

The Catholic Lawyer

Volume 10
Number 3 *Volume 10, Summer 1964, Number 3*

Article 9

**Conscience; Lawyer Saints; Civil Rights Act; Business Ethics;
Model Penal Code; Obscenity and Free Speech; Good Samaritan
Statutes; The Individual**

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>

This In Other Publications is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

IN OTHER PUBLICATIONS

Conscience

Monsignor John Tracy Ellis has joined the ranks of those experts participating in the current dialogue on the subject of conscience and religious commitment. Writing in the June 1964 issue of *The Catholic Mind*, Monsignor Ellis states, in part, that the present problem in this area does not lie with the attitude and policy of the American bishops, their priests and the public, about either the theory or the practical implementation of Church-State relations. It lies rather with the traditional teaching of some Catholic theologians on this question, a position which, to most men outside the Church and to a strong minority within, appears as unalterable. It is traceable to the failure of the Church of our day to set at rest, by an authoritative pronouncement, the uneasiness which thousands of well-intentioned men outside the Catholic fold feel because they know how the historic link between altar and throne has so frequently in the past meant either complete deprivation of the religious rights of non-Catholics or their greatly restricted exercise.

Happily, a change has been gradually unfolding in Catholic theological circles on this all-important question. Historians of theology may well date its rise to the publication a half century ago of the work of the great Jesuit theologian, Arthur Vermeersch, *La Tolérance* (Louvain, 1912). From Vermeersch's pioneer effort there stemmed a line of argument that can be traced through succeeding decades to a remarkable essay of Father Yves de la Brière,

of 1935, in which that learned Jesuit stated that the psychological and moral conditions of contemporary society demand, in what he described as "the name of public tranquility and the public interest," that the legal freedom of all religions be recognized everywhere as a "universal rule of civilization." Yves de la Brière, S.J., "A Propos de la Tolérance Civile," *Miscellanea Vermeersch, Scritti Pubblicati in onore del R. P. Arturo Vermeersch, S.J. II*, 182-83 (Rome, 1935). See also the excellent summary of Catholic teaching in A. F. Carrillo de Albornoz, *Catholicism and Religious Liberty* (Geneva, 1959); and Eric D'Arcy, *Conscience and Its Right to Freedom* (New York, 1961).

Only four years ago Giacomo Cardinal Lercaro, Archbishop of Bologna, traced in a remarkable essay the teaching of the Church on the subject of religious freedom, while at the same time he was at pains to differentiate it from the tenets of philosophical liberalism. With engaging candor the Cardinal proceeded to delineate the views of the theologians of the sixteenth and seventeenth centuries on controversial themes like the Inquisition, to face up bravely to the stern pronouncements of Popes Gregory XVI and Pius IX against the idea of religious liberty, and to explain the distinction of more recent theologians between the "thesis" of the ideal situation of Church and State and the "hypothesis" of the order of real life.

In describing the circumstances out of which arose the often embarrassing facts of

Catholic history in this regard, the Cardinal maintained that the problem of religious freedom itself is a relatively modern one that necessitates the careful distinguishing between what are the defined and unchanging doctrines of the Church and what he has called "the impact [that] given historical situations have made on the Church." For the Cardinal of Bologna the freedom necessary for the act of faith is sufficient theological basis for the Catholic doctrine of religious liberty. The seal of approval for this teaching was bestowed by the highest authority in the Church when Pope John XXIII stated in *Pacem in Terris*:

Every human being has the right to honor God according to the dictates of an upright conscience, and therefore the right to worship God privately and publicly.

Augustin Cardinal Bea, president of the Secretariat for Promoting Christian Unity, last year made known his personal commitment to the principle of religious freedom which he particularized in unmistakable terms. "This freedom," said the Cardinal,

means the right of man to decide freely, and according to his own conscience, regarding his own destiny. From this freedom is born the right and duty of man to follow his own conscience. It is the duty of the individual, and of society, to respect this freedom and this right that man has to decide for himself. Augustin Cardinal Bea, "The Truth in Charity," *Catholic Mind*, LXI 57 (March, 1963).

There is no equivocation in these words, no subtlety that may either conceal or confuse man's wish to understand precisely what Cardinal Bea had in mind. It is heartening to recall that it is he who has officially sponsored this teaching, and that this highly respected member of the Roman Curia has promised to stand sponsor for this vital formula in the Council.

Needless to say, according to Monsignor Ellis, the issue of religious freedom is a complicated one which is easy to oversimplify. Many historians have thus pictured the Catholic Church as the stubborn foe of human freedom; many, too, would contend that if it is only now that the Church has begun to see the necessity to relax its rigidity in this regard, it is but a matter of expediency. But this is a false and misleading way to read the Church's record. For more than once in major crises of mankind's troubled passage through this world, it has been the Catholic Church alone that has stood as a bulwark against the inroads of tyranny and oppression.

Lawyer Saints

The February 1964 issue of the *American Bar Association Journal* contains an extremely interesting and informative article by James K. Gaynor on the patron saints of the legal profession. Five men who were successful in the legal profession of their day stand out as saints. The author recalls these men and tells us something about each.

Ambrose was born in Gaul, probably in 340, and grew to manhood in a political atmosphere. He became a barrister in Rome and was successful in both law and politics. He was appointed governor of two provinces with headquarters in what is now Milan.

At that time, only six decades after the persecution of Christians had ceased, Christianity had for all practical purposes become the official state religion of Rome. The secular authorities took a deep interest in the affairs of the Church, and when an assembly was called in 374 to elect a bishop,

Ambrose attended in an effort to bring unity among two contending factions. He was only a catechumen; he had not yet been received officially into the Church. Nevertheless, he delivered a stirring speech.

It was not unusual at that time for a person not an ordained priest to be named bishop, and spontaneously a cry arose, "Let us elect Ambrose!" He was selected by acclamation.

One might expect a layman, wise in the way of politics, to administer ably but give secondary attention to spiritual considerations. But not Ambrose: he was ordained, apportioned his money among the poor, settled his lands upon the Church and devoted his life to pastoral duties. He died on Good Friday in 397.

That sham was not involved in the life of St. Ambrose was evidenced by his part in the conversion of St. Augustine. The latter, whose *Confessions* and *City of God* have been best sellers through the years, hardly would have been swayed by one who was wanting in sincerity.

Many years later, in 1252, there was born at Kermartin in Brittany one Ervoan Hélyory. The Latin shortening of his Celtic name was "Ivo" and the French form "Yves." It is from the Anglicized form of the latter that the name "Yves" comes to us.

Ivo went to Paris and became a successful lawyer. He became a judge in the ecclesiastical courts, first at Rennes, then at Treguier. Ordained a priest in 1284, he became a defender of the innocent and came to be known as "the poor man's advocate." He died on May 19, 1303, and was canonized in 1347.

The story of the swallows of Capistrano, which return to the same mission church in California on March 19 each year, is a familiar one. The patron of that church was a

practicing lawyer and public official before embracing the religious life.

John was born in 1386 at Capistrano, a small town in the Abruzzi, which then was a part of the Kingdom of Naples. He studied at Perugia and became a successful lawyer. In 1412 he was appointed Governor of Perugia.

In 1416 he turned to the religious life; some accounts say that it was because of the death of his wife, others that it resulted from meditation while a prisoner of war during a local conflict.

John joined the Franciscan Order and was ordained a priest in 1420. His life as a religious was both eventful and turbulent, culminating in the preaching of the crusade prior to the time of the capture of Constantinople by the Turks.

Early in 1456 the Turks were advancing to lay siege to Belgrade and John exhausted himself in preaching and exhorting the Hungarian people to meet the threatened danger. The siege was finally abandoned and Western Europe for the time was saved, but John fell victim to infection from thousands of unburied corpses and died on October 23, 1456.

The mission of San Juan Capistrano, founded by Father Junipero Serra in 1776, still stands not many miles south of Los Angeles, honoring the lawyer-turned-priest, St. John Capistrano.

Sir Thomas More was not a priest or a monastic. He was a brilliant lawyer who became the first layman to serve as Lord Chancellor of England, succeeding the deposed Cardinal Wolsey.

Born in London in 1478, he was admitted to Lincoln's Inn in 1496 and was sitting in Parliament by 1504. A favorite of Henry VIII, he was expected to support the king in his desire for a divorce from Catherine

when he was raised to the chancellorship. Instead, he was deposed and sentenced to the Tower.

After a brilliant defense at his trial for treason in which he represented himself, he was convicted and beheaded on July 7, 1535. "I die the King's loyal servant, but first God's," he is quoted as having said as he faced execution.

The son of Don Joseph dei Liguori, captain of the royal galleys, Alphonsus was born near Naples in 1696. He began studying jurisprudence at age thirteen and, by special dispensation required because of his age, was permitted to present himself at the University of Naples, for the doctor's degree in both civil and canon law when he was seventeen.

The degree was granted by acclamation and it has been said that in eight years of law practice, he never lost a case.

After ten years at the bar, Alphonsus passionately argued a case involving an estate of great value only to learn that he had overlooked the deciding point of law. Conceding the error, he walked from the courtroom, abandoned the law and entered the religious life.

Alphonsus formed the Redemptorist Order and wrote a well-known work, *Moral Theology*. His life as a priest extended over a period of forty-eight years.

Mr. Gaynor points out that other lawyers have become saints, but less is known about them.

In the fourth century, when the Roman Empire still dominated the political world, a barrister was elected Bishop of Antioch in 319 and served until his death in 324, after having been imprisoned for confessing the faith. Little more is known of him, but he is venerated as St. Philogonius.

In the same century another lawyer, a

brother of St. Ambrose, assisted in the administration of the diocese of Milan. He remained a layman and appears not even to have been baptized until rescued after having been shipwrecked. The remainder of his life, marked by sanctity, makes him memorable as St. Satyrus.

In the sixth century one of the highest judicial offices of Orleans was abandoned by Liefard when he was forty. He became a monk and developed a great monastery at Meung-sur-Loire. He is better known to us today as St. Liphardus, who died about 550.

Although the legal profession has had an ample number of representatives from which to choose, those generally recognized as patron saints of lawyers are St. Ives, St. Thomas More and St. Genesisus. Little is known about St. Genesisus. He was not a lawyer but the clerk of a court in Arles in the second century; he refused to record sacrilegious testimony.

There are two patron saints for jurists: St. John Capistrano and St. Catharine of Alexandria. Tried before the Emperor Maxentius early in the fourth century, St. Catharine is reported to have vanquished fifty philosophers who opposed her defense of Christianity.

Civil Rights Act

Adoption of the Civil Rights Act of 1964 creates important new rights and obligations for employers, employees, unions, employment agencies, hotel and restaurant owners, public officials, and minority group members. To clarify these rights and obligations, a new operations manual has recently been published, entitled *The Civil Rights Act of 1964*. It explains the most important sections and the new pattern of federal-state relationships established by the Act.

Prepared by the Editorial Staff of The Bureau of National Affairs, Inc., *The Civil Rights Act of 1964* provides authoritative and detailed information on the background, interpretation, coverage, and enforcement of the Fair Employment Practices, Public Accommodations, and Federal Assistance Titles of the Act. Written in clear non-technical language, this operations manual is a practical handbook dealing with activities under these three Titles of the new law.

Part I of *The Civil Rights Act of 1964* discusses and analyzes the Federal Fair Employment Practices Title—the much-discussed Title VII—against its extensive background of executive orders, state laws, and municipal ordinances. It points out what this Title will mean to employers, unions, employment agencies, employees, and the states, and how it was developed by Congress. In another chapter the Title's coverage and exemptions are discussed. Specific types of discrimination by employers, employment agencies, and labor organizations, and discrimination in apprenticeship, training, and re-training programs are carefully detailed by defining the use of the standards of race, color, religion, sex, and national origin.

A particularly important chapter in Part I tells how Title VII will be administered and enforced by the Equal Employment Opportunity Commission as to the investigation of discrimination charges, enforcement proceedings, posting requirements, rules, regulations, and studies. Completing this Part is coverage of union contract restrictions on discrimination, how arbitrators have construed these restrictions, and how state laws have dealt with discrimination.

Part II begins with "Public Accommodations," describing the scope of the new fed-

eral statute outlawing "white only" policies in hotels, motels, restaurants, lunch counters, theaters, and other places of accommodation and entertainment. This is not the first such federal statute; a Reconstruction measure adopted in 1875 was declared unconstitutional eight years later. The history of this law and the common-law duty of innkeepers, as well as enforcement by the states of public-accommodation laws forbidding racial discrimination, are analyzed to provide the background of the new legislation.

Thoroughly explained in this section are the types of establishments which are covered by the new federal law, what is expected of them in the way of nondiscriminatory treatment of customers, and what types of legal actions can be brought against them for violations of the Act.

The Civil Rights Act of 1964 then takes up the Federal Assistance Title of the Act, which strikes down discrimination on the grounds of race, color, or national origin in connection with programs and activities receiving federal financial assistance. This Title—Title VI—directs the federal departments and agencies concerned to take necessary steps to carry out this policy.

These chapters trace the legislative history of the Federal Assistance Title and its relationship with existing executive orders relating to nondiscrimination in construction and housing. The coverage of the Title, the method and conditions under which regulations are promulgated, how appeals can be taken, and the effect of the section on employers are set forth fully.

Of special interest here is the list of those federally-assisted programs which the Justice Department considers subject to the provisions of this Title, including aid to education, public welfare grants, and vocational

rehabilitation. The discussion of the provision limiting the cut-off of funds for discrimination in connection with a federally-assisted program to the particular locality involved also merits careful attention. In addition, specific consideration is given to the section of Title VI which underscores the policy of the federal government to abolish employment discrimination in programs aimed primarily at creating jobs.

Completing the comprehensive coverage of *The Civil Rights Act of 1964* is the Appendix, which includes such reference aids as the text of the entire Act, the House Committee Report (there is no Senate Committee Report), and extensive excerpts from congressional debate. The book is fully indexed.

(Copies of *The Civil Rights Act of 1964* may be ordered from BNA Incorporated, 1231 24th Street, N.W., Washington, D.C. 20037 at \$9.50 per copy, \$8.50 paper-bound.)

Business Ethics

The America Press of 920 Broadway, New York City, recently published an excellent brochure on the subject of ethics of the businessman and the need for clear codes in this area. Written in part by William Byron, S.J., the brochure establishes that if businessmen want to help improve the level of business conduct, they should first understand and accept the fundamental ideas of natural law morality.

But as cases become more entwined in the machinery of production and marketing, and farther removed from the simple black-and-white areas of traditional morality, a consensus becomes much harder to establish. This is why so many businessmen complain: "It is more difficult to *know* what is right than it is to do it."

The industry-wide ethical practice code is probably the best solution to the need for information on what is right and wrong in modern business dealings. The self-enforcement idea sounds good in speeches but looks bad in history. It simply doesn't work.

Many businessmen are interested in seeing meaningful codes of business ethics written for individual enterprises. They are almost totally opposed to the idea of letting the federal government draw up such codes and police them. The general preference is to have top-management men, and all who contribute to company policy, get together with their counterparts throughout the industry and hammer out a workable set of ethical ground rules. They want the code to be specific.

Businessmen are practical men and thus uniquely fitted to the task of carrying forward the initial consensus to meet the complex collection of ethical dilemmas found in the market place. In other words, the same human nature that once lied, stole or murdered without finesse in the unadorned cave, can now lie, steal and murder in any number of more sophisticated ways in the swank executive suite. The new environment is so complicated, and the new techniques so advanced, that the liar, thief or murderer can pass unnoticed by ordinary people. Often enough, even he does not recognize himself for what he is. Only those who know both their ethics and their way around the competitive business jungle will recognize the offender and the offense. Only the business expert — the top management man — can write it all up in a code.

Difficulties repeatedly crop up when you try to be specific in these matters. That is why so few realistic codes have been written. Every businessman knows that stealing another man's property is wrong; but will

all agree that a man's job, or the promotion to which he is clearly entitled, constitutes property?

The same difficulty turns up in medicine and law. Murder is always wrong, but doctors share no consensus that abortion is always murder. Lawyers must not advertise, but does the publication of one's courtroom conquests constitute advertising? As cases become more specific, the consensus weakens. But it is precisely in the area of specific cases that businessmen seek the direction and protection of a code.

Generally, the industry groups and trade associations are less specific than individual companies in cataloguing business right and wrong. There are two ways of looking at this. The more people involved in drawing up an ethical standard, the more difficult it is to get a consensus. The greater the number of companies falling under a code, the more diverse are the situations that must be covered, thus making the job more difficult from the outset.

On the other hand, industry-wide codes will be more easily composed and more readily accepted once the idea of each company having a clear and specific ethical standard catches on. In effect, this means that the businessman of good will, who happens to enjoy an influential post in a given company, can really do something about improving the ethical climate of American business right now.

Father Byron concludes that the daily test of upholding a code challenges the personal integrity of everyone from top to bottom of the enterprise. Meeting this challenge is one way of strengthening personal morality and individual initiative. Some might argue that man's freedom, dignity and personal moral development would be better advanced if he were not bound to a code

imposed by his company or trade association. His conduct would be more noble if he were not watched by those responsible for enforcing the code.

This argument is unrealistic according to Father Byron. It overlooks or ignores the fact that we are all creatures of our environment. The practice of virtue can be difficult and, at times, almost impossible if personal ideals must buck the trend of public practice. This is why "ethical climate" is a good expression. An improved climate makes for better ethical conduct on the part of those who must live, breathe and work within it. Every new code of business ethics will demonstrate how serious American business is about improving that climate. The specificity of each code will be a clue to the courage that produced it.

Model Penal Code

The April 1963 issue of the *Notre Dame Lawyer* contains an excellent critique of the 1962 Official Draft of the Model Penal Code proposed by the American Law Institute. The general areas discussed are (1) abortion, (2) statutory rape, (3) arson, (4) theft, (5) disorderly conduct, and (6) vagrancy.

In discussing the Code's liberal position in these six areas the comment attempts to consider each with a view to the degree of respect which it reflects for human life and the sanctity of the person involved.

Possibly the clearest example of the drafters' concern for one's welfare and integrity is its extensive revision of the law of abortion. By enlarging the ambit of justifiable abortion, the Code has protected the woman in danger of health or in danger of bringing into life a being unwanted because of the circumstances resulting in its conception. It is ironic, however, that in thus

endeavoring to protect one life, that of the mother, the Code has sanctioned the taking of another life, viz., that of the unborn child. What appears at first blush to be a concern for human life, on second glance is seen to be no more than a selection of which of two lives is the more worthy of protection.

Furthermore, it would appear that in lowering the age of consent in the area of rape, the Institute has indicated a degree of disregard for the protection of a young woman's inviolability. Surely, it would seem that most still consider a ten-year-old girl's virtue important enough to prevent her immature "consent" from being operative to excuse her attackers from a prosecution for rape, and to thereby encourage future perpetration of such assaults on the young.

It might be thought also that by the removal of the technical distinctions in the areas of arson and theft, the Institute has neglected individual well-being by placing a higher premium on the welfare of the citizenry to the detriment of the accused. However, in these areas, the Code has properly protected the public while not minimizing the rights of the individual accused. For example, the old common-law distinction of a dwelling house as opposed to other structures recognized the inherent dangers to an occupied structure. The Institute has retained this principle, but has codified it so as to reflect more accurately these dangers as they are present today in our more mobile and transient society. Thus, the law should not recognize, nor would the Code purport to recognize, any distinction which does not in fact reflect accurately the possible consequences of a wrongful incendiary act. This is not to say that the rights of the accused are in any way prejudiced. Whether the object of his act has been an individual's home or other structure in which he might happen

to be present, the essential guilt of the actor is the same.

Similarly, the distinction between larceny, embezzlement, and obtaining money by false pretenses — crimes generally involving the same degree of culpability — should not prevent the prosecution of the perpetrator of such acts. The only dangers which might arise from a consolidation of such offenses is a possible failure to notify the accused of the crime for which he is being prosecuted. However, by reason of the specific provisions in the Code, the possibility of such danger is slight. Fair trial of the accused is insured by the provision empowering the court to grant a continuance or other appropriate relief where substantial prejudice might result from the possible effects of consolidation. In light of this provision, the substantive and administrative benefits derived should far outweigh any imagined prejudices.

The rights involved in the discussion of vagrancy and disorderly conduct, of course, derive their validity from the Constitution. The Institute was obviously cautious in its drafting of these sections so as not to transgress upon them. However, the comment suggests that the recognition of these rights, fundamental to any penal code, must be kept in perspective. If not, the individual conduct will be protected only at the expense of the public welfare. It is doubtful if the Code has reached a proper balance between these two competing interests.

Obscenity and Free Speech

The first of a two-part treatise dealing with obscenity and constitutional freedom appears in the Spring 1964 issue of the *St. Louis University Law Journal*. Co-authored by Dean M. Slough and P. D. McNany, S.J., the second installment will

appear in the Summer issue of that Journal.

Following an extensive historical treatment of the subject, the authors attempt an analysis of Mr. Justice Brennan's and Mr. Justice Harlan's working philosophy on obscenity.

According to the article, in his search for integrity of the initial decision Mr. Justice Brennan has championed a series of procedural measures which insist on the full judicial process for any obscenity determination. Starting with the necessity of a jury determination in all obscenity cases, he has added other requirements. In *Smith v. California*, his majority opinion found a Los Angeles ordinance wanting because it contained no *scienter* clause. It was not the fact that the state could not place strict requirements on individuals, even in the area of speech, but that this could not result in an encroachment on protected expression. Obscenity indeed could be controlled, but only after it had been determined by full judicial process that such items were obscene. Not every method of control was legitimate since the knife's edge between protected and unprotected allowed for no leeway at all. The self-censorship imposed (or at least encouraged) by law in California made the bookseller's decision pre-judicial and open to serious encroachments on protected areas of expression.

Again, in the *Bantam Books* case, Mr. Justice Brennan's opinion turns on the protection of the initial judgment of obscenity by judicial process. There an administrative decision that was non-judicial in nature was substituted by the bookseller for his own judgment (as in the *Smith* case) or for the judgment of a fully judicial trial. To be sure, there was no physical or legal constraint, but the *tendency* of the factual situation pointed toward a non-integral determination

of the obscenity issue and the concomitant invasion of possible areas of protected speech. In *Marcus v. Search Warrant*, there was unanimity in the Court because there the initial decision was not only pre-judicial and non-jury, but occurred on the mere suspicion of already suspicious police officers. A final gloss on his obscenity doctrine can be gained from his long concurrence in *Manual Enterprises v. Day*, where the issue discussed was the factual one of whether Congress had actually granted the Post Office Department the powers of determining the obscene nature of items to be mailed. Behind Mr. Justice Brennan's negative conclusion lies the feeling that any such power belongs primarily to courts of law, where proceedings before a jury are carefully guarded by uniform regulations and are open to review.

To summarize the Brennan-obscenity-jurisprudence, according to the authors one might say that the central issue is *who* made the initial decision and *when*. If obscene speech is unprotected and subject to full government control, all other speech (libel, of course, excepted) is fully protected. State and federal governments are equally bound by the first amendment, and there seem few restrictions in the Brennan universe which could be justified. This black/white situation demands as accurate and early a determination of the obscenity issue as is possible. But if the restrictions are rigorous outside the obscenity area, there is a lenience in the Brennan view toward the control of items once the jury has spoken. For it would appear that Mr. Justice Brennan leaves the decision as to what is obscene to the countrymen of the jury. Once they have, in full trial and with due knowledge of the proper standards, made their judgment, then the matter is closed. There will be ex-

ceptions to this general rule, to be sure, for Mr. Justice Brennan does not abdicate judicial review altogether; but by and large there is no friendly interest in the case-by-case review as proposed by Mr. Justice Frankfurter and adopted by Mr. Justice Harlan. Clearly, for Mr. Justice Brennan, obscenity is a matter for the common good sense of the average man, helped in his decision by eleven of his peers.

The opposing philosophy has been articulated by Mr. Justice Harlan. His general thesis can be stated as a balance-of-interest approach, more akin to the general technique at the heart of the original clear-and-present-danger test. This theme was enunciated in his *Roth* opinion and has been reinforced by each addition since. In this first obscenity decision the balancing is most explicit, and later cases draw their meaning from the earlier one. Since every restriction on speech must be justified by a competing social interest of relatively greater importance, any decision to suppress *this* expression must be judged in its full existential context of interest-danger circumstances. The protection of public morals lies with the several states by right; and this right has been exercised in the passage of various obscenity laws, based on the not irrational judgment that obscenity is harmful to the public welfare. But since *each* suppression of speech requires a constitutional judgment involving a balance of interests, the determination must be *individual*. In order to insure against an inaccurate assessment of these multiple factors at the primary level, appellate courts should review the decision *de novo*, in effect remaking the same inquiry and judgment that any constitutional determination demands. In *Roth* itself this individualized balance resulted first in a different set of standards for

state and federal control, and secondly in differing results when applied to the items before the Court.

Since *Roth* Mr. Justice Harlan has pursued the same patterned approach. *Kingsley Pictures v. Regents* was an opportunity to emphasize the importance of independent review, for by an artful use of it the Court could save an item of expression without invalidating the state statute. This same concern for judicial respect of state action in balance with freedom of expression was manifested in *Smith v. California*, where a Los Angeles ordinance without a *scienter* clause, for the punishment of selling obscenity, was found wanting by the Brennan majority. For Mr. Justice Harlan the fault lay not with the ordinance itself, but with the trial procedure in applying it. Again in *Manual Enterprises* and *Bantam Books* the emphasis was on leaving the federal government and Rhode Island with their means of control while turning back a particular application of it.

To point up the contrast between the Harlan and Brennan philosophies on obscene speech, the authors suggest that the former does not care when or who decides the obscenity issue, but *how*. Any judgment that decides to control this particular speech must take into account not so much whether it is obscene or not, but whether the conflicting interests of freedom and protection of public morality are carefully counter-balanced. It is a matter of degree, and the difficulty of coming to a constitutional judgment demands that the decision be remade at various levels of review. This puts a burden on the appellate courts to police the efforts of lower courts in this matter, but it also provides a particularized protection of both interests at stake. Although there should be a test for judging when an object is obscene

or not, its application must itself be a constitutional judgment. Triers of fact are not always aware of the full dimensions of the problem of free expression and have to be checked out by minds more accustomed to such nice distinctions as first amendment litigation demands. Obscenity is not protected, but the state is justified in its control of it only by bringing forward an interest which in each case outweighs the suppression sought.

Good Samaritan Statutes

Legislation exempting physicians, and quite frequently others, from liability and civil damage for negligence while rendering emergency treatment has been the subject of several good articles in current law journals. The Summer issue of the *De Paul Law Review* features a comment that discusses the impact of this legislation on the law of torts and makes a comparative study of the state enactments which, in one form or another, have appeared within the last five years in over half of the states.

According to this comment the importance and popularity of such legislation are apparent when it is considered that thirty-two states during 1963 entertained bills or amendments to existing laws designed to afford civil liability immunity for those rendering aid or assistance in emergency situations. This type of legislation seems to be predicated on the beliefs that some medical treatment in emergencies is better than none at all, and that today's physicians are so conscious of their legal liability in an emergency situation that they "will pass by on the other side" unless they are given absolute assurance beforehand that their wrongful acts, if any, while attending will not later be held against them. It is obvious that the social purpose of Good Samaritan legisla-

tion, however, is not to shield the physician from the legal consequences of his wrongful acts. The real beneficiary, if there be one, of Good Samaritan laws is the victim of an accident or other emergency who is helpless and in critical need of immediate medical assistance. And there are doubtless specific instances where no Good Samaritan has acted because he was fearful of the possibility of suit for doing so. Yet one may question the soundness of a law which seeks to further a policy of humanitarianism by releasing a tort-feasor from his obligation to respond in civil damages for his wrongful acts.

The March 1964 issue of *Case and Comment* contains an article on the same legislation by Albert Averbach. In it he states that lawyers concerned with advising local, county, state and national medical societies or groups need to carefully study the impact upon the public image of the doctor of such legislative activities and advises against attempted enactment of Good Samaritan laws. A recent example of forthright action upon the part of counsel was the handling by the New York State Medical Society of a resolution from one of the county medical societies recommending that the state society petition the Legislature of the State of New York to enact

a law by which physicians giving first aid in accident cases without compensation shall not be liable to malpractice claims arising out of the rendering of such care. *New York State Journal of Medicine*, September 1, 1960, p. 56.

It is reported in the annual meeting of the state society

that the reference committee has had the benefit of counsel's opinion, which is that malpractice actions arising from purely emergency cases in this State are exceed-

ingly rare, that legislative enactment of a law such as this resolution proposes is very unlikely, and such a law is of doubtful constitutionality. Accordingly, disapproval of this resolution is recommended. *Id.* at 151.

Governor Rockefeller, in his veto of such legislation, used the following pertinent language:

The sponsors argue that the bill is necessary to counteract an 'unprecedented increase' in malpractice actions growing out of situations where a doctor, in an emergency, away from proper medical equipment, voluntarily lends assistance.

It represents an undesirable lowering of the standard of accepted conduct which has prevailed for many years.

. . . I have sought the opinions of authorities in the field of tort law. Professors Fowler V. Harper and Fleming James, authorities in the field, have commented: 'As a matter of tort liability of physicians for malpractice, it is our view as teachers and scholars in the field of Torts that the liability should be the same whether medical service is rendered gratuitously or for compensation and regardless of whether the situation involves an emergency or not.'

The Individual

Ian Brownlie, writing in the current issue of the *Virginia Law Review*, makes an excellent current survey of the place of the individual in international law.

Historically, the individual's status in international law has been closely tied to his state. While there have been some changes in this traditional relationship because of the influence of the United Nations and other multi-state organizations, the individual's "place" on the stage of world law remains generally diverse and, on the whole, prospective in nature. In this survey of many of the legal relations of the individual, the author gives perspective to the individual's

"place" and indicates some of the obstacles in the path of those who would reform existing institutions.

The author concludes it is clear that legal developments have done much that is constructive, but it is equally clear that political conditions determine the extent and permanence of the progress made in terms of legal obligations and institutions. Three points may be made to place the problem of the individual in international relations in perspective. Theoretical controversy as to whether the individual is a subject of the law is not always very fruitful in practical terms, and the issue is always viewed with the idea of proving that he is a subject *vel non*. He probably is in particular contexts, although some would say that this is true only when he has true procedural capacity.

The second point is that the individual must be seen in the context of the organized community in which he lives and, therefore, his individual condition will depend on general social and economic advancement in that community. Some very difficult issues at once arise which are not solved by general formulae of the conventional kind about human rights. A government may desire to control the economy of the state and to create a public sector which, in its view, is necessary to proper economic growth. If full compensation must be paid (and the human rights of the investors and corporations concerned are to be protected in this way), nationalization on any scale is impossible at least on "prompt and adequate" terms. There is then a collision of interests which may (on the views of some governments, including governments which are not ideologically Communist) be resolved at the expense of the human rights of the national community as a whole. Finally, whether it is palatable or not, many states in the Gen-

eral Assembly of the United Nations see human rights issues as bound up with community rights to self-determination: the Charter is concerned with the equality of states *and peoples*. Self-determination and racial equality are prominent issues in the world forum, as evidenced by the attitude of the majority of member states toward South Africa.

For the future, work on individual human rights may tend towards a synthesis of the "civil liberties" model and programs of social and economic advancement for communities devastated by poverty. The economic gap between the industrial nations

and the Afro-Asian world is widening, and legal development should responsibly reflect the most urgent needs of the world today. The "right of property" has no great appeal to states who want what they call economic self-determination; talk of human rights is not entirely pertinent with regard to individuals with interests in powerful corporations. To some readers this will no doubt seem invidious, but recognition that these areas of acute controversy exist is necessary if we are not to become complacent about those peripheral advances, like the European Convention, which tend to monopolize the attention of many jurists.

DECISIONS

(Continued)

istered, and the patient recovers *or* dies, the issue of conflicting rights becomes moot. Refusal to hear a case for this reason greatly enlarges a judge's authority since, upon the issuance of an order, he would know that his reasoning or authority would not be subject to review by reason of future mootness. Such actions are not infrequently attempted, as Mr. Justice Douglas has stated:

History shows that governments bent on a crusade, or officials filled with ambitions have usually been inclined to take short-cuts . . . the demand for quick and easy justice mounts. These short-cuts are not as flagrant perhaps as a lynching. But the ends

they produce are cumulative; and if they continue unabated, they can silently rewrite even the fundamental law of the nation.³⁰

In the area of the conflicting interests of the religious freedom of the individual and the police power of the state, there appears to be an increasing need for the higher courts to formulate definitive standards, thereby providing concrete guidelines for the lower courts to follow. Movement toward such clarity will only be hampered or stagnated by the mootness argument, and can be defeated by "short-cuts" or "quick and easy justice" on the part of a judge issuing an order compelling medical treatment. Historical and constitutional precedent would seem to require that courts determine that it is only within the areas of general welfare and *parens patriae* in which the state may order medical treatment against the wishes of an adult patient.

rence, especially if public rights are concerned. ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES 520 (1951); see also 5 C.J.S. *Appeal and Error* §§ 1354 (1), (3) (1958).

³⁰ Douglas, *A Challenge to the Bar*, 28 NOTRE DAME LAW. 497-98 (1953).