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Church and State

Is the so-called "wall of separation" between Church and State impenetrable and fixed, or is it permeable and lacking in definite boundaries? – This challenging question is posed, analyzed and answered by Professor Robert Weclew in his article, "Church and State: How Much Separation?," published in the winter issue of the *DePaul Law Review.*

Professor Weclew observes that five positions in the inter-relationship between Church and State may be considered in connection with establishment of religion: (1) Government gives its full support and authority to making a particular religious sect the state religion, as in England; (2) Government grants a preference to one or more sects; (3) Government aids all religions; (4) Government co-operates with all religions; (5) Government assumes an attitude of absolute neutrality toward all religions. There is very little responsible support for Government's doing (1) or (2) in this country. It has been argued that Government's maintaining an attitude of absolute neutrality, (5), is in effect being "neutral in favor of" secularism as opposed to religion and in effect is assistance in the establishment of a state religion of secularism. In addition, absolute neutrality in our pluralistic society would violate the freedom clause of the first amendment in many instances. Absolute neutrality is virtually impossible. The real problems are in (3) and (4), and to a lesser degree in (5).

The article concludes a thorough discussion of the state and federal cases which are pertinent to the question with the following interesting distinction:

> It is probable that the philosophy of *Everson,* a 1946 [1947] case, and *McCollum,* a 1948 case, were by-products of the preferred position philosophy emphasizing the firstness of the first amendment, which was accepted by a majority of the Court from 1943 to 1948, but not thereafter. Where firstness of the first amendment is emphasized the judicial starting point is a taint of presumptive invalidity, and not of presumptive validity. The Court, having encompassed the other provisions of the first amendment within the fourteenth, and having given them preferred status, could have used *Everson* and *McCollum,* where establishment was emphasized, to round out the first amendment. This is in opposition to Holmes' theory of federalism expressed as follows:
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> > "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those

whose judgment I most respect."

The Court may well have adopted the Holmes' philosophy in 1952 in *Zorach*, with the preferred position of the first amendment abandoned.

Elsewhere in the article it is argued that since the state requires school attendance it is the state's duty to provide schools that do not violate the parents' conscience. To the degree that the state maintains neutrality regarding religion and creed it takes a theological position, since it assumes that religion has no real concern with everyday life. This assumption by the state is contrary to the beliefs of many. Certainly it is contrary to fundamental Catholic beliefs. It is argued that nobody is compelled to send his child to a public school but may give him his education in any approved parochial school. This is equating immunity from government coercion and freedom from all government aid to religious freedom.

Giving up the right to freedom of conscience cannot be the price extracted by the state for a public education. Denial of equal benefits to parent and child merely because of their religious beliefs is a form of discrimination. To say that no support of any kind may be given to religion would mean that "irreligion has been endowed and established as the national religion." Since the state allows parents to send their children to nonpublic schools, it may not make their church affiliation a liability to their receipt of benefits granted for the general welfare of all citizens. "The exercise of religious liberty must not become a liability before the law in the disbursements of the benefits of law."

As Professor Weclew states:

Federal funds are available on long term loans to denominational colleges for the purpose of building classrooms, cafeterias, dormitories, and other facilities owned and operated by churches under the College Housing Loan Program.

A United States governmental agency is authorized to award scholarships for scientific study at private, including religious, institutions.

The National Defense Education Act of 1958 under subchapter II makes available to nonprofit as well as public institutions funds from which students attending denominational schools may borrow up to $1,000.00 per year to finance their college educations. Under subchapter III funds are also made available for loans to private nonprofit elementary and secondary schools for acquiring equipment to be used in teaching science, mathematics or foreign languages. Under subchapter IV National Defense Fellowships are awarded with no stipulation that attendance be only at public colleges. Under subchapter VII grants-in-aid may be made to nonprofit private organizations for research and experimentation in television, radio, and motion pictures related to school operation. The Act is concerned with the fullest development of the technical skills and resources of all the nation's young men and women, whether in attendance at public or private schools, in the interests of national defense. The United States Commissioner of Education did not see a violation of the principle of Church and State, nor an aid to the school in that portion of the act which authorized the U.S. Office of Education to pay for academic testing in nonpublic schools, where the state does not have the authority; but he rather viewed it as an attempt to identify students for guidance purposes so as to reduce the large loss of talent.

The article concludes that the "wall of separation" is permeable, lacks definite boundaries, and is of uncertain height. Time, place, circumstances, and subject matter determine what degree of separation there shall be. There are areas where none will deny that the maximum degree

of separation is best for all. There are areas, however, where separation is unnecessary, undesirable, or impossible.

Natural Law

Discussions on natural law are very lively in Christian literature of our time. Indeed, there is an interesting controversy presently going on within the Protestant ecumenical community between those who uphold, in one form or another, the ancient idea of natural law and those who do not believe that the divine imperative is expressed in the structure of God's universe and of the human heart. At the Oxford Conference (1937) of the Life-and-Work movement a distinction was introduced which has occupied the ecumenical discussion ever since, the distinction between an "ethic of ends" and an "ethic of inspiration."

The upholders of an ethic of ends look upon the universe as an ordered whole, in which man and human society have their particular functions and proper operations discoverable by a rational examination of their natures. This conception presupposes a meaningful universe with a hierarchy of values: the right behavior of each part of the universe can be read from the end and purpose for which it is destined in the harmony of the whole. The upholders of an ethic of inspiration, on the other hand, are convinced that the moral attitude of the Christian cannot be defined in terms of fixed laws; it is rather a living response to a living person. Man is not destined to unfathom the universe and himself, and to conform himself to the structure of their finiteness. He is to seek fellowship with God, the Father of Jesus Christ, Who is sovereignly free, unlimited by His creation and its structures, and to learn every day anew that to be good means to do the will of God. This will must be sought in a personal decision at every moment.

Father Gregory Baum, writing in the January 20, 1961 issue of *The Commonweal,* feels that the distinction between an ethic of ends and an ethic of inspiration, though interesting, is not a good one. In an article entitled "Protestants and Natural Law" he reasons that such a distinction does not permit the Catholic to state his view on morality and the ethical engagement of man. Sometimes, it is true, the Catholic position is presented as if it were an ethic of ends. Sometimes, when defending and explaining our natural law tradition, we give too rationalistic an account of the matter. We pretend that we can see through human nature, that we can conceptualize it adequately, and derive from it detailed laws concerning human behavior. We create the impression, occasionally, that the natural law is a set of laws, a little codex hidden in the heart, giving us the solution of the moral problems of man and society. Conceiving the natural law as laws, we have the obvious difficulty of explaining why there are different moral standards in various societies, and why philosophical systems have arrived at laws, supposedly all derived from natural law, which in fact are at variance with one another.

Father Baum corrects these misconceptions and clarifies the Catholic position on natural law with the following observations:

> The natural law is not a set of laws in the human heart. The natural law is an unwritten law; it is not conceptualized. According to the metaphysical intuition of a St. Thomas,

in harmony with a long line of men of wisdom, the very being of man implies his moral vocation. Man is engaged in moral striving, not on account of laws distinct from him, but by his very nature. Morality is man's fidelity to what God made him to be. It may be difficult to define what man is; it may be difficult to hit upon an exhaustive enumeration of man's essential characteristics. Concretely human nature may be defined as that which the Son of God took upon Himself when He became this man Jesus – from which follows that human nature is eminently compatible with holiness.

But whether we can come to a definition of man or not, is irrelevant from our point of view here. For the knowledge of what the natural law in man's heart implies is not rationally derived from a definition of human nature; it is not extracted from premises by means of a syllogism; it is not the conclusion of an argument. We discover what the natural law demands of us in the various situations of life, not by rational knowledge, but by knowledge *per inclinationem*. This "kind of knowledge is not clear knowledge through concepts and conceptual judgments; it is obscure, unsystematic, vital knowledge by connaturality or congeniality, in which the intellect in order to bear judgment consults and listens to the inner melody that the vibrating strings of abiding tendencies make present in the subject." (Maritain).

He concludes, in part, with this statement:

Whenever the philosopher derives specific precepts from the natural law or proves that certain maxims are implied in the law of nature, this is what Maritain calls "after-knowledge." It is a reflection on, and an attempt to penetrate, that which we know by the aspiration of our being. We are often too ready, it seems to me, to claim that certain laws and principles are actually contained in the natural law, when they are actually only remotely connected with it. Because of the difficulty of discovering the profound inclination of our heart, obscured as it is by our congenital selfishness, God has revealed in Holy Scripture, and proclaims through the teaching of the Church, the basic moral principles which are in harmony with our profound inclinations.

Jurisprudence

The hazards of planning a symposium in the field of jurisprudence derive largely from the fact that the field is itself ill-defined. An historical approach seems reasonably satisfactory, however, as illustrated by the series of studies of some of the great figures in the history of legal philosophy which appears in the December 1960 issue of the *Vanderbilt Law Review*.

The introductory essay by Roscoe Pound, "The Function of Legal Philosophy," was originally printed forty years ago. It is intended as a concise statement of the functional significance of twenty-four hundred years of legal speculation. The collection of articles which follows Dean Pound's introduction is obviously not intended as a comprehensive survey of that vast philosophical heritage. In reviewing some of the basic issues with which that heritage has been concerned, however, this symposium does touch most of the great ages of legal philosophy. The Greek period is represented by Hans Kelsen's detailed analysis of Plato which takes sharp issue with recent contentions that Plato was a proponent of an empirically grounded natural law. The central figure in the medieval period was Thomas Aquinas, and Father Thomas E. Davitt, S.J., explores the contemporary implications of the Thomistic theory of law in the fields of Constitutional Law, Torts, Criminal Law and Property.

From an examination of four eighteenth-

century theories of justice (those of Hume, Rousseau, Montesquieu and Kant), Clarence Morris draws some inferences about the modern legislative machine and the responsibilities it places upon the judicial process. John Austin's theory of law is considered by Samuel E. Stumpf, and his conclusions question the common belief that Austin's system was premised on a complete separation of law and morals. In a unique study of the arresting Nietzsche, Thomas A. Cowan offers support for a jurisprudence of a truly experimental and critical sort.

Modern European legal philosophy has produced many distinctive contributions. Jhering's attempt to revise the fundamental notion of law itself is examined by Iredell Jenkins, who offers an explanation for the widely diverse interpretations put upon Jhering's work by his contemporary followers. The impact of the Nazi regime on legal thought continues to be an important area for analysis, and Wolfgang Friedmann's account of Radbruch's legal philosophy could not avoid involvement with this issue.

In one of the most engaging and poetic articles of the symposium, Professor John C. H. Wu describes the parallel between the philosophy of Holmes and the very spirit of the common-law process. If Holmes was one of the more philosophically oriented of American jurists, Morris Cohen was the most juristically oriented of American philosophers. Huntington Cairns, in one of the concluding symposium articles, surveys the complex and wide-ranging world of Morris Cohen and notes particularly Cohen's insistent queries into the meaning of scientific method. On the whole, readers will find much of interest in the symposium collection despite its rather ambitious scope.

St. Thomas More

The Yale University Press at New Haven, Connecticut, has announced the forthcoming publication of twin editions of the works of St. Thomas More – one a scholarly edition of eleven volumes, the other a popular edition of seven volumes. The popular edition will have modernized texts and less apparatus than the scholarly. The Chairman of the Editorial Committee is Louis L. Martz of Yale and the Executive Editor is Richard S. Sylvester, also of Yale. The first volumes are scheduled for 1961, and the project is expected to be completed by 1970. A prospectus is available upon request.

Another volume recently published by the Yale University Press is entitled *St. Thomas More: A Preliminary Bibliography of His Works and of Moreana to the Year 1750*. It is compiled by R. W. Gibson with a Bibliography of Utopiana compiled by him and J. Max Patrick. This volume is divided into eleven sections, the first six of which provide full bibliographical descriptions of More's works and of biographies of him, giving locations of copies insofar as it has been possible to discover them. Section I covers Utopia; Section II, Separate Works; Section III, Collected Works; Section IV, Lucian, with More's translations; Section V, Prayers; and Section VI, Lives of More.

The bibliography (Section VII) then lists letters to and from More alphabetically by correspondent. This section is followed by "Moreana" (Section VIII), a collection of allusions to More and his works. Section IX covers Utopiana. Section X deals with fictitious Utopian addresses and Section XI lists the portraits of More which occur in works described in the bibliography. A full index completes the volume.

Bishop John J. Wright

The December 1960 issue of the *Catholic Mind* is devoted to a selection of articles from the pen of one of the most articulate members of the American hierarchy – Most Rev. John J. Wright, Bishop of Pittsburgh. More than an outstanding religious leader, Bishop Wright is also a scholar of recognized merit.

The Bishop, for example, has long been interested in the problem of nationalism. His book, *National Patriotism in Papal Teaching,* first published in 1942, has gone through three printings. It has been hailed as "required reading for all students of government." Among the articles and addresses selected by the Editors of the *Catholic Mind,* therefore, we single out for special attention his "Education for the Postwar World," a doctrinal and historical treatment of the phenomenon of nationalism with particular reference to its postwar manifestations in this country. Citing its dangers, Bishop Wright proposes as the only remedy a truly Christian, and therefore internationalist, view of the world. For a still deeper probing of the theological foundations of internationalism, we recommend "The Mass and International Order."

Also worthy of special note is "The Church and American Society." In view of the current religio-political controversy between Catholics and Protestants, Bishop Wright's reflections on Catholicism in America are most timely. Similarly, "Authority and Freedom," an explanation of the Catholic view on these two apparently contradictory concepts, is a valuable contribution to this controversy.

In " 'Liberals,' 'Conservatives' and the Common Good" Bishop Wright plunges deep into another controversy that is raging both within and without the Church today. What is "liberalism," anyway? What is "conservatism"? Is there a common ground on which "liberals" and "conservatives" can meet? Thoughtful reading of this article will do much to allay intemperate name-calling.

Other articles, dealing with such diverse topics as "privilege" and the "space age," manifest the range of Bishop Wright's interests.

Civil Rights

Father Robert Drinan, S.J., Dean of Boston College Law School and a member of the Board of Advisors of *The Catholic Lawyer,* has an excellent article in the February 1961 issue of the *Catholic Mind,* entitled "Civil Rights in the Sixties." In it he points out that the legislators of America should confront the following facts and enact or implement laws capable of correcting these deplorable situations:

(1) In every northern city Negroes are segregated in their housing on a "checkerboard" pattern. This situation can be corrected only by effective legislation vigorously enforced along the lines of the recently enacted laws in New York City and the State of Massachusetts.

(2) There is abundant evidence that able Jewish citizens are deprived because of their religion of positions in business and banking to which they are entitled.

(3) Evidence exists that qualified Catholic professors are not as readily hired at city and state colleges as non-Catholic professors.

(4) The right of a woman to receive equal pay for equal work – a right expressly reaffirmed by Pope Pius XII – is not generally guaranteed in American law.

(5) The right of a person accused of crime to be free from prejudicial pre-trial publicity has sometimes been lost because of an unreasonable devotion to freedom of the press.

There are then many frontiers for the law to study and conquer. But the status of the Negro in the Sixties will not depend primarily on what new anti-discrimination laws are enacted or how much desegregation is ordered by our federal and state courts. The status of the Negro – his place in the sun of American freedom – will depend on how deeply all Americans believe in the spiritual principle of human equality.

Father Drinan argues further that total integration, the total disappearance of all segregation and discrimination, *is* possible if we carry out a three-way program: 1) a continuous appeal to our state and federal lawmakers for more and better anti-discrimination legislation; 2) an ever more intense campaign to inform society and influence public opinion about the inherent equality of all men; and 3) a crusade of prayer to the Father of humanity begging Him to enlighten the minds and inspire the hearts of His children with a love for every man as an image of His creator.

He concludes that education to provide the moral consensus necessary for the most complete integration of the Negro in the North must stress the following:

(1) Color or race is irrelevant in our dealings with our fellow citizens. To hold otherwise is to embrace, at least to some extent, the terrible error of racism so vehemently condemned by Pope Pius XII and all modern Popes.

(2) It has been shown by many studies that the greatest obstacle to integrated housing in the North is the fear that the presence of nonwhites in the neighborhood will bring about depreciation of the surrounding property. No myth is more difficult to dispel, yet no myth could possibly be more erroneous.

(3) The human dignity which the Constitution and our basic law presupposes as the indispensable bond binding us together does not mean that we should grant to each other the minimum of those amenities the denial of which would be rudeness. The concept of human dignity which is a part of every American's credo – be he Christian, Jew or agnostic – impels us to be good neighbors to those who share our common destiny.

It is this concept of human dignity which forms the centerpiece and the driving force of the entire movement for full equality for every American.

Mental Disease

Readers of the recent two part symposium in *The Catholic Lawyer* on "Mental Disease and Criminal Responsibility" will be interested in the *New York Times* news item of February 13, 1961. It reports that new ways to determine insanity in criminal cases will be sought by the New York State Department of Mental Hygiene.

Two bills, which have been filed in Albany by the Department, are designed to modernize the Penal Law and Code of Criminal Procedure.

The Department seeks to redefine insanity and criminal responsibility along more modern lines than the old rule that fixes responsibility on the defendant's ability to know "right from wrong" and that defines insanity as the inability to know this difference.

The bill to amend the Penal Law provides that a person is not responsible for

criminal conduct if at the time of the act he cannot "know or appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law" because of a mental disease or defect.

The companion bill to amend the Code of Criminal Procedure broadens the admissibility and nature of psychiatric testimony in criminal trials in pleas of insanity.

It provides that a psychiatrist who has examined a defendant be allowed to give in court a complete report of all findings. Under present procedures such testimony can be omitted if objections against it are sustained by the court.

The proposed legislation would do away with the yardstick of whether a defendant can tell right from wrong. This is the M'Naghten Rule formulated in England in 1843.

Abortion Legislation

The most recent expression on this topic appearing in legal periodicals has been the article in the Winter issue of the *Georgetown Law Journal,* by Eugene Quay, entitled "Justifiable Abortion – Medical and Legal Foundations." The article, by far, is the best on the subject which has as yet appeared in print. It contains, in part, a thorough, objective discussion of the medical opinion on abortion as evaluated through the eyes of a lawyer. In essence, the article establishes:

(1) that in medical practice, as in other professions, not all members are equally ethical;

(2) that the difference in diligence, patience and general attitude towards interference with pregnancy on the part of different medical men makes any uniform handling rationally inconceivable;

(3) that the availability of the easy method of therapeutic abortion to meet any combination of pregnancy with complicating disease would offer a constant temptation to resort to therapeutic abortion when other but more difficult or time-consuming methods would fully protect the mother without sacrifice of her child;

(4) that practitioners for whom therapeutic abortion was not available have met the challenge by working out successful medical treatment for complications once regarded as impossible of management except by therapeutic abortion;

(5) that the average practitioner may make a mistake in determining the necessity for therapeutic abortion in a particular case;

(6) that a consultant who may get his case-taking and anamnesis from the physician calling him may err in consequence;

(7) that after a particular indication for therapeutic abortion has been proven both unnecessary and harmful, it will be a matter of years before the whole profession abandons it; and

(8) that the end does not justify the means.

Mr. Quay argues that if therapeutic abortion is to continue to be recognized on a medical basis in spite of the medical testimony against it, then it should be recommended:

(1) that it be confined to no-fee clinics;

(2) that it be done only on the recorded judgment of the staff or a specially qualified committee, on specified medical grounds, reciting the facts of each case and the authority for holding that therapeutic abortion is necessary and will be beneficial in such case, without offsetting after-effects;

(3) that such judgment be entered only after appearance of a public guardian or attorney for the unborn;

(4) that a follow-up record on each patient be required, with a clearing house for reports of all cases and continuous revision of acceptable indications in the light of additional experience, development of therapies, et cetera;

(5) that the statutory excuse of necessity of therapeutic abortion for the preservation of the life of the mother be made an affirmative defense, to be proved by the defendant as a fact, not as a mere opinion;

(6) that there be denied to any staff or committee the authority to approve therapeutic abortion in any case in which it is asked on social or other nonmedical grounds, or on a record in which entries have been made of such nonmedical elements.

Sterilization Laws

At present, twenty-eight states have sterilization laws, twenty-six of which are compulsory. Mentally deficient persons are subject to the laws in all of these states and in all but two they are also applicable to the mentally ill. Seventeen states include epileptics in the groups designated by such laws. Nineteen of these laws apply to persons confined in hospitals or other institutions caring for afflicted persons with the named conditions while the remaining laws include persons who are not confined.

In an excellent article entitled "Reappraisal of Eugenic Sterilization Laws," appearing in the January 1961 issue of the *Cleveland-Marshall Law Review,* Elyce Zenoff questions the wisdom of this legislation and discusses the current medical and legal views on the matter.

According to the article the American Neurological Association's Committee for the Investigation of Eugenical Sterilization summarized the main arguments of the proponents of sterilization as follows:

(1) Mental illness, mental deficiency, epilepsy, pauperism and certain forms of criminality are steadily increasing;

(2) Persons with these diseases propagate at a greater rate than the normal population;

(3) These conditions are hereditary;

(4) Environment is of less importance than germ plasm in the creation of these conditions. Implicit, and sometimes explicit, in this point of view is that euthenics is against natural selection because it keeps alive the unfit and, therefore, is against the racial welfare.

Although it was accepted by the state legislatures and the courts that at least the inheritability of these conditions had been scientifically proven, studies undertaken in the last twenty-five years have thrown substantial doubt upon this conclusion. The most important of these studies was that conducted by the American Neurological Association. They made the following answers to the statements of the advocates of eugenic sterilization laws:

(1) There is nothing to indicate that mental disease and mental defect are increasing, and from this standpoint there is no evidence of a biological deterioration of the race.

(2) The reputedly high fecundity of the mentally defective groups . . . is a myth based on the assumption that those who are low in the cultural scale are also mentally and biologically defective.

(3) Any law concerning sterilization . . . under the present state of knowledge [of heredity] should be voluntary . . . rather than compulsory.

(4) Nothing in the acceptance of heredity as a factor in the genesis of any condition considered by this report excludes the environmental agencies of life as equally potent, and in many instances, as even more effective.

Mr. Zenoff points out that there are two legal viewpoints concerning the constitutionality of compulsory sterilization laws. The first theory which became prominent was that the constitutionality of sterilization statutes depends upon their scientific validity. Many proponents of this view believe that the scientific premises upon which the statutes rest are erroneous, and that consequently, compulsory sterilization is an arbitrary and unreasonable deprivation of liberty.

The second theory considers the right of procreation as a fundamental liberty and one which cannot be interfered with by a government order. The analogies used by Mr. Justice Holmes to uphold this type of legislation have been severely criticized by some of the proponents of this view. Mr. Justice Holmes said: "The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes." However, when the Massachusetts Supreme Court upheld the vaccination law, it said:

> If a person should deem it important that vaccination should not be performed in his case, and the authorities should think otherwise, it is not in their power to vaccinate him by force, and the worst that could happen to him under the statute would be the payment of the penalty of five dollars.

The article concludes, in part, as follows:

> Since sterilization is a drastic remedy and generally a permanent infringement of bodily integrity, those affected by laws authorizing it are entitled to every reasonable precaution. Thus far they have not been adequately protected. The sterilization of persons without legal authorization, before testing the constitutionality of the laws, sterilization under unconstitutional laws, and the lack of representation by counsel, are all clear illustrations of this disregard of rights.
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> The fact that scientific opinion differs as to the value of sterilization certainly indicates that the merits of this type of legislation should be re-evaluated. Since court decisions have assumed that the conditions included in sterilization statutes are hereditary, the constitutionality of such statutes is questionable if scientific opinion is divided concerning the effectiveness of this procedure.