

# Birth Control; Obscenity; Religious Tax Exemptions; Federal Education Act; Law and the University; Aid to Education

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## IN OTHER PUBLICATIONS

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### Birth Control

The recent decision, on June 7, of the United States Supreme Court in the Connecticut birth control case has come under considerable attack by some because of the Court's presumed law making. Like much other litigation brought before the Court in recent years, *Griswold v. Connecticut* appears to be representative of what has been termed "associational jurisprudence," or the planned use by interest groups of the judicial processes in order to establish new law and thus advance their social aims. But all of this is entirely proper and long practiced. Here the interest group was Planned Parenthood, and the judicial processes were invoked through deliberate violation of a statute believed (correctly, so it turns out) invalid. Twice before, in 1942 and 1961, the attempt had been made, by similar means, to get a decision of unconstitutionality from the Supreme Court, but in both cases the Court refused to entertain jurisdiction. On this third try, the Court decided the case on its merits and handed a signal victory to the contesters of Connecticut's eighty-six year old statute which made the use of contraceptives a crime.

The case under discussion involved Estelle T. Griswold, Executive Director of the Planned Parenthood League of Connecticut, and Yale professor, Dr. C. Lee Buxton, Medical Director for the League, who opened a birth control clinic at New

Haven in 1961, thereafter giving instruction on contraception at the clinic to married persons. Buxton was a veteran of the 1961 litigation. Their arrests and convictions followed, under the Connecticut statute rendering accessories criminally liable. The underlying crime to which they were judged accessories was violation of the aforementioned statute providing that "any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days. . . ." Connecticut courts upheld the convictions.

The July 9 issue of *Commonweal* contains an extremely interesting and scholarly commentary on the case entitled "The Court and Birth Control." The author, William B. Ball, discusses the decision first as a matter of constitutional law. He raises the point that seven justices agreed that the statute violated the right of marital privacy, and they have collectively elevated the long-mooted "right to be let alone" to a new status in our constitutional law. (Precisely what that status is, is a bit in doubt, thanks to two basically different theories presented by majority members. Plainly, however, it has been strikingly improved.) Justices Black and Stewart, in dissent, argued in part for the right of states to be let alone by the Court, and in part that no specific "right of privacy" is to be found in the Constitution.

Justice Black who, in his twenty-eight years on the high court, has not been a notable apostle of judicial restraint, lambasted the employment of a "natural law due process theory" as the means "to invalidate any legislative act which the judges find irrational, unreasonable or offensive." While Black's indictment is already serving as fresh ammunition for critics of the Warren Court, both its deriding of "natural law due process" thinking and its intended doctrinal effect with respect to invasions of personal liberty by governmental action deserve rebuttal. Perhaps the best rebuttal is to be found in the essays of the majority members whom Black put under fire.

Justices Douglas and Clark found the right in what Douglas called "emanations" of other privacy-related provisions of the bill of rights. The fourth amendment, for example, provides a right against unreasonable searches and seizures, and Douglas noted that the Court had long since agreed that this amendment really affords protection against all governmental invasions "of the sanctity of a man's home and the privacies of life." So through similar "emanations" of the first, third, fifth and ninth amendments did Douglas see a "zone of privacy" created as a distinct and recognizable constitutional guarantee, a sort of penumbra of the bill of rights. Douglas placed the relationship of marriage well within that zone. The anti-use statute, he said, sought to achieve goals by means destructive of that relationship which is "intimate to the degree of being sacred."

Justices Harlan, Goldberg, Warren, Brennan and White, agreeing that the statute involved a right of marital privacy, disagreed with the Douglas-Clark view that

that right was a thing pieced together out of other bill of rights provisions. Rather, they turned to language of the fourteenth amendment which prohibits state action depriving any person of life, liberty or property "without due process of law." They noted that the Court had long since interpreted this language to refer to those rights so basic as to be "implicit in the concept of ordered liberty," and they found that, in the Connecticut case, such a basic right had been violated. Justice Goldberg, in an eloquent concurring opinion, called the right of privacy "a fundamental personal right." "Although the Constitution," he said, "does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection." He added that "the entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected." Analyzing the Black-Stewart view that no specific right of marital privacy exists, Goldberg concluded: "if a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control would also seem to be valid," and that the latter law would be "totalitarian."

Mr. Ball's reaction to the adverse comment made by some Catholic commentators on the case is that it has centered upon the reliance of several of the majority upon the ninth amendment—"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The point is peripheral. The true focus of

the case is its powerful vindication of the right of privacy in marriage as a part of our essential constitutional liberties. Radiations of this right, going well beyond use of contraceptives, were indicated at various points by the majority justices—as, for example, “the marital relation” generally, “the marital home,” the right “to bring up children,” “the private realm of family life.” While press reaction has focused too little upon these significant and inevitable inclusions of the decision, it has speculated widely concerning changes in public law which may be sparked by the decision.

Developing the positive aspects of the decision, which flow from the “right of privacy” protection, Mr. Ball concludes that rather than finding in *Griswold v. Connecticut* a legal buttressing of state-supported family planning programs, one may well find in the totality of the Court’s recent pronouncements on governmental coercion, rights of conscience and rights of privacy, a doctrinal position on birth control closely paralleling the Court’s position on religion and governmental action—namely, that government should be neutral, neither penalizing birth control nor promoting it.

Grave questions, indeed, respecting the coercive power of the state in relation to the indigent individual are posed by many of the loosely worded family planning programs now cropping up at local, state and federal levels. The view taken by the Court in the school prayer cases that coercion of conscience of the child was implicit in the mere passive presence of the state in sponsoring the “voluntary” religious programs would appear not inapplicable to the situation where the indigent mother on relief is interviewed by a gov-

ernmental bureau. The reach of the inquisitorial power of the state in the caseworker-client relationship, moreover, raises most serious questions precisely in the area of privacy now constitutionally zoned by the Supreme Court. Does it extend to such matters as frequency of sexual intercourse, ethical outlook, savings habits, drinking habits? What may be made a matter of record, and what guarantees of confidentiality are legally mandated? How far (apart from birth control) may the “planning” in family planning be carried? Some may see in these programs a sort of new Comstockery, with a now highly managerial paternalism toward the poor and often unspoken puritanical assumptions respecting “undesirables.” The whispered eugenicism in all too many welfare circles identifies these undesirables as Negroes. The overtones here are overpopulation, “but the undertone is unter mensch.”

The vital questions raised by state family planning programs have been little asked, and certainly they have not been answered by the routine Catholic blasts at the programs as “violating God’s law” or as “state-promoted promiscuity.” Perhaps the new Court decision will now serve to induce discussion of these programs in terms of rights of privacy—a civil frame of reference meaningful to all in the community.

### Obscenity

Readers of *The Catholic Lawyer* who have expressed interest in the recent symposium on “Obscenity and the Law” which appeared in the Autumn 1964 issue will find further remedial suggestions on the subject in a two part article published in the February and April 1965 issues of

the *New York State Bar Journal*. The article, by Samuel H. Hofstadter and Shirley R. Levittan, sheds new light on a subject now receiving a great deal of judicial attention.

According to the authors, the Supreme Court, in *Roth v. United States*, set forth twin constitutional norms in conjunction with each other—that the material must be judged as a whole and that it must be examined in the light of its effect on the average adult rather than by its impact on the susceptible or immature. The intrinsic significance of that case resides in its articulation of this two branched criterion rather than in its reformulation of obscenity. In so far as the Court undertook to “define what may be indefinable,” it inevitably could only meet with indifferent success.

On the basic assumption that pornography may not find shelter under the wing of the first amendment, *i.e.*, that it is not immune from proscription, it is their submission that the desired result in the application of the law, within the criterion established by *Roth*, can be best achieved by relegating the issue in each instance to a local jury, which shall be the sole judge of the law and the facts. At one time it was the rule in all criminal cases, and it continues to obtain in libel cases to this day. Pornography has never been within the protection of the first amendment. Obscenity is not a true constitutional problem but rather one of application of generally valid statutes. Hence, when an effort is made to bring matter within its protection, the Supreme Court should be more diffident in arrogating to itself subjective evaluations. This is a jury’s function. Holmes’ admonition is particularly pertinent:

We ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe . . . [it] as committing to the Court, with no guide but the Court’s own discretion, the validity of whatever laws the States may pass.

In the context of pornography, the jury process is uniquely salutary and thus imperative. Justice Brennan once noted:

The jury represents a cross-section of the community and has a special aptitude for reflecting the views of the average person. Jury trials for obscenity provide a peculiarly competent application of the standard for judging materials which by its definition calls for an appraisal according to the average person of contemporary community standards.

To effectuate this thesis, we must insert the word “local” before the word “community”; for it is the consensus of the local community which should be determinative in this area of human behavior and standards.

Hofstadter and Levittan further submit that the principle that sheer pornography, merely because it is well written, ceases to be pornography is a dubious one. For, in the history of the written word, there has always been a current of subliterate of the obscene—sometimes created by true men of letters from Ovid through La Fontaine, Goethe and Mark Twain to the “beats.” The same is true of other artistic creations. Indeed, a book or work of art cannot acquire a patina of respectability just from its authorship when it is, in fact, as denuded of substance as the “Emperor’s New Clothes.” It is time we acquired the clarity of vision of the child in that well known tale and forthrightly recognize obscene material, whatever its literary or artistic coloration, to be what it is—ob-

scene. For, although obscenity may be variable, it is not illusory. To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared overriding public policy against pornographic displays.

Doubtless, the matter like many others in the law is one of degree. Competing goods require a high dedication to honorable accommodation and the problem arises frequently in connection with guarantees of individual freedom and the common weal. In broad outline, it may be said that the salutary operative principle is that when an element of prejudice to individual or social right in enforcing the law is disproportionate to the general good (and the matter is within the area of the first amendment), then the constitutional guarantee is uppermost and controlling. And, conversely, when the prejudice to a common good is highly disproportionate to the degree of invasion as to what would otherwise be a respected individual right, the latter becomes subordinate and the former prevails. These imponderables involve a fine fusion of objective correlatives. There are no absolutes, but rather tensions, in a system of checks and balances which make for ordered freedom.

The authors conclude by reiterating their argument that the issue of obscenity is one of municipal order and, in that sense, a domestic, restricted one, although of great importance. It is essentially one of mores obtaining in communities and reflected in the law. Its resolution, therefore, is uniquely appropriate by local action. The Supreme Court should not attempt to force, or enforce, a national

standard that, as Chief Justice Warren suggests, cannot exist. If various jurisdictions differed in *The Tropic of Cancer* cases as to whether the book was obscene or not, they were truly reflecting the diverse community mores of our great land. If there is any residual validity for the continued recognition of the federal-state complex (and all agree that there is, although there can be honorable disagreement as to its scope), it is in this field where mores, morals, aesthetics and the law are so inextricably interrelated. In our cultural pluralism, which is the essence of the American system, free play for differences in outlook should be afforded the different communities. It is only thus that we may reconcile the unity in diversity which is the supreme American contribution to the history of civilized government.

### Religious Tax Exemptions

The May 1965 issue of *The Catholic World* contains an article entitled "Religious Tax Exemptions and the First Amendment" by Father John J. Regan, C.M. It forcefully presents the argument that supporters of religious tax exemptions are consistent with the latest trends in Supreme Court interpretations of the first amendment religion clauses.

Father Regan's observations are confined primarily to exemptions from taxes on real property, although many of his conclusions apply equally to other forms of tax exemption. His emphasis is placed chiefly on the constitutional issues involved in tax exemptions rather than on public policy arguments.

According to Father Regan, the Supreme Court has not ruled on the issue whether such exemptions constitute a vio-

lation of the establishment clause. The Court had the opportunity to do so in 1956 and again in 1962 in appeals taken from the decisions of the California and Rhode Island Supreme Courts, but it dismissed these appeals on the ground that they did not raise substantial federal questions. It is arguable that such dismissals meant that these exemptions raised no real issue with respect to the first amendment, but it would be hazardous to say that these dismissals give a definitive answer to the problem.

The only other references by the Supreme Court to this problem are contained in two of the concurring opinions in the recent *Abington School Dist. v. Schempp* decision which was decided together with *Murray v. Curlett*. Justice Brennan stated that, "nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and non-profit organizations." Justice Douglas, however, took the opposite stand, but without making direct reference to tax exemptions when he said, "financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause."

The case against the religious tax exemption rests on a strict interpretation of the "no-aid" principle set forth by Justice Black in *Everson v. Board of Educ.* and quoted above. Taken literally, this principle means that the federal government and the states must not permit any form of financial support for religious activities, even on a non-sectarian basis. The fact that such aid is part of a general program of governmental support extended indiscriminately to activities with secular

purposes is irrelevant; aid must be denied to the religious portion of such activities. Thus it would make no difference that the exemption for churches is part of the overall exemption for property of all non-profit organizations serving charitable purposes. Justice Rutledge stated well the "strict separationist" view in his dissenting opinion in *Everson*:

It [the first amendment] was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. . . . The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.

Professor Paul Kauper of the University of Michigan Law School has outlined some of the subsidiary arguments advanced by those opposing religious tax exemptions. The determination whether the exemption applies in a given case requires the courts to undertake the difficult task of defining what is meant by a house of worship or by religious activities and purposes. It is also said that churches relying on tax exemptions become debtors to "Caesar" and lose some of their free and voluntary character. It has been further argued that these exemptions are rooted in the established state religions of the past and should be abolished in the same fashion.

As cogent as these arguments against the exemptions may appear, supporters of the exemptions find them out of step with the latest trends in Supreme Court interpretations of the religion clauses. The arguments are also relatively unsophisticated in their treatment of so delicate an area as the first amendment. The basic position

favoring these exemptions likewise originates in the "no aid" dictum of Justice Black in *Everson*, but its interpretation of the dictum is tempered by what the Court actually did in *Everson* (and not alone by what it said) and by subsequent religion decisions.

The principle of "religious neutrality" as the working norm in government-religion relations provides justification for most, if not all, of the religious tax exemptions now permitted. This principle was best stated by Justice Clark in the recent *Schempp-Murray* decision:

The test [of legislation challenged under the establishment clause] may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the establishment clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

The question thus is, do tax exemptions for religious institutions have a secular legislative purpose and is their effect primarily secular in nature? To answer this question a distinction must be drawn between the various types of activity engaged in by churches and religious institutions. Such activity is frequently concerned with education, hospitals and charitable work for various underprivileged groups in society. Not only secular private agencies but government itself is also concerned with such activities, and therefore, it is argued that tax exemptions for all organizations performing such work serve a public welfare purpose. Indeed, the efforts of private agencies, religious or not, save government the expense of providing these

services.

The constitutional principle of religious neutrality stated in *Schempp-Murray* is reinforced by a second look at some previous court decisions. In *Everson*, for example, in spite of Justice Black's words about "no aid to religion," the Court upheld the New Jersey program reimbursing parents for bus fares paid to transport their children to parochial schools. Likewise in *Zorach v. Clauson*, Justice Douglas, writing for the majority, spoke of the need for government to accommodate itself to the religious interests of its people. Finally, in the Sunday closing laws cases, the Court found that such laws served a secular purpose at the present time, despite their undeniably religious origin and the fact that Christian sects benefited from their enforcement.

This line of argument, however, cuts two ways. If churches enjoy the same tax exemption on secular activities as other private agencies, they must also be prepared to forsake special exemptions when they engage in business activities unrelated to their religions or eleemosynary mission. In 1964, the delegates to the first National Study Conference on Church and State, sponsored by the National Council of Churches, accepted the logic of the conclusion when they expressed disapproval of exempting the unrelated taxable business income of church bodies. Neutrality implies no special privileges as well as no special burdens for religion.

Moreover, the "secular purpose" argument has limitations. While a secular purpose can be found in many of the secular activities and institutions of the churches, what justification is there for governmental support of houses of worship and of religious functions in a strict sense?

Father Regan suggests that the answer to this question lies in the theory of religious neutrality formulated by Professor Wilber Katz of the University of Wisconsin. Professor Katz believes that the two religion clauses of the first amendment should be read together as intended to promote a single purpose: the religious freedom of all citizens. Ordinarily, legislation serving a secular purpose will not run afoul of the establishment clause (by favoring religion against non-religion or one sect over another) or of the free exercise clause (by impairing a citizen's freedom to practice his religion). There are certain cases, however, where a too rigid interpretation of the establishment clause could lead to an interference with religious freedom guaranteed by the free exercise clause. Therefore he reasons that legislatures should have at least discretionary power to create exemptions to laws having this effect. The result of such exemptions is not to prefer religion but rather to safeguard the religious freedom of all citizens. On this basis he justifies the provision by government of chaplains for men in the armed forces and in prisons, the exemptions from the draft laws given to clergymen and theological students, and the permission given to public school children to attend released time programs conducted by their churches during the regular school day.

Strong support for Professor Katz' position was recently provided by the Supreme Court in its decision in *Sherbert v. Verner*. In this case the Court upheld the claim of a Seventh-Day Adventist for state unemployment compensation benefits, which had been denied because of her refusal to work on Saturday, the Sabbath of her faith. By declaring her ineligible for benefits, the

state forced her to choose between following the precepts of her religion and forfeiting the benefits, or abandoning one of her religious tenets in order to accept work. The Court reasoned that government could not place a citizen in this dilemma. The net result of the decision is to *require* government to grant an exemption from general legislation to a citizen whose religious freedom would otherwise be seriously impaired, unless a substantial state interest dictates that the exemption not be granted.

Applied to the tax exemption problem, Professor Katz' and the *Sherbert* principles indicate legislatures have discretion in granting exemptions from tax laws to further the religious liberty of the citizenry. This is not to say, however, that such exemptions are constitutionally required. It would be pushing the principles too far to conclude that the free exercise clause demands such exemptions without clear proof that religious freedom would otherwise be seriously threatened.

Support for the constitutionality of religious tax exemptions is also found in the fact that they have such a long history in this country. Professor Kauper thus explains the argument:

This history cannot be explained solely as a carry-over from the earlier days of established churches. These exemptions are found also in states formed and organized after churches had been disestablished in the colonial states. In many states they have also been recently amended to extend the scope of the exemption. This suggests a rationally conceived and deep-seated policy, and not an accidental or vestigial survival of outmoded practices.

On the balance, it seems that a persuasive case for many religious tax exemptions can be constructed. Only the

Supreme Court, of course, can decide the issue. It is important, however, that a climate of free and open debate on the issue be maintained until the Court has been presented with the proper case for resolving the issue. It would be dangerous for private citizens or public officials to reach final opinions about the issue prematurely, as President Kennedy seemed to do in opining that federal aid to parochial schools was unconstitutional in the face of strong legal opinion to the contrary. Indeed, the fact that the Supreme Court has twice declined to pass on the issue may foreshadow the result of any future tests of the constitutionality of the religious tax exemption. Perhaps, as Professor Kauper observes, the Court is disposed to accept Justice Holmes' axiom that a page of history is worth a volume of logic.

### **Federal Education Act**

Writing in the May 13 issue of *The Brooklyn Tablet*, Congressman Hugh L. Carey states that the cornerstone of the most comprehensive program of equal opportunity ever undertaken by any nation in history is the Federal Elementary and Secondary Education Act of 1965 which was signed into law on April 11.

This bill is meaningful in three aspects. First, it is as important in its performance as in its passage since that performance will require enlightened implementation to assure the full measure of its benefits to every child in need. Second, its successful implementation is important as a precedent and prospect of future federal assistance toward educational excellence for all in the future. Third, the history of the preparation and production of this bill is significant as a basis for continuing cooperation among all interests in education.

As cleverly as this bill reconciles differences, just as clearly it does not compromise the vital and traditional principles of educational freedom which are our inalienable birthright. There is no compromise on the parental right to freedom of conscience in requiring religious training without the forfeiture of public benefits. There is no compromise on the guarantee of freedom under the first amendment, for no church or religion is established under the bill and no program of education is disestablished or discriminated against because it has religious component. There is no compromise on the principle of equal treatment of all children under our law at the federal level. It was worth working for five years to preserve that principle which is as old as the Constitution and as valid today as it was in the Northwest Ordinance. There is no compromise on our unity in diversity, our freedom from state control and monopoly of education or our resistance to conformity for these compromises are anathema to the individual in a free society.

Above all, according to Congressman Carey, we have legislated a clear concept of the federal obligation and responsibility in education as a most significant precedent. The federal obligation is to provide for all children in need of assistance without difference, distinction or discrimination, recognizing all interests in education, state and private, which serve the public purpose. The federal responsibility is to supplement but not displace state, local, and private resources and interests so that quality and excellence are enriched and local and parental control are not impaired.

Passage of the law means that funds for pre-school, under the Economic Oppor-

tunity Act and under the Elementary Act, funds for facilities, equipment and personnel to aid the education of the disadvantaged, textbooks and library resources for all children, funds for supplemental centers and research and demonstration classes, should be in communities beginning this summer. It means that in the immediate weeks and months ahead superintendents, teachers, specialists and librarians should initiate community-wide discussions involving all interests without delay.

There is no reason why a "head start" pre-school program should not be underway in every eligible community under public and private sponsorship wherever appropriate, during the summer. The resources and funds are available now.

The fall semester of 1965 should incorporate dynamic and visionary curriculum changes for deprived children in all schools developed and co-ordinated by public and private authorities. The range of these services should be broad and deep as the need of the child and in every case the need of the child should be the primary and paramount consideration determining the scope and the site of the program. For some children it may be a free hot breakfast. For others, it may be one or more of the following: provision of clothing, shoes and books; increased guidance services; special classes for the physically handicapped; language laboratories; equipment of classrooms for radio and television instruction; after school study centers; institutes for special teacher training.

In short, there is no limitation on the kinds of distributive innovation which educators are encouraged to suggest to meet the needs of individuals and groups

of disadvantaged children.

Titles II, III and IV of this bill are innovations in themselves, much needed innovations. According to Congressman Carey, Title II, which brings 100 million dollars in textbooks and teaching materials into the hands of students and teachers will produce a dividend of excellence far beyond the size of the investment.

As for Titles III and IV, he foresees that new centers of learning and research using all the public and private resources available will set a new pattern in American education. They will enable each school system public and non-public to complement the other, to explore and expand on common strengths and to cure common weaknesses.

Most important, these centers of cultural, artistic and instructional diversity will bring the school and the educator into the community and the community into the entire educational process.

It is true that the federal programs taken together amount to little more than 10% of state and other expenditures. But as federal precedent set the way in civil rights, in apportionment, in voting, the supremacy of the federal principle is more important than the dollars involved. It is foreseeable that, with the growth of understanding and appreciation of the voluntary effort in private education, in the public purpose as worthy of public support, that the cobwebbed antiquities in state law will be discarded. These antiquities are as outmoded in the diversity of a pluralistic society as is any limitation upon the growth of education. There are too many Americans who need and want education today for any restriction upon our capacity to make it available in quality and abundance.

A few years ago the words "non-public school" in a federal aid bill were unmentionable. In this year and from now on the inclusion of all school children in all federal programs is not only probable, it is inevitable.

### Law and the University

Paul L. O'Connor, S.J., President of Xavier University in Cincinnati presents a most scholarly justification for the university as a necessary means of preserving our philosophy of law, in the May 1965 issue of *Catholic Mind*.

Father O'Connor explains that our changing world does not seem to care for the lessons of the past in the theory and practice of the philosophy of law. To an appalling degree our changing world either ignores or rejects the notions of law. And so it is very much the business of the legal profession and the academic profession to reflect on the true and saving glory of the law and the university.

When you take the idea of reason away from the idea of law you have destroyed the very idea of law. When you say that law is a practical thing and does not need a philosophy to explain it and support it, when you say that the American Constitution does not need the Declaration of Independence to explain and support it, then you have undermined the whole structure of our political way of life; you have turned a deaf ear to the traditions which have made our nation great; you have destroyed the sacred trust of the profession of the law.

For it is not just any philosophy that will do for the support and sustaining of the American system of law. It is only the tradition in which the American republic was conceived and founded that

can explain and preserve that republic. It is the philosophy which makes law the work of reason and right and denies that law is arbitrary will and naked might. It is the philosophy that explains the law as the servant of man, that explains law as coming from a government which does not exist for its own sake but exists for the protection of human rights. This is the philosophy which answers the question "What is law?" only by first answering the question "What is man?" For the law exists for man and not vice versa. This is the philosophy which insists that man is a spiritual as well as a material being. Not a cosmic ganglion as Oliver Wendell Holmes believed. This is the philosophy which sees man as the image of his Creator, which sees him as endowed by that Creator with rights which no man or government can take away from him.

In times of change like these, the problem is not to prevent the change, out of fear that the values of the past and present will be lost, nor is it to promote the change merely for the sake of change. It is to guide and direct our changing world so that it will neither lose the greatness of the past nor fail to realize the promise of the future.

The law and the university are needed and eminently qualified to preserve the past and to advance the future for they have the stability and the perspective to preserve the past, and the flexibility, adaptability and dexterity to advance the future.

As the Church is now engaged in reflection on its true nature, its true greatness, so now we need—our world of revolutionary change needs—an *aggiornamento* in the law. The law must rediscover its true nature, must rediscover that it is

a noble work of reason, that it is the protector and the servant of man and that it can lead him to a glorious future.

The university and the law are needed in these three movements: 1) in the movement toward world peace; 2) in the movement toward Christian unity; 3) in the movement toward racial justice.

These great movements need the law. They need the work of reason. They need the help of the legal profession. They need the help of the university. They need an *aggiornamento* of the law. We must not fail them. How can the words of Pope John's encyclical *Pacem in Terris* fail to ring in the ears of the legal profession:

Today the universal common good poses problems of world-wide dimensions, which cannot be adequately tackled or solved except by the efforts of public authorities endowed with a wideness of powers, structures and means of the same proportions: that is, of public authorities which are in a position to operate in an effective manner on a world-wide basis. The moral order itself, therefore, demands that such a form of public authority be established.

How can we propose to lead the world to a just and lasting peace through law when some of our laws still contain the statutes of segregation, when some of our laws still contain evidences of pride and hate rather than reason and justice?

The changes of our revolutionary age will not necessarily be changes for the better. Our times of change are not inevitably a period of improvement rather than a period of deterioration. Our times are times of deep, foreboding crisis, and the crisis concerns our present subject, viz., the work of reason. Our past success as a nation cannot be preserved for our future happiness unless the philosophical basis of our past success is recovered

and applied to our future world. This means that the Judeo-Christian-American philosophy of the law must be clear and it must be applied to the changing world in which we live. This is not an automatic process. As Walter Lippman says, "The acquired culture is not transmitted in our genes, and so the issue is always in doubt."

The crisis of our times is touch and go. The issue hangs in the balance. If you ask what you can do for your country, Father O'Connor answers:

What we can do, you of the legal profession and we of the academic, is to reconstruct the public philosophy of law, to make the law accomplish the work of reason, to rejuvenate the great tradition of law which is our heritage, to achieve the *aggiornamento* which our changing world requires. This will, under God, mean much for our country and for the world.

#### Aid to Education

As we go to press the *New York Times* (July 27, 1965, p. 21, col. 3-4) reports with respect to the aid to education controversy a matter of importance to parochial school educators. The *Times* revealed that Dr. James E. Allen, Jr., the State Education Commissioner, ruled that parochial school pupils will be permitted to attend special public school classes financed entirely by the federal government.

Dr. Allen's view clears the way for the allocation of \$99,903,739 in federal aid for special courses for pre-school and poor children in such subjects as remedial reading. The ruling is likely to cause a controversy and perhaps a court test, because the New York State Constitution prohibits the use of public money for the aid of schools run by a religious denomination.

New York City will be a main beneficiary of the federal funds, Dr. Allen said.

Meetings are planned throughout the state to discuss the aid program in detail.

Dr. Allen issued the interpretation of the Education Department in a special message being mailed to local public school administrators, diocesan superintendents, private school officials and others containing legal opinions on the Federal Education Act of 1965. One opinion was written by Attorney General Louis J. Lefkowitz, and the other, an expansion of Mr. Lefkowitz's views, was by Dr. Charles A. Brind, chief counsel of the Education Department.

Dr. Allen acknowledged that the department was putting a "liberal interpretation" on the State Constitution and Mr. Lefkowitz's opinion. But he said that he favored steps to bring youngsters of the state "closer together" insofar as education was concerned.

Attorney General Lefkowitz wrote to Dr. Allen on July 15 in a letter made public today that if any state or local property, credit or public money was used for the programs required by the federal law it would constitute aid to sectarian schools and would violate the State Constitution.

But he wrote:

that the federal act does not require the use of state money or money of local educational agencies, or property or credit of a state or a local subdivision.

Thus the prohibition contained in the constitution, would then be involved if the entire cost of the programs in this state, including administration thereof, is paid out of federal grants.

Amplifying that view, Dr. Brind wrote on behalf of the Education Department:

The opinion [of Mr. Lefkowitz] points out that if the money from the federal government continues to be identified as federal money, then its use does not come

under the provisions of the State Constitution.

This means that whenever any school district received any federal money . . . it may not be commingled with other tax or public moneys, but must be kept in a special account in a bank so that it is perfectly clear what disposition is being made of it.

Dr. Brind went on to say that the federal money could be used to rent property, retain teachers and purchase supplies. "The teachers thus employed could be assigned to teach anywhere in the school district, including sectarian schools," he said.

Teachers' benefits and the standards they must meet would remain the same as in the public school system, and if the teachers or any supplies are assigned to sectarian institutions, the cost of the extra benefits, such as retirement, would come from federal funds, too, he asserted.

There is nothing to prevent a board of education from renting property in a sectarian or other nonpublic institution, Dr. Brind said, and, it could assign one of its own public school rooms for the use of programs under the federal law.

What the educators have in mind are courses in such subjects as remedial reading which would be held after regular school hours. Children from either public or private school would meet in a central location—all, of course, paid for from federal aid.

Though a board of education does not have the right to rent out its own property, Dr. Brind said, it could make room available for use of special programs if there is "complete recompense for light, heat, property, etc. And that, hence, no state or local funds are being used."

Spokesmen for Roman Catholic and

Orthodox Jewish denominational schools said yesterday they welcomed the state's interpretation of the use of federal school funds.

Msgr. Raymond P. Rigney, superintendent of Catholic schools for the Archdiocese of New York, called the ruling "very encouraging." "We do hope that we can cooperate to achieve the aims of this education act for all the children of this city," he said.

No immediate comment was available from public school officials.

Moses I. Feuerstein, president of the

Union of Orthodox Jewish Congregations of America, said that "the Orthodox Jewish community welcomes this ruling because under it the greatest possible benefits of the federal education act will be made available without discrimination to the maximum number of children, regardless of their school affiliation."

Among the groups that have opposed the provisions of the act permitting federal aid to church-related schools, the American Jewish Congress has said it would test the constitutionality of the program in the courts.

