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BOOK REVIEWS

THE AMERICAN LAWYER: A SUMMARY OF THE SURVEY OF THE LEGAL PROFESSION.
By Albert P. Blaustein and Charles O. Porter. The University of Chicago Press,
1954. Pp. 360.

For the past seven years the legal profession has been engaged in a self-survey of the bar in all its aspects including legal education. This survey was sponsored by a Carnegie Grant and by the American Bar Association at a cost of almost a quarter million dollars. "The American Lawyer" is a summarization of some 175 separate reports which were prepared as the result of research by survey teams of over 400 men and women. This volume covers in separate chapters, the status of the legal profession in society; professional services by lawyers; availability of legal services; public service by lawyers; judicial services; legal education; admission to the bar; ethics of the law and the organization of the legal profession.

The survey contains an imposing array of statistics covering such diversified information as the frightening fact that there are more attorneys in New York City than in twenty-three states combined,¹ and the equally frightening menu of the Chicago Bar Association Dinner in the 1880s which included a mere thirteen courses including turkey, beef, partridge, oysters, venison and roast quail. The survey teams discovered that lawyers were "surprisingly unpopular."² Thankfully, no statistics are forthcoming to establish the degree of unpopularity. It is heartening to know, however, that the lawyers' mortality rate does not differ materially from that of the average American male. There is no separate data reflecting the incidence of ulcers in practicing attorneys. To attempt to give a complete portrayal of the average American lawyer would be an impossible task but this volume does give the average layman a better idea of the ethical and professional standards and education of his lawyer plus a sketch of the services he renders the community in his individual practice and through the organized bar. The failure of the profession to be fully aware of the importance of "public relations" has resulted in some rather unfortunate impressions among laymen. The popular press, as well as mass entertainment media such as the motion picture, television, and radio have not endeared the attorney to the public. The other professions have succeeded in a more sympathetic approach to the public than the attorney.

The survey's discussion of legal education and ethics of the law, Chapters VI and VIII, are interesting and provocative. One of the most perplexing problems of the law schools has been the difficulty of encompassing in the traditional measure of three years all of the material which the modern lawyer must utilize in his practice. In the past quarter century, taxation, trade regulation, administrative law, and labor law have been necessarily included in the curricula of most law schools. At the same time basic and fundamental subject matter cannot be eliminated. The result has been over-crowding. The attempted solution of wholesale election of subjects by students has offered no answer. A free election may result in the production of the superficially well-informed tax or corporate expert with no knowledge of rudimentary legal concepts which are intrinsically vital for the practice of the law to say nothing of the demands of bar examinations. Some few schools have attempted to solve the problem by extending the law school curriculum for another quarter or half term.³

1. "The American Lawyer," p. 4.

2. *Ibid.* p. 1.

3. Three and one-half year courses are now offered at Iowa, Minnesota and South-

With the general insistence upon a college degree as a prerequisite to legal education and the ever-present interruption of military service, the extension of law school curricula could well result in the extinction of the "young lawyer" except as a term of endearment. The survey properly identifies this answer to the problem as the "least desirable".⁴

Perhaps the most fertile area of research is in the prelegal education of the student. The fusion of prelegal and legal work will result in the most practicable and efficient use of the materials offered by the law schools. The principal difficulties involved will be a thorough cooperation among the law schools and the various colleges supplying law school material (at Fordham Law School, for instance, the student body includes the graduates of 146 different colleges). The survey also indicates that only one-third of law school students had determined to become attorneys before leaving high school. Most legal educators are agreed at the present time that the prime function of prelegal education is to train the mind, to instill good study habits and, above all, to train the students to read and write English fluently. This is not inconsistent, however, with the pursuit of courses at college which will better acquaint the student with the operation of the business and financial world in which he will practice, particularly in a metropolis such as New York City. Certainly the acquisition of some concept of corporate finance, accounting, and even the operation of a stock exchange will be invaluable background material for a course of study in law school. The survey at least indicates that legal educators are not only cognizant of the problem but are looking toward a closer cooperation with the college preparing the law student.

A study of the replies of some eighty-five law school deans to a questionnaire in 1950 indicated their general agreement upon the importance of inculcating a strong sense of professional responsibility in the fledgling attorney, but there is wide disagreement as to how much and in what manner this can be accomplished. One-third of the law schools which answered the questionnaire offer no material at all in this area. Surprisingly some law school deans felt that the responsibility is not that of the law school but rather of the organized bar. It is difficult to imagine why the law school, which is presumably the normal vehicle for the lawyer's education, should not be equipped to supply this most vital phase of training. How effectively the organized bar could succeed is questionable. It should be noted that out of an estimated 190,000 practicing attorneys in the United States, only 43,000 have joined the American Bar Association. Moreover, there is usually a hiatus between admission to the bar and membership in a bar association. While honesty cannot be taught in the sense of forced honesty, it is incumbent upon the law schools to at least provide some reasons for the adoption by and adherence to a Code of Ethics. In this field the Catholic law school has a special mission and obligation. Recognition of the importance of the problem and the admission of dissatisfaction on the part of law schools with the results achieved may presage a renaissance of interest in Natural Law philosophy with its doctrine of the ultimate source and sanction of Positive Law in a Divine and Eternal Being. Certainly the sophistries which have prevailed have not succeeded in satisfying legal educators or the bar itself.

WILLIAM HUGHES MULLIGAN†

western; three and a quarter year courses are given at Illinois, Pittsburgh, Texas and Southern Methodist.

4. *Ibid.* p. 175.

† Assistant Dean, Fordham University School of Law.

CASES ON CHURCH AND STATE IN THE UNITED STATES. Compiled by Mark De Wolfe Howe. Cambridge: Harvard Press, 1952. Pp. 393.

Supreme Court decisions on Church and State relations have in recent years provoked a plethora of disputatious articles in quarterlies, political, philosophical, theological, historical, and legal. But, with the exception of the customary inclusion of contemporary decisions on the First Amendment within the Case-book compendiums, there is a surprising absence of a volume of cases wholly concerned with this most difficult and complex problem. Carl Zollmann's *American Church Law* which first appeared in 1917 and reappeared in a revised edition in 1933 still remains the classic work on the subject within those years. In 1935 Patrick J. Dignan made the first outstanding Catholic contribution to this field with his volume, *History of the Legal Incorporation of Catholic Church Property in the United States (1784-1932)*. This book made use of the more important studies on the subject to date, including the writings of Dr. Peter Guilday—the leading historian of the Catholic Church in the United States. In 1948 William George Torpey published his work, *Judicial Doctrines of Religious Rights in America*. He covered much the same ground as Zollmann but appearing fifteen years later it is more up to date. Mark De Wolfe Howe, Professor of Law at Harvard University, has supplied a substantial need for a compilation of Cases on Church and State in The United States. We are advised in the preface that this volume is but a preliminary collection of cases and that a much more complete edition of these materials is forthcoming enriched with far more extensive annotations and editorial comment than will be found in the present temporary edition. On the two related problems of religious freedom and separation of Church and State, cases have been gathered from colonial times to the decision of the Court of Appeals of New York in the *Zorach* case of 1951. The chapter headings may invite prospective readers and students of law to use this book. (I) The Dismemberment of Established Churches; (II) The Church as Corporation; (III) The Effect of Ecclesiastical Adjudications; (IV) Police Powers; (V) Education. It is regrettable that such a useful compilation of cases is clouded by technical defects which careful and attentive proof-reading might have obviated.

JOSEPH F. COSTANZO, S.J.†

LAW AND THE LAWS, BEING THE MARGINAL COMMENTS OF A THEOLOGIAN. By Nathaniel Micklem. London: Sweet and Maxwell, 1952. Pp. 122.

This short and compact volume contains the lectures given by the author at the University of Oxford under the terms of the Wilde Lectureship in Natural and Comparative Religion. The recurrent enduring theme is the necessity for the relationship of the three disciplines of theology, moral philosophy, and jurisprudence in order to restore those conditions wherein man may live worthily as a human personality. Alternate extremes have vitiated the fruitfulness of the circumincession of these sciences. The proper distinction between them should not be so broad as to isolate them from one another and neutralize and even render irrelevant their mutually beneficent consequentials. Nor, on the other hand, should they fuse and lose their autonomy; this would arrest their inherent potentials for dynamic development. Correlation and mutual influence are equally opposed to the sterile disjunction

† Professor of Political Philosophy and American Constitutional Law, Georgetown University School of Law.

(insisted upon by some modern schools of jurisprudence) and to the egalitarian immersion of all values, even of transcending religious ideals, under a monistic computation.

The titles of the chapters are: (1) Jurisprudence and Ethics; (2) Jurisprudence and Theology; (3) The Classical Tradition; (4) The Medieval Construction—I—The Eternal Law and the Law of Nature; (5) The Medieval Construction—II—Positive Law and the Law of Nations; (6) Modern Jurisprudence—I—Austen, Kelsen and Duguit; (7) Modern Jurisprudence—II—The Sociological School and the Historical; (8) Natural Law and the Historical School; (9) Natural Rights and Legal Rights; (10) International Law; (11) Corporate Personality; (12) The Concept of Positive Divine Law and the Common Good; (13) Conclusion.

(1) The author justly regrets that the mutual references of law, morality, and religion which from distant centuries have been traditionally maintained as central truths of public life have been thinned out almost to dissolution by a gradual secularizing rationale of the modern age. The moral presuppositions of the law of liability in respect of both criminal law and of torts, the ethical promotion of Equity in historical development, the semantic connotations of ideal justice in *Droit*, *Recht*, *diritto*, and *derecho*, the moral quality of Ownership and of the Law of Contract—to name instances of a Christian heritage—have been denied or ignored with increasing frequency by modern jurists.

(2) This unnatural severance works with the inexorable logic inherent in an absolute to the absorption of all it claims to disallow.

"When thousands, or even millions, of Russian peasants are 'liquidated' in the interests of Communism, they are disposed of in a legal manner; but in their demise an ethical question is involved, with which the moral philosopher is concerned, and a theory of the value of personality, about which the theologian may be heard. Every system of law rests, at least implicitly, upon an anthropology or doctrine of man, which is rather a theological or metaphysical question than a legal. In so far as these modern theories of jurisprudence are descriptive of the law as it actually is, the theologian as such is in no position to criticize their adequacy or exactitude; but their implicit or explicit doctrine of man is clearly within his province. The autonomy of jurisprudence *in suo ordine*, or within its own soke, is not in dispute, but in the consideration of the place of law and jurisprudence in our total and comprehensive view of life, the philosopher, the moralist, the theologian and many others have an interest. A theologian without impropriety may therefore offer a marginal comment upon jurisprudence." (p. 49).

It is factual history that theology and jurisprudence have exercised a mutual influence. The central theological doctrine most telling upon jurisprudence has been the absolute and imperishable value of the human personality created in the image of God endowed with original responsibilities and rights. These divine endowments are as inalienable as they are inherent: inalienable because of man's eternal transcendence, inherent because of the divine creation of human nature. The so-called Realist who discards the divine intention in human history belies his nomenclature: he does not see the whole of reality, he is partial, unphilosophical and unhistorical. We'll grant he is an empiricist. The rejection of the Christian valuation of man in Russia and in Germany has worked to the destruction of the individual and to the misery of society. It spells the doom of the reign of law. But as a witness to the enduring influence of the Christian heritage in the Anglo-American tradition of law—even when it is disowned—the Christian doctrine of man provides the mentality and principles by which law-makers of the legislature and of the courts are providentially guided. The law does not say that man is a child of God but the writ of *habeas corpus* has a theological implication. The inviolability of the individual secured by due process, substantive and procedural, is

dictated by a right to such reverence. But a right presupposes a value of the human person and where that value is denied there is no writ of *habeas corpus*.

(3) The author's brief study of the classical tradition is not wholly satisfactory. Graeco-Roman stoicism conjoined law, right reason, and nature and, accordingly, provided a philosophic (though imperfect) basis for the objectivity of justice as a transempiric, moral order. He apparently fails to discern the salutary consequent of this conjunction. Henceforth law was to be born of the idea of justice, not of religion, and an autonomous science of jurisprudence was made possible of development. The author, too, does not rightly appraise the arresting limitation inherent in stoic monism. Its cosmological necessitarianism left no room for a free personality. Not till

(4) the advent of Christianity did man break through the all-enclosed system of naturalism born of Greek intellectualism and Roman voluntarism which bound the ultimate Good of human existence wholly within City. The author, however, naively dispatches the transition from stoicism to Christianity with an old and uncritical continuity theory still in vogue. "The philosophy of Cicero, taken over in substance by the medieval Church, was fructified and developed by reference to the Christian Scriptures." (p. 30). The author signals out Suarez, the Jesuit theologian-jurist, as representative of the Christian medieval construction to which St. Thomas had contributed the hierarchial divisions of law, original, derivative, and complementary such as the eternal, natural, and positive law (human and divine). St. Thomas provided the natural law *presupponenda* of the juridical order. Law as an ordination of reason as of voluntary determination and congruous with the divine purpose (*lex aeterna*) in creation (*lex naturalis*) constitutes the source of its moral quality, its justice as well as its legitimacy, and establishes the premise for conscientious compliance. It is to Suarez' credit that he laid the proper and due emphasis upon human consent as the efficient cause of the juridical order. The medieval Schoolmen did not, like the Stoics, maintain that law was synonymous with Nature, nor with Universal Reason. But, by means of the metaphysical Jacob's ladder, the analogy of being, they distinguished between the hierarchial orders of essences and attributed to human reason an autonomous active discernment of their teleological exigencies in whose compliment the Divine Exemplar is mirrored. Thus human providence may parallel the divine. On the moral reference to the Divine Law, eternal and natural, rests the righteousness of all human laws, consuetudinary, statutory, and international. "It is the will of God that human life should be organized politically and juridically, because only in this way can man's nature attain to its full possibilities." (p. 47).

(6) The unanimous acceptance of the moral import of human law which extended from the classical age of the Graeco-Roman civilization and culminated in the theological-philosophical synthesis of the medieval schoolmen has prevailed to modern times, when, no thanks to the various theories of jurisprudence, imperative, pure, historical, functional, sociological, and teleological; the science of law is no longer regarded by many either as a branch of ethics or as a handmaid of theology. The walls of the medieval construction have been severely battered by such juriconsults as Austin, Kelsen, Pound, J. Stone, and Savigny. Austin distinguished the science of jurisprudence from the science of legislation to which he assigned the proper concern for the public weal. By reserving to the juriconsult the interpretation of law as it emanates from the naked will of the legal sovereign (without reference to transcendent justice) he paved the way for the *political* abuse by the ruler of the legislative power. Kelsen's pure jurisprudence dealt with law exclusively as a logical system whose characteristic virtue is its own inward consistency and the validity of its basic norm is an assumed hypothesis. Since this norm is normative barely in the sense of

sheer logical direction and not purposive in the teleological meaning, (Kelsen considers "needs" as meta-legal and beyond the purview of jurisprudence),—no ultimate determining reason exists why law should be regarded as binding apart from its utility value. Duguit maintained that the ultimate for law is not the will of legislators nor the deliberate and prudential contrivances of men but the immanent necessities of society at any particular stage of its complicated development. This goes far towards identifying right with the convenience of any existential order. It severs the medieval *Bonum Commune* from the ideal of justice and perverts it into a situational readjustment of the social organism. (7) In reaction to the abstractionism of Austin and Kelsen and in implicit protest against the medieval normative concept of law, Roscoe Pound conceives of jurisprudence as a functional science and laws as processes of "social engineering." Similarly, Julius Stone holds that law exists for the resolution of conflicting social interests to the realization of ever greater harmony. Savigny's *Volksgeist* theory of law (once we dispel the fog of its Romantic *mystique*) identifies law with the prevailing national sentiment of justice. It not only disregards the pre-historic "higher law" of God; it annuls the science of jurisprudence itself. With such an *ethos* National Socialism reaped a harvest of human wreckage.

(8) The apparent or assumed alternate extremes of the "realism" on which the modernists take their stand and, on the other hand, of the "metaphysics" of the natural law doctrinaires takes its rise from a radical misconception. The medievalists rightly would describe the "realists" as empiricists and therefore partially unreal. The historical school would refer to the metaphysicians as unreal, static, non-historical. Both criticisms are with certain reservations salutary. The medievalists, with the exception of St. Isidore, did not give adequate consideration to the historical-sociological presuppositions of law. The moderns are crippled with a maimed anthropology. That the natural law is not static and unrelated to human historical experience is easily refuted by the English, American, and French revolutionary struggles for "inalienable rights"—so excellently epitomized in the American Declaration of Independence. And in our own day even the Red judges at the Nuremberg Trial invoked the "higher law." The contrariety and disjunction is artificial and false. The law of God and the law of men are ordained to one another by divine design and this teleological nexus can only be annulled by cancelling God. The eternal law is not only the supremacy of the divine law and the moral limitation of society as well as of its justice; it also establishes the obligation of recognizing the supremacy of human positive law by reason both of the justice inherent in it and the consent from which it arises.

(9) The ninth chapter on Natural Rights and Legal Rights is exasperatingly muddled. It is a medley of wholly sound statements of ill-phrased questions which suggest a prejudicial answer of a misconception of the relation of pre-historic natural law and of the temporal, mutable law of men, and of a petulant animadversion upon the non-democratic character of the Catholic Church. The author correctly observes:

"It never occurred to the peoples of antiquity that the individual citizen could have rights against society or that man as man has inherent and inalienable rights. It was the advent of the Christian religion which brought with it the sense of the infinite value of the human soul, because man is made in the image of God and called to be a child of God. The Greeks recognized the everlasting law of righteousness or justice which was older than the gods; but man they regarded as essentially a social being, for whom justice meant that he had his due place in society and fulfilled the duties of his office; against society he had no prior rights, for the slave had none; man had his rights as a citizen, that is, as a member of society, but never against society." (p. 82).

But his study of the relation of natural and legal rights actually misconceives both

their nature and purpose. Had the author made appreciative use of the Schoolmen's full complement on the subject he may have averted the inaccuracies he commits. Natural law rights are consequent upon original responsibilities. They are means for the achievement of man's divinely ordained destiny. The primary, secondary, and tertiary principles are cognizable by the proper use of reason and their contextual meaning is definite even when it is general. The apperception of moral compulsion is seriously conditioned by vincible and invincible ignorance, by a subjectively erroneous conscience (in good and bad faith) and the objective dictates of a rightly enlightened conscience. The dual function of positive law must be borne clearly in mind: it is *repetitive* of the natural law, v.g. enjoins by civil force the same commands of the Decalogue; it is *specifying* when it enjoins what is not evident deduction from the natural law. The priority of natural law rights to legal rights is not sterile. In default of a legal prescription setting down the conditions for a valid contract, a free consensual agreement is a real contract binding in conscience. The author unfortunately stresses unduly the specifying function of positive law almost to the extent of eviscerating the content of natural rights and their ethical imperative. It is not therefore too surprising when the chapter concludes with an expression of dissatisfaction for the semantics of "natural rights" and "inalienable" and the proposal made that we speak rather of natural claims, with a highly questionable process of reasoning. "Apart from the pre-supposition of Biblical theology, we cannot maintain law in the West as we know and honour it." (p. 89). What of natural theology? What of the metaphysics of man?

(10) The chapter on International Law is very jejune. It comprises a cluster of quotations on the salutary need for observance of international law. Allusions are made to "primary rules," "general sense of civilized humanity," "legal conscience of the contemporary world;" but as the author properly points out, can such a mentality prevail without the foundations of the Christian faith or of a generally accepted concept of the divine order.

(11) On the profound and complex problem of corporate personality the author probes questioningly and without any clear definite resolution. We suggest summarily our own approach to the problem. It is necessary, we believe, to combine a triune study,—the philosophical presuppositions of association, the sociological actualities of historical circumstances, and the juristic synthesis,—toward the comprehension of a moral corporate person, (artificial, not fictitious), analogous to human personality, (neither substantive in itself nor a mere figure of speech) best expressed in Aristotelean categories as a *relatio*. He is obviously annoyed and distracted by the Pauline *Corpus Mysticum Christi*, "a mythology of the Church" much to his own blame because it is utterly alien to the present study.

(12) This chapter on the Concept of Positive Divine Law and the Common Good is seriously marred by misconceptions which the author might have avoided had he consulted either the Schoolmen or the Catholic moral theologians.

"It might not unfairly be said that the Roman Church is governed by Canon Law rather than by the Bible. It is not usually maintained, however, that Canon Law is positive Divine Law, for Divine Law, it is said, must be immutable, and Canon Law can be varied by the authority that uttered it. The argument is curious, for it is claimed that the authority uttering Canon Law is the plenipotentiary of the Most High, and the Levitical law of the Old Testament is received as positive Divine Law, though it is said to have been abrogated in its ritual aspects in the new dispensation that came with Christ. But modern historical inquiry has made it impossible to regard the Levitical code as positive Divine Law, for on its ritual side it is the least distinctive element in the religion of Israel, having innumerable parallels in what we call

'primitive' religion in all parts of the world. It would indeed be proper to call the Natural Law, the *lex naturae*, positive Divine Law, if only it could be reduced to a code, but that it cannot be. It is traditional for Christians to speak of 'the new law,' 'the law of Christ,' 'the law of the Kingdom' as laid down in the Sermon on the Mount; and the Christian ethical code might be deemed positive Divine Law, but there is no such code. The ethical teaching of Christ comes to us in occasional and episodic form; from concrete instances principles may be inferred; we infer principles but are not given rules. In the New Testament there is no ethical system, and the 'law of love' is not concrete positive law, as the lawyers use the term." (p. 106-7).

Let us observe: Divine Positive Law is that law which God promulgates to rational creatures *directly*, i.e. apart from the law that is promulgated by the creative act through the natures of things and to be discerned by the light of human reason. Canon Law is not positive Divine Law but ecclesiastical law promulgated by the Church for its own governance, for the protection of the Sacraments, and for the regulation of secular-spiritual relations. Whether or not Divine Positive Law is mutable or not is not contingent on the eternity of Divine Ordination but on the intrinsic nature of the matter commanded or forbidden. God could never sanctify what is intrinsically and absolutely evil, v.g. blasphemy, fornication, murder, etc.; but God has ordained that certain Old Testament precepts which were sustained with a special divine providence be perfected by the New Dispensation, v.g. the ruling out of divorce and polygamy. (Parents are wont to exercise a similar providence. They would say to their children, do not do this or that unless I am present to see that you will not harm yourself.) The Natural Law is *virtually* the human intellect with the faculty of constructing judgments as to the 'thou shalt' and 'shalt not' of human conduct. *Formally* the Natural Law consists in these very judgments of moral categorical imperatives. *Fundamentally* the Natural Law is the objective reality of natures and their essential relations which give validity to the correctness of these judgments and of their moral compulsion. Whether or not Natural Law can be reduced to a code is irrelevant to Divine positive law. The manner of the origin of the law—whether it proceeds from the original divine act creative of natures or from a distinct divine dispensation—and not its reduction to a code will constitute the basis for the legitimate ascription of *positive* law. The "law of love" of the New Testament is the law of motivation and not thereby in any way a diminution of the commandatory nature of, v.g. the indissolubility of marriage, the injunction against divorce.

(13) In his concluding chapter, the author reaffirms the necessary relation between law and religion. But I cannot help but discern a lopsided emphasis that conceals a fundamental weakness in metaphysics. The argument seems to stress without the proper correlative references the need *for* such a necessary relationship if we would have these beneficent rather than those disastrous consequents. The desirability for such a legal-ethical polarity is *ex consequentiis*; the author's *argumentum* does not directly rest on the *constitutive* norm of morality, i.e., created human nature and its divine exemplar. Frequent references are made to Biblical Christianity and to "faith." "Jurisprudence rests on faith. That it is the end of law to do justice and to render every man his due is a matter of faith, not proof." (p. 114). What is more disconcerting, a Lutheran cloud shades the author's pen. For he casts doubt upon the epistemological (rational) certitude as to the human cognoscibility as well as the intelligibility of the existence and content of the natural law because of the Fall of man.

What began auspiciously with the tremendous significance for man and society of the conjunction of human and divine law weakens for want of a sound philosophy of man. A very laudable argument is drawn for the salutary consequents of a moral-

legal order; but the author does not give adequate consideration to the *ontological* exigencies of such a moral universe; for the validity of ethics is wholly as a prolongation of a sound metaphysics. Apart from this inadequacy (and not all readers might insist upon it) the volume points out serious lessons to our jurists and rightly warns them of the responsibility they must bear for the conditions of society if they would self-enclose their legal science apart from the all-pervading and all-comprehensive moral universe. The author happily combines a sensitive appreciation of the tremendous issues involved with his critical measure of the modern jurists. The black, red, and brown revolutions of Europe are historical confirmations of the perspective he formulates. This is not a cold book to be read only by a lawyer as an intellectual task during office hours. It addresses itself to all who would live as neighbors in a world that has been fragmented by the rejection on the part of some nations of the Hebraic-Christian dispensation and of the medieval synthesis which the Schoolmen, with the light of revelation to guide them, constructed according to the dictates of conscience, the logic of reason, and the exigencies of the nature of man and of society.

JOSEPH F. COSTANZO, S.J.*

* Professor of Political Philosophy and American Constitutional Law, Georgetown University School of Law.