CONSCIENCE AND LAW[1]

A Medieval Disputation
between
Fr Laurence Bright, O.P., Defender, and Fr Edmund Hill, O.P., Objector, with Fr Illtud Evans, O.P., as Moderator

MODERATOR: The subject of this disputation is a fundamental one and touches the centre of every moral dilemma—for the individual as well as for the community at large. Conscience and law. Are they enemies, and is the most we can hope to achieve an armed neutrality, so that the conflict between them can at least be kept within bounds? Or are they brothers, twins—and Siamese twins at that, so that one must necessarily imply the other? Of course we must first want to see what the words mean, for here, as always, we are at the mercy of the labels we use to avoid the painful work of thinking. Conscience—too easily it can be the name for the spontaneous response of anarchy or anguish: law—as easily it can be the title for no nonsense, the totalitarian's eternal alibi.

To decide what is their relationship, then, must demand a careful scrutiny of what their function is: a function that is proper to the human person, with a mind to know and a will to implement his knowledge. That is why the form of this disputation may be specially useful, demanding as it does a patient definition of terms, and a guarded inspection of their use in argument.

Of the method of concession-and-denial I think I need say nothing now: most people are now familiar with this kind of argument. But perhaps I should point out one difference of procedure which we have introduced in order to extend the dialectic as usefully as we may. The disputation will proceed in two directions. First, Fr Laurence Bright will defend the claims of conscience as preceding those of law, and his argument will be taken up in logical form by Fr Edmund Hill. Then their roles will be reversed. Fr Edmund will speak for the claims of law, and this time Fr Laurence will question his conclusions. In this way the respective claims of conscience and law will be examined as

1 The slightly abbreviated text of a Disputation held at the Aquinas Centre, St Dominic's Priory, N.W.5, on May 1, 1958, and broadcast on the Third Programme of the B.B.C.

closely as possible, for the purpose of this disputation is not of course to establish a dialectical triumph on one side or the other. It is to attempt to arrive at the truth: a high ambition, you may think, but one worth perhaps a measure of unaccustomed mental exercise.

And so I call on Fr Laurence Bright to defend the priority of conscience over law.

FR LAURENCE BRIGHT: The purpose of this discussion, it seems to me, is to work out the relative importance of the different factors in a moral judgment. Roughly speaking, conscience stands for the individual factor in such a judgment, law for the factor introduced from external authority, such as the society in which we live or the church to which we belong. Neither of us is going to deny that both factors have to be taken into account; what we have to argue is which is to bear the greater weight in the case of conflict; which, in short, comes first.

Now I think we can take it as common ground that moral behaviour is rational behaviour. Since the nature of man is to be rational, his actions are good when they square with his rationality; on the other hand actions done deliberately in defiance of reason are evil because in one way or another they fall short of properly human standards. I shall not elaborate this analysis, because though I know that many people would wish to challenge it, certain basic positions have to be taken for granted in a discussion of this kind.

We normally say that in moral matters it is a man's conscience which leads him to determine whether a particular course of action is right or wrong. But this still leaves open the question of what conscience is. One hears it said for instance that conscience is an inner voice—the voice of the 'little me' inside, or even the voice of God—which simply says 'Do this' or 'Do that'. I am sure that neither of us accepts such irrational views of conscience, which would lead to moral anarchy if they were fully accepted. No, in line with what I have just said about the character of moral behaviour, conscience must mean a judgment based on rational principles in a particular moral situation. The 'inner voice' notion gets its plausibility from the fact that such a rational judgment about action can often be made very quickly, indeed almost as it were by instinct; but this does not make it any the less reasonable than, say, the decision of an experienced card-player

to put down a particular card. He does it almost in a flash, but he is prepared to defend his play by reasons that were implicitly present and needed only to be drawn out on demand.

Conscience, then, implies a decision based on reasoning. Now though I insist that this reasoning has to be done by the individual who makes the moral judgment, and is not something that can be done for him by any one else whatsoever, at the same time I do not consider it a matter of mere private intuition. Reasoning must always be capable of being brought out into the open for the inspection of others. Like the card-player, I must be able to defend my moral decision, if need be, by argument with others until we come to a mutual agreement that we have reached the truth about this particular matter. In other words, I must be able to state explicitly the moral principles on which I am acting, and set them out if need be as a code of law by which others as well as myself can judge conduct.

Such a code of stated moral principles is traditionally called the natural law. Understood in this way, it clearly presupposes the reasoning of individual consciences, to which it forms the objective correlative. I am not suggesting that mankind as a whole has reached a *consensus* of opinion about the constitution of natural law. On an extreme view you could say that there is hardly any aberration which at some place or time in history has not been taken as the moral norm. Passions, feelings, emotions so easily escape from the control of reason that error is very difficult to avoid. All I maintain is that where differences of opinion exist, argument is always possible, and that agreement can be reached. Whether in practice I should reach it with a cannibal about his unfortunate error of judgment in putting me into the pot, is another matter.

However this may be, my thesis does not concern the natural law, but law as we meet it in our courts of justice. And this surely, some critics will say, is simply the method by which the rulers of the State regulate the behaviour of the citizens for the common good of all. But though I agree that law is concerned with the good of society as a whole, I cannot admit that it simply represents the will of those who are in command. If law were not the product of reason, reason concerned with the order of human activity, it would be meaningless to speak of respect for the laws, as we do in a civilized country. This is why law must be expressed in

language that is understood. You can impose your will on a slave without its use, but the obedience of a free man requires communication in terms of intelligence. The contrast between the two points of view becomes sharp where the State is controlled by evil men; most of us would then agree that we ought not to obey laws which command us to do wrong. The sanction of authority is not essential to law. The force of law comes rather from its agreement with principles of justice from natural law; good men do not feel it as a constraint, and only the criminal is aware of those sanctions which the State imposes.

Does this view of law make it too much like a moral code? Certainly I think it is dangerous to keep them too far apart, as people sometimes try to do. We must of course distinguish crimes punishable by law from private sins of which the law takes no cognizance. But this is merely a matter of convenience, not of principle. A crime is an immoral action which affects the whole community sufficiently for the law to take note of it. Yet in some sense every sin, however private, must do this, by changing the sinner and making him less fit for society; the law however can only concern itself with more obvious attacks on the common good. Finally it will be said that a great deal of legislation is morally neutral. Is it immoral to exceed the speed-limit, for example? I think the answer must be that it is, when we reflect that the purpose of such legislation is to protect our fellow men in areas considered dangerous; and that something similar must be said about many other so-called neutral laws. I do not see how any properly human activity can be morally neutral.

I can sum up these remarks on law by saying that law as we know it in the courts is a determination of the principles of natural law to particular cases. Thus it must be a directive to the conscience, and is certainly never to be broken recklessly; yet in the last resort it is the individual who decides what is his right course of action in virtue of the reason he has been given, and not directly because of any external authority whatsoever. Normally speaking it will only be in rare cases, and with the utmost caution that he decides that a law is unjust and may not be obeyed, but it is of course these rare cases that require a decision of principle such as I have endeavoured to give—cases of genuine conscientious objection to the law as it stands. I will now put my argument very briefly in the form of a syllogism, which will give my friend the

opportunity to comment on, and perhaps modify my views:

A moral judgment comes before law;
Conscience is a moral judgment;
Therefore conscience comes before law.

FR EDMUND HILL: I like your statement of the case very well; there is nothing in it I would quarrel with. But I am afraid I do not really like your syllogism, because it does seem to presuppose that morals and law form two separate and autonomous worlds, or at least that moral judgment does not enter into law itself. This I deny. And so I would distinguish that syllogism as follows:

A moral judgment made by the legislator comes before law, I agree: one made by the subject comes before law, I deny.
Conscience is a moral judgment made by the subject, I agree; made by the legislator, I deny. And so I deny your conclusion.

Law *is* the product of a moral judgment, but of a different sort of moral judgment from conscience. The moral judgment of the legislator as legislator does not bear on the rightness or wrongness of his own particular behaviour here and now, but more generally on the rightness or wrongness of certain types of behaviour in the community at large. It is concerned with establishing more or less general standards, which it embodies in laws. The moral judgment of the subject, precisely as one under the law, is concerned with applying in particular circumstances the standards set him by the law. This moral judgment we call conscience. Unfortunately there is no word I know of for the legislator's moral judgment. I would like to call it jurisprudence.

FR LAURENCE BRIGHT: That is an interesting point you make about the legislator and I will take you up on it. Whatever my syllogism may have suggested, I wanted to make it plain that law itself is the product of moral judgment, that the decision of a legislator to frame a law is a judgment engaging his conscience. And I shall go further and say that since in every judgment of moral value a man must be making his own personal decision, in that sense he is first legislating for himself, though certainly he must also be guided by what existing law has to say on the subject. But if he put law in the first place he would simply be taking over another's decision. So I shall prove my minor premiss in the form in which you have rejected it, as follows:

A decision that a man has to take for himself is a moral judgment made by the legislator;
But conscience is a decision that a man has to take for himself;
Therefore conscience is a moral judgment made by the legislator.

FR EDMUND HILL: I would distinguish that argument as follows:
A decision which a man has to take for himself without recourse to established rules is the moral judgment of a legislator, I agree; a decision which he has to take for himself with recourse to established rules is the moral judgment of a legislator, I deny. Conscience is the decision a man has to take for himself with recourse to established rules, I agree; without recourse to established rules, I deny. And so I deny your conclusion.

Situations do of course arise in which the law says nothing to help a man in a decision he has to make—he may find himself in a more or less lawless society, like every hero of the Wild West. In that case he has to be a law to himself, as we say; which means he has to work out for himself some rule of conduct to guide his decisions about his particular actions here and now. In this case he becomes a quasi-legislator. But this does not make his conscience a legislative moral judgment, or an act of what I called jurisprudence just now. It means that you can analyse his decision into two moral judgments: a jurisprudential one establishing his rule of conduct, and a conscientious one applying that rule. He has not become legislator pure and simple—he remains a subject at the same time, subject to law which he happens to make himself. Not a very satisfactory situation, it is true, and normally society does provide established rules, and so relieve the subject of the extraordinary role of legislator. But one way or the other, the decisions of conscience have recourse to rules which we call law.

FR LAURENCE BRIGHT: That is all very well, but I do not think it meets my point that a man, though he will take account of authority and the rules it establishes where these exist, does not even then necessarily have recourse to them in order to make a moral judgment. For it is always within his own power to decide these questions in the light of the principles which his reason makes plain to him. So I shall again take up the minor premiss of that last syllogism in the form in which you rejected it, and prove it as follows:

A judgment based on rational principles is a decision made without recourse to established rules;
Conscience is a judgment based on rational principles;
Therefore conscience is a decision made without recourse to established rules.

FR EDMUND HILL: I shall distinguish that like this:

A judgment based immediately on rational principles is a decision made without recourse to established rules, I agree; one based remotely on rational principles is a decision made without recourse to established rules, I deny. Conscience is a judgment based remotely on rational principles, I agree; based immediately on them, I deny.

And so I deny your conclusion.

The point is that rational principles of conduct which we call natural law, which are ordinarily called 'common sense notions of right and wrong' or 'principles of natural justice', these are pure generalities of the type 'Do as you would be done by', or a little more specifically 'Thou shalt not kill'—innocent people of course. At the other extreme decisions of conscience are pure particularities—each is unique and irreducible to any other, because conscience is concerned with unique, particular acts here and now. Our moral judgment of conscience, faced continually with the necessity of making these particular decisions, requires to have the general principles of conduct, of the type just mentioned, broken down for it, made more specific and limited and readily applicable to the here and now. This is the function of law, which is a sort of shuttle-service between rational principles of conduct and conscience, and provides a whole hierarchy of gradually less and less general, more and more particular rules of conduct; through these conscience is remotely, but not immediately, based on rational principles.

This go-between function of law operates on two lines. First by a sort of deduction or argument, of concrete analysis of more general into less general principles. Thus 'Thou shalt not kill'—innocent people of course—is a more particular rule easily arguable from the more general 'Do as you would be done by'. But this is not enough. In some circumstances it is rather difficult not to kill—when you are one of many people, for example, driving fast vehicles around. So law has to step in again and by a

sort of arbitration determine rules, which are not deducible from more general principles, in order to make it comparatively easy not to drive lethally; you must drive on the left not on the right. This is a decision which could have been made otherwise. Granted it is a more sensible, because more English, determination than the one which prevails elsewhere; but that is no grounds for conscientiously driving on the left of the road in France; for it is the function of jurisprudence (in the sense I have given that word), not of conscience, to decide such matters. Not for conscience to reason why, but simply to do, and if possible avoid dying, which I suppose it has slightly more chance of doing if it drives along the right and not the left side of Paris streets.

MODERATOR: At this stage of the discussion, rather than let the defender continue along this line of argument with further syllogisms, I shall now call on the objector to state his case, namely that law comes before conscience. The defender will then modify it, by making distinctions in the terms of the argument put forward.

FR EDMUND HILL: We are agreed that reason is the essence of both law and conscience. But I want to stress now that they are different functions of reason. To repeat what has been said already, conscience is the particular judgment of the individual person on his own conduct; it says 'I must do this now', 'I should not have done that then'. Law is the statement of a more or less universal rule of conduct, as we have just seen, and it is made by the legislator not as an individual person—which he rarely is any way —but as a public person concerned with the good of the community as a whole and with the conduct in general of all its members. And so law says: 'This sort of thing must be done by that class of persons in the following sorts of circumstances'.

Law then being the statement of reasonable standards, and conscience being a reasonable judgment on particular behaviour, our ranking of them will depend on a distinction between what the scholastics called the order of exercise and the order of specification. To speak English, it is the difference between the field of actual application of standards in a particular situation, and the field of determining those standards as applicable to many situations; the difference, more or less, between building a house on a particular site, and designing a house-type edifice, small

families, for the use of. In the former field conscience comes first because its business is the application of standards, and if your conscience says one thing and the law another, you follow your conscience or you do wrong. It is the builder, not the designer, who should have the last word on the site. But in the other field law comes first because its business is the determination of standards, the providing of rules for conscience to regulate its decisions by. In this field the rule comes before the thing it regulates, the ruler before the pencil it guides across the paper.

Before stating this case in a syllogism, let me observe that this distinction has all along been implicit in the dialectic of this discussion. While Fr Laurence was stating the priority of conscience in the field of actual application of standards, I was opposing his view-point with arguments concerned with the field of setting those standards at a more general level. Now our roles are reversed, and while I defend the priority of law in this latter field, the order of specification, he will be questioning it in terms of the former field, the order of exercise, or so I surmise. So then I can state my case as follows:

What regulates conscience comes before conscience;
But law regulates conscience;
Therefore law comes before conscience.

FR LAURENCE BRIGHT: The pattern of our discussion does seem to be working out along the lines you suggest, for in order to counter your syllogism I shall draw a distinction from the more concrete point of view of the person who actually exercises his conscience —the viewpoint you were trying to drive me away from in the earlier part of the disputation.

What regulates conscience absolutely comes before conscience, I agree; what regulates it as a guide comes before conscience, I deny. Law regulates conscience as a guide, I agree; absolutely, I deny. And so I deny your conclusion.

A man who takes the law as an absolute rule, to be obeyed without question, has ceased to think—he is allowing the legislator to do his thinking for him. I am sure that most of us find this a temptation; it is a great relief to know that a competent authority has worked out the solution to some complex moral problem, such as the rights and wrongs of nuclear warfare. We want to be spared the agony of decision. But we must resist this temptation

as hard as we can if we are to remain human. Even where the solution has been given, where a law exists, we cannot obey it without question. Normally speaking, of course, we shall be guided by it; we have to take other men's thought into account, and will probably judge it to be correct. But it must never become more than a guide. That is why the legislator himself, in civilized countries, recognizes the possibility of conscientious objection to his laws. I am not suggesting that an arbitrary 'hunch' to disobey could be permitted. The conscientious objector must argue his case in open court, in free rational discussion with his fellow men. By that means we reason to truth in moral matters as in theoretical. This is to use the law as a free man should, to guide his thought, to be judged correct in the majority of cases, but never to become an absolute or dictatorial rule.

FR EDMUND HILL: Perhaps the question of conscientious objection would be better discussed later on. But notice that it is the law which introduces conditions into the obligations it imposes, not the individual conscience. And the cases where this sort of crux is met are in reality conflicts of laws, between which conscience has to choose. For example, supposing there were a civil law making work on Saturdays in a certain trade obligatory. The orthodox Jew acknowledges a religious law forbidding work on Saturdays. Which is he to follow? Naturally the higher, that is the one which is concerned with the good of the nobler, the more universal community. This community, for the Jew, is the people of God, and so he will presumably obey the sabbath law. And a civilized state will make allowances for the Jew's special religious law, and allow him exemption, or conscientious objection to the hypothetical law of obligatory Saturday work. But one way or another the conscience of the orthodox Jew in this case, or of any other conscientious objector in parallel cases, is bound absolutely by the law, which is directed to something greater than the individual's interest, namely the common good of some society to which he belongs. And so I will take up my minor premiss in the form in which you denied it and prove it as follows:

What concerns the good of the whole community regulates conscience absolutely;
But law concerns the good of the whole community;
Therefore it regulates conscience absolutely.

FR LAURENCE BRIGHT: I will distinguish that syllogism like this:

> What concerns the good of the whole community as determined by reason regulates conscience absolutely, I agree; what concerns that good as determined by the law-giver regulates conscience absolutely, I deny. Law concerns the good of the whole communtiy as determined by the lawgiver, I agree; as determined by reason, I deny. And so I deny your conclusion.

Law in the sense we have taken it, as the justice administered in our courts, does, I agree, concern the good of society as a whole. It cannot in practice, and should not, deal with purely private morality, though as I pointed out earlier, it is not easy to draw a clear line between what affects only the individual and what also affects his fellow men. Is suicide a crime? We must remember that 'no man is an island'. However that may be, the law as it exists necessarily expresses the legislator's idea of what is reasonable for the whole community. And the legislator may be wrong, especially if he is a wicked man determined to bend reason to his own purposes. We know that in Nazi Germany, to take an obvious example, the State enacted unjust laws against a section of the community. The Nuremberg trials recognized the fact that individuals must decide for themselves the true good of the community, by the reason which makes them human. The plea of obedience to superior orders cannot be allowed where those orders are manifestly unjust. An unjust law cannot therefore bind the conscience; in that sense it is no law at all. Hence I cannot accept the view that the decision of the legislator is absolute, and though there is need for the greatest caution in practice I must hold that the individual reason has finally to determine what is the common good, even against the judgment of the legislator.

FR EDMUND HILL: In mentioning the Nuremberg trials you start a hare I should dearly love to chase, but I shall restrain myself for the moment. I feel that in saying unjust laws are really no laws at all, you have implicitly conceded my point. But there is perhaps a confusion here which should be cleared up. When I say that law is supreme over conscience, because it is concerned with the good of the whole community, I do not mean that it is the function of law, or the lawgiver to determine arbitrarily what that good consists in. No, the good of society is something given, given by reason, given in those principles of natural justice which lie

behind all genuine law, given, for example, in concepts like peace and prosperity and just administration. It is the lawgiver's task merely to work out suitable *means* to this end he is given. It is in so far as the means he determines are not in moral conflict with the proper ends—for we are not concerned here with merely foolish or inefficient law—that they are valid laws, and bind conscience absolutely. Granted there may be mad or wicked lawgivers; I am not arguing in favour of absolutism or of the infallibility of Parliament. The essence of law none the less is that it is an expression of social reason, an embodiment of the principles of natural justice. So to take up the minor premiss of my last syllogism which you denied, and prove it in a further one:

> What expresses principles of natural justice is concerned with the good of the whole community as determined by reason;
> But law expresses principles of natural justice;
> Therefore it is concerned with the good of the whole community as determined by reason.

FR LAURENCE BRIGHT: Certainly I was not intending to suggest, at the eleventh hour, that we disagree about the nature of law as an expression of reason. But laws after all do not exist in a Platonic world of their own, but in the fallible human minds of legislator and subject. I was concerned with possible moral error in the framing of law. You admit that this can happen, and I must point out explicitly that it invalidates your argument, which I therefore distinguish as follows:

> What expresses the principles of natural justice infallibly is concerned with the good of the whole community as determined by reason, I agree; what expresses those principles with the possibility of error is concerned with the good of the whole community as determined by reason, I deny. Law expresses the principles of natural justice with the possibility of error, I agree; infallibly, I deny. And so I deny your conclusion.

Your argument would be true of the natural law itself, which can be known, at least in its highest principles, without possibility of error. There can be no conflict with conscience here. We however are talking of actual laws, where we agree that both legislator and subject can make errors of judgment. But the legislator, as you have said, is something of an abstraction. We must therefore concentrate on the concrete situation where law is

being brought to bear on the subject. This is where error will be shown up and the need to change a law become apparent. Once again I do not imply that ages of tried legislation may be overthrown on some wayward impulse. Objections to law must be tried publicly, eventually in the court of Parliament. Yet it still remains true that it is tested on the moral pulses of the subject. In the last resort a moral decision must be his. Conscience, I maintain, is the ultimate touchstone. Conscience comes before law.

NOTICE

Enthusiasts of the medieval disputation will be interested to learn that another is to take place at the Aquinas Centre, St Dominic's Priory, London N.W.5, on Friday, February 13, at 7.45 p.m., and is being broadcast on the Third Programme of the B.B.C. The subject is 'Religion and Morality', and those taking part are Fathers Ian Hislop, O.P., Columba Ryan, O.P., and Thomas Gilby, O.P. This has been given the intriguing sub-title of a 'triangle disputation', and really forms a cluster of three disputations. Two of the team will, in turn, dispute the contrasting theses, 'Morals can do without Religion' and 'Religion can do without Morals'. Finally the third member of the team, who so far has taken no part in the debate, will attempt to defend a position synthesising, in his view, all the positive points made by the other two in the course of their discussion, and meet their objections.