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The Conscience of the Law

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THE CONSCIENCE OF THE LAW†

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The time is 399 B.C. The place is Athens, Greece. The occasion is the trial of Socrates. The charges brought against him by the leaders of the restored democracy were: First, not worshipping the gods whom the state worships, but introducing new and unfamiliar religious practices; and, second, corrupting the Athenian youth. The prosecutor demands the death penalty.

The original source of this information is Diogenes Laertius to whom we owe most of the biographical and source material of pre-Socratic philosophy.[1] It is my purpose, however, to concentrate on "the conscience of the law," extolled by Socrates at his trial.

As the trial progressed, with Socrates acting as his own counsel, we learn that the first charge was never explicitly defined and the second could not be satisfactorily supported because of a grant of amnesty by the very political leader who instigated the trial. Despite these facts Socrates was condemned to death by a majority vote of the jurors. His execution had to be delayed about a month, thus allowing sufficient time for his friends to arrange an escape. Socrates refused to take advantage of their offers, however, on the ground that such a course of action would be contrary to his principles that one "must do what his city and his country order him; or he must change their view of what is just."[2] We read in the *Phaedo* that, as a consequence of his respect for the law, when the drink of poison reached his heart there was a convulsive moment and he died "of all men of his time whom I have known, . . . the wisest and justest and best."[3] Both in his life and in his death he was a witness to the majesty of the written law, "[one] must do what his city and his country order him,"[4] and also to the unwritten law, "or he must change their views of what is just."[5]

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[1] *See generally* DIOGENES LAERTIUS, LIVES OF EMINENT PHILOSOPHERS (R.D. Hicks transl. Harvard Univ. Press 1925).

[2] THE WORKS OF PLATO 102 (I. Edman ed. B. Jowett transl. Random House 1928).

[3] *Id.* at 189.

[4] *Id.* at 102.

[5] *Id.*

In probing the conscience of the unwritten law of universal justice, our sourcebook is fittingly the classic Greek tragedy *Antigone* composed by an older contemporary of Socrates and a fellow citizen of the Greek state—Sophocles.[6] It is this universal justice, binding on all men, including those who have neither association nor covenant with one another, that Antigone refers to when she says that the burial of her brother Polyneices was just, despite the prohibition of written law. She meant that his burial was just by nature, by a natural justice, for the unwritten laws of God live "not of today nor yesterday, the same throughout all time they live; and whence they came none knoweth."[7]

This continuum of natural justice appears again in remarkable passages of Cicero's *On the Commonwealth*:

> There is in fact a true law—namely right reason—which is in accordance with nature . . . . It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all peoples; and there will be, as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor.[8]

As time passed and the legal genius of the Romans became more evident, the classic distinction was introduced between that which is just (*jus*) and the command to do that which is just (*lex*).

Is it not remarkable that at this early stage the *is* of codified law becomes correlated with the *ought* of unwritten law? Is it not more remarkable that these two forms of law seemed to coexist with an empathy that is not only absent today, but whose very existence is denied? I refer to the psychological gap interposed by legal positivists between the enactments of positive law and the moral obligations of the higher law written in the heart of mankind.

It is this timeless conscience of the law that should be our contemporary concern—a return, in a sense, to the realism in American law evidenced in the 1920's. That movement, it appears to me, resembled a return to the ancient Roman distinction of whether the law that *is* corresponds adequately with what *ought* to be in natural justice. Moreover, it would supply the necessary corrective to today's voluntarism in law which emphasizes a kind of sociological justice not unlike the "greatest good of the greatest number" under the rubric of utilitarianism. As an ethical theory, utilitarianism maintains that the moral good or the moral evil of human actions is determined by the good or bad consequences to society which

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[6] *See* SOPHOCLES, THE ANTIGONE (G. Murray transl. George, Allen & Unwin Ltd. 1941).

[7] *Id.* at 38 vv. 456-58.

[8] MARCUS TULLIUS CICERO, ON THE COMMONWEALTH 215-16 (Bk. III) (G. Sabine & S. Smith transl. Ohio State Univ. Press 1929).

these actions produce. Within this frame of reference, the guarantor of what ought to be the actual needs of human existence, instead of being right reason becomes the will of the majority. At this point the enactments of written law become separated from the actual obligations of the unwritten law, resulting in the identification of law with will and ultimately inviting the tyranny of the majority.

A *cause célèbre* representative of this type of legislation and precipitating much soul searching was the decision of the United States Supreme Court last January 22, 1973, which legalized abortion,[9] a decision which was characterized by one Justice as "an exercise of raw judicial power."[10] In the wake of this decision, concerned citizens are perplexed by argumentation which substantively concludes that people may follow their own religious and moral convictions in the private sector of their lives, but disbars them from voicing such beliefs in the public sector of a pluralistic society. The irony of this rhetoric is that it is articulated by the adherents of a value system which is cleverly contrived to fit into our constitutional neutrality toward religious and moral values, but it is de facto a religion of secular humanism—utilitarianism.

In forbidding the establishment of any religion, our Constitution provides for the freedom of all religions. It does not give a priority to areligious ideologies of secular humanism and thereby deny the right of other religious and moral groups to intervene in the formulation of public policy. Citizens and groups each have the right and duty to advocate the adoption of whatever public policy they judge in conscience to be in the best interest of the commonwealth. Those of us whose consciences are formed in the more traditional modes of religion and morality should not be expected to either remain mute or submit uncritically to the "new morality" of utilitarianism. In fact, the seeming reasonableness of this position is supported by frequent public welfare programs to alleviate poverty, provide adequate health facilities, and develop environmental safeguards—all motivated in part by religious and moral concerns for the well-being of all.

I am reminded at this time of the eighteenth and twenty-first amendments to the Constitution, prescribing and proscribing prohibition. This costly experiment represented an effort to treat the social consequences of drunkenness through legislation. The law was prompted by many motives—to eliminate poverty, to prevent the breakup of homes, to curb delinquency and crime, and even to promote patriotism—and championed by proponents from varied religious and moral backgrounds. The legislation did not solve the problems for which it was passed; yet, we must reflect on the fact that it was an intervention in a moral issue by a majority of

[9] Doe v. Bolton, 410 U.S. 179 (1972). *See also* Roe v. Wade, 410 U.S. 113 (1972).
[10] Doe v. Bolton, 410 U.S. 179, 222 (1972) (White, J., dissenting).

the citizens through their representatives in three-quarters of the states and in the Houses of Congress, both for the original amendment and again for its repeal.

I mention this because, like the abortion question, it too represented an attempt at legislating morality by a majority vote. This seems significant to me since the related argument to that of disqualifying persons because of religious and moral beliefs is that the majority of the people will always know what is good for mankind. This is not necessarily so. As our own history sadly attests—the treatment of the American Indian, the abomination of slavery, the segregation of Japanese in concentration camps during World War II—the majority can be both stupid and brutal.[11]

Like the prohibitionists, the abortionists have manipulated public opinion to accept legalized abortion as a solution to our vast social problems. The utilitarian ethic of "the end justifies the means" has been canonized by the highest court in our land. This positive legislation represents the prescriptive *is* of civil law, but ignores the fundamental moral *ought* of the unwritten law of natural justice.

It is not my purpose to concentrate only on the abortion issue relative to the sanctity of life and the value judgments involved in legislative enactments. Yet, this decision has reactivated past antilife proposals and programs and opens the way to new life-control experimentation and further conscience conflicts in other areas. This open door to utopian utilitarianism, while it dates back many centuries, is today more awesome due to the expertise of our technological culture. I would propose for consideration a few areas of contemporary significance:

Experimentation, Not Therapy

Although the dates indicate technical achievements rather than general availability, one author has envisioned:

PHASE ONE: by 1975
Extensive transplantation of limbs and organs
Test tube fertilization of human eggs
Implantation of fertilized eggs in womb
Indefinite storage of eggs and spermatozoa
Choice of sex in offspring
Extensive power to postpone clinical death
Mind-modifying drugs: regulation of desire
Memory erasure
Imperfect artifical placenta
Artificial viruses

[11] *See generally* G. GRISEZ, ABORTION: THE MYTHS, THE REALITIES, AND THE ARGUMENTS 270 (1970).

PHASE TWO: by 2000
Extensive mind modification and personality reconstruction
Enhancement of intelligence in men and animals
. . . .
Perfected artifical placenta and true baby-factory
. . . .
First cloned animals
. . . .
Man-animal chimeras

PHASE THREE: after 2000 on
Control of ageing: extension of life span
. . . .
Disembodied brains
Brain-computer links
Gene insertion and deletion
Cloned people
Man-machine chimeras
Indefinite postponement of death[12]

The legal and moral questions are: First, whether we are to do with legal and moral responsibility everything that we can do technically; and second, should science do everything it can do?

Health Facilities and Personnel

It is not a secret that, as a result of the abortion decision, health services facilities and personnel, especially Catholic, are anguishing about their continued existence as Christian witnesses to and service of the sick and dying. This anguish is caused by proposals from state and federal agencies that these Catholic facilities and personnel be allowed to perform abortions and contraceptive sterilization.[13] Such proposals are in direct conflict with the moral convictions and directives of Catholic hospitals which do not allow their facilities or personnel to cooperate in such procedures.[14]

Catholic Higher Education

The Bundy Program,[15] with which we are quite familiar, prohibits the receipt by private educational institutions of New York State aid as long

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[12] G. TAYLOR, THE BIOLOGICAL TIME BOMB 204-05 (1968).
[13] *See generally* Schwager, *Legal and Ethical Problems Present in Catholic Health Facilities*, 19 CATHOLIC LAWYER 259 (1973).
[14] Ad Hoc Comm. on Pro-Life Activities, Nat'l Conference of Catholic Bishops, Pastoral Guidelines for the Catholic Hosp. and Catholic Health Care Personnel, April 11, 1973.
[15] N.Y. EDUC. LAW § 6401 (McKinney 1972), *as amended*, (McKinney Supp. 1975).

as the institutions remain religiously committed. To remain faithful to its Catholic commitment, our own university sacrifices financial assistance otherwise available through this program in excess of $3 million a year.

A Living Will

An organization called the Euthanasia Educational Fund is distributing a form, not legally binding, which declares that if the time arrives when one can no longer actively participate in decisions affecting his or her own future, this "will" is to be a statement of personal wishes. The form reads in part:

> If there is no reasonable expectation of my recovery from physical or mental or spiritual disability, I, [name] request that I be allowed to die and not be kept alive by artificial means or heroic measures. . . . I do not fear death as much as I fear the indignity of deterioration, dependence and hopeless pain. I ask that drugs be mercifully administered to me for terminal suffering even if they hasten the moment of death.[16]

If one were to read the above uncritically it would appear to be compatible with Catholic teaching on natural dying and death. A more reflective reading from the perspective of Catholic moral teaching on this subject, however, reveals the absence in this form of presumptions which are implicit in our Catholic position, namely, the patient is expected to be prepared both spiritually and temporally for death; the determination not to use extraordinary means is made at a particular time and under specific circumstances, and not the long-range decision implicit in the living will; and the disability criteria and the identity of the responsible person making such a decision are more specific and determinative than the vague generalities of the "will," especially in comparison with its total lack of specificity as to who will make the judgment according to such criteria.

Although, as was indicated above, this is not legally or morally binding, it seems to qualify as a wedge principle for legalizing voluntary euthanasia and, ultimately, involuntary euthanasia. The technique which the Euthanasia Educational Fund is presently using is a form of propaganda to form the public according to their point of view. And this, it seems to me, qualifies under the ethic of utilitarianism.

In concluding these reflections on "the conscience of the law" there are a number of considerations I would stress.

First, the conscience obligation imposed by any just law is based on the natural moral order, and this is ultimately dependent upon God.

Second, although they are interrelated and interdependent, legality and morality are not identical. They overlap, but they are not coextensive.

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[16] Euthanasia Educational Fund, A Living Will, November 1970.

There are crimes that are sins and sins that are crimes, but crimes and sins are not the same realities. It is in this critical existential area of private and/or public morality that general moral principles alone do not decide particular cases, but the particular cases cannot be decided without the general moral principles.

Third, the civil law must respect the natural moral law. A manmade law cannot morally command actions which are violations of natural rights, nor can it prohibit the reasonable exercise of these same natural rights. It distresses me to conclude that the Burger Court's decision removes the unborn from the privileges accorded by law to human beings as the Taney Court's decision in the *Dred Scott* case[17] made it impossible for the American black to be accorded the privileges of citizenship. The latter, as we know, was corrected by constitutional amendment. May we hope for the same happy outcome for the former?

Fourth, the professional moralists and ethicians are cognizant of the dependence of the moral law upon the legal order for clarification, determination, updating of moral obligations in our contemporary life situations, and protective and coactive assistance in maintaining and developing public order in society. It seems to me, however, that on both the moral and civil levels, there is a serious need to disabuse the public of any opinion that law is primarily minimal and punitive.

Finally, this change of attitude can be achieved in a formal manner within the lecture halls and classrooms of our law schools, our colleges, and universities. It seems that in such a setting the professors of jurisprudence, medical ethics, and moral philosophy could emphasize the educative force of law for inculcating a public morality in our citizens that would assure the true common good of all—the good of man as man. This same objective can be achieved in another way by legislating sound public policy that will provide for the moral order as well as for the civil order of society. The consequences of this could be a moral consensus among our citizens which is sufficiently compelling to reawaken that timeless declaration of our Founding Fathers: "that all men are created equal, that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."

May St. Thomas More, patron of *The Catholic Lawyer*, and witness by his own martyrdom to the conscience of the law, pray for us.

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[17] Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).