

Life, Death and the Law

L.C. McHugh, S.J.

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BOOK REVIEWS

LIFE, DEATH AND THE LAW
by Norman St. John-Stevas

Indiana University Press, Bloomington, Ind., 1961. Pp. 375. \$5.95.

Reviewed by

L. C. McHUGH, S.J.*

Life, Death and the Law, by Norman St. John-Stevas, a distinguished young British legal authority and a Roman Catholic, addresses itself to the relationship between morality and the law, particularly in the United States and England.

This relationship, of course, is one of the perennial problems of the jurist. Extreme positivists tend to deny that there is any relationship between civil law and traditional morality; they see in the law nothing more than the will-to-power of the dictator or the democratic majority. A religious reformer like Calvin, on the other hand, tends to view the state itself as an organ that can be forced to impose sectarian theological precepts on the community. In between are the rest of us, sure that morals have some bearing on the law, but unsure to what extent the secular arm should command the ethical good or, more especially, prohibit moral evil.

This problem has a peculiar urgency for the conscientious Catholic lawyer in America. He has the duty of helping to shape legal policy on a number of issues on which the traditional moral judgment of the community, as well as its religious and political leaders, seems to be suffering radical change. Some of these areas of controversy touch on the essential sanctities of life, like the questions of encouraging contraception, liberalizing abortion or legalizing euthanasia. What basic attitude is the Catholic student of jurisprudence to take, when apparently progressive social forces demand legislative changes that ignore or even reverse our established moral judgments on such matters?

Life, Death and the Law is a much needed and significant contribution to the debate on the relationship of law and morality that is winning increased attention not only from lawyers, but from moralists and theologians as well.

The book is built on a simple plan that involves seven chapters and an array of sixteen appendices.

* Associate Editor of *America*, formerly a professor of ethics at Georgetown University in Washington, D. C.

In the opening chapter, the author examines the positions of Protestants, Catholics and nonbelievers on the relation between law and morals. In the remaining chapters, he analyzes the major areas of contemporary concern in the United States and England: the control of conception, artificial insemination, sterilization, homosexuality, suicide and euthanasia. In each of these areas St. John-Stevas discusses the historical background, submits the laws now in the statute books to critical analysis, weighs proposed changes in the laws and offers some recommendations of his own.

The text is readable and understandable, even for those who are not lawyers, and the course of the argument is supported by an extensive use of footnotes as well as by the full appendices. The appendices, incidentally, are exceedingly valuable for anyone who wishes to pursue the major theses of the book further. One appendix, for example, summarizes the status of birth control legislation in the United States. Another cites the laws of the fifty States punishing homosexual offenses. For the general student of the problems raised, the most valuable appendix will be the select bibliography listing several hundred references to all aspects of the relation between law and morality.

I do not intend to discuss the treatment given by St. John-Stevas to the individual areas of controversy. I wish, however, to call attention to what seems to be the most important practical question raised in the book:

Whatever the differences between Catholics and Protestants on the relationship between Church and State, or law and morals, they have a common interest that the exercise of power should be regulated by the moral order. Can some principle be found acceptable to both, and possibly also

to secular liberals, which will mark out the frontier between law and morals, and in particular draw a line between morality and the criminal law?¹

The answer to this question forms the essence of whatever contribution St. John-Stevas has to make to the current dialogue on morals and the law. Let me therefore, perhaps at the risk of some unfairness to the author, summarize the working rule which he proposes for resolving disputes on the shaping of the law in democratic-pluralistic societies such as our own.

The author says: "A working rule might be that the majority should abstain from obliging the minority to follow any practice which they condemn as immoral, provided abstention does not injure the common good."² Fraternity, therefore, together with its corollaries, liberty and equality, require that the majority should respect the conscientious convictions of minorities, except where conformity with the majority will be essential for the welfare of the state.

I think a second working rule proposed by St. John-Stevas would cover the problem of the Christian lawyer who seeks an ally in the law to preserve the fabric of society from agnostic corrosion and wholesale secularization. The Christian attempt to preserve moral values in existing institutions is reasonable and understandable — up to the point where the moral judgment expressed by the law no longer has any correspondence with the general view of society. "Public enforcement of religious standards cannot extend beyond the area of community agreement."³ Hence our ef-

¹ ST. JOHN-STEVAS, *LIFE, DEATH AND THE LAW* 34 (1961).

² *Id.* at 47.

³ *Id.* at 45.

forts to implement law should terminate when we cease to have the backing of the consensus of the community. Just as the good of civil peace is a value which dictates the maximization of the conscientious rights of minorities, so it also commends that Catholics, for example, "exercise a self-denying ordinance," and recognize that some past moral judgments, such as the condemnation of contraception, may have to be treated as private judgments.

Fundamental to the development of these positions of St. John-Stevas are several subsidiary theses, *viz.*, that (1) good theology is not necessarily good government; (2) that social policies with moral implications are not laid down by fiat from above but are evolved gradually through the reflections of free men; and (3) the view that the law is in practice expressive of the collective conscience of the community on those matters that cannot be left to individual choice.

Conceivably then, in a religiously pluralistic society such as ours, the role of the Catholic lawyer might be to argue and to persuade, but not to regard the natural law as an absolute set of values that can be forced upon an unbelieving and unwilling community. Perhaps, as the existing moral consensus of our people changes its view on such things as the immoral character of mercy killing or the unacceptability of homosexual "marriage," the best we can hope for, as a religious minority, is that the civil law will continue to reflect some modest compliance with the dictates of objective morality in those matters that are not only right and true, but wholly essential to the pursuit of the public good, at least as it is conceived in scholastic circles. For, if St. John-Stevas is correct, the imposition ground of Catholics, Protestants, Jews and

police power of the state, in the absence of a community consensus on our own views of morality, would lead to greater evils than the ones we are intent on suppressing.

Undoubtedly, in Catholic circles, one can see recent trends toward some such working rule as that outlined in *Life, Death and the Law*. This is especially true of the controversy over the Massachusetts and Connecticut birth-control statutes. These laws, passed more than eighty years ago by Protestants, now find themselves defended by Catholic influence, although the struggle is not so much over the jurisprudential aspects of these Statutes, as over which of the contending parties shall manifest dominant power and prestige.

Writing in *Look* for October 10, 1961, Fr. John A. O'Brien, research professor of theology at Notre Dame University, argued that "the time has come to take the birth-control issue out of politics, out of the field of legislation, and confine it to the legitimate domain of conscience and religion." With regard to the use of contraceptives in the home, we are dealing not with public crime but with sins done in privacy. Only failure and anarchy would follow any serious effort to invade the home in order to detect or forestall private lapses against the law, especially in a matter where it cannot be shown that the immoral act is an important hurt to the common good. Religion itself, in the estimation of Fr. O'Brien, would be the worst victim of the attempt to force credal beliefs upon those who sincerely differ with us on the morality of artificial birth control.

The working principle advocated by St. John-Stevas, of course, recognizes the paramount character of the common good, which is indeed the common meeting of patterns of activity by sheer use of the

secular humanists when they weigh the relations between morality and law. But, as he would be the first to admit, it is very difficult to find unanimity, or a general consensus, on what moral elements are properly or essentially constitutive of the common good in civil society. The scope and extent of such a consensus varies from one society to another, and it is not something "given" for all time in a developing and pluralistic society such as we find here in America. The latter point is brought out by the very question of contraception itself — an issue whereon the community consensus has not only shifted drastically in two generations, but has shown itself peculiarly responsive to doctrinal changes in church teachings and to various other sociological factors. Not many years ago we had a moral consensus, grounded in religious belief, that artificial birth control was contrary to divine law, tended to the destruction of the family and population decline, and hence touched gravely on the common good (even though the practice never became a matter of legislation generally). Today, Catholics stand almost alone in their reprobation of contraception: as for its other aspects, most non-Catholics now regard the practice as a matter of esthetics rather than morality, and many of the clergy are beginning to say that encouragement of birth control is a positive demand of the common good in the face of the so-called population explosion.

There is a certain attractiveness in the thought that the primacy of the common good, in its aspects of fraternity, liberty and equality, justifies the practical rule that the moral consensus of the community may be granted the role of principal determinant of what should or should not be incorporated in the body of positive law. But it is

exceedingly hard to assess what are the right prudential limits of the toleration of moral evil when we insist (as Catholics do) that the state as such, and independently of any moral consensus of its members, has a true role from natural law as the promotor and protector of objective moral values that are indissoluble from any just appraisal of the common good. For it is clear that the law does sometimes undertake to educate, even in a democracy and where there is an imperfect community consensus at best. The recent history of the Supreme Court in respect of racial segregation tends to bear that out.

The question of the acceptable limits of tolerating moral evil has grave poignancy for the Catholic lawyer when he reflects on the continual erosion of moral values in American society. Will the day come when our society becomes completely secularized? Will the law, as a consequence, become as dissociated from all moral commitments as the government is neutral to all establishments of religion? And what will be the ultimate shape of the common good, if it is to be determined by a majority consensus that has no ties to either God or natural law? Can we accept the rule that a community consensus must determine the relation between law and morals, if the end-product is indistinguishable from sheer positivism and the tyrannical rule of a secular majority?

The erosion of moral values in America was strongly emphasized in "Unchanging Duty in a Changing World," the statement issued by the Catholic Bishops of our country on November 19, 1961.

The Bishops noted that many of us are questioning or even denying the distinction between good and evil. "They are cutting themselves off completely from moral tra-

ditions. For the first time they find themselves without a moral law to break."

The erosion of moral values has a serious bearing on the nature of the consensus within our society, and hence also on the moral content of civil law and the form of the common good. It is all very well to argue that contraception, for instance, is a private act, and that matters of this sort may be removed from the field of public policy because they belong primarily in the arena of religion or individual morals. But where are we to draw the distinction between what is tolerable and intolerable in activities that have no apparent relation, or only an indirect one, to the basic requirements of the public good? Suppose that relaxed moral standards, plus the propaganda of interested parties, creates a climate that is favorable to homosexual unions, and that, as a consequence, the statutes of the states regarding such perversions are abrogated. Can our society allow widespread practice of the vice that characterized ancient Greece, without grave harm to the most necessary ideals of family life and monogamous marriage?

Or again, can we make any real contribution to the common good by permitting lawyers, psychiatrists and sociologists to enlarge the notion of legalized therapeutic abortion? There is already considerable agitation in this country for "abortions of convenience." If any kind of direct abortion is actually a form of murder, can we truly forward the good life of man on earth by reverting to an invasion of life's sancti-

ties that is properly characteristic of pagan rather than Christian societies?

It would seem that no matter what may be the moral consensus in communities, there comes a point of toleration with respect to such aberrations where we begin to deny the radical dignity and inviolability of the human personality (*e.g.*, in the legalization of euthanasia), and effectively liquidate the most basic values that are incorporated in the historical ethos of our people and government.

I do not intend these objections as a strong criticism of St. John-Stevas, nor as a rejection of the working principle he has offered in *Life, Death and the Law*. This author has the great merit of having come to grips with a thorny problem that is afflicting modern pluralistic societies wherein religious differences and even religious decline are creating a trend to secularize the law and finally divorce it from all moral absolutes that bear on the common good. This is a trend that favors sheer positivism in the law and encourages pure relativism in morals. Neither aspect of the trend can triumph without robbing the common good of all objective moral constituents and leaving its definition to the mercy of totalitarian planning boards or the most dangerous passions of the majority. It is to be hoped that other Catholics, following the lead of Norman St. John-Stevas, will now contribute to the growing debate on law and morality, and thus help to provide the human spirit with optimum conditions of development in the busy City of Man.'

