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IN OTHER PUBLICATIONS

Right to Travel

The right to travel and migrate has been discussed in previous issues of *The Catholic Lawyer*.¹ The 1961 issue of *The Notre Dame Natural Law Forum* contains additional depth material on this topic in a note by Judge Charles Fahy. The note thoroughly analyzes the significant United States cases involving migration and deals at length with their philosophical implications.

According to Judge Fahy, as the matter stands in the courts today, the right to travel — a natural or personal right — is a liberty within the protective provisions of the fifth amendment. The consequence of this is that proceedings looking toward restraint upon this liberty, at the hands of federal authority, must conform with constitutional provisions, including both procedural and substantive due process of law. Thus it is fair to say that the positive law, insofar as it is evidenced by judicial thinking, recognizes the right to travel, or freedom of movement, as a part of the natural law and as within the idea of liberty with which all men are endowed by their Creator. This liberty does not depend for its existence upon the Constitution or upon any other positive law, though a citizen is protected by the Constitution from its deprivation without due process of law.

One starts out as it were with freedom to travel, to go from place to place, but on the way one may be held to the use of this freedom so as, in the common good, to

safeguard the freedom of others. One starts out with an inalienable liberty and is nevertheless bound to recognize its partial alienability. The natural right exists but its exercise is subject to reasonable regulation under law, so that the natural and the positive law begin to merge, the positive law itself, however, being subject to limitations as to the means and the reasons by which it can limit the fullness of the natural right. Liberty is precious and one may be deprived of it only by methods which are fair and for reasons which are sound and rest on the common good, on a good so great as to outweigh in some circumstances the great good of individual liberty.

Aid to Education

While the issue of the permissible governmental assistance which may be extended to sectarian schools awaits ultimate resolution by the Supreme Court at some future date, the controversy about it continues to rage in the public arena.

It is a dispute capable of producing deep-seated and bitter divisions. As responsible Catholics, therefore, we have a duty to take the greatest pains to see that when our views on the question are presented in the public debates, they are not stated in a manner calculated to offend those who honestly entertain a different opinion. It is true, of course, that many of those opposed to all aid to religious schools rest their true opposition on the grounds of hostility or intolerance towards organized religion, especially toward Catholicism. People in this category are impervious to rational arguments on our side, no matter how convincing. On the other hand, there are many

¹ See Norris, *The Right to Travel and Migrate*, 6 CATHOLIC LAWYER 43 (1960). See also 4 CATHOLIC LAWYER 363 (1958).

people who, at present, sincerely believe that the first amendment of the Constitution prohibits any type of aid to a religious institution on the part of government.

In addition to the informative articles in the current issue of *The Catholic Lawyer* on aid to education which are very much in line with this inoffensive approach there are several excellent ones in the same tone which appear in the June '61 *Catholic Mind*. Paul Butler, former chairman of the Democratic National Committee, defends the constitutionality of federal aid to the private and the parochial schools in one article while the companion piece, written by Austin P. Morris, S.J. points to the central, and neglected issue in the dispute — the true meaning of the no-establishment clause in the first amendment to the Constitution.

Mr. Butler, in discussing the proposed legislation in the federal aid to education area, makes the following pertinent, objective and dispassionate observations:

It appears that if the proposed Federal or State action is for the public welfare, or for the benefit of pupils or their parents, and not for the purpose of aiding religious institutions as such, it is constitutional. However, it is not quite clear whether the form of payment is to be determinative of the question of whether the purpose of the governmental action or assistance is to aid the public welfare or to support or establish religious institutions.

I don't see why it should be. For instance, religious institutions can receive far more substantial aid or support, if you wish, in the form of tax exemption than by direct payments for tuition of certain of their pupils. Moreover, Congress provided for direct tuition payments to universities under the Serviceman's Readjustment Act of 1944, the so-called G.I. Bill, and did the same thing for Korean veterans. Catholic and other re-

ligious hospitals have long participated in the grants made available under the Hospital Construction Act, popularly known as the Hill-Burton Act. No responsible authority has suggested that these forms of congressional aid are unconstitutional.

Finally, it seems to me that if Congress may pay tuition directly to Catholic universities, as is provided in the Kennedy bill now pending, it can do the same at the high school level, and that if religious institutions can receive government money for healing the sick, they can receive similar financial assistance in their efforts to educate the young.

Father Morris deals with another aspect of the problem. He is of the opinion that it is high time that we had open scholarly debate on the meaning of the first amendment. He feels that if feeling against public support of religion should become constitutional law, religious freedom in this country will soon be in jeopardy. And this is to say nothing of the shambles that would be made of the freedom of speech, press, assembly, and of the academic world.

He concludes by stating that we in the United States cannot afford to be immature in our judgment on this issue of Church and State. We cannot afford to let an extremely secularistic solution to this problem allegedly made in the interest of freedom, destroy religious freedom, divide the country and mar our relations with foreign governments. As a South American Bishop said to Archbishop Alter of Cincinnati:

You tell me that you Americans cannot help me with my educational and welfare work because you cannot extend aid on a sectarian basis. . . . Yes, do not help the Catholic Church because you must be very careful not to help any religious organization. Do not help the Protestants because by doing so you will also be helping religion. Do not help the Jews or the Moslems or the Hindus because then, too, you will be helping to strengthen and preserve religious

faiths, customs and traditions. Then, my friend, who remains for you to work with except the very forces whose goal it is to destroy your freedom and mine? (Quoted in the *Catholic Messenger*, Sept. 29, 1960, p. 2.)

Law and Morals

This same issue of *Catholic Mind* carries an article by Norman St. John-Stevas, a frequent contributor to *The Catholic Lawyer*.

Writing on *The Law and Christian Morals*, Mr. Stevas emphasizes that laws embodying moral precepts are only enforceable if they are supported by a corresponding moral consensus in the community. As the author points out, the legislator first has to consider if a prohibitory law would be effective. If it would not be, then the law is better not passed, for its disregard would bring the law in general into disrepute. Secondly, the legislature must ask whether a prohibitory law would lead to worse evils than that which it was designed to avoid.

As the late Pope Pius XII pointed out in his address to the Convention of Italian Catholic Jurists in 1953, the duty of repressing moral and religious error cannot be an ultimate norm of action, but must be subject to higher and more general norms. One such norm is the right of the individual to privacy and the importance of preserving the inviolability of the home.

Finally, according to Mr. Stevas, the legislator must ask whether criminal punishment is the best means of dealing with the problem. Is the best way of dealing with homosexual offenders to send them for months or years to prison — an exclusively male society? Are those who attempt suicide more likely to be cured of this tendency by the help of a psychiatrist

or by the ministrations of a prison warden? According to the answer given to these questions, so should the law be shaped.

Religious Liberty

American interest in the domestic aspects of religious liberty during recent months may stimulate further concern for developments on the international scene. Strikingly similar conclusions can, in fact, be drawn from discussion of the religious issue in the 1960 Presidential campaign and the protracted efforts of the United Nations to protect freedom of thought, conscience and religion. One of these is the wide-spread loss of understanding of the true meaning of religion in its supernatural, corporate and temporal dimensions. Another is the demise of the notion of freedom as a positive empowerment of the human person to worship God; this seems to be due to the emphasis on unrestricted individual choice in the whole matter of recognition or non-recognition of God.

There is, nonetheless, a range of opportunities open to men of faith to make their beliefs operative in the socio-political order. If governments seem progressively less inclined to support and encourage religion as such, they may also, under the mounting pressure of world opinion, be more reluctant to directly hinder its free exercise. Where there is recourse to more subtle and indirect methods of suppression, concerned groups will be called upon to devise a counter strategy of thoughtful and prudent action in behalf of the universal common good. It appears certain, at any rate, that a greater measure of world public attention will be focused on the status of religious liberty at national and international levels.

An excellent article describing and evaluating the work of promoting religious liberty

carried on since 1946 by the Human Rights Commission of the United Nations is featured in the June '61 issue of *Social Order*. Entitled, *United Nations And Religious Liberty*, it is authored by Mother Patricia Barrett, Professor of Government at Maryville College, St. Louis, Missouri.

Mother Barrett emphasizes that what should be the immediate concern to religious groups is the growing rash of evidence pointing to the delinquency of governments regarding the positive duty of public authorities to ensure as widely as possible freedom of thought, conscience and religion to all religions and beliefs and to their followers. The article ends as follows:

A review of United Nations efforts in behalf of religious liberty warrants the following conclusions:

- (1) There has been progress in recognition by states of the legal right to freedom of thought, conscience and religion. In some instances there has been, however, a parallel development of indirect methods of thwarting the exercise of these freedoms.
- (2) Religion, as a transcendent reality essentially concerned with man's relation to God, is not universally accepted. In the minds of many, it ranks alongside such contradictory "beliefs" as agnosticism, rationalism, atheism as a manifestation of freedom of thought and opinion.
- (3) Popular emphasis on individual freedom of conscience leaves out of account the social element in religion and often fosters opposition to the activities of organized churches in their corporate capacity.
- (4) Extreme nationalist movements in a number of countries have interfered with the properly ecumenical character of world religions, particularly in the matter of communication and the training of personnel.
- (5) The work of educating and crystalliz-

ing world public opinion in the interest of religious liberty needs to enlist the best available talent and personal dedication.

Obscenity and the Law

The difficulty in deciding cases involving obscene and pornographic material centers around three basic problems. Courts have had difficulty in defining obscenity and in applying any such definition to a particular fact situation. There is a conflict of opinion as to whether the reading of obscene material has an ill-effect upon the reader sufficient to warrant its suppression from the public. Finally, publications not obscene to an average adult might well affect the morals of youth, and to the extent required to protect youth such publications should be suppressed.

The Spring '61 issue of the *Washburn Law Journal* examines the third of the above problems and establishes some interesting conclusions. After outlining the historical development of the obscenity problem and discussing the early and modern American trends in this area, the author, Mr. L. D. McDonald, states in part:

The major objection concerning the pornographic descriptions contained in those books referred to as "obscene" is not that the words are bad, or that the plot is vulgar, but that the light in which they present perversion, sexual encounters and social problems (drug addiction, prostitution, gangs, alcohol) is not a true light. The bright, fast, intriguing side is usually out of proportion to real life. The reader is seldom allowed to view the physical and emotional ruins left in the wake of such escapades. A normal adult who has encountered many of the ways of the world, and is able to read of the exaggerated capers of thrill seekers and realize the unwritten but inevitable consequences that accompany the abnormal activities described, does not need the pro-

tection of the state. But the youth of our country, who are the most subject to the influence of what they read and observe, are not able to associate the unfamiliar consequences with the new and intriguing capers of the fictional characters whose identity is so easily assumed by the young reader, at least in his imagination.

It is apparent that no definite conclusion as to the effect obscene literature has on its young reader has been reached. But until proven otherwise, the protection of our greatest natural resource — youth — should be preserved; when the benefit is great and the harm (if it later be proven that obscenity has no effect on the young who come in contact with it) is comparatively small.

Therefore, each state, should be allowed to establish its own policy concerning obscene publications and their distribution. A statute so worded as to punish those who sell or make available obscene literature to youth is within the powers of the state and is directly comparable with the selling of alcoholic liquors to minors. In one case the body is injured; in the other the mind; but in both, the community ultimately bears the loss. Sex intrigues all, especially the young, who find it difficult to cope with the coming of maturity. The natural problems alone are enough without subjecting them to unrealistic and unnatural situations in obscene publications that clothe these situations in normalcy.

Segregation

The Spring '61 issue of the *Villanova Law Review* features an excellent lead article dealing with segregation in northern public schools. Stressing the fact that this segregation is *de facto* and not *de jure*, the author, Mr. Will Maslow, establishes that northern metropolitan areas create school populations that for all practical purposes are almost completely segregated. In New York City, for example, there are 75 public elementary schools (out of a total of 570) with Negro or Puerto Rican enrollments

of 90% or more. In Chicago, 102,000 Negro children, 87% of the city's Negro elementary students, are said to be attending practically all-Negro public schools in the black belt. A 1957 study revealed that of the 107,000 Negro children in Detroit's public elementary schools about 45% were registered in schools in which Negroes constituted more than 80% of the school population. According to this study, five elementary public schools in San Francisco had a Negro enrollment and two an Asian enrollment of more than 80%; in Cleveland, where about 30% of the city's 130,000 public school children were Negroes, 27 of the city's 127 elementary schools were "predominantly Negro."

In Philadelphia, according to an official 1960 study, 47% of the students in the public schools are Negroes. In each of 38 public schools, 14% of the total number, the Negro enrollment is 99%.

About half of the 100,000 Negroes of Massachusetts live in the Roxbury section of Boston. According to an unofficial estimate, 13 elementary schools and one junior high school in Roxbury have a Negro enrollment of 90% or higher.

In Los Angeles, expert estimates indicate that in 43 of the city's 404 elementary schools the percentage of Negroes, and in 34 the percentage of Mexican-Americans, is 85 or higher.

In Indianapolis, seven of the city's 89 elementary schools are "all Negro," although 56 are "mixed." Of the 76,000 pupils in its public schools, Negroes constitute 23.7%.

In Youngstown, Ohio, in 1958, three of the city's 31 elementary public schools had a Negro enrollment exceeding 90% and the number of white students in each of these schools had declined since 1953.

Does such *de facto* segregation have a detrimental effect upon Negro children? Mr. Maslow feels that it does and argues strongly that a desegregation plan must be devised and put into operation immediately in these areas.

As one suggestion toward a possible solution, the author states that the "Princeton Plan" offers a relatively simple method of achieving integration in small towns, or even in larger areas, where a school serving a Negro area is relatively close to a school serving a white one. School authorities in Princeton, New Jersey, assigned all children in the first three grades to one school in a Negro area and the other grades to a second school outside the area, thus achieving integration. The Public Education Association disclosed in 1955 that there were 258 pairs of elementary and junior high schools within the same school districts in New York City which differed in the percentage of continental white children by 30% or more. Adoption of the Princeton Plan of rezoning or variations thereof would therefore lead to better ethnic balance in such schools.

Divorce and the Catholic Attorney

Catholic attorneys, aware of the sacredness of the valid marriage bond, are often in doubt about the moral lawfulness of accepting cases of clients seeking or defending themselves from actions for divorce, judicial separation, or annulment of marriage. The problem is more acute for young lawyers just out of law school and employed by firms who have cases either assigned to them as part of the firm's business or offered them as a means of supplementing the generally lower salaries which they receive. But more experienced and even well established lawyers not in-

frequently have to face the problem too. There are some cases which they may accept without offense to conscience, but there are others which they may not conscientiously undertake.

The February '61 issue of the *University of Detroit Law Journal* has published an excellent article on this subject. The author, Robert H. Dailey, S.J., considers primarily the problem of the formulation of the correct and certain conscience of an attorney with regard to the divorce action of a particular client.

Choosing a morally lawful course of action in a given situation involves the ability to form a correct and certain conscience and the virtue to follow it. One must know the law and be able prudently to apply it to the actual situation so that a conclusion "this may be done" or "this may not be done" can be arrived at without fear of error.

The Code of Canon Law has no *explicit* law about civil divorce, judicial separation, or annulment, but laws do exist. These are derived from various sources: by necessary conclusion as implicitly contained in certain matrimonial and procedural laws of the Code; from statements of the Roman Pontiffs and replies of the Holy See; from regional councils and diocesan synods; from the writings of approved authors. Although these sources are very different in authority and in quality they do provide some positive laws and some expositions of the moral law which needs no legislative enactment to be binding.

Father Dailey makes the following summary of the subject matter which he deals with in detail in his article:

- (1) The decision to accept or reject a domestic relations case must be made with moral rectitude. This implies a

knowledge of the law, the ability to apply it to a particular case, and the virtue to act upon that conclusion.

- (2) The marriages of Christians are regulated by canon law and their marriage causes belong properly and exclusively to the ecclesiastical forum, with the exception of those matters which are within the competence of the State.
- (3) Competence of the State regarding the marriages and the marriage causes of Christians is limited to the merely civil effects. Over marriages and marriage causes of non-Christians the State has wider powers but it does not have the power to dissolve the valid marriage bond.
- (4) No valid marriage can be dissolved by the consent of the spouses but some kinds of valid marriages can be dissolved by canon law and the power of the Vicar of Christ. Valid, consummated marriages between Christians are absolutely indissoluble except by the death of one of the spouses no matter whether the partners are both Catholics, both baptized non-Catholics, or one Catholic and the other a baptized non-Catholic.
- (5) As a remedy for the wrong-doing of one partner canon law provides for separation of the spouses perpetually or per se temporarily. The bond remains.
- (6) The secular divorce law has bad and good aspects. Bad are its pretension of breaking the bond of valid marriage and the usurpation by the State of competence over the Christian marriage cause. Good is the power it has to terminate marriages that are really

invalid although valid in civil law; the power to give freedom to marry to those whose marriages are dissolved by competent ecclesiastical authority; the power to protect the innocent spouse, the good of the children, and even the sanctity of marriage itself.

- (7) For this reason and in the absence of effective ecclesiastical remedies the Church can and does permit an innocent spouse to seek a remedy in the secular courts.

- (8) Suggested Directives.

(1) *When the Marriage Has Been Celebrated Before a Priest*

The plaintiff needs the permission of the bishop to seek civil divorce or separation. Unless this permission has been obtained the Catholic attorney cannot take the case. He can defend the respondent who is illegitimately sued. He can defend the respondent who is legitimately sued in order to safeguard his merely civil rights.

(2) *When the Marriage Has Not Been Celebrated Before a Priest*

(a) If one partner is a Catholic the marriage is invalid so that the attorney may represent the plaintiff in seeking freedom from the civil bond, the real bond being non-existent. He may defend the respondent in order to obtain his merely civil rights.

(b) If neither spouse is a Catholic the attorney may not represent the plaintiff who is seeking a divorce for the purpose of remarriage. He may defend the respondent. The attorney may represent the plaintiff who has true, serious, honestly provable causes for divorce or separation. He may defend the respondent. In these cases

he is bound by Christian love for his fellow man to try to effect a reconcilia-

tion of the embittered spouses if the marriage is valid.
