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## *American Legal Education: The Catholic Solution<sup>1</sup>*

**Abstract:** The article examines structural deficiencies in American legal education, emphasizing the neglect of foundational inquiry into the nature and purpose of law. The author argues that the dominance of legal positivism and the abandonment of natural law traditions result in insufficient intellectual and ethical formation of future lawyers. This technocratic approach to legal training contributes to professional identity crises. The proposed solution is the reintroduction of Catholic legal philosophy—particularly the Thomistic concept of the common good—as a framework for understanding law more comprehensively. The case of Ave Maria School of Law illustrates the practical applicability of this educational model.

**Keywords:** natural law, common good, Catholic legal philosophy, legal education

The title of this article is deliberately provocative. It clearly implies that there is a problem with legal education in my country and then asserts that somehow there is a Catholic solution to that problem. I believe both points to be true, and I will endeavor to explain both the problem and the solution.

Before doing so, let me establish my *bona fides*. I was a law professor at the University of Mississippi School of Law for 27 years. In that time, I taught approximately 2,500 students. My specialty was bankruptcy law, commercial transactions, and civil procedure, which are difficult subjects for students, and therefore a challenge for the professor teaching them. As with all appeals to authority, this experience

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<sup>1</sup> This article is based on a speech delivered on May 26, 2025, to the faculty of Cardinal Stefan Wyszyński University in Warsaw. I would like to thank Dean Michał Gierycz and Professor Monsignor Piotr Mazurkiewicz for the invitation to deliver these remarks, and the faculty of Cardinal Stefan Wyszyński University in Warsaw for their insightful discussion.

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does not prove that my opinions are correct or wise; however, I believe that this background does qualify me to at least opine.

What is the problem? Put simply, the way we train lawyers America is incomplete. At least, it is incomplete at the vast majority of the 197 law schools in the country. American law schools fail to produce lawyers who are fully formed, in the sense of understanding deeply what their purpose is.

Let me illustrate the problem with an incident from my own life. I clerked for a major New York City Law firm in the summer after my second year of law school. In the United States, law school is, unlike most other nations, a graduate program that lasts three years. It is not unusual for students to clerk in the summers for law firms or other employers after their first and second years. I was fortunate to be able to pay much of my tuition from those summer jobs.

I split the summer after my second year between the law firm's offices in Los Angeles and New York. For a young person with a middle-class background and no lawyers in the family, it was an extraordinary experience of law practice at a very high level of sophistication, and of the financial rewards that come with it.

To be honest, even as a law student clerk, I had developed some of the bad habits of American lawyers. I had put off producing a research memorandum that the head of the Los Angeles office had asked me to produce. The topic was something called a "subordinated bond debenture", something I had never heard of and certainly did not understand. This was in the summer of 1985 before the internet, Google, artificial intelligence, and sophisticated means of conducting legal research. We had computers, but much of legal research was done using physical books.

Because I had delayed, I was working on a Saturday night in downtown Los Angeles which felt completely deserted. I was alone and having trouble grasping and analyzing the legal issues I had been asked to examine. Amid my frustration, of all things, another skyscraper caught at fire several blocks away. I found myself frustrated, making little progress, while flames came out of a large office building, and while the fire department responded.

At that moment, in frustration and perhaps a touch of dark humor. I asked myself—what am I doing with my life? After two years of law school, I did not have a clear, satisfactory answer.

Fortunately, the practical side of my situation took over. I had a memorandum to finish, I had bills to pay, and I had another year of law school to complete. After that, I needed to find a job. If I were not successful with the task at hand, all those pressures would be more difficult. So, I got on with the task and somehow wrote the memorandum.

In retrospect, this seems very strange to me. Indeed, in reflecting about how we train lawyers, it eventually dawned on me that something crucial is missing from the average American law school curriculum.

Before I discuss what that is, perhaps a summary of what American legal education is in order. I confess that I am not deeply familiar with how lawyers are trained in Poland or the rest of Europe, except the British system with which I am familiar.

As graduate students, American law students already have received a degree in a field of their own choosing. There is no prerequisite degree for attending law school. I, for example, am somewhat unusual in that my undergraduate degree is in chemistry. As an indifferent chemistry major, I knew that I had to do something else, and law school seemed a good fit for my personality and skills.

The American legal system derives from that of England and its common law tradition. We of course have legislatures, both Federal and state, that make law. However, in large swaths of American law, it is judges that make the law. For example, in the law of contracts or of torts it is judges who declare what the law is in the United States.

The original idea behind the common law system is a strange one to the modern, positivist ear, and it is not thoroughly discussed in American law schools. It is that there is a proper, “common” law of contracts or torts that through reason can be discovered. This is an important point. Law is not constructed, it is “discovered.” Judges are trained in reason and are the experts on the law, and therefore they are the group best qualified to declare what the law is. They do so incrementally through cases that come before them.

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The first year of an American law school is devoted to introducing students to the common law through what we call the “case method.” Most of the first-year courses and much of the upper-level are taught by assigning students court cases to read and then discussing those cases in class. Traditionally, it is not the practice for the professor to simply lecture students. Though that is changing somewhat, the case method remains very much in place.

For example, I taught law for 27 years, and I never entered class with a prepared lecture. Indeed, I never entered class with anything other a casebook with notes in the margins of the cases to remind me of the questions I intended to ask students. I also never—not once—used PowerPoint slides in class, and I only made very limited use of the blackboard.

That is not to say, however, that I was unprepared or that my classes were simply my random musings of whatever struck my fancy on that day. I thought deeply about the cases I had assigned and was prepared to see if the students had done the same. This approach makes sense because law teaching for me is and should be as much about training students to think and act like lawyers as it is about conveying the contents of the law to them.

It is the Anglo-American tradition to conceive of law as a trade. Indeed, I believe the medieval philosophers deemed law to be one of the three “learned” professions or trades, along with medicine and theology. For me, what that means is that law school is the place where novice tradespeople, the students, come to buy their tools, not unlike a store that sells woodworking tools to carpenters or paint supplies to an artist. The only difference for the lawyer is that the tools of his or her trade are almost purely intellectual.

This difference is crucial to understand why American legal education is structured the way it is. Michelangelo was born with great artistic talent, but I wager that he was not capable of sculpting the Pietà when he was ten years old. His inherent talent needed to be developed through practice with the guidance of older, experienced master artists. The same is true in all the various trades, from plumbing through medicine, including law.

In my experience, there are very few “Mozarts” who can produce professional work of the highest caliber when they are children. The trades require practice and

guidance to achieve proficiency. Indeed, in English, and I understand in Polish as well, we say that lawyers „practice” law, which affirms through language the nature of the lawyer’s trade. Whether or not one agrees with the view of law as a trade, it is understandable why a society that embraces that model would train lawyers the way we do in the United States.

Which brings us to the question--what is missing from how we educate lawyers?

I first started thinking about that question when I realized something that in retrospect made no sense to me. By that time, I had spent three years in law school, and I had practiced or taught law for over ten years. However, it was only after thirteen years of training and experience as a lawyer that it occurred to me that not once in law school did we ever discuss in class or otherwise the *meaning* of the word law.

This seemed very strange to me. I attended an excellent law school of which I am very proud—the University of Virginia School of Law, which was founded by our third president Thomas Jefferson, the author of The American Declaration of Independence. My professors at Virginia were uniformly brilliant and superb. I practiced law at two of the largest law firms in the United States, and then I went on to teach law for many years, all without considering the *meaning* of the word law. Indeed, the school I attended had the word “law” in its very title. How often do human beings devote large portions of their lives to institutions or endeavors without fully considering their nature?

Perhaps we do it more than we would like to admit, particularly where those institutions or endeavors help us to meet our basic needs. After all, regardless of the meaning of the word law, being a lawyer in the United States ensures a good living and a certain level of status in society. The history of the law school I lead clearly illustrates this point.

Ave Maria School of Law was founded by a man named Thomas Monaghan in the year 2000. Mr. Monaghan had founded Domino’s Pizza decades earlier, which he built from one store in Ann Arbor, Michigan into a worldwide chain with thousands of stores. He did this despite being a child raised in an orphanage run by Polish nuns in Michigan, and despite not having a penny to his name when he began. Mr. Monaghan is a remarkable man.

After decades of toil and business setbacks, he sold Domino's for \$1 billion in 1994. After a few years of buying all the "toys" that billionaires typically buy, he realized that his money had placed his soul in jeopardy. He was always a devout Catholic due to those Polish nuns, but he resolved that he would thereafter devote his financial success to, as he puts it, "try to get to heaven and to bring as many people with him as he can" [catholiceducation.org].

To do that, he asked himself the following question—who in American society other than priests and other religious, has the most influence for better or worse? For Tom, and for any clear-thinking observer, the answer is obvious—lawyers. Therefore, Tom founded Ave Maria School of Law.

As Tom's thinking illustrates, it is no exaggeration to say that being a lawyer in America brings with it prestige and financial reward. But, to repeat, not once in my study to become a lawyer was I asked to think about the fundamental question—what is the nature and purpose of law? However, please do not misunderstand me. It is not as if my professors were neutral on this topic.

In my first semester of law school, my criminal law professor informed us that he was a communist. He would therefore teach us law from a communist perspective. He quickly assured us that we *would* learn the law, but he would from time to time interject a communist perspective on criminal law. To his credit, he did what he promised, and I learned the law despite my aversion to his ideology.

He was not the only one. I had two or three professors who approached law from an economic perspective. In other words, they believe that the structure and nature of law could be explained through economic incentives. I found this approach to be somewhat more congenial to me than that of my criminal-law professor, but their ideology took second place in my mind to simply learning the law.

The same was true of the two or three professors claimed to be "critical legal studies" professors, a phrase that has come back into vogue forty years later. They believed that law is the product of the powerful, particularly as understood through racially based structures in American society.

What I did not have in my three years of legal training was a professor willing to admit, or even to signal, that they believed what every American lawyer believed up until approximately 1940 - I did not have one professor who believed in or even

discussed the natural law. Why is it that from the earliest part of our history in the 17th and 18th centuries until approximately 1940 were all lawyers trained in the natural law as the basis of American law, but by the time I attended law school the phrase natural law was rarely mentioned?

I am not a legal historian, and as I understand it, the history that led to the rejection of the natural law in American intellectual circles is complex. However, I can say that the death of the natural law understanding was clearly signaled in a United States supreme Court opinion when a famous justice - Oliver Wendell Holmes - was quoted favorably as saying „there is no brooding omnipresence in the sky” [U.S. Supreme Court, 1938]. This statement was not crucial to the decision in the case, but it reflected the total victory of legal positivism over natural law in elite intellectual circles.

That victory means that legal positivism is the only legitimate basis for understanding law in the collective wisdom of American law schools. While some of my professors would explain law through an economic, Marxist, racial, etc., lens, it would always be with the understanding that legal positivism, not natural law, that is the underpinning theory of the law.

This is a grave error. If law is based on nothing more human will, then anything is possible as the history of the 20<sup>th</sup> century proves.

This plays out in Law schools in a strange fashion. As I mentioned earlier, we do not discuss the philosophy of law or the nature of legal positivism much. Instead, we concentrate almost exclusively on teaching the nuts and bolts of law. And, remember, American lawyers attend law school as graduate students who can major in any subject as undergraduates. This means that the average American law student has no more sophisticated understanding of the nature of law than I did.

As a result, many lawyers, often in the middle of their career, have a sort of crisis. Without a deep understanding of the nature of law, they begin to wonder what it is exactly that they have devoted their life to. Or, more sadly, they look at their career and can only see the pursuit of money or power on the part of themselves and their clients. In many, this leads to despair and all the problems that result.

It is difficult, however, to speak very much of God in modern American law schools. The culture is too diverse, faith in God is declining, and among those

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who do believe there is division regarding the nature of God. How, therefore, can I claim in the title of this paper that there is a Catholic solution to the present state of law schools in the US?

Fortunately, among the many gifts, the Catholic church has bequeathed to the world a sophisticated political philosophy based upon Her long experience with human beings. Pope Saint Paul VI made this point vividly. In the early 1960s, he was the first Pope to visit the United Nations in New York. I have been an advisor to the Holy See's Nuncio to the United Nations for 25 years. I can assure you that there is no more secular place on earth than the United Nations.

There was thus a great deal of curiosity about what Pope would say. The Holy See had recently become an observer State at the UN. People wondered-- why was the Holy See there, and what would its role be?

The Holy Father provided the answer. He stated that the church had no interest in meddling in the political affairs that take up so much time at the UN. That is not what the Church has to offer. Rather, he said that the Holy See had joined the UN to offer the church's expertise on the human person [Paul VI 1965].

Isn't that a profound and beautiful thought? The Church founded by Christ has 2,000 years of often bloody experience with the nature and foibles of human beings. She joined the United Nations to share that knowledge in the hope that mistakes of human history need not be repeated.

Part of that expertise involves the nature of human institutions, which of course includes law. St. Thomas Aquinas formulated the definition of law 800 years ago, and it has never been matched. Law is an ordinance of reason promulgated by the proper authorities and directed to the common good. The one element of that definition that is not inherent to legal positivism is the requirement that law serve the common good. Obviously, it is necessary to discuss that element of the definition, and to do so one must take a position on what constitutes the 'good' [S. Th. I-II, q. 90, a. 4].

It is my assertion that at least in American law schools we purposely avoid training students to discuss the good of human beings, and that failing to do so leads to law being justified on all of the grounds I mentioned before, and many others, but *not* in terms of serving a common good. As I said earlier, if there is no ultimate

good to which all goods regress in the end, then literally anything is possible. The twentieth century and even more recent history provide ample evidence for this assertion.

Thus, because we Americans are reluctant to speak of an ultimate good, we simply ignore the most important portion of Aquinas's definition of law. Indeed, if one were to take a random survey of 100 American lawyers, I would bet that fewer than, 20% of them could recite Aquinas's definition of law. Indeed, I fear that even 20% is too high, perhaps by an order of magnitude.

This is a great flaw which leads to great harm. The solution is to turn our attention to every legal domain and ask how it serves the good. As a bankruptcy lawyer, I would need to justify (and have attempted to do so) American bankruptcy law by an appeal to the common good rather than simply through economic or Marxian analysis, to name only two alternatives.

We do precisely that at Ave Maria School of Law, and I believe we are unique among American law schools. We teach Aquinas's definition to our students in the first semester, and each of our professors attempts to apply it to their specialty. Our students have an opportunity unique in the American legal academy—to understand the nature of their career in terms of serving the good, as that good is properly defined. If this were the general approach in law schools, I believe there would be greater satisfaction born of a true understanding of the lawyer's role.

How this is to be done? Fortunately, St. John Paul II shows us the way. For example, in his great encyclical *Centessimus Annus*, he among many other things presents a theory of the corporation founded in Catholic philosophy. Stated very briefly, his theory envisions the corporation as a community of human beings united for a particular good, which must in turn serve the common good. The corporation and all human institutions must first serve the good of the human beings which are part of it. In doing so, the corporation, if properly run, will serve the common good. This powerful theory of the corporation provides the basis for truly understanding the law of corporations, and for suggesting ways in which that body law could be improved [John Paul II 1991].

In short, the uniquely Catholic doctrine of the common good, with its reciprocal relationship between the good of individuals and the common good of all provides the tool for analyzing and understanding all law, which is merely a tool which can

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be used for good or for ill. If used for the good, the law will also serve the good of the individuals who are bound by it.. Understanding all of this, particularly as applied to their particular legal specialty would turn lawyers from servants of power or of racial politics or of economic interests into servants of the common good, thus perhaps lessening their despair in the midst of grinding work and bringing forth the truly noble nature of the lawyer's trade.

This approach is particularly important for any law school that calls itself Catholic. In his great encyclical *Ex Corde Ecclesiae* St. John Paul II put forth a vision of Catholic institutions of learning which challenged such institutions to be Catholic in everything they do [John Paul II 1990].

Therefore, in the rules governing our school, we strive to follow the teachings of the Church, including on issues which are difficult or controversial in the modern world, such as those on marriage and human sexuality to name two. We do this not because our Bishop or the Pope tells us to do so, but because we believe that church teachings are the truth, and therefore are laws that bind us. Being valid laws, they serve the common good, which as I have said is the goal of every human institution including law and law schools.

It is therefore an act of love to observe Church teachings, even when it is difficult. This is so because, as the church teaches, loving thy neighbor means nothing less than desiring the good for that person. Once again, the Catholic way boils down to identifying and standing up for the good.

Finally, I believe that this is the message of St. John Paul II when he exhorted the world repeatedly to "be not afraid." As the history of the world since Jesus Christ demonstrates, the world itself often rejects the good, and it does so violently at times. Nevertheless, we must embrace and spread the good. It is our duty as Christians to do so, even in law schools, and even in America.

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