


## Mater et Magistra; The United States Supreme Court; The Eichmann Trial; Positivism; Life, Death, Law; Charitable Contributions; Capital Punishment; Natural Law; Aid to Education

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## IN OTHER PUBLICATIONS

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### **Mater et Magistra**

The recent encyclical of John XXIII, *Mater et Magistra*, is a lengthy 25,000 word document which is perhaps the most significant writing to have come from the pen of John XXIII in the three years of his reign. As a definitive statement of Catholic social teaching it restates and applies to the world of the 1960's, the social principles set forth in the *Rerum Novarum* of Leo XIII and the *Quadragesimo Anno* of Pius XI. It is an encyclical which all lawyers, particularly Catholic lawyers, should read since it relates directly to the activities in which they are primarily involved.

The current issue of *Catholic Mind* publishes *Mater et Magistra* in its entirety. In addition, it features an excellent article which should prove of great assistance to those who seek an understanding and analysis of this latest encyclical. Entitled "Pope John's Gift to Mankind," it is written by Father John Cronin, S.S., Assistant Director of the Social Action Department of the National Catholic Welfare Conference. According to Father Cronin it is difficult to appraise the new encyclical in a brief article. The difficulty arises from the richness of its contents and the complexity of its treatment of grave social problems troubling the world today. Obviously, the Pope has taken a keen and penetrating

look at the swift social changes of the past thirty years.

In discussing some of the highlights of the encyclical Father Cronin observes that one major conclusion stands out when this momentous document is studied carefully. In the classic struggle between the liberal and the conservative viewpoints on social and economic matters, the Church has taken a decisive stand in favor of the liberal position. Details may be argued and qualifications noted, but the total impact of the encyclical is positive, liberal and constructive.

One needs but list some of the major positions of American conservatives, many of them Catholic, and compare them with *Mater et Magistra* to see the contrast. Of course, the conservative viewpoint in the United States is by no means uniform. Russell Kirk might merely disagree with much of the Pope's viewpoint, Senator Goldwater should find it distasteful, whereas Robert Welch should see in it an almost complete negation and repudiation of his social philosophy.

Catholics whose main social viewpoint consists in sniping at the United Nations, opposing foreign aid, trying to cripple labor unions, fighting against welfare legislation, and concentrating exclusively on internal Communist subversion will find the pages of this encyclical dry and bitter reading.

Not only will they discover little support for these views; they will rather note that most times they are categorically rejected. Even more decisive than detailed positions is the spirit and tone of the document. It is warm, humane, tolerant, hopeful, and constructive. The Pope avoids condemnation and pessimism. He breathes warm hope and encouragement.

A note of caution is sounded, however, with reference to state power. While it is obvious that the Holy Father finds much good in the social legislation of recent decades, it would not be accurate to state, as did one headline, that the Pope endorses the welfare state. This term is too inexact to be the subject of papal approval or disapproval. But concrete elements often associated with the welfare state, such as social insurance, health insurance, and subsidized housing are taken for granted as a part of modern society. So likewise is the work of many UN agencies, the mission of technical assistance to developing nations, and combined state and co-operative effort to rescue agriculture. The Pope writes in terms of the highly complex society of today. He refers to automation, nuclear energy, monetary and fiscal controls of the business cycle, the redistribution of income through social security, inflation, the effect of wage levels on employment, and to many other contemporary world problems.

Those who hold that the traditional concept of private property has lost some of its meaning in American society are given a respectful hearing. But the traditional position, particularly as stated by Pope Pius XI, is reaffirmed.

The pastoral concern of the Pontiff leads him to state objectives demanded by justice, charity, and world peace. But he is

very flexible in regard to means and techniques to be used to attain these ends. So long as the rights of man and of the family are safeguarded, the choice of methods is a matter of political prudence. These general comments will be documented as specific issues are treated.

According to the analysis, the encyclical does not offer any startling new comments on labor unions. What may be significant is the lack of criticism and the strong urging that labor be given more opportunity to participate in profits, ownership, and management of industry. The common good demands that wage and other policies provide employment "to the greatest number of workers." It warns that we must "take care lest privileged classes arise, even among workers." Yet, if national and international bodies make decisions that affect the welfare of individual plants and companies, workers or their representatives should have some voice in the making of such decisions.

While there are strong cultural, moral, and spiritual reasons for encouraging farm workers to remain on the farm, this aim cannot be realized without necessary economic and social changes. The economic changes include efforts to secure adequate prices for farm products and income for farmers. This can be done by government or co-operative effort. "Today almost nobody hears, much less pays attention to, isolated voices." Social changes involve community efforts to make rural life more desirable. Examples are better roads, schools, health facilities.

Father Cronin concludes by stating:

So extensive is the scope of this Encyclical that any commentary in article form is bound to be highly selective. The remarks offered here should stimulate readers to

study deeply the original document. In this connection, it is gratifying to learn that America Press and Paulist Press are preparing better translations and are about to publish them, with study aids, independently. There are inaccuracies and obscurities in the English text released in Rome. The English speaking world deserves a translation that does full justice to an historic encyclical, majestic in its scope and pregnant with hope and encouragement to the world.

### The United States Supreme Court

Since Supreme Court decisions inevitably shape the structures of American society, interest in the decisions and philosophy of the Court manifests the nation's concern for its meaning and goals. For the past four years the October issue of *Social Order* has carried an article by John Dunsford which reviews the Court's activities of the preceding court year. This year's article proves as informative and scholarly as those of prior years.

According to the author, three diverse problems of religious pluralism were dealt with during the term. A unanimous Court struck down a Maryland constitutional provision requiring a declaration of belief in the existence of God by public officials, in the particular case a notary public.<sup>1</sup> The Sunday closing or "blue" laws of three states were upheld against a variety of challenges, the center of the controversy being the religious rights of Jews and other Sabbatarians.<sup>2</sup> Attacks on a Connecticut statute prohibiting the use of contraceptives and counsel as to their use by a doctor

were avoided by a 5-4 court on the ground that absence of enforcement made the cases non-justiciable.<sup>3</sup>

All of these cases arose in the matrix of federalism, since each of the plaintiffs relied on the protection of the fourteenth amendment to the Constitution against legislation enacted by different states. The Sunday closing and notary public controversies appealed to the first amendment (made applicable in effect through the fourteenth) which commands that the state "shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The Connecticut contraceptive statute, on the other hand, was argued as a deprivation of life and liberty without due process of law. That the Court could find such massive evidence of non-enforcement as to dismiss the case is a rather crushing verification of the hollowness of such laws. The issue, however, will undoubtedly return sooner or later in a justiciable form.

In the area of criminal law, an unusually large number of important cases were decided during the term. The most radical departure from existing law was the 6-3 decision in *Mapp v. Ohio*<sup>4</sup> where the Court extended the ban on the use of illegally seized evidence in criminal cases, the rule in federal courts since 1914, to state courts as well. This was the final step in a process of reformulating the original principle on which the exclusionary rule was based.

Long-awaited decisions on the constitutionality of the registration requirements of the Internal Security Act, revealed a closely-divided Court. For ten years the Subversive Activities Control Board has been seeking to compel registration of the

<sup>3</sup> *Poe v. Ullman*, 367 U.S. 497 (1961).

<sup>4</sup> 367 U.S. 643 (1961).

<sup>1</sup> *Torcaso v. Watkins*, 367 U.S. 488 (1961).

<sup>2</sup> *Braunfeld v. Brown*, 366 U.S. 599 (1961); *Gallagher v. Crown Kasher Super Mkt., Inc.*, 366 U.S. 617 (1961); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961).

Communist party with the Attorney General. Deficiencies in the administrative proceedings, including the use of perjured evidence given by several witnesses, had postponed the Court's confrontation of the basic constitutional issues. The Act is a comprehensive regulatory scheme demanding extensive filing of information by communist-action or communist-front organizations, including the names of officers and members. Such groups and individuals are then subject to certain disabilities: among other things, they must identify themselves in publications and radio or television broadcasts; income tax exemptions and contribution deductions are lost; employment in defense facilities and labor organizations is forbidden; applications for passports are unlawful. The Communist party sought to litigate the constitutionality of each of these consequences, but from a voluminous record and multiple claims, the Court, in an opinion by Justice Frankfurter, decided only that there was no legal infirmity in the registration requirement as such. Litigation of the other problems was dismissed as premature, "addressed to future and hypothetical controversies."<sup>5</sup>

In discussing the equal protection clause, Professor Dunsford explains that in its steady infusion of the equal protection clause of the fourteenth amendment with a realistic standard of racial equality, the Court has experienced difficulty in some cases; the problem arises in enunciating principles which by their breadth do not threaten other interests of the society. Since the Constitution only inhibits state action, the distinction is usually made that racially discriminatory action of a private character, in the absence of appropriate legis-

<sup>5</sup> *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).

lation, is not legally prohibited. Public school segregation and discriminatory seating on municipally-operated transportation are relatively easy cases, for there the state control is indisputable. The trouble begins when the discriminatory relationship involves private parties who are in various ways linked with state organs.

Since the twentieth century state has enlarged its domain of activity and multiplied its lines of cooperation with private enterprise, a growing number of social institutions function hand-in-glove with state power. What constitutes "state action" for purposes of control by the Constitution then becomes exceedingly complex. An example of the reach of the constitutional claim may be found in the sit-ins. Participants could contend that the use of police and laws forbidding trespass on private property buttresses the discrimination practices of merchants in a way that represents "state action." Nor is the dilemma restricted to racial questions. Labor unions partially derive their exclusive bargaining status for employees in a given unit from the compulsion of law; thus, it is arguable that they are subject to all the particulars of equal protection and due process. Again, the governmental support of private educational institutions might have similar legal consequences. This term the Court revisited this general problem in several race cases as well as in situations where dues from labor members, and lawyers in an integrated bar association, were being used for political purposes opposed by the complaining individuals.

Professor Dunsford concludes, in part, by pointing out that on the matter of applying proper standards to outlaw the obscene, the Court again manifested its deep concern that overzealous or loose judgment

of a censor may inhibit publications which are within the protections of the first amendment. In *Marcus v. Search Warrants*<sup>6</sup> it unanimously struck down a Missouri procedure by which police officers had obtained warrants to seize magazines merely on the opinion of the police that they were obscene. Moreover, the warrant gave broad discretion to examine all the publications of the particular distributor and make *ad hoc* determinations of their legality. While the material thus seized was tied up by judicial testing of the matter, the Court pointed out, the legal as well as the illegal material would be withheld. In the particular case, 180 publications which were seized were found not obscene.

### The Eichmann Trial

Readers of *The Catholic Lawyer* may recall that mention was made in the last issue of an article dealing with the moral aspects of the Eichmann trial.<sup>7</sup> The legal aspects are also being reviewed in various articles now that the trial has concluded. One of the best of the series dealing with the legality of the trial and collateral issues is by Professor Hans Baade and appears in the Summer 1961 issue of the *Duke Law Journal* under the title, "The Eichmann Trial: Some Legal Aspects." The article deals with the subject both under Israeli law and under international law.

In discussing Israeli law on the issue of whether criminal jurisdiction can be obtained through the forcible abduction of the accused from a foreign jurisdiction, the author comes to the interesting conclusion that English courts "have no power to go into the question, once a prisoner is in lawful custody in this country, of the cir-

cumstances in which he may have been brought here." The same principle of *male captus, bene detentus*, has, incidentally, also been recognized by well over twenty states of the United States and by the United States Supreme Court in a long line of cases.

It should be added, however, that Professor Austin W. Scott, Jr. has ably argued that the principle of discouraging police illegality that precludes the receivability of evidence obtained in violation of rights protected against state action by the fourteenth amendment should be extended to cases of kidnapping of fugitives from justice across state lines. But the persuasiveness of this argument is limited to the United States constitutional system, and at least until there is a widespread reversal of the impressive line of cases holding that force or fraud in capture do not vitiate criminal jurisdiction, the courts of Israel will be on safe ground in following the principle *male captus, bene detentus*. Judging from the newspaper reports, the District Court of Jerusalem would appear to have so decided on a preliminary objection to its jurisdiction, and while this ruling might be challenged on appeal, it seems to be amply supported by precedent.

The article points out that since Argentina renounced any claim for the return of Eichmann by settling for a public apology, the trial is not in violation of international law.

On the issue of whether Israel can try Eichmann for acts committed before 1945 under a statute enacted in 1950, the maxim, *nulla poena sine lege*, is not a rule of general international law. While most states — including the Soviet Union since 1958 — have adopted the principle that acts or omissions can be punished only if already

<sup>6</sup> 367 U.S. 717 (1961).

<sup>7</sup> 7 CATHOLIC LAWYER 150 (1961).

punishable at the time of their commission, there are still substantial exceptions from this principle. For one thing, some states, such as Denmark, specifically authorize the analogous application of penal statutes to situations not expressly dealt with therein. Secondly, where criminal law is customary, *i.e.*, judge-made, it necessarily is retroactive whenever a new crime is created by judicial decision, unless the decision is made prospective only. Thirdly, even in states with an entirely codified criminal law, judicial decisions on previously doubtful questions, or reversals of previous precedents are retroactive. Finally, a number of states have enacted expressly retroactive criminal statutes to deal with collaborators after World War II.

Nevertheless, several international conventions and declarations, such as the 1949 Red Cross conventions, the Universal Declaration of Human Rights, the Draft Covenant of Civil and Political Rights, and the European Convention on Human Rights and Fundamental Freedoms, in principle proscribe retroactive criminal statutes. While these conventions and declarations do not afford a sufficient basis for the assertion that international law prohibits retroactive penal laws, they nevertheless lend support to the theory that states are not permitted to subject aliens to criminal prosecution on the basis of criminal statutes making punishable that which could not reasonably have been expected to be illegal at the time of its commission.

It would seem that little argument is needed to show that such a rule — if it exists — is not violated by the prosecution of Eichmann under the 1950 Law. The District Court of Tel Aviv has described this law as “retroactive.”

Professor Baade also considers the ques-

tion of whether international law permits a state to punish an alien for an offense committed abroad which is punishable both under the law of the place of commission and under the law of the place of prosecution, provided the punishment imposed does not exceed the penalty incurred in the place of commission. He holds that the answer can only be in the affirmative. All states are interested in bringing alleged criminals to justice; no state is interested in harboring fugitives from justice. On the other hand, no state is obliged, in the absence of treaty, to extradite persons who are alleged to have committed offenses abroad; the machinery of extradition is rather cumbersome, to say the least; even where states are willing, in the absence of treaty, to effect extradition, formal obstacles such as the lack of diplomatic relations may well prevent or delay the delivery of the person accused. While extradition remains cumbersome and of limited applicability, the answer to the dilemma, at least as between states which have little or no formal preadmission procedures for aliens, is criminal law enforcement by proxy.

Professor Baade sums up with the following observation:

Even if the Federal Republic of Germany wanted to — or by Eichmann's action in an administrative tribunal, were compelled to — object to Israel's exercise of penal jurisdiction over Adolf Eichmann, this objection would fail to affect the legality of the Eichmann trial under international law. For the Federal Republic of Germany is all but absolutely precluded from raising objections to *any* exercise of criminal jurisdiction by proxy. Section four of the German Penal Code expressly provides that German penal law is applicable to offenses committed by an alien abroad, if these offenses are punishable under the law of the place where

they were committed, and if, although extradition is in principle permissible for that particular type of offenses, there is, in fact, no extradition. If Germany claims jurisdiction to try an Israeli Eichmann for offenses committed in Israel, Germany cannot fairly object to Israel's claim to jurisdiction to try a German Eichmann for offenses committed in Germany.

### Positivism

Perhaps the most fundamental problem of jurisprudence is embodied in the age-old argument about the nature of law, whether *ius quia iustum* or *ius quia iussum*, whether law is essentially constituted by being just or by being commanded, whether it is essentially of reason or essentially of will. The mediaeval tradition in English jurisprudence, which was based upon the Christian view of man as a rational being subject to eternal, natural, divine, and human law and upon the Christian view of human law as the complement and supplement of natural law, firmly adhered to a reason-theory of law.

The modern tradition is essentially committed to a will-theory of law. In the words of Thomas Hobbes, the father of legal positivism, law "is not Counsell, but Command," and "Command is, where a man saith, Doe this, or Doe not this, without expecting other reason than the Will of him that sayes it." The essence of legal positivism is thus the belief that whatever the legislator posits as law, no more and no less, is law; one cannot go behind the command of the legislator to question its reasonableness, for the legislator's expressed will is, of itself, law.

An excellent and searching scrutiny of legal positivism may be found in the current issue of the *University of Toronto Law Journal*. Professor Mark MacGuigan

in an article entitled "Law, Morals, and Positivism," after tracing the history and growth of legal positivism argues that the dependence of the legal on the moral order was brought out a half-century ago by Sir John Salmond. He defined law as "the rules recognized and acted on by courts of justice" and stressed that what a litigant obtains in a court of justice "is essentially and primarily justice and not law." Salmond had a clear conception of the nature of the "ought" implied by justice, for he writes: "the statement that a man ought to do a certain act presupposes some appointed end, and indicates that the act in question is the proper means to that end." St. Thomas Aquinas himself could not state the nature of obligation better: law is a necessary means to a necessary end, and obligation arises from this relationship of means to end. This is the nature of all obligation, legal or moral. Moral obligation involves the perception by reason of this means-end relationship. Legal obligation adds to this the positive act of legislation on the part of the lawgiver, but since it includes reason's perception of the necessity of an act in relation to a necessary end, it is essentially founded on moral obligation, which is just another name for this perception of reason. The subjective motives of the citizens in their obedience do not matter; what matters is the objective worthiness of the legal rule to obligate, that is, its objective and necessary relationship to a necessary end. In the words of d'Entrèves, "law may or may not be obeyed for the sake of its obligatoriness. But there is only one ground for the obligation of the law, and this is a moral ground." Moral obligation is the very soul of legal obligation, and without it legal obligation is devitalized and lifeless, a mere corpse.



In refuting positivism, Professor MacGuigan has this to say:

Of course, reason plays some part in positivistic jurisprudence, as it must in all things human, but its role is as a *rationalizing* rather than as a rational force. Reason is employed to rationalize and systematize the primary datum, law as willed. A will-theory of law cannot get along without using reason to this extent, but it is a strictly subsidiary role for reason. It is never allowed to get to the root of the matter, never allowed to consider the reasonableness of the rule itself, for the rule has no reasonableness *per se* — any reasonableness it has is purely accidental. I believe it is this rationalizing role of reason which Professor Fuller has in mind when he writes that "law, considered merely as order, contains . . . its own implicit morality" and that "this morality of order must be respected if we are to create anything that can be called law, even bad law." In a will-theory reason can be nothing more than a veneer applied to something already fully constructed by the will of the lawgiver. But this is not enough, for, as Fuller puts it, "law, as something deserving loyalty, must represent a human achievement; it cannot be a simple fiat of power . . ." The thoroughgoing adherence of positivism to a will-theory of law involves a denial of the moral content of law and a consequent inability to explain legal obligation.

The author notes in conclusion that it is easy to understand why the legal positivists exclude reason, morals, and obligation from their conception of law, for these elements are the complex aspects of legal reality, and the fundamental desire of the positivists is to simplify reality into a form that can be absorbed by positivism. In their desire to keep law clear, distinct, and simple they eliminate from its essence everything but will. The legal world of Austin is thus a vacuum world, "pure" but artificial. Unfortunately for Austin, man

cannot escape the real world, crude and unsystematized as it may be.

There is something sub-human about a positivistic jurisprudence, which conceives of law as sheer wilfulness and sees man as responding to the crack of the sovereign's whip. Any will-theory necessarily and inevitably conceives of man as at best a child, at worst an animal, for it holds that he need be told only what to do. But this is not enough for man, who has been endowed with reason and whose reason demands an answering echo from law. Man must therefore know not only what is the right thing to do but also why it is the right thing. No will-theory of law can ever explain law and thus give satisfaction to the human mind, because by its very nature it eschews any attempt to explain. But in the long run man must be led, not driven, and so, in the long run, he will reject legal positivism, because its emphasis on arbitrary will and the consequent separation of law and morals have rendered it incapable of explaining legal obligation.

### **Life, Death, Law**

Few books dealing with law and morality in recent years have attracted more widespread comment and attention than *Life, Death, and the Law* by Norman St. John-Stevas. Because of this interest, Father L. C. McHugh, S.J., Associate Editor of *America* magazine has been invited to review the book for the next issue of *The Catholic Lawyer*.

In a recent review of the book which appears in the August 1961 issue of the *Notre Dame Lawyer*, Dean Charles Sheedy of the University of Notre Dame explains that the chapters of Mr. St. John-Stevas' book attempt to establish and apply principles and guidelines to aid the law in the

touchy matter of legislating morality. The law should bear in mind its outer-directedness towards public order and external peace. Thus prohibition of private homosexual activity between consenting adult males, for instance, should go out of the criminal law. Again, public law in moral matters requires a "moral consensus," in the absence of which groups should refrain from pushing for laws as part of a power struggle in which the moral issue itself tends to get lost. The Catholic side of the contraception issue no longer enjoys a moral consensus, and the Catholic body in, for example, Massachusetts and Connecticut has no right to enforce its view through public law. However, though moral consensus may be lacking in a portion of an issue, it may be present or at least possibly present in another portion. Thus Catholics, abandoning the struggle for legal prohibition of contraception, may still rightly press for legislation against advertising, sale to unmarried minors, sale from slot machines, and provisions for contraception in foreign aid programs. Whether a moral consensus exists as to a given issue should be determined by peaceful democratic processes. No group should attempt to use naked power, but rational persuasion only. Mr. St. John-Stevas suggests that the Catholic legislators of Connecticut might, for a change, turn their attention towards the state's compulsory sterilization law, just as much against Catholic morals as contraception, and discover if they might find a moral consensus for the repeal of that law.

Dean Sheedy observes further that no side is favored in Mr. St. John-Stevas' book. Catholic intransigence has placed the Catholic Church in the unwelcome, unrewarding, and ultimately impractical role of

watchdog of everybody's conscience. But Protestant and liberal Protestant relativism, personalism, opportunism, changing with the times, joining up with anybody, place Protestants under a strong necessity of coming to some decision as to where, morally, they stand. Short of bloody murder, there seems now to be almost no manifestation of human behavior that does not find some ministers and others willing not only to condone and permit, but enthusiastically to support and sign petitions for. Besides the Catholic and Protestant, other positions, secularist-liberal and utilitarian, receive review and criticism in this book.

He concludes:

*Life, Death, and the Law* is a truly didactic book, in the best sense of that word. It teaches, and the reader learns from it. It is full of good law, good moral theology, and good sociology and criticism. It is clear, cogent, and persuasive throughout its development, arguments, and recommendations.

### Charitable Contributions

A subject of much concern and discussion today is the financing of higher education in the United States. Since the need for additional financing is ever increasing, resort must be made to all available sources of revenue. One source upon which private educational institutions always have relied and to which state supported institutions now must look is charitable contributions from private donors. An article entitled "Taxes and Charitable Giving to the University," by Professor William Bowe, in the April 1961 issue of the *Rocky Mountain Law Review*, contains information on the federal and state tax consequences of charitable contributions to educational institutions. It was prepared primarily for the use of lawyers whose clients may wish to

make inter vivos gifts or testamentary bequests to colleges or universities.

Professor Bowe points out several very interesting tax advantages to this type of contribution resulting from the fact that federal and state government bear a substantial portion of the cost of most gifts to private schools. Thus, if a donor is in a 50 per cent federal income tax bracket and a 10 per cent state bracket, the net cost of a gift of \$5,000 by him to a school may be only \$2,000. Indeed, if he makes the gift in appreciated property the net cost may be considerably less. The exact cost in any particular case may be determined, based upon the donor's estimated adjusted gross (federal) and net (state) income, by reference to federal and state income tax tables.

Where stocks, bonds, real estate, or other property are given, it may be advisable to select assets that have a low income tax cost basis since the transfer to the school will escape the capital gains tax. Thus if stock costing \$10, now worth \$50, is given to the school, a deduction of \$50 is allowed and the potential capital gains tax on the \$40 profit is avoided. In most cases it will be found preferable to give appreciated property rather than cash. Conversely, assets that have a current value of less than their tax basis should be sold and the proceeds given to the school. Such a sale entitles the donor to a tax loss which would not be available to him if he had given the property itself to the school.

A donor may wish to give only his profit in appreciated property to the school. Here it is possible in some cases to sell, for example, the stock that cost him \$10, and is now worth \$40, to the school for \$10. This will result in a recovery of his original investment and entitle him to a \$40 charitable deduction. No capital gain

will be recognized where the sale price is limited to the donor's cost basis. The authority for this conclusion is the leading case of *Reginald Fincke*,<sup>8</sup> which held no gain was realized by a donor on the sale of shares at cost to family trusts even though the current market value of the shares was very substantially in excess of the sale price.

### Capital Punishment

The pros and cons of capital punishment continue to be debated in the law journals throughout the country. The latest offering appearing in the May 1961 issue of the *Cleveland-Marshall Law Review*, is entitled "Should Ohio Abolish Capital Punishment?" by Richard Goetz.

Ohio is one of twenty-two states which presently employ electrocution as the method of execution. Twelve states use lethal gas, while seven states employ hanging. Mississippi and New Mexico recently changed their method of execution from electrocution to lethal gas, while Oklahoma is still using electrocution until a gas chamber is provided. Apparently these states feel that lethal gas is a more merciful method of execution. In Utah, a condemned man has a choice of being hanged or shot.

Of the remaining states, six have abolished capital punishment entirely, while three, though counted as abolition states, still retain it for a few rare offenses, namely treason and murder in prison by a convicted murderer. Nine states, after having abolished capital punishment, reinstated it; usually after a spectacularly heinous crime. Maine, it is interesting to note, abolished the death penalty in 1876, restored it

<sup>8</sup> 39 B.T.A. 510 (1939).

in 1883, and abolished it again in 1887. Michigan was the first state to abolish the death penalty. In 1958, Delaware became the first state in forty-three years to abolish capital punishment. The nation's two newest states, Alaska and Hawaii, came into the union without the death penalty.

Mr. Goetz, in analysing the proponents viewpoint of capital punishment, states that the arguments for retention of the death penalty center around two main points: (1) It deters crime. (2) The criminal must pay society for his offense.

Probably the chief forces against elimination of the death penalty in Ohio, as in other states, are police officers and law enforcement agents. Their main contention is that the life of a policeman will become more hazardous if the criminal knows that he can kill and not face a death sentence. Police authorities state that the threat of death exerts important influence in many situations prior to the final moment when a crime is committed. This threat, it is said, is what leads robbers, for example, to use unloaded guns, and persuades burglars to go unarmed.

In discussing the opposing viewpoint the author states that opponents of the death penalty cite various reasons to show why its use should be abolished. Probably the most comprehensive study in recent years was compiled in a report submitted to the Delaware legislature when it was conducting hearings on a proposed resolution to abandon the death penalty. The basic arguments presented in this report were:

- (1) The evidence clearly shows that execution does not act as a deterrent to capital crimes.
- (2) The serious offenses are committed, except in rare instances, by

those suffering from mental disturbances; are impulsive in nature, and are not acts of the "criminal" class.

- (3) When the death sentence is removed as a possible punishment, more convictions are possible with fewer delays.
- (4) Unequal application of the law takes place because those executed are the poor, the ignorant, and the unfortunate without resources.
- (5) Convictions of the innocent do occur and death makes a miscarriage of justice irrevocable. Human judgment can not be infallible.
- (6) The state sets a bad example when it takes a life. Imitative crimes and murder are stimulated by executions.
- (7) Legally taking a life is useless and demoralizing to the general public.
- (8) A trial where a life may be at stake is highly sensationalized, adversely affects the administration of justice, and is bad for the community.
- (9) Society is amply protected by a sentence of life imprisonment.

#### Natural Law

One of the more meaningful articles in current periodicals which deal with philosophy is the one entitled "St. Thomas and Legal Obligation," by Mark MacGuigan, in the July 1961 issue of *The New Scholasticism*. (As noted earlier, Professor MacGuigan also appears currently in the *University of Toronto Law Journal*.)

Legal obligation, so says Dr. MacGuigan, depends upon both intrinsic and extrinsic causes, but in different ways. The intrinsic cause, the natural law, is the pri-

mary and general cause of legal obligation, whereas the extrinsic cause, legislative authority, is the particular cause which determines the general cause to a specific effect. There is no conflict between the two causes because each is restricted in its efficacy to the area in which it coalesces with the other: natural law does not give rise to legal obligation unless the ruler of the community has made a particular determination, and the ruler cannot oblige his subjects in conscience unless his determination is in accordance with natural law. Not only is there no conflict between the causes but indeed their cooperation gives rise to mutual fulfillment. The natural law, incomplete in itself as a guide for human conduct, demands fulfillment by positive law. Conversely, the work of the legislator is made possible by the natural law, because the very existence of an authoritative, external power is prescribed by the natural law precept of sociability, and because his commands, as rational and not as volitional, strike a responsive chord in the subject. The ruler, then, merely causes the subject to realize the good which he would have chosen for himself had he recognized its desirability. Hence an intrinsic cause, the inherent rationality of human law because of its conformity with the law of the subjects' nature, is the primary reason for the ruler's power to oblige his subjects, and indeed the very submission of the subjects to the ruler's authority is conditional upon the submission of the ruler himself to the natural legal order.

The obligation of human law thus comes primarily from natural law, but not as from something extrinsic to it. For St. Thomas, human law is derived from natural law and is law only in so far as it is in accord with the principles of natural law.

On the one hand, this means that an edict clearly at variance with natural law precepts is not law and is not binding in conscience, unless perhaps accidentally for extrinsic reasons, *viz.*, the avoidance of scandal or the maintenance of civil peace. On the other hand, it also means that every valid human law is binding in conscience, and that it is thus obligatory primarily because of the natural law which exists within it. The natural law is not something entirely apart from human law, to be left behind as a mere starting point once the realm of human law is entered. On the contrary it is present in every valid law as part of it, for it is the very root both of human law in general and of every individual human law.

In one sense, then, it is right to say that St. Thomas finds the primary source of the obligation of human law not within that law itself but within the natural law. But in another sense it is more right to say that, though St. Thomas posits the natural law as the primary source of legal obligation, he still finds that source within human law, for the natural law itself exists within the very substance of human law as its root. The primary obligation of human law is reduced by St. Thomas to that of the natural law, its rule and measure, by an intrinsic reduction. Law is not an arbitrary imposition upon man from the outside, but rather exists within himself originally and outside himself only subsequently and in accordance with the exigencies of his nature. Thus not only is the obligation of natural law intrinsic, but even that of human law is more principally intrinsic than extrinsic. Human law is the complement and completion of natural law, and legal obligation, in turn, is the consequence and fulfillment of the obligation of natural law.

### Aid to Education

Writing in the October 1961 issue of *The Catholic Educator*, Father John Evans joins the group of those educators who take issue with the current governmental policy of denying federal aid to non-public schools. His article, entitled "Fossils and Federal Aid," points up the fact that ten years ago, in dealing with the basic rights of parents, Article Two of the Council of Europe's Convention of Human Rights declared that:

[N]o person shall be denied the right to education. In the exercise of any function which it assumes in relation to education and to teaching, the State shall respect the rights of parents to ensure such education and teaching as is conformable to their religious and philosophical convictions.

In 1955, the prominent Union Internationale Pour La Liberté D'enseignement, directing attention on the child, unanimously resolved: "Distributive justice demands that all schools have part of the public funds so as to reduce the excessive difference noticeable in the conditions of children in the public schools and those in the free schools." Representatives from ten democracies agreed that western nations impale themselves on the horns of a normal dilemma whenever they "affirm the formal and juridical democratic right of liberty of education but effectively deny that right by refusing the material conditions for its exercise."

The United Nations has given formulation to ideals in this matter. In 1959 its Declaration of the Rights of the Child stated in Principle Two: "The child shall enjoy special protection, and shall be given opportunities and facilities by law and by other means, to enable him to develop physically, mentally, morally, spiritually,

and socially in a healthy and normal manner and in conditions of freedom and dignity." On this point, the General Assembly adopted the interpretation of the drafting committee that "in the enactment of laws for this purpose, the best interest of the child shall be the paramount consideration." In Principle Seven, the Declaration indicates that while the best interest of the child shall be the guiding principles of those responsible for his education and guidance, "that responsibility lies in the first place with his parents."

In reviewing these resolutions and principles, it is embarrassing to reflect that they find reality in the United States, primarily because of the glowing convictions and sacrifices of a minority of our fellow citizens. Furthermore, we should be appalled because, unlike these other free nations, there is not a single state or federal constitutional provision in the legal corpus of the United States which directly guarantees the rights of non-public schools to exist, or parents to build and support them, or of children to attend them.

Father Evans comments on these facts as follows:

It is time for us to accept the fact that in the question of public aid to non-public schools performing a public service, our state educational systems, both in theory and in practice, are following an outmoded pattern. It is time for us to act in the direction of change. It is difficult to see how we as a free nation, already jarred somewhat off balance for our tardy action to relieve the illogical and cruel plight of Indians, Negroes, and Mexicans, already somewhat projected before the world as a calcified democracy, can assume a dynamic posture which will effectively ward off further thrusts should those who attempt to marshal world opinion choose to aim at our restrictive educational policies.