

# ad. veritatem

ST. THOMAS MORE SOCIETY OF ORANGE COUNTY

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The High Calling of  
the Lawyer  
PAUL A. ALARCÓN

The Seed of the Lily  
JOHN J. FLYNN III



# PRESIDENT'S COLUMN

GREGORY N. WEILER

Our theme for March reflects on conscience and martyrdom. These topics cut to the essence of our calling as Christians.

The mission statement for the St. Thomas More Society centers upon evangelization of the legal profession, a faith integrated into our consciences, reflected by the way we live our lives, and in particular how we practice law. As we begin our Lenten journey in preparation for a late Easter this year, it is good that we ponder how to form our consciences to better conform to the Christian ideal and how our Lenten intentions might help us.

It is self-evident that our society is suffering a plague of badly formed consciences. Catholics know that we have a duty to form our conscience. Like all freedoms, freedom of conscience is subject to the absolute responsibility to bridle such freedom with truth, as objectively ascertainable and knowable.

Rather than giving up ice cream or chocolate this lent, we might consider some more robust formation, like some bubble expanding service to the needy, or the study of some great saints on conscience. Consider setting aside some time to ponder the Easter mysteries.

Matters of conscience are most at issue when a circumstance or decision requires me to engage in self-denial, some dying to self. Some assent to self giving rather than self-assertion. It is a form of martyrdom. In some respects, I envy the martyrs who faced a one-time decision to choose Christ or die, and chose correctly.

While I'm not exactly anxious for a trip to the Coliseum, at times what I would give for the opportunity to sign a once and for all assignment of my free will to God, a "once saved always saved" irrevocable general release to Christ, rather than the lifelong "yes" required of most of us. My prayer for this Lent is that our daily journey in Christ's footsteps continues, and that our bloodless martyrdom is not a burden but a joyful dance.



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The St. Thomas More Society of Orange County is an independent organization sponsored by lawyers and judges who are practicing members of the Roman Catholic Church.

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**IDEALS OF ST. THOMAS MORE**

The legal profession is a high calling with corresponding responsibilities to society. The principal objective of every lawyer is to promote and seek justice. Catholic lawyers pursue the truth in both their spiritual and professional lives. The duty of a Catholic lawyer is to remain faithful to Jesus Christ, His Church and its teachings at all times despite the personal consequences.

**THE OBJECTIVES OF STMS**

- encouraging its members to live a Christian life and apply the principles and ideals exemplified by St. Thomas More in their lives and encourage same in the legal profession.
- promoting and foster high ethical principals in the legal profession generally and, in particular, in the community of Catholic lawyers.
- assisting in the spiritual growth of its members.
- encouraging interfaith understanding and brotherhood.
- sponsoring the annual Red Mass for

elected and appointed officials and members of the legal profession.

**MEMBERSHIP IN STMS**

- Each member of the Society is committed to:
- strive to live an exemplary Christian life and apply the principles and ideals exemplified by St. Thomas More in their daily lives and encourage same in the legal profession.
  - attend monthly meeting of the Society and provide personal support to the St. Thomas More Society.
  - attend and support the Red Mass.

**LAWYER'S PRAYER**

Give me the grace, Good Lord, to set the world at naught; to set my mind fast upon thee and not to hang upon the blast of men's mouths; to be content to be solitary; not to long for worldly company but utterly to cast off the world and rid my mind of the business thereof.

- ST. THOMAS MORE

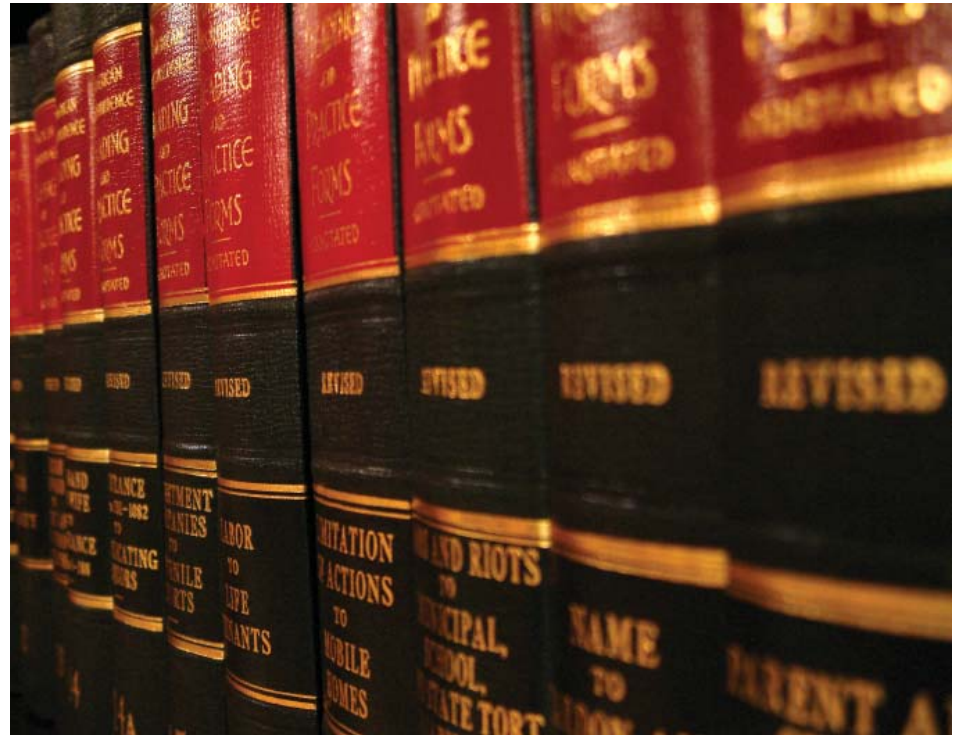
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# THE HIGH CALLING OF THE LAWYER

LEGAL COUNSELING IN LIGHT OF NATURAL LAW

**PAUL A. ALARCÓN**

As Catholics, we recognize that all valid laws find their source in a law whose principles are determined by nature itself, that is, the natural law. The Apostle Paul declared to the Romans: “However whereas the gentiles, who do not have the law, do these things naturally which are of the law; not having this kind of law, they are the law for themselves.” *Romans* 2:14 (Vulgate) (translation my own). One millennium later, the Angelic Doctor defined law as “an ordinance of reason for the common good, from one who has the care of the community, promulgated.” THOMAS AQUINAS, *SUMMA THEOLOGIAE*, Prima Secundae Partis, Question 90, Article 4 (translation my own). Thomas Aquinas went on to identify the natural law as those norms governing the behavior of rational beings with a free will. *Id.* at Question 91, Article 2. Importantly, Thomas Aquinas stated:



“Whence every posited human law insofar as it has the account of law is derived from the law of nature. If such a thing varies from the natural law, it will not be a law but a corruption of the law.” *Id.* at Question 95, Article 2.

As Catholic attorneys in present day America, we live in a world as far removed from that of Thomas Aquinas’s as his was from the world of the Apostle. Nevertheless, Catholic attorneys, their clients, and society could benefit from a renewed appreciation for the natural law. Specifically, Catholic attorneys would do well to examine how, as counselors and advisors, they might more frequently promote just results through legal analysis drawing

not only from positive law but also from the natural law.

An attorney is not merely an advocate, but also a counselor. Rule 2.1 of the *Model Rules of Professional Conduct* states that “[i]n rendering advice, an attorney may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.”<sup>1</sup> In practice this advice is often neglected; attorneys limit their advice to the minimum standards required by positive law. See THOMAS D. MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY* 298 (10th ed. 2008). Such an approach reduces the counseling function to telling clients

<sup>1</sup>Like Aquinas’s notion of ‘law,’ the “rules of professional conduct are rules of reason.” MODEL RULES OF PROF’L CONDUCT, Scope ¶ 14 (2008).



what they must do or not do to avoid the sanctions of positive law.

An attorney who really took to heart the recommendation inherent in rule 2.1 could adopt a counseling approach that recommends appropriate behavior to clients even when that behavior is not within the minimum requirements of positive law. Although neither the basic function of counseling nor the focus on positive law precepts changes, this approach commands an attorney to adjust his advice about positive law in light of natural law norms. In giving his or her advice, an attorney would draw not only from positive law, as expressed by legislators or courts, but also from the precepts of the natural law—even if those norms are not formally part of the corpus of positive law.

For example, suppose a person is sued for the payment of a debt. Upon investigation, his attorney discovers that the suit was filed after the perpetuities period had run. An attorney considering only the mandates of positive law would tell his client that he probably has a strong defense which completely bars recovery. That is all. Depending on the circumstances, a motion for judgment on the pleadings or a motion for summary judgment would be appropriate. Should an attorney who is cognizant of the natural law act differently? Not necessarily. However, natural law reasoning invites the attorney to consider the problem more carefully before giving his advice and, perhaps, even to modify his advice based on his investigations. Thus, the attorney may discover that the suit was late through some slight inadvertence, for example, the attorney submitting the complaint had a family emergency and forgot, or the complaint was lost in the mail, or the party bringing the suit through mere ignorance consulted an attorney merely a little too late, or had trouble locating an attorney because of

financial concerns, et cetera. In such a case, the attorney will likely conclude that he should not only tell the client about the statute of limitations defense, but also other relevant considerations which may call for behavior not required by the existing positive law. For example, the attorney may stress to the client that it is important to pay back debts, that failure to pay the debt may harm the creditor in serious ways, that failure to pay off the debt may affect the debtor's credibility in the community, or simply that it would be immoral to take advantage of the technical defense under the circumstances. After providing this additional advice, the attorney may suggest that his client attempt to settle with the other party and either pay off the debt or perhaps reach an agreement to pay as much as the client is willing or able. There is precedent for such counsel. See 2 DAVID HOFFMAN, A COURSE OF LEGAL STUDY 754 (2d ed. 1836) ("I will never plead the Statute of Limitations, when based on the *mere efflux of time*; for if my client is conscious he owes the debt; and has no other defence than the *legal bar*, he shall never make me a partner in his knavery.").

Of course, the natural law does not bar a client from ever using a purely technical defense, such as the statute of limitations defense, where it is the only valid defense. Purely technical defenses may be appropriate. Often this is so when the defense is used to serve the purpose for which they were created. For example, when the opposing party fails to timely bring the suit in bad faith, as when he is waiting for an elderly adverse witness to die. Similarly, when the debt is asserted so late that it is unfair to expect others to remember or have the means to pay the debt, as with a business debt owed by a retired or deceased person.

This more complete approach opens

up a new world of legal reasoning. An attorney takes on a special role—namely, engaging in legal reasoning to develop client-specific mandates which are not actually enshrined in positive law, but which can be offered to clients as appropriate standards of behavior. Thus, an attorney gains the opportunity, in a way, to engage in the law-making function—or at least the type of legal reasoning proper to the formulation of

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laws—not just as a citizen by voting, or a legislator through statutes, or a judge through developing the common law, but also as a counselor.<sup>2</sup> This richer understanding of the counselor role transcends purely technical legal analysis and encourages legal reasoning ordered to justice in a more immediate way. This kind of legal reasoning is, at most, only experienced in law school. It does not merely fit the facts of the particular case to the controlling norms but allows an attorney, in a sense, to reshape the confines of the controlling precepts themselves in light of what the result ought to be.

Beyond the opportunity to engage in aspirational legal reasoning, an attorney who regularly employs this richer method of counseling clients will improve the image of attorneys in the eyes of society. The public will recognize that attorneys who counsel

<sup>2</sup>Since an attorney's counsel to his client is neither binding on the client nor others, there is no risk that such counseling will render the law making process undemocratic.

their clients to do what is right even when positive law does not demand it are using their art to achieve justice rather than unscrupulously striving only for the desired result. Further, the client who opts to do more than is required by positive law also gains some benefit. At a more noble level, he gains the satisfaction of paying his just dues and assisting in accomplishing a just result. More practically, he will generally benefit from a quicker and less acrimonious resolution of his case. Also, he will gain a reputation in his professional community as a fair and reasonable person. Finally, society itself will reap the benefit of legal results which accord more closely to our notions of justice. If such transcendent legal reasoning becomes widespread, it will likely have a beneficial influence on positive law itself.

Undoubtedly, my suggestion will be objectionable to some. After all, the essay encourages attorneys, acting in their capacity as counselors, to interject moral views into the legal process. But this is not so bad for someone who takes the natural law seriously. After all, the natural law is universally valid for rational beings, it is not something which, as modern moral relativists would have it, each individual or society establishes for itself. *See*

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*generally* Gilbert Harman & Judith Jarvis Thomson, *Moral Relativism and Moral Objectivity* (1996). Further, natural law theory, to some extent, is premised on what has been termed the overlap thesis, that is, that legal norms can only find their full expression through some reference to morality. *See, e.g.,* 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*41 (identifying “ethics” with the “natural law”); LON L. FULLER, *THE MORALITY OF LAW* 33-94 (2d ed. 1969) (expressing eight principles of the “inner morality of law” necessary for any true legal system to exist).

Further, an attorney is hired by the client in part to provide counseling about how to act—this counseling need not be limited to the minimum requirements of positive law but can extend to other ethical principles. In fact, attorneys are particularly suited to the task of counseling a client about whether an action is morally, as well as legally, appropriate. Attorneys are experts in positive law and therefore are better suited to merge the demands of morality with the demands of positive law. That is, attorneys are better able to consider the moral dimension of legal issues together with the dimension of controlling positive law. Indeed, the training and experience of attorneys prepare them for critical legal or moral reasoning, whereas most clients are simply unequipped for this kind of analysis. Additionally, clients will find it difficult to remain objective in their moral reasoning because they are focused on their legal troubles. Attorneys will often have a greater capacity to remain objective and thereby aid clients who may be blinded by subjectivity. Finally, an attorney as an officer of the court has a position of trust, expertise, and power in our society which carries with it the responsibility to provide moral guidance to clients in order to ensure that justice is maintained.

I encourage attorneys to improve

their role as counselors by providing advice which goes beyond the minimum requirements of positive law. Of course, each attorney must look at his own practice and clients and judge for himself whether this is possible or practical. Finally, an attorney is only acting as a counselor and must leave the final decision to the client. As with any legal advice, if the client rejects the advice of the attorney, the attorney must either follow the client’s instructions or sever the professional relationship.

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Monthly distribution includes the Catholic legal community of Orange County (**over 1,000 members**), select local parishes, and state and federal judges sitting in Orange County.

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# THE SEED OF THE LILY

**JOHN J. FLYNN III**



Prior to my return to the Church in '92, "conversion" would have seemed to me, if I had even considered the issue, no more than a change of mind or belief, as effortless perhaps as falling off a log, since one merely succumbs to the gravity of a better argument. In one moment, you disagree with the Church; in the other, you agree. But, as we learn from St. Paul's story, conversion is violent, and even produces a kind of death, as Jesus himself intimated. (John 12:24.) Dietrich Bonhoeffer, a Lutheran theologian (who enjoys a high level of esteem in various Olympian Catholic

circles), put it this way:

Jesus' summons to the rich young man was calling him to die, because only the man who is dead to his own will can follow Christ. In fact every command of Jesus is a call to die, with all our affections and lusts. But we do not want to die and therefore Jesus Christ and his call are necessarily our death as well as our life.

**THE SEED OF THE LILY IS PLANTED IN THE SOIL OF CALVARY; THERE IS NO EASTER WITHOUT GOOD FRIDAY.**

To follow Christ, to put the Gospel ahead of every other ideological and emotional predilection and habit, produces a pain so real and powerful that we call it death.

In part because of my own cowardice in the face of that death, I have never been able to read the writings of St. John of the Cross. I do not suffer well, and I am not by nature inclined to know any more than necessary about a "dark night." But I cannot deny the genius of St. John's central insight: It is only a "dark night" because of the infusion of divine light, which the body and even the soul receive with pain, like eyes exposed to the sun when they have known only darkness. The light of divine love is therefore perceived as darkness; suffering ensues. More than once, John Paul II commented on this paradoxical aspect of suffering, which produces within us a terrible emptiness, yet the very emptiness required for the inflow of grace.

The Church, it seems, is built on paradox after paradox: The first last, and the last first, losing one's life to save it, and the ironies embedded in the Beatitudes. All the others point, however, to the paradox of salvation, which reveals the meaning of conversion: The seed of the lily is planted in the soil of Calvary; there is no Easter without Good Friday.

## CALENDAR OF EVENTS

MONTH	DATE	DESCRIPTION	LOCATION
March	Wed, March 16	Fr. Robert J. Araujo, S.J. on the Conscience of the Catholic Lawyer and St. Thomas More	Jilio-Ryan Hunter & Olsen 14661 Franklin, #150 (entrance at rear of building) Tustin, California
April	Wed, April 20	Andrew Zepeda on "He Became a Curse for Me: Understanding the Temptation of Christ"	Jilio-Ryan Hunter & Olsen (same as above)