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**The Attorney and Tax Morality; Censorship; Fair Trade Laws; John Courtney Murray. S.J.; Wolfenden Report; Artificial Insemination; The Case of the Bishop of Prato; Natural Law; Religious Factors in Adoption;**

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## IN OTHER PUBLICATIONS

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### **The Attorney And Tax Morality**

Specialized areas of tax law have been treated in THE CATHOLIC LAWYER from time to time.<sup>1</sup> For a general treatment of the moral problems facing the tax practitioner, however, the reader's attention is directed to a worthwhile article entitled "Conscience and Propriety in Tax Practice" appearing in the *Seventeenth Annual Tax Institute of New York University*. The author, Norris Darrell,<sup>2</sup> treats those tax practices which may not result in disciplinary or criminal proceedings against the attorney but which may, nevertheless, involve serious questions of morality. Proceeding by way of hypothetical cases, the author examines the recurring problems

which crop up in various phases of tax practice, including the ethical decisions required of the attorney in filling out a client's tax return.

The counselling phase is discussed under the heading of "General Advisory Problems." Here the lawyer's permissible latitude in passing on the use of tax devices and in sanctioning the colorable transaction, such as fictitious family partnerships, are considered. The point is made that exploitation of tax loopholes hampers the law-abiding citizen when all-inclusive remedial legislation is subsequently passed. Another topic covered in this section is that of building up the record in anticipation of possible future litigation.

Omitted income, unauthorized deductions, mistakes discovered after the return is filed, etc., are treated in a section labelled "Tax Return Problems." Other portions of the article are devoted to "Post-Audit" and "Fraud" problems; "Influence" and "Fee Problems" (un-itemized bills, improperly allocated charges, etc.). The final section covers "Problems of Public Responsibility."

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<sup>1</sup> See, e.g., Garland, *Charitable Remainders and the Income Tax*, 2 CATHOLIC LAWYER 329 (October 1956); Garland & Cahill, *The Concept of Church in the 1954 Internal Revenue Code*, 1 CATHOLIC LAWYER 27 (January 1955); *Professional Disciplining of Attorneys for Tax Evasion*, 4 CATHOLIC LAWYER 98 (Winter 1958).

<sup>2</sup> Chairman, Mills' Advisory Group Sub-committee on Sub-chapter C; Member of Council and Executive Committee, American Law Institute.

The author concludes in part:

It may well be that some day persons performing so vital a function as those of the tax practitioner in the operation of our self-assessing national income tax system will more generally recognize, as I believe they should, and as many already do, that their work is affected with the public interest and, leaving aside responsibilities to clients with respect to issues joined in battle, will more freely accept a high level of responsibility for leadership in the cooperative effort necessary to the successful operation of the system. Such cooperation may be vital if the system, which is dependent for enforcement primarily upon voluntary compliance and not police state methods, is to survive as other than a deplorable muddle, destroying the moral stamina of our citizens by teaching or stimulating them to cheat.

If this be so, it means that the tax adviser, while continuously struggling to keep his own tax house strictly in order, must try to develop qualities of leadership and help to educate and influence clients to conduct themselves in their tax affairs as honorably and ethically as the adviser would himself act under similar circumstances.

In most taxpayers, ourselves included, there is a tendency toward a little larceny when it comes to taxation, though none of us would think of stealing a cent from or deliberately hurting our friends. This natural tendency is nurtured whenever tax officials, also human, seem to act in an overzealous and partisan fashion, and it thrives in an atmosphere of distrust of the fairness of the tax law. For these if for no other reasons, may not the tax adviser be charged with a further duty, namely, a duty to do what he can to help make the tax law more fair, practical and equitable and to improve its administration? This is an important challenge which I fear we tax specialists have not adequately faced.<sup>3</sup>

## Censorship

The Supreme Court of the United States has just rendered a ruling that comes as a shock to the church-going people of America. For the Court says the Federal Constitution "protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax."<sup>1</sup>

Thus did David Lawrence begin his editorial "A Shocking Decision" which appeared in the July 13, 1959 issue of *U. S. News & World Report*.

Commenting on the above quotation from Justice Stewart's opinion, Mr. Lawrence rightfully asks whether adultery is really on a par with socialism or the single tax and suggests that the Court is confused between the field of economics and the field of morals. He further points out that the result of the decision will be to take away from the states the right to regulate in their own way conduct affecting the morals of the local communities. This is indeed a far-reaching usurpation!

## Fair Trade Laws

In the area of commercial law there is an interesting article criticizing Fair Trade Laws, by Robert J. McEwen, S.J., which appeared in the June 1959 issue of *Social Order*. Such legislation has uniformly been justified in the past by lawyers and economists on the theory that the good will in the product built up by the expenditure of much money and effort by the manufacturer in national advertising may well be destroyed by predatory price cutting.

<sup>1</sup> *Kingsley Int'l Pictures Corp. v. Regents*, 27 U.S.L. WEEK 4492 (U.S. June 29, 1959), to be discussed in the Autumn, 1959 issue. [N. Y. Decision commented on in 4 *CATHOLIC LAWYER* 285 (Summer 1958)].

<sup>3</sup> N.Y.U. 17TH INST. ON FED. TAX 23-24 (1959).

Father McEwen takes the point of view of the consumer and argues that tremendous distortions have been introduced into the economic system as a consequence of Fair Trade Laws. He concludes therefore that if consumer protection is to be the basic reason for such legislation then no moral or economic justification can be established in its favor.

The weakness in the article, however, lies in the presumption which the author makes that consumer protection is the main purpose of Fair Trade Laws. Most, if not all, of the statutes in the forty-five states which provide for fair trading recognize that the primary aim of the law is "to protect the property — namely, the good will — of the producer, which he still owns."<sup>1</sup> The price restriction is adopted as an appropriate means to that perfectly legitimate end and not as an end in itself.

### John Courtney Murray, S.J.

The current (June 1959) issue of the *Catholic Mind* consists entirely of selections from the writings of John Courtney Murray, S.J., one of U. S. Catholicism's most creative and penetrating thinkers. Father Murray's work has appeared several times in past issues of THE CATHOLIC LAWYER.<sup>1</sup>

Over the years Father Murray has addressed himself particularly to the problems which arise in a religiously pluralist society such as ours. In this collection he discusses the special "Challenges Confronting the

American Catholic." In "Church, State and Religious Liberty" he approaches the difficult problem of Church-State relationships and provides an answer to the very timely question: Is there conflict between Catholic doctrine and the "no-establishment" clause of the U. S. Constitution? "Church, State and Political Freedom" shows how man's true political freedom stands or falls with the freedom of the Church. "America's Four Conspiracies" touches on the tensions which make for civic disunity between Catholic and Protestant, Christian and Jew and between the secularist and the "divisive forces" of religion. He suggests what is perhaps the only remedy — the civilized structure of the dialogue as a substitute for active struggle. Two articles on education, "The State University in a Pluralist Society" and "The Catholic University in a Pluralist Society," point to the responsibilities devolving on both types of school in a religiously pluralist society.

In the final two articles Father Murray takes up the extremely complicated questions involved in the foreign and military policies of this country in their relation to the character, standards and goals of the free society. The "Confusion of U. S. Foreign Policy" provides a penetrating analysis of the Soviet threat and suggests a direction for American policy. In "God, Man and Nuclear War," Father Murray applies the traditional Catholic doctrine on war to the problem of war in the nuclear age.

### Wolfenden Report

On March 19, 1959 *The London Times* reported that Mr. Justice Devlin, delivering the second Maccabean lecture in jurisprudence, expressed the belief that the separation of crime from sin — in the wide sense

<sup>1</sup> *Old Dearborn Distributing Co. v. Seagram-Distillers Corp.*, 299 U.S. 183, 193 (1936).

<sup>1</sup> *Freedom, Responsibility and the Law*, 2 CATHOLIC LAWYER 214 (July 1956); *The Problem of Pluralism in America*, 1 CATHOLIC LAWYER 223 (July 1955).

of transgression of the principles of morality — would not be good for the moral law and would be disastrous for the criminal law. As a practical administrator of criminal law he was convinced that it needed the moral law, and that in particular in England it needed Christian morals.

While he expressed no view one way or the other on the conclusions of the Wolfenden report, he thought it wrong in principle to require special circumstances, such as the need to preserve public order and decency, to justify the intervention of the law against immorality. The subject of the lecture was "The Enforcement of Morals: A Consideration of the Jurisprudence in the Wolfenden Report."

According to the Justice, there is only one explanation of what had hitherto been accepted as the basis of the criminal law, and that is that there are certain standards of moral principles which society requires to be observed; the breach of them is an offense not merely against the injured person but against society as a whole. Morals are not always a matter for private judgment; for the structure of every society is made up both of politics and morals. Thus marriage is part of the structure of our society and also the basis of a moral code which condemns adultery. This institution will be gravely threatened if individual judgment is permitted about the morality of adultery; on these points there must be a public morality, and it is not to be confined to those principles which support institutions such as marriage. A recognized morality is as necessary to society as is a recognized government; and society may use law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence. Societies disintegrate from within more frequently

than they are broken up by external pressures.

How is the lawmaker to ascertain the moral judgments of society? English law has evolved and regularly uses a standard which does not depend on the mere counting of heads. It seeks the judgment of the right-minded man in the street, the man in the jury-box. Those who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust. If that is so it is wrong, but its presence in the minds of reasonable men is a good indication that the bounds of toleration are being reached. Not everything is to be tolerated. No society could do without intolerance, indignation, and disgust; they are some of the forces behind the moral law, and if the genuine feeling of the society in which we live is that homosexuality is a vice so abominable that its mere presence is an offense, he (Mr. Justice Devlin) does not see how society can be denied the right to eradicate it.

### Artificial Insemination

The controversial subject of artificial insemination has received detailed treatment in *THE CATHOLIC LAWYER*. Reverend Anthony LoGatto, a lawyer and experienced social worker, explored its legal, ethical and sociological aspects in two past issues.<sup>1</sup> A plea for the legal recognition of the practice recently appeared in a leading medical publication and was reprinted in

<sup>1</sup> LoGatto, *Artificial Insemination I—Legal Aspects*, 1 *CATHOLIC LAWYER* 172 (July 1955); LoGatto, *Artificial Insemination II—Ethical and Sociological Aspects*, 1 *CATHOLIC LAWYER* 259 (October 1955).

the April issue of the *Chicago-Kent Law Review*.<sup>2</sup>

The author, Dr. Arthur A. Levisohn,<sup>3</sup> states in his opening paragraph that he has analyzed the problem in an emotionless and objective manner. Yet a large portion of his article is given over to an emotional discourse on church authoritarianism and the propaganda output of anti-insemination critics. Typical of the doctor's approach is his following observation:

Conservative theologians and others who try desperately to maintain established or traditional ways of thinking and believing, consequently, deplore most vocally the acceptance of artificial insemination on moral and religious grounds. But the tide cannot be stemmed.<sup>4</sup>

Apart from attacking the opponents of artificial insemination, the article unduly extols benefits to be derived from the practice. A pattern is visible in which the author raises objections to his views, but only in the most general terms. The opposing ranks, denied space to develop, fall as so many straw men. For a more complete discussion of the social and personal dangers involved in the practice of artificial insemination, the reader is referred to the second of Father LoGatto's articles.

The substance of the author's conclusion may be gleaned from this excerpt:

This may raise questions for which, at present, the law has no answers. But answers must be found, for the influence of

<sup>2</sup> Levisohn, *Dilemma in Parenthood: Socio-Legal Aspects of Artificial Insemination*, 36 CHI.-KENT L. REV. 1 (1959). This paper is substantially the same as one appearing in 4 JOURNAL OF FORENSIC MEDICINE 147-72 (1957).

<sup>3</sup> Professor of Medical Jurisprudence, Chicago Medical School.

<sup>4</sup> 36 CHI.-KENT L. REV. 1, 2 (1959).

religion on law constitutes a major stumbling block in the path of progress in scientific and social thought as well as the reason for much of the cultural lag in the changing aspects of the modern family. Not until the attitudes of the total adult population have been scientifically determined by statistical and other sociological methods, perhaps, could the just status of artificial insemination be defined or the degree of "obsoleteness" in current views be revealed.<sup>5</sup>

It seems clear that science and religion are again declared to be in basic conflict. This argument will continue to be raised as long as certain scientists refuse to recognize that moral principles stem from reason and are as discoverable as any scientific fact.

### **The Case of the Bishop of Prato**

Last year, the widespread interest in legal circles occasioned by the case of the Bishop of Prato inspired the editors of THE CATHOLIC LAWYER to publish an article on the subject by Pio Ciprotti, a prominent Italian attorney and Professor of Canon Law.<sup>1</sup> The article was written for the sole purpose of clarifying the facts of the case and discussing the pertinent Italian law for the enlightenment of our readers. It made no attempt to explore what might have been the results under American law on the same facts.

This interesting legal point of comparative law has recently been examined in a lengthy note appearing in the *Georgetown Law Journal*, entitled "The Bishop of Prato and American Law: Defamation and the Clergy."<sup>2</sup> The note establishes that under

<sup>5</sup> *Id.* at 33.

<sup>1</sup> 4 CATHOLIC LAWYER 244 (Summer 1958).

<sup>2</sup> 47 GEO. L. J. 374 (1958).

the law in this country, in the area of slander and libel, the clergyman will enjoy a qualified privilege based upon public policy and thus will escape liability even if he defames a member of his congregation provided he does so within the scope of his authority, while acting in good faith, and without malice.

### Natural Law

The interesting and analytical study by D. P. O'Connell, "Natural Law and the International Community" which appears in this issue of THE CATHOLIC LAWYER is but one of a number of essays on this subject which are currently in print. A note by Johannes Messner<sup>1</sup> in the *Notre Dame Natural Law Forum*,<sup>2</sup> entitled "The Post-war Natural Law Revival and Its Outcome," while stressing that the general principles of natural law elaborated by Aquinas and Suarez retain their validity, insists that our time affords special opportunities to explore and apply the principles from new points of view.

Messner points to the need of carrying back into our metaphysical thinking on the *animal rationale* the insights into human nature afforded by recent development of the concept that ". . . man is in the first place neither a political (related to the state) nor an individual being but a family being."<sup>3</sup> He feels that scientific data now available for the first time should be applied to confirm and clarify our metaphysical conclusions on the "law of nature" and

"natural law."<sup>4</sup> Finally, he urges that natural law thinking shall not rest in the contemplation of first principles, but shall carry forward the task of applying those principles to our world which is changing so rapidly and so deeply in its political, social, economic and cultural aspects. ". . . Thomas was right in thinking that natural law doctrine is above all a practical, not a speculative science."<sup>5</sup>

### Religious Factors in Adoption

Many states, including New York,<sup>1</sup> have statutes which provide that adoptive parents shall be of the same faith as the child "whenever practicable." In recent years the amount of litigation involving such religious protection clauses has increased greatly. Accordingly, the attention of the reader is drawn to an article entitled "Impact of Religious Factors in Nebraska Adoptions," appearing in the May, 1959 issue of the *Nebraska Law Review*, for a general view of the many facets of the problem.

Rather than a microscopic examination of local law, as the title might indicate, the article consists of a collection of studies made of the various sociological and legal problems involved in the whole area. In addition, the authors<sup>2</sup> have included a study of their own, conducted by way of a questionnaire addressed to local adoption agencies and county court judges. The

(Continued on page 268)

<sup>1</sup> Professor of Ethics and Social Ethics, University of Vienna, Austria.

<sup>2</sup> 4 NATURAL LAW FORUM 101 (1959).

<sup>3</sup> *Id.* at 105.

<sup>4</sup> *Id.* at 103.

<sup>5</sup> *Id.* at 105.

<sup>1</sup> See, e.g., N. Y. CHILDREN'S CT. ACT § 26; N. Y. C. DOM. REL. CT. ACT § 88(3); N. Y. SOC. WELFARE LAW § 373 (3).

<sup>2</sup> Dale W. Broeder and Frank J. Barrett.

## IN OTHER PUBLICATIONS

*(Continued)*

inquiries related to: (1) Protection afforded the religion of the child's natural mother or that of the child himself. (2) The effect of a mixed marriage on a party's application for adoption. (3) The extent of inquiry into the applicant's church membership and church attendance. (4) Applications for adoption made by agnostics and atheists.

The results of the survey indicate that the agencies are more diligent in their inquiries into religious matters than are the courts. However, neither group felt disposed to having children adopted by either atheists or agnostics.

A little further on in the article, the authors show a leaning toward the view that religion has no appreciable influence on a person's behavior, while chiding J. Edgar Hoover for his statements to the contrary. Here they rely in part on a comparative study made of eleventh grade girls in public and parochial schools, with regard to cheat-

ing on examinations. Some reliance was also placed on the claims of religious belief and profession made by juvenile delinquents and convicted criminals.

With respect to the grade school children, cheating on examinations, although deplored, is no complete test of the relationship of religion to behavior. Secondly, might not one question whether the public school children were devoid of religious training in view of Sunday school, released time and other programs? With respect to the claims made by delinquents and convicted criminals, might not one take the position that these people might have some stake in putting a best foot forward in view of their position at the moment? Secondly, might not their religious attestations be a mere reflection of the fact that few men in society are professed atheists?

Despite these shortcomings, the lawyer handling an adoption problem and the reader interested in the general subject will find worthwhile material in the article.