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Justice; Mater Et Magistra; Civil Rights; Zoning; Sociological Jurisprudence; Mr. Justice Brennan; Business Ethics

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IN OTHER PUBLICATIONS

Justice

The article by Gilbert M. Cantor in *The Shingle* for January 1962 entitled "The Search for Justice in the Christian World," suggests that the precepts and counsels of charity proclaimed by Christ were in some way opposed to the virtue of justice. Mr. Cantor poses the problem of "a public ambivalence" toward the bar and suggests that one explanation of that ambivalence "may be found in the teachings of Jesus." He believes that "the Christian virtues of humility—forgiveness, charity, abnegation and self-denial—do not merely go beyond the idea of justice: by clear implication they reproach it."

John B. Gest counters in the March issue of *The Shingle* with an answer to Mr. Cantor entitled "The Idea of Justice." According to Mr. Gest, in the treatment of virtues by the Christian writers, justice and charity are not in any sense incompatible. Rather, justice is enriched and ennobled by charity or love.

The idea of justice as an objective goal, rendering to every man his due, involves, of course, the antecedent and undetermined concept of "due." The "due" is that to which a man has a right. Rights, therefore, must exist before the act of justice. The recognition of these rights and their determination and protection, as far as humanly possible, is the prime function of government in Christian political philosophy.

Notable in considering the position of justice in current Christian thought are the Papal encyclicals on "Social Justice," particularly "Rerum Novarum" (On the Condition of Labor) by Pope Leo XIII; "Quadragesimo Anno" (Reconstructing the Social Order) by Pope Pius XI; and recently "Mater et Magistra" by the present Pope, John XXIII. In the first, the Pope "grieving for the misery and wretchedness pressing unjustly on such a large portion of mankind, boldly took in his own hands the cause of workingmen, surrendered, isolated and helpless. . . ." The principles of social justice which he announced were developed and applied in the later encyclicals and extended to the increasingly complex fields of capital and labor relations and domestic and international relations in the social and economic order.

Justice as a virtue, rendering to each his due, is, with prudence, temperance and fortitude, one of the cardinal virtues, so called because the other moral virtues depend upon them as on a hinge (*cardo*). What, then, is the relationship between justice and charity (or love) in the Christian culture? Other theological virtues—faith, hope and charity—motivate actions and enrich and elevate them—"and the greatest of these is charity." Charity in this context means the virtue of love, love of God for His own sake and love of

man as a creature of God. "Thou shalt love the Lord thy God with thy whole heart . . . and thy neighbor as thyself."

Mr. Gest suggests that the answer to the downgrading of the idea of justice in the modern mind, as observed by Mr. Cantor, is rather in the failure to retain the ideal of justice inherent in the Christian tradition. In the formative period of our nation its influence was strong and its concomitant political philosophy, that of inalienable natural rights, was said by Jefferson to be an expression of the prevailing view. It was certainly the philosophy fundamental in the writings of Burke, Wilson, Adams, Hamilton, Otis and other writers of the 18th and 19th centuries.

But the late 19th and 20th centuries have seen the growth of the skeptical and positivist attack on these principles. The question "what is truth" has been largely displaced by questioning the objective reality of truth itself. A subjective approach has become popular with the intellectual "smart set" under which truth is fashioned by the thinker rather than the reverse. And, of course, the idea of justice takes the same course, for justice is founded on truth. The idea of human law has become separate from the traditional higher law written on the heart of man. Objective values of human rights have been replaced by emotional values, and law and justice, under the prevailing secularist view, can only rest on the uncontrolled will of a majority that can override human rights.

Secularism and materialism have permeated the modern mind and with it the legal profession itself. That is the real answer to the downgrading of the idea of justice and the public ambivalence to the bar. The criticism should not be of Christian

culture, but rather of the rejection by the modern mind of the fundamental idea of law and justice, founded on the view that man is a creature endowed by his Creator with inalienable rights, for the protection of which governments are instituted among men. This was the foundation of political philosophy prevailing in the formative period of our nation, and even up to recent times. It was certainly based on principles then and now sustained by the Christian tradition, principles that are attainable by the use of reason by men of all cultures.

Mr. Gest concludes by submitting that it is the modern intellectual iconoclasts who would dislodge justice from its foundation and rob the legal profession of its ideal—not Christian culture.

Mater Et Magistra

The Autumn '61 issue of *The Catholic Lawyer* contained a splendid analysis by Father Cronin of the encyclical "Mater et Magistra." The March issue of *Social Order* contains another analysis by a sociologist, Father Hervé Carrier, S.J., secretary of the Institute of Social Sciences of the Gregorian University, Rome. The article first appeared in a symposium in a sister review, *Relations of Montreal*, and was translated by William B. Neenan, S.J., of St. Mary's College, Kansas.

In this latest article on the encyclical, Father Carrier explains that the economic progress of the modern world and its greater solidarity put in stark relief the inequalities which exist at all levels. The encyclical returns constantly to the theme of imbalance. This theme, with solidarity, is the key concept for describing the contemporary scene. Individuals, groups, regions, economic sectors, nations are each

presented with their contrasts, disparities, inequalities; in a word, with their socio-economic imbalances, causes of multiple injustices.

First of all, it is a fact that in a number of countries and even "on entire continents" masses of workers and their families are reduced to "subhuman conditions." Often the contrast between the luxury of the privileged and the misery of the multitudes is "glaring and outrageous." In other countries, under the banner of "an ill-conceived national prestige" or out of a desire for an unreasonable economic growth, the present generation is restricted by inhuman privations or large portions of the national income are spent on arms.

Even in developed countries, the benefits enjoyed by certain citizens are out of line with their taxes and "disproportionate to their contribution to the common good."

These imbalances are the reflection of a fundamental inequality between social progress and economic development. They are the sign of "profound errors" concerning the goals, structure, and functioning of the economy. "The economic and social imbalances which violate justice and humanity are numerous in our day."

Private property presents other problems: the economic security of the individual has been separated from his possession of private property. Due to the establishment of rights in employment, people frequently base their security on their skills rather than on "rights founded on capital." According to the encyclical, "men strive to acquire a competence that will earn a salary for them rather than to become owners of property." Thus there has developed a popular doubt concerning even the right to private property. It is in this sociological context that the encyclical em-

phatically reaffirms the principles of the right to private property, including the ownership of productive goods.

The encyclical deals extensively with two particularly acute contemporary problems, the inferior position in which farmers almost universally find themselves, and the struggles facing the underdeveloped countries.

The farm problem is a "fundamental question" for every nation. How can the "disproportion in productive efficiency" between the agricultural sector and the industrial and service sectors be reduced? How can the gap between urban and rural living standards be closed? How can "an inferiority complex" in the farm population be prevented? Our age is characterized by such inequality; "the agricultural sector is nearly everywhere a depressed sector," underdeveloped, and poorly equipped relative to other sectors. This imbalance is due to poor economic coordination and unequal chances for development. Agricultural income is accumulated more slowly. The risks are greater. In addition, those who possess capital have little inclination to invest in agriculture.

These serious inequalities call for a bold political program of support, coordination, and modernization. The encyclical emphasizes this point at length. It also insists that the farmers themselves be active in their own behalf. Association here, as also in other sectors, is of "vital necessity."

These socio-economic imbalances exist not only between sectors of production but they can also be found in various regions within nations. Some regions are prosperous; others are "economically backward." This situation demands a common, effective effort by private enterprise and public authority.

Father Carrier observes further that the striking imbalance between countries in various stages of development is the most pressing social preoccupation of our day. Some countries "enjoy a high standard of living" while others "suffer from extreme poverty" and their citizens experience such domestic problems that they are all but overcome by poverty and hunger and are not able to enjoy basic human rights.

These differences in economic development become even more urgent if we also consider the increasing importance of the population problem. The problem stems from the imbalance between the means of subsistence and population. The encyclical devotes considerable attention to this problem and indicates that its only solution lies in consciously developed world-wide cooperation.

This pressing problem involves the collective responsibility of all peoples. The peace of all nations is at stake. "It is impossible to preserve a lasting and beneficial peace while glaring socio-economic inequalities persist among them."

Emergency aid is indispensable; but this aid must be complemented by an attack on the roots of the imbalance. "These derive above all from the primitive or backward nature of an economy."

The Holy Father is not satisfied with a mere statement of facts; he incisively points up the obligations facing the modern conscience as well as the dangers and temptations which threaten the wealthy countries in their dealings with poor countries. There is the temptation to push for economic development without also promoting harmonious social progress. There is the more subtle temptation to "impose their own way of life while aiding such countries." And there is the omnipresent temptation

for a nation to seek its own interest "in a spirit of domination" which would be "a new form of colonialism." But "the most insidious snare" would be to give to these countries an exclusively material well-being which would threaten the moral fiber of the aided people.

The commentator concludes by stating that the anomalies, inequalities and injustices of our day have their roots in the more profound disorder of moral judgment itself. We can see this disorder in "social relations," truncated ideologies and the illusion that the earthly city can be built without religious foundations. "No folly is more characteristic of the modern era than the absurd attempt to reconstruct a solid and prosperous temporal order while prescind from God. . . ." Despite admirable scientific progress humanity has not shown an ability to develop spiritually; in fact there seems to be an alarming spiritual regression. "Our age is characterized by the contrast between prodigious scientific and technical progress and an alarming regression of humanity."

In spite of its frankness and undisguised realism the Holy Father's description of the present world scene does not convey any notion of nostalgia, pessimism or dejection. The Church gladly accepts the world as it exists while unsparingly and with candor indicating its errors and aberrations. But, above all, Christians cherish a lively hope of establishing a common life "in truth, justice and love."

Civil Rights

Vice Dean Thomas O'Toole of Villanova Law School adds to his status as a Constitutional Law authority with his brilliant review of Konvitz' "A Century of Civil Rights," in the February issue of

Social Order. Dean O'Toole points out that the liveliest corpse on the American legal scene is the doctrine of "separate but equal." *Plessy v. Ferguson* has been killed in the law books but it continues to express the reality of life not only South of the Mason-Dixon Line but, all too often, in the North as well. These are disappointing realities when one considers that seven years have passed since the Supreme Court mandated an end to segregation. This disappointment can become only deep and bitter when attention is called to the fact that we are nearing the centennial of the emancipation of the Negro slaves.

The review stresses the fact that it is against this longer perspective that Konvitz assesses the development of civil rights for the freedman. In a most interesting opening chapter he shows how the question of slavery became subordinated to the question of race, so that the abolition of slavery was not effective in securing civil equality for the man of color. Unlike other civilizations which had condoned slavery, the white Southern society knew the condition of being a slave as befalling only colored persons and readily concluded that to be colored was incompatible with being free. Thus, the slavery question became a race question, unsolved by executive or constitutional emancipation.

At the base of the problem was the failure of slaveholders to view Negroes as being equal to the white man in moral and spiritual dignity. This was tragically revealed in the attitude toward slave marriages and in the indifference towards preserving the integrity of slave families. Konvitz is emphatic in declaring that the root of the race problem is a failure of moral judgment concerning the worth of the Negro.

In his outline of the legislative proposals which began with emancipation and which continue to our own day, Konvitz succeeds in demonstrating that we are still hearing the same objections to desegregation which were voiced a century ago. This narrative provides a telling answer to those who would have us believe that racial equality will come about through mere lapse of time. The debate over the Civil Rights Act of 1875 is re-enacted, almost in the same terms, whenever the Senate considers a civil rights proposal today.

Konvitz is thoroughly at home in his materials, and traces each of the legislative and judicial steps which brought us to our present position. Of greatest importance is his analysis of the emergence of the concept of "state action," limiting Congressional power under the fourteenth amendment. Harlan's dissent against this doctrine still rings with a moral fervor and sense of indignation, best summarized in his declaration that the Supreme Court was now refusing to protect the personal rights of freedom the way the property rights of slaveowners had formerly been protected. Harlan saw the moral issue clearly and expressed it in the famous dictum that our Constitution is color-blind.

Though strong on the history of civil rights legislation, Konvitz deals very inadequately with the present problems. Perhaps he deliberately put these beyond the main scope of his work. In any event, a couple of curious failures require comment. It is becoming increasingly apparent that the Supreme Court made a serious error in approving pupil placement laws when these laws are part of a pattern of hostility to racial integration. Konvitz does not mention this development by which the South appears to have shaped a tech-

nique for insuring that integration will not progress beyond the token stage. It is a courageous Negro who will face the placement process with its delays and its pitfalls. Even if he is successful, he may well find that the process has consumed a couple of years in his educational career. The recalcitrant community can thus preserve itself from genuine integration and keep the vast majority of the Negroes in their freedman status.

According to Dean O'Toole, in an attempt to deal with the question of "state action," Konvitz suggests that this concept is sufficiently broad to prohibit police action against those who seek racial equality at lunch counters, in theaters and at other places of public accommodation. He advances this argument on the basis of the decisions prohibiting specific enforcement of restrictive covenants in real estate deeds. The argument is at best dubious and certainly threatens to expand the notion of "state action" so broadly as to destroy its meaning. Perhaps the time has come when the Supreme Court should reconsider the position taken in the *Civil Rights Cases* of 1883. Harlan's powerful dissent in that case has lost none of its persuasiveness, and the majority's decision seems as ripe for rejection as was *Plessy v. Ferguson* seven years ago.

Zoning

The overwhelming weight of judicial authority in the United States is that the complete exclusion of churches, colleges, universities, parochial schools and academic private schools from residence districts by zoning regulations is ultra vires and, consequently, is an invalid exercise of delegated police power. Especially is this so where other nonresidential uses are per-

mitted by zoning ordinance in such districts. There is a plethora of decisions to this effect in the highest courts of various states.

The February 26-27 issues of *The New York Law Journal* feature a two part article by Ralph Crolley and Arden H. Rathkopf which analyzes this whole area of law, particularly from the point of view of New York.¹

In treating the zoning of churches, the article states in part that apparently the determination of whether these uses may be validly excluded from residence districts, and to what extent, is to be made by the highest courts of the individual states. The Supreme Court of the United States has not ruled upon the question. In the landmark case of *Village of Euclid v. Ambler Realty Co.*,² the Court specifically omitted from its consideration the validity of zoning ordinances excluding such uses from residence districts of municipalities, and since then has apparently not passed on this issue. In *Corporation of Latter Day Saints v. City of Porterfield*³ the issue of the validity of such exclusion was specifically presented on an appeal from the decision of the highest court in California, which upheld such exclusion. The appeal, however, was dismissed for want of a substantial federal question.

The *Latter Day Saints* case, therefore, is ample authority for the position that the exclusion of churches from a particular residence district does not in-

¹ For a more comprehensive study of the cases in this area see Note, *The Effect of Zoning Ordinances on Churches*, 7 CATHOLIC LAWYER 151 (1961).

² 272 U.S. 365 (1926).

³ 338 U.S. 805 (1949).

volve the question of prohibition of the free exercise of religion guaranteed by the Constitution. If local decisional law is that churches are subject to zoning ordinances in the same manner and to the same extent as other uses, and may validly be prohibited from a particular district if their inclusion would not be compatible with the comprehensive plan or otherwise reasonable, no constitutional rights are infringed.

Private academic schools are those which are subject to a modicum of state supervision, which have curricula similar to that current in public schools and which comply with the state's compulsory educational requirements.

With respect to the zoning of schools, public schools, which are in New York constitutionally mandated, have always been exempt from local zoning ordinances on the ground that the state has delegated to boards of education and to the commissioner of education authority to regulate and control them, thus pre-empting to such boards and state official the entire field of activity of the school, which necessarily precludes a municipality from the exercise of local regulation and control of such use.

Private schools, even though nonprofit and though having curricula equivalent to that of public schools, are not on the same plane, since they are not similarly regulated by local boards of education or directly to be considered to be an arm of the state and, unlike public schools, they need not serve a community without discrimination.

While parents have the basic constitutional right to have their children educated in schools of their own choice, subject to reasonable regulations as to the subjects required to be taught, the manner and pe-

riod of time of instruction,⁴ this does not mean that private schools are as to location immune from the application of municipal zoning ordinances. Consequently, in *Great Neck Community Schools v. Dick*⁵ the lower court held that the latter constituted a valid basis for denying the village the power to control by zoning regulations the state's school system, leaving the village the power to set aside areas by zoning regulations in which private schools were not permitted. The ordinance in that case, which excluded private schools from certain areas in which public schools were, perforce, permitted, was stated to be valid. Later cases in New York, however, put nonprofit private academic schools, which, in all except their ownership, were equivalent to public schools, on the same basis in so far as zoning regulations were concerned. In the process, however, of equating public schools and private schools of the character discussed, the basis upon which exclusionary provisions were held to be invalid was changed. The original basis, as above indicated, was that, with respect to public schools, local municipalities could not so act as to thwart the policy of the state. Obviously, such basis of decision did not lie with private schools, no matter how closely parallel their activities might be to public schools. The reason for invalidating such ordinances with respect to private schools was, consequently, placed upon the same basis as the reason for invalidating ordinances which attempted to exclude churches from residence districts. Churches, irrespective of their denomination, are held as a mat-

⁴ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

⁵ 140 N.Y.S.2d 221 (Sup. Ct. 1955), *aff'd*, 3 App. Div. 2d 664, 158 N.Y.S.2d 379 (2d Dep't 1957).

ter of law and state policy to promote and support the public health, safety, morals and general welfare of the community. Since zoning ordinances may exclude uses only when such exclusion is necessary for public health, safety, morals or general welfare, there is an obvious contradiction in an attempt to exclude churches and church-conducted schools, which are really accessory uses to churches, on these grounds. The same rule applies to colleges and universities. Such an exclusion is, consequently, arbitrary, unreasonable, and an ultra vires attempt at exercise of the delegated police power.

However, the article concludes that a municipality's fire, health and safety regulations, as far as reasonable and applicable, may be enforced as to buildings or structures in residence districts used for church, college, university, parochial, and such non-profit private school purposes, regardless of zoning, and the right to use such property is subject to the issuance of required certificates of occupancy showing compliance with such regulations. It is just as essential to public health, safety and welfare to see that such uses are properly located as to see that they comply with fire, health and safety regulations and with area, height, bulk and yard requirements.

Another article dealing with church zoning appears in the February issue of the *Hastings Law Journal*. It summarizes the California decisions on the subject as follows:

(1) Excluding all churches and schools is non-discriminatory under the Fourteenth Amendment to the United States Constitution.

(2) Houses of worship must be considered equally with other land uses in the planning of residential communities.

(3) The courts will seldom interfere with a zoning ordinance based upon public welfare.

(4) All of the decisions directly affecting churches were handed down by an intermediate court. Neither the California nor United States Supreme Court has directly passed upon the constitutionality of an ordinance which wholly excludes churches from specified districts. The fact that these courts have declined to review these causes does not imply a negative view upon the merits.

(5) The California ruling is a minority view, having been followed only in Florida. The majority of states, as stated earlier, have determined that the absolute exclusion of churches does not adequately promote the general welfare in order to justify any qualification of the first amendment.

In conclusion, the article argues that the distinction between the California view and the majority view appears to be in the definition of *general welfare*. The majority view emphasizes traditional humanistic values. It contends that different considerations are involved in any regulation when the user of the land is a church. The California position emphasizes the best and most reasonable utilization of land possible and holds that a church must fit into a comprehensive zoning plan as would any other property owner.

Reasonable minds may differ as to the more desirable view. Some argue the physical undesirabilities of churches outweigh the social value; others, that absolute freedom of religion as affecting the character of the individual is of greater importance than empirical values.

If the public laws are to be used to bar churches from specified areas, certain

groups of citizens could conceivably control the practice of religion in widespread areas. Whole towns could successfully bar churches from within their limits. These abuses are fortunately theoretical, but legally possible under California's present decisions.

To prevent such possible abuses and to clarify the law, it would be desirable for the legislature to make more definite its intent to regulate land use for church purposes. The wisdom of this decision should not be left to judicial review, on a case to case basis.

Sociological Jurisprudence

The current Winter issue of the *Villanova Law Review* contains an excellent critique of sociological jurisprudence by James A. Gardner. Mr. Gardner believes that Dean Pound has been much influenced by the Neo-Hegelians, both in his approach to legal problems and in his studies in legal history and philosophy. This has been particularly true in more recent years. It renders his entire work suspect where classification and interpretation on a broad scale are involved, and this has been Pound's particular hobby for many years. In connection with his theory of interests, Pound has shown the manifestations of a system-builder, with an idealistic teleological axiology. While denying values per se, he has inevitably been forced to adopt values, as for example Kohler's conception of civilization (which is Neo-Hegelian), and in the formulation of the jural postulates and the scheme of social interests. He has constantly interpreted history as a continually widening process of becoming. While he does not claim this to be inevitable, in the context of his notions of civilization, one feels that it is. More-

over, as the years have gone by, Pound has gradually shifted his emphasis from the study of what the courts do in fact to the study of jural ideals of the present and past. In religion, Pound is a skeptic, and he could well feel that by past experience and conviction he is wedded to a relativistic view of the universe—but one wonders if underneath he is not obsessed by a desire for certainty and longing for the absolutes of a universal and immutable natural law. So much of Pound's writing seems to reflect this longing for the natural law ideal—his jural postulates belong to the ultimate ideals of the age, his conviction that the ethical ideal is the prime motivating factor in the behavior of judges, his recent tendency to ignore the factual setting in which events have taken place and to select the ideological as the motivating factor, his conviction that "higher ideals" will prevail—that one wonders if his ideal of justice and his whole theory of interests is not really anchored in natural law and more specifically in Neo-Hegelian idealism. While Pound claims to be a pragmatist and has repeatedly affirmed this position, Professor Cohen states that as a logician and especially as a legal historian, "he is decidedly Neo-Hegelian, showing markedly the influence of Kohler in emphasizing the ideological factor." The question then becomes this: What difference does it make? The answer is that it affects Pound's objectivity. A large part of the philosophical world rejects the Hegelian viewpoint and holds that it has grave defects as a system and that "system-building" in general has repeatedly been proven to be worthless by reason of the invalidity of some major premise. Such thinkers approach the study of Pound's writings where interpretation and classification are in-

volved with grave skepticism. When patent defects appear, they reject it. As a pragmatist, Pound would say that no system is perfect—the question is whether it will work. But even applying this test, there are simpler ways which will work as well if not better.

Pound's choice of pragmatism as an ethical theory has been criticized from several viewpoints. The scholastic objection is that the theory denies absolute values and makes the sense of mankind, for the time being, the highest measure of the legal order. This is a basic objection, but it attacks Pound from the position of a different philosophical value system. Different major premises being assumed, the issue is joined on a level where it can never be resolved, though for practical purposes Pound may be found in the natural law camp. A second objection is that the theory ignores the factor of individual justice and subjects the entire society to the ephemeral caprice of public opinion. While on a purely mundane level Pound is much concerned about individual justice, in theory he denies the validity of the problem. He maintains that this involves subjective values, while the only reasonable test is that of harmonizing claims. Mr. Gardner submits, however, that ethical notions in the sense of ideas of right and wrong are important in the context of society even if no absolute principles are involved, and that the individual element in justice is an important factor, that no "felicific calculus" is available which can reduce the matter to a cut and dried scheme.

Mr. Gardner believes further that Dean Pound has become too disturbed about the uncertainties of the law in action and has sought consolidation in the security of a quasi-natural law system. While still ad-

hering to his earlier ethical values (pragmatism), he has adopted Neo-Hegelian idealism to a considerable extent and has devoted much of his prodigious energy to the defense of his system. This fusion of pragmatism with Hegelianism has not been an altogether happy union. Mr. Gardner observes that this fusion has created certain problems as to where Pound stands as a philosopher and how consistent he remains. Yet Pound has steadfastly maintained his position against all criticisms. While Pound's philosophy admits of a viewpoint that does not assert immutability, nevertheless for practical purposes it must be treated as if it did. This puts Pound in a class closely allied to fundamentalism, yet without the advantages of consistency which the true fundamentalists maintain. As a result, he receives more than his fair share of criticism, some of it the result of a failure to understand what his position actually is. Nevertheless, his great legal studies keep him at the head of our generation of law reformers. If he had continued in the wake of his early studies of law in society, his position would be less controversial and perhaps his contribution to jurisprudence would have been even greater than it now is.

In conclusion, Mr. Gardner emphasizes that to point out weaknesses of abstract Poundian theory is neither to deny the immense contribution of sociological jurisprudence to modern legal studies nor Pound's leading part therein. This article has concentrated on the theory of justice, but it cannot be gainsaid that sociological jurisprudence in general has been the main-spring of twentieth-century legal theory nor that Dean Pound's insistence upon treating law in the context of society as a living organism and his great writings in this

context have been among the outstanding contributions of the century. In any subsequent examination of the jurisprudence of our age, Pound's name must be writ large. Thus, in spite of certain criticisms of his theory of justice, Pound may be said to be the founder and leading representative of a school of thought which will remain a permanent part of jurisprudential theory and will continue to exert a powerful and ameliorating influence upon the law in action.

Mr. Justice Brennan

Much speculation has existed during the past several years among legal philosophers and moralists as to just what is involved in the legal philosophy of Mr. Justice Brennan and just how this philosophy will be expressed in decisions he makes as a member of the highest Court in the United States. The January 1962 issue of *The Catholic University of America Law Review* ambitiously attempts to analyze this philosophy in three separate articles. The most detailed of the three, entitled "The Common Sense of Mr. Justice Brennan," is by William V. Shannon, head of the Washington Bureau of the *New York Post*.

Mr. Shannon reasons that the distinguishing quality of Brennan's pattern of thought is what may be called massive common sense. His approach to every case is practical, specific, factual. Unlike Black or Frankfurter, he rarely lays down sweeping dicta. He gives the impression of reasoning inductively from the facts before him rather than deductively from his own set of first principles. This, in turn, accounts for the characteristic tone of his opinions. While some of his colleagues give the impression of writing for posterity rather than any present audience, Brennan invariably addresses himself to his breth-

ren on the Court and his professional colleagues in the law. He is conciliatory and moderate. His is the negotiator's manner; one catches in his opinions the overtones of the conference room mediator and the earnest debater, seeking to persuade rather than overpower. Those overtones are missing in the opinions of several of his colleagues. Brennan is neither prophet nor professor nor publicist. His tone is that of the practical man who, even when most deeply convinced of the rightness of his own position, does not wholly forget that one or another of his colleagues who differs with him today may join with him in making a different majority tomorrow. This is not to suggest that there is anything weakly placating or self-deprecatory in Brennan's work; he has at his command a resource of lucid, sturdy prose. But he foregoes the witticism, the epigram, the twisting personal thrust, if, indeed, these literary devices occur to him; and although he occasionally rises to indignation, it is an impersonal kind of indignation, and his language is characteristically calm and good-humored. One does not turn to Brennan's opinions to enjoy their high style, discursive erudition, or the working out of an iron logic, but one does find in them a body of reasonable argument reflecting a patient open-mindedness and a decent, humane spirit.

He concludes by stating that Brennan has demonstrated it is possible to achieve libertarian results by weighing conflicting interests rather than by erecting absolute prohibitions. He has placed his main reliance upon the lessons of history, practical experience, the common sense derived from common experience. This is an appealing attitude for a man to have whose task is to interpret the present-day mean-

ing of the oldest written Constitution in the world still in use. Moreover, it places Brennan in our nation's central tradition because we Americans are a covenanted people, the people of the Mayflower Compact and the Constitution, always harking back to first principles, but we are also a people of pragmatic temper, a people of Yankee inventors, western pioneers, and enterprising immigrants.

Given Brennan's libertarian temper but open-minded, undogmatic position on the theoretical issues, he could conceivably serve as a bridging influence within the Court between the absolutist defenders of liberty and the sometimes unrestrained advocates of self-restraint. Although that has not proved true in these first five years, his common-sense approach may provide Mr. Justice Brennan with increasing opportunities over the long reach of his future career to play a unique and useful role in reconciling the divergent intellectual viewpoints for which his colleagues now contend.

In a short companion article entitled "Mr. Justice Brennan After Five Years," Professor Daniel Berman observes that it is still too early to predict whether Brennan will always content himself with employing essentially conservative judicial formulas to achieve liberal results, or whether he will eventually choose to make a more lasting contribution to constitutional law. If the past is any indication, he will not lack for heavy-handed advice as he struggles with the intellectual dilemmas that will confront him in the years to come, and after he makes his choices there will be an overabundance of intensely personal criticism. But he will never be swayed, except by the logic of an argument.

Not that denunciation does not disturb

him. He was deeply troubled at the time of his nomination to the Supreme Court when he was attacked by McCarthyites (who considered him soft on Communism), by bigots (who could not abide the thought of a Catholic on the Court), and even by some Catholics (who were startled by the categorical assurance he had given the Senate Judiciary Committee that "there isn't any obligation of our faith superior to [the oath of office].") And the sum total of this criticism was negligible compared with the abuse that was heaped upon him after his opinions in *Jencks* and *duPont* — and especially after it became clear to some Cantabrigians that he was not a Frankfurter man even though he had studied at Harvard Law School.

The last of the series by Lawrence Speiser focuses on the specific area of the Bill of Rights and Mr. Justice Brennan. According to Mr. Speiser, although Brennan does not adhere to the absolutist view of the first amendment, he will not permit the freedoms of speech, press or religion to be infringed on the basis of mere legislative preferences. These freedoms he considers the very matrix of our society. If there is a choice to be made, he tends to protect first amendment freedom by some procedural due process ruling. He is deeply conscious of the tragic brandings with the "badge of infamy" that have been committed in the name of "national security." He has sublime faith in the ability of traditional procedural due process to prevent injustices in the name of national security.

Mr. Speiser asks how history will assess Mr. Justice Brennan. His answer is that it is still far too early to tell. But that he will be considered a "liberal" member of the Court, there can be no doubt. The stream of 5-to-4 decisions emanating from the

Supreme Court and apparently fluctuating with the heat of the Cold War has found him firmly beside the Chief Justice and Justices Black and Douglas. At a time when many liberals were willing to balance the public's interest in national security against the individual's interest in free expression and procedural rights, Brennan has refused to be panicked from the position that protection for the rights of individuals is not incompatible with protection of the country.

Business Ethics

Lawyers who practice primarily in the area of commercial law will be extremely interested in an article appearing in the published proceedings of the Sixteenth Annual Convention of The Catholic Theological Society of America. Entitled "Moral Problems in Business Practice," it is an excellent treatment of a subject on which there is a noticeable lack of literature.

With respect to taxes, the author, Father Daniel Lowery, C.S.S.R., points out that much printer's ink has been spilled over the moral obligation of paying just taxes. But the question still comes up frequently in serious conversation with businessmen.

In the United States two opinions regarding the payment of taxes seem to be quoted most frequently. Two theologians, Henry Davis, S.J., and Francis Connell, C.S.S.R., are quoted often enough as proponents of the two schools of thought. Father Davis is usually cited as a proponent of the penal law theory in regard to taxation. He clearly holds that "in England the obligation is certainly penal only." He says further: "In most states nowadays, and prescinding from periods of urgent need and imminent danger, it is questionable whether this obligation is more than

penal." Fr. Connell, while acknowledging that some theologians uphold the penal law theory, says that "the far more probable opinion" and the opinion "that should be followed" is that the payment of taxes binds in conscience, out of legal justice, "so that it would be a grave sin to refuse to pay a just tax bill for a sizable amount." Fr. Connell then adds: ". . . it seems probable that one would not fail against this virtue (legal justice) if he used strategem to diminish his tax bill *to some extent*, since the rates are based on the supposition that there will be some evasion on the part of many."

It is clear that Fr. Davis and Fr. Connell are primarily concerned with justice (and restitution) in their treatment of this question. But it should also be noted that these men are conscious of the requirements of other moral virtues that may be involved. Thus, Davis states:

Nevertheless, there is no possible excuse for studied evasion of taxes, and therefore though, *post factum*, it is not necessary to urge restitution, *ante factum*, citizens should be urged to pay their share of the taxes. No countenance can be given to the employment of *fraud*, *deceit*, or *lying*, in the matter of income-tax returns. But such acts are not clearly sins against *justice* and do not necessarily entail restitutions; *they are usually sins against truthfulness and no confessor can ever condone them under any circumstances.*

And Fr. Connell, having stated his opinion as given above, adds: "Needless to say, this involves at least a falsehood, and is surely not to be recommended."

Father Lowery thinks the point is important. If these opinions are not fully explained, they give the impression that these men are approving of (or at least not disapproving of) deceit, lying, misrepresentation of facts, etc. This is untrue.