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IN OTHER PUBLICATIONS

Anti-Contraceptive Laws

The recent Connecticut case upholding the constitutionality of a statute forbidding persons to use contraceptive devices or physicians to prescribe them is commented upon elsewhere in this issue of *The Catholic Lawyer*. The progress of the case through the Connecticut courts has been followed by many with great interest. Now, the case has been carried to the United States Supreme Court.

Regardless of the Supreme Court's ruling, the Catholic Church will not change her judgment that the use of artificial contraceptives is contrary to both the natural law and the divine positive law. But this does not necessarily mean that the Church favors such laws as the one in question in Connecticut.

Rev. John Maguire, C.S.C., writing on this subject in the June 1960 issue of *Ave Maria*, argues that moral theologians are agreed that a law which cannot be enforced is a bad law. In his opinion, a law forbidding the use of contraceptives is practically unenforceable and therefore a bad law.

Father Maguire offers this interesting explanation of his position with reference to the present Connecticut and Massachusetts anti-contraceptive laws:

We would not say that the state never can pass laws such as this, but that it can be done only for the gravest of reasons and when the acts outlawed are manifestly against the common good. Error has no rights, it is true, but persons — or consciences — in error do.

From these considerations, we feel that a Catholic can justifiably favor repeal of the Connecticut and Massachusetts anticontraceptive laws, or breathe happily if they are declared unconstitutional. But, since this is a purely prudential judgment, not every Catholic would agree.

Perhaps some Catholics are in favor of such legislation. Undoubtedly, many Catholics will deplore any ruling of the Supreme Court that such laws are unconstitutional, if such is, indeed, the court's ruling. Perhaps they base their judgment on the constant exhortations of the recent Popes to Christianize society and our social institutions.

But our own feeling is that this type of law becomes meaningful only when society itself has first been Christianized. And it's quite debatable whether 20th-century America is Christian enough to benefit from such a law.

It's difficult to forecast just how the Supreme Court will decide on the issue. What is certain is only that it will arouse controversy. But let it be controversy marked not by emotion, but by wisdom. Ultimately the question is whether or not the Connecticut law impinges on constitutional rights.

There is a definite distinction between a moral judgment about the use of contraceptives and a prudential judgment about the wisdom of a law which forbids their use and dissemination of information about them. About the first, there is only one Catholic position; as to the second, there is no Catholic position, but only positions taken by individual Catholics.

Artificial Insemination

Past issues of *The Catholic Lawyer* have presented scholarly and well documented articles by Rev. Anthony LoGatto on the legal and moral aspects of artificial insemination. The most recent material to be published elsewhere on this subject appears in the October 1960 issue of the *Catholic Mind*, entitled "Artificial Insemination and the Law."

The article is a reprint of a statement recently presented to the British Government's Departmental Committee on Artificial Insemination. The statement was prepared, on behalf of Catholics in England and Wales, by a group of English Catholic theologians, doctors and lawyers, at the request of Cardinal William Godfrey, Archbishop of Westminster.

The statement sums up the Catholic Church's teaching on artificial insemination to the effect that respect for the order divinely established in human nature requires that the generative faculty be used only within marriage in conjugal intercourse. Artificial insemination of an unmarried woman is therefore rejected as well as artificial insemination of a wife with donor's seed. Artificial insemination of a wife with the husband's seed obtained apart from intercourse is also rejected; but not what is termed "assisted insemination," whereby after the natural act of intercourse the husband's seed is projected from the

vagina into the uterus. The statement concludes with the following legal recommendations:

The legal recommendation we consider to be ideally necessary may not be considered capable of enforcement. Artificial insemination by donor has such dangerous potentialities that in the public interest we recommend: That artificial insemination by donor should be made an offence under The Offences against the Person Act of 1861.

We recognize however that a legislative measure of this kind may be judged to be impracticable. If that be so, we urge that the law should at least refrain from giving any positive support or favor to A. I. D. and those who practice it.

We recommend as both feasible and desirable in the public interest:

- 1) That the maintaining of a bank of donors and the sale of semen be made illegal;
- 2) That the recognition by law of antecedent and perpetual impotence as a cause of nullity of marriage remain unchanged, even if a child has been born by artificial insemination with the seed of husband or donor;
- 3) That in the event of a woman being inseminated with the seed of a donor without consent of her husband, the husband be entitled to cite the inseminator and the donor as respondents or parties cited and to claim against them for costs and for damages;
- 4) our attitude to divorce is known but we consider that artificial insemination by donor should be made a ground for judicial separation under the same conditions as adultery, i.e., unless the husband has consented to, or has condoned, the insemination.

Federal Aid to Education

The September 1960 issue of *The Catholic Educator* contains an excellent article by Rt. Rev. Msgr. Timothy O'Leary, Superintendent of Schools, Archdiocese of Boston, dealing with the social and legal

bases of government aid to Catholic schools.

Monsignor O'Leary states that the fundamental postulates upon which the Catholic position toward federal aid is based are:

(1) If the concept of federal aid includes the idea of federal or any other kind of governmental control which would destroy the antecedent educational rights of the family or the supernatural educational rights of the Church, then such aid is to be rejected upon well-established social, moral, constitutional, and traditional grounds.

(2) If the concept of federal aid excludes children in nonpublic schools as the legitimate beneficiaries of social services and economic advantages to which they are entitled by virtue of their status as part of the body politic, then it is to be rejected as discriminatory.

Monsignor O'Leary contends that Catholic education, as a distinct but coordinate system in the larger scheme of American education, does not ask for either federal or state funds to underwrite construction or repair of parochial schools, to subsidize maintenance of them, or to pay teacher's salaries.

It does demand, however, that its subjects, as the offspring of present taxpayers and as future citizens themselves, participate in whatever benefits and advantages may accrue to the school population generally from the distribution of federal funds for payment of auxiliary services.

Unfortunately, the whole issue of federal aid to private and parochial schools has been beclouded by serious misunderstanding as to the true meaning of the Jeffersonian concept of the "wall of separation" between Church and State. Misconstruction of this doctrine has tended to

foster the notion that schools which supplement secular education with religious instruction are inimical to the idea of separation of Church and State. This, in turn, tends to confirm the fallacious reasoning which contends that education of the youth in the land is properly a state or government monopoly and that sectarian schools exist only by government sufferance.

Until the decision by the Court in the Illinois religious instruction case [*McColum v. Board of Educ.*, 333 U. S. 203 (1948)]; see also *Zorach v. Clauson*, 343 U. S. 306 (1952)], we had cause to believe that such invidious philosophy would find little support in American constitutional interpretation. The Oregon school case [*Pierce v. Society of Sisters*, 268 U. S. 510 (1925)]; see also *Cochran v. Louisiana State Bd. of Educ.*, 281 U. S. 370 (1930)], and the New Jersey school bus case [*Everson v. Board of Educ.*, 330 U. S. 1 (1947)], had previously led to the belief that the state as *parens patriae* could legally and constitutionally provide social benefits to all its children without regard to the type of school attended. Then, however, the wall of separation between Church and State was enormously heightened into an impregnable barrier between public education and any attempt to leaven its secularism with religious or moral instruction.

The sweeping generalizations of the *McColum* decision were fortunately modified by the 6-3 ruling in the *Zorach* opinion of 1952. In that case the constitutionality of released time off the school premises was tested. This arrangement was sustained by all the New York courts as well as by the United States Supreme Court.

The full meaning of the *Zorach* decision is still a matter of some speculation. From 1952 until at least early 1960, the United

States Supreme Court has not granted review to any important Church-State matter. As a result, it is not certain to what extent *Zorach* would condemn various Church-State practices which are now in litigation. In any event, *Zorach* is significant for the following reasons:

(a) The opinion contains the often cited phrase by Justice Douglas who wrote for the majority of six: "We are a religious people whose institutions presuppose the existence of a Supreme Being."

(b) The decision does not even mention the "wall of separation" adverted to in the *McCullum* opinion.

(c) The ruling, while stating that it does not set aside *McCullum*, nonetheless affirms that the separation of Church and State is not an absolute and that the state may accommodate its schedules to serve "the spiritual needs" of its people.

If extension of federal aid to nonpublic schools, particularly to Catholic schools, should founder upon interpretations currently fashionable as to the meaning of the "wall of separation between Church and State" — interpretations, by the way, which would probably amaze, if not shock, the author of the phrase — then a nonlegal phrase taken out of context will become a constitutional norm superseding the narrowest interpretations of the "general welfare" and "equal protection" clauses of the Constitution itself.

The "wall of separation" argument is used today as a means of denying parental rights conferred by the First Amendment of the United States Constitution, e.g., by attempts to make it difficult for the parent who wishes his children to get a Christian education, by denying rights of transportation, free lunches, school adjustment counseling, etc., to Catholic schools, and to

drive the Catholic schools out of business by taxation as was attempted recently in California. Thus the enemies of the Catholic schools discriminate against Catholic parents and children on the sole ground that they are Catholics. Both are penalized by the very fact of their religion.

Monsignor O'Leary concludes with the following effective refutation of the "wall of separation" argument:

The "wall of separation" works, indeed, against the welfare of state and nation. As Edwin S. Corwin has pointed out in his criticism of the *McCullum* case, a democracy presupposes, if it is to work at all, a people or citizenry morally responsible, and there can be no real moral training unless it is based on religion. In this statement Professor Corwin has given an excellent summary of judicial thinking on the subject in America. Therefore, when separationists oppose schools where religion is taught, they are denying state and nation of the very thing government requires for its existence.

In the states, and in federal provisions where they affect the schools of the nation, discrimination results from legislation which treats matters of general welfare as exclusively public school matters, as in school adjustment counselors, free lunches, etc.

In this whole matter we may recall the words of Leo XIII in the encyclical, *Rerum Novarum*. "No man may with impunity outrage that human dignity which God Himself treats with reverence; nor stand in the way of that higher life which is the preparation for the eternal life of heaven."

Loyalty Oath Affidavits

Ever since Congress passed the National Defense Education Act of 1958, a controversy has raged between the colleges and universities of the country over the requirements of a loyalty oath affidavit which the

Act establishes as a condition precedent to the grant of federal educational financial assistance to individual students.

Rev. Joseph F. Costanzo, writing about the required oath in the June 1960 issue of the *University of Detroit Law Journal*, states that the controversy really centers on two considerations. First, may the United States Government choose to exclude from its beneficiaries of a national defense education program those students who are unwilling to disavow disloyalty? Secondly, should the university authorities who object to the non-subversive disclaimer do so to the extent of depriving deserving and needy students of the right to make their own choice at their institutions unimpeded?

Father Costanzo concludes his scholarly and objective analysis of the pros and cons of the problem with the following statement of his position on the matter:

Fortunately no one is obfuscating the atmosphere of discussion by imputing or insinuating less patriotism to any of the critics — a charge which we think would be undeserved as well as irrelevant to the rational merits of their position. My own considered opinion is that it is not even a question of right or wrong. I personally find the reasons justifying the retention of the loyalty oath affidavit more convincing than the reasons urging its repeal, and in several instances I find their criticisms misleading. It is heartening to observe that no fast and clear line divides the supporters of the proviso from its critics, public from private institutions of higher learning, religious or church-affiliated schools from those which are neither officially. Dissenters are found within the same religious profession and even amongst educational institutions of the same religious order. Statistically the overwhelming number of schools cooperating with the federal loan plan as it is, is sharply

in contrast with the relatively few who oppose it.

One last reflection. The argument that the loyalty oath affidavit "represents an affront to freedom of belief and conscience" bears within itself a premise of assault upon the oath of allegiance — a dialectical nexus that has not been lost altogether on at least one Senator and a university group which is urging the repeal of both in the National Defense Education Act. We are of the opinion that the validity of the manner of reasoning and logic rooted in a doctrinaire conception of freedom will not stand the test of reflection. Academics are not exempt citizens.

The Connally Reservation

John B. Gest's latest arguments in support of the retention of the Connally Reservation appear in the October 1960 *Pennsylvania Bar Association Quarterly*.

Mr. Gest strongly advocates that repeal of the Connally Reservation would be a move against peace. He argues further that if an unjust decision were made concerning a matter within our domestic jurisdiction, and we refused to comply, we would be accused of violating our engagement, and would stand convicted in the forum of world opinion. It is better to avoid unjust decisions in advance, by retaining the Connally Amendment, than to incur the ill will consequent upon a breach of our undertaking to observe them.

He concludes that the law that will advance World Peace is the law based on recognition of man as endowed by his Creator with rights to life, liberty and the pursuit of happiness. This cannot be merged with the ideology of communism which recognizes nothing spiritual in man, strips him of his rights and teaches that treaties are to be kept only so long as they serve the party and to be scrapped at

will. Our Senators are the sworn guardians of our constitutional liberties and they would not be true to their oath of office if they attempted to delegate to this foreign tribunal the determination of issues that are essentially within our domestic jurisdiction.

It would be a tragic blunder to transfer the determination of our domestic jurisdiction from our own State Department, where it belongs, to the World Court which represents largely other systems of law including that of a tyranny which seeks our destruction. To promote peace and law in the world we must keep America strong and defend our concept of law and the rights of man. That, according to Mr. Gest, is the way to display our leadership.

Natural Law

Dean Joseph O'Meara of Notre Dame Law School has recently taken the complex subject of natural law and with facile pen explained it in a manner both lucid and understandable to today's practicing lawyer. In his article, "Natural Law and Everyday Law," appearing in Volume 5 of the *Natural Law Forum* (1960), he suggests an approach to natural law which attempts to make it useful on a day-to-day basis in the perplexities with which practitioners and judges constantly are confronted.

Law, he explains, is a good deal more than an aggregation of already existing rules, — it is a living process for the just resolution of never ending human controversies and as such it receives a positive contribution from natural law.

Precedent, constitution and statute often point simultaneously in more than one direction, and as a consequence the answer must be sought in sources beyond the relevant legal materials. What are the criteria

of choice among the alternatives which virtually every case presents?

Dean O'Meara suggests that the criteria include the principles of the natural law; in other words, when the nature of the case warrants, the judge or the lawyer should turn for guidance to relevant ethical principles — those principles of conduct, that is, "which are in keeping with man's nature as it would be if it were able to resolve its disharmonies and to surmount its imperfections."

He sums up by stating:

Natural law in its usual meanings is not very helpful in the day-to-day problems of professional life. This could be remedied, I suggest, and natural law made much more fruitful if it were thought of as the contribution to law which can be made by ethics. At the same time, of course, it would be necessary to think of law as a process of decision rather than as an agglomeration of rules, a process in which the judge performs not a mechanical but a creative function. In so doing, he must of necessity rely, in the end, on his own intellect, experience and conscience. Thus he has urgent need for guides to which he can turn in his recurrent perplexities. My suggestion is that natural law, in the sense in which I am using that term, is one such guide.

Church-State

The recent presidential election campaign has so stirred the interest of the American people in the relationship of Church-State that a survey article dealing with the historical and legal aspects of the subject is sure to attract widespread attention. Just such an article appears in the current November 1960 issue of *Social Order* by Rev. Edward Duff, S.J.

Father Duff follows his thorough analysis of the legal and historical background

of this controversial issue with a plea that a satisfactory theology of religious toleration be worked out. He points out very forcefully that there is a need of an adequate and affirmative argument establishing the theological validity of the acceptance of the American political system with its separation of church and state provisions.

He concludes that in working out this

argument theologians will have a clear set of facts to start from: the uninterrupted and the consistent declarations of the American hierarchy extolling, as fully satisfying the demands of Catholic teaching and as fruitful for religion, a regime in which responsibility for the growth of the Kingdom of God is left uniquely in the hands of his assigned agents, unassisted by Caesar's functionaries.
