Can Law And Human Freedom Be Reconciled In Modern Society?

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CAN LAW AND HUMAN FREEDOM BE RECONCILED IN MODERN SOCIETY?
by
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April 6, 1970
(Date)
To those who encourage rather than criticize!
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INTRODUCTION

Underlying every form of government, said James Hallowell, in The Moral Foundations of Democracy, is some basic conception of the nature of man and the meaning of human existence. A governmental mechanism is preconditioned by and dependent upon the basic philosophy of its framers. Likewise, the American philosophy of government flows from the "American" philosophy of man. Furthermore, the Declaration of Independence is the instrument which sets forth the ideals and reflects the standards of what has been held as the American Creed. "And today it remains the American Conscience: a constant challenge to those who would subvert our democratic process by denying persons their unalienable rights."¹

During the period which gave form to the Declaration, men spoke of unalienable, natural rights.

We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights...

Nearly two centuries later, men are still conscious of such human rights. These are the rights that distinguish men from the other creatures who inhabit the earth; the

rights that make for the "human-ness" of the human being. Some saw the dignity of the individual, his "intrinsic nobility," as flowing from the belief that all men are created by God. Others saw man as unique and inviolable on strictly humanistic grounds. Consequently, the framers created a government geared to the purpose of securing their natural rights.

That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed...

This is the theory; this is the basic conception with regard to the nature of man and the meaning of human existence which underlies the culture and civilization of this nation.

Power tends to corrupt; absolute power tends to corrupt absolutely, warned Lord Acton. The framers of the American system, aware of such danger, were careful to place limits on their governmental apparatus. As a result the 1770's witnessed the most unique and balanced system of freedom and restraint since the beginning of history. The dawn of constitutionalism in the modern sense, as a method of limiting governmental power as well as establishing it, was ushered in when the conviction that the individual must be protected against the government was articulated in the Bill of Rights.
The Bill of Rights is the foremost declaration of freedom. Man must be free. The human spirit requires freedom for self fulfillment. Therefore, the realm of privacy must be held sacred. However, since man is not self sufficient, he can fulfill himself only in terms of others. Consequently, men must form a community. Man has one nature; -essential, abstract, theoretical. But this nature is two-dimensional. On the one hand, man is individual. In this perspective, each man is totally unique, identical to no other person in existence. On the other hand, however, man is at the same time communal. In this view, all men are similar creatures in search of a common end, -self fulfillment thru self preservation.

Man, possessing one, two-dimensional nature, acknowledges a "split identity." Through his consciousness (of self) man is aware that he is a person through his freedom. At the same time, he is cognizant of the fact that he is one within a community of persons through his freedom and responsibility with regard to others. This is the existential, concrete consideration.

Public Man, the social being, is guided and regulated by the laws of the community. In a like manner, Private Man, the person, is guided by conscience. Most unfortunately, the dictates of conscience and the demands of the law sometimes appear to be inconsistent with each other.
Man's conscience makes him aware of his freedom. Law must give concrete expression to human freedom. A problem arises in modern society when the law fails to recognize freedom as a right. Hence, a challenge presents itself. Modern society must reconcile, i.e., bring into harmony, the conflict between the dictates of conscience and the demands of the law so that one complements the other.

To reconcile such a conflict requires an understanding of the nature of law, the essence of freedom and the meaning of human existence. The methodology of this paper will investigate these areas and analyze concrete examples of modern conflict with regard to law and human freedom. It is the purpose of this paper to show that law and human freedom MUST be reconciled, that they CAN be reconciled, and that they WILL be reconciled.
Chapter I. Law and Public Man.
The origin of law cannot be dated. It is a phenomenon that has evolved over time. Down through history legal philosophers have propounded many definitions of law. Some considered it to be a science, others thought of it as "right reason." Furthermore, each person has his own ideas as to the nature, function, and purpose of the law. These personal ideas are the product of each man's individual experience with the law. For example, citizens see law as rules which must be obeyed; lawyers see law as a vocation; judges see law as guidelines to decision-making; legislators see law as something they create; social scientists see law as judicial review and civil liberties; and so on.

This diversity of definition bears witness to the fact that the content or scope of the law is indeed diverse, vast, and complicated. As a result the "essence" of law is a most difficult concept to capture in the substance of a few sentences. Many such attempts usually define only one facet of the law to the exclusion of other vital areas. As a result, most efforts have done an injustice to law by identifying it with something else and thus limiting its broad character and shrinking its perimeter.

Too often law is identified with morals. Granted, both law and morals consist of rules and principles.
governing human conduct. But, many moral principles are not embodied in the law. The danger in associating the two is that such an identity results in a fallacy which holds that all moral matters are the subject of legislation. In vehement dispute, however, it must be recognized that privacy is a right which is precious to the individual and must not be infringed upon. Nevertheless, somewhat paradoxically, law will enforce the moral values of a particular society to the degree demanded by the common good. Moreover, "the whole majesty of the law, when supported by the collective conscience of the people, will not only enforce but could also create morality."²

A second notion has identified law with order. This again is too narrow. Such an identification focuses on law solely as a means of social harmony. However, law doesn't always arise out of social controversy. It may have as its purpose, not regulation, but rather the extension or enhancement of human freedom. Considering law as merely the "politics of order" results in inadequate lump-sum thinking. An important function of law is securing order and maintaining peace and tranquility, but, it is not the only function or purpose of law.

Another fallacious identity arises when men think of law as politics. Such a statement falls far short of explaining the essence of law. Rather, it merely stresses a force that influences law. Moreover, it must be borne in mind that politics is only one of many factors which influences legislation. And, ironically enough, the relationship of politics to law is many times remote indeed.

Hence to ask for a definition of law is analogous to asking for a definition of life. Both encompass so much. Possibly, however, the Thomistic synthesis of Christian theology and Aristotelian philosophy produced the notion which comes closest to revealing the "essence" of law in simplified terms. According to this conception, law is derived from a greater objective reality. St. Thomas defined law as: "an ordinance of reason for the common good, made by him who has care of the community, and promulgated."\(^3\)

Here a dialectical argument finds harmony. The thesis, the Reason Theory, and the antithesis, the Will Theory, with regard to the source of law blend into

synthetic unity on the merits of this definition. So stated, law includes both reason and will, each in its own place. Moreover, this definition reveals the scope of law: all acts deemed necessary to insure and promote the common good. Finally, implicit in the above definition is the concept of legitimacy with regard to law. At the outset it must be understood that to be valid law must be the product of public consensus. When we allude to such concepts as "right reason" and "public consensus" we are bearing witness to the fact that we of a democracy make a basic act of faith in man. Heirs of the Judaeo-Christian Tradition, we inarticulately and subconsciously believe that man is basically intelligent, rational, and reasonably capable of achieving what is "right." Presupposed is the fact that the public conscience, the reservoir of rational thought, is both formed and informed. Once this is granted, it can be said that promulgated law, an ordinance of reason, is right, just, valid, or legitimate. Theoretically, this is law in its purest sense.

Law, then, is to the public as conscience is to

Many, even most, hold the Thomistic notion as antithetical, i.e., as only a reflection of the Reason Theory. However, the Will Theory, liberally interpreted, can be inferred. Will does not negate reason. With this in mind, reason can be seen as accounting for the formulation of legal content, whereas will, conscious and deliberate action whether based on reason, greed for power or whatever, can be seen as accounting for making it known (promulgated) to the public.
private realm. This must be the guiding maxim in any discussion involving law versus conscience. A notion even more intangible than that of law, conscience is a most unique concept indeed. Law is the natural outgrowth of communal living. In a somewhat similar sense, conscience is an attribute of man which flows from his very nature. Furthermore, it is a quality which complements human nature. Man, by nature, is an entity which must be free. 

Conscience is man's experience of his natural freedom. As stated by Peter Riga, "conscience is man's experience of freedom which makes him aware of his responsibility." 

Hence, conscience is the essence of human freedom, man's natural right to act positively toward goals he has chosen.

Now the question arises. What is the status of the private conscience in the face of public law? This question has come to the front and cannot be forgotten until it is answered. Undoubtedly, this query will find its reply in how the conscientious objector is handled in the United States in this decade. In this specific instance public law does not coincide with the dictates of an individual's conscience. In such a situation, a question of allegiance arises. Which way is a man to turn? "Follow your conscience," some scream. "Obey the law," reprimand others. And, there

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are even those who utter, "Who knows?" Let's examine the argument.

The conscientious objector contends that he must follow his conscience absolutely. The inarticulate premise of this position is that man is rational and free. This fact is hardly one to be disputed. Hence, freedom has come to be recognized as a right due to the fact that it is derived from the very nature of man. Conscience, which goes to the very essence of man, is man's experience of this freedom. And, freedom can't be divorced from responsibility. Therefore, once man becomes aware of his responsibility through conscience, it is his duty to live up to it. Finally, and of utmost importance, is the fact that the conscientious objector considers the dictates of his conscience to be positively "right."

Our Judaeo-Christian Tradition teaches that man has dignity, is worthy of respect, and is valuable as a human being. So, the argument runs, if a person follows this pattern of thinking he could not possibly participate in a useless war which snuffs out human life on a mass scale without losing all semblance of moral integrity. Consequently, the conscientious objector believes that it is his moral responsibility to refuse to participate in such a war "though the heavens fall." Furthermore, he concludes that the freedom of the individual to follow his conscience is absolute and must not be hampered by
public law. Therefore, since the law, which requires a man to serve in the armed forces of the United States and while serving to kill if ordered, conflicts with this individual's conscience, then that individual has the duty of opposing the law even to the point of total disobedience.

As always, however, there are two sides to the question. The conscientious objector is opposed by those who declare that the law must be obeyed at all costs. Proponents of this view confirm the fact that it is in our best national interest to be strong militarily. Practically speaking, few could dispute this point. Moreover, in the words of General Hershey, "history does not support the theory that survival can be secured by mercenaries." Therefore, since the past gives no proof that a professional army is adequate, a draft system has been set up whereby men are inducted into the Armed Services by law. Supporters of the present draft mechanism consider the two year obligation merely as a "tax" on man's time. Although proponents of this view do not completely rule out the role of conscience, they concur in saying that the citizen "has the right to protest the system -- yet he cannot go outside the law to do so." The draft is necessary for our national defense, and, as such, dissent, which is of the political

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7 Ibid, p. 7.
arena, must not be allowed to endanger its effectiveness. Therefore, the edict of Congress, the representative mouthpiece of the national moral consensus, must be upheld no matter what. Under no circumstances, say the strict militarists, can the law be abused through disobedience. And, one who does break the law, in this case one who refuses to be inducted into the army, must suffer the consequences.

As is apparent, the battle line has been drawn. The whole dispute, it seems, revolves around the notion of responsibility. The one side claims that the responsibility of man as directed by conscience is to refuse obedience to the law because it is morally wrong in terms of individual dignity. Conversely, the other side holds that man's responsibility lies in compliance with the law. Yet at the same time both recognize that (1) man is free and rational; and, (2) that freedom can't be divorced from responsibility. However, each interprets this freedom in terms of responsibility differently and each calls for a distinct course of action. Under the circumstances, just what then is man's responsibility? Before an answer can be attempted it first becomes necessary to critically evaluate the merits and failings of each position.

The conscientious objector calls for total disobedience to a law which he says is immoral, unjust and inconsistent with man's nature. This is by no means a brand new, formerly unheard of proposal. Throughout history, those
who saw the overriding goal of the law as the realization of justice in society considered the enactment of a totally unjust law as a frustration of the chief goal of legal regulation and therefore not worthy of obedience. St. Augustine came to the conclusion that law that was not "just" was no law at all; St. Thomas Aquinas held that an unjust law was not law but a "perversion of law;" and, John Locke pointed out that legislators passing "oppressive and arbitrary laws put themselves into a state of war with the people, who are thereupon absolved from any farther obedience." However, this notion of justice, it must be observed, very closely approaches the realm of absolute individual freedom. And, such absolute thinking misunderstands human relations.

Now pragmatically, such action could prove to be catastrophic. For one moment imagine what would happen if citizens were to act in such a way. In a situation, where each individual man has the liberty to withhold obedience at will, all semblance of order would vanish. Chaos would reign supreme. Survival of the fittest in a "dog-eat-dog" world would be the ensuing medium. This is anarchy! And, to date history has not proven that man can live in the midst of anarchy. Remember, man, since he is not self sufficient, is free and secure only

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in terms of others. As a result men group together in a community. Furthermore, communal living presupposes rules and regulations for the good of all. In the light of this it does not stand to reason that man could experience freedom in any way in the vacuum which would result from legal disobedience and the subsequent decay of ordered society.

However, the other extreme exists also. The strict militarist view is likewise far from adequate. This position demands strict compliance almost to the point of "blind obedience." Unfortunately, political thinkers who have gone before us also have been of the same opinion. A legal philosophy which regards law as a set of rules for the establishment and maintenance of order in society are inclined to uphold the validity and binding force of law regardless of its intrinsic and substantive content. The positivistic thinker, John Austin, for example, said that law, in itself, has authoritative force and must be applied and obeyed regardless of the reasonableness of the enacted measures. To Austin and men of his mind "unjust" meant "the expression of a subjective and irrational preference by the utterer of the criticism."9

The effect in this case, too, could be devastating.

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A system which calls for blind obedience is in no way anything but totalitarian. Although history has evidenced the fact that man can exist under such a regime, it has at the same time failed to show that such a system is self-perpetuating and satisfactory in creating an environment conducive to the growth of both personal and social freedom. Today the high emigration from iron curtain countries bears witness to this. The very fact that an "iron curtain" was set up in the first place to "imprison" and prevent voluntary withdrawal from such a system is proof positive that totalitarian rule misinterprets human nature. In the name of human freedom to demand absolute obedience is inherently contradictory and utterly ridiculous.

As a result, it is easy to conclude that neither absolute disobedience nor blind obedience will suffice. Hence some middle ground must be achieved. Rank and absolute thinking misunderstands political economy.

Modern man, it is feared, in his extreme egotism, seems to be losing the sense of community. According to John Gardner, "a community, however defined, is something one 'belongs to,' something central to one's identity.

10 It is extreme to brand John Austin, a positivist, as the epitome of totalitarian thinking. However, a regime based on his theory could easily result in totalitarian rule.
It is a repository of shared values and shared goals. Furthermore, the loss of the sense of community is extremely dangerous. "In some ways modern society binds the individual too tightly, but in other ways it holds him too loosely -- and the latter causes as much pain as the former. He feels constrained by the conformity required in a highly organized society, but he also feels lost and without moorings. And both feelings may be traced to the same cause: the disappearance of the natural community and its replacement by formula controls that irk and give no sense of security." Most important a community is the arena in which a man can experience freedom and exercise responsibility, both as an individual person and as a social being. The natural community, or more narrowly defined - the State, is established as the servant of the individuals within it. Hence it is the medium for the enhancement of human freedom.

Now, since fulfillment can be secured only in terms of others it becomes apparent that a give and take attitude must be a prerequisite of communal living. The individual must accept certain kinds of responsibility and the State must create the institutional framework in which individual

12Ibid, p. 6
responsibility is feasible. Thus, the individual contributes to the State and, in turn, derives benefits from it.

In the light of this it now becomes possible to answer our original question. What is the individual's responsibility with regard to the dictates of his conscience and the demands of the law? First of all, man's primary responsibility is to his own self fulfillment. Logically then, since he can do this only by securing the freedom of others, it is his responsibility to comply with the rules of society which are set up to achieve this goal. Man is at the zenith with regard to freedom when the sum total of all the individuals comprising the society of which he is a part are free and secure. Therefore, it would seem that the conscience of the person, if properly formed and informed, should recognize this and direct the citizen to comply with the law so as to secure the common good. If the challenge is thought of in this light, it can be said that by so acting man at one and the same time is fulfilling his responsibility to himself, as a person, and to others by creating an environment conducive to the growth of social and, in turn, personal freedom.

But, there is a further consideration. Law is an outgrowth of the community in that it is an expression of the values of those forming it. Theoretically then,
the values of the community should be consistent with, if not identical to those of the individuals comprising it. However, it must be concluded that due to new discoveries in human relations, or new insights into the nature of man and the meaning of human existence, new values come to the fore. Consequently, a law may become outdated and no longer proper. The claim voiced by the conscientious objector can be considered as such. The shift in values is evidenced by the expression that to pick and choose among wars is a matter of conscience not politics. In connection with this the Just War Doctrine arises. According to definition a war is "just" if (1) declared; (2) carried out by legitimate authority; (3) for a just cause; and, (4) the good to be gained must be greater than the evil overcome. Therefore, it stands to reason that if there is such a thing as a just war, there must be such a thing as an unjust war which the citizen has the right to reject. Hence, strictly on grounds of moral argument, the right conscientiously to object to participation in a particular war is incontestable. If guided by this pattern of thought, it becomes man's responsibility to change the law so as to bring it into conformity with current standards by getting this right legally recognized. The methodology for bringing about this change must also be derived and carried out rationally and intelligently. It certainly is not found in blind obedience nor can it
possibly be found in outright disobedience to the present law. This is evident when one considers the devastating effect of either method. Rather, intelligently expressed, the influence of public opinion, an expression of the values of individuals united, must be exerted upon the existing political mechanism and change carried out in a peaceful and rational way. Furthermore, this must not be considered as an over optimistic attitude especially in terms of the United States. "A high level of morale is essential if a society is to succeed in the arduous task of renewal. The members of society must have faith in the possibility of achieving their shared goals."¹³ That we have existed for nearly two centuries should lead us to believe that our political institutions have been and will continue to be responsive to desired and needed change. Despair in the political arena could be fatal. Finally, looking back on a Civil War, on race riots, and the like, we must take the vow that violent irrationality will not be repeated in our history with regard to minority rights.

The conscientious objectors, possibly still in the minority, possess one set of values - highly individualistic. The strict militarists possess still another - more socialistic. The conscientious objector calls for a change in the law

to bring it into conformity with his standards which place little emphasis on the common good. The militarist is at present quite complacent. It is my contention that change can be secured and both sides satisfied. In this specific instance I believe the desired change could be carried out by legislation which continues induction of eligible men into the armed services but which at the same time provides for noncombatant immunity for those who express sincere opposition in terms of conscience. Under this, a person who sincerely believes that a war is wrong would not have to participate in the actual waging of the war. But, at the same time he could fulfill his responsibility to the community and in turn, to himself by indirectly helping to insure national security - a matter of utmost importance if man is to exist (in freedom) at all.

Finally, law so vitally important to the common good must be obeyed until it is changed. I have faith that the plight of the conscientious objector will become legally recognized. I hope it will come speedily.

In conclusion I hope it is now apparent that law and human freedom MUST be reconciled if man is to live in peace and harmony as a person and as a social being. Furthermore, I hope it is evident that law and human freedom CAN be reconciled by changing the law so as to bring it into conformity with the highest values
of those comprising the body politic. Finally, law and human freedom WILL be reconciled as citizens accept the challenge, recognize and exercise their responsibility, and strive for renewal in a growing nation.
Chapter II. Law and Private Man.
Law has been employed to bear the limitless burden of social control, to carry out as far as possible the work of the home and in some instances to even legislate morality. "Law secures interest by punishment, by prevention, by specific redress and the wit of man has discovered no further possibilities of juridical action."14 Up to this point the stress has been on law as the means of social control and national security. Law, as promulgated, must be obeyed when it is dedicated strictly to achieving the common good. Where national security and social control are involved, the law, it seems, since it is articulate, representative legislation, must be held above reproach.15 Now then, with the preservation of the State so important, isn't there a real danger that the political environment will be polluted by an explosive atmosphere similar to that of a police state?

The syllogistic logician might very well arrive at this conclusion. However, this deduction will not stand up due to a theoretical variable which rests as the cornerstone of democratic thinking. Speaking more specifically, the notion of rights flowing from the


15 The inarticulate premise in this sweeping statement is that a law not in accordance with public consensus will be changed by a responsible citizenry.
very nature of man adorns democracy with its uniqueness. Furthermore, that right which stands above all others as marking the critical distinction between a democracy and a police state is the right to privacy. This is the privilege to be left alone, not only at home, but at the office, at Church, and in association with others. Moreover, Article IV of the Bill of Rights of the Constitution of the United States is the living documentation of the right to privacy.

The right of the people to be secure in their persons, houses, papers, and effects...

It must be noted here that the Fourth Amendment was not intended to provide a right to absolute privacy. The equalizing effect of naked democratic theory at work must be recognized. Just as the government is limited in terms of individual rights, individual rights are limited in terms of public welfare. Therefore, rights, whether they be public or private, can't be conceived of as absolutes; rights can't be divorced from responsibilities.

The right to privacy is essential to a free society. A society in which privacy is systematically attacked and all but eliminated will result in a regime comparable to Nazi Germany. Most fortunate are the citizens of the United States whose government differs radically from the past German regime. Justice Louis Brandeis, in speaking of the traditional relationship
between citizen and government in the U.S. said:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.\textsuperscript{16}

In less prophetic language, they recognized that man, apart from the fact that he is a citizen, is a person. Man, in addition to being a political animal, has a more intimate nature. This is the realm of the personal, the spiritual, the moral. Recognition of this distinction is vital. But, unlike the sum total of man's public activity, each and every private (moral) act of man is not proper material for legal pronouncement.

The relationship between law and morals now becomes the topic of discussion. Too often law is identified with morals. Law and morality are related but are not identical. Both law and morals consist of rules and principles governing human conduct. However, many moral principles are not embodied in the law, and many laws have no moral content.

Nevertheless, two schools of thought are present

on the matter of law and morals. One trend of thought was exposed in Great Britain when the Wolfenden Committee issued its report on Homosexual Offenses and Prostitution published in 1957. The Report made a critical distinction between law (criminal) and sin. Law it said "is to preserve order and decency, to protect the citizen from what is offensive and injurious, and to provide sufficient safeguards against the exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."17 However, and of primary significance is that the Report recognized that "there must remain a realm of private morality and immorality which is in brief and crude terms, not the law's business."18 This opinion is further supported by John Stuart Mill's statement: "The only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others... His own good either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinions of others, to do so


18 Ibid.
would be wise or even right." The United States Supreme Court supported this notion in the case [Griswold vs. Connecticut](https://en.wikipedia.org/wiki/Griswold_v._Connecticut). In the course of its decision the Court held that a Connecticut statute which banned the use of birth control devices was an intrusion into man's privacy.

Sir Patrick Devlin, however, as representative of an opposing view claims that there can be no theoretical limits to legislation against immorality. According to Devlin, society is entitled by means of its laws to protect itself from dangers, whether from within or without. The suppression of vice is as much the law's business as the suppression of subversive activities.

"The true principle is that the law exists for the protection of society. It does not discharge its function by protecting the individual from injury, annoyance, corruption and exploitation; the law must protect also the institutions and the community of ideas, political and moral, without which people can't live together. Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies..." Hence, he concludes

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that if morality is deemed to be necessary to society, society must use the instrument of teaching, which is doctrine, and of enforcement, which is law. It is this trend of thought which claims that law and morals are identical. As a result the idea that individual morality is valid subject matter for legislation has been adopted by many.

A synthesis of the two schools is necessary. The function of law is not to promote every virtue nor to suppress every vice. Rather only those moral offenses which affect the common good are fit subjects for legislation. This theoretical principle which limits the enforcement of morals is based both on the experience of the common law and on Thomistic teaching. The common law as it developed was very careful to first of all establish that harm would come to society before it established a new offense. The common good of persons seemed to be the maxim. Along these same lines, history has recorded St. Thomas as saying that human law "does not prescribe concerning all the acts of every virtue: but only in regard to those that are ordainable to the common good -either immediately, as when certain things are done directly for the common good, -or mediately, as when a lawgiver prescribes certain things pertaining to good order, whereby the citizens are directed in the upholding of the common good of justice
and peace." Having erected this principle it does not necessarily follow that every moral offense affecting the common good will be made a crime but only that it may be. The point to be emphasized is that moral offenses not affecting the common welfare should be excluded from the scope of the law.

Law will enforce the moral values of a particular society to the degree demanded by the common good. Moral consensus, i.e., moral ideas and ideals of conduct, is included under the concept of the common good. Although education, persuasion, and actual behavior have greater influence in preserving this consensus, the force of law can't be ruled out. This consensus is most likely to be destroyed by adverse public acts, but it cannot be said with any certainty that a contrary private act will have no effect on the common good. Euthanasia, for example, may very well be a private act, but making it legitimate would gravely modify the principle of the sanctity of life, a basic premise of the present moral consensus. Whether public or private behavior seriously threatens the fabric of society, and thus should be outlawed, is a question dependant upon an analysis of the prevailing attitudes and beliefs of a given society. Take abortion for example.

On this topic Bernard J. Ransil, M.D., in his book, *Abortion*, contends that each case should be evaluated on its own therapeutic merits and on how it is liable to affect human welfare. To snuff out "existing life" could very well corrupt present views with regard to the dignity of human existence. But, at the same time, the psychological effect that bearing an unwanted child may leave on a mother may have a profound and degrading effect on the status of the familial institution which rests at the very base of society. To point up the foregoing facts is not to say that one or the other is "right." Rather, the purpose is to inject a note of caution. Each specific instance must be evaluated in relation to its effect on society as a whole. When law is brought to bear in a moral situation it must be extremely careful not to create a situation which may give rise to greater evils than those it is intended to eradicate.

Finally, I must conclude that in a moral situation when the common good is not affected, even the collective conscience of society must not be allowed to promulgate "communal morality" based on majority rule. In a sense, what is being called for is legislation which prohibits legislation in such an instance. The right to privacy must flourish!
Chapter III. Attitude.
With the advent of 1970, we leave behind a decade of bewildering—often tragic—contradictions and enter an era both bright with promise and fraught with peril. To proclaim an ideal is one thing, but to live up to it is quite another. In this context the words of St. James ring clear: "Faith without works is dead." An even more pessimistic note is struck when it is realized that to profess a belief while at the same time acting in a manner inconsistent with it is the height of official hypocrisy. Most shocking of all is the fact that, upon a cursory glance at American life, many citizens have echoed that inconsistency between ideology and action may very well have crept into the lifeblood of this society. According to Arthur Schlesinger, "the decade of the sixties, immersed in the savagery of present difference, can no longer repress the theme of discord. We have suddenly been reminded of ambiguous strains in our legacy from history, of national instincts for aggression and destruction which have long warred with a national capacity for civility and idealism." Furthermore, ingrained in the American mentality since the start has been the zenephobic attitude of superiority ready to

accept and overcome any conceivable challenge. Much weight must be given to this notion in evaluating the reasons for success in facing such hard times as the Great Civil War, the Great Depression, and the Great World Wars. But today the United States is facing a "crisis of confidence" as many of its citizens are harboring doubts as to whether or not present leaders can solve such crucial problems as Russian and Chinese aggression, urban ghettos, polluted water and contaminated air, poverty, unemployment, inflation, as well as many others. Such a doubting complex will only add pitfall to the search for reconciliation between the dictates of the law and the demands of human freedom. Declining morale and internal decay have led to the downfall of civilizations as great as that of the Romans. History must never be able to look back on this nation as a civilization of the past which came tumbling down because despair eroded its gallant spirit. The great American dream which started as an experiment must be allowed to run to completion. Despair, destructive dissent and disgust could be the catalytic agents which spell out failure for the noblest attempt ever in constitutionalism.

Faith in constitutionalism, in democracy, in man must not diminish in our midst. Our salvation will never be handed to us. It is up to us to earn it. The
United States is merely a reflection of its citizens.

In this context the words of Walt Whitman's, *By Blue Ontario's Shore*, come to mind.

O I see' flashing that this America is only you and me,
Its power, weapons, testimony, are you and me
Its crimes, lies, thefts, defections, are you and me
Its Congress is you and me, the officers, capitolis,
armies, ships are you and me...

I dare not shirk any part of myself,
Not any part of America good or bad
Not to build for that which builds for mankind
Not to balance ranks, complexions, creeds and the sexes...

I will not be outfaced by irrational things,
I will penetrate what it is in them that is sarcastic upon me,
I will make cities and civilizations defer to me,
This is what I have learnt from America - it is the
amount and I teach again...

America isolated yet embodying all, what is it
finally except myself.
These States, what are they except myself.

Disciples of freedom, you and I are responsible for what
America is. Artists of legislation, you and I are responsible
for what it becomes!
Selected Bibliography


