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## The Criminal Psychopath; The United States Supreme Court; Engel v. Vitale; Church-State; Federal Aid to Education; Conscientious Objector; Separation and Divorce

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## IN OTHER PUBLICATIONS

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### **The Criminal Psychopath**

Readers who recall the *Catholic Lawyer* Symposium on Mental Disease and Criminal Responsibility which appeared in the Autumn 1958 and Winter 1959 issues will be interested in a further treatment of the subject in the December 1962 issue of the *Journal of Criminal Law*.

Writing on the subject "What To Do With the Psychopath," James Graham points out that it is no secret that the courts and legislatures have been reluctant to date to accord the same prestige to psychiatry as to the other sciences. The roots of the conflict run wide and deep and to a great extent are entwined with philosophical biases as to questions of guilt and innocence. But no one should deny that psychiatrists can aid the legal process of shedding light on some age-old mysteries of human behavior; despite widespread divergencies of opinion among them in many areas of their study, psychiatrists have been able to define and diagnose certain categories of mentally sick individuals. For example, the so-called criminal psychopath presents a subject on which psychiatrists, lawyers, and moralists may find themselves in agreement more often than not.

The majority of psychiatrists, according to Mr. Graham, believe that the psycho-

pathic delinquent should be incarcerated (after the commission of a crime) in a prison or a mental institution or in an institution which combines the features of both. In that prison or similar institution, facilities should be available for the application of various forms of psychiatric treatment. Social workers and psychologists should be on the staff to prepare case histories, interviews for counseling purposes, etc. The length of treatment, of course, may well depend on the period of incarceration. A short sentence for a minor offence may frustrate successful treatment and return a potentially dangerous criminal into society. On the other hand, a heavy sentence could hang like a dark cloud over rehabilitation efforts. An indeterminate sentence is the answer proposed by many specialists in the field.

Since 1937, twenty states and the District of Columbia have enacted statutes to deal with so-called "sexual psychopaths." The term is strictly a legal one. It has no medical justification, because medicine does not recognize a distinct line between sex offenders and other law violators. The same varying symptoms of basic difficulties are found in thieves, burglars, etc. The statutes enacted by the various states emphasize the need to protect society from the sexual criminal; they generally provide for special commitment proceedings, instead of broadening the

tests of criminal insanity. Unlike ordinary commitment laws, they usually require action by a District Attorney or Attorney-General. The New York law is fairly typical. It provides for a one-day-to-life sentence for a defendant convicted of first-degree sodomy, first-degree rape, sexual abuse while committing a felony, and for assault with intent to commit sodomy, rape or carnal abuse. The sentence may also be imposed on one convicted of any felony if he has previously been convicted, in any jurisdiction, of any of the sex crimes mentioned. After conviction and before sentencing, a psychiatric examination is made and its results submitted to the court to aid in determining what the sentence should be. The law does not define sexual psychopath, nor does it make any provision for treatment.

While Mr. Graham feels that the New York law is a step in the right direction, he is of the opinion that the "defective delinquent" statute of Maryland is preferable in that it goes several steps further. This statute provides for certain proceedings after a defendant has been convicted and sentenced by a Maryland court for (a) a felony, (b) a misdemeanor punishable by imprisonment in a penitentiary, (c) a crime of violence, (d) a sex crime of any of three types, (e) or after two or more convictions punishable by imprisonment under Maryland law. On its own initiative, or by petition filed by the State's Attorney, the Department of Correction, or by the defendant or his attorney, which petition must state reasons why defective delinquency is suspected, the court may order an examination of the defendant at the Patuxent Institution. The Superintendent there, himself a psychiatrist, submits a psychiatric report to the court, a "trial" is held, and if the defendant is found "guilty" of defective delinquency, the court suspends

the original sentence and sentences him anew to an indeterminate sentence at Patuxent Institution.

Mr. Graham concludes by observing that in the present state of our knowledge, the Maryland statute offers an adequate solution to the problem of what to do with the psychopath. It should mollify both the positivists in the field who stress rehabilitation of the criminal rather than punishment, and also the traditionalists who insist that a man be punished for his crimes, provided he is mentally responsible. Since science is uncertain as to the cause, cure, exact definition, and state of mental responsibility of the psychopath, there is no alternative under the law but to find him guilty and then detain him in an institution where his condition may be studied and treated.

### The United States Supreme Court

Writing in the February 1963 issue of the *Loyola Law Times*, Professor Robert Burns presents an interesting analysis of the present United States Supreme Court with respect to its employment of moral imperatives. It is Professor Burns' contention that for its zeal in rediscovering concepts of natural or moral law, the Court must be commended, but in the decisions of the Justices embodying moral standards, the Court has lost its focus on the conditioning elements of time, place and circumstance.

In proof of his thesis, Professor Burns examines the areas involving free speech, religion, criminal justice and "state action" in contravention of the equal protection clause of the fourteenth amendment, since these are value-laden areas.

In the area of religion, he argues that the Court has enacted an imperative of conscience which is unrealistic and utopian; in the area of obscenity, an imperative which

is completely divorced from the mainstream of contemporary mores; in the area of search and seizure, imperatives that are unknowable and impracticable; and in the area of equal protection of the law, imperatives that by nature are incapable of effective concretion by the rule of law. In each of these jurisprudential areas, some members of the United States Supreme Court have flatly refused to recognize, weigh, or balance such "competing" values as social order, security, civic peace and general welfare. In each case the Court has been driven by a "moral imperative" to decisions and rules which in the real world cannot be made, like Kant's imperatives of "a universal law," and which have occasioned civic disunity, enforcement difficulties and a truly deplorable disrepute for the Court and its decisions.

After a thorough discussion of the cases illustrating these findings, Professor Burns concludes with the following blanket criticism:

The United States Supreme Court deserves praise for its commendable concern with moral values, the rights of individuals and the protection of minority groups from the force and injustice of community prejudice.

Members of the present Court who follow a theory of natural rights such as Justices Black, Warren and Douglas are to be preferred for their instincts are different in kind from the indifferent, unconcerned and irrelative. They are no rubber stamps for omnipotent government, pressure groups or vested interests. I am therefore reluctant to criticize but criticize one must for there are alarming indications that perhaps a majority of the United States Supreme Court have embarked upon an approach to law and morals which is imprudent and unwise. Like the Duchess their hearts are in the right place, but their laws, rules and standards can function only in the make believe, not the real world.

### Engel v. Vitale

Father S. Oley Cutler, S.J., whose article on the moral and legal aspects of sex is featured in this issue of *The Catholic Lawyer* makes some interesting observations on *The Prayer Case* in the current issue of the *Syracuse Law Review*. According to Father Cutler, the Supreme Court must be the constant guardian of constitutional freedoms, even against local school boards, but it is another question whether the Court should pre-empt the competency to adopt local experiments or endeavors to operate better public schools. Here we go to the essence of what is the factual problem in *Engel v. Vitale*: what precisely is the purpose of this type of school system. As Professor Corwin notes, the matrix of the American public school system was the Northwest Ordinance, enacted in 1787 by the last Continental Congress, operating under the old Articles of Confederation. That great piece of legislation provided for free public schools for the first time with this avowed purpose: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Certainly, Jefferson, who is credited as the father of the "wall of separation" phrase, himself had very definite convictions of the importance of religion in public education, as his plans for his own University of Virginia clearly reveal. Yet, what is at stake in the present case is not a question of sectarian indoctrination, as is obvious from the nondenominational wording of the prayer and the absence of any compulsion upon pupils to recite it. Rather, the practice of the prayer recital at the start of the day's

classes represents the prudential judgment of the Board of Regents and the local school board. This judgment grew out of an effort to strengthen the moral and spiritual training of New York State youth. In earlier cases the Court has given wide and proper recognition to individual freedom in the field of education to parents and to school boards. Parents were recognized to be the fundamental possessors of the right to educate their own children as they thought best. The *Everson* decision seemed to further *Pierce* in that children who chose to attend sectarian schools were not to be deprived of the protection of state-provided school transportation. *McCollum* represented a setback at this point, but it was minimized somewhat by the holding in *Zorach*. It was in the latter case that Mr. Justice Douglas felt moved to say: "We are a religious people whose institutions presuppose a Supreme Being." With Justice Douglas' holding in *Engel*, this sentiment seems to be slightly withdrawn. Now that the Court has returned to its old role as "national school board," one wonders what will happen next.

Father Cutler observes further that when the heat of controversy has lessened, it is to be hoped that the questions at issue will be given a second look. Undoubtedly, "not by prayer alone . . ." can the public school achieve a degree of citizenship training based on spiritual and moral convictions such as the Board of Regents had hoped. In a pluralistic society, where individuals of many faiths and some of none, must live side by side, working for the common good of all, too much can be expected from mere secular education to which the public school system is necessarily committed. After the *Engel* decision, the fear arises that one must come to expect too little.

### Church-State

Dr. Sylvester Theisen poses the question, "Can religion survive as a vital force in a free pluralistic society?" in the first of a two-part article entitled "Religion and the Free Society" in the March 1963 issue of *Social Order*. With the thoroughness and objectivity of the scholar, he analyzes the extreme complexity of the problem and concludes that it must be settled outside the sphere of government. In line with this thinking, he sees the separation of church and state as a means of assuring religious liberty.

According to Dr. Theisen, the effect of the first amendment was to remove man's search for and convictions about ultimate values from the competence of the federal government. This move was a bold and original one. The American state left this formation to a plurality of forces which it placed beyond its control. Although American society was religious, the Constitution provided that the national government should not seek to direct that religious life in any way. One must avoid the unwarranted leap to a position which demands separating religion from all social institutions. The reason why no religion shall be established is largely in order to allow exercise of religion. The Constitution does not use the confusing figure of speech "wall of separation" but uses instead clear, understandable words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." This also forbids the establishment of secular humanism as the operative system of ultimate values. The danger exists that because secular humanism is not called a religion, it can establish itself in violation of the Constitution without anyone being fully aware of what has transpired.

The important truth gained from historical experience in this regard seems to be "that democratic government can and does operate successfully when some fundamental issues can be left unsettled. When man finally decided that questions of religious faith could be left unsettled, democracy rose and flourished. . . . The key to democratic unity is not found in the agreement on fundamental principles. Rather it is found on the willingness to leave outside the sphere of government policy those issues on which men are unwilling to compromise." In regard to the cultural and institutional developments of society, the neutral state takes no position discriminating in favor of one or another set of ultimate values, so long as the basic democratic civic values are not endangered.

Dr. Theisen argues that the discussion of possible social policies should not be considered foreclosed by the Constitution. It is evident, he states, that there are two aspects of religious liberty: freedom from any form of religious discrimination or coercion and the opportunity for citizens to exercise their religious liberty in positive ways. The tension between these two forms of religious liberty is the source of the deepest problem here and it is a mistake to try to solve the problem by one-sided federal prohibitions which take account only of the negative form of religious liberty. Separation of church and state must be seen as a means for assuring religious liberty; otherwise, as a dogma, it can easily be turned into an instrument of oppression.

### **Federal Aid to Education**

Father Drinan, S.J., writing in the current issue of *Social Order*, discusses the theory advanced by Mr. Justice Black in the *Torcaso* and *Engel* cases that the establish-

ment clause can be violated without a violation of the free-exercise-of-religion clause. Under this interpretation of the first amendment, questions Father Drinan, can it be argued that the secularization of the public school amounts to a violation of the establishment clause, since a particular form of religion (or irreligion) is given a preferential status? If such a violation of the establishment clause can be shown, Catholics or others can enjoin it even though there is no infringement of anyone's religious freedom.

Aside from the question of standing to sue, can religious parents prove a violation of the establishment clause if the state gives financial assistance only to the school where education is deliberately divorced from religion? Preferential treatment to irreligion would seem to be as constitutionally objectionable as any preference given to religion.

Some Catholics have asserted that attendance at a public school by their children violates or restricts the religious freedom of both children and parents. The assertion is made that Catholics have a right to be treated like conscientious objectors or like Jehovah's Witnesses who have been granted an exemption from laws requiring a flag salute in a public school.

Mr. Justice Frankfurter saw the force of this analogy when, dissenting in *West Virginia State Bd. of Educ. v. Barnette*, he voted against granting an exemption from the flag salute to children conscientiously opposed to the practice. Mr. Justice Frankfurter saw the consequences of the Court's bowing to the religious scruples of a minority and raised this question:

What of the claims of equality of treatment of those parents who, because of religious scruples, cannot send their children to public schools?

This potential argument of the Catholic

or other parent has not been developed or litigated. To be able to show that religious parents "because of religious scruples cannot send their children to public schools" (to use Mr. Justice Frankfurter's language) would seem to require more proof of an antireligious bias in the public school than would appear to be now probable.

It is not now necessary, however, states Father Drinan, to have such proof before one can claim rights by reason of the first amendment. Under the interpretation of the establishment clause adopted in recent years by the Supreme Court, any preferential treatment granted by the state to religion or irreligion constitutes a violation of constitutional rights. The allegation that is difficult to prove is, of course, the assertion that the secularized public school gives preferential treatment to irreligion. The widespread and deeply-held conviction persists that silence about religion in the public school is the same as neutrality or impartiality. On this basic conception is built the whole thesis that the public school can be fair to believers and non-believers by assuming that their differences for the purposes of education are without significance. It is this basic assumption of the public school which, it is submitted, violates the letter and the spirit of the establishment clause.

The secularized public school meets and treats its students only as future citizens. Their religious or spiritual beliefs are to be regarded as irrelevant and, hence, unimportant with respect to the entire educational process. It is this basic disregard of the great ideas and religious aspirations in the lives of the students in a public school which is the burden of the religionist's complaint. To the believer — at least to many believers — the silent assumption by the public school

that religion in any meaningful sense is irrelevant to the educational process amounts to an official establishment of secular values.

Father Drinan concludes that it seems clear that many converging forces have precipitated the national debate about the advisability of parochial schools sharing in some part of federal aid to education if such assistance is authorized by the Congress. The debate is filled with anomalies, the most curious of which is the fact that no controversy exists at the state level over parochial schools, since at that level the question was resolved in the last century when virtually all states enacted laws prohibiting the distribution of public funds to sectarian schools. In the federal-aid controversy, Catholic spokesmen are in effect asserting that this policy embraced in the last century by the states is not a wise or fair one for the federal government to follow.

Cogent arguments exist to support the Catholic contention. Among them are the following:

1) The fully-accredited private school has important public dimensions in that it carries out the secular goals of the state. Because of this semipublic status conferred on the private school, this institution has some claim to share in the public funds set aside by the state for the education of all of its future citizens.

2) Public-welfare benefits surely include secular education, and by the rulings in *Cochran* and *Everson* the benefits extended by the state to all citizens may not be denied to anyone because of his religious faith or lack of it.

3) In the distribution of these public-welfare benefits no Supreme Court opinion has held that the only constitutional formula is one which prevents even some incidental aid to religion. The Sunday-law decisions,

in fact, expressly hold that the state is not precluded from implementing its secular goals in a way which bestows some collateral benefits on religion.

4) In view of clear Supreme Court rulings precluding sectarian teaching and religious practices in public schools, it can be persuasively argued that the granting of funds only to the public school is a violation of the establishment clause because such a policy endorses and prefers one educational and philosophical orthodoxy over all others. This is the very essence of the Catholic case.

It seems fair to conclude that neither the Congress nor the Supreme Court of the United States has confronted the claim which is being made by parents who are dissenters from the orthodoxy which the public school represents. No quotation seems more appropriate to express their sentiments and to affirm the spirit with which the entire controversy over church-related schools should be discussed than the ringing words of Mr. Justice Jackson in the *Barnette* decision:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

### Conscientious Objector

The Congress and the American people have historically been deeply concerned with protecting the free exercise of religion and respecting the scruples of those who for religious reasons claim they cannot conscientiously bear arms. Mirroring this attitude, any legislation based upon this recognition has almost exclusively limited relief to those whose claim is based upon a duty to a higher being, rather than a personal or political philosophy. In attempting to obtain a work-

able formula which will protect the religious liberty of the sincere conscientious objector, the major concern of Congress has been to enact a law liberal enough to achieve this objective, but strict enough to discourage the coward and the shirker.

Father Francis Conklin, S.J., suggests, however, in his article on conscientious objector legislation in the Winter 1963 issue of the *Georgetown Law Journal*, that recent United States Supreme Court decisions have created grave doubts as to the constitutionality of the present exemption provisions. Father Conklin feels that the Supreme Court has removed the vital flexibility of the first amendment and has placed obstructions in the path of future congressional attempts to devise a workable exemption provision.

According to Father Conklin, the sweeping language utilized in *Torcaso v. Watkins* all but explicitly rules the "belief in a Supreme Being" clause of the 1948 Selective Service Act unconstitutional. Moreover, it casts considerable doubt upon the constitutionality of the ministerial exemption provision in that same statute.

In that case the Supreme Court held that a provision in the Maryland Constitution which required a declaration of belief in the existence of God in order to qualify for the office of notary public, invaded Torcaso's freedom of belief and religion.

In effect, the Supreme Court has ruled that any governmental attempt to define the word "religion," as that word was used in the first amendment, will be unconstitutional if the definition excludes any philosophical, sociological, political or humanitarian belief which even the smallest minority chooses to call a "religious" belief. As the brief for appellant, Torcaso, clearly demonstrated, in reaching its decision the Court had to repudiate the definitions of religion given in a



whole series of previously decided cases. However, the Court's opinion, as is usually the case, contains no further indication of the revolutionary interpretation it had determined to give the word "religion" in the context of the first amendment.

The major portion of Father Conklin's article involves a review of the historical materials relevant to the word "religious" as used in the "religious scruples" provisions of the various state and military acts. He then examines the ramifications of the *Torcaso* decision in the light of these materials and discusses its effect upon them.

Father Conklin concludes that the difficulties which Congress must now face if it wishes to continue the conscientious objector exemption can be seen by a glance at the spectrum of conscientious objectors. At one extreme would be the conscientious Quaker, opposed to war in any form, and able to point to the historical belief of his sect and the sincerity of his co-religionists. At the other extreme is the ordinary young male, eager to see the world, but naturally hesitant about killing or being killed.

In between these two extremes are: (1) the denominationally-affiliated person who expresses a minority viewpoint within his denomination (such as the Catholic or Methodist conscientious objector in World War II); (2) the conscientious objector who believes that God has forbidden men to kill each other—but is not affiliated with any denomination; (3) the objector affiliated with a humanitarian organization—atheistic or agnostic—but in which the denominational opposition is based upon social or humanitarian principles; (4) the independent, educated, articulate conscientious objector whose opposition may be based on "philosophical" reasons (*e.g.*, war is a tool of capitalism), economic reasons

(*e.g.*, war creates a false economy), political reasons (*e.g.*, war is an inept and inefficient instrument of foreign policy), or—as will usually be the case—for mixed reasons. Then comes the final, and most difficult category—the inarticulate conscientious objector.

Given this broad spectrum, Father Conklin asks where can Congress draw the line? Up until now the line has been drawn at the extremity of the theistic believers. However, to move the line one notch and include the denominationally-affiliated humanitarians—as the American Civil Liberties Union advocated in 1940 and in 1948—clearly discriminates against those without denominational affiliation and "establishes" the denominations by giving them a sacrosanct status.

Moreover, any further attempt to classify these objections to military service will be frustrated by the simple expedient of having a sufficiently articulate defendant designate his political, sociological or economic beliefs as "religious," on the premise that they occupy the same place in his life as the theistic beliefs occupy in the lives of people who believe in a Supreme Being.

Thus, according to Father Conklin, we return once again to what seems to be the basic problem which the extreme view of the establishment clause propounded in *Torcaso* raises: whether any branch of the government can constitutionally define the term "religious" in the first amendment without violating that amendment. The historical evidence clearly shows that the Founding Fathers and succeeding generations of Americans, although cautious in their language, clearly understood the term "religious" as being theistic in origin, concept and development. However, this historical understanding of the term has been

brushed aside as irrelevant—and in the name of greater liberty. We are thus returned to the possibility that a frustrated Congress will abolish the conscientious objector provision entirely.

Thus, the Court's espousal of what seems to be a doctrinaire position has deprived the law of its needed flexibility, and if rigidly adhered to, will produce logically insoluble conflicts. While the "Supreme Being Clause" may seem objectionable to what Mr. Justice Douglas called the "fastidious atheist," if it does in fact constitute a government acknowledgment of the value of religions, the fact remains that it is what the people through the action of their Congress at the time of the Constitution and ever since have expressed as desirable.

### Separation and Divorce

A set of rules of morality to be used as guides for a Catholic attorney in a civil action of either separation or divorce are listed in the current issue of the *Loyola Law Review*. Expounded by Father Louis Hiegel, S.J., the rules permit the moral evaluation of various legal steps in this intricate area of domestic relations law.

In addition to the enumeration of the aforementioned morality rules, the article sets forth the tenets relating to marriage and the family upon which the rules are based. The most important of these are the following:

1) Marriage, once validly contracted, *per se* endures until the death of one of the contractants. This is a matter of divine law. It is therefore beyond the power of the state to really dissolve the bond during the lifetime of the parties. The Church, however, has vicarious powers from Jesus Christ to effect the cessation of the bond in cases of non-consummation, the Pauline privilege and the

Petrine privilege.

2) An annulment is a declaration by the competent court that a marriage never really ripened into a valid marriage; rather it was essentially defective *ab initio*, and the defect was never remedied up until the time of the declaration of nullity. The competent court to make such a declaration is the proper ecclesiastical tribunal for all marriages in which at least one party is baptized, the proper civil tribunal for all marriages of two unbaptized persons.

3) A valid marriage between two baptized parties is necessarily sacramental and as such is under the exclusive competence of the Church. Also, the Church has exclusive competence over the marriages in which one party is baptized. Hence all questions pertaining to these marriages, as well as the effects inseparably connected with them, can properly be decided only by the competent ecclesiastical court.

4) The State has competence over the marriages of two unbaptized persons. Also it has jurisdiction over the separable effects (the merely civil effects) of all marriages within its territory.

5) There are valid reasons which justify married people to live separate and apart without dissolution of the marriage bond. For the unbaptized these reasons are evaluated according to the dictates of the natural law. For the most part the various state statutes giving grounds for separation and divorce harmonize with the dictates of natural law, and for simplicity's sake will be referred to in this paper as statutory grounds. For the baptized, the reasons for separation are enumerated in canons 1128-1132 of the Code of Canon Law.

6) Catholics are bound under pain of nullity to celebrate their marriages before

an authorized priest and at least two witnesses.

7) There are sufficiently clear and valid moral principles which form the basis for judging the rightness or wrongness of cooperating in the evil action of another.

8) The Third Plenary Council of Baltimore of 1884 laid down positive legislation

binding on all the baptized within the territory of the United States relative to civil action for separation and divorce.

9) Every reasonable man is capable of grasping and understanding the basic dictates of the natural law relative to marriage and the family.

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