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Edward H. Flannery

THE FINALY CASE

IN MAY 1954 word came from Paris that Antoinette Brun, who had been accused of illegally sending to Spain two Jewish children whom she had saved from the Nazis and baptized as Catholics, was acquitted by the Court of Cassation, the supreme court of France. Legally, the Finaly case was closed.

L'affaire Finaly, as the French called it, was, alas, more than a legal problem, and there were many aspects of it that were not likely to be settled by a decision of the courts. A juridic problem it certainly was, but still more it was a human problem, a moral problem, and a theological problem. From the very outset it had all the ingredients of a *cause célèbre*. Happenings and issues on every level, persons from every walk and from many countries, were to become entwined in a web of circumstances that was to challenge the best efforts of jurists, politicians, and theologians for several years.

One could hardly expect that the popular press in France and elsewhere would not see in this imbroglio a journalistic bonanza; here were headlines aplenty for many a month. And it is perhaps to a large extent on the press that we must finally lay the blame for the hard and fast positions taken by both sides so early in the development of the events, and for the dangerous pitch of emotion reached later. Regrettably and ironically, just those issues which were the enduring constituents of the case—the children themselves and the theological involvements—got shortest shrift from the press, whereas the sentimental and purely legal factors were blown up beyond all proportion. This could be easily excused if at the same time all the facts were presented, to let the public make a true appraisal. But this was not done. The presentation of facts followed fairly strictly the particular line of each editorial staff. That is why, now that the tempest is over, a better under-

standing is needed, if we are to salvage any salutary results from the case.

For we cannot close our eyes to the fact that there was bitterness involved. Wounds which had seemed healed during the war and the post-war period in France and elsewhere—anti-clericalism and anti-Semitism—were reopened.¹ Whether these unfortunate results will remain the final legacy of the *affaire Finaly* will depend in large measure on our ability to encompass the total facts and their legitimate implications, and to bring to bear a just judgment. In this way alone will it cease to be a stumbling block; thus alone will wounds be healed and tears dried.

THE FACTS

THE story begins in 1944 in La Tronche, a suburb of Grenoble in France. In February of that year, Dr. Fritz Finaly and his wife, nee Annie Schwarz, both Jews, were arrested by the Gestapo and deported, never to be heard of again. They left two children behind: Robert, aged two, and Gerald, aged one. Although the Finalys were not observing Jews they had had both boys circumcised; considering the constant danger of exposure which threatened Jews at the time, this seems evidence that the Finalys wished their children to remain Jews.

A short time before their arrest the parents had brought the children to a Catholic orphanage in Meylan, near Grenoble, and had given a

1. Just a few examples of the sharpness and extravagance of statement heard in the early part of 1953: From the man in the street there were murmurings about "a clericalist plot against the Republic," "a Jewish and Masonic affair," "a trick of Franco's to get some political refugees back," and so on. A notice posted in southern France read: "Are we going to let the Jews and their bought press insult and persecute with their hatred the priests and nuns who, in the hour when they were being hunted down, saved them from the Gestapo at the risk of their own lives?" (quoted in "The Affair of the Finaly Children," by Nicholas Baudy, *Commentary*, XV, 6, June 1953, p. 556). Rabbi Jaïs of Paris did not scruple to say: "... under the pretext of opposing to certain so-called dispositions of particular laws the rights of God, the Church takes its stand on faith and gives morality a vacation" (*Documentation catholique*, XXXV, 1155, Sept. 6, 1953, col. 1117). The Chief Rabbi of France used the sad affair as an occasion for a smug evaluation of Jewish morality and an implied attack on the Church, surprising in a man of his standing: "For Judaism the end does not justify the means. We have an infallible method which permits us to know whether an action is or is not religious: 'Is it in conformity with ethics?' With us there is no divorce of religion and ethics" (*Alliance Review*, VIII, 27, June 1953, p. 5).

certain Mme. Poupaert power of attorney over them. In order to keep them out of the reach of the Gestapo, they were soon brought to the school of Notre Dame de Sion and shortly after to the municipal crèche, both in Grenoble. There they were received by its director, Mlle. Antoinette Brun, who agreed to hide them among the other children. The heroism of this action cannot be overstated. The laws against harboring Jews were ferocious, and still, in the course of the war, this fearless woman took in some ten Jewish children. Only a sincere love for the persecuted and for these children in particular can explain her valor. The Finaly boys remained at the crèche until the end of the war. When no one came to claim them, Mlle. Brun kept them on, and as the months passed grew attached to them.

Back in February 1945, the first inquiry about the children had come in a letter to the mayor of La Tronche from Mrs. Fischel, Dr. Finaly's sister in New Zealand. Like practically all Jews at that time she was seeking news on the fate of her relatives. The mayor replied that Dr. Finaly and his wife had been deported but that the children were safe with Mlle. Brun. He also conveyed to Mrs. Fischel her brother's "dearest wish" that if anything happened to him, she should take the children. About this time, Mr. Ettinger, a friend of Dr. Finaly, wrote to Mrs. Fischel to the same effect. At once Mrs. Fischel wrote to Mme. Poupaert and to Mlle. Brun, asking that the children be sent to her. Mme. Poupaert, an intimate friend of Mlle. Brun, answered immediately, reporting on the children's health (they were ill) and making known Mlle. Brun's desire to keep the children. Mlle. Brun herself did not reply for several months. Finally she sent Mrs. Fischel a long letter—an important document in the dossier of the case—in which she counselled Mrs. Fischel to wait before taking the boys, dwelt at length on all she had done for them at her peril and the imprudence of sending the boys on so long a voyage in their precarious state of health and tender years. In conclusion she wrote: "These are bonds of affection which one has no right to break just like that. Their money is nothing to me. But they are in a way my own little ones, and I am disgusted to see that people, so-called friends of the family,² want to take them away from me in order to share their inheritance. I am

2. The word "family" is used here, as it will be throughout the article, to refer to all the close relatives of Dr. and Mrs. Finaly who took an interest in the case of Robert and Gerald. It is important to understand, moreover, that in Jewish mores this larger family plays a much greater role than it does in most Christian cultures.

French and Catholic; along with these two children I have adopted or received seven children whom I have raised as well as I could, with the fruits of my labor and my own money. The affection of my children is my recompense, I ask no other. Your nephews are Jews, that is to say, they have remained in their religion."³ Some interpreters of the case have seen an anti-Semitic strain in this letter and in Mlle. Brun generally.⁴ This is hardly plausible when we consider that of the five children she adopted after the war one was a Jewish child, and that her assistance to Jews on other occasions was unstinted. Anti-Semitism may well have been a by-product of the Finaly case; it was not at its origin.

As Mlle. Brun was thus writing to Mrs. Fischel, she was at the same moment taking steps to acquire legal guardianship of the children. She did this in compliance with a law enacted seven months earlier, on April 20, 1945, which set up the legal machinery for handling such cases. Accordingly she convoked a "family council," of which five of her Jewish friends were named members, while she herself was appointed provisional guardian of the children. She told the members of the council nothing about Mrs. Fischel's desires and Mrs. Fischel nothing about the family council. This was the first family council of a case that was finally to turn into a battle of family councils. Its chief importance lies in the fact that it gave Mlle. Brun a prior legal claim on the children and showed that she had determined from the outset to hold onto them.

From this point in 1945 to the middle of 1948, the history of the Finaly case is simply an account of the manifold *démarches* taken by, or at the behest of, Mrs. Fischel to gain possession of the children. It is important to have a clear idea of the extent of these efforts, since later on it will be the contention of Mlle. Brun and her attorneys that the family showed little interest until 1950.

There were, as far as I can ascertain, at least fifteen steps of one kind or another taken during this period. We describe them in summary fashion. In 1945: a permit for the children's entry to New Zealand was procured; two requests were made by the French minister in Wellington to the Foreign Ministry in France; two letters were sent by Mrs. Fischel to the District Attorney of Grenoble, two to the Foreign Min-

3. Quoted by Baudy, *loc. cit.*, p. 549.

4. ". . . Mrs. Fischel received a long letter . . . filled with malicious allusions to Dr. Finaly's friends and to Jews in general." See "The Case of the Finaly Orphans," by M. Keller, *Congress Weekly*, March 23, 1953.

ister, one to the mayor of La Tronche (there had been one before), and one to friends of Dr. Finaly in Grenoble; several appeals were made to the Red Cross and the OSE, the Society for the Protection of Health Among Jews. In 1946: notes were sent from the French Ministry of Foreign Affairs to the Veterans' Ministry; Mrs. Fischel received a report from the Red Cross, which stated: "Mlle. Brun refuses categorically to hand over the children. She was named guardian in 1945"; and also a letter from the minister in Wellington much to the same effect. Early in 1948: through the good offices of Cardinal Griffin of Westminster the Bishop of Auckland sought information on the children from the Bishop of Grenoble, who reported Mlle. Brun adamant in her refusal to surrender the children. At this time, the attorney for the French Red Cross advised the family to attack the legality of Mlle. Brun's guardianship.

Thus began, in the middle of 1948, the legal phase of the affair. Mrs. Fischel withdrew in favor of her sister, Mrs. Rosner, who was living in the state of Israel, for it had been decided that someone nearer the scene of events should take up the case and institute legal proceedings. Mrs. Rosner in turn appointed Mr. Keller, an engineer of Grenoble and a member of the World Jewish Congress, to represent her. Calling on Mlle. Brun, he was badly received and was told that the boys had been baptized. He then lodged a complaint with the District Attorney in Grenoble. Maître Garçon, famed member of the French Bar, member of the Academy, and a Catholic, agreed to represent the family.

Some time later Mr. Keller learned that on January 24, 1949, Mlle. Brun had convoked a new, a second, family council on the grounds that Mr. Emmerglick, the deputy guardian, had disappeared. In the new council all the Jewish members were eliminated and replaced by non-Jewish friends of Mlle. Brun. Advised of this, the deposed members, together with Mr. Keller, protested Mlle. Brun's action, and on July 26 were empowered to form a new, and third, council with Mrs. Rosner as guardian. Mlle. Brun, who was retained as a member, was ordered to surrender the children. It was discovered that Mr. Emmerglick had not disappeared at all, but had been in touch with Mlle. Brun within the month. Mlle. Brun then attacked the third council on technical grounds (grounds that would have invalidated her own first two councils), and it was annulled. Taking account of the technicality, Mr.

Keller immediately formed a fourth council on December 5, 1950, identical with the third. Again Mlle. Brun sued for annulment on the basis that Mr. Schwarz,⁵ Mrs. Finaly's brother, had been omitted, and it was again granted. On June 11, 1952, Garçon appealed and won, thus causing the fourth family council to be reinstated and Mlle. Brun to be ordered once more to present the children. It was at this session that the children were called to testify; they admitted that they wished to stay with their "maman" (Mlle. Brun), but also that they only saw her about once a year.

On July 15, 1952, Mr. Keller and a bailiff presented themselves at Mlle. Brun's to take the two boys. But the three were nowhere to be found; they were not expected back for a month. A complaint was filed, and Mlle. Brun was summoned to appear before the criminal court to answer charges of violation of the Civil Code for non-presentation of the children.

The trial of Antoinette Brun was held on November 18, 1952, in an atmosphere of tension. The case had taken on religious overtones, since it had become generally known that the children had been baptized as Catholics. At the hearing Mlle. Brun reiterated that she had saved the lives of the children and had reared them like a mother since 1944, whereas the relatives had shown no interest in them until 1950. The decision was set for December 2. In the interim Attorney Garçon prepared a voluminous brief purporting to prove with documentary evidence the falsity of Mlle. Brun's contentions. This he presented on November 28. On that same day, however, four days before the day scheduled for the decision, the brief as yet unread, the decision was rendered: The Court of Appeals was reprimanded for reinstating Mrs. Rosner as guardian, and on a technicality Mlle. Brun was acquitted of violation of the Civil Code.

Things were at a feverish pitch. To many it appeared that the court had manifested partiality and had based its decision on nonjuridical grounds, particularly on the point of the baptism. Jewish and secular groups protested, and some Catholic writers too. The magistrate who had rendered the decision was a Catholic, and it was thought he had used a technicality to have his personal beliefs prevail. The Attorney

5. It should be mentioned here that in 1945, while passing through Grenoble to Austria, Mr. Schwarz had visited Mlle. Brun and the children, and had told her to keep them. He knew nothing at that time of Dr. Finaly's wish or of Mrs. Fischel's efforts, and subsequently reversed his opinion.

General appealed the verdict, while the family brought civil action against Mlle. Brun.

On January 8, 1953, Maître Garçon pleaded the case of the family anew before a jammed and turbulent courtroom. Forcefully he charged that Mlle. Brun had not acted like a mother to the boys after 1944, but had shunted them from place to place.⁶ Charging also that she had obstructed justice, he demanded a severe sentence. In this he was joined by the Solicitor General. The verdict was rendered on January 29: Mrs. Rosner became permanent guardian, Mlle. Brun was convicted of kidnapping and was sentenced to jail. She now had but one resort: to surrender the missing children and appeal to the Court of Cassation. The family made known through its attorneys that if the boys were rendered all penal charges would be dropped.

But the Finaly affair was far from over, as also were the travels of Robert and Gerald. Mlle. Brun was now in jail, but apparently there were others who were convinced that the boys belonged to her, or to the Church, and that, the law notwithstanding, they must be kept at any cost.

On February 1, 1953, they were discovered at St. Louis Gonzaga's school in Bayonne, near the Spanish border, where they had been brought under assumed names by a sister of the Mother Superior of Notre Dame de Sion in Grenoble.⁷ The director, Canon Silhouette, had recognized them, consulted his ecclesiastical superiors, and informed the district attorney. On February 3, Mr. Keller arrived at Bayonne to call for them, as the press and the curious converged on Bayonne for the final chapter of the famous *affaire*. But all for nought; once more they had been spirited away. A tumult followed; roads were blocked,

6. Since the findings of Maître Garçon with regard to the whereabouts of the boys from 1944 until the trial had a critical effect on the judgment of the court, we summarize them briefly. At the crèche in Grenoble, Robert and Gerald were in the care of a maidservant; next they were taken to a religious boarding school called *L'Aigle*, near Grenoble; then to a day school in Voiron, at which time they lived with a lady in town, under the names of Robert and Gerald Brun. In 1949 they went to a pension in Lugano, Switzerland, for about a year; in the latter part of 1950 they were at school in Voiron for three months under the names of Louis and Marc Brun. Later evidence proved that in September 1952 they were living in Paris, and for part of 1953 in Marseilles, under the surname Quadri; also in 1953, they were at another school in Marseilles under the names of Martella and Olivieri.

7. Though the Grenoble convent of the Religious of Notre Dame de Sion thus became involved in hiding the boys, it should be pointed out that when Mlle. Brun was planning to have them baptized, the convent was opposed to it. See *Echos de Notre-Dame de Sion*, No. 7 (April 1953), p. 178.

trains searched, and arrests begun. Five Basque priests and the Mother Superior were jailed. All of them admitted complicity in the kidnaping, but maintained a "wall of silence" on the location of the boys. It was believed that they had been taken into Spain, a little less than twenty miles away.

The Finaly affair was approaching its high-water mark, and excitement was universal. All around one heard strident declamations about "the rights of man," or "the rights of God," or "the rights of the heart." Anti-clericals went on about "democratic rights" and "medieval practices." Jewish opinion was in the main restrained but indignant. Among Catholics, opinion generally condemned the abduction, and here alone we find an attempt to see the complexities of the matter. Perhaps the most forthright appeal for the return of the boys was that of Cardinal Gerlier and Bishop Caillot.⁸ It went unheeded, despite the fact that the boys were then in France and in Catholic hands; obviously there was some divergence of opinion among Catholics.

The actual exodus into Spain did not take place until February 13. Passed from hand to hand and with the aid of a professional smuggler, Gerald and Robert arrived at the border and marched through snow for five hours across the Pyrenees. In Spain they were separated, one going to a fishing village, the other to a village inland.

There has been some question raised about the motivation of the actors in this drama, probably all of whom were Catholics, several of them priests. Some commentators have said in their defense that they removed the boys merely for "safekeeping" pending the final decision of the Court of Cassation. Others believed that they were acting in compliance with Mlle. Brun's wishes, whose cause they, as so many others, had come to identify with the "Catholic side."⁹

8. Dated February 10, the appeal reads: "Monseigneur Caillot, Bishop of Grenoble, in agreement with His Eminence Cardinal Gerlier, Archbishop of Lyons, appeals to any person or group, religious or lay, who are aware of the location of the Finaly children, or who are in a position to furnish information on this subject, and requests them to make themselves known, with or without intermediary, be it to the lawful authorities, or in some other way . . ." (*Documentation catholique*, col. 1102).

9. A closer look at Mlle. Brun might have given cause to question her Catholic standard-bearing. The following items are revealing: (1) In an interview early in the case, when asked about her Catholicism, she replied that she didn't give a fig for the Pope (Baudy, *loc. cit.*, p. 550). (2) On the question of the baptism of the children, she persistently claimed that she had no religious motivation but only the natural desire to have them included in the festivities of First Communion, a high point in school life (Michael de la Bedoyere in *The Catholic World*, Sept. 1953, p. 457).

Others again thought that here was a clear case of proselytism.

There is every reason to believe the priests themselves on the subject of their motives. What they were is clear from a declaration of conscience, published on March 8, 1953, in *L'Homme Nouveau*, by a group of Basque priests, intimates of the jailed priests. Its salient points are these: (1) the Finaly boys were French (by the will of their father), they were Christians, and were attached to Mlle. Brun as to a mother; (2) they had expressed an explicit desire not to be returned to their relatives or taken to Israel; (3) there was irreducible conflict between the civil law and certain incontestable superior rights, which posed an "ultimate of conscience." Without attempting at the moment to adjudge the content of these motives, we cannot doubt that the priests acted sincerely and not from a merely partisan spirit. And it is well to remember that during the war they had been members of the Resistance and more than once had had to oppose the decisions of civil authority.

Days went by, then weeks. The *affaire* was now an international scandal, and leading journals throughout the world commented on the extraordinary doings in southern France. The debate took a decidedly theological turn as serious writers and theologians tried to untangle the issues. On the practical side, various attempts were made to bring the boys back, and once again the effort of Cardinal Gerlier was the most noteworthy. An accord was signed by the Cardinal, the Chief Rabbi of France, and the Rosner-Finaly family. It was agreed, on the one hand, that the Cardinal would do all he could to effect a recovery of the boys; on the other, that on the boys' return the family would keep them in France—in St. Leonard, at the country home of Mr. André Weil, a prominent Jewish attorney—until after the decision of the court; further that the family would drop all penal charges, and

She is reported to have said: "Baptism, that means a godfather, a godmother, security in bad times. It was done quite naturally, as in thousands of families where they hardly practice the faith, and where the children are baptized and taken to Communion, and where they get married and die in the Church" (P. Démann, N.D.S., "L'Affaire Finaly," *Cahiers Sioniens*, VII, 1, March 1953, p. 79). (3) During the last stage of the affair, in late July 1953, Mlle. Brun addressed a moving appeal to the President of the Republic. In it she spoke of her affection, her night-watches, her tears, and then added: "What does it matter to me if they are baptized or circumcised? They are above all 'my children,' little French boys" (*Documentation catholique*, col. 1144). Mlle. Brun may have minimized her faith for tactical reasons. Still it seems that her motives in having the children baptized were far more natural than supernatural.

that they would respect the consciences of the boys. Though the agreement was concluded on March 6, 1953, it was not until June 6 that knowledge of its existence became public. The occasion was an irate outburst on the part of the Chief Rabbi, who complained that no results had been gained by it and expressed doubt about the sincerity of the Catholic party to the agreement. Father Chaillet, representative of the Cardinal, thereupon revealed the steps taken by His Eminence, which included appeals to the Spanish government, also to the Vatican for its intervention, and the sending of a personal representative to Spain in an effort to establish negotiations with the abductors. It was obvious that the Cardinal had done all he could. The Grand Rabbi reinterpreted his remarks and endeavored to shift the blame elsewhere.

On June 23, after long deliberations, the Court of Cassation handed down its decision: permanent guardianship was conceded to Mrs. Rosner. Three days later word arrived that the two boys had been surrendered to the Spanish government for return to France. Handed over by a Spanish mayor to a representative of Cardinal Gerlier, they were sent immediately to Mr. Weil, while Mrs. Rosner flew from Israel to meet them. The boys asked to see Mlle. Brun, but were refused.

The police stepped in to interrogate them. It was thus learned that five other priests, hitherto unmentioned, had aided in the kidnaping. They were arrested and jailed. Public reaction rose again at this renewal of the painful *affaire*; penal charges had been dropped by the family, and it seemed that little was to be gained by this useless prolongation of the prosecution.

The sojourn of Robert and Gerald at St. Leonard was briefer than expected. On July 26, in semi-secrecy, Mr. and Mrs. Rosner boarded a plane with the boys and flew to Israel. On departure Mrs. Rosner said she no longer felt herself bound by the agreement of March 6, since it applied only to the situation extant before the decision of the court. The Catholic daily *La Croix* agreed, but insisted that the spirit, the very essence of the agreement, respect for the children's freedom of conscience, was still binding.¹⁰

The abrupt departure was applauded by the family attorney, the "Comité Finaly National," and others. The supporters of Mlle. Brun were joined, however, by Mr. Weil, who called the sudden departure

10. *Documentation catholique*, col. 1131.

"surprising and saddening. Neither Chief Rabbi Kaplan nor myself were told about it. Moreover, the Chief Rabbi had not authorized their departure on the Sabbath." Several neutral newspapers also reacted unfavorably to it, describing it as "inelegant," "injurious to the psychology of the boys." What many, among them *Le Figaro*, deplored was that Mlle. Brun, though she had accepted every possible condition, was denied a last meeting, a last embrace, with the children.¹¹

Reports coming back from Israel after the arrival of the boys did in reality seem to give substance to certain misgivings. Newspaper stories told of the boys' being brought up "in the spirit of Judaism," of their receiving new Jewish names, and of their participating in rites by which they renounced their Christian faith. It was also reported that the boys were acting of their own volition and that they were quite aware of having been the center of a dispute of world-wide interest.¹² There seems little doubt that this awareness has done harm to their personalities.

Some Jews have seen in this final turn of the affair a sort of poetic justice, while to some Christians it seems to be a new "ritual kidnaping" and violation of primary rights. Such reactions are perhaps premature and still filled with the heat of controversy. What the real and final outcome will or could be must be sought on another level and in another realm—on the theological level and in the realm of grace. It is to these that we must now attend.

THE ISSUES

THERE can be little doubt that what turned the Finaly case from a run-of-the-mill legal tussle and kidnaping, common enough occurrences nowadays, into an *affaire*, into an international scandal, was the baptism of the boys in 1948. Not only did it greatly influence the alignment of opinion of the people and the press, and the behavior of certain actors in the drama, but it also posed grave problems for the theologian. There seems little question that here is the heart of the Finaly affair. But it was exactly here that misconceptions and oversimplifications occurred; it was here too that the positions taken were often struck with an emotional or pragmatic stamp. It is of importance,

11. *Ibid.*, cols. 1141, 1143.

12. *N. Y. Times*, Sept. 19, 1953.

therefore, that we review the case in its full complexity if we are even to approximate what a true Catholic position would be.

In the absence of any episcopal pronouncement—the intervention of Cardinal Gerlier and Bishop Caillot was of a purely practical nature—we turn to the theologians. Fortunately, some of high rank took an interest in the case, and in the final accountings their contribution may well be seen as the finest fruit of the entire affair, turning it, as we hope, from a stumbling block into a new lesson in Christian wisdom and human understanding.

STATE OF THE QUESTION

Behind the problem of the baptism—its licitness, its validity, its consequences—lay the larger problem of the relationship of Church and State created by the peculiar circumstances of the baptism. For this was no ordinary baptism; in the minds of many participants and observers of the case it was a baptism “on trial” before the tribunal of the temporal power. And it is in this frame of reference that the theologians must study it.

The problem is thus divided into two major parts: one concerned with the rights and duties of the State, and the other with those of the Church; in other words, the juridical problem and the sacramental problem. However, the Catholic theory of the relationship of Church and State includes not only categories dealing with each power but also a category having to do with the primacy of the spiritual, a category which translates into Church-State terms the recognition of the inherent superiority of the spiritual over the material, of man’s ultimate end over his temporal or proximate ends. That man’s ultimate end transcends his temporal ends, that the spiritual outranks the material, is beyond any doubt. Indeed, in a sense this principle forms the very crux of the Finaly question. Yet it would be an extreme interpretation of this principle if it were used to suppress all natural and juridic considerations of the case on the grounds that the sacramental issue overrules, purely and simply, all other issues. Many of Mlle. Brun’s supporters seemed to suggest this course. Today more than ever, it seems to me, the proper exigencies of the natural and the juridical are to be greatly emphasized, since natural law and natural rights are on the defensive in so many parts of the world. This does not mean that we ought to embrace—God forbid!—the opposite error of those who subscribe

to the conception of an omniscient, laicized State, and who would relegate all spiritual considerations to the "sacristy" or to private devotional life. Too many of the followers of the Finaly family appeared to offend here.

We must avoid both extremes if we would approach what, in my view, could be considered the Catholic position. For it is only thus that the claims of both the natural and the supernatural find their proper place. And only thus can we render "to Caesar the things that are Caesar's" and also "to God the things that are God's."

THE JURIDIC PROBLEM OR THE RIGHTS OF THE STATE

Catholic thought has always seen the origin, the nature, and the end of the *civitas*, the body politic, and hence of its instrument, the State, in what St. Thomas calls the law of nations. Body politic and State exist by virtue of the social nature of man, and their end is to promote the temporal welfare and the virtuous life of all, that is, the common good. By its nature the body politic is a perfect society, autonomous, complete within its own order, limited solely by its own end and competencies; and its juridic arm falls within the ambit of natural justice.

Philosophically, this doctrine is of Aristotelian-Thomistic provenance, and theologically, it stems from Pope Gelasius I (492-496), whose formulation of it has served as the classic stand of the Church on the subject. It has been reiterated in our own day by Leo XIII in *Immortale Dei* in these terms: "God has apportioned the charge of the human race between two powers, the ecclesiastical and the civil, one set over divine things, the other over human things. Each is supreme in its own order; each has marked out for it by its own nature and immediate origin certain limits within which it is contained. Consequently, each has, as it were, a certain sphere with fixed boundaries; and each in its own sphere acts by native right." So also Pius XI in *Non Abbiamo Bisogno*: "[The State] has duties and rights that are incontestable, as long as they remain within the proper competencies of the State; those competencies in their turn are clearly fixed by the finalities of the State, which are not of course simply material and corporal, but which are of themselves necessarily contained within the limits of the natural, the terrestrial, the temporal."

Applying these doctrines to the case at hand, this much becomes clear: in judging the Finaly case the French court was within its rights

and competence when it evaluated all the facts and handed down a verdict in keeping with its own positive law, in so far as this law is in consonance with natural rights and justice. Did the court err in the performance of its task? Was the transfer of the permanent guardianship of the children to Mrs. Rosner a breach of justice?

This question is above all a matter of getting at the facts. The judiciary as well as the press and the public had considerable difficulty establishing them, as was plainly evidenced by the multiplicity of family councils and annulled decisions. In retrospect, it is possible to see why. At first, Mlle. Brun appeared to have the stronger legal claim, for, as she pleaded, she had saved the children, become their legal guardian in 1945, and mothered them till 1953, whereas the family had not instituted proceedings until 1948; the boys, it was stated, had been taken to Spain of their own volition "for safekeeping" pending the court's final decision. Her case seemed convincing and consistent enough.

But it was incomplete. Thanks to the research of the family attorneys, other findings more closely tied up with natural rights were unearthed: (1) that Dr. Finaly had provably expressed his "dearest wish" in the matter; (2) that from 1945 to 1948 the family had made relentless efforts to fulfill this wish of Dr. Finaly; (3) that Mlle. Brun's "maternal" care of the boys had been exaggerated. As these facts gradually emerged, the responsibility of the court became increasingly clear, for it was precisely these elements, related to natural rights and justice and implicit in the law, that the court was charged to preserve and promote. The court's task, in other words, was simply that of interpreting the positive law in the light of natural law. Seen in this light, the decision rendered gives all indications of accord with Catholic legal theory.

A word here about obedience to civil authority. One of the most extraordinary aspects of the affair was the open resistance to legal authority by some Catholics, priests and laymen. For one of the cardinal tenets of Catholic tradition is that legitimately constituted authority must be obeyed, save in the event of violation of the natural moral law. So certain a trait of Catholic social doctrine is this that the Church has often been accused of ultra-conservatism. However, she has never recognized temporal authority as absolute. Of this, the history of martyrdom is eloquent witness: resistance to the death is sometimes

obligatory. And St. Thomas leaves no doubt about the right of rebellion against the tyrannical, unjust ruler. But the grounds for rebellion must be precise and certain; there must be present a grave violation by the State of its proper rights or duties. Such was not the case in the Finaly affair. A presumably just decision had been rendered in compliance with the precepts of natural law by a legitimately constituted government. Furthermore, the Church had refused to indicate any disagreement with the court; contrariwise, the sole intervention by the hierarchy was to urge all concerned to yield "to lawful authority." How then are we to understand the acts of those who refused to bow to it?

They appealed to conscience and to divine law. But were they justified? The return of a baptized child to a non-Christian family, they reasoned, was inadmissible, for it would endanger his faith. Hence, in the absence of a decree of the Church or in the teeth of a refractory public authority, there was one course left: to supply for both in the name of the rights of God. What has theology to say about this?

THE SACRAMENTAL PROBLEM, OR THE RIGHTS OF THE CHURCH

Faced with the fact of the baptism of the Finaly children, the theologian asks himself: Was their baptism licit? What are the consequences of an illicit but valid baptism? In case of conflict of divine and natural law, which takes precedence? Has the Church, custodian of divine law, the right to take a baptized child from non-believing parents? Posing these questions, all the theologians who dealt with the issues of the Finaly case arrived, though by diverse approaches, at identical conclusions. The pages which follow are largely the gist of their findings, in particular those of Monsignor Charles Journet, the illustrious theologian of Fribourg, and of Father Robert Rouquette, S.J., who published a remarkable study on the Finaly case in a leading French Catholic monthly.¹³

1. First the permanent principles. In the mind of the Church, baptism is a sacrament, that is to say, a privileged instant in time in which God's free, creating, and saving act intervenes in a human soul. It is not merely a symbolic gesture, not merely a memorial of Christ's love and redemption of long ago, not merely an outward confirmation of an

13. Journet, "Précisions d'un théologien," *La Liberté* (Fribourg), March 3, 1953; and *Nova et Vetera*, Jan.-March 1953; reprinted in *Documentation catholique*, cols. 1108-1109. Rouquette, "L'Eglise et le baptême des enfants juifs," *Etudes*, April 1953; reprinted in *Documentation catholique*, cols. 1119-1128.

inward experience of God by faith. Rather is it the act by which the risen Christ prolongs the mystery of the Incarnation in His Church: by which He takes hold of a human person, works in him an invisible transformation, re-creating him, converting him from a being marked by original sin into a son of God, capable of sharing in the divine life. Hence baptism is much more than admission to a religious organization, for the Church is much more than a "religious organization"; she is a *mysterium*, Christ's visible body in history, a lasting reality, by which and in which we are brought into communication with the life of the Triune God. It is clear, then, that the initiative which brings us to this marvel must be divine. Baptism works *ex opere operato*; in other words, it is not man who brings about its fruits but God, acting with the sovereign power of His love. It has thus a supernaturally ontological value and a real efficacy.

But baptism is not magic; its efficacy is not blind and automatic. For an adult to receive it validly, his free and intelligent assent is necessary; force or ignorance of the nature and effects of baptism would render it invalid, nonexistent. Benedict XIV, the great canonist-Pope (1740-58), even held that the validity of a baptism conferred on a child who has the use of reason, but not the knowledge of what baptism means and does, is at least doubtful. The Church insists, on the other hand, that children can and should be baptized before they reach the age of reason, since baptism is a sacrament and its action primarily of God. But she looks to the day when children thus baptized do reach the age of reason, and counts on their then giving their assent and personal adherence to the mystery of their baptism. First Communion, for example, provides such an occasion.

2. The Church clearly forbids the baptism of a child against the will of his parents. Benedict XIV, the present Code of Canon Law, and the whole of tradition are at one in this. For the baptism of an infant to be licit, the Code, in canon 750, sect. 2, requires the assent of his parents or lawful guardians, or of at least one of them. And Benedict XIV makes his own the words of St. Thomas: "It has never been the usage of the Church to baptize the children of Jews unless such is the will of the parents."¹⁴

Summing up their teaching, Monsignor Journet declares that to baptize a child against the will of the parents would be a violation of

14. Denziger, *Enchiridion Symbolorum*, 1481; *Sum. Theol.* II-II, q. 10, a. 12.

natural justice, for "it is by natural and inviolable right that an infant, still deprived of the exercise of his free will, is placed under his parents' providence,"¹⁵ that, in the words of St. Thomas, he "is enfolded in the care of his parents, as in a spiritual womb."¹⁶ And, to quote St. Thomas again, "injustice should be done to no man." In the complementary interpretation of Father Rouquette, who looks to the duty behind the right: It is the family that is charged with making it possible for a child to grow to the full stature of his humanity. The parent of a Christian child has the grave duty of leading him in the ways of faith and the supernatural life, in short, of giving him a Christian education; hence to baptize a child against the will of non-Christian parents places a responsibility on them they cannot meet. For the sole duty of a non-Christian parent is to be faithful to the light given him and to communicate it to his child, in other words, to educate him to social and virtuous living. These are his capacities, and such is God's plan; man cannot demand more.

In the light, then, of these principles, what are we to think of the baptism of the Finaly boys? It was illicit and imprudent, though of course valid; it was a violation of natural justice. In 1948, when she had them baptized, Mlle. Brun had no guarantee whatever of ever becoming their permanent guardian.

3. What now are the consequences of an illicit but valid baptism of a child who remains in, or is returned to, a non-Christian family?

To begin with, the Church is possessed of certain jurisdictions, certain powers, judicial and penal. They are part of the power of the keys given her by Christ, of her responsibility to guide souls to their ultimate end in God. Being a perfect society, then, the Church must be empowered to implement her teaching and sanctifying work with authority that binds. What interests us here, however, is the extent and limits of these rights or powers. Do they include temporal or coercive measures? To be specific: can the Church remove a baptized child from a non-Christian family?

There is no doubt that the past discipline of the Church gives an affirmative answer to the last question. In his letter *Postremo Mense* (1747), Benedict XIV states that, unlawful and immoral as it is to baptize a child against the will of his parents, nevertheless, if a Jewish

15. *Documentation catholique*, col. 1108.

16. *Sum. Theol.* II-II, q. 10, a. 12.

child is validly baptized, he must be removed from his family and be brought up in a Christian milieu. In this he was echoing a view of long standing, to which there are references in the Fourth Council of Toledo and in St. Thomas, and in practice there is more than one precedent to point to. The present Code, without expressly repudiating it, makes no mention of this discipline.

Which brings us to the knot of the difficulty. On the one hand we have the rights of the parents, which are reinforced by the judicial branch of the temporal power; on the other the rights of the Church, as represented by the legislation of Benedict XIV. There appears, in sum, to be a direct conflict between ecclesiastical law and natural law. How is it to be resolved? Should the policy of the past be applied to-day? All the theologians who wrote on the Finaly case reply negatively to this last question, but in varying ways. We may reduce their answers to three categories: the psychological, the historical, and the sociological.

(a) The psychological aspect. To apply today the policy formulated by Benedict XIV would cause grave scandal among non-Catholics and great uneasiness among Catholics. "To be sure," writes Father Rouquette, "it is not our sensibilities that ought to determine our value-judgments. On quite a few points, the demands of the Christian faith jar against the secularized mentality. One need only remember the law of the indissolubility of marriage or that of conjugal chastity. But we must equally recognize that if a state of affairs is a cause of universal disquiet to the conscience of an epoch, even to that of the most faithful Christians, it is often a sign of progress in moral conscience and of a legitimate expectation of an adjustment of discipline. It is advisable, therefore, to take seriously a disquiet so general."¹⁷

On this phase of the problem Monsignor Journet's approach differs interestingly from Father Rouquette's. Faithful interpreter of St. Thomas, Journet maintains that today the Church renounces her right in such cases because the natural right is more fundamental, *plus foncier*, than the divine right. This is the way he puts it: "We used to say: the parental right, which is natural, is not suppressed but surpassed by the right of the Church, which is supernatural. We say today: the right of the Church, which is supernatural, is not suppressed but surpassed by the parental right which, being natural, is more funda-

17. *Documentation catholique*, col. 1123.

mental. The same general principle which, even in the past, forbade the baptizing of children against the will of their parents now forbids that children, if they have been baptized without the knowledge of their parents, be withdrawn from their education. 'The divine law, which is the law of grace, does not do away with human law, which is the law of natural reason' (St. Thomas, *Sum. Theol.* II-II, q. 10, a. 10). If the Church can thus renounce the exercise of her right, it is because she is rapt in an ever deeper vision of the role the secret attentions of divine grace have in the life of every soul."¹⁸ And again: "The Church abandons the exercise of her right to God, whose providence is all-powerful and who knows those who are His own: those children whose baptism will soon be known to none but Him."¹⁹ We might add that the Church surrenders her right with a view the better to fulfill her saving mission to all men. That this would have been better accomplished had the Finaly boys been forcibly kept from their relatives is hardly a plausible hope in this day and age.

(b) The historical aspect. The legislation of Benedict XIV on the Christian education of baptized Jewish children is best understood in its historical perspective. That it is in a way the product of the political and the social conditions of its times can scarcely be doubted. That these conditions do not exist today is equally certain. Hence we must draw a distinction between that which is permanent and immutable in this discipline of the Church and its application, which may change with the needs of a given epoch. Pius XII has spoken of "the vital law of adaptation" and "the providential path of history and circumstance."²⁰

When Benedict XIV legislated in favor of the removal of baptized Jewish children from their families, his act presupposed a society in which the religious power and the civil power were largely intertwined. It required that the Church use coercion, which in turn required that the Church have a "secular arm," either by virtue of the closest cooperation of Church and State, or by virtue of temporal possessions, such as the Papal States. Neither situation exists today. So true is this that Jacques Maritain has been led to comment: "As a matter of fact no government is less authoritarian than the government of the Catholic Church. It governs without police force and physical coercion the im-

18. *Ibid.*, col. 1110.

19. *Ibid.*, col. 1109.

20. Allocution to the New Cardinals, Feb. 21, 1946, *passim*.

mense people for whose spiritual common good it is responsible." ²¹

There is no doubt, Father Rouquette writes, that in a historical setting like ours, the duty remains, for the Church as a whole and for each of the faithful, to assure as much as possible that baptized children will be steadfast in their faith and Christian life; on the other hand, we may explicitly renounce not only the claim that the secular arm is an ideal but also any attempt to replace it. And he concludes: "This is what is implied, it seems, by the silence of present-day canon law, which no longer speaks of an obligation to remove the child from his family." ²²

Perhaps we may say then that the Church has been led to interpret the principle of the primacy of the spiritual in an ever more spiritual sense. Her "indirect power" in temporal things no longer means that her action is spiritual in its end and, whenever necessary, temporal in its means, but rather that its purely spiritual ends *and* means produce indirect temporal effects.

(c) The sociological aspect. Father Rouquette has closely studied the sociological factors which made possible Benedict XIV's legislation. The Pope's attitude here was a remnant of medieval policy which had made a special case of Jews—as also of Mussulmans—giving the Jews a status only a little above slaves. Tracing certain practices from medieval times to the day of Benedict XIV, Rouquette shows that he was under the influence of a thinking which deemed it entirely normal to take a baptized Jewish child from its family, but which would never lay claim to a child of Protestant parents, even though the Church considers every real baptism a Catholic baptism. Indeed, "the Church

21. *Man and the State* (Chicago: University of Chicago Press, 1951) p. 185. If we are to understand the significance of the temporal power of the popes, a historical observation may be helpful. Though reduced today to the merest token, it was once vital. Necessary as it was from the beginning of barbarian times till well into the feudal age, not so much for the Church as for the common good of society, it was always a burden to the Church; with the providential growth of political and social responsibility, this burden has been providentially lifted from her. It may be important to add here what Pius IX had to say on the deposition of kings by the popes: "This right has in fact—in exceptional circumstances—been exercised by the popes; but it has nothing to do with papal infallibility. Its source was not the infallibility, but the authority, of the pope. The latter, according to the public law then in force and by the consent of the Christian nations, who recognized the pope as the supreme judge of Christendom, extended to judging, even in the temporal field, both princes and states. Now the present situation is altogether different." From *Civiltà cattolica*, VIII, 3 (1871), p. 485; as quoted by Joseph Lecler, S.J., *The Two Sovereignties* (New York: Philosophical Library, 1952), p. 63.

22. *Documentation catholique*, col. 1126.

did not, when it was politically possible, order the removal of Protestant children from their mothers in order to raise them in a Catholic environment. In the same way, the Church today does not dream of laying claim to children presented for baptism by Communist parents." Yet the issue is the same in all three cases. Today "we cannot think of Jews save as persons, in the most sacred sense of the word"; our consciousness of the dignity, rights, and basic equality of all persons and all families is such that we regard the removing of any children from their families as an "inhuman cruelty."²³

THE WAYS OF GRACE AND THE FINAL OUTLOOK

In the wake of every unresolved conflict there is the sacrifice or defeat, at least partial, of one side. But a conflict is effectively resolved when a higher level of consideration is reached on which the opposites or oppositions are reconciled. In the Finaly case, it seems at first that in the final outcome the ecclesiastical and sacramental rights suffered a setback: the natural common good was given precedence over the supernatural good of the two children. However, there is reason to believe that the conflict has been resolved on another level. For have the "rights of God" really met defeat? Must we despair of the salvation of the Finaly boys?

In his monumental work on the Church Monsignor Journet writes: "The Church of Christ, entrusted to Peter, is at once purer and vaster than we know. Purer, because though not without sinners she is without sin, and because the faults of her members do not soil her. Vaster, because she gathers around her everyone in the world who is saved. She is aware that from the depths of space and time there are tied to her by desire, in an incipient and hidden way, millions who, by an invincible ignorance, are prevented from knowing her, but who have not, in the midst of the errors in which they live, refused the grace of living faith which God offers them in the secrecy of their hearts, God who wills that all men be saved and brought to the knowledge of the truth. She herself does not know them by name, yet she senses their numberless presence about her, and oftentimes, in the silences of her prayer, she hears ascending in the night the confused sounds of their march."²⁴

23. *Ibid.*, cols. 1125-1126.

24. *L'Eglise du Verbe incarné* (Paris: Desclée de Brouwer, 1951), II, 1114.

All the theologians who treated the Finaly problem ended in one way or another on this truth, and here, it seems, is the final answer to our questions. If grace does its work even in an unbaptized soul in a world which knows nothing of Christ, may it not work also in the baptized souls of boys who have had some training in Christian living? Is it not possible that Christ will triumph in their souls even though they are removed from the Church's motherly care? For the ways of God are inscrutable.

And the Church? She has been injured in the maelstrom. Can we hope that here too, despite all, she will shine forth anew through the mist of our blunders as the "city seated upon a mountain," as the "light of the world"? Must we view her situation in the modern world, bereft of a "secular arm" and temporal power, with pessimism? On the contrary. In these new circumstances, and as her methods become more and more spiritual, she can act more as a "leaven" among souls. Her relationship now is less with states and plenipotentiaries than with persons, her children and her children-to-be. Father Lecler has aptly described this present position of the Church: "Her action, as we have seen, has become more discreet, more intimate, less spectacular. She is no less efficient, however, on that account; and indeed such an attitude corresponds better to her present position and to her title of 'Church Militant.' It is not for the Church a time of glory, but one of humility, of effort, of interior progress. Her rapid growth in early centuries, her external brilliance in the medieval period were doubtless necessary as a first step towards the penetration of the world by the Christian spirit. But the hardest, the most mortifying tasks still remain to be fulfilled. Deep down in human society still lurks, almost as strong as ever, the old pagan spirit: its materialism and its cupidity for enjoyment and its cruelty. . . . For a work of this kind no political hegemony is needful: what is required above all, in all classes and in all milieux, is a living and genuine sanctity."²⁵

On this note we conclude. It is a note of hope—the hope that in ways which are not ours and which escape analysis, God will turn injury into blessing.

25. *Op. cit.*, p. 185.