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Cover Page Footnote

The views expressed herein are my own and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit. I wish to acknowledge, with thanks, the assistance of Christopher Lacaria, my law clerk, and T. Z. Horton, my legal extern, in preparing these remarks.

THE CATHOLIC LAW SCHOOL & CONSTITUTIONAL SELF-GOVERNMENT

The Honorable Diarmuid F. O'Scannlain⁺

I

Thank you, Dean Attridge, for that very generous introduction, and for your very kind invitation to deliver the Brendan F. Brown lecture. It is a great pleasure—and an even greater honor—to be speaking to you here at the Catholic University of America Columbus School of Law.¹

My presentation this afternoon coincides with this year's observance of Constitution Day. The importance of the United States Constitution—not only as our foundational charter of self-government and ordered liberty, but also as the cornerstone of contemporary American legal education—can hardly be overstated. Yet I would like to use this occasion not simply to extol its many virtues or to plumb the intricacies of its august provisions. Rather, I propose that, given our current setting and company, we instead reflect on the distinct vocation that Catholic law schools have both to our community of faith and to our country as a whole: namely, to form in character and intellect the next generation of lawyers and to impart in them the wisdom of the Catholic intellectual tradition for application to contemporary questions of law, jurisprudence, and constitutional self-government.

In one of his many insightful letters, John Adams famously wrote, “Our Constitution was made only for a moral and religious people.”² Our pluralist democracy does not require citizens—as some would have it—to check their most deeply held religious convictions at the threshold of the public square. Rather, the enduring principles of right and justice, which our positive constitutional and statutory law presuppose, have historically found many eloquent defenders in men who unambiguously invoked such convictions—from illustrious figures such as John Witherspoon and Abraham Lincoln to the prophetic clergymen, such as the Reverend Martin Luther King, Jr. in the last

⁺ Diarmuid F. O'Scannlain serves as a Circuit Judge of the United States Court of Appeals for the Ninth Circuit. This talk was delivered at the Columbus School of Law, The Catholic University of America on September 15, 2014 for the 2014 Brendan F. Brown Lecture and has been adapted and updated for this article format.

¹ The views expressed herein are my own and do not necessarily reflect the views of my colleagues or of the United States Court of Appeals for the Ninth Circuit. I wish to acknowledge, with thanks, the assistance of Christopher Lacia, my law clerk, and T. Z. Horton, my legal extern, in preparing these remarks.

² John Adams, To the Officers of the First Brigade of the Third Division of the Militia of Massachusetts, in 9 THE WORKS OF JOHN ADAMS 228, 228 (Charles Francis Adams ed., 1854), available at <http://oll.libertyfund.org/titles/2107>.

century's struggle for civil rights. With such inspiring examples in mind, I would humbly submit, that the duty of transmitting our constitutional principles—with which responsibility our nation's law schools are especially entrusted—is not something inconsistent with but, on the contrary, is enhanced by a distinctive and deep religious faith. America's Catholic law schools, accordingly, have a special vocation in this constitutional pedagogy that they most faithfully discharge by remaining true to their Catholic heritage and identity.

II

The relationship between Catholic schools' religious identity and their practical educational mission has provoked much discussion in recent years. Pope Benedict XVI, in his 2008 apostolic journey to the United States, addressed this very University about the “nature and identity of Catholic education today.”³ His Holiness touched, in particular, on two central themes.

In the first place, he called attention to the “communal identity” and the “ethos of our Catholic institutions.”⁴ Catholic identity, he cautioned, is not just “dependent upon statistics” nor “can it be equated simply with orthodoxy of course content.”⁵ Rather, we appraise our schools by their contributions to “the Church's primary mission of evangelization.”⁶ Now by “evangelization,” of course, His Holiness was not speaking of *proselytization*—of using the classroom lectern as a pulpit—but of making faith—that is, belief in and commitment to first principles and the Gospel—integral to education. This role of faith in education is twofold. Given that God is the “transcendent guarantor of the truth he reveals,” as he stated, and that truth cannot contradict truth, the truth accessible to unassisted human reason does not conflict with, but rather bulwarks, that which Holy Scripture reveals or Sacred Tradition transmits to us.⁷ To divorce faith from education, therefore, is to remove the buttress that supports the truth that education attempts to preserve and to transmit. Furthermore, education unintegrated with faith may “engage the intellect” but “neglect[s] the will,” which leads to a “distorted” notion of freedom.⁸ In contrast to the libertine view, which deems an absence of restraint as itself a *desideratum*, “authentic freedom” does not consist in spurning all rules and responsibilities not chosen by oneself.⁹ Instead, freedom, properly understood, is the state wherein our intellect acknowledges and our will conforms to the ultimate ground and standard of choice: namely, truth itself. Thus, by promoting an environment that

³ Pope Benedict XVI, Remarks at The Catholic University of America (Apr. 17, 2008).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

seeks ultimate truth, Catholic education utilizes the freedoms granted to us by the Constitution to explore and to express religious and ethical concerns, developing in students an even more holistic form of freedom that unites will and moral conviction.

In the second place, Pope Benedict recognized that, by integrating faith and education, Catholic schools contribute to the “nation’s fundamental aspiration to develop a society truly worthy of the human person’s dignity.”¹⁰ The Church and her academic institutions help “shed[] light on the foundation of human morality and ethics, and remind all groups in society that it is not” practice “that creates truth, but truth that should serve as the basis of” practice.¹¹ These objective and ultimate truths, which the Church through her teaching function and institutions “illuminates,” are the bases on which public “consensus [can become] attainable” and can “keep public debate rational, honest and accountable.”¹² Without “the essential moral categories of right and wrong,” hope for the common good and effective self-government attained through communal dialogue “only with[er]s, giving way to cold pragmatic calculations of utility which render the person little more than a pawn on some ideological chessboard.”¹³ Pope Francis echoed this sentiment when his Holiness lamented that “in a culture where each person wants to be bearer of his or her own subjective truth, it becomes difficult for citizens to devise a common plan which transcends individual gain and personal ambitions.”¹⁴ Such an amoral society can hardly be said to respect human dignity. Catholic schools, then, are a crucial defense against such degradation of our system of self-government.

Contemporary secular society generally rejects the idea of objective norms independent of each person’s subjective choice, enshrining as “the ultimate criterion of judgment” nothing but “the self and the satisfaction of the individual’s immediate wishes.”¹⁵ Without such objective standards—without an end for human life in light of which we may direct our actions—our perspective narrows into a “relativistic horizon” and, ignoring these greater truths, “the goals of education are inevitably curtailed” and the ends of self-government muddled.¹⁶ Instead of providing an education in which students learn not only to pursue and to know the truth, but also to love and to choose the good, most schools—even many Catholic schools these days—focus on technical training, at best disregarding and at worst affirmatively excluding any consideration of fundamental truths or substantive norms. The resulting apathy, when extended beyond the educational context, threatens to unmoor our process

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Pope Francis, *THE JOY OF THE GOSPEL* 32 (United States Conference of Catholic Bishops) (2013).

¹⁵ Pope Benedict XVI, Remarks at The Catholic University of America (Apr. 17, 2008).

¹⁶ *Id.*

of self-governing, separating it from notions of communal justice and ethics and reducing it into a mere contest of technical aptitude.

Pope Benedict thus emphasized two aspects of schools that offer uniquely *Catholic* education. First, faithfully adhering to their Catholic identity, such schools form their pupils in the ultimate basis for all intellectual inquiries and endeavors—that is, truth itself—as well as for all exercises of the free will. Secondly, our Holy Father posited that Catholic schools have a special duty to the larger political community—and not just to us and to our fellow Catholic citizens. By articulating and defending truth, the Church’s educational apostolate chastens political projects and ambitions in disregard of fundamental norms, and corrects the irresponsible, value-neutral notions of “freedom” that follow from such disregard. The Church’s role in education is thus to serve society as a whole and not just the faithful.

III

Of course, Pope Benedict did not sketch this ideal for Catholic education with law schools specifically in mind. But his remarks given right here at this University, I believe, have great relevance for Catholic law schools in particular. The law is inextricably related to society’s prevailing norms—its view of right and wrong, that is, what it considers justice. These notions imbue even the driest and most technical of legal curricula. Catholic law schools would do well to reflect seriously on what its stated and implied educational priorities suggest about these deeper issues.

As among legal education’s more highly esteemed institutions, Catholic law schools have broadly demonstrated a commitment to excellence. But contemporary metrics of quality for law schools—career placement, faculty credentials, and the incoming class’s LSAT scores—do not even begin to exhaust the standards by which Catholic institutions should assess themselves. Law schools, both Catholic and secular, necessarily focus on imparting a *technique* to their students, a combination of discrete skills—reading cases, writing briefs, oral advocacy—and a distinctive way of thinking and looking at the world that we lawyers can instantly recognize as the marks of a fellow *juris doctor*. But this classical lawyerly training is certainly not the full extent to which the Church can—and should—contribute to the formation of future attorneys.

Without a grounding in the deeper principles of justice—of right and wrong—legal education provides its students with a powerful set of tools but without any clear notion of how they ought to be employed. The ancients had a word for this phenomenon, preserved in our language to this day as a pejorative: sophistry. Ancient Greek sophists offered, in exchange for handsome fees, to teach politically ambitious young men how to make the weaker argument seem the stronger. Without a moral vision—without an objective standard by which to distinguish the just from the unjust, or worthy from unworthy uses of our legal acumen—lawyers risk degenerating into a contemporary class of sophists.

Traditionally, lawyers prized vigorous argumentation on both sides of a legal issue as a means to uncover—not to occlude—the truth. But we should not be surprised if today’s well trained and rhetorically gifted attorneys, inattentive to the deeper ethical underpinnings of law, prefer to win arguments at any cost regardless of the inadvertent violence that their clever advocacy may wreak against the cause of truth. Such an unfounded approach, considering the influential position which lawyers hold in our society, has particularly dangerous consequences when employed by members of our legal profession. Thus, Catholic law schools’ special contribution in ensuring that legal training is not divorced from the service of truth plays a powerful role in preserving a social order grounded in ethical concerns.

Now one might respond that in virtually all law schools today, and in the legal profession more generally, there is great emphasis on professional ethics. Certainly, the American Bar Association and state bar examiners require law graduates to understand and to observe rules governing both actual and apparent conflicts of interest, the duties of confidentiality and loyalty to clients, and the obligation to avoid sharp dealing and self-promotion. All of this regulation is necessary and salutary but, by itself, is a rather brittle foundation. Limiting the *means* by which we conduct our profession hardly informs us of the ultimate *ends* toward which we should direct our practice. A robust Catholic education, deeply imbued in the “ecclesial life of faith”—as Pope Benedict put it—provides just such a broader framework.¹⁷ Catholic law schools should not, and generally do not, rest content in graduating technically proficient and ethically punctilious junior attorneys; such schools also aspire to form in their prospective graduates a vision about what greater purpose a life in the law should serve and the ultimate basis on which any tolerable earthly approximation of justice must rest. That is not to say that this wider view about law and education cannot, to some great degree, be glimpsed in the context of a secular law school. But such a vision for education should be *especially* amenable to Catholic educational institutions, heirs to a robust intellectual tradition in the natural law and cooperators in the Church’s larger mission of evangelization.

This aspiration—to provide law students with a more comprehensive grounding in the principles of justice and right—relates closely to the other principal purpose that well-functioning Catholic schools serve. That is, as Pope Benedict outlined, to serve the whole community beyond the Church, by giving a rational account of the fundamental basis for justice, morality, and ethics. Philosophy and theology faculties may execute this function at a more abstract level—but law schools have the potential to fulfill this duty directly.

In a society such as ours, saturated with statutes and at some times suffocated by regulation at every level of government, the proscription of law necessarily dictates much of our daily conduct. We stop at red lights, recycle our trash, and purchase health insurance because “it’s the law.” The “positivist” view of law—

¹⁷ *Id.*

a subcategory of the “positivistic mentality” the Holy Father specifically denounced—would locate the ultimate authority for these legal obligations simply in the will of the sovereign: the pleasure of the president or the whim of some temporary legislative majority. Of course, litigators must argue about and, subsequently, judges must interpret the positive law as the legislative authority has promulgated it, and not according to any underlying moral principles that they themselves might favor. But this practical respect for the Rule of Law—itsself an important principle of justice—does not mean that we lawyers—or that law schools and law professors—must be blind to those principles that provide individual laws with their content and the law’s prohibition with its morally binding force.

The Catholic intellectual tradition in law, in fact, has much to contribute on this particular topic. Against the various versions of positivism that have cropped up throughout history, Catholic thinkers have consistently pointed back to the concept of natural law—that law, which, as St. Paul says, is written on our hearts, that is accessible to human reason as such, and which provides an enduring basis for right action.¹⁸ I have spoken and written elsewhere about natural law and its relationship to the American legal regime and judiciary. No doubt, the topic would exhaust many lifetimes’ worth of prolific scholarship. Suffice it to say, for today’s purpose, that natural law, properly understood, is not simply a body of rules and prohibitions. Rather, natural law is a set of principles that derive from a comprehensive view of man’s purpose and ultimate destiny. When we divorce our understanding of rules that govern conduct—such as many of our laws—from consideration of ends and purposes, we risk subjecting human life to crude and base utilitarian calculations. As I mentioned earlier, Pope Benedict distinctly warned Catholic educators to avoid this danger, and it is one that especially threatens the study and practice of law.

In fact, the namesake of this lecture, Brendan F. Brown, the great former dean of this law school, identified a similar problem in his day. Among his many notable interests and activities, Dean Brown also tirelessly advocated that Catholic law schools draw on our faith’s vast intellectual resources to contribute to, and even to direct, the academic and public debates about law. In particular, Dean Brown cautioned Catholic law schools against simply imitating the teaching methods of their secular peer institutions and assuming their same philosophical principles. Dean Brown believed strongly that the Church’s intellectual tradition in law—especially natural law, as exquisitely synthesized by St. Thomas Aquinas and his school of thought—should provide the jurisprudential foundation at Catholic law schools. This not only meant that jurisprudence classes would expose students to such philosophies, but that all aspects of the curriculum would reflect those principles that comport closely with a thoroughly Catholic perspective on law. Dean Brown saw, in his day, the dangerous potential in ideologies such as positivism, which have “repudiated”

¹⁸ *Romans* 2:15.

all basis for law “in society, save economic expediency or the will of politically powerful majorities.”¹⁹ Accordingly, he along with many of his contemporaries discerned a distinct vocation for the Catholic legal academy, not only to educate the students in their charge but also to affect the wider community.

Alexis de Tocqueville, in his *Democracy in America*, likewise emphasized the importance of the legal academy in American society at large. He highlighted the influence that citizen-lawyers have in shaping public discourse. “[T]he spirit of the lawyer, born inside the schools and the courts, . . . spreads little by little beyond their precincts; it so to speak infiltrates all society,” ultimately shaping the understanding of “the people as a whole.”²⁰ In contemporary American society, for example, this legal ascendancy gives rise to the mode of public debate about such critical societal issues as the redefinition of marriage or euthanasia. So given this extraordinary breadth of influence that Tocqueville keenly discerned, it is all the more apparent how significant a role American Catholic law schools have to play not only in shaping American law, but also, and especially, in forming the outlook and character of the American people. Recalling the words of John Adams, “a moral and religious people” being necessary for the American project of constitutional self-government, the importance of Catholic law schools in molding American legal—and general—culture can hardly be overstated.

IV

Your own University president, John Garvey, eloquently explained his vision for Catholic education in a 2010 article published in *First Things*, in which he echoed the thought of Cardinal Newman, writing: “The goal of the Catholic university . . . is to unite intellect and virtue, which man’s fallen nature has allowed to drift apart. We engage the whole person and point him or her toward knowledge and true happiness. The two lie along the same axis, and are best sought in concert.”²¹ Your Columbus School of Law mission statement further builds on this understanding. “As a law school,” it reads, “we strive to discover, preserve, and impart the truth in all its forms; to achieve academic distinction in the Catholic intellectual tradition; and to assure, in an institutional manner, faithfulness to the university’s Christian inspiration.”²² This is entirely admirable, and indeed very much representative of the vision that Pope Benedict laid out here at Catholic University six years ago.

¹⁹ Brendan F. Brown, *Legal Education in Philosophical Perspective*, 3 U. DET. L.J. 181, 192 (1939-1940).

²⁰ Alexis de Tocqueville, *DEMOCRACY IN AMERICA* 257–58 (Harvey C. Mansfield & Delba Winthrop trans. & eds., 2000).

²¹ John Garvey, *The Idea of a Catholic University*, *FIRST THINGS*, Nov. 2010, available at <http://president.cua.edu/articles/first-things-2010.cfm>.

²² Mission Statement, Columbus School of Law, The Catholic Univ. of Am. (Dec. 18, 2009), available at <http://www.law.edu/missionstatement.cfm>.

All this said, I would like to conclude by sketching out a couple of principles according to which Catholic law schools such as yours might best maintain and reinforce their uniquely Catholic identity and tradition in the face of the dominant secular positivism and perfidious political correctness in today's legal culture. I offer these thoughts not as an academic, an expert in legal education, or spokesman for the institutional Church, but as an interested observer, a fellow student of the law, and a member of the Catholic laity.

It is important first that the ambience of Catholic law schools be ever infused with the Church's rich natural law tradition. Graduates of Catholic law schools should be uniquely familiar with Thomistic legal thought such that upon entering the contemporary legal world, they will be able to glimpse modern issues not only as the secular mindset frames them but also through the lens of that law which is indelibly written upon our hearts. In perpetuating and bolstering this distinctly Catholic perspective, such law schools will further counter the insidious "positivistic mentality" that Pope Benedict condemned. Further, Catholic law schools, in adhering to this principle, will thereby continue to suffuse American society with enriched public discourse concerned with the *good* beyond the mere satiation of individual preferences.

Finally, this is a message relevant not only to my fellow Catholic lawyers and aspiring lawyers. The richness of American culture, especially academic culture, has long depended on active and vibrant communal institutions, and on none more than its churches and their schools and universities. Our constitutional order, in addition, presupposes religious pluralism but our Founders remained conspicuously open to—nay, solicitous of—the insights, founded on faith, that their fellow citizens brought with them into the public discourse. The Catholic and apostolic faith which this fine institution upholds and transmits has great and distinctive relevance to the field of law, generally, even as it exists in our contemporary American landscape. All of you should be eager and proud to share this inheritance with our countrymen; and I anticipate that our fellow Americans of good will should welcome the diversity and breadth of vision that our sharing would thus help foster.

Thank you. I will be happy to take any questions you may have.