

## Church and State; Toleration; Ethics of Advocacy; Right to Work Laws; Aid to Education; The American Tradition; Censorship; Catholic Law Schools; The Eichmann Trial

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## IN OTHER PUBLICATIONS

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### Church and State

It is sometimes argued that although an abundance of quotations can be given from American Catholic sources on the benefits of separation of Church and State, at least an equally abundant number favoring union of Church and State can be found in European Catholic sources. These facts should account for the great difference of opinion on this problem that exists among Catholic thinkers. Instead, the interpretation is stressed that Catholics say one thing when they are benefiting from religious freedom in the New World and quite another when they are benefiting from religious uniformity in the Old World.

The June 1962 issue of *Catholic Mind* features an interesting article on just this point by Father Kenneth Dougherty, S.A., entitled "The Real and the Ideal."

Father Dougherty states that the twentieth century brings new problems in the relationship of Church and State. These problems have become matters of great political and social concern in our own era, especially prior to the election of President Kennedy. The relation of Church and State, in other words, is not a completely fixed relationship. Each generation encounters it in the light of the problems existent at the time. There is great danger in a too rigid and doctrinaire judgment of a basic theory.

Every Catholic in America, or anywhere else in the world, who is true to Catholic teaching would admit that Church and State are really distinct societies and that there must never be a union of Church and State which would blur the distinction between the two. The Catholic refuses to accept a separation of Church and State which would set each off in isolated compartments, one having no relation to the other in cooperating for the common good. It is a cardinal principle of Catholic doctrine that the supernatural builds on the natural in the unity of the real order. Man must eat in order to pray. The Church has a vital concern, therefore, in whether a man receives a living wage, dwells in decent housing, and gets just treatment under the law. It is completely unrealistic to suppose that Church and State could operate in two hermetically-sealed spheres. The state will be either friendly or hostile to religion. History testifies that there is no middle ground.

For the Catholic, the Church is not primarily in the polis, as though it were a national church or an ethnic religion, but in the cosmopolis. The Catholic does not regard the Church as another community function—a club, labor union or fraternal association. The Church is a complete society just as the state is. But it has a more important goal than the state—the salva-

tion of mankind. There is an order that transcends the political. The Catholic rejects the principle of modern positivism that makes every act of the state legal because it is enacted by the state. This doctrine sets aside divine and natural law as the norms by which political acts are to be judged.

This superiority of the spiritual does not mean a subordination of the political order to the personal designs of a churchman. There is a real distinction between the Church and churchmen. There have been times in history when a Wolsey or a Richelieu have used their ecclesiastical powers to gain purely political ends. Men are not angels. Yet, in the full record of history, the great benefits of worthy ecclesiastics serving God and their fellow men far outweigh the excesses of some who sought to feed themselves rather than their flocks.

The political realist knows that in our day the great danger is not to be found in the intrigues of powerful churchmen but in the claims of the temporal power. Nazism, Fascism and Communism are examples from our own lifetime of political philosophies of totalitarianism.

May it not be said that today in our own nation we have a supremacy of the temporal power? This point no doubt is worthy of discussion. The forces of religion are indeed strong in America. Yet people have developed a cautious attitude toward the voice of religion in the public forum. How the supremacy of the spiritual is to be realized in our pluralistic society is more or less a problem for every religious group.

According to Father Dougherty, the eighteenth and nineteenth centuries witnessed the incorporation of provisions relating to Church and State in constitutional and statutory law. The twentieth century,

however, is an era of interpretation. The question of aid to religious schools stands out as the most conspicuous of problems. Other questions pertain to taxation of church property, censorship of movies, Sunday Closing Laws, United States representation at the Vatican, gambling, artificial birth control and so forth.

The emotion-charged atmosphere more or less characteristic of all religious groups has not improved matters. In a recent meeting between ministers and priests in the Boston area, the confrontation proved enlightening. It was discovered that the ministers' image of the Catholic was that of a second-class citizen who must be watched, for fear that the Vatican would gain control of America. The priests' image of the Protestant was that of the traditional Yankee who had very little credal affirmation but a great deal of protest against Rome, especially against the so-called "Catholic bloc" vote which is really a figment of the imagination.

Dialogue has been useful in bringing about the confrontation of priests, ministers and rabbis and has often served greatly in producing a better understanding both of points of departure and of common ground. Interconfessional peace is essential to the common good of our republic. For the sake of the common good, respect has to be shown for the diversity of religions in our pluralistic society. The fear that Catholics are half-citizens who are plotting to take over the country in order to make our laws and institutions Catholic to the detriment of other faiths is certainly without foundation.

In conclusion, Father Dougherty states that the separation of Church and State is morally sound in the pluralistic American society. However, separation does not

of itself exclude cooperation between the churches and the state. The American heritage gives evidence of such cooperation. The churches and the state are often involved in pursuit of the common good. The words of the Founding Fathers and the history of governmental practices show that the first amendment does not prohibit cooperation between the churches and the state. There is no neat formula that informs us how far this cooperation can go.

In concrete situations, in which the question of cooperation between the churches and the state arises, public opinion is a guidepost indicating how far such cooperation should go. In respect to the question of federal aid to religious schools, agreement has been reached in some instances on fringe benefits. Public opinion seems to be moving in the direction of direct aid. Moreover, more and more attention is being given to the teaching of some common-core religion in the public school. For in our three-religion America, there is an ever-growing realization of the role of religion in promoting the general welfare under God. This is a cardinal teaching in the Judeo-Christian tradition.

### **Toleration**

Readers of *The Catholic Lawyer* who enjoyed the articles on tolerance by Father Cahill and Cardinal Lecaro which appeared in the Spring 1961 and Winter 1962 issues will appreciate "Toleration and Conscience" by Henry St. John, O.P., in the April 1962 issue of *Catholic Mind*.

The author points out that there is a prevalent belief among non-Catholics that the only orthodox doctrine of religious freedom permissible to Catholics is that based upon the distinction between thesis and hypothesis. In thesis, where pure Roman

Catholic principles can be applied, error must not be allowed to be propagated. Only in hypothesis, when, in adverse circumstances, Roman Catholics cannot prudently impose their principles, can freedom to propagate error be provisionally tolerated as the lesser evil. When a minority, Catholics defend external religious freedom. But as a majority, should they gain power, they would deny it to others.

It is true that in various forms the theory of thesis and hypothesis is defended by certain Catholic theologians but it is also true that it represents only one phase in a series of differing positions taken by churchmen from the early days when they were first engaged with the problem of religious freedom.

Throughout, two fundamental principles have been at work, sometimes obscured or applied with varying emphasis to existing social and political circumstances, yet always accepted in the mind of the Church as such. These are: 1) the principle that religious and civil power, or as we say now, Church and State, have distinct rights, each being competent in its own sphere; and 2) the principle that conscience is inviolable, together with the corollary that, though error has and can have no rights (since, technically speaking, a full right responds to the objective truth of things), no public authority exists possessing the right to force a man to act against his conscience even though in fact he be mistaken. At a particular period in history one principle may stand out with great clarity, while the other falls into the background and becomes scarcely noticed. Later, in course of time, the latent principle begins to come into its own, and later still the wheel of development will turn through its full circle and return to the position it started

from, and there perhaps meet with fuller understanding.

In examining this complex problem throughout the passage of history, we must not consider axioms or particular attitudes in isolation. We must scrutinize, with close attention, the Church's attitude as a whole. We must take note of its latent attitudes, side by side with the temporary and *ad hoc* attitudes forced upon it and upon society by the exigency of critical historical situations. In doing this we may discern, beneath these varying and sometimes inconsistent phases, the growth of a living unity of principle and a line of true development.

To undertake this task adequately, we need a comprehensive and impartial view of the complex history of the growth of religious freedom. This view must be seen within the context of differing forms of social milieu in which the Church has lived and propagated the life of grace. It must include the development within the social milieu of the principles upon which such freedom is based.

These principles which, as has already been said, are reducible to two, involve respect for the free and proper activity of Church and State in their own fields and for the inviolability of conscience, including a sincerely erroneous conscience. Of the first it can be said that, for complete harmony, the State should be in agreement with the Church as to the bases of morality; in other words the civil government should proceed upon a true idea of the natural law, which involves at least belief in God, and allow for the preaching of divine revelation to interpret it correctly. Of the second it can be said that conscience cannot and must not be forced; *ad amplexandam fidem Catholicam nemo invitus cogatur*, is

the clause in the Code of Canon Law which states this in principle.

Religious persecution results when either the civil power usurps religious power and attempts to form men's consciences, or when religious power takes over or seeks the aid of temporal power to force men's consciences. The Henrician and Elizabethan persecutions were instances of the former, the Marian persecutions of the latter. Whenever Church and State diverge, there is danger, in proportion to their divergence, of damage to men's consciences by malformation or compulsion; this is true not only of divergence between Church and State, but also of divergence between the State and religion in its widest sense, provided such religion contains elements of true morality.

The article concludes, in part, that the Catholic Church goes a great deal further than mere toleration of error as an act of individual charity. It teaches that respect for sincere conscience is a demand of justice, which may not rob a man of what is his own unless his exercise of it deprives others of their fundamental rights. These claims of our consciences are both personal and corporate; they belong to individuals and to groups; no authority, civil or religious, may force a sincere conscience.

Religious freedom then is an inherent right. It belongs to our nature as human. Since man is made in God's image, free will involves conscience, and conscience, even when in error, is supreme because it is the means of his proper fulfillment and the guiding compass on his journey to God. Any restrictions therefore upon the rights of conscience, save those which safeguard the proper liberties of others, are contrary to God's will because contrary to the inherent nature of His rational creation.

### Ethics of Advocacy

The moral theologian, as St. Thomas Aquinas warns us, "has to consider the circumstances" of a human act before he calls it "good" or "bad." The assumptions of our traditional Anglo-American adversary system of administering justice constitute the circumstances under which the trial lawyer works. A critique of the ethics of advocacy must constantly refer to them. Failure to do so results in misunderstanding and consequent cynicism about the morals of the advocate. Hence, the loaded questions which the puzzled layman puts to him: "Isn't it wrong to defend a man you know is guilty?" "Is it right to plead a technical defense against a just claim?" "Isn't it plainly dishonest to cross-examine a witness who has told the truth?" In the moral sciences such abstract questions divorced from the "circumstances" of a given case invite abstract answers. Small wonder that the answers rarely satisfy.

Professor Edward Barrett of Notre Dame Law School undertakes to answer some of these questions in a manner satisfactory to lawyers and laymen in the current issue of the *Notre Dame Lawyer*. In his article, "The Adversary System and the Ethics of Advocacy," Professor Barrett contends that our adversary system is frankly based on the pragmatic assumption that the truth of the controversy between the parties to a lawsuit stands a reasonably fairer chance of coming out when each side fights as hard as it can to see to it that all the evidence most favorable to it and every rule of law supporting its theory of the case are before the court. In this legal combat each litigant is entitled to an advocate professionally bound, on the one hand, to exhibit in his client's cause "entire devotion, warm zeal and the utmost skill,"

and on the other hand, equally obligated as an officer of the court to discharge his trust "within and not without the bounds of the law," honorably resisting even in the heat of battle the temptation to win by foul means or by "any manner of fraud or chicanery." The apparent ambivalence of this difficult ethic thus imposed by the assumptions of the adversary system and the ultimate purpose of a lawsuit is hopefully to be resolved by the advocate's obedience to "his own conscience and not the conscience of his client." In our contentious craft of advocacy the resolution is not always easy.

Critics of the adversary system point to the flood of manuals and textbooks on the tactics and strategy of trial advocacy as proof that the assumptions of the system lead necessarily to the "fight" or "game" theory of a lawsuit. In such books the fledgling advocate may learn from the masters of his craft such matters as: how to disconcert a nervous or timid witness; when and how to hold back your surprises so that they may be sprung at the proper tactical moment to take an opponent off guard; how to force your adversary to make an opening statement; how to "bottle up" a defendant's closing argument by cleverly distributing your points for the plaintiff over your own opening and closing arguments, etc. In fairness be it noted that some of these criticisms fail to relate the suggestions on tactics and strategy to the assumptions and conditions of the adversary system. Others ignore the fact that many of the books in question do not purport to be treatises on the ethics of advocacy which they take for granted. There is no reason why the trial lawyer of the highest moral principles should not have at his skilled command the tested

weapons of advocacy. Good morals are no excuse for incompetence in any profession. The advocate uses the weapons of his craft as an advocate and not as an assassin. Strychnine is a poison and a medicine. Surprise as a trial tactic may be abused to pervert justice. It may also be used to pillory a perjurer.

Under the assumptions of our system, the advocate does not merge his identity with his client's or with his client's cause. He does not surrender his personal integrity as a man nor his own dignity as a human being. He cannot falsely state to the court a matter of fact or of law. He cannot knowingly induce or permit his client or his client's witnesses to lie. It should not take a canon of ethics to remind him of the consequences of his refusal to represent a client and courageously defend every right afforded him under the law of the land, no matter who the client and no matter how disfavored his case or cause may be in the community. The very word "advocate" carries down through the centuries the noblest connotations.

According to Professor Barrett, the truly great advocates of our history have resolved, even in the context of the adversary system, the apparent conflict between dedication to the idea of justice and championship of a client's cause. They have remembered that conscience is the Supreme Court of Morals and that in the myriad of situations which no human code can reach, the ethics of advocacy rest upon "obedience to the enforceable."

### Right to Work Laws

*Catholic Lawyer* readers who recall the debate on "right to work" legislation which appeared in the 1956 volume will be interested in Father Coogan's latest

statement on the subject.

Writing in a pamphlet entitled "Pope John and the Right to Work," distributed in June by the National Right to Work Committee at 1025 Connecticut Avenue, N.W., Washington, D. C., Father Coogan argues that the concern shown by Pope John for the rights of the worker, in the new encyclical *Mater et Magistra*, is merely a continuation of the concern already shown by the peasant Pope in his letter of July 12, 1960, to the French *Semaine Sociale*. At that time the Pope came down squarely on the side of the "right to work" principle, discrediting compulsory unionism. While pointing out that membership in such "intermediate bodies" as trade unions could be very helpful, he insisted that "it is indispensable that they be offered to and not imposed upon the free choice of mankind." The worker's acceptance of union membership, the Pope continued, is to be "the result of a free and justified choice of careful thought about himself, his destiny, and the world."

Pope John's *Semaine Sociale* letter emphasized the great danger of the "excessive socialization" of our time, tending towards dehumanization. "Modern man," the Pope declared, "sees in many cases that the sphere in which he can think alone, act on his own initiative, exercise his own responsibility or assert and enrich his own personality is becoming excessively restricted." Compulsory unionization, he felt, intolerably increased the already too burdensome "bureaucratic organization of human relations in all sections of society's life."

The *Semaine Sociale* letter disapproving of forced unionism with its excessive interference with the freedom of the individual had been long prepared for by the 1952 Christmas message of Pius XII. That mes-

sage complained that "access to employment or to places of labor is made to depend upon registration in certain parties or in certain organizations which trace their origin to the labor market. Such discriminations are indicative of a wrong concept of the proper function of labor unions and their essential purpose, which is the protection of the interests of the wage earner within modern society, which has become more and more anonymous and collectivist."

Father Coogan argues further that a few clerics identified with compulsory unionism have claimed—with no show of evidence—that the 1952 Christmas message of Pius XII and the 1960 Letter of Pope John to *Semaine Sociale* are pertinent only to socialist Europe. This despite the fact that Pope John himself, in a letter to the Canadian Social Week Convention of September 1960, specifically applied the 1952 Christmas message to the Canadian trade unions, international extensions of our own American unions. Despite the fact, too, that the *Semaine Sociale* letter nowhere even hints that its application is confined to socialist Europe. Instead, its reference is general, to modern man, to mankind, and it declares the evil it is combating (excessive socialization) is "one of the greatest dangers of our time." Moreover, the 227 Bishops and Archbishops of the American Catholic hierarchy in their 1960 N.C.W.C. annual statement on the "Need for Personal Responsibility," again and again cited the *Semaine Sociale* letter of Pope John as pertinent to the American scene.

Now Pope John in his new encyclical, *Mater et Magistra*, refers to his 1960 warning in *Semaine Sociale*, making verbatim citations from it on the dangers of

excessive socialization. Moreover, he opens the door to the "right to work" principle by adding that "where the services of the state are lacking or defective, there is incurable disorder and exploitation of the weak on the part of the unscrupulous strong who flourish in every land and at all times." In the light of the findings concerning union abuse of the individual worker by Senator McClellan's committee, surely, if anywhere, there is need for state action—at least by striking down compulsory membership in such unions and leaving workers free to save themselves from union violence and injustice.

Father Coogan concludes:

Moreover, the new encyclical re-emphasizes the repeated papal warnings of the necessity of the principle of subsidiarity, that "fundamental principle of social philosophy, unshaken and unchangeable." That principle declares it "wrong to withdraw from the individual and commit to the community at large what private enterprise and industry can accomplish." Consequently, there must be no interference with the "right that individual persons possess of being always primarily responsible for their own upkeep and that of their families." Pope John adds that "Experience shows that where the personal initiative of individuals is lacking, there is political tyranny." The individual is perfected through self-activity. Is not compulsory unionism, then, an unjustified limitation upon personal initiative?

And yet certain clerics—obdurate in their commitment to compulsory unionism—claim to find in the new encyclical justification for forced membership in American labor unions. Their argument is that the encyclical commends "the work performed with true Christian spirit" by certain Catholics in "associations of workers" operating on natural law principles. But we ask, is a commendation of the work of those individuals a commendation of the associations themselves? Moreover, what percentage of the millions of Catholics functioning in



American labor unions have performed "with a true Christian spirit?" Will Herberg, the friendly and informed Jewish commentator, has paid special tribute to the Catholic unionists, yet declares that "There has been an almost total divorce between their religion and their labor activity." And as to whether our unions take their inspirations from the natural law, Herberg adds that "The lack of a labor conscience . . . is, in a sense, the basic problem of American trade unionism."

Hence we can say with no fear of successful contradiction, that absolutely nothing in the new encyclical justifies compulsory unionism. We can broaden that by saying the Vatican has never at any time authorized compulsory membership in any labor union whatever, not even in the Christian unions which alone have had her positive approval. The Right to Work principle, that "Americans must have the right but not be compelled to join labor unions," is a thoroughly Catholic principle.

### Aid to Education

Dean John Hayes of Loyola University Law School, whose article on obscenity was featured in the Spring issue of *The Catholic Lawyer*, is also the feature author in the Spring issue of the *De Paul Law Review*. Writing on "Federal Aid to Church-Related Schools," Dean Hayes' position is that there are a number of constitutionally-permissible forms of participation by church-related schools in any program of massive federal aid to education. The question remains as to whether any of them ought to be utilized.

The same federal government which has vindicated the basic constitutional rights of parents and children to choose to be educated in private and church-related schools ought not thereafter to initiate a program which, by excluding such schools without constitutional necessity, substantially imperils their healthy existence and

development. On the contrary, to be consistent with the policy of constitutional law, comparable aid ought to be afforded to those schools by including them in the federal program in forms which are permissible under the Constitution as presently construed.

Why would the initiation of a program of massive federal aid to public schools only imperil the healthy existence and development of the church-related schools thereby excluded without constitutional necessity? Because, so long as parents and children choose to exercise their constitutional right to attend church-related schools, those schools, in justice both to their patrons and to the governments whose public purposes they subserve, must keep pace with the educational facilities, practices and standards of the public schools. They must do so not only to comply with the minimal requirements of governmental supervisory agencies and private accrediting agencies, but also to continue to provide a competitively-excellent secular education together with the religious and moral education which is the distinctive plus value which the public schools are legally unable to provide. If and when, therefore, new massive federal aid is extended to public schools, church-related schools will have to keep up with whatever improvements and developments the federal money will enable the public schools to undertake and public and private accrediting agencies thereafter to exact—and this in addition to meeting the sharp growth demands to which they, like the public schools, are currently being subjected. The money to sustain these new burdens of meeting growth requirements and improved public school standards must come either as tuition payments or as contribu-

tions from the patrons of the church-related schools, who are also simultaneously sustaining as taxpayers their fair share of the costs of the growth requirements of the public schools plus the costs of the new massive federal aid to the public schools. As an example, if the State of Mississippi used half of its share of the proposed federal aid to public elementary and secondary schools to increase teachers' salaries, the estimate is that the annual salary of each such teacher would be raised \$480.00. In addition to paying their share of the cost of this federal aid, the patrons of the church-related schools in Mississippi would have to match that salary raise for the increasing number of lay teachers in those schools or be content with second-rate lay teaching personnel and suffer the inevitable consequences.

This is the prospect which has caused His Eminence, Cardinal Spellman, to say that any new program of massive federal aid which excludes church-related schools is the beginning of the end for those schools. And Dean Hayes' point is that the destruction or substantial impairment of church-related schools without constitutional necessity is inconsistent with the policy of constitutional protection of the rights of children to an education in church-related schools and the rights of their parents to direct and control the education of their children by choosing to send them to church-related schools.

### **The American Tradition**

The February 1962 issue of the *Fordham Law Review* is entitled "The Dedication Issue" and contains the papers given by distinguished guests present at the dedication of the new law school buildings at Fordham.

Among the papers is one by the Most Reverend John J. Wright entitled "The American Tradition and Its Religious Inspiration." Bishop Wright's words are especially interesting in view of the fact that they were written and delivered before the United States Supreme Court handed down the *Engel v. Vitale* decision.

According to Bishop Wright the conservatism of our forefathers is particularly saving in time of crisis; it reminds us that there will be, when the tumult and the shouting die, no new Heaven and no new Earth. It reminds us that the citizens of the brave new world to be will still be men, not gods. It reminds us that any future world can only be built out of whatever good survives from the old. It warns us never to hold lightly the good which our forefathers built so patiently here in this land; never to gamble with the liberties which are the heart and soul of that good; never to permit the religious faith, which taught us those liberties, to grow cold; never to forget the blessings on our traditions by which Almighty God has confirmed the wisdom of these who, building it, honored Him and His chief creature, the spiritual person.

Yet even in America are sometimes heard the voices of new prophets who spread a teaching forgetful of our forefathers' God and of their reverence for the dignity of the human person. These new teachers write their laws without reference to God, and indifferent to Sacred Scripture with its warning that we put not our trust in princes; they propose, sooner or later, a government of men, not laws. They talk little of the family, less of the sovereignty of parents and not at all of the spiritual roots of personality. They speak rather of race, of tribe, of class-consciousness, of

nationalism or of internationalism, not of the person. They hold in contempt or neglect, by studied silence, the earthly beginnings of the Kingdom of God, and they boast of their readiness to build, without the help of Heaven, a self-sufficient City of Man. They repudiate the religious revelation which is the heart of our tradition of faith and they reject the legal concept of objective natural law which was the heart of our tradition of freedom. The phrases which meant so much to our Founding Fathers that they enshrined them in the basic documents of our national life—phrases which spoke of natural law and of God's authority—"the laws of nature and of nature's God"—have no meaning whatsoever for many who now seek to write or construe the laws of our land in shaping its educational policy.

People tell us blandly, "Our courts are no longer 'natural law' courts." Or concerning legislation governing education, marriage, or other partially moral matters, they assert, "Our democracy is strictly secular. Its citizens may individually reverence their God, gods, or moral laws, but the State is not concerned with sacred matters nor with moral values!"

All this may be, but it was not always so. Some of the men who occupy our courts may not accept the natural law, but the men who founded these courts did accept such "higher law" and gave our courts a religious aura for their protection. Our democracy may have become more amoral or unreligious in the days of secularism, but in the days of its original inspiration and initial strength those who launched it talked of the endowments man has from his Creator and of his consequent accountability to God; that is how our Republic came to be founded.

No defense of Christianity and of the values which it taught our forefathers could be more effective than the present straits to which these new prophets, contemptuous of the faith, have reduced our society. Nothing could better warrant meditation of the lesson our forefathers learned so well, a lesson that the Catholics of Poland taught Catherine II of Russia: "We love liberty and therefore we love religion even more; we are free because we love religion."

### Censorship

The current issue of the *University of Toronto Law Journal* contains an excellent article dealing with "Obscenity, Censorship, and Juvenile Delinquency," by Professor Bernard Green. In discussing the issue of whether obscene publications are a significant factor in the spread of juvenile delinquency and should therefore be suppressed, Professor Green concludes that, on balance, the intervention of the state seems necessary. Despite the paucity of evidence, there is a widespread popular belief that obscene and pornographic matter plays an important role in causing juvenile delinquency. Furthermore, parents who share the popular belief lack the ability to control the content of communications that their children are exposed to.

In their praiseworthy desire to protect the freedom of the adult to read and see adult material, the courts have invalidated legislation designed to protect children at all costs. Several groups feel that, as a result, there is inadequate protection of the young. To remedy this, many public officials knowingly engage in extra-legal censorship, using methods that are often despicable. They are encouraged and assisted by private groups who also proclaim that

their intention is to protect the young. There is no question that society is injured by the lawless action of state officials and the exercise of police powers by private groups; whereas the danger that is avoided—the possible harm of juveniles—is indefinite and probably not very significant. Nor can self-regulation by the public mass media be looked to as a complete and effective alternative to state action. The mass media would require the assistance of the state to enforce the most logical method of control, age classification. Furthermore, the results of self-regulation in those media which have developed codes are unsatisfactory: the products tend to be bland; in any case the complaints of improper material in the mass media continue unabated.

Assuming the desirability of governmental control, we must decide what level of government—federal, state or municipal—should exercise the power. This question raises important issues of federalism. At the present time we have all levels of government acting in the field, with unfortunate and sometimes ludicrous results. Books that in one jurisdiction circulate freely are proscribed in another. In a time when, we are told, large numbers of Americans move from one end of the country to the other, it may be asked why material that would not be harmful to them in one place would suddenly be dangerous in another. Small governmental units lack the resources to perform control functions adequately. Furthermore, the fact is that certain key cities can affect the content of communications in other jurisdictions. Citizens of these latter jurisdictions do not effectively participate in the decision of what they will be allowed to see or read. For these reasons, municipalities should be divested of all censorship functions.

The choice that is left, according to Professor Green, is between state and federal control. Mr. Justice Harlan, in urging that the censorship function should be reserved for the states, claims that federal control would create a greater danger to civil liberties. Perhaps he is right. But if three states such as New York, California, and Pennsylvania were to declare a book obscene despite the contrary conclusions of other states, would any publisher find it profitable to sell the book? Would not those states in fact dictate to the rest of the nation what would be read? And this would be done, moreover, without any power on the part of citizens in other states to affect the action. Mass communications are not local problems; national action is necessary if an adequate system of control is to be developed. And national action would enhance one of the great advantages of a method of prior restraint—a single decision frees the way for publication of the examined material without danger to the publisher anywhere in the country.

Professor Green recommends that our aim must be to devise a procedure that will not restrict the flow of adult material to adult readers and viewers, and yet will protect juveniles. A system of age classification would seem to offer the best hope. Age classification procedures have been used in several jurisdictions in the United States and elsewhere, but only for motion pictures. Even that use has been criticized as impractical and as containing some of the dangers inherent in any scheme of prior restraint. Age classification schemes could be used in media other than motion pictures. Books and magazines could be imprinted with a special sign indicating that they were not to be sold or given to anyone under a specific age. But there is no

way of absolutely controlling who will see or hear what program on radio or television. Once we recognize that total control is an impossibility the only solution—and the one that has been adopted, but not wholeheartedly—is to schedule adult programs in the later hours of the evening when juveniles are supposedly asleep.

Nor need an age classification procedure impose any undue burden on the bookseller or theatre owner. He would only be liable if he knowingly or recklessly sold or offered prohibited material to a juvenile under the prescribed age. The argument that an age classification scheme would entail great cost seems difficult to counter. One way of lowering costs would be to allow a communicator the option of submitting or not submitting his material for review. Communication clearly intended for adults only probably would not be submitted. Many firms in the communication industry now contribute to the costs of policing self-regulating in their field. An age classification scheme should lessen the need for and the expense of extensive self-regulation. There would be no undue burden on the mass media if they were required to meet some of the costs of the new system.

### **Catholic Law Schools**

In the current issue of the *Santa Clara Lawyer*, Dean Leo Huard of Santa Clara Law School comments on the article entitled "Christian Precepts in the Common Law" by John Hervey which appeared in the Autumn 1961 issue of *The Catholic Lawyer*.

Writing on the subject of "Education for Professional Responsibility and the Catholic Law School," Dean Huard points out that according to Dr. Hervey's article every teacher in every law school can infuse

Christian precepts into every law school course.

Dean Huard then comments that Dr. Hervey is not a Catholic, but if "Natural Law" and "good morals" were introduced at appropriate points in his thesis, there would be little to quarrel with therein. If all law school courses were analyzed in terms of Natural Law and good morals, the analyzes would provide an excellent basis for a strong program of education for professional responsibility.

According to Dean Huard, by the very nature of things, Catholic legal education is in the hands of laymen. Some of these people are Catholic, others are not. Catholic or non-Catholic, lay persons tend to feel disqualified the moment reference is made to Natural Law and to morals. They tend to feel that these are matters for the clergy rather than the lawyer and they are, of course, partly right. But, if these gifted people are lost because of this feeling, Catholic legal education will suffer a mortal blow. We, all of us, laymen and clergy, teachers and practitioners, must join in convincing our lay teachers that they need not become theologians and moralists in order to teach in Catholic law schools. They must be made to realize this.

We should ask only that they approach the legal problems presented in their courses from the Natural Law standpoint. Beyond this, they need only display a willingness to call upon the members of the Theology and Philosophy departments. The talents of the able people in these departments are not utilized nearly enough and it would be good pedagogy, as well as good sense, to bring this inter-disciplinary approach to bear upon education for professional responsibility. Catholic law schools are in a particularly fine position

to relate professional responsibility to the law of God as well as to the law of man. This is their unique contribution and they should make haste to fulfill it.

### The Eichmann Trial

A further footnote on the Eichmann trial has appeared recently in the form of a pamphlet published by the Fund for the Republic entitled "The Eichmann Trial and the Rule of Law." Written by Yosal Rogat, whose special field is constitutional law, the treatise criticizes Israel for failing to subordinate national desires in the decision by refusing to relinquish jurisdiction of the trial to an international court.

According to Mr. Rogat:

[T]he Eichmann trial forces us to consider the most basic moral and political perplexities, for, whatever else the Nazis horror may have taught us, it made clear that the patterns of decency and humanity that we have wanted to see as a deep part of the world are, to a major extent, only surface decoration. In our own time men have assumed that everything is possible and have performed in daylight acts that they should not have acknowledged even as fantasies. We know now that we dare not take civilization for granted; that we must explicitly

guard against the eruption of barbarism and moral chaos.

Can we, however, in holding others totally guilty, avoid the arrogance and pride of the false belief that we are ourselves totally guiltless? In a deep sense one becomes competent to judge not by proving that he differs completely from the defendant, but by his awareness of what it is that he shares with him. Are we, then, certain that our own motivation for wanting to punish the Nazis has in it as little as possible of the very gratification in applying punishment that they themselves felt?

Such issues can present themselves even when action takes place within legal forms, recognizing this makes it all the more imperative to foster strong and clearly disinterested institutions in order to counteract human partiality and weakness. In the *Oresteia*, Aeschylus elaborated the theme of a compelling chain reaction of vengeance and of primitive retaliation, of blood demanding more blood and of force that destroys both those who use it and those who feel it. It is a reaction that stops only with the establishment of a dispassionate tribunal. The Western world has never ceased to be preoccupied with the central problem of the *Oresteia*. It has characteristically reacted to a deep moral disorder by attempting to impose a legal order upon it. Today, we have no alternative.

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## HIGHER LAW

(Continued)

for St. Thomas it is. The reason for this difference lies in their definitions of the natural law. Bracton identifies it with the spontaneous movements of animal appetites in both beasts and men; Thomas uses the term to denote the natural light of practical reason, through which man shares in the divine idea of the government of the world. This light is identified with certain general and indemonstrable principles of

moral conduct which God has imprinted in the intellectual nature of man.

For both Bracton and St. Thomas, God is the ultimate recourse against abuse of political authority. But while Bracton makes God the only, as well as ultimate, recourse, Thomas speaks explicitly of the right of deposition of a tyrant. Finally, Bracton, the judge, sees the Last Judgment and the divine vengeance as God's remedy for tyranny; Thomas, the theologian, sees also God's power to change the tyrant's heart.