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John G. Hervey

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CHRISTIAN PRECEPTS IN THE COMMON LAW†

JOHN G. HERVEY*

I BRING YOU THE GREETINGS of the official family of the American Bar Association and of the Section of Legal Education and Admissions of that Association in whose cause I have labored for almost fourteen years. Those of us who are familiar with your institution share with you the pride in your accomplishments during the past decade. We are as thrilled as you are by your plans for even greater excellency.

I come now to address myself to a subject which has intrigued me for many years. Bear in mind please that what I now have to say is strictly personal. The ideas I propose to advance today have not been submitted to the Council for consideration. It is simply that your speaker has labored in the vineyard of legal education for more than thirty years. He has certain fixations which he believes are entitled to merit and he now shares them with you. But these fixations are not intended, in any manner, to reflect the views of the Council of the Section or of the American Bar Association.

Some years ago I expressed the thought that the Church-related law schools of America should be different from secular institutions — that such schools unlike those which are supported out of legislative appropriations, in training the lawyers of the future, should consciously synthesize the Christian precepts with knowledge of the law and with professional responsibility. It has been my practice each summer to peruse the catalogues of the approved law schools and my readings disclosed no substantial differences between the programs offered in the various law schools, *i.e.*, whether Church-related, public-related, or independent. In some of the metropolitan areas, wherein law schools of all types are operated, the catalogue statements disclosed no differences in the stated objectives of the several schools. True it is that the words have not been the same, but the stated aims could not have been more identical if the deans of the several schools had exchanged drafts prior to publication.

† The following is the text, in part, of an address delivered at the 1961 Law Day Banquet of Saint Mary's University School of Law in San Antonio, Texas.

* Dean and Professor of Law, Oklahoma City University Law School.

There are reasons for some identity of objectives irrespective of the type of institutional attachment. There is the obvious time pressure with which both lawyers and law schools are all too familiar. There is an ever-expanding range of technical subject matter that must be covered within the time period allotted to law study. The three-year program for full-time students and the four-year program for part-time evening students have become fairly standardized throughout the law school world with a departure from standard practice in only a few institutions. The time limitation and the lengthening range of materials to be covered have been discussed and rediscussed in formal meetings of law school people. Few schools, however, have been so bold as to venture forth on extended programs.

A concomitant of the limited time factor has been the specification of bar examination subjects in the rules governing admission to practice in the several states. Since the traditional law school program is geared to the preparation of graduates for immediate entrance into the practice of law, the curriculum planners, in every law school, have perforce had to keep in mind the "bar exam hurdle."

If you will indulge me an aside, I shall return immediately to my theme. I would like to say that I do not acknowledge the validity of the argument, made by some Church-related law school teachers, that the time limitations and the bar examination hurdles make it virtually impossible for a Church-related law school to be different from a secular school. In teaching the bar examination subjects within the traditional three-year and four-year programs, a law faculty in a Church-related school, can, with the will to do it, avoid

the cynicism and moral indifferentism which pervade much law teaching in the secular institutions. The faculty members can, even now, delineate and underline the Christian foundations of the common law which they now teach. The excuse that "time does not permit" or that "bar exam subjects have precedence" is wholly unacceptable to me. Every law teacher in every law school, non-secular as well as secular, could, if he would exert himself, infuse the Christian precepts into every course presently taught in the law schools.

And now, with that off my chest, to return to my theme. Seven years ago I said that I believed firmly that every Church-related law school owes an obligation to its sponsoring parent, to the profession, and to the public to be served, to emphasize the Christian precepts which are back of the common law. The matter has been taken seriously by the faculties in a few of the schools. In the reshaping and implementation of their objectives, they have given heed to the exhortation of Saint Thomas More that "we cannot desire what we do not know nor can man achieve what he does not understand."

In the Spring, 1961 issue of *The Catholic Lawyer*, published by the St. Thomas More Institute for Legal Research of St. John's University School of Law, there is a provocative article styled "Society Challenges The Lawyer" by Vice Dean Theodore H. Husted, Jr. of the University of Pennsylvania Law School which merits a careful reading by every law school teacher. He states the problem thusly:

Members of our profession are largely responsible for our political and constitutional heritage based upon the existence of a rational order of truth and justice which man did not create, but which he

could discover. From this tradition the founding fathers drew the concepts of freedom under law, of justice, of human equality, of representation and of consent. The legal profession can be justly proud of this contribution, but pride in this genesis does not excuse us from the obligation of stewardship. If our profession sired our constitutional system, we have all the more obligation to see to it that it works — that your nation does not lose sight of those self-evident principles upon which it was founded. In carrying out our obligations of client loyalty, we must not ignore the fact that there is a law beyond the letter of a statute, beyond the doctrine of *stare decisis*, to which we and they are subject. If our loyalty to our clients and our pride in our technical skills cause us to lose sight of justice and social responsibility, we breed contempt for law. We ask the public to show respect for law and lawyers while we depreciate our currency or peddle shoddy merchandise under the label of law.

Dr. John Wu, distinguished professor of law at Seton Hall University, has well said:

It is no exaggeration to say that Anglo-American Jurisprudence — the Common Law of England before the 19th and the Common Law of America since the 18th century — is permeated with the spirit of Christianity to a greater degree than any other system of law except Canon Law. You will find dark spots here and there; but where the Common Law is at its best, you feel that Christ Himself would have smiled upon its judgments.

Mayhaps your reaction is: "Well, Hervey, so what? What can the law schools do about it all?" And may I in turn ask whether the Christ would, if present today, smile upon the judgments of our courts or give His blessing to the innumerable statutes on the law books? And if not, then why not? I doubt that He would smile upon the judgments or applaud the statutes. And the reason therefor would be because

the law schools have not delineated and underscored the relationship of our inherited legal principles and the Christian precepts of justice and human worth.

There is much that the law schools, especially the Church-related ones, can do about it. Each law teacher can place the emphasis where he pleases in each course. He can develop or ignore the Christian precepts. He can present the law as the product of economics or of history or of sociology. He also can show it to be right reason in an attempt to promote justice among God's highest creations. In evaluating legal problems yet to be solved the teacher can proceed cynically, casuistically or purposively. If he proceeds purposively, his starting point can be the natural law or Freudianism, Marxism, Existentialism or any of the other fads of thought.

The highest work and most challenging task today facing any Church-related law faculty is to inquire and judge as to each course: What are the relationships of the chief problems of this course to Christian precepts? How can the course content be infused with Christian concepts? What fixed legal doctrines, to be covered in this course, contravene the moral law and ethical values? What can be done in this course to bring the law back to the point where the Christ, if present, would smile on the judgments in this field?

Believe me when I say that the field is ripe. The secular institutions have no monopoly on educating for the legal profession. During the academic year there are 38,158 law students enrolled in the undergraduate divisions of the A.B.A. approved law schools in the United States. Significantly, more than 29 per cent, or 11,225 to be exact, are enrolled in the Church-related schools — 6,207 of the 11,225 are

enrolled in law schools attached to Roman Catholic institutions of higher learning. Assuredly 29 per cent of the undergraduate law school population is sufficient to make an imprint upon the profession in the years ahead if there be the will on the part of the teachers in the Church-related institutions to be up and about the job at hand.

Some years ago, upon receipt of a copy of the earlier address to which I have referred, the dean of one Church-related school wrote me that the address had been made "required reading" for all members of his faculty. He asked that I delineate in greater detail. With your indulgence, I should like to explore specific delineations in a few of the fields covered in every law school.

Permit me to take first the "obligations imposed by law." These are commonly covered in the course on negligence. Moral responsibility is a Christian precept. The Scriptures teach the accountability of individuals for their wrongful acts. The common law follows the Christian concept that liability for harm occasioned by one party and suffered by another should be related to the moral responsibility of the person. But the notion that legal liability should follow fault has been attacked in recent years. The doctrine now being urged, both in the courts and in the legislative halls, is that damages for injuries suffered should be borne by the party better able to bear them. This doctrine completely ignores the Christian precept of moral responsibility.

There are some circumstances in which the law imposes liability regardless of fault. The liability of innkeepers and public carriers immediately comes to mind. These are instances in which the common law was initially expounded by the judges. In

the field of industrial employment there is also liability irrespective of fault on the part of industrial workers engaged in hazardous tasks. But here the liability was imposed initially by legislative enactment.

In teaching this area of the law, the astute teacher can explore the moral justification of a legal rule which requires one sans moral responsibility to bear the loss for the harm suffered by others who are morally responsible. And this more especially in posing hypothetical cases for discussion respecting unsettled problems in the field.

Those who now study in the law schools will be the makers and the expounders of the law of tomorrow. Let us never forget that fact. The imprint which is made on these lawyers in embryo will carry over. Permit me to illustrate. We are rapidly becoming a nation of "brand-name consumers." Madison Avenue is devoted to the task of making America brand-name conscious. We seldom purchase a commodity as such — we ask for and purchase brand-name products all the way from the cradle to the grave. Should manufacturers of brand-name products be held liable? If the consumer suffers injury as a result of the use of a brand-name product, should the manufacturer thereof, who is without fault, be held liable at law on the theory that he can better protect himself via insurance and thus spread the costs among all consumers of said product? How far should public policy go in decreeing strict liability without moral responsibility? Frankly, I do not know. But the generation of lawyers now being trained in the law schools of the nation will have to answer the question when they come to sit in legislative halls and on the bench. I seriously question whether the training we now

give them will be adequate for the tasks ahead.

Let me shift to another field of instruction — the field of criminal law and procedure. The Christian precept of moral responsibility is being perceptively eroded in the criminal law field. The do-gooders and certain of our sociologists and criminologists have set about consciously to change the criminal law. Say they: "Society, not the individual, is responsible for the criminal acts of men." They argue that the emphasis in the criminal law should therefore, be upon rehabilitation and not upon punishment; that punishment does not deter criminals; and that thus the law should not convict men of crimes in order to punish but in order to rehabilitate them.

We have expended millions of dollars upon rehabilitation, and crime in the United States today is more rampant than ever. And the number of juvenile offenders is staggering. Why? Quite candidly, I think that it flows in large part from the de-emphasis on moral responsibility — because the fear of certain punishment has been removed. I do not like it. I would definitely shift the emphasis back to certain punishment for deliberate departures from righteous moral conduct.

I have mentioned the possibilities for emphasis of Christian precepts in the fields of negligence and criminal law. The whole field of public law is ablaze with opportunities to underscore the Christian precepts. This is the area of the law in which public policy, more than in any other field, has been and will continue to be fixed by legislative bodies in which the lawyers exert the greatest influence. Public policy circumscribes individual rights. As Dr. Sheldon E. Elliott, Director of the Institute of Judicial Administration and Professor of

Law at New York University, has well said:

The Congress or a State Legislature in a single session can produce more law that impinges on or vitally affects more people than does the average output of a Supreme Court in a decade.

The modern state constitutions generally declare that all persons have the inherent right to life, liberty, the pursuit of happiness, and the enjoyment of the gains of their own industry. The forerunner of such is, of course, the Great Charter of King John, the Magna Charta, granted at Runnymede on June 15, 1215, which expressly provided: "We also have granted to all the freemen of our kingdom, for us and for our heirs forever, all the underwritten liberties, to be had and holden by them and their heirs, of us and our heirs forever," and thereafter delineated those liberties at length. It goes back also to the unanimous Declaration of the thirteen United States of America, of July 4, 1776, commonly referred to as the Declaration of Independence, which, after referring to the Laws of Nature and of Nature's God which permit a people to dissolve the political bands which have connected them with another government, expressly declared: "We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty, and the pursuit of happiness."

Every constitution of every modern political organization contains its bill of rights. It is to insure individual rights that government is instituted among men. If the individual rights thus guaranteed are to be enjoyed then perforce legislative fiats do not necessarily constitute law. If a legislative enactment contravenes individual

rights as delineated in the basic law, the courts decline to follow the legislative decree. The real lawgiver is thus not the legislature which enacts the statutes but the judges who expound them.

The rights and liberties of the individual, as we well know, are usually stated in general terms. For example, the due process clauses of the fifth and fourteenth amendments of the Constitution of the United States guarantee "life, liberty, and property" but do not define them. Whence come individual rights? Are they implicit God's highest creation? Are they conferred by the sovereign? If they be inalienable, as our Founding Fathers decreed, then they antedated the present state. The decisions repeatedly traced them back to the natural law.

Every teacher of constitutional law should expound the "natural law" as the source of human rights. He can search for the fountain of right and contrast the Stoics with Aristotle, and Locke and Rousseau with St. Thomas Aquinas. By a resort to the sources, the teacher can instill in his students, whether they later become legislators or judges, respect for the natural law and Christian traditions of justice, enhance their respect for human dignity and individual rights, and thus turn back the pressures of the age which would cast all men in a common mold to a common end.

Finally, I invite your attention to the field of property law. It covers generally the acquisition, production, allocation, and distribution of rights and interests viewed primarily as sources of wealth.

The Christian precepts decree that property should be respected — wars have been fought on that score. They decree also that the owners thereof acknowledge their

stewardship thereof — wars also have been fought on that score. Finally, they recognize that, under certain circumstances, the owner's rights therein are subordinate to the claims of the "society" in which he lives. But the Christian precepts speak pointedly also on the composition of the "society" which is entitled to make the claims.

Man is created in the image of God. The Christian precepts emphasize the individual. Society, in which man must live, is only a means by which man may realize the potentialities of his creation. Thus the problem of the individual versus the society in which he lives. As one writer has said: "The problem of synthesis is difficult; it cannot be (individual) freedom from society, and (as with Rousseau and the Communists) the freedom of man cannot be equated with the perfection of society — a society which is therefore justified in removing the nonconformist."

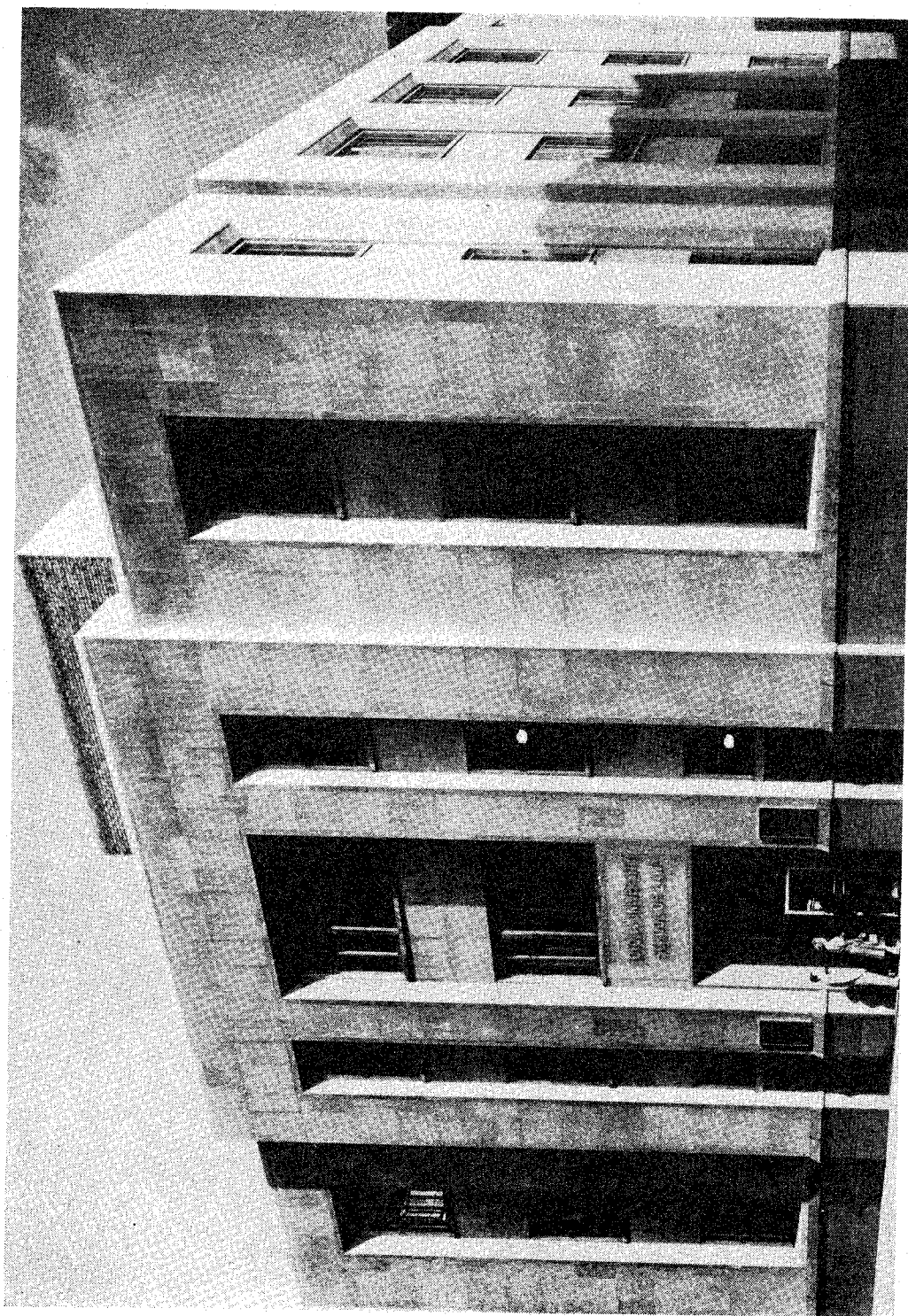
Lawyers need to recognize that they, more than any other organized group, unless it be the clergy, are responsible for the kind of society in which individuals exercise their inalienable rights and God-given freedoms. Shall it be a society which de-emphasizes the spiritual values of the individual and emphasizes the material values of the masses? Shall it be a society which recognizes that mass opinion expressed through government is only a means to an end and not the end in and of itself? Shall it be a society which acknowledges and preserves the freedoms of the natural law? Or shall it be a society of the "organization man" wherein "togetherness" strangles the creativeness of the individual? Shall it be a society which, by the legal process of inheritance taxes and purposeful deflation of the medium of ex-

change, reduces man to a common level? Shall it be a society which decrees that religion is only an opiate to hold the masses in subjection? Shall it be a society wherein nonconformists are extinguished or one in which conformists may be extinguished after they have served the purposes of the leaders? Shall it be a society which endorses the annihilation of a race because allegedly evil blood flows in its veins?

These are serious questions. They cut across fields of the law other than property. Your speaker was never more serious than when he asked them. Remember, if you will, the observation of the late Mr. Justice Holmes, in *Noble State Bank v. Haskell*, when he said that the police power of the state, the power of government to regulate men and things, "may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare" — that the constitutional limitations do not preclude it. Assuredly, if that preachment be carried to its logical

conclusion, America will come out at precisely the same point as Hitler did in *Mein Kampf* and as Hobbes did in his *Leviathan*. What Holmes was saying, of course, is that the judiciary is not the only agency of government charged with the protection of the liberties of the people — the identical obligation rests equally upon the legislative bodies which enact the statutes of the land. Those are the bodies in which lawyers predominate and supply the leadership, if any.

Thus I end, where I began, with a plea that every law teacher in every Church-related law school restudy the Christian precepts and that, insofar as possible, he teach course contents with emphasis on those concepts. I acknowledge that many of the old teachers are past praying for. If left to them, the free men of Western civilization will likely become the slaves of a totalitarian state. But for the younger law teachers in the Church-related law schools, there is time for repentance. The one last hope that Western civilization will survive with emphasis on individual freedoms and human dignity rests with them.



Loyola University School of Law