

## New Labor Law; Public Funds for Birth Control; Released Time Programs; Church Law; Usury; Goble-Kenealy Debate; Natural Law; Segregation; Criminal Responsibility

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## IN OTHER PUBLICATIONS

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### New Labor Law

As finally adopted, The Labor Management Reporting and Disclosure Act of 1959 is a synthesis of several bills and motions<sup>1</sup> introduced at various stages of the deliberations in the Senate and House of Representatives. That legislation so vigorously opposed by labor could come out of a Congress whose Democratic majorities had been increased a year ago by victories of labor-supported candidates surprised both labor leaders and usually well informed observers.

Leo C. Brown, S. J., National Director of the Institute of Social Order, has recently criticized the new labor law in an article<sup>2</sup> which stresses the point that Congress deserves criticism less for the law it wrote than for the law it failed to write.

The fact has become apparent that union officials, once they learn the requirements of the law, are gravely concerned. Most disquieting to them, of course, are the criminal provisions of the law. The law punishes only for willful violations, but its detail and its obscurity offer occasions for material violations through mere inadvertence. What labor officials are asking is whether, in the atmosphere created by

years of unfavorable publicity of the corruption in some unions, investigating agencies and juries will be prepared to accept a defense of inadvertence, no matter how justified it may be.

The outlook of union people is darkened by their multiple problems both internal and external, by the dismal failure of their efforts first to block and then to modify the reform legislation, and by a widespread conviction among them that they must expect the severest interpretation which regulation agencies and courts can place upon the law.

Father Brown, however, is inclined to adopt a much less pessimistic outlook. The law, he concedes, is definitely restrictive and needlessly burdensome, but will not destroy labor unions and it is doubtful that it will seriously hamper them in the achievement of legitimate goals. While the federal courts, upon whose decisions the interpretation of the new legislation will ultimately depend, have shown an increasing appreciation of the changed status and present power of labor unions, they have likewise demonstrated a perceptive sympathy for the needs and problems of collective bargaining.

Father Brown observes that the objectives of the legislation might have been achieved more simply and more effectively

<sup>1</sup> Notably, the Landrum-Griffin Act.

<sup>2</sup> 9 SOCIAL ORDER, No. 10 (1959).

had less reliance been placed on the courts for enforcement and more on a regulation agency. More specifically, he suggests that the fullest measure of genuine democracy would have been preserved and promoted by giving the unions the choice: 1. of adopting their own codes of ethics and enforcement tribunals (which could have been required to meet minimum standards set up by the enforcing agency) or 2. of being subjected to regulation by the agency.

He concludes:

Such an experiment might have required the temporary toleration of some abuses of lesser moment. But the preservation of the fullest measure of self rule, and the diversity and flexibility which it permits, is worth some costs. The effort should have been made. The results might well have been sounder than this legislation will achieve.

### Public Funds for Birth Control

In their November meeting, our bishops condemned the use of public funds to promote artificial birth prevention. Catholic-baiters seized upon the statement with all the eager delight of a Neanderthal hunter reaching for his favorite club. They have since used it as a handy weapon for clobbering all Catholics in general and presidential-aspirant Catholics in particular.

As a political "hot potato," the controversy has been notably cooled by President Eisenhower's observation that the issue of birth control promotion is moral and religious and so outside the areas of political discussion. The President's balanced judgment hasn't, however, stopped debate in the rarefied atmosphere of speculative morality.

A clear, concise explanation of the Catholic position on the matter was made in a recent editorial by Aidan M. Carr, O.F.M.

Conv., in the January 1960 issue of *The Homiletic and Pastoral Review*.

Father Carr states:

If a president of the United States, Catholic or otherwise, were confronted with the question of governmental promotion of birth control, all Catholic moralists would agree that he could not himself initiate such a program. The thorny problem arises if he should be presented with legislation already passed by Congress and containing a provision for the dissemination of contraceptive techniques. His approval of the bill, *even* in circumstances where a sound prudential argument might be adduced in favor of the passage of it as a lesser evil, would — in the eyes of his fellow countrymen — cause him to appear favorable to the goals of the legislation. Whatever his personal intention before God, his action would most certainly scandalize any genuinely Christian conscience.

An alternative would lie in his shelving the bill, thereby neither expressly approving nor disapproving of it. But, under the Constitution, such a procedure would have the same result as if he signed it: the bill would become law after ten days. It is a probable opinion that he could morally thus dissociate himself from the proposed law if, by doing so, he precluded greater evils, e.g., public disturbances consequent upon a veto.

But we are of the opinion that he would be more probably obliged to veto legislation containing a contraceptive program, although it is difficult to pre-judge a case in the abstract. Actually, of course, a law of this kind would be law only in a technical sense, for nothing unnatural can achieve the quality of true law.

Under the American system, a president is a very powerful man as well as a free agent who must be guided, in all his official acts, by the law of the land and by his personal convictions. Every chief executive, Catholic or not, has the right and the duty to work toward a legislative program and an administration reflecting his own

moral principles. This includes his use of the power of veto, a potent negative force in all legislative matters.

Any president who would not struggle — legally and justly, of course — toward the country's good as he sees it in the light of his convictions would, we're convinced, betray those who chose him for the highest office of a nation proud of its devotion to the loftiest ideals of individual liberty.

Every American has a perfect right to decide for himself whether or not he wants to vote for a Catholic as president, but if one does so vote, then one must accept the candidate as he is. It certainly appears un-American to require the leader of our nation to subordinate his highest loyalties to mere considerations of political expediency.

### Released Time Programs

A recent comment appearing in the *Baylor Law Review*, entitled "The Released Time Program In the Public Schools"<sup>3</sup> once again gives voice to the oft repeated error — "The right not to believe is guaranteed under the Constitution."

The comment attempts to impartially weigh the pros and cons of "released time programs" — a term which applies generally to school programs which provide for release, on written request of their parents, of public school students during regular hours in order to receive sectarian instruction.

Based upon the conclusion that the First Amendment guarantees the right of children to form their own religious or non-religious beliefs, the author resolves the issue by stating that released time programs should be declared unconstitutional since they impair the "free exercise principle."

The error in such reasoning is clearly

established by the following correct explanation of the First Amendment:

1. The idea of the separation of church and state as a "wall of separation" between the church and the state is only a metaphor, a figure of speech, a slogan, or a shibboleth which is not a part of the American tradition or constitutional history.

2. The First Amendment was not intended to divorce religion from government or to impose government neutrality between believers and disbelievers but to meet in a practical manner the problems raised by a multiplicity of sects by prohibiting Congress from adopting any one religion.

3. There was no intent on the part of the drafters to bar a general support of religion by the federal government, and therefore the limitation does not prohibit the non-preferential expenditure for religious purposes of funds raised by federal taxes.

4. The First Amendment does not bar preferential treatment of a particular religion or sect short of according it monopolistic recognition.

Thus, since the constitutional provisions were only for equality among believers, the Constitution does not in any way guarantee freedom of non-belief.

### Church Law

The last decade has seen much attention given, in court decision and legal writing, such as the aforementioned *Baylor Law Review* comment, to the constitutional problems involved in Church-State relationships under American constitutions. Familiar is *Everson v. Board of Educ.*<sup>4</sup> and the ensuing discussion concerning the extent to which, consistent with constitu-

<sup>3</sup> 11 BAYLOR L. REV. 292 (1959).

<sup>4</sup> 330 U. S. 1 (1947).

tional mandate, the State may aid in the transportation of parochial pupils. Even more familiar is the celebrated *McCollum v. Board of Educ.*<sup>5</sup> decision with its strict requirements of complete separation of Church and State, followed only a few years later by *Zorach v. Clauson*<sup>6</sup> in which the Supreme Court of the United States retreated from the extreme position of *McCollum*.

Under the governmental and social structure of this country there exist many other problems of Church-State relationship. Although in the present state of American constitutional doctrine these problems do not raise constitutional issues, they do present legal issues which are at once difficult, interesting, and important to both Church and State. Thus there are questions concerning the appropriate extent to which the State should regulate the creation and termination of various types of religious bodies and the extent to which the State should concern itself with the internal management, operation, and control of active religious organizations. Despite the known existence of these and analogous problems of a legal nature, concentration of attention upon the constitutional aspects of Church-State relations has appeared to leave relatively unconsidered these less spectacular but at the same time equally significant problems. Sensing the need for a comprehensive consideration of such questions, the Summer 1959 issue of *The Ohio State Law Journal*<sup>7</sup> contains a symposium devoted entirely to the subject of church law. The articles, both separately and together, provide an effective insight into a relatively unexplored area of the law.

<sup>5</sup> 333 U. S. 203 (1948).

<sup>6</sup> 343 U. S. 306 (1952).

<sup>7</sup> 20 OHIO ST. L. J. 387 (1959).

## Usury

Lawyers and economists who are interested in religious and ethical thought on the morality of interest will find a wealth of information on the subject in a recently published book by Thomas F. Devine, S.J., entitled *Interest — An Historical and Analytical Study in Economics and Modern Ethics*.<sup>8</sup>

Father Devine has taken a new approach to the problem of usury. While others have justified interest on titles extrinsic to the nature of economic interest, he asks the question which goes to the heart of the problem, namely: "can interest be justified on purely intrinsic grounds? From the very nature of economic interest, can an intrinsic title to interest on a money loan be proved to exist?"

The author's conclusions may be summarized as follows:

1. From the point of view of commutative justice, interest is morally justified as the market price of present income in terms of future income.
2. Interest as a functional share is warranted on grounds of distributive justice as a remuneration corresponding to the value of the contribution of the services of capital to the total product of the economic system.
3. In view of the requirements of social justice: (a) an individual's right to interest in commutative justice may be superseded by an obligation to lend gratuitously to a needy borrower; (b) the State should by appropriate measures strive to reduce existing inequalities of ownership of wealth that the functional share of interest may benefit as large a proportion of the popula-

<sup>8</sup> Marquette Univ. Press, Milwaukee.

tion as possible; (c) the State should afford whatever protection is required in the field of small lending for consumption where forces of competition are less likely to operate on a wide scale; (d) economists are in quite general agreement that the government can, by a judicious use of monetary and fiscal policies, assist in achieving and maintaining a high level of employment and fairly stable rate of economic growth which would connote an obligation on the part of the State to assist in the attainment of those goals, and though there is less agreement regarding the importance to be attached to them in the changing phases of the cycle and other ebbs and flows of the price level and the level of employment, it is, nevertheless, conceded that policies which influence the interest rate are among the important and sometimes necessary means of achieving those ends.

Robert J. McEwen, S.J., in his fine review of the book in the January 1960 issue of *Social Order* praises it highly as marked by sober and careful scholarship, by sharp and penetrating economic analysis and by a deep concern for the social problems associated with interest and interest rates.

The following concluding paragraph of his review, however, indicates that he feels that the door is wide open for further thinking and writing on the subject:

This problem of interest has stirred the imagination, aroused the emotions and exercised the intellects of men of all classes for centuries. Even now, in the halls of Congress and in the political debates of the coming year, it promises to become one of the chief topics of debate for the American people. Father Devine's book should cause us to clarify our own thinking on these problems; it should, moreover, bring closer the day when we may present an intellectually respectable and generally ac-

cepted Catholic position on money and interest.

### Goble-Kenealy Debate

For the last four years Father William J. Kenealy and Professor George W. Goble have engaged in what they choose to call a "friendly debate" on the natural law through a series of articles first appearing in the *American Bar Association Journal* and lately in *THE CATHOLIC LAWYER*.<sup>9</sup>

The latest contribution to this discussion, "The Mutability of Law" by Professor Goble, appears in the November 1959 issue of *The Hastings Law Journal*.

The article consists largely in a repetition of the material originally presented by Professor Goble in his *CATHOLIC LAWYER* article "The Dilemma of the Natural Law." The only new element is a summary of human history according to Durant and Wells.

Professor Goble's article attempts, by argument and by appeal to his historical authorities, to make these points:

- 1 There are and can be no absolute rules or principles of morality.
2. Moral rules and principles are made by men, according to the objectives and purposes they have adopted *de facto* as controlling for their time and in their society.
3. Man's morality is a product of the general process of biological and social evolution.

These three points deny, at least im-

<sup>9</sup> Goble, *Nature, Man and Law*, 41 *A.B.A.J.* 403 (1955); Kenealy, *Whose Natural Law?*, 1 *CATHOLIC LAWYER* 259 (1955); Goble, *The Dilemma of the Natural Law*, 2 *CATHOLIC LAWYER* 226 (1956); Kenealy, *Scholastic Natural Law-Professor Goble's Dilemma*, 3 *CATHOLIC LAWYER* 22 (1957).

PLICITLY, that there is a rationally discoverable morality in the nature of man, which morality is constant as man's essential nature is constant. To deny these things is to deny that man can rationally discover a necessary moral relation between himself and the Creator of the Universe. To argue such denial is to attempt to subvert the philosophical foundations of religion.

### Natural Law

As a balance to Professor Goble's pessimistic outlook on the natural law, it is refreshing to come upon an article in the November 1959 issue of the *Melbourne University Law Review* by R. D. Lumb, entitled "Scholastic Doctrine of Natural Law."<sup>10</sup> Another article by Professor Lumb — "Natural Law — An Unchanging Standard?" will appear in the Spring 1960 issue of THE CATHOLIC LAWYER.

In his current article, Professor Lumb carefully and critically examines the doctrine of natural law as expounded in the works of Aquinas and Suarez, in order to clarify the basic elements of the doctrine and provide answers to questions which at first sight seem to raise insuperable difficulties.

The article is divided into five parts. In the first part there is a brief discussion of the eternal law. In the second part, discussion centers on the relationship between human inclination and human reason. The third part examines the meaning of the word "law" as it is used in the phrase "natural law." The fourth part considers the relationship between the primary and secondary precepts of the natural law and their cognitional status. The fifth part dis-

cusses the statement that the natural law is a universal moral code and constitutes the standard for the action of the individual.

### Segregation

The decisions of the Supreme Court in the school-integration cases have created enormous issues, which have grown progressively more serious in the five years since *Brown v. Board of Educ.*<sup>11</sup> The current issue of the *Notre Dame Lawyer* contains a symposium devoted to *The Problems and Responsibilities of Desegregation*<sup>12</sup> which makes a substantial contribution toward the resolution of these grave issues. The purpose of the symposium is not to debate the merits or demerits of the Supreme Court's decisions. Its purpose is to concentrate on the practical problems arising from the Court's decisions and on the responsibilities, in relation to these problems, of public officials, of the churches, of educators and school administrators, of the Negro community and of the legal profession. The symposium approaches the matter constructively with the idea of illuminating the problems involved and making practical suggestions for their solution.

Dean Joseph O'Meara, in his introduction to the symposium, states:

There are two ways of approaching a problem: one is to see it as a road block, the other as a challenge. Our Symposium has been planned on the assumption that the latter is the approach that should be made. It has been planned, moreover, on the assumption that, if we can stop calling names long enough to take a hard look

<sup>11</sup> 347 U. S. 483 (1954).

<sup>12</sup> 34 NOTRE DAME LAW. 607 (1959).

<sup>10</sup> 2 MELBOURNE U. L. REV. 205 (1959).

at the practical problems involved in de-segregation, and to assess our responsibilities with respect thereto, we will find the answer to this crisis of education, this crisis of law, this crisis of morals; and thus will be able to face the challenge of a thermonuclear world as one united people.

### Criminal Responsibility

There are a great many areas within the law in which the problem of determining the responsibility of a defendant merges in a confused and confusing way with extra-legal matters, and especially with fundamental questions of ethics. No particular legal problem encounters this complication more directly, or with greater need of clarification, than that of establishing a proper standard for exculpation on grounds of mental disorder, or insanity.

Readers of last winter's CATHOLIC LAWYER Symposium on *Mental Disease and Criminal Responsibility*<sup>13</sup> may be interested in another article on the subject which appeared in the Fall 1959 issue of the *University of Miami Law Review* entitled *Criminal Responsibility and the Knowledge of Right and Wrong*.<sup>14</sup>

In essence the article condemns without qualification, the M'Naghten Rule, on the grounds that it does not meet the minimal requirements for clear, consistent, and authoritative standards applicable with reasonable stability and justice.

The specific objection made is that there are conflicting beliefs concerning the grounds of knowledge in moral affairs, conflicting opinions concerning the nature of the ethically right and wrong, and confusions with respect to the intended legal significance of these terms.

While the author does not expressly claim that objective moral standards do not exist, he argues that the question of their existence has been the source of prolonged and profound philosophical dispute. He concludes therefore that knowledge of the difference between the morally right and wrong is a most unsatisfactory test of criminal responsibility since, whenever the existence of moral standards of just that kind is a matter of genuine doubt, the whole system of establishing the responsibility of mentally disordered offenders will be viewed as without foundation.

These objections have all been satisfactorily answered in the aforementioned symposium. The basic criticism that can be made of this article however is that it makes no constructive or corrective suggestions with respect to the defects which the author claims exist in the present M'Naghten Rule. He concludes his critique with the following observations:

Because psychiatry is not yet a perfectly exact science; because there are so many intermediate cases between the completely insane on the one hand and the perfectly sane (if any) on the other; and above all because the philosophical problems of responsibility are puzzling, and perhaps perpetually so — for all of these reasons and more, the line drawn between the legally responsible and the legally non-responsible must be somewhat arbitrary.

Whatever the difficulties may be in drawing this line, however, they do not justify the continued use of a test or standard of criminal responsibility which is crude, obsolete, impractical and unjust. For, as it has been shown here at length, confusion, mistake, inconsistency and injustice are the natural consequences of approaching the problem of the responsibility of the mentally disordered by asking about the defendant's knowledge of the difference between right and wrong.

<sup>13</sup> 5 CATHOLIC LAWYER 1 (1959).

<sup>14</sup> 14 U. MIAMI L. REV. 30 (1959).