

Rule of Law; Discrimination; Punishment; Immigration; Truth Drugs and Criminology; Censorship; Artificial Insemination; Charitable Immunity; U.S. Supreme Court; Abortion and Criminal Law

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IN OTHER PUBLICATIONS

Rule of Law

In line with the symposium on juridical world order which will appear in the next issue of *THE CATHOLIC LAWYER*,¹ there is a challenging article by Charles Rhyne in the current issue of *The Loyola Law Review*² which outlines how lawyers can aid in attaining world peace through the rule of law.

According to Mr. Rhyne, St. Thomas More appreciated more than most men that the rule of law is in its ultimate essence based upon deeply felt religious principles. He envisioned what the rule of law founded upon such a basis could do for humanity within nations and especially between nations.

While steps to bring this great idea to fruition may not be as dramatic as the launching of a satellite or a missile, they can be much more meaningful in the long run to mankind. It has been truly said that an idea can be more powerful than an atom, and that nothing can deny an idea whose time has come.

The ideas which Mr. Rhyne seeks to establish through his article are: (1) A world conference of lawyers should be held to focus world-wide attention upon

what law can do for the world community. A "World Law Day" similar to the "Law Day — U.S.A." and a "World Law Year" similar to the International Geophysical Year should be utilized for the same purpose; (2) The world conference should concentrate upon increased use of the rule of law in world courts. Increased use of the International Court of Justice, creation of new regional courts, and extension of world court jurisdiction to disputes arising from international transactions of individuals should be considered; (3) Iron Curtain lawyers should be invited to the world conference. Their failure to accept, or participate in any meaningful way, should not be allowed to veto or impede this effort; (4) World government is impracticable and impossible in the world of today. But the rule of law applied in a world judiciary is a practical and attainable first step toward a peaceful world; (5) We should do all that is possible to strengthen the United Nations, especially by urging increased application of and adherence to the rule of law in its deliberations and actions.

A fitting climax to the article is the following concluding paragraph:

Thomas More is dead but the principles for which he stood live on as indeed they must. If they do not, the civilization of the world is doomed. More is more important to us at this moment than at any moment

¹ See *Editorial Comment*, this issue.

² Rhyne, *St. Thomas More: Champion of the Rule of Law*, 9 *LOYOLA L. REV.* 149 (1959).

since his death because we, as his successors at the Bar, have the responsibility of insuring that he did not die in vain. When law replaces weapons in the control of the fate of humanity our lawyers' mission will have been completed. In a world ruled by law man can walk in the freedom, the dignity and the peace which was the goal envisioned by St. Thomas More over four centuries ago.³

Discrimination

Individual communities in democratic countries can take further action to insure world peace in addition to the program outlined above by recognizing that the greatest challenge of our times is to perfect the means whereby free men may live together in mutual acceptance with respect for differences.

The October 1959 *Chicago Bar Record* contains an excellent article which highlights the fact that housing discrimination must first be eliminated before America can be, in fact, a land of equal opportunity.⁴

Writing from the point of view of the situation as it exists in Illinois, which is representative of the majority of states, the author lists the various unfair housing practices that currently exist: (a) Minorities are refused to be shown rental housing in "restricted areas"; (b) Minorities are prevented from shopping openly themselves for homes in "restricted areas"; (c) Discriminatory advertisements underscore supposed public acceptance of segregated housing; (d) The bulk of rental housing and sale housing in metropolitan areas is handled by Boards of Real Estate Brokers agreeing to unwritten codes not to sell properties in "restricted areas" to minori-

ties; (e) Financing for housing for minorities in "restricted areas" is withheld; (f) Pricing for housing for minorities in "restricted areas" is disproportionately high; (g) Developers of new housing sections refuse to offer homes to minorities; (h) Actual misrepresentations of attitude of neighborhood about minorities are circulated by agents and other persons, producing panic and resentment; (i) Zoning ordinance amendments are designed to freeze existing patterns of segregation and/or to force minorities from particular areas without plans for resettlement.

The following recommendations are offered as at least a partial solution: (1) Business leaders, real estate brokers, bankers, and plain citizens in Human Relations Councils and church organizations should join together in effective educational campaigns to encourage freedom of residence for all people. (2) Lawyers should begin now to organize every responsible citizen in their community to support a bill for freedom of residence in their state legislature. Lawyers should urge the passage now of a freedom of residence ordinance in their own cities and villages. (3) Foundation grants to community-organizations should be encouraged to create workable plans for democratic living between the races. (4) Committees of lawyers might explore the possibility of making fuller use of the present civil rights statutes and court decisions in their particular states.

Punishment

A current article appearing in the July 1959 *English Law Quarterly Review*⁵ anticipates to some extent the material in the

³ *Id.* at 158.

⁴ Frey, *Freedom of Residence in Illinois*, 41 CHI. BAR RECORD 9 (1959).

⁵ Radzinowicz, *Changing Attitudes Towards Crime and Punishment*, 75 L. REV. Q. 381 (1959).

symposium on Punishment which will appear in the Spring 1960 issue of *THE CATHOLIC LAWYER*.⁶

As illustrated by the author, the potentiality of criminal legislation and penal system combined, for influencing the phenomenon of crime, has been greatly exaggerated in all countries and by practically all criminological schools of thought. There is a tendency to simplify the causation of crime. In the idealistic figment projected by Saint Thomas More's lofty imagination in *Utopia*, there was to be no more crime, an occasional petty theft perhaps. This image of a society from which crime has been banished is cherished by all believers in *Utopia*: this is how it ought to be. But curiously enough these Utopian dreams have often been appropriated and mistaken for attainable actualities by criminologists, and by penal and social reformers, who are not given to building castles in the air but diligently engage themselves in observing the reality around them, and sifting evidence of all kinds in accordance with the strictest requirements of scientific methods.

In an attempt to set the record straight for this group, the writer traces the evolution of punishment in English law from the time when capital punishment was the penalty for at least one hundred and sixty separate crimes, to the Homicide Act of 1957 which for all practical purposes has abolished capital punishment. The author realistically concludes that despite the enlightened methods of dealing with criminals which have resulted from such study and reform, crime has not been eradicated. It still abides, and will always abide, a constant phenomenon in all societies, whatever their racial, national, social, moral and economic conditions may happen to be. We

⁶ See *Editorial Comment*, this issue.

must not therefore weaken the barrier against crime which the criminal law has erected and above all we must not condone the atrophy of individual responsibility.

Immigration

To focus attention on the abiding problem of the refugee, the United Nations' General Assembly resolved that June 1, 1959 to June 1, 1960 will be known as "World Refugee Year."

Our American responsibilities in this area are clear, as pointed out in the symposium on immigration published in the Spring 1958 issue of *THE CATHOLIC LAWYER*. How falteringly we are meeting them and the scandal of our discriminatory immigration laws emerges from Professor Amundson's article published in the October 1959 issue of *Social Order* as its contribution to World Refugee Year.

The salient features of the article include a detailed analysis of some of the more obvious discriminatory features of the McCarran-Walter Act with accompanying examples. The following proposals are recommended by way of revision and amendments to the Act to make it a reasonable and workable law: (1) Liberalization of Oriental quotas. (2) Consolidation of agencies in order to eliminate the double examination of immigrants. (3) A vigorous review of present policies that violate due process of law. (4) Establishing a single, unified quota of one-sixth of one percent of the total population of the United States based on current census data, including Negroes and Indians. (5) Transfer of present and future unused quotas to countries which have used up their quotas or already mortgaged them into the future. (6) A permanent though flexible provision of our basic

immigration law to include the right of asylum for expellees and refugees.

The most comprehensive and potentially effective bill to revise our present 1952 law was introduced on May 12, 1959 (S.1919) by Senators Javits, Case, Keating, and Saltonstall, entitled "Immigration and Nationality Act Amendments of 1959."

This bill, if enacted, should produce a reasonable, equitable, and workable immigration law; one which we could put before the world with a clear conscience and clean hands. It contains provisions for revision of quotas, for adjustment of the status of aliens by the Attorney General, for changing judicial review proceedings, for the creation of a Board of Visa Appeals in the Department of State, for granting of non-quota visas to members of families of citizens of the United States, for pooling of unused quotas, for granting of non-quota visas to certain refugees, and for changing the present law concerning the loss of nationality because of certain periods of residence abroad.

Truth Drugs and Criminology

Modern science closely touches morality in its experiments with new scientific methods to reach directly to the intimate sources of thought and will, and therefore also of expression. An interesting and informative examination of these psychological techniques is contained in "The Truth Drug in Criminal Investigation" appearing in the September 1959 issue of *Theological Studies*.

While it is true that scientific methods are rightly used in criminal investigation in the collection and analysis of purely physical evidence, the line should be drawn between tests that reach only bodily functions and methods that reach free will and the in-

tegrity of the self. Science is not independent, but is subordinated to the end it is supposed to serve. This subordination of means to ends is particularly urgent in view of the growing tendency to use scientific techniques to investigate the mind. Principles of morality and justice are concerned here, involving the rights of the individual, but going far beyond these to include the rights of the whole community. These ends the scientific expert must serve, and with regard to these ends the judgment of philosophers and moralists is more decisive than that of scientific experts. The author sums up his observations with the following quotation from an address by Pope Pius XII to the Sixth International Congress on Criminal Law, October 3, 1953:

The judicial investigation must exclude physical and psychic torture and narco-analysis, first because these violate a natural right even if the accused is really guilty, and then because too often they produce erroneous results. It is not a rare thing for them to result exactly in the confession desired by the court, and in harm to the accused person, not because he is really guilty, but because his physical and mental energy is exhausted and he is ready to make any statements that may be desired, "Better prison and death than this physical and mental torture!" We find abundant proofs of this state of things in spectacular and well-known processes, with their confessions, their self-accusations, and their requests for pitiless punishments.

Censorship

A recent article in the *Saskatchewan Bar Review*⁷ entitled "Censorship and the Law in Canada" points up forcefully the fact that

⁷ Welbourn, *Censorship and the Law in Canada*, 24 SASKATCHEWAN BAR REV. 29 (1959).

the Canadians are as aware as Americans that the greater interests of the state at large will inevitably conflict with absolute license. Whatever our devotion to freedom, other desirable social ends must be recognized. The history of free expression in democratic societies is one of a constant re-evaluation and redressing of the balance between freedom and state interference, between license and censorship.

The author first surveys the system of legally imposed censorship which exists in Canada today on both the federal and provincial levels. He points out that nine out of the ten provinces have motion picture censorship boards, although, for constitutional reasons, they are operated in the guise of licensing bodies. Six of them have absolute and complete discretion to permit or prohibit the exhibiting of any film in the province concerned. The remaining three are required to reach their decision, in the words of the British Columbia Act Respecting Moving Pictures and Film Exchanges:

... with a view to the prevention of the depiction of scenes of an immoral or obscene nature, the representing of crime or brutalizing spectacle or which indicates or suggests lewdness or indecency or infidelity or unfaithfulness of husband or wife or any such picture he (the censor) may consider injurious to morals or against the public welfare or which may offer evil suggestions to the minds of children or which may be likely to offend the public.⁸

An appeal generally lies to a body designated by the Provincial Attorney General. But in at least one case, Quebec's, this is the board itself merely reviewing the film. In two provinces the decision of the appeal tribunal is final. Besides controlling what films may be seen, the boards also have control of all displays and advertisements

used in connection with any film promotion.

On the federal level, Section 1201 of the Customs Tariff prohibits the importation into Canada of any "books, printed papers, drawings, paintings, prints, photographs or representations of any kind of a treasonable or seditious or of an immoral or indecent nature." (This reads like a protectionist clause for a domestic pornographic industry.)

The Criminal Code, however, contains a number of what might be termed censorship sections, notably those sections dealing with offences tending to corrupt morals. Section 150(1) makes everyone guilty of an offense who:

... makes, prints, publishes, distributes, circulates, or has in his possession for the purpose of publication, distribution, or circulation any obscene written matter, picture, model, phonograph record or other thing whatsoever.

Reviewing the Canadian judicial interpretation of these statutes, the article concludes that the Hicklin Rule is still followed in Canada and a book is to be judged according to its most colorful passages. A book is also to be judged only on the facts of the case and evidence as to the contemporary nature of other books in general circulation is inadmissible. Furthermore, no decision *in rem* appears possible and a book judged obscene in Vancouver may be circulated with impunity in Hamilton. The net result is that the man on the street receives little assistance towards his duty of finding out how the law stands, because it is impossible to point with any accuracy to the law.

The author recommends that a partial solution is to abandon the term "obscene" since it eludes precise legal definition in any case. He suggests the word "pornographic" which has much the same dictionary mean-

⁸ *Ibid.*

ing but little of the emotive content of "obscene." In any event, the author's despairing conclusion seems to be that today Canada is as much at sea as the United States when it comes to the area of obscenity and its prohibition.

Artificial Insemination

Another paper dealing with the history, legal, social, religious and ethical aspects of artificial insemination written by Charles E. Rice has appeared in the August 1959 *Notre Dame Lawyer*. Artificial insemination is of two types, one (homologous artificial insemination) where the seminal fluid of a husband is injected by mechanical means into his wife so as to induce conception, and the other (heterologous artificial insemination) where the seed is that of a "donor" other than the husband. The former is referred to as AIH, the latter as AID.

Readers who are familiar with the excellent treatment by Father Anthony LoGatto of the same subject matter in past issues of THE CATHOLIC LAWYER and who read this new article will appreciate that Mr. Rice brings the same high degree of scholarship to bear on the problem.

Among the many new observations which the author reports on the subject is his mention of an interesting factual rejoinder to the claims of the artificial insemination advocates, which is found in the Rand (So. Africa) Daily Mail of March 15, 1957. According to this news account, the practice of AID "has been entirely suspended in New South Wales, Victoria and Queensland, because of family breakdowns and the grave religious and legal problems created."

The following recommendations which Mr. Rice makes concerning artificial insemination,

while admittedly not novel or original, are both sound and sensible: (1) AIH should not be regulated specifically by legislation. The social danger is minimal and existing medical rules would seem to provide sufficient safeguards for the cleanliness and integrity of the procedure. (2) The performance of AID, with or without the consent of the husband, should be made a criminal offense on the part of the doctor, or other implementing intermediary, and the donor. The certain increase in the likely occurrence of incest would be sufficient reason alone for such a prohibition. Statutory requirements of adequate disclosure and of official registration of the birth are not enough to prevent the secrecy which leads to incest even if they were enforced as strictly as possible; the impulse of privacy is too strong. In fact, even a personal criminal penalty for the act itself may not be an adequate deterrent; however, it is difficult to see what more could be done. If AID were made criminal on the part of the mother and her husband, that would have a harmful effect in inhibiting adoptions in those cases where AID might be performed in violation of the law or in states not prohibiting AID. (3) AID should not be declared to be adultery. Nor should AID without the husband's consent be made a ground for divorce. There is an obvious difference between AID, replete though it is with its own dangers, and the clandestine personal relationship which alone, in New York at least, will legally sunder a marriage. (4) AID children should be declared by statute to be illegitimate, whether the AID was with or without the consent of the husband. This rule should have only prospective effect; the tangle which would result from a retrospective decree of the illegitimacy of the thousands of AID children,

who are regarded as legitimate by their families and some courts, would be insoluble. A rule of illegitimacy would seem to be dictated by the inherently extra-marital nature of AID, and would bar the possibility of an unwanted or at most a tolerated, intrusion by an AID child into the husband's inheritance pattern. In most states an illegitimate child can inherit only from its mother and presumably an AID illegitimate child could not inherit from the donor. If the husband wishes to provide for the child, he can do so by will or he can adopt the child. If an AID child were legitimate, there would seem to be no reason why a child born of a common adulterous union would not be legitimate, at least where the husband condoned the adultery. An extension of the concept of legitimacy to cover an AID child would make it wholly inexact. (5) Adoption procedures should be liberalized to permit greater secrecy and dispatch in the adoption of AID children. Even assuming the illegality of AID there should be a mechanism for adopting AID children already born and those who may thereafter be born in violation of the law or in states not prohibiting AID. (6) The falsification of birth records should be strictly prosecuted with criminal sanctions imposed upon all parties knowingly participating in the fraud. A proper birth record entry should be made a prerequisite for adoption of the AID child by the husband. As a practical matter, nothing can be done about the false entries already made, with the possible exception of a privilege to correct partially false entries without criminal liability.

Charitable Immunity

The pros and cons of the immunity doctrine for charitable organizations continue to appear in debates and articles on the

subject throughout the country. The most recent objective survey of the jurisdictional law on the subject appears in the current issue of the *Saint Louis Law Journal*.⁹ In addition to the survey material, Professor Simeone sets forth the various theories upon which the doctrine is predicated although he makes no attempt to either justify or criticize their soundness. He intimates instead that the end of another decade will find a majority of the American jurisdictions holding that charitable immunity no longer exists since such is the trend of modern court authority.

The case in favor of continuing the doctrine is ably presented by Sister Ann Joachim, O.P., in the August 1959 issue of the *American Bar Association Journal*. She asked the following questions: Has anyone figured out the consequences of the decisions abandoning the doctrine and the consequent liability imposed on charitable institutions? Is it not the legislative branch that should investigate these areas in large and small institutions, compile the facts and then decide? If the institutions should carry insurance to protect or cover their losses, how many are insured? Could those who are not, survive liability for torts committed within the last two years, the statute of limitations in most states in tort actions? How will the result of the ruling in these cases affect insurance rates? Funds ordinarily used for better service, equipment and facilities will have to be diverted to premiums leading perhaps to a gradual lessening of services. Who will benefit from the present court action, which imposes unrestricted liability?

She concludes that many great minds in

⁹ Simeone, *The Doctrine of Charitable Immunity*, 5 ST. LOUIS U. L. J. 357 (1959).

the judicial as well as the legislative branches of our government believe that *stare decisis* should be maintained on the immunity doctrine and if and when that is no longer feasible, the legislative branch should investigate and act.

U. S. Supreme Court

Believing that certain decisions of the Supreme Court had weakened the Nation's internal security, the American Bar Association recommended in February that Congress enact corrective legislation. The A.B.A. was bitterly denounced by left-wing groups such as Americans for Democratic Action and the American Civil Liberties Union in such extreme terms as "unprofessional," "irresponsible" and "disgraceful." But it is brilliantly defended by Attorneys Roy M. Cohn and Thomas A. Bolan in the current issue of the *Fordham Law Review*.

Their article, entitled "The Supreme Court and the A.B.A. Report and Resolutions," says that the "present members of the Supreme Court have assumed an unrealistic attitude towards the Communist Party in the United States. They have ignored warnings of former Communist Party members, congressional committees, the F.B.I. and other governmental agencies, and have instead imposed their own views on the Nation in the form of policy-making decisions beneficial to the Communist Party and its members.

"Particularly disturbing has been the court's disregard of precedent. The frequency with which the court has overturned previous decisions has led to great instability and confusion in the law. The value of the Supreme Court is greatly diminished

when its decisions are predicated upon what five justices personally happen to feel is best for the Country."

Mr. Cohn and Mr. Bolan assert that "in its rulings involving Communists, it is clear that the court has frequently employed a double standard. Such use by the court is typical of many liberal leaders of the nation. They have constantly switched principles depending on what happens to have been at stake. When the court handed down rulings which they disfavored, these liberals were quick to condemn the court, but now breathe fire at any hint of criticism. It is illogical to maintain, as some now do, that legislation, remedying Supreme Court decisions constitutes an attack on the court as an institution. When members of the bar disagree with Supreme Court decisions, it is their right, and indeed their duty, to criticize these decisions and to suggest appropriate remedies."

Abortion and Criminal Law

The editorial in the last issue of THE CATHOLIC LAWYER criticized the draft of the section on abortion in the Model Penal Code currently being prepared by the American Law Institute. The basis for the criticism lay in the fact that the draft proposed the legal justification of abortion in instances where pregnancy resulted from rape or incest — or where pregnancy might result in the birth of an abnormal child, economic hardship or mental or physical abnormality in the mother. This in the face of the fact that voluntary abortion is intrinsically wrong since it is the direct killing of a human being and is never justifiable.

Evidently inspired by the draft proposal, a recent article in the *Stanford Law Review* entitled "Therapeutic Abortion: A Prob-

lem in Law and Medicine"¹⁰ goes even further in justifying abortion than the proposals of the American Law Institute.

Although the writers admit that mistakes have been made by obstetricians as a group in the past, the article advocates that a board of advisers made up of obstetricians should be set up in each hospital. If this

board approves an abortion prior to its performance, then the approval should afford complete protection to the abortionist in any subsequent civil or criminal suit.

In effect, complete jurisdiction to determine the justification of abortion in any particular case will be removed from the court to the board under this suggestion. If a particular board decided to justify abortion on the sole ground that one child per family is enough, the board could so rule. Shades of George Orwell's 1984!

¹⁰ Packer & Gampell, *Therapeutic Abortion: A Problem in Law and Medicine*, 11 STAN. L. REV. 417 (1959).
