

Sterilization; Natural Law; Contingency Fees; The Presidency; The Connally Reservation; Housing Discrimination; Government and Religion

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IN OTHER PUBLICATIONS

Sterilization

The current issue of *The Citation*, the scientific journal published by the American Medical Association, contains a most interesting and informative study entitled *Reappraisal of Eugenic Sterilization Laws*, copies of which may be obtained from the A.M.A. on request. The article concludes as follows:

Since sterilization is a drastic remedy and generally a permanent infringement of bodily integrity, those affected by laws authorizing it are entitled to every reasonable precaution. Thus far they have not been adequately protected. The sterilization of persons without legal authorization, before testing the constitutionality of the laws, sterilization under unconstitutional laws, and the lack of representation by counsel are all clear illustrations of this disregard of rights.

The fact that scientific opinion differs as to the value of sterilization certainly indicates that the merits of this type of legislation should be re-evaluated. Since court decisions have assumed the conditions included in sterilization statutes are hereditary, the constitutionality of such statutes is questionable if scientific opinion is divided concerning the effectiveness of this procedure. A study of sterilization statistics indicates that its use is steadily decreasing. However, it is not known whether this stems from doubts concerning the constitution-

ality of the laws, public reaction or a change in medical opinion.

In recent years, it has been questioned whether sterilization is constitutional even if scientific studies could demonstrate its effectiveness in reducing mental disability. In fact it has been suggested that in the near future "three generations of imbeciles may no longer be the prediction and even where it is, it may no longer be enough" and that "*Buck v. Bell* may in the end serve as a monument only to the wit but not the wisdom of Mr. Justice Holmes."

Natural Law

The "friendly debate" about the validity of the scholastic philosophy of natural law ends its fifth year with the publication in the May issue of the *Hastings Law Journal* of Father Kenealy's reply to Professor Goble's comments of last November in the same review.¹

¹The articles in the series are Goble, *Nature, Man and Law*, 41 A.B.A.J. 403 (1955); Kenealy, *Whose Natural Law?*, 1 CATHOLIC LAWYER 259 (October 1955); Goble, *The Dilemma of the Natural Law*, 2 CATHOLIC LAWYER 226 (July 1956); Kenealy, *Scholastic Natural Law - Professor Goble's Dilemma*, 3 CATHOLIC LAWYER 22 (January 1957); Goble, *The Mutability of Law*, 11 HASTINGS L. J. 95 (1959); Kenealy, *The Immutable Foundation of Law*, 11 HASTINGS L. J. 440 (1960).

In his latest offering, Father Kenealy seeks to clarify the meaning of the scholastic doctrine that there are some principles of law which are immediately evident, certain, immutable and universal. These fundamental principles of the natural law, far from shackling the mind in its pursuit of truth, are a few truths the mind can definitely and safely rely on. They are the immediately evident starting points and directional guides for the pursuit of all other truths in the practical or normative order.

It is Father Kenealy's belief that "while further experience and accumulating wisdom will undoubtedly give us a deeper appreciation and a better understanding of human nature and of the facts of human existence, nevertheless 'man's broader knowledge or deeper insights' will never show or prove that good should *not* be done and evil should *not* be avoided, or that *anyone* should be deprived unjustly of his life, or liberty, or property, or reputation, or any other *essential* human value."²

Contingency Fees

The contingency fee system has been given sanction and legality in America — but not because the system was considered faultless or unlikely to be abused. Quite the contrary. At the time of its adoption into our legal system it was well recognized that there are important practical, ethical and moral objections to the use of the contingency fee, but it was considered essential that poverty-stricken citizens be assured of their day in court in the enforcement of legitimate claims that might otherwise be abandoned because of the financial helplessness of the claimants. From a purely social and economic viewpoint the advan-

tages of the contingency fee were deemed to outweigh its disadvantages. Thus, the contingency fee system developed in the United States as a *protection to the injured worker without financial means to hire a lawyer*; it was never intended as a means for the exaction of excessive or unconscionable fees by the lawyer; nor was it ever intended to apply to any case in which the client had sufficient means to employ a lawyer on a non-contingent basis.

The June, 1960 issue of *For the Defense*, a magazine published by the International Association of Insurance Counsel, features an article on this subject by Wayne E. Stichter. The author notes that the ever-increasing resentment by the American public against the present abuses in contingency fee practice in personal injury cases demands a re-examination of the origin, purpose and development of the contingency fee system in the United States and a re-evaluation of its proper sphere and function in our legal system.

According to Mr. Stichter the most practical and effective way to curb abuses of the contingency fee system is through the adoption by the trial court, in every jurisdiction in which the practice of excessive and unconscionable contingent fees exists, of a rule similar to that adopted in 1957 by the First Department of the Supreme Court in New York City. This rule of the First Department limits the amount of the contingent fees that may be charged in cases filed in Manhattan or the Bronx and requires every contingency fee attorney to file a report in each contingency fee case setting forth the amount of the recovery and the amount of the contingency fee received by him; where special circumstances warrant — such as the expenditure of an unusual amount of time and effort — the court is authorized to allow additional fees over and

² Kenealy, *The Immutable Foundation of Law*, 11 HASTINGS L. J. 440, 459 (1960).

above those provided by the sliding scale arrangement.

The author also argues that if the courts fail to exercise their clear power to eliminate these abuses in our contingency fee system, there is the serious possibility that the public will eventually decide to take matters into its own hands and either (1) impose by legislative fiat a limitation on the amount of contingency fees that may be charged (as has been done repeatedly by Congress in federal matters) or (2) legislate the entire contingency fee system out of existence. It therefore behooves the entire bar — plaintiffs' lawyers and defendants' lawyers — to lend its efforts to bring about rigid judicial control and regulation over the contingency fee practice in every jurisdiction in which such abuses may exist.

Mr. Stichter calls attention to Canon XIII of the Massachusetts Bar Association as summarizing some of the other evils and disadvantages inherent in the contingency fee system in personal injury cases. The Canon reads:

A lawyer should not undertake the conduct of litigation on terms which make his right to reasonable compensation contingent on his success, except when the client has a meritorious cause of action but no sufficient means to employ counsel unless he prevails; and a lawyer should never stipulate that in the event of success his fee shall be a fixed percentage of what he recovers or a fixed sum, either of which may exceed reasonable compensation for any real service rendered.

Such practices tend to corrupt and discredit the Bar. Lawyers who try to get business by charging nothing unless they succeed, even though they leave the size of their fees to be determined by the amount and character of their services, are constantly tempted to promote groundless and vexatious suits. Those who go further and bargain that, if successful their fees shall be fixed sums or percentages are not only

apt to become public pests, but are in constant danger of abusing or betraying their own clients. When making such a bargain the lawyer's superior knowledge and experience give him an advantage which tempts him to overreach his client. By making it he, in effect, purchases an interest in the litigation. Consequently, unhappy conflicts between his own and his client's interest in respect to the settlement or conduct of the suit, are always likely to arise; his capacity to advise wisely is impaired; and he is beset by the same temptations which beset a party to be dishonest in preparation and trial.

The Presidency

In view of the nomination of Catholic Senator John F. Kennedy for the Presidency of the United States by the Democratic party, the religious issue may possibly be raised in the coming fall debates. All Americans, it may be presumed, would prefer that there would be in the 1960 election no recrudescence of the bigotry that marked the 1928 campaign. It is futile nevertheless to say that because the Sixth Amendment forbids a religious test for public office, the question of a candidate's religion has no place in the coming campaign. (It is likewise stultifying to announce that Catholic dogma is alien to the nation's political philosophy and thus blandly disenfranchise nearly 40 million American Catholics.) By definition, a man's religion provides his general orientation for living and serves as his norm of interpreting the significance of events. A Catholic can quite legitimately, then, be asked how his faith conditions his judgment on questions of public policy.

In an excellent editorial entitled *A Catholic as President?* Edward Duff, S.J., in the May, 1960 issue of *Social Order*, points out, however, that there must be some ground rules for questioning the significance of the religious affiliation of a candidate.

He states with approval that the Fair

Campaign Practices Committee, in a recent Washington meeting, elaborated the following simple principles to guide the voters in this area:

1) It is proper and desirable that every public official should attempt to govern his conduct by a personal conscience informed by his religious faith.

2) No candidate for public office should be opposed or supported because of his particular religious affiliation. A campaign for a public office is not an opportunity to vote for one religion against another.

3) A candidate should be judged by his qualifications for the office he seeks, and by his position on issues relevant to that office. He may properly be questioned about such issues and about the bearing of his religious faith and conscience on them. A candidate's religion is relevant to a voter's decision, but only so far as it bears on such relevant political issues.

4) Stirring up, fostering, or tolerating religious animosity, or injecting elements of a candidate's faith not relevant to the duties of the office he seeks are unfair campaign practices.

5) Intelligent, honest and temperate public discussion of the relation of religious faith to the public issues will, as it has already done, raise the whole level of the campaign.

The Connally Reservation

The Connally Reservation is the proviso attached to the United States' acceptance of the jurisdiction of the World Court by which this country reserves for itself the right to determine what are matters of purely domestic concern beyond the Court's jurisdiction. Since 1946, when this quali-

fied acceptance was made, it has been attacked and defended time and time again in articles on the subject throughout the country. The most recent support of the controversial amendment appears in the latest *Marquette Law Review*³ in an article by Howard H. Boyle, Jr., entitled *Proposed Repeal of Connally Reservation—A Matter for Concern*.

Mr. Boyle argues that if the Connally Reservation is repealed the International Court would assume jurisdiction over essentially domestic matters. He bases this conclusion on the fact that modern international thinking of the "world government" persuasion holds that there is no difference between domestic and foreign affairs — that any matter of substance has international implications.

Where such philosophy obtains, Mr. Boyle asks:

what . . . would be the position of the International Court on the question of whether matters having to do with immigration, or with the Panama Canal, were essentially domestic to the United States? What would be such a court's position if the question of President Truman's seizure of the steel mills during the Korean War should arise again? Or, to take other situations which are not unrealistic in view of happenings in other countries, suppose the question of silencing a newspaper critical of the UN should come before the International Court — or of quartering UN emergency forces in private United States homes — or of suppressing religious teachings contrary to UN doctrine?⁴

In a "world government" atmosphere, he concludes, it is quite reasonable to expect that the International Court would determine such matters not to be "essentially domestic" to the United States, but as hav-

³ 43 MARQ. L. REV. 317 (1960).

⁴ *Id.* at 319-20.

ing international implications — and would then proceed to decide the same without regard, of course, to United States constitutional protections.

The case in favor of repealing or withdrawing the Connally Reservation is ably presented by Edmond J. Clinton in the February 1960 issue of the *American Bar Association Journal*. Mr. Clinton answers the objection made by Mr. Boyle by explaining that in accepting the compulsory jurisdiction of the International Court of Justice, a country recognizes such compulsory jurisdiction only with respect to those classes of legal disputes specifically enumerated in Article 36 (2) of the statutes, namely:

- a. the interpretation of a treaty;
- b. any question of international law;
- c. the existence of any fact which, if established, would constitute a breach of an international obligation;
- d. the nature or extent of the reparation to be made for the breach of an international obligation.

It is clear, therefore, so Mr. Clinton argues, that if a dispute relates to questions which fall within exclusively national jurisdiction, it does not fall within one of the classes enumerated in paragraph 2 of Article 36.

Housing Discrimination

Equality of opportunity in housing remains an unfulfilled American ideal, but in little more than a decade the law has swung about from enforcing racially restrictive agreements to a point where such discriminatory housing practices are not only denied the assistance of the state, but are, in a number of states, even banned by statute.

Commenting on this favorable changing trend in the area of housing discrimination,

an article in the Spring 1960 issue of the *Iowa Law Review* concludes that the new approach has been caused in part by the heightened moral pressures that look upon such discrimination as a negation of American ideals. The article, by Harold Saks and Sol Rabkin, entitled *Racial and Religious Discrimination in Housing — A Report of Legal Progress*, discusses discrimination in both public and private housing and the legal steps which have been taken to abolish it.

Government and Religion

A scholarly survey of the legal opinions of various state courts on the subject of government and its relationship with religion appears in the Spring 1960 issue of the *Villanova Law Review*. F. William O'Brien, S.J., in an article entitled *Has Government an Interest in Religion?*, reports that an analysis of many state court opinions gathered from all sections of the country reveals that three reasons have been advanced by state courts as justification for the age-old practice of extending government aid and encouragement to religion.

The chief reason, according to Father O'Brien's findings, has been that religious institutions perform a secular and material function, public in character, thereby relieving the state of part of its duty. Just as long as religious schools teach secular subjects and church-affiliated hospitals mend ailing bodies, they have been judged to be public-welfare enterprises and accorded the same government benevolence extended to other schools and hospitals. Courts have frequently written that it would be completely opposed to the American tradition, and perhaps a violation of constitutional guaranties, if aid were withheld from such institutions because of considerations of religion.

The second reason why religions merit public beneficence is because, by raising the spiritual and moral tone of their adherents, they are public benefactors.

The third reason given by courts for laws promoting religion rests on the very nature of government — especially a democratic one. The object of a free civil government is the promotion and security of the happiness of the citizens. Thus, so long as piety is recognized by common assent as a valuable constituent in the character of our citizens, the general law must foster and encourage what tends to promote it.

Relative to this point, courts have distinguished between a religion preferred by law and a religion preferred by the people. American constitutions prohibit the first, but to forbid legislatures from giving recognition to the people's preference is to deny a basic democratic principle, to render gov-

ernment insensitive to the will of the governed and to make justice really blind.

Father O'Brien's report ends with this final revealing observation:

In conclusion, then, although the survey made in these pages is not exhaustive, it is sufficiently complete to confirm an 1898 statement of the Supreme Court relative to the state constitutions, namely, that all indicate "a profound reverence for religion and an assumption that its influence in all human affairs is essential to the well-being of the community." It proves that a government unconcerned with or indifferent to religion is unknown to American history and that when any state extends a friendly hand to "aid, encourage, promote" religious teaching, it acts in accordance with the oldest tradition of the nation.⁵

⁵ O'Brien, *Has Government an Interest in Religion?*, 5 VILL. L. REV. 335, 373-74 (1960).