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Article 10

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Connally Amendment

The editorial page of the April 22 issue of *The Tablet* (Catholic weekly for the Archdiocese of Brooklyn) contains a strong plea in favor of retaining the Connally Amendment. According to the editorial, the new president of the Court is a representative of Communist Poland. To add flavor to the news, a new judge on the fifteen-member panel is a Soviet representative. The new Polish Chief Judge, Bohdahn Winiarski, is seventy-seven years old, and after serving the non-Communist Polish government in exile during World War II, found it possible to make an accommodation with the Communists when they took over Poland at the end of the war. He was regarded by them as sufficiently reliable politically to merit appointment to the Court in 1946.

The new Soviet judge, Vladimir Koretsky, is seventy-one years old and has served the Communist regime in various important capacities as a legal adviser to Soviet diplomatic missions. His background assures that he would view the Court as another apparatus for the realization of Soviet aims in the war against civilization.

The point which *The Tablet* makes is that it is to judges of this stripe that the Connally repeal forces would entrust the concerns of the United States, indifferent to the fact that judges from monolithic governments act as agents of the state and make no pretense of being unbiased. Their decisions are made before trials commence. Only a completely naive person would imagine that Communist judges would ever act outside Communist ideology, or pass up an opportunity to use the Court to advance Communist interests or to embarrass the United States.

On the other hand, the arguments in favor of repeal continue to multiply. John C. Satterfield, in an article entitled, "The Connally Amendment – A Detriment to the United States," which appears in the March issue of the *Mississippi Law Journal,* anticipates the aforementioned *Tablet* objection by pointing out that it is hardly feasible that the Communist countries will gain control of the Court, when one understands the structure of the Court. There are fifteen judges. At present, there are two judges from Communist countries. This is a long way from controlling the Court. Furthermore, we need not fear that change in the control of the Court will hurt us. We have a right to withdraw from the Court upon six months notice. The fifteen judges hold office for nine years. Their terms are rotated so that five judges are elected every three years. Consequently, in order to alter the majority, a period of six years is necessary. Should the membership of the Court assume a political aspect or be threatened by Communist control, we could exercise our right of withdrawal.

The article concludes by stating in part:

> If the Connally Amendment is repealed,

we will be free in many instances to appeal to the World Court when other countries flaunt our rights by denying the rights of our citizens, and confiscating our property without a proper legal basis. At present, we are crippled by the "reciprocity" clauses. These clauses enable any defendant in a suit by the United States to invoke the same veto against us. The amendment, therefore, has a multiple effect, in that every country has this Connally Amendment veto right against us, when we are the plaintiff nation. It does not matter that we have never used the Security Council veto, nor that we intend to continue to exercise the utmost restraint in its use. Others may use it arbitrarily against us. The result is, then, that the Court will lack jurisdiction and we will be out of court. If normal diplomatic channels have failed to solve the problem, we are left with the choice of threatening force or accepting the particular injustice. This is usually the situation, for a nation does not go to the expense of appealing to the World Court without first attempting to solve the problem through normal diplomatic means.

Abortion and the Law

Early in March the New Hampshire House of Representatives, 209 to 156, passed a bill allowing doctors, under certain conditions, to halt pregnancies during the first 20 weeks of fetal life. The bill, strongly opposed by Catholic Bishop Ernest J. Primeau of Manchester, was supported by the State Medical Association, the Manchester Ministers' Association and the New Hampshire Council of Churches.

It is distressing to see staid New Hampshire heading toward a relaxation of statutes on therapeutic abortion at a time when, as Bishop Primeau noted, "leading medical authorities have all but ruled out" the destruction of fetal life as a "medically indicated" treatment of the complications that sometimes arise during pregnancy.

The March 25 issue of *America* contains an excellent comment on this turn of events in New Hampshire. In the judgment of the editors of *America* the broad area of human life and its sanctities is a field in which the ethical judgment of the churches upon society is morally imperative. Of what value are increased church membership and interest in religion, if they go hand in hand with a rejection of our traditional abhorrence of such practices as abortion, sterilization and euthanasia?

If the churches do not guard morality in a democratic state, the determination of morality tends to go by default to the majority vote and the popular will. If the pulpits are silent, people look more and more to the government to define right and wrong. After all, it is natural for simple folk to identify moral judgment on abortion, etc., with the penal statutes that cover these matters. In such situations, the repeal or relaxation of penal provisions takes on the appearance of a toleration or even a societal approval of what was previously prohibited.

Psychiatry and the Law

Readers who were interested in the recent two part symposium in *The Catholic Lawyer* dealing with Mental Disease and Criminal Responsibility, will enjoy the excellent article by Professor Erickson, "Psychiatry and the Law: An Attempt at Synthesis" in the Winter 1961 issue of the *Duke Law Journal.*

As a prelude to synthesis the writer points out that the law is based upon the assumption that free will exists. It allows for certain exceptions—for example, insane and other mentally diseased persons—but other than these exceptions, wrongdoers are held responsible for their acts because it is assured that they have the ability to

do right if they so desire. Most psychiatrists would maintain that this is not so, for acts are predetermined, so they claim, and the concept of "responsibility" is not scientifically meaningful. From this (and here is where the ranks of psychiatry begin to diverge more), some conclude that the use of punishment is both illogical and fruitless, either as a means of individual treatment or as a means of general deterrence, and that the only meaningful approach to criminality lies in the use of psychotherapy, which will bring about a change in the (usually unconscious) factors that have influenced the person in such a way that he has committed a crime.

When one considers the extreme disparity between the "deterministic" and "free will" interpretations of man's behavior, it becomes somewhat puzzling that there has been any *rapprochement* whatsoever between psychiatry and the law. The explanation for the degree of rapport that exists would seem to be that only a few psychiatrists *really* take psychology and its branches seriously as far as their practical relations in everyday life and the functioning of the criminal law are concerned. Even such extreme advocates of the "psychiatric position" as Franz Alexander and Gregory Zilboorg would probably hesitate to say that there is no advantage whatever in holding anyone morally responsible for anything. The majority of forensic psychiatrists, regardless of what they might proclaim as their theoretical position on the question of determinism, have behaved in their relationships with the law *as if* they considered the "normal" individual to be morally responsible and, therefore, accountable for his acts. Their major contention with the law has not been over whether or not it is possible to attach moral responsibility to anyone at all, but over the criteria to be used in determining who should be held responsible for his acts and who should not. In fact, some are quite insistent upon the necessity for sidestepping the whole issue and thereby ignore the fact that regardless of what they say, the functioning of psychiatry is based upon the assumption of determinism.

Having established the points of fundamental divergence the Professor begins his synthesis by arguing that a realistic appraisal of the nature of man and his relationship to his society necessitates accepting that in order for man to live in a relatively harmonious state, it is mandatory that he entertain certain beliefs about himself and his institutions that are not scientifically demonstrable. A more effective system of criminal law cannot be based upon a philosophy that ignores this, nor can it ignore the fact that one of its major functions is the control of the noncriminal majority in the population. If the sole function of the criminal law were the future deterrence of individuals who have already committed criminal acts and have fallen into the hands of the law, the difficulties involved in prescribing the optimum methods to be utilized would be greatly reduced. Such, unfortunately, is not the case. Even if it is agreed that the proper end of the criminal law is the utilitarian function of preventing crime, it would appear that one of the factors necessary for accomplishing this is the ascription of personal moral responsibility for our actions, involving the threat of punishment for each and every one of us should we behave in an unacceptable way.

The interesting conclusion that the article arrives at is that our concept of guilt has inherent in it the concept of re-

sponsibility for one's acts, and it *is* of importance to determine whether the individual in question was or was not a free moral agent capable of controlling his behavior; for however erroneous belief in this concept of free choice may be, it is a concept that must be retained if we are to be maximally influenced by moral and ethical considerations. To maintain that it makes no difference whether we incarcerate a man for a criminal act or commit him to an institution as a sick individual is to overlook the extremely important effects that such a straightforward utilitarian philosophy would have upon the population as a whole. Perhaps for the psychiatrist, the individual's social dangerousness and not his moral blameworthiness is the essential criterion in administering the criminal law, but this is by no means true for the majority of people. For them, the moral blameworthiness of the accused person is a factor of extreme relevance.

In the words of Professor Erickson:

> We must believe in personal responsibility and free will if the law is to function; all that is required of the law is that it allow us to be consistent with our beliefs by not punishing persons who are so extremely and obviously deranged that they are clearly not capable of exercising their free will. What is required is some specified criteria for establishing the degree of derangement that is to be considered obvious and extreme. . . . [W]e have in the Model Penal Code an approach that will accomplish essentially what the *M'Naghten* Rules accomplish, the excusing from criminal responsibility of a small percentage of extremely deviant individuals whose condemnation and punishment would prove disturbing to us because they are manifestly not the same as the rest of us. The major difference is that the Model Penal Code appears to be more in harmony with current knowledge concerning cognition and conation and their relationships to overt behavior, thus satisfying our need for an approach that is not so anachronistic as that based upon the *M'Naghten* Rules.

Right To Work Laws

Although the last word has long ago been said on this subject in the pages of *The Catholic Lawyer,* other publications continue to discuss the matter with unending vigor. James Youngdahl reviews the state of the law in Arkansas after thirteen years of a "Right to Work" law in the Fall, 1960 issue of the *Arkansas Law Review.*

After a detailed analysis of the cases interpreting the Arkansas legislation in the last decade, the author concludes:

> As suggested in the Introduction, most "conclusions" about the Arkansas right to work law are expressed in terms of economic bias. . . .
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> There are some economic observations which might be helpful for judgment on the effectiveness of these measures in Arkansas. It has been demonstrated that work stoppages due to labor disputes have occurred with about the same frequency in the years after 1947 as during a comparable prior period. There is little or no evidence that right to work laws have appreciably increased industrialization; of the ten states which led the nation in increased industry between 1939 and 1953, only two, Texas and Florida, were right to work states.
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> In 1929 the annual Arkansas per capita income was $304, and by 1945 it had risen to $654. In 1950 it was $805 and had risen to $1322 by 1959. Thus in the past thirty years the rise in per capita income appears to be about constant through right to work and non-right to work years. In general, it appears that right to work states have substantially inferior incomes. Out of forty-eight states and the District of Columbia, Arkansas in 1959 was next to the last in per capita income rankings. Under some other standards, right to work

states have relatively less social legislation and higher rejection rates for failure of army education tests.

Whether all of these factors are coincidental or consequent to right to work legislation must be left up to the advocates, but it does appear that extravagant claims for their economic value to the state are somewhat exaggerated.

As to direct legal consequences, no prosecutions under the penalty provisions of the statute are on record. On the contrary, the law has been "enforced" through injunctions against picket lines with what are characterized as illegal purposes, or defenses to contract actions with what are held to be invalid union security clauses. The major problems on constitutionality have been resolved, but there appear to be two serious questions on the scope and enforcement of the statute under the federal constitution which have not been presented to the Arkansas courts.

The controversy over union security, or the right to work, will continue. It is hoped that the preceding survey of its operation in Arkansas will be of some value in measuring its success in the public and legislative debates to come.

Right to Property

The Winter, 1961 issue of *Theology Digest* features a scholarly, well reasoned note dealing with private property and raising the question as to whether it is an absolute right. Written by Franz Kluber, it argues that seventy years ago Leo XIII countered Marxism's attack on private property with the doctrine that private property is man's by natural right. Catholic moralists and ethicians promptly took up the banner; and they are still carrying it — in the wrong direction.

According to Kluber, they gave first place to the subordinate right, the right to private property. Sometimes they even transferred the inviolability of private property as an institution to the individual's right to a particular piece of property. Hence the natural law of common use, the right all men have to the use of earthly goods, though it is pre-eminent, was relegated to second place. The hierarchy of means and end was subverted, and the "sanctity of justly acquired property rights" became the earmark of Catholic social ethics.

The author concludes:

> The institution of private property — subordinate to common use — does belong to the unchangeable natural law. But the concrete expression of an individual's right to property belongs to the changeable natural law and hence is subordinate to positive law. The right to define concrete, private rights to property belongs to the community and, in the last analysis, to the state. Hence the redistribution of property cannot be rejected a priori on the grounds of the "inviolability" of existing property rights — as if private property did not exist simply for the sake of the common good.

Capital Punishment

Readers of the recent symposium on Punishment will appreciate Professor Orville Snyder's article on "Capital Punishment: The Moral Issue," featured in the February, 1961, *West Virginia Law Review.*

Professor Snyder poses the moral issue as being dependent upon evidence. If the evidence supported a firm conclusion that, because of its deterrent effect, capital punishment protects the community better than its alternatives, we could say confidently that the penalty is morally justified. Also, if the evidence supported a firm conclusion that, notwithstanding the deterrent effect it does have, capital punishment does not protect the community as well as its alter-

natives, we could say confidently that the penalty is morally unjustified. He observes, however, that evidence supports neither of these conclusions.

In such a situation he concludes, the principle to be applied is derived from our concept of the moral-law basis of government's just powers and of the nature and measure of these powers. It is that the public safety takes precedence. The application of this principle resolves the doubts in favor of protecting the community. In safeguarding the community, it would, of course, be morally wrong to ride roughshod over the legitimate interests of harm-doers. However, resolving the doubts about which of alternative ways of dealing with them better protects the community in favor of the community, instead of in favor of the harm-doer, in cases of the grave harms listed above, infringes unjustifiably no interest of the criminal which is legitimate either constitutionally or morally. Consequently, the adoption or retention of capital punishment is morally justified.

Censorship

Readers who recall the 1958 *Catholic Lawyer* symposium on censorship will find new observations and conclusions on the subject set forth in the November 1960 issue of the *Minnesota Law Review*. In this issue, Dean William B. Lockhart and Professor Robert C. McClure, the "outstanding authorities on obscenity" (as they were titled by Mr. Justice Douglas in *Roth v. United States*) again demonstrate that their *expertise* is to be found in their scholarly resolution of the problems of liberty and authority posed by obscenity censorship. After examining the turn that constitutional protection of literature has taken since 1957, they point the way to a practical resolution of the problem by formulating constitutional standards which comport favorably with the approach to "obscenity" problems taken by the United States Supreme Court.

In considering the development of a test to identify "censorable obscenity," they examine the nature of pornography and conclude that it provides a useful guide. They find that "hard-core pornography" is the foundation for the "constant" concept of obscenity currently applied by the Court; and they advocate a "variable" concept which would make the validity of censorship depend upon the particular material's primary audience and upon the nature of the appeal to that-audience.

The authors also discuss: (1) the requirement that material be judged as a whole on the basis of its dominant theme; (2) the weight to be given "redeeming social importance"; (3) the protection of "immoral" ideas and the "end of ideological obscenity"; (4) the requirement of *scienter*; (5) the meaning and application of "contemporary community standards" and (6) the need for independent judicial review of obscenity findings.

The authors conclude with the following pertinent observations:

> In the past three years the Supreme Court has made substantial progress toward developing constitutional standards for obscenity censorship, but difficult problems must still be faced. The Court has made it quite clear, both in words and in deeds, that constitutional freedom of expression applies to literature, art, and scientific works dealing with sex. It has established several significant constitutional limitations on obscenity censorship, all designed to prevent serious inroads on freedom in this area, though the full scope of these limitations has yet to be charted by the Court. But the Court has not yet struggled in its opinions with the core

problem of obscenity censorship – how to draw the line between constitutionally protected material dealing with sex and material properly censorable as "obscene." It has thus far made no effort to clarify the brief, inadequate, and somewhat misleading *Roth-Alberts* verbal formulation relating to this core problem.

It is important for the Supreme Court to give guidance to the lower courts on this core problem of obscenity censorship, but we do not criticize the Court for its delay thus far. On the contrary, we believe the Court has been wise to avoid an attempt in these first few years to verbalize the basis for its conclusions that obscenity findings in several cases violated constitutional requirements. The Court is charting a new course here, and it is far more likely to chart a true course that will avoid dangerous shoals in the future if it gains substantial experience in dealing with the difficult cases before it makes any effort to generalize its constitutional standards for obscenity through a verbal formulation. But soon it will have to formulate guide lines for the lower courts. When that time comes, we hope that our analysis will prove useful to counsel and to the Court.

Eichmann Trial

As this issue of *The Catholic Lawyer* goes to press, the trial of the notorious Adolph Eichmann has begun in Israel. Readers who would be interested in a well documented discussion of the moral aspects of this case are referred to a lengthy article by Helen Silving, entitled "In Re Eichmann: A Dilemma of Law and Morality," in the April, 1961, *American Journal of International Law.*

Along the same lines, but on a broader topic, in an article written in the March, 1961 issue of the *American Bar Association Journal,* Nicholas R. Doman undertakes to answer contentions that there was no existing international law to properly penalize the defendants in the Nuremberg Trials. Much of what he writes is in direct refutation of Dr. August von Knieriem's claims made in his recent book entitled "The Nuremberg Trials."

Dr. von Knieriem's prime contentions which Mr. Doman refutes are: (1) There was no law in force in Germany, international or otherwise, penalizing many of the acts charged against the German defendants at the time these acts were committed. (2) Persons charged with war crimes should have been tried under their national law. (3) Individuals are not subject to international law and may not be punished thereunder for any crime by any international tribunal. (4) An order from a superior authority may confer immunity on the actor.