

## Obscenity; Psychiatry and Law; Child Custody Laws; Canons of Legal Ethics; Church-State; Right of Ownership; Becker Amendment; Natural Law

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## IN OTHER PUBLICATIONS

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### Obscenity

The Autumn 1964 issue of *The Catholic Lawyer* contained a discussion, in the Notes and Comments section, of the *Jacobellis* case decided by the Supreme Court of the United States on June 22, 1964. In this discussion the statement was made that the holding resulted in a "national community standard" for the determination of suppressible obscenity.

However, a different interpretation of the *Jacobellis* case on this point has recently appeared in an article by the Honorable John F. Scileppi, Judge of the New York State Court of Appeals, in the January 1965 issue of the *New York Law School Law Review*. Judge Scileppi states:

In *Jacobellis v. Ohio*, Justices Brennan and Goldberg argued that the standard must be a national standard. It is to be noted, however, that this is not the opinion of the court. The Chief Justice and Justice Clark take issue on this point and maintain that national standards do not control. This part of the Roth test, therefore, has not been finally settled by the highest court.

The *Tropic of Cancer* case, being an appeal from the Florida District Court of Appeals, was decided on the same day and on the reasoning of the *Jacobellis* case.

The *Tropic* decision has been widely accepted by lawyers and librarians as giving a national clearance to the book. In view of Judge Scileppi's analysis, it may well be argued that this is entirely incorrect. If the "community standards" rule has not been changed, the *Tropic* case should only be considered as binding in Florida. There-

fore, state and federal courts should continue to make their own findings as to community standards, and existing decisions banning the *Tropic of Cancer* and other obscene publications should be regarded as valid and binding unless and until reversed on appeal. It will be interesting to determine which position will ultimately prove to be the correct one.

Part II of a two-part article on "Obscenity and Constitutional Freedom" was published in the Summer 1964 issue of the *St. Louis University Law Journal*. Part I was discussed in this section of the Summer 1964 issue of *The Catholic Lawyer*.

In the main portion of the concluding Part II installment, authors M. C. Slough and P. D. McAnany, S.J., take issue with Mr. Justice Brennan's contention that hard core pornography has no appeal for the sexually mature or the ordinary adult. They contend that even a high degree of offensiveness does not of itself eliminate the factor of prurient interest appeal. Momentary subjective repulsion may stifle sexual arousal in the sense that erotic stimulation scarcely exists; yet, they are not prepared to rule out the effects of morbid suggestion upon the psyche of ordinary men. Nor are they prepared to assert that erotic satisfaction is at a minimum in all pornographic objects. In fact, they have noted that blue movies, sex-tease photographs, and sundry pornographic items can prove appealing to the average adult despite the fact that one's saner self considers such to be a violation of a publicly held social norm or religiously held sexual ethic. To hold that the sexually

mature person is not attracted to the hard core object is tantamount to asserting that the emotional structure of man is a constant, unchanging thing, and they doubt that prurient appeal can be measured in terms of the absolute.

They concur with Chief Justice Warren's observations to the effect that materials should not be judged out of context, divorced from the color and character of actual setting. Therefore, they freely admit that they cannot press for the acceptance of a constant, unbending standard that will apply in equal measure to all persons under all circumstances. On the other hand, they submit that appeal to prurency should, as a rule, be judged with reference to the average adult, because implicit in their concept of obscenity control is the idea that the average adult is subject to the lure of prurency. In the interest of achieving simplicity, the two authors prefer to think of patent offensiveness as a necessary concomitant of prurient interest appeal; however, they recognize the fact that the element of offensiveness may be considered an integral part of appeal to prurency or stated as a requirement in the conjunctive. When it appears that the object has been designed and disseminated for a special audience, notably the physically, mentally and emotionally immature, they do not question the wisdom of abdicating a constant standard which treats of appeal with reference to the average adult. Adoption of a variable obscenity standard becomes a matter of necessity in these instances.

Employment of a variable standard makes it possible to reach the panderer who advertises and pushes the non-obscene object as obscene. Nevertheless, Slough and McAnany would prefer to rely upon legislation which explicitly outlaws advertising

appeals of this nature. Positive legislation, evidencing the philosophy that any dishonest or fraudulent advertising effort shall be prohibited, would reach the panderer who exploits a public weakness by offering the non-obscene as though it were packed with prurient appeal. They have seen that a concept of variable obscenity also reaches the problem of the scientist whose interest in prurency is wedded to a valid research effort, but they suggest that specific legislation could well be designed to protect such interests. Basic in their approach to obscenity control is the idea that no law, however precise, will achieve a legitimate purpose unless it is administered in such manner as to assess public attitudes in terms of time and place. This is particularly true in regard to obscenity laws, the unique contribution of which is so dependent upon a proper evaluation of sexual morals as mirrored by the contemporary community conscience.

### Psychiatry and Law

"Psychiatry Pleads Guilty" is the title of a most refreshing short article in the current *American Bar Association Journal*. In it the author, psychiatrist Robert Sadoff, makes the startling admission that psychiatrists are guilty of extending the realm of their expertise beyond its medical borders. But this has happened, he continues, because courts and lawyers, searching for assistance in determining the complex issue of criminal responsibility, have insisted on asking psychiatrists questions not specifically related to medical psychiatric problems. The time has come, he concludes, for the law to decide the moral and legal issues, and for the psychiatrist to remain a medical expert.

According to Dr. Sadoff:

The psychiatric battle of the experts over legal-moral issues is indeed a tragic one, for it destroys not only the image of psychiatry to the public but also annoys the legal professional, who feels intruded upon and whose authority is usurped by the unwitting psychiatrist. As long as the psychiatrist is asked to consider the moral questions involved and his opinion of responsibility is demanded in court, this ignoble condition of forensic psychiatry will prevail.

Yet, psychiatrists and lawyers continue to debate the virtues and vices of the M'Naghten test of criminal responsibility. This is not the basic issue, but rather the symptom of underlying anxiety on the part of both lawyers and psychiatrists in regard to man's inherent ignorance to settle the age-old issue of responsibility. When is a man responsible for his acts? When are his acts predetermined? When "a product" of mental illness? A passage in *Ethics of the Fathers* reads: "Everything is foreseen and yet the freedom of choice is given." The ambivalent resolution of the determinist-free will conundrum is obvious even in the wisdom of the sages.

Today we, too, are on the horns of this dilemma, but we approach it indirectly by asking: "Whose responsibility is it to determine when a man is responsible for his behavior?" It is the responsibility of the law to make this awesome determination and it is the responsibility, nay, the duty of the psychiatrist, to help the law by sharing unashamedly his knowledge of mental illness and its relation to behavior.

It behooves the lawyer not to consider his psychiatric servant an expert in anything but psychiatry and it is incumbent upon the "expert" not to testify to anything that is not within the realm of his expertise. Once these limits are set, we can stop using M'Naghten and Durham as pawns in our game of legal and psychiatric polemics and begin to share the mutual responsibilities of our roles in society in the determination of criminal guilt or insanity.

### Child Custody Laws

Criticism of custody procedures has increased sharply in recent months as legal scholars have argued that court battles often lose sight of the goal of the law, viz., to satisfy the best interests of the child.

Experts in law and psychiatry have contended that children frequently become "pawns" in such proceedings, since everything is done in a context of conflict which sharpens rather than eases parental ill-will, and that the courts are thus cut off from obtaining pertinent information from specialists in child welfare and behavioral sciences.

A dissatisfaction with some, or most, aspects of custody procedures has been expressed in recent issues of the *Yale Law Journal*, the *New York University Law Journal* and the *Michigan Law Review*. Much of the criticism centers on the traditional form of "adversary proceedings" followed by courts, a form that accepts the principle that justice emerges from the battle of the skillful charge and the skillful countercharge. But the critics insist that the child's interests, which are supposed to be supreme, are hardly spoken for in this exchange, and that the present method is ill-suited for determining these interests.

A survey of expert opinion in several fields suggests that parents often seek custody of children not for love but for money, and not to help the children but to hurt the former husband or wife. It suggests, also, that rigid court rules often prevent judges from getting the best medical and psychological information and encourage abduction of children from one state to another in order to take advantage of differing rule-of-thumb regulations in various states.

These are the more searching and out-

spoken judgments. Experts are not uniformly agreed, and by no means are they convinced that the system should be extensively altered. But no individual interviewed failed to have some point of sharp criticism. There was one remarkable point of agreement: with one exception, every individual interviewed spontaneously characterized the role of the child in custody cases as that of a "pawn."

One child psychiatrist put it this way:

Because the unconscious and overt hostility of the parents makes them blind to the emotional needs of the child, he is really a pawn on the battlefield.

How little the needs of the individual child have been weighed in court cases can be seen in the changed rule of thumb often followed by courts in regard to granting custody to either a father or mother. The patriarchal view that gave fathers almost absolute rights to custody of their children prevailed for centuries until 1939 when a British court recognized that the mother might have legal rights. United States courts have moved more and more toward a matriarchal position. The rule of thumb in many courts is that a child up to five years of age goes with the mother unless she is manifestly totally unfit. New York courts, for example, have refused to consider an adulterous mother unfit when she had only one paramour. Alcoholic mothers whose attributes were otherwise acceptable have also won custody of children over non-alcoholic fathers of good character.

Rules regarding modification of custody awards provide that there must be a clear showing of a substantial change of circumstances since the time of the original award and that those circumstances require a change of custody for the child's sake.

But some critics say that courts accept

a superficial rather than a substantial change of circumstances as sufficient for a new custody award. "Trial courts can almost always find changed circumstances—the age of the child, for example, if nothing else," the *Yale Law Journal* pointed out.

The "adversary proceedings" often affect the psychiatric and psychological testimony necessary to make a proper judgment on which parent shall gain custody. Dr. J. Louise Despert, former professor of psychiatry at Cornell University Medical College and author of *Children of Divorce*, said:

The great deficiency in our system now is that in these battles one psychiatrist is appointed by the father and another by the mother, and they are drawn into the battle. I have yet to see a case in which the two psychiatrists are of one opinion.

Each psychiatrist gets all his details from his side and never has a chance to consult with the other side—it is strictly forbidden by usage.

Since you do not ever get to know the people on the other side, you are necessarily biased by the plethora of details which are presented to you and it builds a picture for you, which isn't necessarily the picture that is true.

Once, when Dr. Despert was asked to appear in court to give expert testimony, she examined the child and found that she must render her opinion not for the parent who consulted her, but for the other side. She disqualified herself:

If I had been appointed by the court, instead of by a side, I would have presented my opinion. If an impartial psychiatrist could see both parents and examine both sides, then the testimony would be a lot closer to the point.

To back up the contention that some parents seek custody of children only to

strike back at their former husbands or wives, critics of the present system point to cases in which parents who have gained custody at great expense have abandoned their right to custody after a brief period. They also point to the fact that maintenance awards and other benefits granted with custody of children are often valuable and bring into the cases monetary rather than loving considerations.

Among those seeking a better method of deciding custody cases is Professor Henry H. Foster, Jr. of the New York University School of Law, chairman of the research committee of the Family Law Section of the American Bar Association. Professor Foster upholds the adversary proceeding as an appropriate method provided that more appropriate social and psychological facts can be brought to bear on judicial decisions. He finds present custody cases marked as a group by "question begging, rigid rules and platitudes." His law research committee has drafted a statute that the committee believes would improve the situation. The statute sent to the Commissioners on Uniform State Law as a point of departure for a model law would allow a court to hear on its own motion any person or expert whose skill or experience would aid a court in arriving at a just decision.

Another solution was advanced in the June 1964 issue of the *Yale Law Journal* by Dr. Lawrence S. Kubie, a psychiatrist and neurologist. Because it is "always disturbing to children to be substantially removed from contact with either parent," he proposed that parents agree "that neither of them shall have an exclusive right to custody." They would try to agree on where the child would live and for how long, where he should go to school, etc.

If they could not agree the matter would go to a mutually selected committee of experts—a pediatrician, a psychiatrist, an educator and a lawyer or clergyman. Further, the children in the case would be assigned a confidential trusted "adult ally" from outside the family circle so that they could express their ideas freely and in confidence. He wrote:

It is rarely easy for a child to talk to adults, and least of all to his own warring parents. The adult ally would be picked from a list of psychologists or psychiatrists.

I have seen extreme cases of parental hostility and it is heart-rending to observe the child's position. Young children beg their parents to live together again, even after both are remarried. If you explain to them that this is not possible they say, "Well, they could do it somehow."

The committee's proceedings would be confidential and aimed at resolving disputes, rather than exacerbating them by causing courtroom battles.

### Canons of Legal Ethics

According to the September 1964 *News Bulletin* of the American Bar Association, the organization is undertaking a broad re-evaluation of the adequacy and effectiveness of the Canons of Professional Ethics through a special committee on evaluation of ethical standards. The committee has been authorized to recommend changes, and the study will require a year or more. The review initially will embrace only the forty-seven ethics canons applicable to lawyers, and not the Canons of Judicial Ethics which apply to judges.

President Lewis F. Powell, Jr. said the project will be one of three receiving major emphasis under his administration. He named Edward L. Wright of Little Rock, Arkansas, immediate past chairman of the

House of Delegates, as chairman of the new committee. Mr. Powell announced that "many aspects of the practice of law have changed drastically" since the canons originally were adopted in 1908. An American Bar Foundation study committee has noted, Powell said, that these changes "make unreliable many of the assumptions upon which the canons originally were based. As remarkably flexible and useful as the canons have proved to be," he said, "they need to be re-examined as guidelines for the practicing lawyer. They also should be re-examined particularly in view of the increased recognition of the public responsibility of our profession."

"It is not suggested that all—or even a substantial number—of the canons are obsolete." Mr. Powell further stated that "there is certainly no thought of starting out to rewrite de novo the ethical standards of the legal profession."

The broad principles, as reflected eloquently in the Canons, are immutable. No doubt, most of the present canons will be found to be adequate; but in view of the changed conditions since 1908 and the experience of the past half century, the time has surely come for the American Bar Association to take a careful look at this critical area of our responsibility.

Mr. Powell said the committee will be concerned with the enforcement of the canons as well as with their content. He said that "there is a growing dissatisfaction among lawyers, with the adequacy of the discipline maintained by our profession." The Missouri Bar Prentice-Hall survey showed that "27 per cent of Missouri lawyers think that perhaps as many as half of their fellow lawyers do not comply with the professional canons." The ABA study committee will "not deal directly with disciplinary procedure and action," but will "carefully

evaluate the extent to which departures from high ethical standards and lapses in strict enforcement are related to the content of the canons." "Appropriate revisions or additions," he said, "could contribute significantly to more effective grievance procedure, as well as to increasing the level of voluntary compliance."

### Church-State

An excellent survey note has appeared in the June 1964 *Notre Dame Lawyer* analyzing the problems which have arisen in the past several years in the church-state relations in America. With respect to the doctrine of charitable immunity, the survey reports that a majority of the fifty-one jurisdictions have abolished the doctrine. The trend of the law has been toward its rejection. Even in states that maintain immunity for these institutions, exceptions have been introduced. In cases that have reaffirmed the doctrine, the commonly employed rationales for its continued existence are strikingly absent. The foundation for reaffirmation appears to be *stare decisis* or, as in Indiana, the belief that this is a matter for legislative determination. Religious institutions have a vested interest in the survival of the doctrine and as such might be expected to be among its leading proponents. But among these groups there is a division of opinion, based upon moral considerations, as to the desirability of continuance. Various religious institutions have recognized moral responsibility to compensate injured parties by waiving their right of immunity through the purchase of liability insurance. Thus, it can be seen that the charitable immunity doctrine is not dead and that there is a diversity of approach and application among the states that adhere to the doctrine, but the move-

ment toward uniformity through abrogation continues apace.

With respect to taxation, the survey states that although the decisions are often explainable in light of the applicable state statutes, the reasoning utilized expresses a growing criticism of churches which claim tax exemptions while engaging in entrepreneurial ventures. If the criticism continues it could affect settled doctrines of religious exemption in the future. As for the federal constitutional question, the Supreme Court may well avoid any decision on the matter, at least until the clamor abates from the recent *School Prayer Cases*, and perhaps permanently. The Court could utilize the lack of a "justiciable issue" to avoid a decision on the merits. Any changes relating to federal tax exemption will likely result from a congressional policy determination because of this "standing" problem. If such changes were to be made, Congress would probably strive to eliminate the competitive advantages of the religious institutions engaged in private businesses. An extensive alteration of our religious tax-exemption practices does not seem imminent or desirable at the present time. As long as we believe that our nation will be improved through the enhancing of morality in our people, then we ought to facilitate our churches' attempts to accomplish this by rendering to them at least indirect assistance through tax exemption, especially where they are not competing with private business.

On the matter of zoning, the survey observes that there have been no major changes in the area with reference to churches and parochial schools. How long such a period of inactivity, and with it a preservation of the status quo, is to continue is open to speculation. There are un-

solved problems, especially the constitutional problem of possible interference with the exercise of religion if a church is excluded from a particular district. The diversity of approach among the states remains, with some prohibiting the exclusion of churches and others allowing it. As long as the public is satisfied with the particular approach that its state has adopted, or at least remains apathetic, there is not apt to be a major development in this area. If, however, there is a demonstration of public interest, for example, by instituting lawsuits, the state legislatures may be forced to review their enabling acts and the courts their decisions. Until such a manifestation of concern, it would appear that the hiatus will continue.

### Right of Ownership

In April 1963, an English law periodical entitled *The Solicitor Quarterly* published an article by Richard Harding which critically evaluated the Catholic position on private property. The article started from the untraditional proposition that for Aquinas common ownership, and not private property, was a natural right. The author concluded that there have been "various changes in Catholic doctrine, which together make up a fundamental evolution from the time of Aquinas." In short, in the critic's view, the "doctrine" on the nature of rights of property has changed. With respect to the jurisprudential value of natural rights, he simply called upon the familiar "doctrine" of Professor Friedmann: one's attitude to "natural law matters is a matter of personal predilection which cannot be shown to be right or wrong." But, he concluded somewhat puzzlingly, "it can be shown to be good or bad, based upon weak or strong evi-

dence.”

According to the excellent reply by Albert Broderick, O.P., which appeared in the April 1964 issue of *The Solicitor Quarterly*, Harding's account is both misleading and erroneous. Since the inconsistency alleged by Harding in Catholic property doctrine stems from the assertion that Aquinas espoused rights to common property, rejecting private as a natural right, Father Broderick examines the analysis of St. Thomas on this point.

This examination results in a determination that at primary (prerational, irreversible) natural law there is nothing but the generic right, common to all and absolutely primary, to share in the goods of the earth. There is at this stage nothing at all by way of choice or preference of a particular, specific regime of property for achieving this end. This choice of regime of property is made by human reason, and ordinarily incorporated in human positive law. But this is no arbitrary choice by reason — the evident circumstances and consequences upon which reason reflects requires choice by positive law of a regime of ownership that is in some sense private. This is, as St. Thomas says, a typical secondary natural law or *jus gentium* situation.

Aquinas distinguishes between two kinds of natural law rights, or natural law. There is the “natural right” that comes about “without deliberate adjustment”; we have seen the example of the natural adaptation of the male to the female for generation. In this sense private property is not a “natural right.” Historically, community of goods may have come first. There is no doubt that the role of property is “to benefit the species.” But human reason reflecting upon human experience sees that this

general benefit would not be best achieved by a regime of common property to the exclusion of private administration. And when there is an evident reasonableness, as in this case of private property, even when enactment occurs the evident natural justice (of private regime of property) antecedes the positive legal enactment. In this sense, private ownership is thus a “natural right.”

It has always been a puzzle and a curiosity that Ulpian, one of the most cited among Roman jurists in the *Digest of Justinian*, had defined *jus naturale* as what “nature taught all animals.” And yet, while recognizing that human living required that man's inclinations be subjected to reason, *i.e.*, man's special inclination to “the human good,” Aquinas adopted Ulpian's words as phrasing primary natural law. These primary propositions alone (plus those they entail) are universal. The other actions that man's experience and practical reason tell him are for the most part necessary to achieve his basic objectives are also called “natural law” precepts by St. Thomas. Reason tells man they are evidently, though not absolutely, necessary for success here; they are not mere arbitrary choices, rather they are well tested, general in scope and for the most part accurate guides to conduct, “oughts” widely recognized. Sometimes Aquinas calls these secondary precepts, or proper conclusions, of natural law; sometimes he refers to them, in a special use of the Roman term that became common in later scholastic use, the *jus gentium*. A favorite example of Aquinas of this second grade “natural law” is private ownership of property. The right to use of goods, absolutely necessary for men to live, is in general a common primary natural right of all the

race in general—and in the concrete for any man in immediate dire need.

Father Broderick concludes that in a philosophical dimension, St. Thomas, like Aristotle, assumes a purposeful, basically fixed nature in man. Only on this assumption can objective moral laws be explained philosophically. In fact, Aquinas a priori predicates certain basic prerational inclinations (later verified to some extent from their effects by our observation) as the guides to the basic precepts of natural law. So long as man needs to eat to survive, there is this irrevocable natural law regarding *some* form of property. But if a new type of human animality developed that made food unnecessary, the perspective of food-property as a necessity would obviously disappear.

On the other hand, there are rules and rights of natural law that Aquinas puts in a separate and secondary category. They reflect such observations about man as are not universally verified, but true for the most part. General change in them is perhaps unlikely, but not impossible to conceive. And in this category fits private ownership of property. If the practical premises upon which this doctrine is based utterly collapse, a development that is obviously not anticipated by either Aquinas or the papal doctrine, it would have to be acknowledged that private property would no longer qualify as a “natural right.” Meanwhile, as a general concept it is firm, as to content it is fluid.

#### **Becker Amendment**

The Fall 1964 issue of *The Georgetown Law Journal* contains a note which should prove extremely interesting to *The Catholic Lawyer* readers in view of their large mail response to our recent articles on the *Engel v. Vitale* case.

In discussing the various constitutional amendments which have been proposed since the controversial *School Prayer Cases*, the note comments that the problems raised by the wording of all the proposed amendments are myriad. Some have specified that recitation and reading of non-denominational prayers be allowed; others have referred to the Holy Scriptures or to the Holy Bible; still others have specified religious worship, prayerful meditation, or any prayer or other recognition of God. Some of the proposals have used positive language, asserting that prayer or worship shall be allowed; others have taken the negative form, stating that they shall not be prohibited. Some have included the requirement that participation be voluntary; others have stated that it must not be compulsory; and still others have provided that those present must be given the opportunity to request to be excused. It is impossible to consider in detail the multitudinous problems of legal interpretation posed by such language.

The note, therefore, singles out the most famous proposal, the Becker Amendment, and gives it a detailed analysis. According to the note, the Becker proposal strikes at only a part of the problem. It attempts to reverse two specific Supreme Court decisions and to fight off the ghosts of future decisions. Yet, its actual coverage is quite narrow. Even if the Becker Amendment became part of the Constitution, the Supreme Court, by adopting the Douglas view, could hold such practices as the authorization of military chaplains and religious tax exemptions unconstitutional as government “aids” to religion. It could be expected that upon such a holding another amendment would be proposed to “return the situation to status quo.” This is not

the proper function of a constitutional amendment. It should not be called into play every time the status quo is disturbed. Rather, Congress should give consideration to the words of the first amendment, viz., that it "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

### Natural Law

In 1954 Professor A. P. d'Entrèves delivered a series of lectures at the Notre Dame Law School which were later published under the title *The Case for Natural Law Re-Examined*. In these lectures, as their title indicates, the arguments favoring use of the natural law concept in discussing and solving problems of legal philosophy were developed affirmatively, though at times the author resorted to the negative method of refuting theories opposed to his basic beliefs.

A recent article in the November 1964 issue of the *Stanford Law Review* by Professor Edgar Bodenheimer uses a different approach. Entitled "The Case Against Natural Law Reassessed," the article examines some influential theories which have been advanced to disprove the validity of the natural law doctrine and then offers refutation. A chief criticism discussed is that the theory of natural law, in its historically most influential manifestations, rested on the presupposition of permanent, fixed, more or less universal precepts that could claim validity for all ethical systems and legal orders. The critics asserted that such universal precepts did not exist, that they were a figment of imagination. In support of this argument they pointed to the diversity and heterogeneity of normative regulation in the various countries of the world. What is considered a crime in State

*A* is regarded as perfectly permissible in State *B*. What is deemed to be a perfectly valid and enforceable contract in one country is proscribed as contrary to public policy or *bonos mores* in another. A business practice outlawed as reprehensible in some communities is accepted as unobjectionable elsewhere. A form of defamation actionable in some legal orders may be privileged in others. This was the main thrust of the argument.

Professor Bodenheimer suggests that reliance on the empirical evidence of cultural and legal diversity does not, per se and without further argument, destroy the foundations of a natural law approach. He therefore suggests that the reply of the natural law jurist in rebuttal might run as follows:

Even if it must be conceded that legal and ethical systems are diverse and inconsistent, this does not prove that one legal or ethical system might not be superior to another and, therefore, better adapted to the accomplishment of the basic objectives of political and social organization. Natural law doctrine has never claimed that its basic postulates are universal in the sense that they cannot be infringed by an empirical legal order. Thus, it is entirely possible that the legal order of State *A* may be in conformity with natural law, while that of State *B* may be in violation of it. If this should be the case, the argument would continue, there is every reason to believe that the legal order of State *B*, because it is not sufficiently conscious of and responsive to certain ineradicable traits of human nature, will suffer crises, breakdowns, and eventual disintegration unless it is brought into conformity with the existential needs of human beings.

The legal positivist would be inclined to meet this assertion by questioning the availability of any scientific criterion by which the legal order of one country could be adjudged to be superior to that of another country. He would contend that standards of right and wrong are conditioned and shaped by the conventions and value patterns of a particular culture, and that no society has the right to condemn or criticize the ethical and legal system of another society on the ground that its conceptions of good and bad are faulty or inadequate. If such criticisms are voiced, the legal positivist would argue that they represent no more than the subjective and irrational reactions of particular individuals or groups and must be deemed devoid of objective validity and rational justification. Implicit in this rebuttal of the natural law position is the assumption that there exist no needs of human beings which demand absolute recognition by all legal orders, and that human nature is sufficiently viable and indeterminate to lend itself to more or less unlimited experiments of cultural conditioning and social readjustment.

Another objection is posed by the following questions. Are we in danger of closing avenues of social improvement if we reach firm conclusions regarding the fixed and unchangeable traits of human nature, and if we declare these traits to form insuperable barriers to experimentation with the human condition by positive law? Does the fact that up to this day we have observed certain common ingredients in the legal system of the world offer any proof of the proposition that these common norms ought to be recognized, preserved, and perpetuated as eternal limitations on efforts at human betterment through the instrumentality of positive law?

The rejoinder to this objection, according to Professor Bodenheimer, must be that none of the natural law theories that have played a major part in the history of jurisprudence has placed roadblocks of this character in the path of social improvement. Although all of these theories have recognized some intrinsic limitations on the power of human legislators stemming from the realities of human nature, not one of them has declared that efforts to make men more cooperative and social-minded were contrary to the natural law and, therefore, bound to end in failure. On the contrary, a large majority of natural law philosophers have proceeded from the assumption of a social instinct in man which the institution of law is designed to complement and reinforce. Even Thomas Hobbes, who accentuated the selfish, uncooperative, and aggressive impulses of men more strongly than any other natural law philosopher, recommended a corrective to this defective condition of human nature through instituting strong governments capable of enforcing the observance of the golden rule and the maintenance of mutual respect for private rights, particularly contract and property rights. In other words, it was the function of Hobbes' *Leviathan* to educate human beings, who in the state of nature would act like rapacious wolves toward each other, to conduct themselves as decent citizens and permit their fellowmen to live peaceful and undisturbed lives.

What the natural law doctrine has always asserted is that the destructive instincts of men must be kept under control, and that curbs on violence and indiscriminate infliction of harm are necessary for the organization and preservation of social groups. The injunction not to injure other members of a society has been, with cer-

tain limitations and exceptions, one of the chief foundations of natural law thinking. It must be conceded, however, that this injunction has not been fully recognized with respect to relations between one social group and those considered by it as external or internal enemies. This does not prove the incorrectness of the statement that it is a fundamental aim of the law to curb human aggression, but merely demonstrates that where human beings embark upon a campaign of violence and extermination it is usually not the law which serves as their guide to action.

Another criticism leveled against the natural law philosophy gravitates around the charge that this philosophy is apt to produce doctrinaire intolerance, monolithic thought, autocratic government and other barriers to human progress. Eugene Gerhart, directing his fire chiefly against Roman Catholic approaches to legal philosophy, has stated, "as a basis for authoritarianism . . . natural law provides an ideal foundation, an excellent major premise."

The clear reply to this, offered by Professor Bodenheimer, is that while St.

Thomas Aquinas in his political writings tended to give qualified support to the political and social institutions of the feudal society of his day, his theory of natural law, which was a cornerstone of his legal philosophy, was completely devoid of any elements of intolerance or glorification of the status quo. His catalogue of fundamental principles of natural law included the right of self-preservation, the sex instinct, the education of one's offspring, the search for knowledge, the desire to live in society, and the avoidance of wrongdoing to others; with respect to the concrete implementation of these principles in different times and different societies, St. Thomas took a relativistic attitude. This broad generality of the Thomist natural law precepts, combined with flexibility in their application, prompted Jerome Frank, a non-Catholic thinker and liberal-minded judge, to say that he could not understand "how any decent man can today refuse to adopt, as the basis of modern civilization, the fundamental principles of Natural Law, relative to human conduct, as stated by Thomas Aquinas."

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