

## NOTE

### IN DEFENSE OF THE PRINCIPLE OF OVERRIDING RIGHT

In a recent survey of theories put forward to solve "the practical problem of decision-making, especially in difficult circumstances, by attempting to formulate new practical principles," Richard A. McCormick, S.J., deals with three proposed principles: Peter Chirico's principle of tension, Charles E. Curran's principle of compromise, and the principle of overriding right that I formulated in the *Furrow* of October, 1966.<sup>1</sup>

The principle of overriding right boils down to this. Situations arise in life when a right clashes with a duty. For instance, when I am attacked, my right to life clashes with my duty to respect the life of another; when I am in dire need, my right to life clashes with my duty to respect the property of another; when an infected organ threatens my life, my right to life clashes with my duty to preserve my bodily integrity; when I am bound by secrecy, my right to preserve the secret may clash with my duty to tell the truth. In all these cases we admit that the right predominates over the duty. This seems to indicate that we need to formulate the general principle underlying these various particular convictions. The formulation I proposed was: "When the infringement of an obligation is necessarily involved in the exercise of a proportionate right, the obligation ceases." I suggested that this principle might be useful in solving the moral problems of contraception, sterilization, and transplantation of organs from living people.

#### PRINCIPLE OR SOLUTION?

Fr. McCormick does not agree. He maintains that the principle of the overriding right is not a principle at all. His chief reason for saying this is that "it does not provide the means of solving a problem, but simply formulates a solution at which one has already arrived" (p. 757). This is his main contention, but in illustrating it he makes one astonishing observation. "Under analysis, the 'principle' only asserts that if one duty is more important than another and I cannot do justice to both, then I must discharge that which is more important. Fair enough. But that does not tell me and cannot tell me which duty is more important or why it is so. This a genuine principle should do" (*ibid.*).

Fr. McCormick should rebuke St. Thomas for a similar failure. St. Thomas

<sup>1</sup> Cf. Richard A. McCormick, S.J., "Notes on Moral Theology: January-June, 1967," *THEOLOGICAL STUDIES* 28 (1967) 753-60. See in this connection my "A New Moral Principle: When Right and Duty Clash," *Furrow* 17 (1966) 619-22; for subsequent discussion cf. *ibid.* 18 (1967) 167-70, 275-77.

says: "This is the first principle of law, that good is to be pursued and done, and evil is to be avoided."<sup>2</sup> Fair enough. But that does not tell me and cannot tell me what is good and what is evil or why it is so. Fr. McCormick is expecting too much if he wants a built-in infallible guide to application supplied with every moral principle.

But to return to his main ground of criticism: Is it true that the principle of overriding right simply formulates a solution at which one has already arrived? Fr. McCormick attempts to prove this with two examples. The first is concerned with the situation of extreme need, and according to him,

to say that my right to life predominates over my duty to respect my neighbor's property is simply a way of saying that we have a basic grasp on the significance of human life and material goods and have decided, correctly of course, that material goods are for man. It is this judgment which is the basis for my decision—my principle, if you wish. Once we have understood the relationship between human life and material goods, we are able to assert the inherent limitations on the right to material goods. Therefore, it is only after I have taken a position on the hierarchy of values that I am positioned to see whether a certain form of conduct involving these values is promotive of human growth or not (pp. 757–58).

Fr. McCormick seems to be saying here that the principle of overriding right is just another way of formulating the conclusion that, in a clash between my right to life and my duty to respect my neighbor's property, my right predominates. He has failed to notice that whereas the latter conclusion is concerned only with the case of a man in extreme need, the principle of overriding right is concerned with all cases in which a sufficiently important right clashes with a duty. I fail to see how this general statement can be said simply to formulate a conclusion about the priority of one's life over one's neighbor's property.

According to Fr. McCormick, it is sufficient to know the hierarchy of values and realize that life has priority over property to reach the practical moral conclusion that in extreme need a man can take his neighbor's property. With this I cannot agree. It is one thing to know that life is more important than property. It is another thing to decide that in this moment of need my duty to respect my neighbor's property is annulled. How do I pass from the conviction, with which I normally live, that it is wrong to take my neighbor's property, to the conclusion that in this moment of need it is not wrong? The persuasion that life is more important than property is not enough. That is always with me. Some new consideration must have entered, the consideration that here and now, in the clash between my right

<sup>2</sup> *Sum. theol.* 1/2, q. 94, a. 2.

to life and my duty to respect my neighbor's property, my right predominates. And I could not arrive at that conclusion unless in some vague and implicit way I was convinced that whenever there is a clash between a sufficiently important right and a duty, the right predominates. My argument against Fr. McCormick comes to this. It is not enough to know that life is more important than property, and that property is for man, to reach the conclusion that in extreme need I may take the property of another. I also need a principle persuading me that when my right to life clashes with my duty to respect my neighbor's property, the right *annuls* the duty. The knowledge that life is more important than property is the minor of the syllogism. The principle that, in a clash between a sufficiently important right and a duty, the right predominates is the major premise. This principle, far from being just another way of formulating the conclusion, is the principle on which the conclusion depends.

Fr. McCormick's second example is drawn from marriage. He writes:

One could put the matter negatively as follows. Is it not precisely because we may have been one-sided or at least vague about the values of Christian marriage that we have been vague about the meaning of actions making procreation in marriage impossible? Would sterilization actually promote the long-run total good of the marriage in some instances or not? This is what the contraceptive controversy is all about. To say that "my right to conjugal union predominates over my duty to preserve bodily integrity" is not to offer a principle of solution to this question; it is rather to formulate a solution already arrived at on other grounds. And that is why Archbishop Hurley has not offered a principle at all (p. 758).

If I have understood this passage correctly, Fr. McCormick maintains that the principle of overriding right offers no help in the sterilization debate because one cannot assert that the right to conjugal union predominates over the duty to preserve bodily integrity until one has proved this assertion on other grounds.

Again Fr. McCormick seems to have misunderstood the function of a principle. A principle is a general statement which can serve as a major premise in reasoning. Normally a conclusion cannot be drawn from it without the help of a minor premise, which applies it to a particular area of debate. I fully agree that the principle of overriding right cannot provide the conclusion that in certain circumstances sterilization is lawful, without a minor premise that narrows the general principle down to this particular case.

Let us set it out this way: *Major*: When the infringement of a duty is necessarily involved in the exercise of a proportionate right, the obligation

ceases. *Minor*: But the sterilization of a married woman for health reasons is the infringement of an obligation (to preserve bodily integrity) necessary for the exercise of her proportionate right to conjugal union. *Therefore* the obligation (to preserve bodily integrity) ceases.

The minor must be proved, and to this end it is necessary to demonstrate (1) that the woman cannot exercise her right to conjugal union without sterilization, and (2) that the right to conjugal union is more important than the duty to preserve the integrity of her generative organs.

These are the issues that Fr. McCormick is concerned about. He is so concerned about the minor premise of the argument that he does not think the major is necessary, or dismisses it as merely another way of formulating the conclusion. But without the major premise, which is the principle of overriding right, the minor alone would be valueless; for even though we may be able to prove that sterilization is necessary and that the right to conjugal union is more important than the physical integrity of generative organs, we could not conclude that sterilization is lawful unless we accepted the principle that, in the clash between a sufficiently important right and a duty, the duty is annulled.

As in the case of extreme need, knowledge of priorities is not enough. We need a principle informing us that when there is a clash, one value annuls the other.

#### THE PRINCIPLE OF TOTALITY

In dismissing the usefulness of the principle of overriding right to illuminate the sterilization problem, Fr. McCormick hints that a much better case can be made out with the principle of totality. He writes: "Would sterilization actually promote the long-run total good of the marriage in some instances or not? This is what the contraceptive controversy is all about" (p. 758). He does not commit himself to the argument from totality, but indicates that this is where we must look for the action in the debate on family morality.

Unfortunately, through inability to keep up with all the literature on the subject, I have not come across a formulation of the principle of totality in all the fulness some people attribute to it nowadays. Before the contraception debate, the principle of totality applied only to physical persons and not to the corporate person of the family. It could be formulated as follows. When a part of the body endangers the whole, the part may be sacrificed for the whole. It was on this principle of totality that surgical operations were justified.

There has been a tendency in some quarters to say that the same principle

can be applied to the family to justify contraception. The application would be: when that part of the family which is the integrity of the generative process endangers the family, it can be sacrificed for the good of the whole family.

There may be something valuable in this approach, but it is not without difficulties. The main problem is that of formulating the principle in such a way that it will not run wild. In the case of the family, we are dealing with a corporate person made up of physical persons, father, mother, and children, who enjoy their own individual rights. Any formulation of the principle of totality applicable to the family must not allow applications contrary to the rights of the members. Thus we cannot say: when a part endangers the whole, that part may be sacrificed for the whole. This would justify the abandonment or killing of one child for the good of the rest of the family.

Furthermore, if the principle of totality can be applied to the corporate person of the family, is there anything to prevent its being applied to the corporate person of the state? Unless it is very carefully formulated, it may very well become a principle of totalitarianism. We should beware, therefore, of invoking the principle of totality in respect of collectivities until we have discovered a foolproof formulation—which I suspect will be very hard to find.

At any rate, I should like to propose that the principle of totality, even as applied to physical persons, is redundant if we accept the principle of the overriding right. The principle of totality justifies surgical operations on the ground that a part of the body endangering the whole may be sacrificed for the sake of the whole. Normally it is wrong to mutilate the body. It becomes lawful when an infected or defective part endangers the whole. If we ask ourselves why this is so, the only reason we can give is that our right to life overrides our duty to preserve bodily integrity—the principle of overriding right again.

#### DELIMITATION OF RIGHTS AND DUTIES

Fr. McCormick concludes his criticism of the principle of overriding right with the following comment:

A genuine clash [between a right and a duty] is only possible if there is no inherent limitation on rights and duties. But there are such limitations. Therefore, to adopt a formulation which speaks of a clash is both to suggest the illimitability of rights and duties and to entice others away from the hard work of delimiting such rights and duties. This is somewhat less than happy (p. 758).

In reply I must point out that my formulation does not speak of a clash.

It says: when the infringement of an obligation is necessarily involved in the exercise of a proportionate right, the obligation ceases. True enough, in working out the formulation I do speak of a clash between right and duty. Perhaps it would have been better to speak of an apparent clash, because, as Fr. McCormick implies, a genuine or objective clash is not possible. The clash is only apparent, in the imperfect understanding of the human mind. Still, for the human mind the clash is genuine and agonizing enough, as has often been the case in regard to contraception and sterilization.

All I am attempting to say is that there must be some such general principle as the one I have enunciated guiding our minds in resolving these apparent clashes. This general principle we have so far failed to formulate in our moral theology. Yet it must be there lurking in the hidden recesses of our mind and making it possible for us to justify self-defense, the taking of another man's property in extreme need, surgical operations, and mental reservations. In each of these cases we have managed to make an exception to a general moral prohibition, and, as far as I can see, always on the ground that a sufficiently important right overrides the duty expressed in the prohibition. I would say, too, that the principle of double effect is an expression of the same implicit conviction. The principle of double effect allows us to perform an action which will have both a good effect and an evil effect, provided the good is proportionate to the evil. Once again it is a case of right and duty clashing, or appearing to clash, and the right overriding the duty.

If clash then is understood in the sense of an apparent clash or a clash as far as our human understanding goes, there is no danger of asserting the general illimitability of rights and duties. I am sure that Fr. McCormick will agree that certain rights and duties are illimitable, like the right and duty to avoid blasphemy.

My contention is that if we formulate the implicit conviction that when a sufficiently important right appears to clash with a duty, the right predominates, we have a principle that can be of enormous service to us. If we had had this principle in the past, perhaps we would have been less prone to talk of the intrinsic malice of things like contraception and sterilization and the removal of an organ from a living person for transplantation to someone in grave need. It is interesting to note that the majority report of the Papal Birth Control Commission invokes the principle of overriding right in a strikingly explicit fashion: "This obligation of conscience for not generating springs from the rights of the already existing child or the rights of a future child."<sup>3</sup> Here the infringement of the obligation (to generate) is

<sup>3</sup> "The Birth Control Report III: The Argument for Reform. IV: Moral Criteria with Regard to Human Intervention in Conception," (London) *Tablet* 221 (May 6, 1967) 513.

necessarily involved in the exercise of the proportionate right of the parents to respect the rights "of the already existing child or the rights of a future child."

The mere formulation of the principle is not going to put an end to all the hard work of delimiting rights and duties. A principle, though it provides some intellectual light, still leaves to the human mind the difficult task of application. In the case of contraception and sterilization, the principle of overriding right says: if you can find a right sufficiently important to override the duty of avoiding what on the face of things is against nature, the right predominates over the duty. This, I think, is an advance on the old position, according to which there was no hope of ever finding a justification for contraception or sterilization unless, in the latter case, the generative organs themselves were affected.

The principle opens up new possibilities but, like any general principle, it does not provide a built-in guide to application. The task still remains for the prudent mind to weigh rights and duties and decide whether or not the former outweigh the latter.

Fr. McCormick quotes (p. 758) from L. L. McReavy's criticism of the principle of overriding right: "the precise statement of a moral duty takes account of such rights as may intervene in the matter concerned and, by delimiting both the right and the duty in conformity with the divine order from which they alike derive, it eliminates the very basis of a *contrary* right."

I take the liberty of quoting my reply:

Mgr McReavy then gives the example of killing, and points out that scientific moral theology does not say bluntly that killing a man is wrong, but, by a process of careful analysis, arrives at the conclusion that direct killing of the innocent is intrinsically evil.

In reply I should like to suggest that the process of careful analysis implies the use of the principle of overriding right. One could put it like this. A rough and ready statement of the moral law is that killing a man is wrong. One soon notices, however, that there may be situations in which a man may be justified in killing an aggressor to protect his own life. So, in such cases, one invokes an overriding right to suspend the obligation of not killing.

Keen to define the exact area of what is intrinsically wrong about killing, moralists ended up with the formula that direct killing of the innocent is intrinsically evil. In their concern for a fixed and determined area of the intrinsically evil, they did not notice that they had fallen into the trap of making innocence the reason for the intrinsic evil of killing and not the value of human life itself. If we accept the conclusion that the intrinsic evil of murder is found only in the direct killing of the innocent, we must also accept that killing a man *quod* man is an indifferent act, and that therefore man as man, prescinding from innocence or non-innocence, has no right to life.

Would it not be much more reasonable to say that killing a man is wrong in itself, but that it can be justified if a man attacks you, since your right to life now overrides your obligation to respect his life?

The principle of the overriding right has also been used by moralists in defining stealing, but this time without falling into any noticeable trap. In a rough and ready manner one could say that taking what belongs to another is wrong. But immediately we notice that the starving man or the public authority may have good reason to take what belongs to another, so, with a bow to the overriding right, we define stealing as taking what belongs to another against that other's reasonable wish—and we presume that he would not reasonably wish to let the starving man die or impede the public authority in its pursuit of the common good.

Similarly, the morality of mutilation and lying can be defined, if we wish, with due regard to the possible necessity (on account of an overriding right) to remove diseased organs in order to save life or to allow someone to be misled in order to preserve a secret.

If it is true, therefore, that there can be no contrary right when a moral duty is precisely defined, this seems to be because the principle of overriding right has been applied in the very definition. I cannot resist the suspicion that, whenever we have managed in our moral formulas to resolve a conflict between right and duty, we have done so by applying the principle of overriding right—a little misguidedly in the case of the morality of murder, as I have attempted to point out above. . . .

This attempt to answer Mgr McReavy's criticism confirms me in the opinion that situations in which right and duty clash [I should have said "appear to clash"] pervade the moral universe, involving not only positive laws but also some of the most serious obligations of natural law, and that there is therefore an urgent need to formulate a principle governing these situations.

As I see it, we have in fact been using some sort of principle of overriding right to solve many problems. The explicit formulation of the principle may help us to solve a few others by keeping us aware that an aspect of human behaviour, which we thought was fixed for all time as intrinsically good or bad, may have to be reconsidered because of a right that had not previously occurred to us. As I suggested in my *Furrow* article, this might have its importance in matters like birth control, sterilization, transplantation of organs from living persons and so on. It may supply part of the answer, on behalf of natural law morality, to the challenge of situation ethics.<sup>4</sup>

#### A CONTRIBUTION TO NATURAL-LAW MORALITY

There is a tendency today to depreciate natural-law morality. It is understandable. There are always some people ready to jettison a system when its imperfections have become too conspicuous. This has been the case with natural-law morality. The emphasis has been too much on pro-

<sup>4</sup> *Clergy Review* 52 (1967) 480–81.

hibition as the expression of the law instead of on promotion of the good with which natural law is primarily concerned. As we saw earlier, the basic precept of natural law for St. Thomas is "that good is to be pursued and done, and evil is to be avoided." The promotion of good comes before the prohibition of evil. The return to the stress on the promotion of good in natural law has received a tremendous fillip from such documents of the magisterium as Pope John's *Pacem in terris*, Pope Paul's *Populorum progressio*, and Vatican II's Decree on Religious Liberty and Constitution on the Church in the Modern World. They have extolled human freedom, human dignity and responsibility, human rights and human solidarity, and shown the good that in our time must be pursued and done. Inspiration of this nature is never achieved without careful formulation. Our failure in the past was that we became bogged down in certain details, mainly of a prohibitive nature, and overlooked all the fulness of the natural good, how the various parts must be seen in a more complete perspective and how we are always learning.

I hope that the principle I have endeavored to formulate will contribute to this fuller perspective. It has the advantage of emphasizing the objectivity of rights and duties, while recognizing that the human situation is full of apparent clashes in which, in the light of principle, we must apply our prudential judgment to the assessment of priorities and exercise our personal responsibility in deciding which course of action under the circumstances will promote the greater good. It calls for the dedication to objective norms of natural-law morality, and the personal judgment emphasized by situationism.

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