes, dripping with sarcasm, not an intellectual response to the arguments made by Justice Holmes's Catholic critics.⁴⁴⁶ This is clear even from the title of Rodell's piece: the Catholic critics of Justice Holmes, including Palmer, are not taken as serious scholars—they are only “Hecklers.”⁴⁴⁷

440. Ford, *supra* note 179; Gregg, *supra* note 262; Lucey, *supra* note 210.

441. Howe, *supra* note 390; Fred Rodell, *Justice Holmes and His Hecklers*, 60 *Yale L.J.* 620 (1951); *see also* BURTON, *supra* note 171.

442. Rodell accuses Fuller of taking “more restrained potshots” at Justice Holmes, Rodell, *supra* note 441 at 621, whereas Howe engages in a more extensive critique of Fuller's criticism of Justice Holmes, Howe, *supra* note 390, at 531–45.

443. THE FIRST 125 YEARS, *supra* note 269, at 118.

444. Palmer, *supra* note 43.

445. *See* Howe, *supra* note 390, at 530; *see also* Rodell, *supra* note 441, at 621. It is also likely that a column by Hearst syndicated columnist Westbrook Pegler also prompted the responses from Howe and Rodell. *See* Howe, *supra* note 390, at 529–30; Rodell, *supra* note 441, at 620; *see also* Westbrook Pegler, *Justice Holmes Became Idol of a Godless Cult*, *EVENING INDEP.*, Dec. 18, 1950, at 15.

446. *See* Rodell, *supra* note 441.

447. *Id.* at 620.

Those who heckle the speeches of great orators are accorded only a footnote to history, if that. Likewise, reporting the remarks of a few disaffected law professors directed at Legal Realism would have been extravagant and unnecessary. Responsible intellectual history would not require as much.

Below, after a review of the pertinent literature, we draw three themes from the standard historical account, which, together, suggest alternative reasons for the lack of any or fair treatment of Catholic legal scholars.

C. Three Factors Behind the Standard Narrative: The Contemporary Rejection of Natural Law, the Confounding of Natural Law and Religion, and the Prevalence of Secularism and Anti-Catholicism in American Society and Academic Culture

The fact that the standard historical account ignores or devotes very little attention to the Catholic response to Legal Realism may reflect a sincere evaluation of its historical significance. It may reflect the good-faith conclusion that the Neo-Scholastic critique is undeserving of much attention insofar as it was unable to alter the conversation—to change the terms of the debate and forge a new consensus that reaffirmed the traditional understanding of natural law, adapted to modern social conditions. Even if the standard historical account is explicable in these terms, a number of questions remain. Specifically, this account does not explain the *manner* in which some histories dismiss the critique of Realism offered by Catholic legal scholars.

For example, according to Neil Duxbury, the campaign against Legal Realism in the mid-twentieth century “may be regarded as a particular initiative of Jesuit law professors and theologians.”⁴⁴⁸ Although the legacy of Justice Holmes was at this time undergoing a general reassessment that recast Holmes in a negative light, for Duxbury, those Catholic scholars who criticized Holmes were guilty of “outbursts” as they “tended to come either from Jesuit law professors such as Lucey, or from journalists swayed by the mood of McCarthyism.”⁴⁴⁹ According to Duxbury, Catholic legal scholars were anything but subtle in their view of Realism. For them, “natural law was the embodiment of the good and legal realism the epitome of evil”⁴⁵⁰ such that they were “unable or

448. Duxbury, *supra* note 45, at 165.

449. *Id.* at 163.

450. *Id.* at 168.

unprepared to conceive of realism as anything other than an out-and-out threat to the established American polity.”⁴⁵¹ According to Duxbury, they saw Realism “as a legitimate cause for panic”⁴⁵² and were willing to go to extremes to accomplish their goal of defeating it. Contrary to the reading of Kennedy and other Catholic critics provided above,⁴⁵³ Duxbury accuses these writers, and Kennedy in particular, of engaging in “a wholly negative reading of the literature” whereby “legal realism was sensationalised” and depicted as “a celebration of authoritarianism.”⁴⁵⁴ Duxbury concludes that “the natural lawyers’ efforts to discredit legal realism amounted to little more than crude attempts at proselytisation.”⁴⁵⁵

Similarly, Laura Kalman notes that, with the rise of totalitarianism and the advent of World War II, Realism was subject to criticism as people were “less tolerant of a philosophy that was descriptive rather than normative.”⁴⁵⁶ According to Kalman, several legal academics “attacked legal realism,” including “a number of Catholic jurists who believed in natural law.”⁴⁵⁷ In a lengthy footnote accompanying this passage, Kalman snidely remarks that “the Catholic jurists were not located at any institutions of great prestige; most taught at law schools such as Georgetown, which were affiliated with the church.”⁴⁵⁸ From this she finds it “difficult to believe that the realists, an exceptionally brilliant group located chiefly at Yale by the 1930s, could not have run intellectual rings around them,” but the Realists “did not seem to want to do so,” reacting instead with “extreme defensiveness.”⁴⁵⁹

In one fell swoop, Kalman casts doubt on the intelligence of the “Catholic jurists” based on the alleged inferiority of their home institutions and her assertion that the Realists could have “run

451. *Id.* at 169.

452. *Id.* at 171.

453. *See supra* Parts III.B.1–2.

454. Duxbury, *supra* note 45, at 172–73. He further accuses Kennedy of being “determined to find nothing familiar or constructive in the literature of legal realism” and of “disparag[ing] the reliance by realists on the methods of the social sciences.” *Id.* at 171. Again, this reading of Kennedy is at odds with the analysis of Kennedy’s work provided above.

455. *Id.* at 169–70.

456. KALMAN, *supra* note 30, at 121.

457. *Id.*

458. *Id.* at 267 n.101.

459. *Id.* at 267–68 n.101.

intellectual rings” around them.⁴⁶⁰ She then questions the academic integrity of the law schools where these “Catholic jurists” taught insofar as they “were affiliated with the church.”⁴⁶¹

Similarly, James Herget contends that the failure of the Catholic revival of Neo-Scholasticism was due to its inherently religious character. Most American law professors and lawyers could not embrace the Neo-Thomistic iteration of natural law because “[t]o accept the medieval doctrine of natural law *one had to accept* the other trappings.”⁴⁶² For Herget these “other trappings” include what, he says, natural law theory was historically invoked to justify.⁴⁶³ That is, according to Herget, “[a]part from the merits of the philosophy, it was difficult [for American legal academics] to accept a doctrine purporting to lead to democracy and justice that had historically justified a feudal system, slavery (in Aristotle’s time), and an ultra-authoritative, antidemocratic church structure.”⁴⁶⁴ The result of this was that “by the late 1950s it was clear that the Thomists were talking to themselves.”⁴⁶⁵

Putting again to one side the historical accuracy of Herget’s claim, it seems clear that something other than the use of natural law to justify social practices and institutions not in keeping with contemporary American sensibilities was at work in the rejection of Neo-Thomism during the period in question. After all, Herget is not suggesting that the Catholic legal scholars who challenged Legal Realism made use of Neo-Thomism to justify feudalism, re-establish slavery, or replace existing governmental structures with ultra-authoritative, anti-democratic structures. Rather, it was, he says, the historical affiliation of the “medieval doctrine of natural law” with slavery, feudalism, and authoritarian, hierarchical church structures that somehow tainted Neo-Thomism and so discouraged non-Catholic legal academics from embracing the natural law perspective.⁴⁶⁶

One odd facet of this alleged account of the failure of the Catholic response to Realism is that institutions that are undemocratic and authoritarian are commonplace in American society—everything from

460. *Id.*

461. *Id.* at 267 n.101.

462. HERGET, *supra* note 39, at 238 (emphasis added).

463. *Id.* at 238–39.

464. *Id.*

465. *Id.* at 238.

466. *Id.* at 238–39.

the Episcopal Church, to the Yale Club, to the Rockefeller Foundation. Yet, when these qualities are associated with the Catholic Church they are thought to be so obnoxious as to disqualify a whole body of thought from consideration. In a similar vein, it is well known that the political philosopher John Locke was a major investor in the English slave trade, and that he even helped to draft the *Fundamental Constitutions of Carolina*, which sought to preserve a feudal system and gave slave owners absolute power over their slaves.⁴⁶⁷ Yet this affiliation has not precluded the serious study and consideration of Locke's thought by American academics, and even the identification of the American republic as fundamentally Lockean in origin.⁴⁶⁸ By contrast, the fact that the natural law theory championed by Catholic legal scholars had "historically justified a feudal system . . . [and] slavery (in Aristotle's time)" supposedly made the Catholic response to Realism difficult for non-Catholics "to digest."⁴⁶⁹

That similar historical affiliations—"trappings"—might be disqualifying in the one instance and overlooked in the other suggests that some other reason was operative in the minds of those who rejected Neo-Thomism as an alternative to Realism. It seems that only those "trappings" that carry the scent of incense burned at the altars of Romish churches are deserving of suspicion.

For Herget, the "trappings" of natural law also included other aspects of Neo-Scholasticism. He claims that "Thomistic natural law was unconvincing unless a scholar was willing to see the world through its accompanying and reinforcing metaphysics, epistemology and perhaps *theology*."⁴⁷⁰ At the same time, Herget elsewhere indicates that adherence to natural law theory need not entail a specific religious commitment, to Catholicism or otherwise.⁴⁷¹ For example, in introducing the notion of natural law, Herget observes that "[i]n Protestant countries the general idea of natural law was turned into a *secular* notion of natural rights"⁴⁷² and "that popular ideas of natural rights in *secular garb*" played "an important part in the governmental

467. See James Farr, *Locke, Natural Law, and New World Slavery*, 36 POL. THEORY 495, 499 (2008).

468. See, e.g., LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA: AN INTERPRETATION OF AMERICAN POLITICAL THOUGHT SINCE THE REVOLUTION* (1955).

469. HERGET, *supra* note 39, at 238–39.

470. *Id.* at 238 (emphasis added).

471. See *id.* at 228.

472. *Id.* (emphasis added).

and legal theory of the [American] founding fathers.”⁴⁷³ This is not to dispute the undoubtedly correct historical claim that the intellectual pedigree of natural rights in the American political order was not Thomistic. It is to say that natural law need not be understood in religious terms, a fact that Herget acknowledges outside the Catholic legal scholar context.⁴⁷⁴

Edward Purcell provides the most complete study of the Catholic challenge to Realism based on natural law, and its ultimate failure. His conclusion, however, is the same as that of other authors addressing the topic. That is, Purcell makes plain the fact that “relatively few non-Catholics expressed interest” in the Neo-Thomistic proposal,⁴⁷⁵ and ultimately the “arguments [of Catholic scholars] . . . were simply not convincing to most American intellectuals.”⁴⁷⁶

Purcell correctly explains one facet of the subjective motivation behind the Catholic response. Catholics, unlike other American intellectuals, were especially motivated to oppose the newer jurisprudence precisely because “[t]he intellectual attitudes they associated with Legal Realism denied their deepest articles of religious faith and emotional conviction.”⁴⁷⁷ Realism and scientific naturalism denied the existence of an objective moral truth. Yet, because of the Catholic belief in the ultimate unity of faith and reason—or, as Purcell says, “the close union between their religious faith and their philosophical training”⁴⁷⁸—Catholics perceived the newer jurisprudence as an assault on their identity *as such*. Thus, they wrote not simply in defense of justice, the rule of law, and “their conception of democracy, but of their faith and their church.”⁴⁷⁹ Regrettably, if understandably, this emotional investment in the intellectual project led some Catholic scholars to respond in a “vitriolic tone” and with “extreme accusations,” a “defensive attitude that at times reached extreme proportions.”⁴⁸⁰

Purcell is less successful in explaining the tepid response of non-Catholics to the Neo-Thomistic critique of Realism and defense of

473. *Id.* at 229 (emphasis added); *see also id.* at 11 (noting that some but not all versions of natural law “include a theological basis that is not universally accepted”).

474. *Id.* at 228–29.

475. PURCELL, *supra* note 1, at 165.

476. *Id.* at 169.

477. *Id.*

478. *Id.*

479. *Id.* at 170.

480. *Id.*

democracy. He opines that “the resolution that the Catholics provided for the crisis of democratic theory was highly questionable.”⁴⁸¹ The dubious nature of the solution proffered was, he says, due to the “almost inextricable intertwining of their rational philosophy with their particular theology,” which “raised doubts as to where the one began and the other left off.”⁴⁸² This confounding of religious faith and public philosophy was, says Purcell, underscored by the fact that “[i]t was certainly [their] religious faith, as any of . . . [the Catholic legal scholars] would have admitted, that made them so purposeful in their adherence to Thomism and their rejection of realism.”⁴⁸³ What is odd about this claim is that Purcell then cites to a series of articles by Mortimer Adler and a Dominican, Walter Farrell, O.P.⁴⁸⁴ Although certainly a Thomist, at the time, Mortimer Adler was also a secular Jew, not a Catholic.⁴⁸⁵ Thus, at least in his mind and (it is reasonable to think) in the minds of others, the distinction between philosophical assent and religious adherence was clear.

Similarly, Purcell notes that “[t]he Catholic faith in its fundamentals was indissolubly linked with a hierarchical institution that claimed [the] ability to interpret an absolutely true moral law, based on the truths of revelation and reason.”⁴⁸⁶ Herget makes a similar point in identifying the difficulty of “accept[ing] a doctrine purporting to lead to democracy and justice that had historically justified . . . an ultra-authoritative, antidemocratic church structure.”⁴⁸⁷ That Catholic critics of Realism had “a ready justification for democracy,”⁴⁸⁸ despite their undemocratic ecclesiology, strongly suggests that religion and Neo-Scholastic philosophy were distinct and could be separately considered. This in turn suggests that something other than the tendency to confound religion and philosophy was at work in the failure of the Catholic critique of Realism to win a sizeable number of non-Catholic adherents.

481. *Id.* at 169.

482. *Id.*

483. *Id.*

484. *Id.* at 169, 300 n.45.

485. See MORTIMER J. ADLER, A SECOND LOOK IN THE REARVIEW MIRROR: FURTHER AUTOBIOGRAPHICAL REFLECTIONS OF A *PHILOSOPHER AT LARGE* 263–64 (1992).

486. PURCELL, *supra* note 1, at 169–70.

487. HERGET, *supra* note 39, at 238–39.

488. PURCELL, *supra* note 1, at 169.

Purcell concludes that “Thomistic rationalism, at least in the minds of most intellectuals, simply could not stand against the combined forces of pragmatism, scientific naturalism, and modern . . . philosophy.”⁴⁸⁹ This may well account for why the Catholic response to Realism was ultimately unsuccessful, but it does not explain why historians have ignored, or dismissed, the Catholic response in the manner in which they have.

A number of themes emerge from a careful reading of these texts. We believe that three themes are especially significant in helping to explain the relative lack of attention given Catholic legal scholars in the standard historical account: (1) skepticism concerning natural law; (2) the confounding of natural law and religion; and (3) secularism and anti-Catholicism in American society and academic culture. While the goal of every historian is to strive for a certain measure of objectivity and detachment, inevitably, every writer is in some way influenced by the biases and commitments that he or she brings to the source material. Here, we believe that the treatment of the Catholic response to Realism suggests that these biases and commitments were at work in setting forth the standard history. Together, they account for the blindness of the historians to Catholic legal scholars’ contributions to the jurisprudential debate.

1. Skepticism of Natural Law

The first theme that emerges from a review of these histories is a deep skepticism with respect to natural law theory. Indeed, the understated, though extremely potent, premise underlying these accounts is that natural law theory is patently unconvincing.⁴⁹⁰ Thus, the failure of the Neo-Scholastic critique of Realism was inevitable because non-Catholic American legal academics were too sophisticated to be seduced by the myth of an objective morality that could serve as the basis of law.⁴⁹¹ The vast majority of American law professors were instead convinced by “the combined forces of pragmatism, scientific naturalism, and modern critical philosophy.”⁴⁹² While Catholic critics “expressed great certainty in the power of reason” in exhibiting their

489. *Id.* at 170.

490. See, e.g., HERGET, *supra* note 39; KALMAN, *supra* note 30; PURCELL, *supra* note 1.

491. Duxbury, *supra* note 45, at 173.

492. PURCELL, *supra* note 1, at 170.

“fervent convictions,”⁴⁹³ the Realists were too bright to be taken in by their “crude attempts at proselytisation.”⁴⁹⁴ Although Realists could have “run intellectual rings around” their would-be peers at lesser schools, they chose not to.⁴⁹⁵ What is obviously wrong does not need to be refuted.

The natural law critique put forward by Catholic critics enjoyed the limited success that it did only because of dramatic circumstances in the world. Their critique did not appeal to the minds of law professors. It played off the fears of the public and constituted, in today’s terminology, an extended *reductio ad Hitlerum* argument.⁴⁹⁶ Natural law succeeded in regaining a small place as “part of the mainstream of American jurisprudence” only “as a reaction against relativism and scientism and as a response to an ideological world war.”⁴⁹⁷

Here, contemporary legal historians reflect the academic culture they inhabit, which has little regard for natural law theory. Although the popularity of natural law has ebbed and flowed somewhat in legal academic circles, throughout the twentieth century, the dominant undercurrent has been one of suspicion and disdain.

For example, in their *Philosophy of Law: An Introduction to Jurisprudence*, Jeffrie Murphy and Jules Coleman contend that classical natural law is teleological in nature, yet “teleological worldview[s]” are seen “as quaintly pre-scientific.”⁴⁹⁸ We live “in [a] post-Darwinian world” and see reality “in terms of mechanistic causation.”⁴⁹⁹ For Murphy and Coleman, “[t]he modern mind finds it difficult to accept that people have ends of purposes other than those they have set or accepted for themselves.”⁵⁰⁰ Indeed, they find the notion that human beings have a purpose, and that this purpose forms the basis of morality, to be “degrading.”⁵⁰¹ Natural law theories are, they say, guilty of the “naturalistic fallacy” according to which one believes “that one can derive a theory of what *ought* to be the case from an account of what *is*

493. *Id.*

494. Duxbury, *supra* note 45, at 170.

495. KALMAN, *supra* note 30, at 267–68 n.101.

496. Though unlike today’s version, not by way of analogy.

497. HERGET, *supra* note 39, at 230.

498. MURPHY & COLEMAN, *supra* note 88, at 15.

499. *Id.*

500. *Id.*

501. *Id.* at 16 (emphasis omitted).

the case.”⁵⁰² Thus, Murphy and Coleman reject natural law as being based on “the dogmatic acceptance of an implausible worldview” having nothing “to commend it to the rational person.”⁵⁰³

Similarly, in his *American Legal Thought from Premodernism to Postmodernism*, Stephen Feldman argues that ethical relativism has made the natural law position no longer tenable.⁵⁰⁴ For Feldman, the conclusion of the Realist critique “meant that values no longer could be derived from abstract reasoning, and of course, the earlier rejection of premodernism meant that Realists could not locate values in some preexisting natural order.”⁵⁰⁵ We demand “that judicial decision making—including constitutional adjudication—be based on some objective foundation,” yet—“despite sundry attempts at rationalism, empiricism, and transcendentalism—legal theorists were unable to discover any such ground for the rule of law.”⁵⁰⁶ He concludes that “[e]thical relativism undermined any vision of judicial review grounded on a supposedly objective source, whether the written text, natural law, or anything else.”⁵⁰⁷

Surely, other texts could be cited that view natural law theory in a more sympathetic light,⁵⁰⁸ but Murphy and Coleman’s and Feldman’s treatments of the subject are broadly representative of how the contemporary legal academy sees natural law theory. Law professors are largely dismissive of natural lawyers who contend that ethical norms are natural and capable of being known through the exercise of reason, even as some skeptics perceive and feel the pull of such a perspective.⁵⁰⁹

Not surprisingly, this dismissive view of natural law is found in the works of the Realists themselves. Like Justice Oliver Wendell Holmes, Jr., many legal academics today find the idea slightly absurd that, in order to be “law” in the proper sense, a statute, administrative order, or judicial holding must be consistent with a non-positd source. For

502. *Id.* (quoting G.E. MOORE, *PRINCIPIA ETHICA* 38 (1903)) (internal quotation mark omitted).

503. *Id.* at 17.

504. FELDMAN, *supra* note 39, at 149–50.

505. *Id.* at 115.

506. *Id.* at 148.

507. *Id.* at 150.

508. *See, e.g.*, JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); *NATURAL LAW THEORY*, *supra* note 91.

509. *See, e.g.*, Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 *DUKE L.J.* 1229.

Holmes, “[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified.”⁵¹⁰ Rather, Holmes held that “[t]he jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere.”⁵¹¹

Other Realists were similarly skeptical of natural law. According to Jerome Frank (in the first edition of *Law and the Modern Mind*), belief in natural law was not the intellectual defense of an idea.⁵¹² It was instead the desire for certitude—similar to a child’s desire for his or her father’s protection.⁵¹³ According to Underhill Moore, “[h]uman experience discloses no ultimates.”⁵¹⁴ Rather, ultimate standards of right and wrong “are phantoms drifting upon the stream of day dreams.”⁵¹⁵

For American legal historians, the debate between Realists, who fit squarely within the legal academy’s rejection of natural law, and Catholic legal scholars, who swam against the cultural tide, was not a debate at all. Instead, we believe, based on statements by historians like Duxbury, Purcell, and Herget—along with other factors, such as the jurisprudential foreignness of Thomistic natural law and the exotic religious perspective of Catholic legal scholars—that a key reason the historians failed to appreciate Catholic legal scholars’ contributions was the historians’ own differing jurisprudential outlooks. This comes through in the way the historians too-easily labeled the Catholic legal scholars as Catholic, Scholastic, and medieval. Furthermore, the too-quick dismissal of natural law as a legitimate jurisprudential perspective shows the work being done by the historians’ differing intellectual commitments.

2. The Confounding of Natural Law and Religion

A second theme present in the standard historical account is that natural law is unavoidably religious. Contemporary historians have not

510. *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

511. Oliver Wendell Holmes, *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

512. See FRANK, *supra* note 3, at 40–41.

513. *Id.* at 41.

514. Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609, 621 (1923).

515. *Id.*

portrayed natural law theory as philosophy in the strict sense because of its close affiliation with Christianity in general and Catholicism in particular. Thus, according to Herget, acceptance of the Thomistic version of natural law offered by Catholic legal scholars required a virtual baptism—an immersion in the cultural and intellectual life of Catholics.⁵¹⁶ That is, to embrace natural law one needed to be willing “to see the world through its accompanying and reinforcing metaphysics, epistemology, and perhaps theology.”⁵¹⁷ In the same vein, Purcell remarks that Catholic critics of Realism were not able to convince most American intellectuals because of the “inextricable intertwining of their rational philosophy with their particular theology.”⁵¹⁸ As these authors portray it, assent to the metaphysical propositions that underlay the Thomistic understanding of natural law required a kind of religious commitment. Whether this acceptance was described in terms of a willingness to be associated with the “trappings” of Catholicism,⁵¹⁹ or an openness to conversion through “proselytisation,”⁵²⁰ the assent sought was not simply the intellectual assent of reason to a proposed philosophical truth but the conversion of a believer—the assent of faith.

The effort to characterize the natural law response of Catholic legal scholars as religious begins by identifying those involved in the critique of Realism as Catholics, rather than as legal scholars who happened to make use of the natural law tradition. Thus, Kalman refers to a number of individuals who “attacked legal realism” by name—Roscoe Pound, Lon Fuller, Rufus Harris, Philip Mechem, and Morris Cohen—and then to “a number of Catholic jurists who believed in natural law.”⁵²¹ Elsewhere she identifies the “Catholic jurists” who criticized the Realists as individuals who taught at less prestigious law schools “affiliated with the church.”⁵²² Similarly, Duxbury says that criticism of Realism was “a particular initiative of Jesuit law professors and theologians.”⁵²³ Although Jesuits such as Francis Lucey, John Ford, and Paul Gregg were critics of Justice Holmes and the jurisprudence he

516. See HERGET, *supra* note 39, at 238.

517. *Id.*

518. PURCELL, *supra* note 1, at 169.

519. HERGET, *supra* note 39, at 238.

520. Duxbury, *supra* note 45, at 170.

521. KALMAN, *supra* note 30, at 121.

522. *Id.* at 267 n.101.

523. Duxbury, *supra* note 45, at 165.

inspired, relative to other scholars, they were both rather late to the Catholic game of criticism and outnumbered by their lay colleagues. The critique of Realism by Catholic law professors began in the 1920s–1930s by figures such as Walter Kennedy, Brendan Brown, and Miriam Theresa Rooney, whereas the Jesuits Duxbury cites wrote in the 1940s–1950s. Thus, here it seems likely that Duxbury employs the word “Jesuit” not merely as a descriptive but as a pejorative term meant to conjure up dark memories of the Counter-Reformation and Europe’s Catholic past—memories of which modern-day intellectuals are glad to be free. Rather than locate the source of the critique in a number of priests belonging to the Society of Jesus, Duxbury has simply underscored the character of the critique that he identifies as Catholic and so has worked to bolster his rhetorical claim that “the natural lawyers’ efforts to discredit Legal Realism amounted to little more than crude attempts at proselytization.”⁵²⁴

Here it is important to note that, in the context of contemporary academic discourse, the meaning of the word “religion” is virtually synonymous with “superstition.” Plainly, not every American academic is a thorough-going secularist,⁵²⁵ but broadly speaking, in academic culture, religion enjoys the same intellectual stature as astrology, alchemy, and tarot card reading. Indeed, many in the academy of today use the word “religious” as a kind of shorthand to describe beliefs that are personal and subjective (often, though not necessarily, idiosyncratic), and irrational. They are irrational because religious beliefs “do not answer ultimately . . . to *evidence* and *reasons*.”⁵²⁶ They are instead, says Professor Brian Leiter, “insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science.”⁵²⁷ Thus, he says that religious belief

524. *Id.* at 169–70.

525. Neil Gross & Solon Simmons, *The Religiosity of American College and University Professors*, 70 SOC. RELIG. 101, 114 (2009) (finding that 22.9% of college and university professors across a variety of disciplines and types of institutions do not believe in God or do not know whether there is a God, and 51.5% may have doubts but believe in God or know that God exists and have no doubts about it); see James Lindgren, *Measuring Diversity: Law Faculties in 1997 and 2013*, at 21 (Mar. 20, 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2581675, archived at <http://perma.cc/M7KH-3JBN> (describing the paucity of Christians and Catholics in the legal academy, compared to the U.S. full-time working population).

526. BRIAN LEITER, WHY TOLERATE RELIGION? 33–34 (2013).

527. *Id.* at 34; see also Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399, 1424 (2003) (“The Enlightenment rendered religion immutable and without need for justification

is “a *culpable* form of unwarranted belief given those ordinary epistemic standards.”⁵²⁸

Accompanying this view of religion is the view that it is a “regressive antisocial force that must be strictly confined to private life in order to avoid social division, violence, and anarchy.”⁵²⁹ This view enjoys support both as a matter of political morality and constitutional law as reflected in the anti-establishment principle of the First Amendment.⁵³⁰ Because the religious character of an idea is thought to disqualify it from consideration as a basis for law, the coupling of natural law with religion is a convenient way in which to dismiss a lengthy tradition of thought and inquiry with little effort.

John Dewey candidly admitted that because “most philosophers had been ‘brought up in the Protestant tradition,’ they ‘identified Scholasticism with the theological dogmas they do not accept.’”⁵³¹ A certain disdain and intellectual condescension for religion is evident in the language employed by many of the Realists. Indeed, it was a frequent trope employed by the Realists to describe a point of view with which they disagreed as “religious” or “theological”—because it was wrong as a normative matter, or because it made use of formal categories that were dispositive of the question at hand, or relied upon deductive logic.

or legitimacy—religion cannot be defended against irrationality because irrationality is thought to be its essence.”)

528. LEITER, *supra* note 526, at 81. For critiques of Leiter’s thesis, see Michael W. McConnell, *Why Protect Religious Freedom?*, 123 YALE L.J. 770 (2013) (book review); Michael Stokes Paulsen, *Is Religious Freedom Irrational?*, 112 MICH. L. REV. 1043 (2014) (book review).

529. FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* 12 (1995) (describing what the author terms the “secular individualist” view); *see also* Michael W. McConnell, *Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115, 120 (1992) (describing some Supreme Court opinions as viewing religion “as an unreasoned, aggressive, exclusionary, and divisive force that must be confined to the private sphere”). *But see* Richard W. Garnett, *Religion, Division, and the First Amendment*, 94 GEO. L.J. 1667 (2006) (arguing that religion as a source of “divisiveness” is more a rhetorical theme and less an operative rule in religion clause jurisprudence).

530. *See, e.g.*, Steven G. Gey, *Is Moral Relativism a Constitutional Command?*, 70 IND. L.J. 331 (1995).

531. JOHN T. MCGREEVY, *CATHOLICISM AND AMERICAN FREEDOM: A HISTORY* 141 (2003) (quoting John Dewey, *in* PRESENT-DAY THINKERS AND THE NEW SCHOLASTICISM: AN INTERNATIONAL SYMPOSIUM 29, 29–30 (John S. Zybura ed., 1926)).

For example, Felix Cohen makes use of religious references throughout *Transcendental Nonsense and the Functional Approach* as a way of satirizing and repudiating the formalistic, categorical approach to law that was the focus of his critique.⁵³² These references begin with the dream “heaven” of pure juridical concepts, a dream “retold, in recent years, in the ‘chapels’” of various schools of jurisprudence.⁵³³ The focus of his criticism is that “in every field of law we should find the same habit of ignoring practical questions of value or of positive fact and taking refuge in ‘legal problems’ which can always be answered by manipulating legal concepts in certain approved ways.”⁵³⁴ Framed in this way, legal questions are meaningless⁵³⁵ and “identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, ‘How many angels can stand on the point of a needle?’”⁵³⁶ At the heart of this approach to law are “legal concepts” which Cohen describes as “supernatural entities which do not have a verifiable existence except to the eyes of faith.”⁵³⁷ His proposed solution—the functional approach to legal concepts—is, he says, “an assault upon all dogmas and devices that cannot be translated into terms of actual experience.”⁵³⁸ Proceeding in this fashion, Cohen seeks to refute “the traditional supernatural approach to practical legal problems,”⁵³⁹ “the dogmas of legal theology.”⁵⁴⁰

Similarly, Thurman Arnold made frequent use of terms such as “religion,” “creed,” “faith,” and “theology”⁵⁴¹ to criticize an opponent’s work—to describe what he regarded as a non-rational system of

532. Cohen, *supra* note 380.

533. *Id.* at 809.

534. *Id.* at 820.

535. *Id.*

536. *Id.* at 810.

537. *Id.* at 821.

538. *Id.* at 822.

539. *Id.* at 813.

540. *Id.* at 833.

541. See, e.g., Thurman Arnold, *Professor Hart’s Theology*, 73 HARV. L. REV. 1298, 1312 (1960) (responding to Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959)). By referring to Henry Hart’s thesis as “Hart’s theology,” Arnold means to say that Hart’s view is “really a whole series of similar pompous generalizations dropped on the Court from the heights of Olympus.” *Id.* at 1299. Arnold is doubtful that these generalizations will lead to the right result when combined with the method that Hart recommends, namely, “the maturing of collective thought.” *Id.* at 1300–01 (quoting Hart, *supra*, at 100) (internal quotation marks omitted).

organization and legitimization. For example, in *The Folklore of Capitalism*, Arnold employs the word “creed” to refer to “attitudes which influence conduct and not . . . principles which actually control institutions.”⁵⁴² A “creed” is found in the “moral and economic prejudices” of a group, “their desire for the approval of other members”⁵⁴³ through which they “become bound by loyalties and enthusiasms to existing organizations.”⁵⁴⁴ Arnold repeatedly uses phrases like “theological opposition,”⁵⁴⁵ “heresy,”⁵⁴⁶ “spiritual conflict,”⁵⁴⁷ “automatic religious opposition,”⁵⁴⁸ and “priestly opposition”⁵⁴⁹ to refer to those instances in which one’s prejudices and enthusiasm are challenged. According to Arnold, “church creeds are not searches for universal truth”; rather, a “creed is important only as a symbol of unity.”⁵⁵⁰ For Arnold “[t]he logical content of creeds never realistically describes the institutions to which the creeds are attached.”⁵⁵¹ Instead one must go beyond the symbols and “mythology” of an institution and examine “[t]he actual habits and attitudes which operate under the banner of the creed” and which “make the institution effective” to really understand it.⁵⁵² In the same vein, Arnold would critically, albeit playfully, greet Robert Hutchins “Hello, Cardinal”⁵⁵³ because the latter subscribed to natural law theory⁵⁵⁴ and not Arnold’s view that “[l]aw’ is primarily a great reservoir of emotionally important social symbols.”⁵⁵⁵

One might plausibly argue that the Neo-Scholastic revival in law was “religious” at least in the attenuated sense that the Declaration of Independence is “religious.” That is, the Declaration makes reference to “the Laws of Nature and of Nature’s God,” “the Supreme judge of

542. THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 9 (1937).

543. *Id.* at 3.

544. *Id.* at 10.

545. *Id.* at 3.

546. *Id.* at 5.

547. *Id.* at 4.

548. *Id.* at 10.

549. *Id.* at 12.

550. *Id.* at 32.

551. *Id.* at 33.

552. *Id.* at 32–33.

553. PURCELL, *supra* note 1, at 159 (internal quotation marks omitted).

554. See, e.g., Robert M. Hutchins, *Natural Law and Jurisprudence*, in *NATURAL LAW AND MODERN SOCIETY* 29 (1961).

555. ARNOLD, *supra* note 283, at 34.

the world,” “the protection of Divine Providence,” and the claim that “all men . . . are endowed by their Creator with certain unalienable Rights.”⁵⁵⁶ In a similar fashion, a number of the Catholic legal scholars who made use of Neo-Thomism in criticizing Realism made reference to God in their writings. For example, in describing natural law, Francis Lucey referred to the fact that man has “certain fundamental duties and rights given him by God which no man has a right to destroy.”⁵⁵⁷ Similarly, Brendan Brown said that the natural law proceeds “ultimately from God but immediately from human reason in which it was mirrored.”⁵⁵⁸

But these references hardly amount to “proselytisation.”⁵⁵⁹ The Catholic scholars who criticized Realism did not base their natural law claims on any specifically Christian or Catholic doctrine such as the Resurrection, the Virgin Birth, transubstantiation, or the Immaculate Conception. It is worth noting, moreover, that such a capacious understanding of “religion” would not only consign the Declaration of Independence to the ranks of the religious, it would also relegate much of Western philosophy to the same status. Many philosophers—not only Aquinas, but Plato, Aristotle, Descartes, Leibniz, Spinoza, Pascal, among others—refer to God or conclude that God exists, not by invoking the privileged authority of some sacred text or revelation, but based on the exercise of human reason.⁵⁶⁰

Nevertheless, the purportedly religious character of the natural law critique of Realism offered by Catholic legal scholars may account for why these scholars have been so readily dismissed in the standard narrative of American legal history. That is, like the Realists themselves, the authors of this history may view religion with suspicion and so see the natural law critique of Realism as an attempt to ground American law and jurisprudence in what are essentially religious premises. From the references to “God” that appear from time to time in the works of Brown, Lucey, Rooney, and others, they may interpret the Catholic response to Realism as a fundamentally religious venture

556. THE DECLARATION OF INDEPENDENCE para. 1–2, 32 (U.S. 1776).

557. Lucey, *supra* note 210, at 524.

558. Brown, *supra* note 22, at 9.

559. Duxbury, *supra* note 45, at 170.

560. The point here is not to summarily conclude that these arguments for the existence of God are correct and the argument on the other side are wrong. Instead, the point is that these arguments are properly understood as being philosophical in nature and not religious.

advanced under the guise of public reason—a theological wolf dressed in philosophical sheep’s clothing. Such an interpretation fits with how some contemporaries of the Catholic legal scholars in the 1950s understood their critique.⁵⁶¹

3. Secularism and Anti-Catholicism in American Society and Academic Culture

The account given above is certainly plausible—that the natural law critique of Realism offered by Catholic legal scholars was essentially religious in nature, and that this religious character disqualified it from serious consideration by most non-Catholic law professors at the time. Furthermore, legal historians today have similarly dismissed the work of Realism’s Catholic critics based on the reactions of these critics’ contemporaries and the historians own reading of the works of Kennedy, Rooney, Brown, Lucey, and others.

Although this account is in some way plausible, still, questions remain: Why would the non-Catholic law professors of the 1930s–1950s be inclined to find “religion” in the natural law critique of Realism offered by Catholic legal scholars based on such slender evidence? And why would those who write American legal history today be inclined to aver in this judgment absent more substantial proof?

The answer to these questions can be found in the third theme that emerges from a reading of the texts quoted above. If, as Purcell says, it was difficult for readers of the Catholic critique of Realism to tell where philosophy ended and faith began;⁵⁶² if, as Duxbury claims, “the natural lawyers’ efforts to discredit legal realism” were “little more than crude attempts at proselytization;”⁵⁶³ if, as Howe claims, responding to the Catholic critics like Lucey would have quickly embroiled him “in a theological controversy beyond [his] competence to discuss,”⁵⁶⁴ then one ought to speak candidly about the religion in question—the religion to which conversion was thought required in order to find the natural law critique convincing. This faith commitment was not some generic spiritual sentiment but a very specific religious tradition—Catholicism—a faith that has had a complex and at times troubled

561. See, e.g., Howe, *supra* note 390, at 530–31.

562. PURCELL, *supra* note 1, at 169.

563. Duxbury, *supra* note 45, at 169–70.

564. Howe, *supra* note 390, at 530.

relationship with the wider American society in which it has dwelled and to which it has sought to contribute.⁵⁶⁵

Although seldom discussed in popular histories today, anti-Catholicism is deeply rooted in the history of the nation. Arthur Schlesinger, Sr., famously described anti-Catholicism as “the deepest bias in the history of the American people.”⁵⁶⁶ The roots of this bias can be found in doctrinal disputes that gave rise to the Reformation in Europe and in the self-conscious founding of America as a Protestant nation.⁵⁶⁷ Having said this, historically, anti-Catholicism in the United States has not been so much opposition to religious ideas—a formal theological dispute—as it has been opposition to ethnic groups and classes associated with those ideas against whom native-born Protestants inherited a historical resentment—a resentment that was fueled by the fear of loss of political, cultural, and economic power brought on by successive waves of Catholic immigration. During the antebellum period, this fear erupted into violence—riots in Catholic neighborhoods, the burning of churches and homes, and the vigilante murder of individuals—in Boston in 1837, Philadelphia in 1844, Cincinnati and Louisville in 1855, and San Francisco in 1856, being among the most famous examples.⁵⁶⁸ This fear also manifested itself politically in an explicit fashion in the American Party or “Know Nothings” in the 1840s–1850s, the American Protective Association in the 1890s, and a resurgent Ku Klux Klan in the 1920s.⁵⁶⁹

Anti-Catholic bias also manifested itself in law.⁵⁷⁰ Prior to the founding of the republic, several of the American colonies enacted

565. See generally MCGREEVY, *supra* note 531.

566. PHILIP JENKINS, *THE NEW ANTI-CATHOLICISM: THE LAST ACCEPTABLE PREJUDICE* 23 (2003) (quoting JOHN TRACY ELLIS, *AMERICAN CATHOLICISM* 149 (1956)) (internal quotation marks omitted).

567. See MCDONALD, *supra* note 88, at 42 (“Some of the state constitutions adopted during the Revolution relaxed religious restraints, but so habituated were Americans to thinking in Protestant terms that few could conceive of a civil order in any other way.”); *supra* note 97.

568. See JAY P. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE: A HISTORY FROM COLONIAL TIMES TO THE PRESENT* 201–03 (1985); CHARLES R. MORRIS, *AMERICAN CATHOLIC: THE SAINTS AND SINNERS WHO BUILT AMERICA’S MOST POWERFUL CHURCH* 60–63 (1997).

569. MCGREEVY, *supra* note 531, at 45, 124, 145.

570. PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002); *Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion) (“[H]ostility to aid to pervasively sectarian schools has a shameful pedigree that we [should] not hesitate to disavow [It is a] doctrine, born of bigotry, [that] should be buried now.”).

statutes that barred Catholics from participation in the political process and even prohibited the practice of the Catholic religion entirely.⁵⁷¹ In the first half of the nineteenth century, state legislatures sought to Americanize the Catholic Church and other hierarchical denominations by empowering the trustees of congregations over their clergy and bishops.⁵⁷² Nativist concerns and an overt anti-Catholic animus also led to efforts to incorporate a doctrine of strict separationism into law.⁵⁷³ The apex of these efforts was the attempt in 1875 to amend the federal Constitution with the proposed Blaine Amendment,⁵⁷⁴ a measure that would have expressly prohibited any government tax revenues or land “for the support of public schools . . . [that] shall ever be under the control of any religious sect.”⁵⁷⁵ The “religious sect” that the Speaker of the House, James Blaine, and his supporters had in mind was the Catholic Church and its system of diocesan-supported parochial schools that served as an alternative to the publicly financed “common schools” that taught their students a kind of non-denominational Protestantism.⁵⁷⁶ Although the Blaine Amendment narrowly failed to gain support in the Senate, thirty-seven states eventually adopted one or another version of it as part of their respective state constitutions.⁵⁷⁷

The Second World War brought about greater acceptance of Catholics, who served in large numbers, side-by-side with other Americans, in every branch of the military, and in every theater of

571. DOLAN, *supra* note 568, at 84–85.

572. Sarah Barringer Gordon, *The First Disestablishment: Limits on Church Power and Property Before the Civil War*, 162 U. PA. L. REV. 307, 311–12 (2014).

573. Marc D. Stern, *Blaine Amendments, Anti-Catholicism, and Catholic Dogma*, 2 FIRST AMEND. L. REV. 153, 167 (2004) (“It would be fruitless to deny that the Blaine Amendments taken as group were aimed at rebuffing Catholic efforts to obtain funding for their schools. Finally, it cannot be denied that some of the rhetoric used in urging adoption of the Blaine Amendments in the nineteenth century was tainted by raw anti-Catholicism.”).

574. HAMBURGER, *supra* note 570, at 321–28.

575. 4 CONG. REC. 205 (1875).

576. *See Mitchell v. Helms*, 530 U.S. 793, 828–29 (2000) (plurality opinion).

577. A few of these state measures preceded the failed effort to amend the federal Constitution, causing some to resist seeing these measures as being an outgrowth of the Blaine Amendment. *See Stern, supra* note 573, at 168. Nevertheless, the practice of calling these state restrictions “Baby Blaines” is commonplace. For a useful resource that lists those states that adopted versions of the Blaine Amendment as part of their respective constitutions, the language of these measures, and cases applying them, see *Blaine Amendments*, BECKETT FUND FOR RELIGIOUS LIBERTY, <http://www.becketfund.org/the-blaine-amendments/#tab5> (last visited Apr. 1, 2015), *archived at* <http://perma.cc/5XLE-MFJP>.

war.⁵⁷⁸ After the war, many Catholic families moved out of the “Catholic ghetto” — the urban, ethnic, parish-centered Catholic enclaves that their immigrant ancestors had constructed — and relocated to the then-burgeoning suburbs. There they further assimilated into American society, living and working alongside non-Catholics, and sending their children to public schools such that “the Catholic population in the 1960s could no longer be thought of as a foreign population.”⁵⁷⁹ The symbolic highpoint of this process of assimilation and acceptance was the 1960 election in which John Fitzgerald Kennedy — a Catholic and the great-grandson of Irish immigrants — was elected President of the United States.⁵⁸⁰ This represented a reversal, of sorts, of the 1928 presidential election in which the Democratic nominee and Catholic governor of New York, Al Smith, was defeated in part because of a vitriolic campaign that focused on his Catholicism.⁵⁸¹

*a. Anti-Catholicism at the Time of the Catholic
Response to Legal Realism*

The transition, however, from pre-war suspicion and derision to post-war acceptance and assimilation was not seamless. Indeed, what is remarkable is how, during the period just prior to Kennedy’s election, an especially virulent form of anti-Catholicism manifested itself at the highest levels of American society. In 1949, Paul Blanshard published *American Freedom and Catholic Power*, a book that garnered a

578. See THOMAS BRUSCINO, *A NATION FORGED IN WAR: HOW WORLD WAR II TAUGHT AMERICANS TO GET ALONG* (2010).

579. PHILIP GLEASON, *KEEPING THE FAITH: AMERICAN CATHOLICISM PAST AND PRESENT* 63 (1987).

580. See MARK S. MASSA, *CATHOLICS AND AMERICAN CULTURE: FULTON SHEEN, DOROTHY DAY, AND THE NOTRE DAME FOOTBALL TEAM* 128–47 (1999). Massa argues that it was only because Kennedy went to such great efforts to assure the public and other political actors that his religion was a purely private affair that Kennedy was able to gain the narrow victory that he did. *Id.*

581. DOLAN, *supra* note 568, at 351; MORRIS, *supra* note 568, at 159 (noting the “anti-Catholic hysteria that met Smith’s nomination,” including “rumors that the Pope would move to the White House or that Protestants would lose their citizenship” and “the burning crosses that lined Smith’s campaign travels through the South and Midwest”). Anti-Catholicism is such an ingrained habit in the minds of some people that they condemn even as they perpetuate it. See PAUL BLANSHARD, *COMMUNISM, DEMOCRACY, AND CATHOLIC POWER* 227–28 (1951) (deploring “the prejudice and passions that were aroused during the Al Smith campaign” but affirming the “clear-eyed and unprejudiced apprehension about the possible effect of placing in the White House a man who was even nominally a disciple of a foreign power claiming certain rights over several million American Catholics in respect to important civic responsibilities”).

recommendation of the Book-of-the-Month Club and then “dominated the *New York Times* best-seller list for eleven months.”⁵⁸² In the book, Blanshard eschewed both the age-old bigotry against the “Catholic people” based on ethnicity and class, as well as efforts to “curtail the rights of the Catholic Church as a religious institution.”⁵⁸³ He warned, however, that “the Catholic problem is still with us”⁵⁸⁴ in the form of the Catholic hierarchy, “an organization that is alien in spirit and control.”⁵⁸⁵ He called for a “resistance movement designed to prevent the hierarchy from imposing its social policies upon our schools, hospitals, government, and family organization.”⁵⁸⁶ He urged people to oppose the “antidemocratic social policies of the hierarchy and to fight against every intolerant or separatist or un-American feature of those policies.”⁵⁸⁷ The policies Blanshard had in mind included Catholic parochial education in general and the use of public funds for textbooks, transportation, and tuition in particular;⁵⁸⁸ the practice of vowed religious women as teachers and in convents and monasteries;⁵⁸⁹ the existence of Catholic colleges and universities, “second-rate Catholic institutions of ‘higher learning’”;⁵⁹⁰ Catholic treatment of mixed-marriages and the Church’s refusal to recognize civil divorce and remarriage;⁵⁹¹ Catholic influence and control over the media;⁵⁹² the Church’s suppression of science and its embrace of relics, apparitions,

582. Patrick McKinley Brennan, *Are Catholics Unreliable from a Democratic Point of View? Thoughts on the Occasion of the Sixtieth Anniversary of Paul Blanshard’s American Freedom and Catholic Power*, 56 VILL. L. REV. 199, 199 (2011).

583. PAUL BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* 347 (2d ed. 1958) (emphasis omitted).

584. *Id.* at 13.

585. *Id.* at 3.

586. *Id.* at 346–47.

587. *Id.* at 347.

588. *Id.* at 94–124.

589. *Id.* at 87–94. As an example of Blanshard’s disdain for Catholic women religious, he refers to nuns as “belong[ing] to an age when women allegedly enjoyed subjection and reveled in self-debasement,” and adorning themselves in “unhygienic costumes and their medieval rules of conduct,” *id.* at 88, where “medieval” is a pejorative term, see John T. McGreevy, *Thinking on One’s Own: Catholicism in the American Imagination, 1928–1960*, 84 J. AM. HIST. 97, 102 (1997) (“To liberals, no more vicious epithet existed than the description of an idea as ‘medieval’ . . .”); see also BLANSHARD, *supra* note 583, at 128 (referring to the clerical and religious vesture of priests, brothers, and nuns as their appearing “costumed”).

590. BLANSHARD, *supra* note 583, at 129–34.

591. *Id.* at 185–211.

592. *Id.* at 212–43.

and superstition;⁵⁹³ and the Church's "master plan" to achieve a privileged position in the United States.⁵⁹⁴ Blanshard also pointedly objected to the Church's opposition to eugenic sterilization, its rejection of modern views of sexuality and the use of birth control, and its refusal to endorse what was then termed "therapeutic abortion."⁵⁹⁵

What Blanshard referred to as the "American Catholic problem" could, he said, be traced not only to the formulation of these policies by an "alien-controlled hierarchy"⁵⁹⁶ but to their substance—a substance that Blanshard viewed as "incompatible with Western democracy and American culture."⁵⁹⁷ For Blanshard, the Church's aim was "to impose its own social, political, and cultural program upon the American community in the name of religion, although a large part of the program has no necessary connection with religion."⁵⁹⁸ Of course "religion" for Blanshard was a purely private affair consisting of devotional practices confined to the church hall or the cloister, not the virtues and corporal works of mercy lived in the public square. In this he assumes, but does not defend, a narrow, anemic, liberal-Protestant understanding of "religion" and assumes that others share this view with him. Indeed, Blanshard and other post-war liberals insisted that religion was "an entirely private matter" that "must be separated from the state" and that "religious loyalty must not threaten intellectual autonomy or national unity."⁵⁹⁹

What is most remarkable about Blanshard's book is not the popular success it enjoyed but the critical acclaim it received from American elites and intellectuals. It is perhaps not surprising that the sociologist, naturalist, and educator John Dewey would praise Blanshard's book for its "exemplary scholarship, good judgment, and tact."⁶⁰⁰ After all, Blanshard was Dewey's former student at the University of Michigan.⁶⁰¹

593. *Id.* at 244–73.

594. *Id.* at 302–24.

595. *Id.* at 142, 160–84.

596. *Id.* at 70.

597. *Id.* at 325.

598. *Id.* at 346.

599. MCGREEVY, *supra* note 531, at 168.

600. McGreevy, *supra* note 589, at 97 (quoting Letter from John Dewey to Melvin Arnold (June 7, 1949)) (internal quotation marks omitted).

601. Moreover, although Dewey was not a lawyer, he was a close collaborator and intellectual leader among the Legal Realists in their efforts to refashion law as a "scientific" discipline. See John Dewey, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS, *supra* note 200, at 73; John Dewey, *The Historic Background of Corporate Legal*

But Dewey was not alone in his praise of Blanshard's work. Other notable figures, including Albert Einstein and Bertrand Russell, were favorably impressed, and McGeorge Bundy described Blanshard's book as "a very useful thing."⁶⁰² John Boas, writing in *The Philosophical Review*, said that Blanshard had "performed a great service to philosophers," and John Coatman, writing in *The Philosophical Quarterly*, found Blanshard's treatment of the subject "objective, scholarly, and restrained."⁶⁰³

Blanshard's book, his subsequent 1951 volume, *Communism, Democracy, and Catholic Power*,⁶⁰⁴ and the critical acclaim that each book received, were reflective of the times. As historian John McGreevy notes, Blanshard's books were only "the most prominent in a flurry of analyses" that portrayed American Catholicism as the source of what was reactionary in American political and social life.⁶⁰⁵ Similar

Personality, 35 YALE L.J. 655 (1926); see also McGreevy, *supra* note 589, at 100 (on use of the word "scientific").

602. For citations to these sources, see McGreevy, *supra* note 589, at 97–98 & n.3.

603. Brennan, *supra* note 582, at 199–200 (quoting George Boas, Book Review, 59 PHIL. REV. 126, 127 (1950); John Coatman, Book Review, 2 PHIL. Q. 284, 284 (1952)) (internal quotation mark omitted).

604. BLANSHARD, *supra* note 583. In this book, Blanshard sought to explore the subject other American writers had "avoided," namely, "the fundamental resemblance between the Vatican and the Kremlin." *Id.* at 1. The fundamental resemblance, according to Blanshard, is that "[t]he Vatican and the Kremlin are both dictatorships," different in some respects but similar in a way that "no cloudy ecclesiastical effusions can quite conceal." *Id.* at 43. The Catholic Church is fundamentally un-American in that "the fundamental thesis on which our whole [American] way of life is based . . . [is] that the majority of the people have the right to determine our future by free choice based on free discussion, with certain inalienable rights guaranteed to minorities." *Id.* at 4. According to Blanshard, both the Soviet Union and the Vatican are run by an undemocratic, centralized authority that prohibits freedom of thought and expression, that demands obedience, and that engages in "thought control." *Id.* at 289. Both organizations seek to "deify" their respective leaders, the Soviet Premier and the Pope. *Id.* at 287–92. Blanshard refers to Catholicism as "the Roman Catholic church-state," which he describes as "a vast empire of churches, schools, hospitals, orphanages, monasteries, political parties, clerical-dominated governments, labor unions, embassies, newspapers—a world system of culture, discipline, and loyalty which in many respects outweighs in influence any single nation in the world." *Id.* at 3. Although the Church's message is one of "personal gentleness and love" and not "ruthlessness and force," *id.* at 287, still, "Vatican power in America is pervasive and substantial," *id.* at 295. Thus, the United States should proceed in dealing with the Vatican only by first demanding certain concessions including that "no outside power should attempt to tell American voters how to decide any American political issue, especially when the outside organization gives its members no participating rights in arriving at the decision." *Id.* at 300–01.

605. McGreevy, *supra* note 589, at 104–05 (quoting Harold J. Laski, *America—1947*, 165 NATION 641, 643 (1947)).

themes concerning the suspect nature of Catholicism in relation to American democracy and liberal society were sounded in the 1920s and 1930s by figures such as Lewis Mumford, Reinhold Niebuhr, A. Powell Davies, Felix Frankfurter, E.C. Lindeman, André Siegfried, and Winfred Garrison.⁶⁰⁶ In the 1940s, “naturalist intellectuals organized a series of conferences . . . to rally their supporters” against what they saw as a rising tide of Catholic “absolutist” criticism.⁶⁰⁷ According to philosopher Horace Kallen, Catholics posed a dangerous threat because “their intent is a spiritual fascism, a moral and intellectual totalitarianism, which has its peers in those of the Nazis and their ilk.”⁶⁰⁸ A democratic citizen should be capable of “thinking on one’s own.”⁶⁰⁹

It was in this milieu that Fred Rodell and Mark DeWolfe Howe wrote their articles defending Oliver Wendell Holmes, Jr., against the criticisms of John C. Ford, S.J., and Francis E. Lucey, S.J. Framing the matter in this way actually overstates the nature of their response. Howe expressly declined the opportunity to respond to Ford and Lucey directly since, according to Howe, their criticisms of Justice Holmes were “so firmly grounded in the Catholic philosophy of law” that, had he attempted to do so, Howe would have found himself “quickly engaged in a theological controversy beyond [his] competence to discuss.”⁶¹⁰ Instead, Howe turned his attention to Lon Fuller’s criticisms

606. *See id.* at 98 & n.4, 106 & nn.30–31.

607. PURCELL, *supra* note 1, at 204.

608. *Id.* (quoting Horace M. Kallen, *Freedom and Authoritarianism in Religion*, in *THE SCIENTIFIC SPIRIT AND DEMOCRATIC FAITH* 3, 10 (1944)) (internal quotation marks omitted).

609. McGreevy, *supra* note 589, at 98.

610. Howe, *supra* note 390, at 530. Howe ostensibly eschewed the theological debate that Ford and Lucey purportedly invited, claiming a lack of competence. This lack of competence did not, however, prevent Howe from seeming to join with Justice Holmes in rejecting “the outworn formulas of Calvinism and the threadbare precepts of Protestant morality,” *id.* at 533, and endorsing “the conviction that morality could no longer find its justification in a theology which science had shown to be unacceptable,” and the belief that “science had turned the creed of Harvard and his ancestors to dust and ashes,” *id.* at 535. Nor did this supposed lack of competence prevent Howe from using the word “theological” as a derogatory expression. *See id.* at 539 (stating that Justice Holmes “led American legal scholarship to follow the historical rather than the purely logical—even theological—methods which had threatened to dominate legal thought”). Howe’s statements concerning the relationship between science and morality—whether paraphrasing Justice Holmes, reflecting his own views, or both—should strike the reader, even the committed naturalist, as baffling. How can science show that the Christian faith is wrong? Surely Howe is not claiming (for himself or for Holmes) that modern, empirical science proves that God does not exist, or that Jesus was not God incarnate, or that the moral imperative to love others as

of Justice Holmes—criticisms, he says, Fuller had “most effectively stated.”⁶¹¹

This move is telling because the same criticisms of Holmes set forth by Fuller that Howe singles out can be found in the works of Ford and Lucey, without any theological adornment. For example, Howe identifies Fuller’s thesis as seeing Justice Holmes as a “child of Hobbes, . . . the American father of legal positivism” who insisted on a sharp distinction between law as it is and law as it ought to be.⁶¹² In contrast to the “positivist tendency in Holmes’s thought,” Howe found that Fuller “persuasively presented” the natural law perspective as an alternative.⁶¹³ However, Howe believes that Fuller misread Holmes as espousing “the creed of an authoritarian,” holding “that might makes right, that the *is* is more important than the *ought*.”⁶¹⁴ On the contrary, Howe argues that Holmes always maintained “that the ultimate source of law is the moral judgment of the community.”⁶¹⁵ Here, Howe cites Holmes’s statement from *The Path of the Law* that “[t]he law is the witness and external deposit of our moral life,” and his statement in *The Common Law* that the “rules of law are or should be based upon a morality which is generally accepted.”⁶¹⁶ In this, Howe believes that Holmes advanced the “more perceptive” understanding of law that views morality as the source of law “rather than its content.”⁶¹⁷ Thus, for Howe, Holmes’s critics should “admit that they have exaggerated the positivist elements in his theory of law.”⁶¹⁸

Had Howe managed to overcome his alleged coyness in dealing with Jesuits for fear of being dragged into a theological fray, he might have observed how both Lucey and Ford concede that Justice Holmes acknowledges that all law is unavoidably moral in the sense that it expresses a normative preference, but not in the sense that such a

Christ loved his disciples is empirically false. Surely Howe is not making the category mistake of reaching a normative conclusion based on empirical premises.

611. *Id.* at 531.

612. *Id.*

613. *Id.* at 531–32.

614. *Id.* at 537 (focusing specifically on Fuller’s reading of Holmes’s Memorial Day Address).

615. *Id.* at 541.

616. *See id.* (quoting Holmes, *supra* note 115, at 459; O.W. HOLMES, JR., *THE COMMON LAW* 44 (1881)) (internal quotation marks omitted).

617. *Id.* at 541–42.

618. *Id.* at 543.

preference is anything other than “the predominant power in the community.”⁶¹⁹ To say that Justice Holmes subscribed to the view that “might makes right” is not to exaggerate Holmes’s positivism. It is, rather, to take him at his word. It is to acknowledge that if one is abused by the majority through the instruments of law—stripped of all dignity, of all property, and even of one’s own life—one has no *legal* principle upon which to voice an objection. Because there is no “absolute principle or even a human ultimate that man always is an end in himself—that his dignity must be respected”⁶²⁰—then no particular individual need be counted among those who vie for power in the lawmaking arena. For Justice Holmes, “the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction” such that when two groups “want to make inconsistent kinds of world[s]” there is no way to resolve the conflict “except [through] force.”⁶²¹ If a human being is merely “a cosmic ganglion,”⁶²² if there is “no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand,”⁶²³ then a human being possesses no inherent dignity that the law must recognize and respect. For Justice Holmes, “when it comes to the development of a *corpus juris* the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions

619. Lucey, *supra* note 210, at 499 n.10 (quoting OLIVER WENDELL HOLMES, *Natural Law*, in COLLECTED LEGAL PAPERS 310, 314 (1920)). In this same passage, Justice Holmes dismisses “[t]he most fundamental of the supposed pre-existing rights—the right of life”—since “whenever the interest of society, that is, of the predominant power is the community, is thought to demand it,” then “the sanctity disappears.” HOLMES, *supra*, at 314 (internal quotation marks omitted).

620. Ford, *supra* note 179, at 264 (quoting Letter from Oliver Wendell Holmes, Jr., to Dr. John C.H. Wu (Aug. 26, 1926) [hereinafter Letter from Justice Holmes to Dr. Wu], in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 186, 187 (Harry C. Shriver ed., 1936) [hereinafter BOOK NOTICES AND UNCOLLECTED PAPERS]); Lucey, *supra* note 210, at 503 n.21 (quoting same).

621. Lucey, *supra* note 210, at 498 n.5 (quoting Letter from Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Feb. 1, 1920), in 2 HOLMES–POLLOCK LETTERS 36, 36 (Mark DeWolfe Howe ed., 1941)).

622. *Id.* at 499 n.9 (quoting Letter from Oliver Wendell Holmes, Jr. to Dr. John C.H. Wu (May 5, 1926), in BOOK NOTICES AND UNCOLLECTED PAPERS, *supra* note 620, at 184, 185); Ford, *supra* note 179, at 269 (quoting same).

623. Lucey, *supra* note 210, at 498–99 n.9 (quoting Letter from Oliver Wendell Holmes, Jr., to Sir Frederick Pollock (Aug. 30, 1929), in 2 HOLMES–POLLOCK LETTERS, *supra* note 621, at 251, 252); see also Ford, *supra* note 179, at 268 (quoting same).

may stand in the way.”⁶²⁴ As Lucey summarized: “If there are no ultimate permanent objective values and no moral oughts, of course, anything which Society capriciously enforces is law, and Society can capriciously bring its force to bear in any direction.”⁶²⁵

Lucey and Ford’s own views — regarding man’s place in the universe, man’s dignity, and the requirement that, in order to be law, a norm must reflect and protect this dignity — were plainly influenced by their adherence to Thomism⁶²⁶ and their biblical faith. Their critique of Justice Holmes, however — thoroughly grounded as it was in Holmes’s own papers and correspondence — stands on its own merits, unmarred by religious bias.

The point, however, is not that Ford and Lucey were correct in their analysis of Justice Holmes and that Howe was wrong.⁶²⁷ Rather, the point is that Ford and Lucey put forth arguments that were at least equal in sophistication to those put forth by Fuller (and perhaps in some ways more rigorous), but Howe chose to avoid responding to the substance of these arguments, dismissing them out of hand as “religious” and impenetrable — the product of “Jesuit” minds.⁶²⁸

Rodell’s short article is no better. Indeed, he mimics some of the major themes found in Blanshard’s book. He begins by noting that “Catholic, and especially Jesuit scholars, plus Catholic laymen have been in the forefront of th[e] assault” on Justice Holmes.⁶²⁹ The core of Rodell’s response to this assault is psychological in nature. Regardless of whether they are religious, or what their religious affiliation is, “[t]he single trait that binds together the critics of Mr. Justice Holmes . . . is a belief in some sort of Absolute, outside and beyond the minds of men” — a belief “the faithful” cling to presumably because there is some “comfort in believing,” a comfort that Holmes unsettled through the

624. Ford, *supra* note 179, at 264 (quoting Letter from Justice Holmes to Dr. Wu, *supra* note 620, at 187); Lucey, *supra* note 210, at 503 n.21 (quoting same) (alteration omitted) (emphasis omitted).

625. Lucey, *supra* note 210, at 508.

626. *Id.* at 524–32 (setting forth the postulates of “Scholastic Natural Law”); Ford, *supra* note 179, at 275.

627. On this point, however, in referring to the Jesuit authors Lucey, Ford, and Gregg, Albert Alschuler had this to say: “These writers understood Holmes better than the lawyers and scholars who viewed him as a liberal hero. Some of them, however, did not enhance their credibility when they denounced Holmes’s agnosticism and linked him with Hitler.” ALSCHULER, *supra* note 114, at 204 n.21.

628. Howe, *supra* note 390, at 530.

629. Rodell, *supra* note 441, at 622.

“lurking fear” of doubt.⁶³⁰ According to Rodell, Justice Holmes held a “deeply democratic faith in man’s power of reason,”⁶³¹ the capacity to think on one’s own.⁶³² Echoing Blanshard’s charge against Catholics, Rodell describes those who ignore or denounce Holmes’s philosophy “as totalitarian-tended and hence unAmerican.”⁶³³ Indeed, just as Blanshard branded Catholicism as unwaveringly authoritarian, Rodell brands Holmes’s critics “authoritarians all, [who] will accept no moral code as truly moral that does not embody some timeless superhuman principles.”⁶³⁴ Those who denounce Justice Holmes do so out of their

630. *Id.*

631. *Id.*

632. The core idea in Blanshard, and a great deal of other anti-Catholic literature, is that the “central structure of the Church is completely authoritarian, and the role of laymen is completely passive,” BLANSHARD, *supra* note 583, at 22; that the hierarchy tells the people what to believe, and these “dogmatic utterances . . . do not admit of modification or change by the Catholic people,” *id.* at 23; and that the Church “stifle[s] self-criticism” and represses the flow of information “on matters of social policy” in a manner “directly contrary to the American conception of freedom of thought,” *id.* at 242. As noted above, Rodell portrays those who subscribe to natural law in a similar way—as having a psychological need for certainty resulting in a penchant for that which is fascist and anti-democratic. See *supra* notes 629–37 and accompanying text.

A similar theme—that Catholics automatically follow the commands of authority and fail to think for themselves—is also intimated in Howe’s essay. He says that because “the Catholic philosophy of law is based” on natural law, “[i]t would have required no special insight to predict, twenty years ago, that Jesuit teachers of law would find Holmes’ skepticism philosophically unacceptable.” Howe, *supra* note 390, at 531. Howe need not bother with the question of whether they have adequately responded to Justice Holmes’s skepticism on the merits. Thus, Howe need only dismiss the reflexive thinking of “Jesuit teachers of law” as such. *Id.* Because Catholics do not think for themselves, because they are programmed to respond in a certain fashion, they have little to contribute to scholarly debate. Howe briefly turns to Justice Holmes’s comment equating the significance of human nature with that of “a baboon or a grain of sand,” but he mischaracterizes Justice Holmes’s remark as a “question” rather than a conclusion. *Id.* at 545. Instead of exploring Justice Holmes’s position, Howe (like Rodell) ventures into the psychological, questioning whether those who resist Justice Holmes’s claim have stomachs “strong enough to accept the bitter pill which Holmes tendered us.” *Id.* Regardless of whether the version of natural law put forth carries with it all the “implications of divine authority,” it still reflects a desire for security, for “seeking shelter from skepticism beneath the deceptive security of a phrase.” *Id.* While acknowledging the legitimacy of inquiring into fundamental “standards of decency,” Howe worries that the then-current turn to natural law reflects “a desire to reinstate the monarchy of absolutes,” *id.*, “the comforts of the absolute,” *id.* at 546. He fears that “this effort to revive the concept of natural law . . . will lead us unconsciously back to the shop-worn absolutes of an earlier day.” *Id.* at 545–46.

633. Rodell, *supra* note 441, at 622.

634. *Id.* at 623. According to Rodell, it was enough for Justice Holmes that there were “no ultimate answers,” that morality was simply “the product of the innate decency of human beings.” *Id.* Justice Holmes’s own commentary on human nature, as found in his papers and

own “emotional need to feel that their personal dependence on some sort of safe-and-sound cosmic morality—call it God or Ultimate Truth or Natural Law—must be a part of every patriot’s creed.”⁶³⁵ Holmes was a severe critic of both “the authoritarianism implicit in Natural Law” and the belief that legal values come “out of some jurisprudential heaven.”⁶³⁶ The penultimate paragraph of Rodell’s essay appears as if it were lifted from the pages of Blanshard’s book. There, he claims that those who read both Holmes and his detractors “will see which of the two conflicting views of life is more nearly fascist (authoritarianism is the essence of fascism) and which is more deeply democratic (democracy postulates the intelligence of each individual man).”⁶³⁷

Rodell and Howe’s articles, standing alone, do not show that the kind of anti-Catholicism found in Blanshard’s writings was widely represented in the legal academy. However, they do show that law professors were not immune to the prejudice against the Catholic Church that Blanshard popularized in his best-selling books under the guise of a sober, scholarly analysis of what he termed “the Catholic problem.” Indeed, given the widespread support that Blanshard’s work enjoyed among other American elites and intellectuals, it would be surprising not to find similar support among American law professors. For his part, Blanshard was glad to note, at a lecture delivered at the Harvard Law School in 1950, that “the new movement against Catholic aggression is rising not on the fringes, the lunatic fringes of religion and fanaticism, but right in the hearts of American University leaders.”⁶³⁸

*b. Anti-Catholicism in the Historical Accounts of
Legal Realism in the Post-JFK Era*

Even if it is conceded that a kind of anti-Catholic bias existed among American legal academics in the 1950s (when Catholic critics dared to challenge the stature of Justice Holmes), can this explain the current telling of American legal history? Can this kind of bias account for the dismissive treatment of Catholic legal scholars’ response to Legal

correspondence and addressed by Lucey and Ford, cast serious doubt on whether Justice Holmes actually believed in such innate decency. *See supra* notes 619–26.

635. Rodell, *supra* note 441, at 622–23.

636. *Id.* at 624.

637. *Id.*

638. McGreevy, *supra* note 589, at 98 (quoting HARVARD LAW SCH. FORUM, THE CATHOLIC CHURCH AND POLITICS: A TRANSCRIPT OF A DISCUSSION ON A VITAL ISSUE 37 (1950)).

Realism in the standard narrative of American legal history? After all, we live in a post-JFK world—a world that, in many respects, celebrates diversity. American society today is far more tolerant than it was during the time of Paul Blanshard. It is a society that has benefitted from the social norm of anti-discrimination found in the Civil Rights Act of 1964 and the various state versions of that landmark legislation, and the cultural changes that these laws have both caused and reinforced. Is it possible that the conventional narrative of American legal history today still bears the marks of this prejudice? In response to this question, we offer three observations.

i. The Passage of Time Since the First Histories of American Legal Realism

First, it is important to note that in speaking of the historical account of American Legal Realism and its Catholic critics today, “today” refers not to a specific date but to a span of several decades. Edward Purcell’s book was published in 1973, whereas Brian Tamanaha’s book came out in 2010. During this period, the nation has undergone enormous change. The country is now far more racially diverse and accepting of people from different backgrounds. For example, in 1970 whites made up almost eighty-eight percent of the total population, whereas in 2010 they made up only seventy-two percent.⁶³⁹ In the 91st Congress (1969–1970), 11 members of Congress were African-American (including one senator), and 11 members of Congress were female (including one senator); in the 111th Congress (2009–2010), 42 African-Americans served in Congress (including one in the Senate), and 99 women served in Congress (including eighteen who served in the Senate).⁶⁴⁰ In the 91st Congress, seventy percent (375 members of the House and Senate) identified as Protestant, and twenty percent (109 members) identified as Catholic; in the 111th Congress, only fifty-five percent (292 members of

639. U.S. CENSUS BUREAU, THE WHITE POPULATION: 2010, at 3 tbl.1 (2011); Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions, and States* tbl.A-7 (U.S. Census Bureau, Working Paper No. 56, 2002), available at <http://www.census.gov/population/www/documentation/twps0056/twps0056.html>, archived at <http://perma.cc/H7HB-HACX>.

640. JENNIFER E. MANNING & COLLEEN J. SHOGAN, CONG. RESEARCH SERV., RL30378, AFRICAN AMERICAN MEMBERS OF CONGRESS: 1870–2012, at 47, 54 (2012); JENNIFER E. MANNING & IDA A. BRUDNICK, CONG. RESEARCH SERV., RL30261, WOMEN IN THE UNITED STATES CONGRESS. 1917–2014: BIOGRAPHICAL AND COMMITTEE ASSIGNMENT INFORMATION, AND LISTINGS BY STATE AND CONGRESS 79–80, 88 (2014).

the House and Senate) identified as Protestant, and thirty percent (161 members) identified as Catholic.⁶⁴¹ In 2008 the country elected its first African-American president, Barack Obama, who won re-election in 2012.⁶⁴²

Plainly, the subject of how the American people have come to terms with the social fact of their diversity and the interactions between the sexes and among the country's various racial, ethnic, cultural, and religious groups is enormously complex. The few statistics cited above provide only a crude snapshot, at best. They are not offered to suggest that the various demographic groups that make up the nation have found a way to overcome all that divides them so as to live as equals in peace and harmony. Sexism is still present in American culture, racial and ethnic bias still exists, and, in a post-9/11 world, tensions between various ethnic and religious groups have reemerged and taken on new forms. Having said that, it would be wrong not to acknowledge that the America that emerged in the last quarter of the twentieth century is not only a more diverse but also a far more tolerant, open-minded, and accepting society than that which had preceded it.

ii. The Persistence of Anti-Catholic Bias in American Society

Second, despite all the positive changes that have taken place, anti-Catholicism has proven to be a remarkably resilient form of prejudice. Although overt discrimination against Catholics simply on the basis of religious affiliation (in terms of disqualification from jobs or housing) is rare, both subtle and not-so-subtle forms of cultural bias persist and are widespread. As historian Philip Jenkins has observed, “[s]ince the 1950s, changing cultural sensibilities have made it ever more difficult to recite once-familiar American stereo-types about the great majority of ethnic or religious groups” such that today statements “that could be regarded as misogynistic, anti-Semitic, or homophobic” are no longer tolerated “and could conceivably destroy a public career.”⁶⁴³ There is, however, “one massive exception to this rule, namely, that it is still possible to make quite remarkably hostile or vituperative public

641. *Faith on the Hill: 2008*, PEW RESEARCH CENTER: RELIGION & PUBLIC LIFE 1, 5 (Dec. 19, 2008), <http://www.pewforum.org/2008/12/19/faith-on-the-hill-the-religious-affiliation-s-of-members-of-congress/>, archived at <http://perma.cc/745H-DC6T>.

642. See *Barack Obama*, WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/barackobama> (last visited Apr. 8, 2015), archived at <https://perma.cc/Q38U-P4UP>.

643. JENKINS, *supra* note 566, at 4.

statements about one major religious tradition, namely, Roman Catholicism.”⁶⁴⁴

Contemporary anti-Catholicism manifests itself in a variety of ways: in how the news is reported,⁶⁴⁵ on editorial pages and in journals of opinion,⁶⁴⁶ and in art, entertainment, and advertising. Comedians chase laughs, horror-movie producers seek to thrill and shock their audiences, and advertising executives covet attention of whatever kind they can get in attempting to sell products and services. Thus, it is not surprising that the makers of media often turn to the Catholic Church and its rich tapestry of doctrines and symbols as source material for their particular ventures. In this it is not always easy to discern whether a character who is identifiably Catholic (like a priest or religious sister) or the appropriation of Catholic imagery is intended to denigrate the Church.⁶⁴⁷ Sometimes, as in the case of the wildly popular novel and film *The DaVinci Code*, the author simply seeks to provide a form of entertainment, but others promote the work as history in order to serve an anti-Church agenda, exposing Catholicism as a fraud from its inception.⁶⁴⁸ At the same time, some actions are so outrageous—such as the desecration of the Eucharist at Mass by gay-rights protestors,⁶⁴⁹ or

644. *Id.* at 4–5.

645. The print, broadcast, and online media’s reporting of the clerical sexual abuse crisis in the Catholic Church was not evidence in itself of an anti-Catholic bias. The story of the sexual abuse of children and young people by Catholic priests, and the response of bishops and other ecclesiastical authorities following the discovery of these heinous acts, was an entirely newsworthy story deserving of substantial attention. However, the enormous attention devoted to the issue—relative to the attention devoted to similar scandals where the Catholic Church was not involved—suggests more than simply informing the public was at issue.

646. See, e.g., Maureen Dowd, *The Archbishop vs. the Governor: Gay Sera, Sera*, N.Y. TIMES, June 19, 2011, at WK8; Maureen Dowd, *Forgive Me Father, for I Have Linked*, N.Y. TIMES, Feb. 9, 2011, at A27; Maureen Dowd, *Hold the Halo*, N.Y. TIMES, Apr. 24, 2011, at WK8; George Weigel, *Maureen Dowd’s Catholic Problem*, NATIONAL REVIEW (June 21, 2011, 4:00 AM), <http://www.nationalreview.com/article/270110/Maureen-dowds-catholic-problem-george-weigel>, archived at <http://perma.cc/QZ33-TCWK>.

647. See James Martin, S.J., *The Last Acceptable Prejudice?*, AMERICA, Mar. 25, 2000, at 8.

648. Chris Carpenter, *Cultural Analysis: The Truth Behind the Da Vinci Code*, CBN.COM, http://www.cbn.com/entertainment/books/carpenter_abanes_davincicode.aspx (last visited Apr. 8, 2015), archived at <http://perma.cc/K3JF-JHS8> (discussing Christians taking offense from any insinuation that *The Da Vinci Code* is true).

649. Jason DeParle, *Rude, Rash, Effective, Act-Up Shifts AIDS Policy*, N.Y. TIMES, Jan. 3, 1990, at B1; see also Megan Twohey, *Gay-Rights Activists Protest at Holy Name Cathedral*, CHI. TRIB., Feb. 15, 2010, at 6.

radio personalities paying two people to have sex in a cathedral as a stunt for their broadcast⁶⁵⁰—that they are difficult to explain absent some kind of animus for the Catholic Church. Indeed, it is difficult to imagine that, if the object of ridicule had been Judaism or the Presbyterian Church and not the Catholic Church, a play like *Corpus Christi*, which portrays a gay, modern-day Jesus living in Texas who performs a gay-wedding for two of his disciples, would ever have been produced on an off-Broadway stage, let alone made into a movie.⁶⁵¹

These incidents serve to highlight the difference between the anti-Catholicism of the Know Nothings and the cartoons of Thomas Nast,⁶⁵² and the anti-Catholicism of today. Unlike anti-Catholic prejudice in the nineteenth and early twentieth centuries, the new anti-Catholicism is not based on ethnicity or social class. It is not concerned with immigration or changes in the demographic composition of American society. Indeed, those who harbor a negative view of Catholicism may even favor the immigration of people from traditionally Catholic countries.⁶⁵³ Moreover, although these themes emerge from time to time, the new anti-Catholicism is not especially concerned, as Paul Blanshard was, with the use of public funds to support parochial schools, or with the diplomatic status of the Holy See⁶⁵⁴ and the Vatican as the center of a

650. Two radio personalities in New York were fired for broadcasting a couple having sex in St. Patrick's Cathedral in New York. *Deejays Fired over Cathedral Sex Stunt*, L.A. TIMES, Aug. 23, 2002, at A28. Not long after their dismissal, the two returned to the airwaves. Paul Farhi, *Opie & Anthony Get the Last Laugh*, WASH. POST, June 26, 2006, at C1.

651. Jason Zinoman, *A Modern, Gay You-Know-Who Superstar*, N.Y. TIMES, Oct. 22, 2008, at C2.

652. See MORRIS, *supra* note 568, at 66 (reproducing Nast's cartoon "The American River Ganges" and describing it as "the most brilliantly poisonous of Thomas Nast's popular anti-Catholic cartoons"); see also Melissa Musick Nussbaum & L. Martin Nussbaum, "The American River Ganges" Rising, FIRST THINGS (Dec. 10, 2010), <http://www.firstthings.com/web-exclusives/2010/12/the-american-river-ganges-rising>, archived at <http://perma.cc/BZH4-7JJT> (commenting on Nast's cartoon, comparing contemporary cartoons commenting on the priest sex abuse scandal and the Catholic hierarchy, and questioning the absence of similar cartoons depicting public school teachers given the higher incidence of child sexual abuse in the public schools).

653. JENKINS, *supra* note 566, at 20–21.

654. The Holy See's place in international relations was well established, long before there was such a thing as the United Nations. See generally ROBERT JOHN ARAUJO, S.J. & JOHN A. LUCAL, S.J., *PAPAL DIPLOMACY AND THE QUEST FOR PEACE: THE UNITED NATIONS FROM PIUS XII TO PAUL VI* (2010); ROBERT JOHN ARAUJO, S.J. & JOHN A. LUCAL, S.J., *PAPAL DIPLOMACY AND THE QUEST FOR PEACE: THE VATICAN AND INTERNATIONAL ORGANIZATIONS FROM THE EARLY YEARS TO THE LEAGUE OF NATIONS*

vast international conspiracy to undermine freedom and the American way of life. It is instead concerned with the ideas associated with traditional Catholic moral teaching, especially as these ideas may influence both law and social practice.

The flashpoints where this new prejudice typically emerges are the cultural issues of the day that excite the most controversy, that is, issues relating to sexuality and gender—the rights of LGBT individuals, same-sex marriage and adoption, polygamy, pre-marital sex, sex outside of marriage, contraception, and abortion.⁶⁵⁵ With respect to each of these issues, the Catholic Church takes a position that, in the American context, is plainly counter-cultural. The Church stands in opposition to the liberationist ethic that has come to define modernity since the latter half of the twentieth century and in favor of an older, alternate

(2004). Still, the question of whether or not the Holy See ought to enjoy international diplomatic personality, and particularly whether or not it ought to enjoy non-member permanent observer status at the United Nations, continues to be a topic of interest for law students and legal academics. See, e.g., Yasmin Abdullah, Note, *The Holy See at United Nations Conferences: State or Church?*, 96 COLUM. L. REV. 1835 (1996); James Fantau, Note, *Rethinking the Sovereign Status of the Holy See: Towards a Greater Equality of States and a Greater Protection of Citizens in United States Courts*, 19 CARDOZO J. INT'L & COMP. L. 487 (2011). That their arguments largely mimic the arguments put forth by those NGOs seeking to have the Holy See's observer status revoked due to the Church's opposition to abortion, contraception, and same-sex marriage reflects the new anti-Catholicism discussed in the text. See Catholics for Choice, *The "See Change" Campaign: The Holy See at the United Nations: Church or State?*, <http://www.catholicsforchoice.org/campaigns/SeeChangeCampaign.asp> (last visited Apr. 8, 2015), archived at <http://perma.cc/ZZC2-UZGC>. They oppose the Holy See's standing as a member of the international community because,

[d]espite its non-voting status at the United Nations, the Holy See has stood as the major barrier to the UN goal of universal access to abortion and contraception for young girls and women throughout the world. While the Church was unable to convince all countries—including the United States—of the evils of abortion, the Vatican, as a sovereign state, continues to play an important role at the negotiating table in areas in which the Church has a stake in helping to ensure the right to life and the dignity of the person.

Anne Hendershott, *What's Behind the UN Attack on the Church?*, CRISIS MAG. (Feb. 10, 2014), <http://www.crisismagazine.com/2014/whats-behind-the-un-attack-on-the-church>, archived at <http://perma.cc/VCC4-68MN>. For the perspective of the head of the Holy See's delegation at the UN Conference on the Status of Women, held in Beijing in 1995, see Mary Ann Glendon, *What Happened at Beijing*, FIRST THINGS, Jan. 1996, at 30.

655. In addition to these perennially contested matters, Jenkins contends that certain intra-religious questions of ecclesial discipline and doctrine that also relate to sexuality and gender—priestly celibacy and women's ordination—are also flashpoints, especially as these issues provide occasions for Catholics themselves to criticize the Church. See JENKINS, *supra* note 566, at 44–45, 76–77. Such internal squabbles are not in and of themselves evidence of anti-Catholicism.

anthropology that understands truth as constitutive of authentic human freedom.⁶⁵⁶

To be clear, the mere act of opposing a given position that the Catholic Church happens to endorse—e.g., that same-sex “marriage” should not be legal,⁶⁵⁷ or that the law cannot legitimately recognize a “right” to abortion⁶⁵⁸—does not in and of itself constitute an act of anti-Catholic bias. Quite obviously, a great many reasonable people disagree with the Church and individual Catholics on any number of important matters, and the mere fact of their disagreement is not proof of bigotry. People can engage in respectful dialogue and reasoned discourse on the most contentious matters of the day free of prejudice, even where those conversations end in disagreement.

The specter of anti-Catholicism is present, however, when a person strategically invokes religion as a way of dismissing a point of view with which he or she disagrees. This argumentative strategy is more or less subtly employed when someone deliberately refers to his or her opponent’s religious affiliation as “Catholic” or claims that the position espoused by his or her opponent is “Catholic” owing to its supposed religious origin or sectarian character. In either case, the person identified as “Catholic” or as advocating for a “Catholic” position stands accused of violating one of the fundamental tenets of American political morality and constitutional law by attempting to impose a set of personal religious beliefs on the public as a whole.

This strategy, which might be described as generally anti-Christian, is specifically anti-Catholic in that it plays off some of the poisonous stereotypes of Catholics that were prevalent in earlier times, without doing so explicitly. Thus, as Ross Douhat has observed, “[t]he new

656. See John M. Breen, *Neutrality in Liberal Legal Theory and Catholic Social Thought*, 32 HARV. J. L. & PUB. POL’Y 513, 579–83 (2009).

657. CONGREGATION FOR THE DOCTRINE OF THE FAITH, CONSIDERATIONS REGARDING PROPOSALS TO GIVE LEGAL RECOGNITION TO UNIONS BETWEEN HOMOSEXUAL PERSONS (2003), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html, archived at <http://perma.cc/J4WH-QAYV>; CONGREGATION FOR THE DOCTRINE OF THE FAITH, LETTER TO THE BISHOPS OF THE CATHOLIC CHURCH ON THE PASTORAL CARE OF HOMOSEXUAL PERSONS (1986), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html, archived at <http://perma.cc/W3XW-ZCQK>.

658. SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, DECLARATION ON PROCURED ABORTION (1974), http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19741118_declaration-abortion_en.html, archived at <http://perma.cc/7HHN-4EQ4>.

anti-Catholicism is a more urbane pseudo-sophisticated version that regards the Church as a stumbling block to progress” on the neuralgic issues of the day.⁶⁵⁹ The message implicit in identifying a person as “Catholic” where he or she agrees with the Church’s position on one or another controversial topic is to suggest that such a person is docile and incurious – reflexively following the dictates of Rome.⁶⁶⁰ Because such a person subscribes to a religion marked by ritual and superstition, he or she may well be thought of as anti-intellectual and (depending on the issue) patriarchal, misogynistic, or homophobic— at least until such time as he or she “evolves” on the issue,⁶⁶¹ embracing the position advocated by his or her erstwhile opponents. Moreover, those who happen to agree with the Catholic Church’s position on one or another of these topics may be regarded as suspect, perhaps even considered un-American—part of a large religious organization meddling in politics, inserting itself in cultural affairs, conspiring behind the scenes, and seeking to have the Pope and his fellow ecclesiastics dictate the policy of the state and the personal choices of individuals and families. By contrast, those Catholics who dissent from the Church’s views on these topics are often portrayed as intelligent and emancipated—freed from the dogma of their unenlightened church and so reliable “from a democratic point of view.”⁶⁶²

659. Joan Frawley Desmond, *Ross Douthat Scores Ryan’s Catholicism and Cardinal Dolan’s Election-Year Strategy*, NAT. CATH. REG. (Aug. 28, 2012), <http://www.ncregister.com/daily-news/ross-douthat-scores-ryans-catholicism-and-cardinal-dolans-election-year-str/>, archived at <http://perma.cc/3BH2-6WER> (quoting Ross Douthat).

660. See, e.g., Mark Stricherz, *Ex-Democratic Lawmaker: Anti-Catholic Bigotry Drove Me to the GOP: Exclusive Aleteia Interview*, ALETEIA (Nov. 7, 2014), <http://www.aleteia.org/en/politics/article/ex-democratic-lawmaker-anti-catholic-bigotry-drove-me-to-the-gop-exclusive-aleteia-interview-5817480832352256>, archived at <http://perma.cc/37U7-DUJV> (describing how Washington State politician Mark Miloscia was depicted in a political ad “donning a papal mitre and clutching rosary beads”).

661. The use of “evolution” as a trope suggests movement to a higher state of being. Cf. Robin Toner, *Shifting Views over Abortion Fog Gore Race*, N.Y. TIMES, Feb. 25, 2000, at A1 (noting how Mr. Gore has changed on the issue from a sometime critic of abortion to a supporter of federal funding of abortion, and quoting NARAL’s Kate Michelman as describing Mr. Gore as having “evolved” on the issue); Josh Gerstein, *Obama Evolves Again on Same-Sex Marriage*, POLITICO (Oct. 20, 2014, 12:43 PM), <http://www.politico.com/blogs/under-the-radar/2014/10/Obama-evolves-again-on-samesex-marriage-197348.html>, archived at <http://perma.cc/Q92N-G2F5> (noting how President Obama described his own views on same-sex marriage as “evolving” in 2010, moved to favoring the matter politically in 2012, and discovered a constitutional right to same-sex marriage in 2014).

662. See Brennan, *supra* note 582, at 201. Occasionally, Catholics are reminded that their participation in public life is contingent on their abandoning that which makes them

In characterizing a certain perspective on abortion or same-sex marriage as “religious”—whether in terms of it being generally “Christian” or specifically “Catholic”—those who oppose the Church on these controversial topics are able to declare that such a point of view is illegitimate—that it is unsuitable as a basis for law and public morality. Moreover, the implication is that those who agree with the Church’s point of view are attempting to institute a kind of theocratic rule. Often this accusation is not implied but is overtly and aggressively stated by referring to opponents of same-sex marriage and abortion as the “Christian Taliban.”⁶⁶³ In either case, the still burning embers of anti-Catholicism in this country are stoked, such that those who employ this strategy often succeed in dismissing an entire perspective out of hand, without ever addressing the merits of the allegedly “Catholic” or “Christian” position with which they disagree. In this way they are able to win an argument without ever really having one.

The specific effort to define opposition to abortion as broadly Christian and narrowly Catholic⁶⁶⁴ has a long and disgraceful lineage.

Catholic. See, e.g., Richard John Neuhaus, *The Catholic Way of Being American*, CRISIS MAG. (Feb. 1, 1996), <http://www.crisismagazine.com/1996/the-catholic-way-of-being-american>, archived at <http://perma.cc/RG2Q-SLKU>. Neuhaus recounts the story of how when John O’Connor first became archbishop of New York in 1984 he made plain the Church’s teaching on abortion to Catholic public officials opposed to that teaching, and at a dinner he was told by one of the most influential editors in the country, “[W]hen John F. Kennedy was elected in 1960, some of us thought that the question had been answered whether you Catholics really belong here, whether you understand how we do things around here. But I must tell you frankly, Archbishop, that in the short time you’ve been in New York some of us are beginning to ask that question again.” *Id.*

663. See, e.g., Maureen Dowd, *Just Think No*, N.Y. TIMES, Aug. 22, 2012, at A25 (stating that, notwithstanding his youthful appeal, because of his anti-abortion politics, vice presidential candidate Paul Ryan is “just a fresh face on a Taliban creed—the evermore antediluvian, anti-women, anti-immigrant, anti-gay conservative core”); Stephen Pizzo, *The Christian Taliban*, ALTERNET (Mar. 27, 2004), http://www.alternet.org/story/18259/the_christian_taliban, archived at <http://perma.cc/LL78-ZVUH> (referring to “Christian fundamentalists” in the Bush administration who oppose abortion, same-sex marriage, and contraceptive based sex-education as “Christian Taliban”). Some supporters of abortion rights and same-sex marriage reject the use the term, not because they regard it as slanderous and incendiary, but for fear of being seen as Islamophobic. See Andrea Grimes, *Stop Calling U.S. Christian Lawmakers the ‘Taliban,’* RH REALITY CHECK (July 23, 2014, 12:17 PM), <http://rhrealitycheck.org/article/2014/07/23/stop-calling-u-s-christian-lawmakers-taliban/>, archived at <http://perma.cc/5RD3-V34W> (“[T]here is indeed a powerful, well-funded and rigidly patriarchal religious movement behind America’s most misogynist laws, and it isn’t any iteration of Islam. It’s Christianity.”).

664. The claim of religious interference in the abortion debate has had to be revised over the years in light of changes in the composition of the pro-life movement. The Catholic Church was at the forefront of pro-life efforts following the Supreme Court’s decision in *Roe*

Lawrence Lader and Bernard Nathanson, early proponents of the repeal of abortion laws and the founders of what is today known as NARAL Pro-Choice America, devised a “Catholic strategy” whereby they sought to portray “the Catholic Church as a political force, for the use of anti-Catholicism as a political instrument, and for the manipulation of Catholics themselves by splitting them and setting them against each other.”⁶⁶⁵ Indeed, this is the standard prism through which most news organizations frame the issue — as a struggle between religious believers

v. Wade, 410 U.S. 113 (1973), creating a constitutional right to abortion. See CYNTHIA GORNEY, ARTICLES OF FAITH: A FRONTLINE HISTORY OF THE ABORTION WARS 178–93 (1998). The United States Conference of Catholic Bishops helped to found the National Right to Life Committee, housing the organization in its offices after it was first established. *Id.* at 107. A number of Christian denominations greeted the decision with enthusiasm, having already adopted a policy favoring a right to abortion. See *id.* at 188. At least some Protestants identified the pro-life position as narrowly sectarian, specifically Catholic, such that they even welcomed the Court’s decision in *Roe*, seeing it as step in favor of religious freedom and the separation of church and state. See *id.* (quoting the Southern Baptist Convention news service’s response to *Roe v. Wade* saying that the Supreme Court had “advanced the cause of religious liberty, human equality, and justice” (internal quotation mark omitted)); MCGREEVY, *supra* note 531, at 262 (noting the same, and that a group of prominent evangelicals had “cautiously endorsed abortion law reform in 1968” in *Christianity Today*). Thus, the argument that legal opposition to abortion is an unconstitutional establishment of religion focused on the Catholic Church. See, e.g., *McRae v. Califano*, 491 F. Supp. 630, 691 (E.D.N.Y. 1980) (case involving Establishment Clause challenge to the Hyde Amendment restricting federal government funds to pay for abortions, noting that “the trial was much concerned with the Roman Catholic position [on abortion] as contrasted with the view of Mainstream Protestantism, and with the action taken by Roman Catholic church organizations and clerical bodies”). In the decade following *Roe*, the stance of many Evangelical Protestants and some denominations changed substantially such that many became major players in the pro-life movement. See Gorney, *supra*, at 340–43 (discussing the Evangelical turn toward the pro-life cause); BERNARD N. NATHANSON, THE ABORTION PAPERS: INSIDE THE ABORTION MENTALITY 188–89 (1983) (noting that the Catholic Church led the opposition “from the very beginning of the abortion revolution” but that a decade after *Roe* “the pro-life group is now a far more ecumenical force that it was ten years ago”). Thus, the claim of abortion proponents that the pro-life position was specifically Catholic, and so unsuitable as a basis for law and policy, was recast as more broadly Christian or generally religious.

665. NATHANSON, *supra* note 664, at 178, 181; see also BERNARD N. NATHANSON WITH RICHARD N. OSTLING, ABORTING AMERICA 51–52 (1979) (describing the origin of the strategy); *id.* at 172 (“The pro-abortionists also seek to rule out discussion of abortion in advance because it is a ‘religious issue.’ Our movement persistently tarred all opposition with the brush of the Roman Catholic Church or its hierarchy, stirring up anti-Catholic prejudices, and pontificated about the necessity for ‘separation of church and state.’”). Lader’s disdain for the Catholic Church and its involvement in the debate over abortion is on vivid display throughout his written work. See LAWRENCE LADER, ABORTION (1966); LAWRENCE LADER, ABORTION II: MAKING THE REVOLUTION (1973); LAWRENCE LADER, POLITICS, POWER, AND THE CHURCH: THE CATHOLIC CRISIS AND ITS CHALLENGE TO AMERICAN PLURALISM (1987).

who want to use the instruments of government to curtail liberty, and a secular-minded public who desire greater freedom.⁶⁶⁶ As one member of the press candidly admitted, in reporting on the issue, “Journalists tend to regard opponents of abortion as ‘religious fanatics’ and ‘bug-eyed zealots.’”⁶⁶⁷ As John Noonan has observed, “[J]ust as a racist press once identified every thief if possible as black, so the press identifie[s] every public opponent [of abortion] if possible as Catholic,” the implication being “[o]nly a Catholic would see the matter this way; there must be some quirk of Catholic dogma that makes Catholics take this extraordinary position” and attempt to impose it on others.⁶⁶⁸

iii. The Presence of Anti-Catholic Bias in American Academic Culture

Third, anti-Catholic bias is not only present in American society generally, it is also present in American academic culture specifically, including the culture of American law school faculties. Sadly, Peter Viereck’s famous comment that “Catholic-baiting is the anti-Semitism of the liberals,”⁶⁶⁹ that anti-Catholicism is “the thinking man’s anti-Semitism,”⁶⁷⁰ still rings true.

One particularly egregious and highly publicized example of this sort of bias in the legal academy appeared in 2007 following the Supreme Court’s decision in *Gonzales v. Carhart*,⁶⁷¹ a case in which the Court upheld a federal ban on the procedure commonly referred to as partial-birth abortion. In this procedure, clinically known as an “intact dilation and extraction,” the child in the womb is delivered in the breech position up to the point where his or her head lodges in the cervix. At this point the physician performing the abortion forces a pair of scissors

666. MARVIN N. OLASKY, *THE PRESS AND ABORTION, 1838–1988* (1988).

667. David Shaw, *Abortion Foes Stereotyped, Some in the Media Believe*, L.A. TIMES, July 2, 1990, at A1; see also David Shaw, *‘Abortion Hype’ Pervaded Media After Webster Case*, L.A. TIMES, July 4, 1990, at A1; David Shaw, *Bias Seeps into News on Abortion*, L.A. TIMES, July 1, 1990, at A1; David Shaw, *‘Rally for Life’ Coverage Evokes an Editor’s Anger*, L.A. TIMES, July 3, 1990, at A1. This article and the other three articles in the series are available at *Abortion Bias Seeps into News*, NO VIOLENCE PERIOD, <http://groups.csail.mit.edu/mac/users/rauch/nvp/media/media.html> (last visited Apr. 11, 2015), archived at <http://perma.cc/ZJW8-ENH5>.

668. JOHN T. NOONAN, JR., *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* 55 (1979) (internal quotation marks omitted).

669. PETER VIERECK, *SHAME AND GLORY OF THE INTELLECTUALS* 45 (1953), quoted in JENKINS, *supra* note 566, at 5.

670. JENKINS, *supra* note 566, at 5 (internal quotation marks omitted).

671. 550 U.S. 124 (2007).

into the back of the head, opens them, then inserts a suction catheter thereby removing the fetal brains and collapsing the skull, allowing for the intact delivery of a dead child.⁶⁷²

In a post on the University of Chicago Law School Faculty Blog titled *Our Faith-Based Justices*, Professor Geoffrey Stone accused the five member *Gonzales* majority of rendering a decision based on their shared Catholic faith.⁶⁷³ After being severely criticized from many quarters for his remarks,⁶⁷⁴ Stone defended his comments, saying that it was “surely unfortunate,” but not surprising, to be accused of “anti-Catholic bigotry.”⁶⁷⁵ In defense of his initial post, Stone said he simply wanted to understand “what makes the Justices tick” and to explore “whether the principle of separation of church and state should create a special responsibility on citizens, legislators, and judges *not* to impose their religious beliefs on other citizens.”⁶⁷⁶ He said that he simply wanted “to raise that question” and that he acknowledged that “the fact that all five Catholic Justices voted together . . . to make up the 5-to-4 majority might have nothing to do with their religion.”⁶⁷⁷

A plain reading of Stone’s original post shows that Stone was doing far more than simply “posing the question.”⁶⁷⁸ He leveled an accusation at the *Gonzales* majority based on the religious identity of the Justices, and when confronted with this fact and roundly criticized for it, he attempted to re-characterize what he plainly said as the quizzical musings of a legal academic. He was not, as he said in his subsequent post, simply “pos[ing] the question and . . . invit[ing] people to think about it.”⁶⁷⁹ He was not acting as a law professor leading a seminar. By

672. This and similar methods are described in *Gonzales*, 550 U.S. at 135.

673. Geoffrey Stone, *Our Faith-Based Justices*, U. CHI. L. SCH. FAC. BLOG (Apr. 20, 2007, 3:01 PM), http://uchicagolaw.typepad.com/faculty/2007/04/our_faithbased_.html, archived at <http://perma.cc/A4DQ-HX7U>.

674. Robert Barnes, *Did Justices’ Catholicism Play Part in Abortion Ruling?*, WASH. POST, Apr. 30, 2007, at A13; Laurie Lin, *Stone Cold: Jan Crawford Greenburg Blog-Smacks Her Former Dean*, ABOVE THE LAW (Apr. 26, 2007, 12:19 PM), <http://abovethelaw.com/geoffrey-stone/>, archived at <http://perma.cc/QT8N-47FP>; Edward Whelan, “Painfully Awkward”? *No, Just Plain Stupid*, ETHICS & PUB. POL’Y CENTER (Apr. 24, 2007), <http://eppc.org/publications/painfully-awkward-no-just-plain-stupid/>, archived at <http://perma.cc/59P4-NQUC>.

675. Geoffrey Stone, *Faith Based Justices (Again)*, U. CHI. L. SCH. FAC. BLOG (Apr. 25, 2007, 9:09 AM), http://uchicagolaw.typepad.com/faculty/2007/04/faith_based_jus.html, archived at <http://perma.cc/AMQ7-WYGF>.

676. *Id.*

677. *Id.*

678. *Id.*

679. *Id.*

his own words, he was pointing something out—“a painfully awkward observation”—something that he thought was “telling.”⁶⁸⁰ “What, then, explains this decision? . . . All five justices in the majority in *Gonzales* are Catholic.”⁶⁸¹ He was in fact leveling an accusation against the *Gonzales* majority, namely, that in deciding the case they “all fell back on a common argument to justify their position.”⁶⁸² According to Stone, this argument rested on the moral conclusion that the procedure closely resembles infanticide and is “immoral” and may be prohibited “even without a clear statutory exception to protect the health of the woman.”⁶⁸³ But according to Stone, “[b]y making this judgment, these justices have failed to respect the fundamental difference between religious belief and morality” by resolving the “profoundly difficult and rationally unresolvable question” of “[t]he moral status of a fetus.”⁶⁸⁴

Stone’s plea of innocence of the charge of anti-Catholic bias is misleading and would be comical but for his use of the passive voice: “[I]t is certainly not appropriate for the state or the justices to resolve it on the basis of one’s personal religious faith.”⁶⁸⁵ But the piece ends not with a question but a conclusion. Stone says that the *Gonzales* majority chose “not to follow” the example of other judges (like Justice Brennan) whom Stone admires, who did not decide legal questions based on their personal religious faith.⁶⁸⁶

Although Stone’s blog post is a particularly prominent example (made worse by his attempt to portray what he said in a positive light, as an open-ended question rather than a definitive conclusion), it is by no means the only example of the argumentative strategy described above wherein a point of view is first defined as “Catholic” or “religious” and then the point of view and the person proposing it are condemned as seeking to impose a sectarian belief on the public at large. Numerous examples of this strategy can be found in the legal academic literature on abortion,⁶⁸⁷ contraception,⁶⁸⁸ fetal and embryonic research,⁶⁸⁹ and

680. Stone, *supra* note 673 (“It is mortifying to have to point this out. But it is too obvious, and too telling, to ignore.”).

681. *Id.*

682. *Id.*

683. *Id.*

684. *Id.*

685. *Id.*

686. *Id.*

687. Perhaps the most famous iteration of the thesis that the pro-life position on abortion is inescapably religious in legal academic literature is Laurence H. Tribe, *The*

now same-sex marriage.⁶⁹⁰ This literature typically does not involve the same inflammatory rhetoric found in the slogans of the Know Nothings, the work of Paul Blanshard, or even the popular press of today, but the reader is meant to reach the same conclusion.

It might be suggested that the authors of these academic texts are entitled to the presumption that their views are not tinged with anti-Catholic bias or religious prejudice, that they perceive a genuine constitutional problem—an effort to establish religion—in those legal measures designed to restrict abortion or same-sex marriage. This is surely the case. But the presumption of good faith and the absence of anti-religious bias is a rebuttable presumption—a presumption that is overcome when no effort is made to demonstrate the supposedly religious character of the point of view with which they disagree, aside from noting the religious affiliation of those who endorse it and the mere repetition of their own conviction that the point of view is in fact religious.⁶⁹¹ Indeed, the presumption seems no longer warranted when a

Supreme Court, 1972 Term—Foreword: Toward a Model of Roles in the Due Process of Life and Law, 87 HARV. L. REV. 1 (1973). This thesis, however, has had many historical antecedents, *see, e.g.*, GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* (1957), and subsequent followers, *see, e.g.*, David A.J. Richards, *Constitutional Privacy, Religious Disestablishment, and the Abortion Decisions*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 148 (Jay L. Garfield & Patricia Hennessey eds., 1984); Jed Rubenfeld, *Rubinfeld, J., Concurring in Roe v. Wade and Concluding That the Writ of Certiorari Should Be Dismissed as Improvidently Granted in Doe v. Bolton*, in *WHAT ROE V. WADE SHOULD HAVE SAID* 109 (Jack M. Balkin ed., 2005).

688. *See, e.g.*, Robert F. Drinan, S.J., Book Review, 73 HARV. L. REV. 608 (1960) (reviewing ALVAH W. SULLOWAY, *BIRTH CONTROL AND CATHOLIC DOCTRINE* (1959)). This book review responds to the historic tendency to treat opposition to contraception as being religious in character. *Id.* at 612. Catholics did work politically against legislative reforms to make contraceptive more widely available before the Supreme Court's decision in *Griswold v. Connecticut*. *See* MCGREEVY, *supra* note 531, at 228–49. Opposition to contraception certainly may derive from religious premises, but not as a matter of logical necessity.

689. *See, e.g.*, Jane M. Friedman, *The Federal Fetal Experimentation Regulations: An Establishment Clause Analysis*, 61 MINN. L. REV. 961 (1977); Larry J. Pittman, *Embryonic Stem Cell Research and Religion: The Ban on Federal Funding as a Violation of the Establishment Clause*, 68 U. PITT. L. REV. 131 (2006).

690. *See, e.g.*, Gary J. Simson, *Religion By Any Other Name? Prohibitions on Same-Sex Marriage and the Limits of the Establishment Clause*, 23 COLUM. J. GENDER & L. 132 (2012).

691. Examples of this strategy of determined assertion and reaffirmation without argument include David R. Dow, *The Establishment Clause Argument for Choice*, 20 GOLDEN GATE U. L. REV. 479 (1990); Robert L. Maddox & Blaine Bortnick, Webster v. Reproductive Health Services: *Do Legislative Declarations That Life Begins at Conception Violate the Establishment Clause?*, 12 CAMPBELL L. REV. 1 (1989); Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1 (2005); Paul D. Simmons, *Religious Liberty*

plainly secular rationale for the law in question is offered and its opponent demurs and confidently reiterates that the *real* purpose is religious and constitutionally impermissible.⁶⁹²

But what can account for this bias in the legal academy if, as we are to presume, law professors today are not bigoted against Catholics in a conscious and deliberate way, like the Know Nothings and the Klan were in earlier times? Why would law faculty members who expressly disavow any prejudice toward those who are Catholic be negatively disposed toward the arguments put forth by those who are identified as Catholic?

Some explanation for this might be found in the fields of cognitive and social psychology. A burgeoning literature in law has copiously borrowed from these disciplines over the last several decades as legal scholars have sought to develop new ways to think about social problems and to improve the formation of legal rules and the process of adjudication. For example, some legal scholars explored the phenomenon known as “implicit bias” in the form of stereotypes and attitudes towards groups and individuals based on race and gender. Notwithstanding a person’s overt rejection of racial prejudice, he or she may unconsciously harbor a negative evaluative disposition toward members of a racial group or hold a mental association between that group and a given negative trait.⁶⁹³ These legal scholars suggest that a correct understanding of this phenomenon can inform how the law should approach anti-discrimination and affirmative action in employment,⁶⁹⁴ and the treatment of racial minorities under the criminal law.⁶⁹⁵ Others have examined the phenomenon of “motivated

and Abortion Policy: Casey as “Catch-22,” 42 J. CHURCH & ST. 69 (2000); Paul D. Simmons, *Religious Liberty and the Abortion Debate*, 32 J. CHURCH & ST. 567 (1990); John Morton Cummings, Jr., Comment, *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 CATH. U. L. REV. 1191 (1990); Karen F.B. Gray, Case Comment, *An Establishment Clause Analysis of Webster v. Reproductive Health Services*, 24 GA. L. REV. 399 (1990).

692. See, e.g., Geoffrey R. Stone, *Same-Sex Marriage and the Establishment Clause*, 54 VILL. L. REV. 617 (2009)

693. See Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006).

694. Tristin K. Green, *Race and Sex in Organizing Work: “Diversity,” Discrimination, and Integration*, 59 EMORY L.J. 585 (2010); Jerry Kang & Mahzarin R. Banaji, *Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 84 CALIF. L. REV. 1063, 1064 (2006).

695. L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035 (2011); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124 (2012).

reasoning,” which “refers to the tendency of individuals to conform their assessments of evidence—from empirical data to logical arguments, from credibility assessments to brute sense impressions—to some goal extrinsic to factual accuracy.”⁶⁹⁶ “Cultural cognition” is a type of motivated reasoning that “promotes congruence between a person’s defining group commitments, on the one hand, and his or her perceptions of risk and related facts, on the other.”⁶⁹⁷ “Identity-protective cognition” is a kind of motivated reasoning “that occurs when individuals selectively credit evidence in patterns that affirm the status of groups to which they belong.”⁶⁹⁸

Although untested empirically in this context, concepts like implicit bias and motivated reasoning may provide a potentially powerful explanation for why the critique of Legal Realism by Catholic legal scholars received so little attention in the standard account of American legal history and why the authors who did acknowledge the work of these Catholic scholars dismissed their contributions in such a derisive manner. The authors who responded to the Realists were, quite conspicuously, Catholic, and both the defenders of Realism and the legal historians of the era identified them as such. Indeed, the fact that some Catholic critics were Jesuit priests was clearly a point of some interest for some historians.⁶⁹⁹ It is, of course, stating the obvious to note that Catholic priests have been the victims of vicious stereotypes throughout much of American history. Dismissing their critique as “theological” and “religious”—as mere “proselytization”—both affirmed the in-group status of the majority of non-Catholic and secular legal academics and gave a ready-made answer to those who might otherwise feel challenged by a natural law critique of Realist premises. Yes, indeed, “We are all realists now.”⁷⁰⁰

One factor that might account for this phenomenon is a lack of interaction on the part of non-Catholic faculty with Catholics. In the make-up of law school faculties, Catholics are under-represented relative to their percentage in the general population. According to a

696. Dan M. Kahan, *Laws of Cognition and the Cognition of Law*, COGNITION, Feb. 2015, at 56, 58 (emphasis omitted).

697. Dan M. Kahan, David A. Hoffman, Donald Braman, Danieli Evans & Jeffrey J. Rachlinski, “*They Saw a Protest*”: *Cognitive Illiberalism and the Speech–Conduct Distinction*, 64 STAN. L. REV. 851, 859 (2012) (internal quotation marks omitted).

698. Kahan, *supra* note 696, at 58 (emphasis omitted).

699. Duxbury, *supra* note 45, at 163.

700. KALMAN, *supra* note 30, at 229.

survey conducted by James Lindgren in 1996, Catholics and Orthodox Christians make up 26% of the full-time working population, but they account for only 13.7% of law school faculty positions. By contrast, Jews account for only 2% of the general working population but make up 26.4% of law faculty.⁷⁰¹ In and of themselves, these figures are not evidence of anti-Catholic bias on the part of law school faculties. They do not show that Catholic candidates for law faculty positions have been discriminated against in the hiring process. Moreover, these figures do not indicate the distribution of Catholic and Orthodox Christians among various law schools.⁷⁰² Perhaps most important of all, these figures do not indicate whether those law professors identifying themselves as Catholic are only nominally Catholic, practicing Catholics who participate in the liturgical life of the Church but who separate their faith from their professional life, or Catholic intellectuals—scholars whose life and work are informed by the nearly two-thousand-year-old Christian intellectual tradition. These figures do, however, suggest that those individuals who might be predisposed to be somewhat more sympathetic to a Catholic point of view are under-represented in the legal academy.⁷⁰³

Although no empirical study on the implicit bias or motivated reasoning of law professors with respect to Christians generally or Catholics specifically (if any) has been conducted, a recent study of law school rankings indicates that some such bias exists. In 1999 Monte N. Stewart and H. Dennis Tolley noticed that, in the *U.S. News & World Report* rankings of the nation's law schools, academics tended to rank

701. Eugene Volokh, *Diversity, Race as Proxy, and Religion as Proxy*, 43 UCLA L. REV. 2059, 2073 n.23 (1996) (citing James Lindgren, *Measuring Diversity* tbl.2 (May 26, 1996) (unpublished manuscript)); see also James Lindgren, *Conceptualizing Diversity in Empirical Terms*, 23 YALE L. & POL'Y REV. 5, 8 n.11 (2005) [hereinafter Lindgren, *Conceptualizing Diversity*] (referring to the same study); Lindgren, *supra* note 525 (providing an updated version of the study).

702. That is to say, it may be the case that Catholic faculty, though underrepresented at law schools as a whole, may be present in larger numbers at Catholic schools.

703. Elsewhere, Professor Lindgren has argued in favor of affirmative action with respect to race and gender in the process of law school faculty hiring. Lindgren, *Conceptualizing Diversity*, *supra* note 701, at 5. This, he believes, is justified because of the historic exclusion of women and racial minorities. Notwithstanding the rationale of “diversity” articulated by schools, he rejects the notion that law school hiring practices are actually based on the goal of achieving a diversity of viewpoints among faculty: “On most law faculties, the groups that would provide the most viewpoint diversity would be Republicans, conservatives, and evangelical or fundamentalist Christians,” *id.* at 8, yet there hardly seems to be a rush to hire candidates of this sort.

religiously affiliated law schools lower than did lawyers and judges.⁷⁰⁴ Although the rankings that secular schools received from academics and practitioners also diverged, the divergence was not as significant.⁷⁰⁵ The authors then decided to expand their investigation to cover the period 1999–2003 and to take into account certain variables that might explain the divergence.⁷⁰⁶ They concluded that “[t]he divergence between the respective assessments of academics and practitioners of religiously affiliated law schools is sufficiently greater than their divergence relative to secular law schools to be statistically significant”; that “[t]he more conservative a religiously affiliated law school is generally perceived to be relative to contemporary cultural/moral issues, the lower the academics’ assessment is, compared to that of the practitioners”; and “[t]he divergence . . . is not due to any differential in scholarly activity as measured by the number of articles published annually either per school or per faculty member.”⁷⁰⁷ Thus, the ranking of religiously affiliated law schools by law professors as a whole seemed to turn on the negative value they attribute to a religious voice and presence in legal education.

V. CONCLUSION

In this Article, we have described the widespread and thoughtful intellectual response to Legal Realism set forth by leading Catholic legal scholars during the 1920s–1940s. Although the scholarship on the Legal Realist movement is voluminous, this literature has either ignored, or casually dismissed, the contributions of these contemporary Catholic legal scholars. This gap is surprising because, as demonstrated above, the critiques offered by Catholic legal scholars constituted the single largest body of criticism directed at Legal Realism. This gap is doubly surprising because the arguments offered by Catholic legal scholars were generally thoughtful and nuanced, in large measure because they built on the worldwide Neo-Scholastic revival then taking place. This Article has sought to provide a more balanced account of what these authors said and in so doing reintroduce their critiques into the still-ongoing conversation concerning Legal Realism and its legacy.

704. Monte N. Stewart & H. Dennis Tolley, *Investigating Possible Bias: The American Legal Academy’s View of Religiously Affiliated Law Schools*, 54 J. LEGAL EDUC. 136, 136 (2004).

705. *Id.*

706. *Id.* at 137.

707. *Id.*

We described these all-but-forgotten Catholic legal scholars as a jurisprudential movement, similar to their Legal Realist interlocutors. Like other intellectual movements, these Catholic scholars sought to institutionalize their movement in various ways. As we illustrated, their ultimate failure to do so helped lead to their movement's eclipse and then collapse in the late-1950s.

We ended by suggesting why later historians have failed to either acknowledge or appreciate the contributions made by Catholic legal scholars during this period. We argued, based on these historians' own statements and other circumstances, that this absence is best explained by the marginal place of Catholicism in American intellectual life, as well as the historians' own differing jurisprudential and religious commitments.