THE BINDING FORCE OF CIVIL LAWS

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INTRODUCTION

In proposing the thesis that all civil laws which participate of the true nature of law according to the definition of Saint Thomas, bind in conscience, no attempt has been made to condemn the merely penal law theory as completely erroneous.[1] Such an attitude would be foolhardy. Evidence will be exhibited, however, which seems to demonstrate that those theologians who teach that all just laws bind in conscience defend the stronger position on this question. Their arguments seem to be more in harmony with the mind of Saint Thomas and also of Saint Paul than those of the opposition.

It must be conceded that the merely penal law theory is the more popular theory, but it does not necessarily follow that it is the more probable opinion. One must also admit that it is the more convenient theory for the individual citizen, but the consequences can be very harmful for the commonwealth. One does not have to cling to the penal law theory in order to avoid overburdening the conscience of the faithful; the general norms which moral theology provides for the guidance of men are sufficient.

After all, even though one admits that all true civil laws bind in conscience, it does not follow that all of them bind *sub gravi.* They bind in direct proportion to the gravity of the matter, and the conditions necessary for the commission of a formal sin must always be present before one is guilty *ad culpam.* Then too, many civil statutes are not really laws. Some of them are unjust; others have such an insignificant relation to the common good that they lack the reason of a law.

Three factors lead one to question the merely penal law theory and to examine its foundations. Some authors have changed

1. "Ex opinionum si quidem praejudiciis quas quis in schola accepit, non licet viros graves alterius scholae qui contrarium docent, temere ac leviter condemnare." — Zubizaretta, THEOLOGIA DOGMATICA SCHOLASTICA (3rd edition, Bilbao, 1938) Vol. I, no. 705.

their opinion to such an extent that one is amazed. Then, the different systems that various authors have used to defend the merely penal law theory do not support each other; rather, they cast a doubt upon the validity of the whole theory. Furthermore, the note of caution found in the admonitions of prudent authors causes one to question the value of the merely penal law theory. Although they are unwilling to abandon the theory, they acknowledge that if it were widely diffused among the laity its effect would be to injure civil society.

Certainly an impressive number of well-known authors advocate the merely penal law theory. Not all of them, however, are recognized authors, nor do their opinions carry equal weight among theologians. Continuators of another author's work and advocates of another writer's opinion are not as a rule considered independent authorities. In many cases they simply adopt an opinion of their predecessors without giving it any special study. Compilers of textbooks often simply jot down the common and convenient opinion without closely examining its foundation. Then, many authors adopt the opinion of the school of thought to which they belong without looking any further into the question. Mere numbers, therefore, do not necessarily add strength to an opinion.[2]

No apology is needed for differing from the opinion of learned and grave theologians. Their authority is no greater than the intrinsic value of the reasons they present for their opinion. It must be presumed that outstanding moralists have solid reasons for the opinions they express, but that presumption always yields to fact where the contrary is proved.[3] One is always permitted to

2. "Possunt enim decem vel plures auctores tenere aliquam opinionem quorum auctoritas vix quidquam magis confert ad eius probabilitatem quam auctoritas unius, quem forte illi sine rei examine ad discussiones secuti sunt." — Cf. Aertnys, THEOLOGIA MORALIS (Turin, 1893), Vol. I, no. 71.

3. Cf. Merkelbach, SUMMA THEOLOGIAE MORALIS (Paris, 1938), Vol. II, DE VIRTUTIBUS MORALIBUS, no. 101. Cf. Aertnys-Damen, THEOLOGIA MORALIS (Turin, 1947), Vol. I, nos. 93, 94.

examine and weigh the opinions of even the best of authors. Their opinions have no more probability than the intrinsic reasons which support them.

A candidate for a degree is not capable by himself of passing judgment on the value of the intrinsic arguments which great theologians employ to defend their view. Only men of equal ability are really in a position to dispute with them. For that reason very little originality will be found in this thesis, its whole value depending upon the manner in which Sylvester, Sylvius, Concina, Medina and Bellarmine interpreted the text of the *Summa Theologica,* which touches on questions related to this thesis. Then, too, the objections which Lopez[4] proposed against the merely penal law theory lend strong support to our position.

4. Lopez, "Theoria Legis mere Poenalis," PERIODICA DE RE MORALI CANONICA LITURGICA, Vol. XXVII (June, 1938), pp. 203-214; Vol. XXIX (Feb., 1940).

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CHAPTER I

LAW IN GENERAL

I. THE DEFINITION OF LAW

LAW in its widest sense is a rule or measure applied to any act, whether physical or moral. In this sense we speak of physical laws, such as the law of gravity. Law also can be considered as an inclination or an instinct to do something or to act in a certain fashion. It is in this sense that Saint Paul speaks when he calls concupiscence "the law in my members."[1] In a more strict sense, law is an ordinance of reason for human acts, but it can be considered as a rule for human acts apart from their moral aspect — for example, the laws of literary composition. Then, too, law is also a rule of moral acts, even though it may bind only one person. This is clearly evident in the obligations which an individual may derive from a false conscience. In the strictest sense, law is an ordinance of right reason proceeding from lawful authority for the common good.

Suárez and D'Annibale give definitions of law that really describe it rather than define it. According to Suárez: "Law is a general precept, just and stable, promulgated in a sufficient manner."[2] According to D'Annibale: "Law is a permanent, general command properly promulgated by a lawful superior for the welfare of his subjects."[3]

Some of the definitions which Saint Thomas provides seem to be no more than descriptive; for instance, he calls law "a rule and a measure according to which one is either persuaded to act or is restrained from acting";[4] "a dictate of practical reason

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1. Rom. 7:23.
2. TRACTATUS DE LEGIBUS, I, i, c. 12.
3. SUMMULA THEOLOGIAE MORALIS (Rome, 1908), Pars I, no. 160.
4. SUMMA THEOLOGICA, Ia IIae, q. 90, a. 1.

emanating from a ruler who governs a perfect community";[5] "a dictate of reason in the ruler by whom subjects are governed."[6] The Angelic Doctor, however, is also the author of the classical definition of law. "Law is an ordinance of reason for the common good, promulgated by one who has charge of the community."[7] Most theologians accept and use this definition.

II. AN EXPLANATION OF THE DEFINITION

A. An Ordinance of Reason. Saint Thomas rightly calls law an ordinance of reason, for the purpose of law is to ordain or direct some actions, by apt means, to a determined end. To direct things, however, to a definite end pertains to reason, which judges both the nature of the end and the means to attain it. Law is, moreover, a command of practical reason; that is, an effective direction thought out by reason and imposed by the will to a determined end. Michael Cronin gives a very thorough explanation in which he shows that a law is primarily a function of practical reason:

> Though law proceeds from reason, it bears also some reference to the will. For law being a plan, a directing and moving force, it arranges a line of action and it binds to that line. It is a thought and a command. For instance, a human law is something more than a mere plan of securing the common good. It is a plan which the legislator lays on our wills for acceptance, a plan binding us to follow. Hence law is not of the intellect alone but of the will also. Intellect is the planning, the thinking, the arranging power. Will is the moving, the binding power. Yet primarily and essentially, law is a function of reason. Will urges to the doing of a certain act, but it urges in the case of a genuine law under the guidance of intellect. The will that binds a subject independently of the intellect is a principle not of law but of confusion and destruction ("magis iniquitas quam lex"). Hence, inasmuch as the guiding power is always principal and of more consequence than that which is guided, we regard law as primarily and essentially a function of reason, not of the will.[8]

5. *Ibid.*, q. 91, a. 1.
6. *Ibid.*, q. 92, a. 1.
7. *Ibid.*, q. 90, a. 4.

B. For the Common Good. The second part of the definition indicates the general object or final cause of law. Laws are formed essentially for the promotion of the common good, as part to the whole. Just as an architect regards primarily not the parts of the building but the whole edifice — to which the parts are subordinated — and only in a secondary way considers the perfection of its parts, so too law has reference primarily to the order which is to be followed in securing the common good, and secondarily to the good of the individual as such. Many laws bind only a part of the community, but these laws are always made so that the particular group with special duties may occupy its rightful place as part of the whole community.[9]

C. By Him Who Has Charge of the Community. "... A law, properly speaking, regards first and foremost the order to the common good. Now, to order anything to the common good belongs either to the whole people or to someone who is the vicegerent of the whole people. Hence the making of a law belongs either to the whole people or to a public personage who has the care of the whole people; for in all other matters the directing of anything to the end concerns him to whom the end belongs."[10] Obviously, as Cajetanus points out, Saint Thomas speaks only of civil governments and civil laws in this article. Our Lord and Saviour appointed Saint Peter and His successors as head of the Church with full power to rule the Church. They

8. The Science of Ethics (New York, 1937), I, 634.
9. Summa Theol., Ia IIae, q. 90, a. 3.
10. *Ibid.*, q. 90, a. 3.

are Vicars of Christ, not the vicegerents of the people.[11] Since, according to Sacred Scriptures, the power to govern comes from God, the people do not hand over authority to the head of the State; they merely have the right to name the person or the body of persons who shall exercise the authority which God gives to civil rulers.[12] As long as justice is observed, the people may choose their rulers in any manner they wish, and they can adopt the form of government they prefer. Once, however, the head of the State is appointed or agreed upon, he becomes the efficient cause of law. He alone has the public power and jurisdiction to establish laws, to declare rights, to impose obligations, and to punish transgressors of the law with grave penalties. Even laws which arise from custom must have at least the implicit consent of the legislator.[13] It might be well to note that only a perfect community is capable of receiving laws; that is, a society complete in itself which has sufficient means and capabilities of achieving its end and is independent of every other society. For example, the whole human race under God, the individual State in regard to its citizens, and the Church in regard to the faithful are perfect societies.[14]

D. Promulgated. A law is said to be promulgated when it is officially manifested to the community in an authentic and public manner. A law is promulgated authentically when it is published with certain solemnities either by the legislator himself or by a source authorized by him. It is publicly promulgated when announced in such a manner that citizens may learn of its existence. Laws are promulgated in various ways.[15] The exact manner of promulgating a civil law is determined by the lawgiver or by

11. Cf. Rom. 13:1-7.
12. Cf. Leo XIII, Encyclical IMMORTALE DEI, § 2.
13. SUMMA THEOL., Ia IIae, q. 97, a. 3 ad 3.
14. Merkelbach, *op. cit.*, Vol. II, no. 222.
15. In regard to Ecclesiastical Law, see canon 9 of the Code.

the constitution of the State. Laws begin to bind when they are sufficiently promulgated, unless their force is officially suspended until a certain day.[16] A law is considered to be sufficiently promulgated if means have been taken so that all subject to it can *per se* be informed of its existence. Even if *per accidens* the knowledge has not come to some, the law obliges in the external forum; in the internal forum, however, he who does not know of the existence of the law does not sin in violating it.

As to whether or not promulgation belongs to the essence of law, there is a dispute. Those who deny that promulgation belongs to the essence of law argue that a rule or measure must exist before it is applied, and they say that promulgation pertains only to the law *in actu secundo*.[17] Those who insist that it belongs to the essence of law argue from the words of Gratian, quoted by Saint Thomas: "Laws are instituted when they are promulgated."[18] They claim that a law which is not promulgated is not a complete law *in actu primo,* but is only in an inchoative state.[19] But, as Wouters remarks: "The dispute is speculative and not practical, because promulgation is necessary so that a law may obtain its obligatory force. Hence he who might know from some other source that a law has been made would not be bound to its observance before it was promulgated. In this sense we can take the words adopted by the Code from Gratian."[20]

16. Billuart, in Vol. IV of CURSUS THEOLOGIAE (Lyons, 1889), Dissert. I, art. 3, explains the various ways in which diverse laws are promulgated.
17. Billuart upholds the negative side of the question with solid arguments (CURSUS THEOLOGIAE, Vol. IV, Dissert. I, art. 3).
18. SUMMA THEOL., Ia IIae, q. 90, a. 4, "sed contra."
19. Cf. Vermeersch, THEOLOGIA MORALIS (Rome, 1933), Vol. I, THEOLOGIA FUNDAMENTALIS, no. 156.
20. Cf. Wouters, MANUALE THEOLOGIAE MORALIS (Bruges, 1932), Vol. I, no. 76.

III. THE ACCEPTANCE OF A LAW

The consent of the governed need not be given for the valid formation and the obligatory force of a just law. The opposite error was condemned by Pope Alexander VII: "The people do not sin even if, without cause, they do not receive a law promulgated by a prince."[21] Just laws bind from the authority possessed by the lawgiver. There are two exceptions to this rule, but they do not violate the general principle. (a) In certain modern nations lawmakers are bound by the norms of the established constitutions not to pass certain grave measures until they have obtained the consent of the people by a popular referendum. (b) When a law is promulgated by the head of the nation, which the greater part of the people prudently consider most inconvenient for their part of the country, because of certain local conditions, an appeal may be made to the legislator to repeal it, and in the meantime the obligatory power of the law can be considered temporarily suspended by the presumed consent of the legislator.[22]

IV. THE GENERAL DIVISION OF LAWS

Law can be considered in two ways, essentially and participatively. In the first manner we view law in God, the First Cause, the principle and the end of all things according as He wills and regulates all things. Since God receives no new concepts in time, but possesses His omniscient knowledge and the omnipotent act of His will from all eternity, law in God must be eternal. Law in God is nothing else than the plan of Divine Wisdom directing all acts and movements towards their due end. It is an ordination in the Divine Mind directive of all things of the universe to their ultimate end according to the purpose of their creation. The

21. "Populus non peccat etiamsi absque ulla causa non recipiat legem a principe promulgatam." — Denzinger, ENCHIRIDION SYMBOLORUM, no. 1128.
22. Rapid modern means of communication have practically voided the application of the principle.

eternal law is actively promulgated from all eternity in so far as the Divine Act is eternal. It is passively promulgated in time in that creatures begin in time and only in time receive the impression of the eternal law.[23]

All other laws, considering them as they are in creatures who are ruled and measured according to the decrees of God, are participative laws. They fall into two classes of law: natural and positive. The natural law is nothing other than an ordination of rational creatures to their end, which is established in nature itself and perceived by the light of reason. The eternal law is the seal and the natural law is its impression on the rational nature of man. We may call it an inclination placed in creatures, moving them to act according to their nature. Saint Thomas defines it as "a participation of the eternal law in a rational creature."[24]

Creatures, from inorganic through organic beings, including rational and free creatures, fulfill the natural law by acting in conformity with their nature. They naturally tend to their appropriate ends. The proper end of man is happiness with God, which is achieved through the perfection of virtue. Nor is the natural law inconsistent with man's proper end. It inclines him towards the natural virtues, for this tendency is simply the expression of the natural law. In the field of man's free actions or moral acts, it is called the moral law.

There are two types of positive law, the divine and the human. The divine positive law is a complexus of the ordinances which God imposes upon men beyond those contained in the natural law. They may be divine *per se* or *per accidens*. Regulations belong to the divine positive law *per se* if they are not contained in the natural law — for example, the ceremonial precepts given to the Jews and the third commandment of the decalogue belong

23. SUMMA THEOL., Ia IIae, q. 93, a. 1.
24. *Ibid.*, q. 91, a. 2.

under this classification. Ordinances belong to the divine positive law only *per accidens* if they are already contained in the natural law; they are also proclaimed by the divine positive law in order that they may be emphasized and that they may be more easily and more surely known by all men.[25]

Divine positive law is divided according to time and the manner of promulgation: (a) the primeval, which was not put into writing, but revealed to the Patriarchs before the time of Moses; (b) the Old Law or Mosaic Law, which was written and promulgated by Moses; (c) the New or Evangelical Law, partly handed down in tradition and partly written, which was instituted by Christ and promulgated through the Apostles.

Human positive laws determine the divine and natural law in its application in society when the need arises. There are two types of perfect societies, the natural and the supernatural — or, as they are generally called — civil and ecclesiastical. In this thesis we are mainly concerned with civil laws and will touch upon ecclesiastical law only in passing; we will not attempt to discuss it in detail.

V. THE EFFECTS OF A LAW

Saint Thomas clearly points out that the two effects of laws are to promote virtue and to curb vices. These two consequences are really the positive and the negative aspects of the ultimate aim: to sanctify men.[26] Human law, especially civil law, does not attempt to wipe out every evil or to hasten righteousness. The complexus of laws or the law of charity bears that heavy burden. Law provides an atmosphere of peace in which men can live a life of virtue, and with punishments it discourages those who might think that their own individual likes and dislikes are more important than the good of the community. Law imposes a

25. Gredt, Elementa Philosophiae (Barcelona, 1946), Vol. II, Metaphysica, Ethica, no. 936.
26. Summa Theol., Ia IIae, q. 92, and q. 96, a. 1, 2.

certain restraint upon individuals who cannot always see their purpose and thus resent the way magistrates seem to disregard their wishes. Law is a help towards a more efficient and fuller life for all. Walter Farrell, O. P., expresses the specific function of civil law clearly and concisely:

> Up to this time the majority of citizens of any state have not been saints; probably they never will be. This fact gives us the clue to the proper interpretation of the universality of law. This universality does not mean that human law should prohibit all vices nor that it should command all virtues; it is framed for the whole community and should be suited to the ordinary condition of its subjects. Some vices it must forbid, certainly those that threaten the very survival of the society; some virtues it must command, certainly those which either directly or indirectly can be ordained by human means to the common good. But its aim is not to make men saints, but to give them peace and a chance to work out their own individual sanctity.[27]

There can be no question, then, in setting the limits of civil law. It extends only to the external acts of man, and then not to all, but only to those which would tend to destroy the commonwealth or injure others. Furthermore, civil law compels us to provide certain temporal needs for each other, but all of us receive more benefits than we bestow.

The first and immediate effect of a law is an obligation to do something, to avoid something, to permit something, or to suffer a just punishment inflicted by lawful authority.[28] An obligation is a necessity by which created beings tend through their operations towards their proper end. This necessity is essentially diverse in rational creatures and in irrational creatures. The latter tend to their end by a determination of nature alone. Whereas the former achieve their destiny according to the norms imposed

27. A Companion to the Summa (New York, 1938), II, 399.
28. In Summa Theol., Ia IIae, q. 92, a. 2, Saint Thomas speaks of these acts of the law.

through the use of their own reason or by the reason of those placed over them. The obligations imposed on rational creatures are called moral: those that guide the other creatures are called physical. A moral obligation may be defined as a necessity to restrain oneself or to act in a certain manner in order to achieve a desired end. Saint Thomas speaks of it as a "conditioned necessity from the supposition of the end."[29] This is evident, because the object of an obligation is always proposed by the will as something without which some necessary end cannot be obtained. The physical liberty, moreover, of accepting or rejecting a moral obligation always remains intact. Saint Thomas, in treating of the effects of law, makes no mention of obligations. He seems to take it for granted that all know that the obligations flowing from the the very nature of law — which is an effective dictate of practical reasoning — must exist. The very nature of man indicates that his guidance should not be physical, but rather the persuasive force which we call a moral obligation. This conforms more to his dignity.

VI. THE SANCTIONS OF LAW

This is another one of those modern terms applied to a point that Saint Thomas called by another name. Moralists[30] describe a sanction as a complement of an obligation, as that which strengthens and urges the observance of the law, as the rewards established for those who observe the law, and the punishment inflicted upon those who transgress it. There are two types of sanctions, natural or internal, which immediately follow acts for or against the law; and the positive or external, which do not immediately follow but are provided by human law. Punitive

29. De Veritate, q. 17, a. 3.
30. Merkelbach, *op. cit.*, Vol. II, no. 237; Noldin-Schmitt, Summa Theologiae Moralis (Barcelona, 1945), Vol. I, De principiis theologiae moralis, no. 109; Gredt, *op. cit.*, Vol. II, no. 942; Rodrigo, Praelectiones Theologico-Morales Comillenses (Santander, 1947), Vol. II, no. 233.

sanctions without a doubt must exist; there are those who are so inclined to evil that they can be curbed and led to virtue only by a threat of punishment. Saint Thomas recognized this fact and he gave it as one of the reasons for establishing human laws or rather what he calls the discipline of the law.

> . . . But since some are found to be dissolute and prone to vice and not easily amenable to words, it was necessary for such to be restrained from evil-doing by force and fear in order that at least they might desist from evil-doing and leave others in peace, and that they themselves, by being habituated in this way, might be brought to do willingly what hitherto they did from fear, and thus become virtuous. Now this kind of discipline, which compels through fear of punishment, is the discipline of laws. Therefore, in order that man might have peace and virtue, it was necessary for laws to be framed.[31]

Saint Thomas, however, did not seem to consider rewards for those observing the law as a necessity. In his response to an objector who said that just as some men are moved to keep a law by a threat of punishment, so others are led to observe a law by a promise of a reward, Saint Thomas points out that a reward can be given by anyone, but only a minister of the law can inflict a punishment on a transgressor. Therefore to give a reward is not an act of the law.[32] From this response it would seem that he did not consider a reward from a human legislator as a sanction of the law, at least in the restricted sense of the word. In other words, it is not necessary that a legislator promise a reward, but it is necessary that he threaten transgressors with punishments in proportion to the gravity of their crimes. This is perfectly

31. " . . . Sed quia inveniuntur quidam protervi et ad vitia proni, qui verbis de facili moveri non possunt; necessarium fuit quod per vim vel metum cohiberentur a malo ut saltem sic malefacere desistentes, et aliis quietam vitam redderent, et ipsi tandem per hujusmodi assuetudinem ad hoc perducerentur quod voluntarie facerent quae prius metu implebant, et sic fierent virtuosi. Hujusmodi autem disciplina cogens metu poenae, est disciplina legum. Unde necessarium fuit ad pacem hominum et virtutem, quod leges ponerentur. . . ." — Summa Theol., Ia IIae, q. 95, a. 1.
32. Summa Theol., Ia IIae, q. 92, a. 2 ad 3.

logical, for if we keep the law we will obtain the end of the law, the good towards which the law tends, which in itself is a sufficient reward.

VII. THE MATERIAL OF LAW

From the definition of law, its material is manifestly anything that will promote the general welfare or the common good. Becoming more specific, we may speak of remote and proximate material. The remote material of a law is a rational being, inasmuch as only such a being can be the subject of a moral obligation, the primary effect of law. The proximate object cannot be other than the human acts of a rational being; because, properly speaking, only by a human act can a man submit to a moral obligation. Furthermore, external acts alone, which conduce to the preservation of the external order, fall under the jurisdiction of civil law. Of course, the law can prescribe the interior acts in certain cases in which they are required for a complete exterior act, as in the making of vows, the taking of oaths, and the drawing up of contracts. Whether or not the Church can prescribe internal acts is an interesting question which need not concern us here, except in so far as it will assist us in more clearly perceiving the limitations of human law, when we touch the highlights of the dispute.

Those who hold the affirmative view say that the Church has authority from Christ to demand whatever is necessary for the salvation of men. But the performance of certain internal acts is necessary that men may save their souls. Therefore the Church has the power to prescribe internal acts.[33] Those who hold the negative view declare that every act which comes under the power

33. Cf. Noldin-Schmitt, *op. cit.*, Vol. I, no. 138, and A. G. Cicognani, CANON LAW, translated by Joseph M. O'Hara and Francis Brennan (Westminster, Md., 1947), pp. 526-529, for a defense of the positive opinion.

of the Church *in concreto* is a mixed act and that the others are commanded by divine law. In fact, they point out that the prescribing of interior acts is one of the reasons for the existence of the divine positive law. In general those who hold the negative opinion present the following assertion of Saint Thomas as their major argument:

> . . . Man can make laws in those matters of which he is competent to judge. But man is not competent to judge of interior movements that are hidden, but only of exterior acts which are observable. . . .[34]

The fact that civil magistrates cannot judge interior acts is a principle which has far-reaching consequences. It seems to be the reason why they punish an individual for acts against the law in which there was probably very little, if any, formal guilt. That is why the courts will order an individual to pay the damages inflicted upon another man, even though there was no more than material guilt involved in the cause. We will have more to say about this matter when we consider the problem of juridical guilt and the penal law.

The law, save for a few exceptions, regulates and measures only future acts. The law does not turn its eyes backwards, that is, in regard to its directive power. Law according to its nature affects only the future. Law cannot permit, cannot command, cannot forbid things that have happened previously. Moreover, it would be more than useless to declare a past irrevocable act invalid. Furthermore, it would be an act of cruelty rather than an act of reason to use coercive measures upon people for acts that were not forbidden by law at the time they were placed. As a general rule, therefore, past acts completed before the law has been promulgated are not punishable. Unless a great necessity

34. " . . . de his potest homo legem facere, de quibus potest judicare. Judicium autem hominis esse non potest de interioribus motibus qui latent, sed solum de exterioribus actibus qui apparent." — SUMMA THEOL., Ia IIae, q. 91, a. 4.

for the common good demands it, even revocable acts placed in the past should not be declared invalid. The magistrate, nevertheless, always retains the authority to inflict a legal penalty for something which another law forbids, especially if the offense was against the natural law. Even this should be done with prudence.[35]

External occult acts, since they are really external, are not excluded from the power of human positive law. The fact that they are not immediately known is *per accidens*. The fact is that they can become known; and, likewise, the fact that the magistrate is not able to judge them and here and now is *per accidens*. The Church, therefore, is within her rights in punishing occult homicide by prohibiting the culprit from the reception and exercise of Holy Orders — that is, by imposing on him the impediment of irregularity.[36]

Heroic acts, being exceedingly difficult and practically impossible for the majority of men, cannot be classified as material of the law in the ordinary sense. Heroic acts, however, can and indeed must be demanded in cases of extreme necessity in which the common good would suffer irreparable injury. Heroic acts oblige an individual when he embraces a profession or vocation in which such acts are required for the fulfillment of his office. For example, a policeman must chase a dangerous criminal, even though he risks his own life; a soldier must undertake a perilous mission when commanded to do so; a doctor must assist the sick afflicted with highly contagious diseases. Génicot-Salsman gives another case in which heroic acts can be demanded and offers an example to illustrate the condition;[37] heroic acts can be demanded if they are considered necessary for the preservation of some state. The reason is that when we embrace any state, virtually we oblige ourselves to those things which are morally

35. Cf. Merkelbach, *op. cit.*, Vol. I, De principiis et virtutibus no. 280.
36. Cf. Aertnys-Damen, *op. cit.*, Vol. I, no. 42; Wouters, *op. cit.*, Vol. I, no. 117.
37. Institutiones Theologiae Moralis (Brussels, 1946), Vol. I, no. 102.

necessary for its conservation. For example, Boniface VIII and the Council of Trent, judging that perpetual cloister was necessary for certain communities of nuns, imposed that obligation upon them even though they had not been bound to it by their rule.

Radically, there are only three types of human acts: virtuous, evil and indifferent. The last-named, however, *in concreto* are always either good or bad, depending upon the intention with which they are placed, or the circumstances. The acts of the law, then, are, logically divided into three classes: those that command virtuous acts, those that forbid vices, and those that permit indifferent acts. In addition, it must be said that in so far as the lawmaker has authority to add sanctions to a law, to punish a transgressor can be considered an act of the law. Some object that permitting a thing cannot be an act. That is not true, because in permitting indifferent acts the law is actually forbidding anyone to interfere when an individual wishes to place an indifferent act. The law provides protection and safeguards in this case.[38]

An affirmative law does not exact a continual performance of virtuous acts, but only as the occasion requires them. Negative measures, on the other hand, demand a perpetual omission of the acts prohibited.

VIII. THE QUALITIES OF POSITIVE LAW

The positive law must first be in accord with the divine law. An honest human command must always promote and not disturb the relationship between man and God. From this principle it is easy to see that civil legislators have no authority to grant divorces.[38a] And laws which impede the preaching of the Gospel are

38. Summa Theol., Ia IIae, q. 93, a. 2.
38a. Although the law granting a perfect divorce with a right to remarry is certainly invalid, a Catholic lawyer can co-operate materially within the limits prescribed by diocesan regulations. Of course, the lawyer must have a good reason for so co-operating.

automatically invalid. Secondly, civil law, since it is no more than an application and a determination of the natural law, cannot command anything contrary to the natural law.[39] Thirdly, civil laws must be for the utility of men; that is, they must either protect or promote the general welfare, the common good; otherwise there does not exist a sufficient reason for restricting the freedom of the members of the commonwealth. Saint Thomas says that all the other conditions necessary for a law, which authors were accustomed to give after the time of Isidore of Seville, can be reduced to the three conditions mentioned above: namely, a law should be just, possible to nature, according to the customs of the country, adapted to place and time, etc.

It was in defense of the first two required qualities that Pius IX condemned the two following propositions:[40]

> The laws of morals do not need a divine sanction, and least of all is it necessary that human laws be conformed to the law of nature or receive the power of obliging from God.
>
> The science of philosophical thinking and of morals, likewise civil laws, can and ought to be divorced from divine and ecclesiastical authority.

When we become more specific about the qualities of law, certainly all agree that laws must be just. To deserve that title, a law must have three characteristics. It must be for the good of

39. "The natural law is above the civil law, is deeper and more fundamental; it is itself the ground of the civil powers, and gives to the civil powers all their authority. The civil law, therefore, cannot act contrary to the natural law, and laws enacted in contravention of nature are invalid from their very foundation." — Cronin, THE SCIENCE OF ETHICS, II, 551.

40. "Morum leges divina haud egent sanctione minimeque opus est ut humanae leges ad naturae jus conformentur aut obligandi cum a Deo accipiant." — Denzinger, *op. cit.*, no. 1756.

"Philosophicarum rerum morumque scientia item, civiles leges possunt et debent a divina et ecclesiastica auctoritate declinare." — Denzinger, *op. cit.*, no. 757.

the citizens considered as a whole; it must impose burdens upon its subjects in proportion to their ability and strength. It must be imposed by a legitimate lawmaker who does not exceed his authority. In brief, a just law is one that does not violate legal, distributive, or commutative justice.[41]

Some authors[42] place perpetuity in a special classification called "The Properties of Law"; but, after all, a property is no more than a permanent quality. It seems, therefore, that perpetuity can be placed here under a more general title. Law may have either positive or negative stability. Certainly, the eternal and the natural law possess positive or absolute stability from their very essence. The same cannot be said for human laws, since the necessity or convenience which gives rise to them may pass away; then the laws become a useless burden, and in some cases may prove harmful to those whom they were supposed to assist. Conditions may change, therefore, to such an extent that the legislator is bound to change the law. Civil laws, nevertheless, do possess a negative stability in so far as they exist until they are repealed by the civil authorities. It also happens that a change in the material of the law gives rise to a custom against an outmoded law and it becomes void with only the tacit or implied consent of the legislators. Since civil laws provide for the more or less permanent needs of a stable society, they should have at least a negative perpetuity. Then, too, it is clear that unstable and insecure laws would injure the common good, and destroy the end for which laws are made.

All laws also possess a certain universality.[43] They are not particular ordinances. They are made for the State or nation as

41. SUMMA THEOL., Ia IIae, q. 96, a. 4.

42. Cf. Rodrigo, PRAELECTIONES, Vol. II, no. 17; Peinador, THEOLOGIA MORALIS FUNDAMENTALIS (Madrid, 1945), Vol. I, no. 347.

43. Cf. A COMPANION TO THE SUMMA, II, 399.

a whole, for many different people, for many different periods, for many different acts. They are established for the present and for succeeding generations in society. Law, therefore, has not only a perpetuity but also a certain universality of its own.

CHAPTER II

CIVIL SOCIETY AND ITS AUTHORITY

I. SOCIETY IN GENERAL

SOCIETY can be defined as a moral and stable union of many working towards the same common end. The final cause of society evidently is some good which those working together would not be able to obtain alone. The formal cause is the union which is called moral because it consists of rights and duties which bind the members of society to work jointly for the general welfare. The material cause of society is beings endowed with a rational nature who alone are capable of rights and moral obligations. The efficient cause is the obligatory bond or moral union which constitutes society. The origin of the obligatory bond or moral union is disputed.[1] Later on in this chapter we will discuss this point and offer a solution.[2]

Moreover, in every established society there must be someone in charge who constantly and efficaciously directs the citizens to their common end: namely, an authority, one who possesses the right of obliging all the members to co-operate in things necessary for the maintenance of the commonwealth. "A society can neither exist nor be conceived of in which there is no one to govern the wills of individuals in such a way as to make, as it were, one will out of many and to impel them rightly and in an orderly way towards the common good. Therefore, God has willed that in a civil society there should be someone to rule the multitude."[3] Authority should be given only to one, either to one individual or to a group acting as one. There may be, and in many cases

1. Cf. Gredt, *op. cit.*, Vol. II, no. 1107.
2. Cf. nos. VI and VII of this chapter.
3. Leo XIII, Encyclical DIUTURNUM, no. 7.

there should be, subordinate directors, but they act only with the authority derived from and in the name of the supreme authority.[4]

II. THE DIVISIONS OF SOCIETY

Considered according to its origin, a society can be natural or positive; that is, a society either takes its origin from the very nature of men, or it is a convenient association over and above the absolute needs of man created by mutual agreement or positive law. Considered according to its perfection, a society can be perfect or imperfect, according as it possesses or does not possess self-sufficiency — that is, all the means necessary to achieve its purpose of existence. Considered in its extent, a society can be universal or particular. In this sense we speak of all mankind as being members of a universal society under God and then of each state as a particular society.[5]

III. THE NECESSITY OF SOCIETY

Man is naturally a social animal.[6] He is so constituted that he must live in society. "Man's natural instincts move him to live in civil society."[7] Isolated, he cannot provide himself with the

4. Cf. Cathrein, PHILOSOPHIA MORALIS (Barcelona, 1945), no. 506.
5. Cronin, *op. cit.*, II, 387.
6. SUMMA THEOL., IIa IIae, q. 109, a. 3, ad 1; Gredt, *op. cit.*, Vol. II, no 1012.
7. "Sociality is just as constitutive of the essential nature of man as his rationality; sociality so pertains to man's nature that a definition which omits this constitutive element must be considered incomplete. It is, therefore, nothing superadded; it is equally original. The individual person and the community are ontologically so related to each other that they can have no existence independently of each other. Even though the individual person may always have genuine self-subsistence and hence a unique kind of being, he has at the same time a limited existence that does not yet realize the idea of man perfectly. Man is perfected only in the community. It is essential for him to be a member of enduring communities." — H. Rommen, THE NATURAL LAW, translated by Thomas R. Hanley (St. Louis, Mo.: 1947), p. 236.

necessary requirements of life nor procure the means of developing his mental and moral faculties. It is therefore divinely ordained that he should lead his life, be it domestic, social, or civil, in contact with his fellow man, where alone his several wants can adequately be supplied."[8] "And indeed nature or rather God, who is the author of nature, wills that man should live in civil society, and this is shown clearly both by the faculty of language, the greatest medium of intercourse, and the many things which men when isolated cannot provide but which they can procure when associated with others."[9] God ordained man for the imperfect happiness of this life as well as for perfect happiness in eternity. In order to obtain his terrestrial end, man requires many things which only an organized society can provide; for example, nourishment and clothing, protection and education, guidance and correction, friendship and love. No man can stand alone, nor is anyone permitted to stand alone. As the Angelic Doctor says: "Because man is naturally a social animal, one must give to another that without which no society can be preserved." Two societies are absolutely necessary for man in his present state, domestic and civil.

IV. THE NECESSITY OF DOMESTIC SOCIETY

Saint Thomas proposes the question of whether or not matrimony is natural.[10] Billuart points out that the sense of this question is not whether or not the act of cotius is natural, but whether or not man beyond all the other animals, created male and female for the office of generation, is to be joined in an indissoluble bond; for that is what we mean by matrimony.[11] Saint Thomas quotes Aristotle, who said: "Man is more naturally a

8. Leo XIII, IMMORTALE DEI, § 1.
9. Leo XIII, DIUTURNUM, § 4.
10. SUPPLEMENTUM, q. 41, a. 1.
11. CURSUS THEOLOGIAE, Vol. X, TRACTATUS DE MATRIMONIO, Dissert. I, a. 11.

conjugal than a political animal."[12] But man is naturally a political and gregarious animal, as the philosopher said in another place.[13] Man, therefore, is naturally conjugal, and the yoke of matrimony is natural. In the body of the article, Saint Thomas shows that matrimony is an indissoluble union, because nature not only intends the generation of children, but also the rearing of them to perfect manhood, which cannot be accomplished unless the parents and their children live harmoniously in a domestic society, at least until the children have grown to adult age and are able to provide for themselves. This clearly is the natural law. The divine law demands the indissolubility of consummated marriage.

V. THE NECESSITY OF CIVIL SOCIETY

Although even one domestic unit is certainly more self-sufficient than an individual, yet obviously one family living completely apart from all others can provide no more than the barest essentials for its existence. Domestic society cannot provide those things necessary for the full development of man's faculties, for the furthering of that culture which befits man's dignity. Man, in becoming an active member of civil society, does not submerge himself, but rather expands his personality from a limited, impoverished state of isolation and self-sufficiency into the full man. Not to have advantages which are possible in an established commonwealth dwarfs the power and scope of an individual's activities. Families living in the same locality must organize a civil society in order to establish hospitals, educational and religious institutions, means of transportation and commerce, methods of safeguarding individual rights and protection from

12. Cf. Saint Thomas, In Decem Libros Ethicorum Aristotelis ad Nicomachum Exposito, nos. 4, 112, 1391, 1719, 1891.
13. *Idem.*, nos 1719, 1891.

enemies.[14] Only an organized government with authority can perfect, among families living in the same territory, those things that make for peace and avoid confusion. Only a government with authority can correct inordinate tendencies, and encourage the perfect accomplishment of all activities that increase the well-being of all.

VI. THE ORIGIN OF CIVIL AUTHORITY

Many philosophers outside the Church, influenced by Hobbes and Rousseau, deny that man is a social animal and also refuse to admit that civil authority comes from God. They teach that civil society takes its origin from a contract freely entered into outside any inclination found in the nature of man. They claim that the obligation of submitting to legitimate authority depends only on the social contract voluntarily entered into. Much has been written on the subject. Leo XIII summarizes for all men the Catholic response to such errors:

> Those who believe civil society to have arisen from the free consent of men looking for the origin of its authority from the same source, say that each individual has given up something of his right, and that voluntarily every person has put himself in the power of one man, in whose person the whole of those rights has been centered. But it is a great error not to see what is manifest: that men, as they are not a nomad race, have been created, without their free will, for a natural community of life. It is plain, moreover, that the agreement which they allege, is openly a falsehood and a fiction and that it has no authority to confer on political power such great force, dignity and firmness as the safety of the State and the common good require. Then only will the government have all those ornaments and guarantees, when it is understood to emanate from God as its august and most sacred source.[15]

14. Saint Thomas, De Regimine Principum, I, 15.
15. Diuturnum, § 8.

VII. ITS MODE OF ORIGIN

All Catholic philosophers and theologians freely admit that civil society and its authority come from God. They disagree, however, in their explanations of the manner in which this is done. Suárez, Bellarmine and their disciples teach that the people themselves are the immediate supreme subject of the authority which they bestow upon their chosen chief of state.[16] Others deny both that society need originate from any type of pact whatsoever, and that the people themselves primarily possess the supreme authority.

Gredt offers a compromise view,[17] and it seems to be a very good solution of the dispute. The State originates from an implicit pact, one which the natural law demanded from a social animal obliged to live in union with his fellow creatures. It is a free contract in so far as the natural law does not determine which families or how many shall be included in any specific commonwealth. Nor does the natural law determine what kind of government the people shall adopt: monarchial government, by one; aristocratical government, by a few; or a democratic government, by many. All three forms are permitted as long as justice is observed and the general prosperity is taken care of.

The power of government lies, first, in the hands of the citizens as a whole; they select one or a group from their number who shall have the full right and authority to govern. The people hold that power only instrumentally, imperfectly, transiently, although vitally, and they must designate someone or a body of individuals to direct efficaciously the common good. It is evident that a large number of families occupying a great territory could not of themselves lay down laws and enforce them effectively.

16. Bellarmine, De Controversiis, Tom. II, i. 3 (Rome, 1886), "De Laicis," c. 6; Suárez, Tractatus de Legibus, I, iii, c. 3 and 4.
17. Elementa Philosophiae, Vol. II, nos. 1032-1033.

Their sheer lack of unity imposes upon them the duty of choosing a governor who will direct the State towards the end for which it exists. The rulers, being duly appointed by a free election of the people or coming into power in any other legitimate way, receive a certain sovereign power — that is, the right to command and direct the multitude in everything necessary for the good of the State. They could not function without sovereign power, but they are limited in so far as they cannot command internal or external matters more than is necessary. Sovereignty confers a right of direction over all the parts of the State and a right to command those parts, but only in so far as the good of the whole requires.

The people, of course, have a perfect right to retain a part of the sovereignty in their own hands. They can limit the power of their rulers, but not to the point of rendering the government useless and ineffective. The organization of the supreme power in the State, the separation of the authority into different branches, etc., is determined and set upon a firm basis by the constitution of each nation. The constitution is the sum of laws which regulates the function of the government.[18]

VIII. GOD CONFERS THE AUTHORITY

The people do no more than designate the person or the group that is to hold the sovereign power; the actual right to use it comes from God. This is the clear teaching of the Church as expressed by the Scriptures and papal pronouncements. There is no true and lawful authority, says Pope Leo XIII, except that which comes from God, the sovereign Lord of all, who alone has the power to give man authority over his fellow man.[19]

18. Cf. Cronin, *op. cit.*, II, 545-550.
19. Encyclical Sapientiae Christianae, § 3.

Since plainly no civil society can function unless there is someone in charge directing things, this authority no less than society itself has its ultimate source in God. It must then proceed from God. Indeed all things must be subject to Him and must serve Him. Therefore, he who holds the authority to govern has it from God, the Sovereign Ruler of all. Hear again the voice of Pope Leo XIII in this matter:

> And other than this opinion, it is impossible that any should be found not only more true but even more advantageous. For the authority of the rulers of a State, if it be a certain communication of divine power, will by that very reason immediately acquire a dignity greater than human — not indeed that impious and most absurd dignity sometimes desired by heathen emperors when affecting divine honors, but a true and solid one, received by a certain gift and benefaction. When it will behoove citizens to submit themselves and to be obedient to the rulers, as to God, not so much through fear of punishment as through respect for their majesty, nor for the sake of pleasing but through conscience as doing their duty. And by this means authority will remain far more firmly seated in its place. For the citizens perceiving the force of this duty would necessarily avoid dishonesty and contumacy, because they must be persuaded that those who resist state authority resist the Divine Will, that those who refuse honors to rulers, refuse it to God Himself.[20]

IX. PROOFS FROM SCRIPTURE

The power of civil authority to govern, to make and to enforce laws finds ample confirmation in the books of Sacred Scripture. The most frequently quoted text is the following: "By Me kings reign and lawgivers establish justice."[21] Saint Paul states the same doctrine in his Epistle to the Romans:

20. DIUTURNUM, § 9.
21. Prov. 8:15-16.

> Let everyone be subject to the higher authorities, for there exists no authority except from God, and those who exist have been appointed by God. Therefore he who resists the authority resists the ordinance of God; and they that resist bring on themselves condemnation. For rules are a terror not to the good work but to the evil. Dost thou wish, then, not to fear the authority? Do what is good and thou wilt have praise from it. For it is God's minister to thee for good. But if thou dost what is evil, fear, for not without reason does it carry the sword. For it is God's minister, an avenger to execute wrath on him who does evil. Wherefore you must needs be subject not only because of the wrath, but also for conscience' sake. For this is also why you pay tribute, for they are the ministers of God, serving unto this very end. Render to all men whatever is their due; tribute to whom tribute is due; taxes to whom taxes are due; fear to whom fear is due; honor to whom honor is due.[22]

Saint Peter expresses the same doctrine in the second chapter of his first Epistle.[23] Both he and Saint Paul were but echoing the doctrine uttered by the Divine Master in His response to the Pharisees: "Render, therefore, to Caesar the things that are Caesar's, and to God the things that are God's."[24] Who can doubt that in that answer our Lord and Saviour taught that we are obliged to obey the laws established by secular rulers? And then note that in the comparison made by Christ the obligation is identical in both instances, an obligation in conscience.

From the testimony of Sacred Scripture it is evident that those who are in charge of a community receive their power from God. Consequently, they are ministers, instruments of God, employed to preserve peace and promote the common good. Considering the origin of their authority and the purpose for which it is bestowed, one can conclude that civil laws bind in conscience.

22. Rom. 13:1-7.
23. I Peter 2:13-17.
24. Mark 12:13-17.

Sacred Scripture says that legislators act in the name of God when they decree justice.[25] Their regulations which, as we have said a number of times, are enacted only to apply the higher laws to specific conditions, bind in conscience the same as the eternal law. A glance at the causal relationship between the eternal law and the human law tells us the same thing. Human law holds itself as a proximate and secondary cause which depends upon the eternal law as the remote and primary cause. A proximate and secondary cause has the force of its effects from the primary and remote cause; but the effect of eternal law is an obligation in conscience. Human laws, therefore, also oblige in the same manner.

X. AN ESSENTIAL ELEMENT

Indeed human positive law must impose such an obligation in order to live up to the essential notion of law. For law, as a command or dictate of practical reason, necessarily implies a moral obligation, a connection of some necessity between the act commanded and the end for which that act is commanded. "The same truth," says Father Farrell, "is brought out when we remember that human law is derived from natural moral law, or that it is derived from eternal law. Either way it is traced back to the essential order of things and ultimately to the mind of God as the supreme source of truth and law. From Saint Thomas' point of view, a law that does not oblige in conscience is, strictly speaking, not a law."[26]

Of course, only a true law binds in conscience, one that is just, that does not violate legal, commutative, or distributive justice. A law is just according to its form when burdens are placed upon the subjects according to an equality of proportion; from its

25. Prov. 8:15-16.
26. Farrell, A COMPANION TO THE SUMMA, II, 399-400.

end it is just when it tends to the common good, and from its author when he does not exceed his lawful authority.[27] Of course, it is possible *"per accidens"* for an unjust law also to oblige in order to avoid a greater evil, such as scandal or personal injury.[28] If, however, a law is not only unjust, but also contrary to divine law, it is forbidden to obey it, according to the words of Saint Peter: "We must obey God rather than men."[29]

27. SUMMA THEOL., Ia IIae, q. 96, a. 4.
28. "Yet it may, at times be right to obey even an unjust positive law (one that is not against the natural law — e. g., a law that imposes an unjust tax burden), because the higher natural-law norm enjoins in individual cases the sacrifice of a particular good to a more general good. For instance, the general goods of security under law and the external order of peace constitute a higher value than does the individual right to just treatment in the levying of taxes. It is consequently not the unjust law that binds, but the higher norm of peace and maintenance of the community." — Rommen, *op. cit.*, p. 55.
29. Acts 5:29.

CHAPTER III

THE PENAL LAW THEORY

I. THE DIVISIONS OF CIVIL LAW

A CURSORY examination of even a few manuals of moral theology will demonstrate that an infinite variety of divisions of civil laws is possible. However, since the appearance of Castro's work,[1] *Tractatus de Potestate Legis Poenalis,* in the first part of the sixteenth century, most authors have divided laws according to their obligations, into three classes: First, the simply preceptive laws, such as the law commanding attendance at Mass on Sunday, which produces a moral obligation. Secondly, there are the mixed penal laws which impose both a temporal punishment and moral guilt: for example, a Canon is bound to recite the Divine Office; and if he does not, he not only is guilty of sin but is also deprived of his stipend when he is not present at the choral recitation. Thirdly, there are the so-called purely penal laws which oblige not as regards the placing or omission of the act commanded by the law but only as regards the acceptance of the penalty imposed for the violation of the law.

II. THE DEFINITION OF A PENAL LAW

Not all authors agree when it comes to defining a penal law, but the different definitions they propose seem to differ only verbally rather than in reality. Alphonsus de Castro defines a penal law thus: "A law establishes a penalty to be inflicted on someone on account of a fault committed."[2] Navarrus says it is that which imposes a privation of some good without reason of one's own fault, or indeed of another's fault, nevertheless, on account of some fault, which seems just to the legislator.[3] Among modern authors the definition which Aertnys-Damen proposes is typical: "A purely penal law is one that imposes a penalty on those who do or omit something without prescribing the doing or omission of that thing under moral guilt."[4] Merkelbach's definition seems to be more to the point. "A purely penal law is one that does not oblige the subject in conscience to do what the law prescribes, but does oblige him in conscience not to resist infliction of a penalty and to undergo the penalty in case of a transgression."[5] Peinador says that his definition will be acceptable to all: "a law stating some penalty for the transgression of some precept."[6] The distinguishing feature always remains: namely, the absence of moral guilt or of moral obligation, except in connection with the penalty. The object of the law may be disregarded as long as one is willing to undergo the penalty which the civil magistrates may inflict for the violation of the law.

III. THE HISTORY OF THE PURELY PENAL LAW THEORY

Generally, both the older commentators and present-day writers[7] freely admit that the theory made its first appearance in an insert placed in the prologue of the Dominican Constitutions by the General Chapter held in the year 1236, which reads as

1. At least Navarrus (COMMENTARII DE LEGE POENALI, no. 26), says that Castro was the first to classify laws in this fashion. There is no evidence to prove the contrary, but it is evident that Castro simply amplified and clarified the divisions which Angelus a Clavasio had made.

2. TRACTATUS DE POTESTATE LEGIS POENALIS, I, i, c. 3.
3. COMMENTARII DE LEGE POENALIS, "C. Fraternis," no. 14.
4. THEOLOGIA MORALIS, Vol. I, no. 58.
5. SUMMA THEOLOGIA MORALIS, Vol. I, no. 287.
6. THEOLOGIA MORALIS FUNDAMENTALIS, Vol. I, no. 264.
7. Cf. Van Hove, DE LEGIBUS ECCLESIASTICIS (Malines, 1930), no. 148; and Michiels, NORMAE GENERALES JURIS CANONICI (Tournai, 1949), I, 261, for references.

follows: "In order, therefore, to provide for the unity and peace of the whole order, we will and we declare that our rule does not oblige *ad culpam* but *ad poenam* unless on account of precept or contempt."[8]

The next step in the development of the theory is the declaration of Henry of Ghent,[9] who used a lot of space to show the reasonableness and fitness of penal laws in religious orders. He states the conditions necessary for applying them in communities; then, without giving reason or explanation, he closes his article with the following statement: "And it is also thus with the statutes of princes and prelates in similar cases." In speaking, however, of the rules of religious communities, he did say, *"ad intentionem statuentis."* It can, therefore, be presumed that in civil laws he considered the will of the magistrate as a condition necessary for the establishment of purely penal laws. As far as we are able to trace it, that simple declaration of Henry of Ghent transferring penal law theory from religious orders to civil society was the first attempt to do so. Later writers began their treatment of this question by agreeing or disagreeing with Henry of Ghent until the time of Castro; after that many of them began to agree or disagree with him.

About fifty years after Henry of Ghent made his proposal, the Council of Toledo made a practical application of it in the following words: "Lest they be burdened with the weight of guilt through the violation of the provincial constitutions, the faithful, upon whom the divine compassion has deigned mercifully to impose a sweet yoke and a lighter burden, we, with the

8. Monumenta Ordinis Praedicatorum Historiae, Tom. III, Acta Capit. Gen., I, viii. Vangheluwe expresses dissatisfaction in accepting this as the origin of the theory, but admits that since no earlier source can be found it must be accepted as the beginning of the theory. Cf. "De Lege Mere Poenali," Ephemerides Theologicae Lovanienses, Vol. XVI (1939), pp. 383-429.

9. "Et simile de statutis principum et praelatorum in consimile materia." — Aurea Quodlibeta, Tom. III, q. 22.

approval of this Council, ordain that the provincial constitutions of our predecessors, and those which will be established in the future — unless expressly stated in the constitutions to be established — oblige not as regards the guilt but only as regards the penalty."[10] The theory of penal laws behind his declaration is evident. The laws of the Synod contained true precepts. They commanded or forbade the doing of certain things; hence it would not be sinful to act contrary to the law unless the offender would be unwilling to submit to the penalty when it was imposed. There is no indication that the Synod was indifferent as to whether or not the law was obeyed or the penalty accepted. The Synod wanted the law kept, but it did not wish to burden anyone with sin for transgressing the law, unless he refused to pay the penalty.

Crowe observes that this explanation of purely penal laws is substantially the same as that which many modern authors consider the only true explanation.[11] Curiously enough, between the Synod of Toledo and the end of the last century, this explanation of the theory of penal laws suffered an almost total eclipse. During this period the explanation of Angelus a Clavasio was commonly accepted.[12] He wrote in the fifteenth century: "Sometimes in statutes there are two precepts. For example, when it is stated in the decree that no one shall do such a thing and he who does it shall pay such a penalty; and then it obliges *ad culpam et poenam.* Sometimes, truly, there is only one precept. For example, when it is said: If anyone shall do such a thing, he shall pay such a penalty; and so from the form of the law it would

10. "Ne onerentur culpae pondere ex transgressione constitutionum provicialium, Christi fideles, quibus divina pietas jugo suavi et oneri leviori supponere misericorditer est dignata, sacro approbante Concilio, ordinamus quod constitutiones provinciales praedecessorum nostrorum, et quae in futurum condentur, nisi aliter in condendis expresse fuerit ordinatum, non ad culpam, sed ad poenam tantum earundem obligent transgressores." — Cf. Peinador, *op. cit.,* Vol. I, no. 367.

11. Crowe, The Moral Obligation of Paying Just Taxes (Washington, D. C., 1944), p. 87.

12. Summa Angelica, under the title "Inobedientia."

oblige only as regards the penalty." Crowe points out that Angelus a Clavasio was mistaken in saying that Johannes Andreas favored this application of penal laws; that author restricted his discussion of penal laws to religious communities alone.[13]

It was the general trend until recent times to divide laws more according to the wording than according to the gravity of the matter. The extent to which this conception of the obligations of penal laws influenced writers can be seen in the examples Castro gives of a penal law. The following is one of the examples he offers. "If anyone (God said through Moses) shall have stolen a cow or a sheep, and shall have sold or killed it, let him restore five cows for one cow," etc.[14] On the contrary, it is the opinion of very many authors that such laws in the Old Testament were not merely penal laws but mixed laws, and if no penalty was attached, then they were merely moral laws binding in conscience in regard to the act prescribed.[15] Castro was mistaken simply because in defining its characteristics he adhered too closely to the formula in which the law was expressed.

Even Saint Alphonsus[16] wrote:

> And this before all must be known: that a purely penal law is one which gives no precept; v. g., whoever does this shall pay a penalty; and this does not oblige in conscience even though the penalty is most grave. . . . Another is a law not purely penal but mixed, which prescribes and also imposes a penalty; v. g., no one shall do this, *sub poena*, etc.

A comparison between Castro and Merkelbach reveals strikingly the old and the new concept of penal laws. The former[17] defines a purely penal law as one that does not prescribe or forbid

13. Cf. In Tertium Decretalium Novella Commentaria, c. VII, "Ne Clerici vel Monaci," III, 1, no. 2, p. 242.
14. *Op. cit.*, col. 1615.
15. Cf. Rodrigo, *op. cit.*, Vol. II, no. 341.
16. Theologia Moralis, I, Tract II, no. 145.
17. Tractatus de Potestate Legis Poenalis, I, c. ix, col. 1613.

the doing of anything, but merely imposes a penalty on him who does something or omits doing something. A mixed law — Castro called it a mixed law — is one that prescribes the doing of something and moreover prescribes a penalty against one who transgresses the law. A purely moral law prescribes or forbids something without designating any penalty. Merkelbach, on the other hand, says: "Certain civil laws are moral or preceptive which strictly oblige the subject in conscience to do what is stated in the law, also at times under punishment — in which case they are also penal and are called mixed; certain ones are merely penal which oblige the subject in conscience not to do what is stated in the law, but only not to resist the infliction of a penalty in case of a transgression and to undergo the punishment inflicted."[18]

There is a significant difference between the two authors. For Castro a purely penal law was simply a law which imposed a penalty but did not definitely command or forbid anything outside the penalty enjoined. If the law would have prescribed something, Castro would have considered it a mixed penal law obliging to both the penalty and the act. Whereas, for Merkelbach and many other modern theologians, a purely penal law may definitely command or forbid something, provided the only obligation it imposes is the accepting of the penalty if and when it is justly imposed.

Navarrus complained that every law which Castro calls purely moral seems to oblige under pain of venial or mortal sin and consequently also under eternal or temporal punishment in either this life or the next;[19] and every law which he calls purely penal seems to oblige tacitly under venial or mortal sin, on account of which sin the penalty is imposed. In spite of that statement, which would seem almost to deny the possibility of a merely

18. Summa Theologia Moralis, Vol. I, no. 287.
19. Cf. Commentarii de Lege Poenalis, no. 41.

penal law as far as Navarrus was concerned, he in his own tract on law speaks of Sylvester's writing against Henry of Ghent, Angelus a Clavasio, and Castro; and then without any effort to develop an explanation he says: "A temporal punishment which does not suppose an eternal punishment excludes it." He grants that an excommunication implies a moral fault, but he gives no other reason for rejecting the moral force of ordinary civil laws than the will of the legislator.[20]

The next author to contribute something new to the question was Suárez, who also defined a penal law according to its verbal form.[21] He said that a purely penal law is one which contains only one precept and that is a hypothetical precept of accepting a certain penalty if this or that occurs. The difference between Suárez and Castro can be perceived readily if we place alongside that definition what Suárez said in his answer to the solution Navarrus offered. "A law containing a precept obliges in conscience."[22] In other words, for Suárez, precept and obligation are correlative terms and a precept always gives rise to an obligation and an obligation is always the product of a precept. This explanation which Suárez presented seems to have had some effect; for, as a matter of fact, many authors — indeed, most of them who followed Suárez — used the word "obligation" in defining a penal law, whereas those who preceded him did not use the word "obligation."

Billuart,[23] and the others he refers to, claimed to be against the idea of taking the obligation of obeying a law from the wording of the law, but actually they did not stray very far away from it. Billuart himself divided law according to its obligation into three classes and then proceeded to subdivide mixed penal

20. Navarrus, Manuale Confessariorum et Poenitentium (Venice, 1428) c. xvii, p. 395.
21. Tractatus de Legibus, V, c. iv, no. 2.
22. *Ibid.*, V, c. iii, no. 6.
23. De Legibus, Dissert. IV, art 4.

laws into two classes. The first kind is copulative, as though the law read, "Let no one export grain from the province and let him who exports it pay a fine," which can be expressed in a single proposition in this manner. "We forbid anyone to export grain from the province under the penalty of paying a fine." The second class of penal laws is disjunctive,[24] as though the law read, "Let no one export grain from the province; or if he does export it, let him pay a fine." After giving that division of a mixed law, Billuart says: "I hold as certain that a mixed copulative law obliges the subject under pain of sin to place or omit the act because it truly prescribes or forbids; and the penalty is not placed that it might take away the obligation but rather that it might strengthen it and more efficaciously move to the observance of it." Then he proceeds to state that it is also certain that the disjunctive law does not oblige definitely either to the act or the penalty, but rather to one or the other. The only reason he could have had for not applying the same criterion to the disjunctive as he did the conjunctive, was that old doctrine which dictated that a law obliges according to the way it is written.

Billuart was mainly concerned with what he defined as a penal law: namely, "one that imposes a penalty on those who do or omit something, but without explicitly, at least, prescribing or forbidding anything." As if it said, he who takes grain out of the province, shall pay "a hundred." The question is whether it obliges one *sub culpa* to place or omit the act or only to undergo the penalty. Each part can be defended. Billuart claims that such a law binds *per se* both as to the act and the penalty. The reason is that, according to the common understanding and the common way of speaking, whoever says, "He that does this shall be condemned to death," is really saying: "I forbid this to be

24. Thus Van Hove was mistaken when he wrote that the disjunctive obligation theory is of nineteenth-century origin. Cf. Van Hove, De Legibus Ecclesiasticis, no. 150.

done, and whoever does it will be condemned to death." Hence, even though he does not explicitly prohibit or prescribe, he does this implicitly.

From the above statements which Billuart makes, it would seem that he stood firmly against the whole theory of penal laws as it is generally accepted today. The fact that he asks the question whether or not a penal law binds in conscience, shows how far he is from the modern concept of penal laws. Today we ask whether or not they exist. I say at first glance; because, a little further on in the same article, Billuart says that he used the qualifying words "*per se*" because it may happen, as in the Dominican Constitutions, from the mind of the legislator or the custom of the people, that a penal law would bind only *ad poenam*. Thus we see that he was not really too far from the mind of those who sponsor the penal law theory today.

CHAPTER IV

PENAL LAW AMONG MODERN AUTHORS

I. THE DIFFERENT THEORIES

DESPITE the fact that theologians now reject the theory of penal laws in the sense in which Angelus, Henry of Ghent, and Castro considered them, there is a great lack of harmony among theologians in explaining the theory and there are three major schools of thought regarding the precise nature of a penal law; also, many lesser opinions have been offered. The first is what might be called the theory of the moral disjunctive obligation.[1] It is a throwback to the moral disjunctive law which Billuart spoke of. The patrons of this theory maintain that a purely penal law obliges either to the act which the law prescribes or to the fulfillment of the penalty, but not definitely and determinately to the one or the other. The subjects remain free to choose one or the other of the alternatives.

The second theory is called a conditional moral obligation. According to its patrons, a penal law gives rise to a purely juridical obligation in regard to the act prescribed or prohibited

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1. D'Annibale, a patron of this theory, wrote: "Lex poenalis ea dicitur quae poenam irrogat transgressori ideo duo semper continet nempe rem aliquam (non faciendam vel faciendam) et poenam, itaque obligat pure poenalis vel ad rem vel ad poenam arbitrio nostro." — SUMMULA THEOLOGIAE MORALIS (Rome, 1908), Pars I, no. 207.

Bouquillon also defends it: "Si stricte loqui velimus repugnat ut detur vero lex pure poenalis non tamen repugnat ut detur lex mere poenalis minus stricte quae scilicet disjuntive tantum obliget vel ad actum ponendum vel saltem ad onus subeundum. — THEOLOGIA MORALIS FUNDAMENTALIS (Bruges, 1903), no. 144, p. 353.

Among others who favor the disjunctive theory are Maroto, INSTITUTIONES JURIS CANONICI (Rome, 1921), Tom. I, no. 189; Tepe, INSTITUTIONES THEOLOGICAE MORALIS, I, 365; Lehmkuhl, THEOLOGIA MORALIS (Freiburg im B., 1914), I, 310; Reuter, THEOLOGIA MORALIS, Tom. I, no. 214; and Ferreres, COMPENDIUM THEOLOGIAE MORALIS (Barcelona, 1925), Tom. I, no. 205, who calls this the most common opinion.

directly, immediately, and relatively. If this obligation is not fulfilled from the law itself, a moral obligation arises either to pay the penalty, if it is a "*latae sententiae*," or to sustain it when it has been imposed. Prümmer, a defender of this theory, says that a purely penal law is one which indeed truly prescribes something to be done or omitted and threatens a penalty to the transgressors. Only a juridical fault is established and is punished by such a transgression.[2]

The third theory is known as the purely juridical obligation. Vermeersch[3] sponsored it. According to his theory, a purely penal law causes no obligation in conscience whatsoever of its own power, neither when it imposes a punishment nor when it prescribes an act or an omission. A penal law has only a purely juridical force in the external forum, obliging indeed principally to the thing and merely conditionally to the penalty, if the prescribed act has not been observed. Nevertheless, there arises a moral obligation of sustaining the penalty, not from the penal law itself, but from the natural law which commands us not to resist public authorities when they demand payment of a debt contracted in their forum.[4]

Rodrigo[5] perceives the inherent weakness of the three major theories. Still he refuses to abandon the purely penal theory; instead, he purposes what he freely admits is an eclectic opinion, which, he says, eliminates the disjunctive obligation theory, amends the juridical, and perfects the conditional theory. It is

2. Manuale Theologiae Moralis (Barcelona, 1946), Vol. I, no. 209; Suárez, Tractatus de Legibus, I, v, c. 4, no. 4; Janssen, "De Lege Mere Poenali," Jus Pontificum, Vol. IV (Rome, 1924), pp. 119-126; Van Hove, *op. cit.*, no. 150.

3. Theologia Moralis (Rome, 1933), Vol. I, no. 172; "Lex mere poenalis nobis concipienda videtur ut lex quae tota quanta conscientiam non obligat; seu quae ut ait S. Alphonsus (Theologia Moralis, "De Legibus," no. 145) 'non obligat in conscientia,' i. e., quae tota quanta se continet in ordine juridico seu fori exterioris."

4. Cf. Rodrigo, *op. cit.*, Vol. II, no. 340, and Lopez, "Theoria Legis Mere Poenalis," Periodica de Re Morali Canonica Liturgica, Vol. XXVII (1938), Fasc. III, p. 207, for an analysis of the Vermeersch view on this point.

5. Praelectiones, Vol. II, no. 346.

quite a difficult task that he purposed for himself, and he does not seem to succeed in accomplishing it. His eclectic opinion leaves much to be desired. He distinguished a twofold obligation: One terminates in the act intended by the lawgiver; this is the principal obligation. Nevertheless, it does not bind in conscience — at least not from the force of the law itself. Otherwise, it would not be distinguished from a mixed penal law. The other is a subsidiary obligation, terminated in bringing forth a due punishment as a sanction of the principal obligation. The principal obligation is purely juridical. The subsidiary may at the choice of the lawmaker be either purely juridical or moral. There always remains in the superior the clear right of demanding a punishment in the internal forum to which corresponds the debt of sustaining it also in the internal forum. And this obligation in conscience is caused by the penal law itself.

To this list we may add the theory of dispensability proposed by Woroniecki,[6] who admits with Renard that just as heat which does not heat, is not heat; and light which does not light, is not light; so a law which does not bind is not a law. Woroniecki says, however, that a law binds proportionately according to the gravity of the matter prescribed for the common good, and then goes on to say that a penal law obliges indeed in conscience to such an act as the law prescribes, but in matters of light moment in social laws subjects can dispense themselves if they judge that it is fitting and useful for them to do so. The burden remains, nevertheless, of undergoing the penalty when it is imposed by the civil magistrates.

Then, too, there are still a few moralists who contend that a penal law can be judged from its form — that is, according to the way in which it is written.

6. "De legis sic dictae poenalis obligatione," Angelicum, Vol. XVIII (1941), p. 379.

II. CRITICAL ANALYSIS OF MODERN THEORIES

Every theory proposed in support of purely penal laws possesses a glaring weakness that even a passing consideration demonstrates. None of the systems proposed in defense of the merely penal obligation can be reconciled with Saint Thomas' classical definition of law. The theory of the disjunctive obligation supposes a purely penal law to have two alternatives, which are proposed as equal principles. The subject has his choice: He can fulfill the law or suffer the consequences. This theory must be rejected, as it is completely illogical. The penalty is only a sanction attached to the law. It is not contained in the primary end toward which the law aims. The acceptance of the punishment inflicted is not the observance of the law. Rather, it is a sign that the subject did not obey the law. In imposing a punishment, the magistrate simply forces those guilty of disturbing peace and order to pay for the disturbance that they have caused.

The disjunctive theory also strikes a discordant note from another angle. A just law can prescribe only something which is absolutely or at least relatively necessary in order to obtain a due end which the common good demands. If the end of the law is not necessary, the legislator, unreasonably restricting the freedom of those under his jurisdiction, enacts not a true law but performs only an act of tyranny. If the end of the law is necessary, the legislator would be guilty of negligence if he held himself indifferent as to whether the law was observed or the sanction enforced.

In every penal statute, therefore, the principal intention of the law does not consider the penalty; for this would be tyranny and cruelty; but it considers the observance of some work of virtue and legal custom to which it joins a punishment, that it may

bind the subject more strongly to the observance of the law lest it be transgressed through disobedience.[7]

The theory of the conditional obligation, according to which the subjects are morally and determinatively obliged to the threatened penalty,[8] does not give a valid reason for imposing a penalty upon a person who placed an act that was not in itself morally wrong. If this theory were true, it is difficult to see how the punishment could be justly inflicted. According to Saint Thomas,[9] a penalty is that which is contrary to the will, is afflictive, and is imposed on account of a *culpa*. The *penalty* must always have a relation to the *culpa* and must be in proportion to it. Either the act was evil, or it was not. If it was evil, the penalty should be imposed. If it was not evil, there is no reason why anyone should feel bound in conscience to undergo a punishment, except to avoid scandal or personal injury.

Like all exponents of the penal law theory, the sponsors[10] of the conditional obligation system seek refuge in the so-called juridical fault that does not go beyond the external forum, but which they twist out of all proportion to its true nature in order to defend their position. (This question will be taken up in its proper place.) The main point on which our attention must be focused is this: Either a man turned against a reasonable command in disobeying a penal law, or he did not. If he did, his act was evil before both God and man and deserves censure. If he did not act against reason, to punish him is not just.[11]

It is not possible to take a human act out of the forum of God, that is, the internal forum; otherwise, it would follow that God does not have charge of human acts: an evidently false supposition.[12] Then, too, human acts *in concreto* are either evil or good.

7. Henry of Ghent, AUREA QUODLIBETA, III, q. 22.
8. Rodrigo, *op. cit.*, Vol. II, no. 343.
9. SUMMA THEOL., Ia IIae, q. 46, a.6 ad 2.
10. Cf. Prümmer, MANUALE THEOLOGIAE MORALIS, Vol. I, no. 209.
11. SUMMA THEOL., Ia IIae, q. 21, a. 2.
12. *Ibid.*, q. 21, a. 4.

They are never indifferent. In the conditional obligation theory it seems that an act could be considered evil and good at the same time. The action contrary to the law is good in so far as it is not considered morally wrong, but it is also evil in so far as the civil authorities can punish anyone who goes contrary to the law. It seems, according to the conditional theory, that I am not bound morally to obey a penal law. Yet if I disobey it, the common good is injured to such an extent that I must repair the damage, and this obligation binds me in conscience. Surely, if the harm inflicted on the general welfare was so great that I am morally bound to make amends, then the act by which the injury was caused cannot be free of moral guilt. Actually there is not any real distinction between the disjunctive and the conditional theory, in so far as even according to the latter system there is nothing to prevent an individual from breaking a so-called penal law and accepting the consequences, while at the same time feeling that he was acting entirely within the moral law.

Vermeersch rightly rejected the disjunctive theory and saw the fallacy in the conditional theory. He attacked them in these words: "We say that the will of the legislator is astonishing and not too suitable which denies the force of obliging to a principal part of the law — i. e., the norms — so that it makes this power of obligation belong to the secondary part, which is the exterior sanction."[13] Although that statement seems an outright rejection of any theory which would relegate the principal effect of law to a secondary position and elevate the exterior sanction above its rightful position, his own system, the purely juridical theory, contains the same unsound line of argumentation. According to his explanation, the superior retains legitimate authority, and therefore, a penalty imposed for a purely juridical fault is legitimate

13. "Miram et parum congruam dixerimus voluntatem legislatoris qui parti principali legis, i. e., normae negaret vim obligandi ut hanc propriam faceret partis secundariae quae est sanctio exterior." — THEOLOGIA MORALIS, Vol. I, no. 172.

and it is not possible to resist the authority inflicting it. This, however, he adds, is not by force of human laws, but of the divine law which imposes obedience to just laws.[14]

One may ask, does the divine law demand only non-resistance to an exterior sanction or does it also include the thing itself which a lawful authority commands or forbids? It seems that in the purely juridical theory all human authority is reduced to the power of uttering threats of punishment. It seems to deny, at least implicitly, that men must respect authority and obey reasonable commands. It seems to presume that men can be moved only by the fear of penalties.

Regardless of any explanation that might be given in this concept of penal laws, men would not be bound beyond the external forum. Legislators who receive their power to rule from God and who act in the name of God cannot place such a limitation upon their commands. They have no authority and cannot exercise any authority unless they act as ministers of God for temporal things. By right and in practice, all authority comes from God. In fact and in practice, the established civil power is from God. Furthermore, the power is exercised in the name of God and must necessarily terminate in God. The ministers of God for temporal things cannot proclaim a law which terminates in themselves and not in God. They have no authority to do so. They are only secondary causes of the laws they promulgate. All laws depend upon God as the primary cause. Just as the effects of a secondary cause are wholly dependent upon the primary cause, so too the effects of laws established by a minister of God obtain their entire force from God Himself, whose ordinances always oblige in conscience.

If a purely juridical obligation were possible, if individuals were not bound in conscience to obey a just law, fear would be the only motive urging the observance of law. Fear, however,

14. THEOLOGIA MORALIS, Vol. I, no. 172.

is entirely too weak a foundation for the promotion of the general welfare. As Saint Thomas said, "Fear is a weak foundation; for those who are subdued by fear would, should an occasion arise in which they might hope for immunity, rise more eagerly against their rulers in proportion to the previous extent of their restraint through fear."[15]

Pope Leo XIII, speaking about rulers who do not recognize nor attribute their right of ruling to God, made a statement which is an implicit attack on the whole theory of penal laws:

> . . . Rulers in the midst of such threatening dangers have no remedy sufficient to restore discipline and tranquillity. They supply themselves with the power of laws and think to coerce by the severity of their punishments those who disturb their governments. They are right to a certain extent, but they should seriously consider that no power of punishment can be so great that it alone can preserve the State. For fear, as Saint Thomas admirably teaches, "is a weak foundation"; for, "those who are subdued by fear would, should an occasion arise in which they might hope for immunity, rise more eagerly against their rulers in proportion to the previous extent of their restraint through fear."
>
> And besides "from too great fear many fall into despair, and despair drives men to attempt boldly to gain what they desire." That these things are so we see from experience. It is therefore necessary to seek a higher and more reliable reason for obedience and to say explicitly that legal severity cannot be efficacious unless men are led on by duty and moved by the salutary fear of God.[16]

The compromise theory which Rodrigo offers as a solution must be rejected, as is evident from what we have said above in refuting the conditional and the merely juridical theory. In addition, it must be said that in Rodrigo's theory the nature of the subsidiary obligation would have to be mentioned in the law, but

15. De Regimine Principum, I, 10.
16. Encyclical Diuturnum (1881), sec. 18.

legislators are not accustomed to discuss the nature of the penalty in the wording of the law. He calls the exterior sanction the subsidiary obligation and the act or omission the principal obligation. Since, however, the acceptation of the penalty obliges morally and the act or omission obliges only in the exterior or juridical forum, the payment of the penalty must be called the principal obligation in his theory. It has power in two forums, while the act or omission is restricted to the civil forum. Like all other theories supporting purely penal laws, this one snatches away from the civil magistrates the dignity which Sacred Scripture attributes to them and leaves them only the power to punish evildoers.

As for the theory of dispensability which Woroniecki proposes, it, too, must be rejected. Although it is a very clever attempt to solve the problem, it does not seem to be in accord with the mind of the legislators. A dispensation is an act of jurisdiction which subjects do not possess. The faculty of dispensing oneself requires an expressed concession from the superior either formally or equivalently. Penal laws do not possess such an acquiescence on the part of the superior. At least no one can prove it exists in any civil statute.

Certainly any attempt to consider a law as merely penal from its form is obsolete. It is irrelevant.[17] The form of every important law in our time is penal in the sense that a penalty is imposed for its violation. In fact, a civil statute which carries no penalty is not now regarded as a law at all. It is merely a directive rule, a more or less persuasive ideal or a civil counsel of perfection. From the form of a law it is almost impossible to draw any reference concerning the extent or restriction of its morally binding character.

17. Cf. John A. Ryan, "Are Our Prohibition Laws Purely Penal?" Ecclesiastical Review, Vol. LXX (1924), p. 408.

A very practical difficulty, a commonplace fact, rules out any possibility of judging the binding force of a law from its form. How many people are there who ever actually read a law in its official form? Safely, it can be said that only lawyers, public officials, and those connected with court cases ever read a law in its official form. The rest of us receive our knowledge of the existence of a law from a resumé given in the newspaper or in some journal or other which does not discuss the moral issue involved at all. If the above principle were a valid method by which to judge the moral obligation of a law, how would the average man, who has not seen or heard the form of the law, know the gravity of his obligations connected with laws that directly or indirectly affect him?

CHAPTER V

AN ANALYSIS OF THE INTRINSIC ARGUMENTS UPON WHICH THE PENAL LAW THEORY IS BASED

I. CUSTOM AND THE PENAL LAW THEORY

IN DEFENSE of the merely penal law theory, it has been said that a custom exists in a community according to which the people consider certain civil laws of minor moment as merely penal. An appreciation of elements required to form a custom betrays immediately the weakness of the custom argument. Custom may be taken either formally or materially. In the material sense it simply means a series of like acts or omissions over a long period of time. For instance, antiquated blue laws in Pennsylvania which have not been observed for over a century, at least. Such a case constitutes a material custom or material for a custom. In order, however, for a material custom to become a formal custom — that is, in order that it may be a correct norm of action — the legislator must give his approval either implicitly or explicitly.[1] The difficulty in accepting this argument lies in the fact that legislators never declare in any manner that certain laws are merely penal. And unless such consent is given, an ordinance of reason promulgated for the common good by one in authority obliges morally.

II. THE COMMON ESTIMATION AND PENAL LAWS

Other advocates of the purely penal theory say that it is not necessary to have a custom, strictly speaking. The common persuasion of the faithful, the common estimation, the common interpretation of the more intelligent, the more timorous, the more

1. Michiels, *op. cit.*, II, 4-6; Cicognani, *op. cit.*, pp. 643-647.

conscientious citizens, is sufficient to demonstrate the existence of laws that do not bind in conscience. No weight can be attached to this argument either, for the simple reason that the only weight attached to the common estimation of a law is that which it may possess as interpreting the mind of the legislator. Popular estimation is not an authentic interpreter of the law except to the extent that it is either tacitly or expressly accepted by the legislator. The only authority the common persuasion contains is that which it may possess as an interpretation of the ruler's mind. There is, however, nothing either in the nature of our civil laws or in any known attitude which indicates a legislative intention to make enactments merely penal.

The common persuasion-argument is a mere presumption which cannot be actually demonstrated. It would be difficult to find an individual who considers himself obliged in conscience to suffer punishment for doing something contrary to the laws of his country which in itself was not morally wrong. Generally speaking, he undergoes the penalty inflicted for such an offense only for fear of a greater injury. For example, a man arrested for speeding pays the fine, not because he thinks it is a sin, but rather because he knows that if he does not pay the fine he will lose his driver's license. The ordinary layman would reject the penal law theory as too subtle a distinction to understand or to be bothered with.

The common ordinary man usually submits to civil reprisals for sinless acts, not because he feels he ought to, but simply out of fear. We have to take into consideration also the evident fact that many people do not realize their obligation in regard to just civil laws. Consequently, they often disobey certain laws that cause them some inconvenience which they consider an infringement upon their liberty. If they are arrested and taken to court, they pay their fine in order to avoid any further annoyance.

Rarely do they stop and consider any moral obligation connected with their action or the penalty they undergo.

It does not seem that the common estimation-argument, as used by the defenders of the penal law theory, can withstand a logical, practical investigation. It seems instead to count against them rather than add any strength to their position. It is at least of very little or of doubtful value in an attempt to prove the existence of merely penal laws which do not bind *ad culpam*.

III. THE GREATER AND THE LESSER ARGUMENT

There is an axiom which says: He who can do the greater can do the lesser. Applying that to the power of a legislator, our opponents[2] claim that since it is a greater thing to bind citizens to both the act and the penalty rather than to bind to the penalty alone, the legislator, therefore, who can bind to both the act and the penalty can also bind to the penalty alone. That axiom in itself is valid, but has no place here and cannot be applied to the formation of laws.[3] The axiom that he who can do the greater can do the lesser, is valid only in case the effect is divisible. For example, a pane of glass two yards square can be divided into small squares, and he who made the large pane of glass, can also divide it into small pieces or make new, smaller squares. It is also evident that the area of both sides of a pane of glass is greater than one side, but it is clear that no one can manufacture a pane of glass with only one side. Glass is not divisible in that manner. In like manner, magistrates can establish laws that are absolutely or only relatively necessary, that carry a light or a grave obligation, but they cannot establish a just and a true law which would not contain a moral obligation. It is a necessary property flowing from the very essence of law.

2. Prümmer, *op. cit.*, Vol. I, no. 210.
3. Crowe, THE MORAL OBLIGATION OF PAYING JUST TAXES, p. 103.

The legislator has the power to determine whether or not a certain action should be commanded or forbidden. He also has the power of adding sanctions to his commands. In one sense the legislators can do the greater or the lesser. Since a law does not presuppose a sanction, they can promulgate one with a sanction or without one. They cannot, however, change the essence of a law. They cannot limit its binding force to the external forum. Law, in its nature, is a rule for the measurement of human acts. There is no such thing as a human act which does not pertain to the internal forum. We are responsible to God for all our deliberate acts. A promulgated law immediately becomes a rule whereby the goodness or malice of human acts is measured. Those acts which conform to it are good; those which do not are evil.

IV. THE MERELY JURIDICAL FAULT

A juridical fault is that by which anyone transgresses a precept of the civil law whether he does or does not offend God through a formal sin. He who transgresses a civil law by a formal sin is guilty of a theological as well as a juridical fault. A merely juridical fault is had when anyone is reputed to have violated a civil law, although he does not offend God through a formal sin — as, for example, he who places an illegal act because of forgetfulness or inadvertence.[4]

The violation of every civil law, whether we call it a purely moral, a mixed, or a merely penal law, always induces a juridical responsibility. That is an obligation of answering to society for all the consequences which follow the breaking of a law. The juridical guilt incurred, as far as the civil authorities are concerned, is always the same. The magistrate simply demands that

4. Heylen, De Jure et Justitia (Malines, 1943), II, 483.

those who damage the social external order must make reparations. The civil judges make no attempt to — indeed they are not competent to — pass judgment upon the interior dispositions that accompanied the offense committed. The law presumes that the will conforms to the deed unless the contrary is proved. Even when the contrary is proved beyond a doubt, the State still has the right to demand reparations, especially if the rights of a third party are involved. In case a person was not voluntarily responsible for his action, he certainly would not be held guilty in the forum of conscience for his act. Nevertheless, the judge can oblige him in conscience to pay the damages. There are two reasons for this. First, he cannot know the nature of the interior act. He can only pass judgment upon the anti-social exterior act. Secondly, the common good demands that law should lead all men to discharge their duties carefully, not to act inadvertently in matters that involve the public good. This power in the hands of the civil authorities forces citizens to a greater respect for the individual and property rights of another.

We can conclude, then, that although a man will not have to answer in the forum of conscience for an involuntary act, he may be bound in conscience to make restitution for the injury that resulted from the indeliberate act. This is a case in which a punishment is justly inflicted even though no moral guilt was incurred. No one can deny that this is just and right. To speak, however, of a purely juridical fault in which a just law was willingly and knowingly transgressed seems absurd, but that is what the defenders of the penal law theory would have us believe. It is not acceptable. Every theory proposed to defend the purely penal laws ultimately rests upon the false assumption that a purely juridical fault can exist even though the disobedience was voluntary.

V. THE WILL OF THE LEGISLATOR

Authors of the past such as Castro, Angelus a Clavasio, Henry of Ghent, and Navarrus, as well as modern writers such as Marc, Noldin, Prümmer, and Génicot, attribute to the legislators the power of restricting the moral obligation to the penalty. The obligations attached to a law, they say, ultimately depend upon the will of the legislator. If he does not intend to bind the conscience of his subjects to the act but only to the acceptance of the penalty, that is the only obligation connected with the law.

In view of the fact that all law is a participation in the eternal law and that the legislator is only a minister of God and not an independent authority, civil magistrates have no power to place such a restriction on a law. Law depends upon the will of the legislator for its existence, but not for its essence. A law would not exist unless those in authority had established it; that is true. The essence, however, is something eternal, some participation in the eternal law of God which is the first and highest rule. As Saint Robert Bellarmine says, "Once a legislator establishes a true law, it is not in his power to limit its obligation, but it will be mortal or venial according to the magnitude of the matter."[5]

Furthermore, no one who advocates "the-will-of-the-legislator argument" can point to a single instance in which a civil authority ever declared that he did not intend this or that law to bind in conscience. When writers come to this question, they always appeal to the constitutions of religious orders as an example of laws that bind only *ad poenam*. The comparison is not *ad rem*. A religious order is not a civil society. It is not a natural society. (More on this point later in the chapter.) It is often said, as

5. De Controversiis, Tom. II, i. 3, "De Laicis," c. 11 ad 6.

though it were true, that custom laws are merely penal, but no one can point to a single nation in which the legislators have declared that they wish the custom regulations to bind only to the penalty when the violator is caught.

If it could be admitted that the obligation in conscience to the act or omission commanded were an impedible property of law, it must be confessed that no civil magistrate has ever made any attempt to impede this obligation, which flows from the very essence of law. The vast majority of civil authorities are always glad to seize any additional means to enforce their laws. Even modern dictators are quick to remind their Christian subjects that their religion commands obedience to the laws of the State.

VI. MODERN LEGISLATORS AND THE MERELY PENAL LAW THEORY

In regard to this question the observations made by Ulpianus Lopez[6] cannot be passed over lightly. He contends that even if merely penal laws were possible, which he does not admit, they do not exist today. In proof of his assertion he claims that the major condition necessary for the existence of a penal law is nowhere to be found among modern legislators: namely, the will to prescind the moral obligation to the act or omission commanded. Most of the classical authors of the past and present demand this as a condition. Lopez quotes Castro, Suárez and Soto to prove his thesis. He could have easily quoted dozens of others. Even Hurth-Abellan says, "It can be asserted freely as intrinsic to the very notion of a law that it binds immediately to the

6. "Theoria Legis Mere Poenalis," Periodica de Re Morali Canonica Liturgica, Vol. XXVII (1938), Fasc. III, pp. 203sqq.

thing; and therefore law demands a positive act of the legislator by which he restricts this natural efficacy of the law."[7]

Lopez bases his case on the following arguments:

1. Laws today are not written disjunctively.

2. Lawmakers do not even consider conscience, far less dispense from the obligation inherent in law.

3. Lawmakers are silent about the moral obligation both in light and in grave matters.

4. Therefore, the only thing to do is have recourse to the patristic interpretation of Saint Paul, from which font Saint Thomas formed his golden principle in which the fundamental norm is contained: "Laws formed by men are either just or unjust. If they be just, they have the power of binding from the eternal law whence they are derived, according to Proverbs, Chapter 8, verse 15: "By Me kings reign and establish justice."[8]

VII. THE SUFFICIENCY OF THE PENALTY

Michiels,[9] Merkelbach,[10] and many others say that in a merely penal law the punishment is a medium through which the legislator efficaciously intends to bind the subjects to do that which is established by law. It is of no value to say that a law will be penal if the lawmakers judge that the threat of punishment is sufficient to enable magistrates to achieve their end. The act prescribed or forbidden by law must in some way be necessary, either for the maintenance or the promotion of the general welfare. There is a necessary end which requires the placing of or the omission of a certain act. In other words, the act has

7. De Principiis, de Virtutibus, et de Praeceptis (Rome, 1948), Pars I, no. 248.
8. Summa Theol., Ia IIae, q. 96, a. 4.
9. Normae Generales, I, 310.
10. Summa Theologiae Moralis, I, 172.

an intrinsic morality before the legislator decides upon the means to enforce it. If he thinks that a sanction is necessary, he prescribes one. If the act itself has no relation to morality, if the common good in no way demands it, then the infliction of a punishment for a contrary action is mere violence and nothing more. If the common good demands it and if the legislator promulgates the law, it is sinful to disobey in proportion to the gravity of the matter involved.[11]

We must always keep in mind that the physical sanctions used in enforcing law and justice have some connection with the obedience that is due civil authority, but this physical force is not the essential characteristic of the law, as has been taught since Kant's time. The physical penalties are merely the means the State may use in enforcing the law.[12] A law can exist without the sanction; it does not presuppose it. It is a means of creating fear, the weakest motive for obedience. It is a secondary and additional means. It is external to the law itself. No matter how the patrons of the purely penal theory try to avoid it, the fact remains that in their theory the payment of a penalty, the undergoing of the punishment, would occupy the primary position, for it alone binds morally; it alone carries a real obligation before the throne of God.

Davis,[13] Lojano,[14] and others claim that when the State exercises considerable vigilance, inflicts heavy fines, and imposes severe direct punishments, etc., the obligations are merely penal, because by that method alone the legislator hopes to achieve his end. That does not seem to be the only nor the most logical

11. Cf. Litt, "Les Lois Dites Purement Pénales." Revue Ecclesiastique de Liege, Tom. XXX (1938-1939), pp. 141ff. Cf. also Brisbois, "Les Lois Pénales," Nouvelle Revue Theologique (1938), p. 1072.
12. Cf. Hans Meyers, The Philosophy of St. Thomas (St. Louis, 1948), p. 503.
13. Moral and Pastoral Theology, (New York, 1946), II, 339.
14. Institutiones Theologiae Moralis (Paris, 1927), Vol. I, Theologia Moralis, p. 130.

conclusion to draw from the fact that there are severe sanctions attached to a law. The excessive weight of the penalty may mean that the authorities consider the law of great importance. The vigilance exercised may simply indicate that the magistrates do not trust the good will of their subjects in that particular regard. It might be they consider that the temptations to violate a certain law are so unusually alluring that they must be counteracted with threats of severe punishments.

To say that the rulers are satisfied with the exactions of penalties from the offenders is a pure assumption without sufficient foundation. There is no evidence that the legislators are thus satisfied. Generally they are willing and eager that enactments shall have all the efficacy that their authority can give to a law.

VIII. A VARIATION

There are very few authors who are content with the usual arguments offered in defense of penal laws. They manage in one way or another to add something of their own to strengthen their position. There seems to be a note of uncertainty among writers which casts at least a shadow of doubt upon the value of their arguments for the defense of merely penal laws. However, when their position is examined carefully, it becomes clear that they really do not depart too far from the beaten path.

For instance, Hurth-Abellan[15] speaks of man's being moved to act not only by moral laws, but also by psychological laws. In his explanation of what he means by moving a man psychologically, it is evident that he means that a man is moved psychologically by the threat of a punishment, by fear of reprisal. That is very true, but it is moving man by a form of tyranny,

15. De Principiis (Rome, 1948), Vol. I, nos. 245-250.

not by an ordinance of reason, which imposes a duty upon him. It is not moving man by law.

Some may suggest that the law moves a person psychologically in the ordinary sense of the term. In the common use of the term, moving people psychologically means to persuade men to act in such a manner that they feel as though the idea of doing this or that originated within themselves without external compulsion from any source. There is nothing to prevent civil authority from acting in that manner. Clever rulers have made abundant use of that method from the beginning of time, but that could not be considered as moving citizens to act by civil law. It would not consist of a promulgated ordinance for the common good. It would have more of the nature of a counsel or wish, or an admonition.

IX. THE RULES AND CONSTITUTIONS OF RELIGIOUS ORDERS

When all the other motives for retaining the purely penal law theory have been rejected, the defenders of it are sure to ask: "What about the rules and constitutions of religious orders? They are true laws, and in the constitutions of many communities it is specifically stated that they do not bind in conscience except as regards fulfilling the penance when it is imposed." We do not deny that the rules and constitutions of religious communities bind morally only as regards the penalty, if that is stated in the constitutions. This fact, admitted by all, presents no valid objection to our thesis. The obligations flowing from civil law and laws in a religious order are not parallel. There is no foundation for an apt comparison between the two types of communities and their laws. They are radically different. A religious community is not a necessary society, but one of convenience. Religious

orders are very beneficial both to the Church and to their individual members. They greatly assist the Church in working for the salvation of souls and in assisting the individual religious to attain sanctity, but they always remain a positive, particular society. Whereas, on the other hand, civil society is a necessary and essential organization for the full realization and well-being of man, who is a social animal by nature. It is a natural society. The root of the obligations for a religious is the nature of the contract he made when he pronounced his vows. The root of civic obligations is man's sociality. The final aim of each religious order is perfection through love of God. The end of civil society is to create peace among men and to promote their general welfare so that they can work out their own individual perfection. Since the rules of religious orders seek to lead the religious to a greater love for God, they bind in charity.[16] Civil laws bind in justice, according to what Saint Thomas said in answer to the question of whether or not Christians are held to obey secular powers: "The order of justice requires that subjects obey their superiors, for otherwise it would not be possible to conserve the order of human affairs."[17]

Since men freely form or enter a religious community, with the approval of the Church, they can determine the binding force of the obligations they will assume. They can limit the moral obligation to the acceptance of the penance. Those rules will be laws only in the wide sense of the term, not in the strict sense of the word. The natural law, however, leads men to form civil societies.[18] Man cannot determine the nature of the obligations he will assume. They are determined by the natural law,

16. Cf. Cajetan, COMMENTARIA, IIa IIae, q. 186, a. 9; Lopez, "Theoria Legis Mere Poenalis," PERIODICA DE RE MORALI CANONICA LITURGICA, Vol. XXVII (1938), pp. 203-216; Vol. XXIX (1940), pp. 23-33.
17. SUMMA THEOL., IIa IIae, q. 104, a. 6.
18. Cronin, *op. cit.*, II, 471.

of which the civil laws are particularized determinations or applications. All civil laws can be traced back to the natural law.[19] Otherwise the result is neither natural law nor human law. The civil law holds itself as a secondary cause depending upon the natural law as a primary cause. Secondary causes have the same ultimate effects as the primary cause, but the natural law binds in conscience. Therefore, so does every true civil law. Plainly, then, it must be admitted that man has no power to determine the extent of the fundamental obligations he will assume in civil society. They are beyond his control in the very nature of things.

Robert Bellarmine[20] considered the question: "If law by its very essence binds to the act, in what manner, therefore, do the rules of certain religious orders oblige only to the penalty?" He responded, "They oblige not through the manner of laws, but through the manner of contracts and pacts as penal laws. Neither is that properly a punishment; rather, it is a penal affliction received for the help of the spirit."

Concina[21] admitted that the words of the prologue of the Dominican Constitutions presented a problem. He solved it in this way, "In one way they participate of the nature of law. In another they recede from the true nature of law. And so they are mere counsels and not altogether true laws, but constitutions which are referred to as laws: and for that which they attain, perhaps they are more than sufficient."

It is safe to say that the rules and constitutions of religious orders are special norms, the observance of which greatly assists the religious to acquire perfection. They are really ascetical norms thought out by the great masters of the spiritual life, and approved by the Church. They are proposed for those who wish

19. Cf. Clancy, "St. Thomas on Law," in Vol. III of Benziger Brothers' English translation of the SUMMA THEOLOGICA of Saint Thomas (New York, 1948), pp. 3270-3276.
20. DE CONTROVERSIIS, Tom. II, "De Laicis," no. 6.
21. Concina, THEOLOGIA CHRISTIANA, Vol. II, DE JURE NAT. ET GEN., Lib. III, c. ix, no. 3.

to proceed unceasingly towards perfection within a religious community.

Although the laws of a purely positive society bind no further than their constitution demands, yet disobedience is often sinful *per accidens* on account of injury to a third party, contempt shown to the rule which is a sacred thing, etc.

There is no point in appealing to the existence of merely penal laws in religious orders as a valid argument for their existence in civil society. As we have shown, there is no foundation for a comparison. Henry of Ghent,[22] who was the first to attempt it, did not give any reason whatsoever for transferring the merely penal law theory from religious orders to civil law. And no one since, among all the authors who have followed his example, has justified his position. They simply adopt it as though it were safe and solid grounds upon which to build the merely penal law theory without ever examining the illogical foundation upon which it is based.[23]

22. Aurea Quodlibeta, III, q. 22.
23. Koch, "Zu der Lehre von den sog. Pönalgesetzen," Tubinger Theologische Quartalschrift, Vol. XXXII (1900), pp. 204ff.; Vol. XXXIV (1904), pp. 574ff. Cf. also, Litt, "Les Lois Dites Purement Pénales," Revue Ecclesiastique de liege, Vol. XXX (1938-1939), pp. 141ff.; Castillo, "La Ley Meremente Penal y la Legislacion Eclesiastica," La Cienca Tomista, Vol. LXIV (1943), pp. 26ff.; Lopez, "Theoria Legis Mere Poenalis," Periodica de Re Morali Canonica Liturgica, Vol. XXIX (1940), p. 29.

Chapter VI

AN ANALYSIS OF THE OTHER EXAMPLES WHICH AUTHORS GIVE OF PURELY PENAL LAWS

I. TRAFFIC LAWS CONCERNING VEHICLES

MANY of the examples authors give of what they consider purely penal laws obviously do not fit into that category, even if it could be proved philosophically that such laws exist. Prümmer[1] speaks of the laws governing the speed of moving vehicles as an example of a law that binds only as regards the penalty. Perhaps thirty years ago, when that learned and famed author wrote his excellent manual, the speed at which automobiles traveled along the highways did not gravely endanger the life, limbs, and property of others using the same thoroughfares. Today sudden death on the highways, especially in congested areas, happens entirely too frequently to justify such an opinion. Think for a moment of the many people killed by imprudent automobile drivers who explain: "It was late at night. I did not see him. I did not think there was anybody on the road at that hour but myself." That alibi does not justify. The laws regulating the speed at which a man may drive are established to cover exactly those situations. There is a common danger. Therefore the law binds all men at all times. No one is permitted to drive an automobile so fast that he will be unable to control an unexpected situation. Whoever does that is morally guilty of the consequences.

Many times one who knows of the existence of the merely penal law theory will say: "I can go through a red light; after all, it is only going against a penal law." A look at the statistics

1. Theologia Moralis, Vol. I, no. 209.

in the United States which tell of the great numbers of people killed and injured each year on account of such conduct reveals that ignoring traffic signals is a grave matter. Many people, also, have lost their lives by hitting parked vehicles which lacked the required parking lights. Civil governments must and do promulgate laws to protect the life and property of its citizens. These laws bind morally according to the gravity of the matter. There may be certain traffic laws in some localities which are so unimportant that they do not bind in conscience. But that must be proved; it cannot be presumed. Possibly in certain cities there are traffic laws which are either unnecessary or unjust. Of course they would not bind, simply because they lack the reason of a law, but that, too, must be proved.

II. THE TAX LAWS

Although no reputable author will dare deny either that the legislator has a right to impose taxes or that the citizens are bound in conscience to bear the expense of their civil government, some writers[2] unhesitatingly state that tax laws in most regions are merely penal. To support their imprudent assertions, they offer no more proof than the usual unsound and illogical arguments put forth to defend the existence of the purely penal law theory — the persuasion of the people, the heavy punishments inflicted, the fact that the legislators do not consider conscience, etc.

Génicot-Salsmans[3] is typical of those who hold this opinion. They divide the question into five assertions. In the first assertion they admit that just taxes oblige in conscience. In the second assertion they hold that it is certain that unjust tributes do not oblige in conscience, but add: "Si autem tantum quod ad excessum injusta sunt, non debentur nisi quod ad partem in qua justa sunt." They also warn that in case of doubt as to whether or not a tax is just or unjust, the presumption stands with the superior. Then, in the fifth assertion they express the opinion that it is more probable that the tax laws in most regions are purely penal. Génicot-Salsman give three reasons:

1. Even in former times there were not lacking doctors who considered these laws, at most, merely penal.
2. Conscientious men interpret tax laws in this way.
3. It is at least probable that modern taxes are unjust in many states and cities.

As for the first reason, the authority of the doctors carries no more weight than the intrinsic reasons they offer for their opinion.[4] We have considered them already in this work and found them wanting. We have also rejected the second reason.[5] The third reason contradicts the principles they laid down in their first assertion; for surely the whole amount of the taxes is not unjust. Therefore, only what is excessive does not bind; if we would grant that a tax law is entirely unjust, it would still not be a penal law. It would be an unjust law; that is, not a law at all. It would have no binding force whatsoever.

Other authors[6] admit that direct taxes bind in conscience, but they say that indirect taxes are no more than penal laws. Noldin and Lehmkuhl both cite the persuasion of men and the heavy-punishment arguments. Marc adds a new twist. He says

2. Angelus a Clavasio, SUMMA ANGELICA, title "Pedagogium"; Navarrus, MANUALE CONFESSARIORUM, c. i, p. 263; Berardi, PRAXIS CONFESSARIORUM (Faventia, 1898), II, p. 176; Crolly, DEPS. THEOL. DE JUSTITIA ET JURE, III, 1001; Frassinetti, COMPEND. DELLA TEOL. MORALE (2nd ed., Genoa, 1866), I, 304; Davis, MORAL AND PASTORAL THEOLOGY, II, 338ff.; Bucceroni, INSTITUTIONES THEOLOGIAE MORALIS (Rome, 1892), Tom. I, DE LEGIBUS, no. 81.
3. THEOLOGIA MORALIS Vol. I, nos. 573-574.

4. *Ibid.*, Chapter III.
5. *Idem.*
6. Ballerini, OPUS THEOLOGICUM MORALE (Prato, 1890), I, 322; Marc, INST. MORALES ALPHONSIANAE, I, no. 967; Lehmkuhl, THEOLOGIA MORALIS, I, no. 981; Noldin, DE PRAECEPTIS (New York, 1926), no. 315.

that indirect taxes do not have such an intimate connection with the common good as do direct taxes. That distinction does not seem to be true. The revenue which the governments collect is all used for the same purpose — the support of the government, its institutions and projects. If there were no indirect taxes, the direct taxes would have to be raised to a point where they would also bring in the amount of money now obtained by indirect taxation. Then, too, no one has settled the dispute as to what constitutes a direct tax and what constitutes an indirect tax. In the United States the Supreme Court has decided that income taxes are indirect taxes. Why would income taxes bind less than levies laid on real estate? Is there any inherent reason?

The method by which a government may collect money to carry on its existence is not determined by the natural law. It is left to the prudent judgment of the lawmakers. If they decided to raise all their revenue by indirect taxation, they would still be acting within their rights. In demanding the payment of indirect taxes, the sovereign is no less a minister of God than he is when he exacts direct taxes. He is still acting for the defense and good organization of society. As long as justice is observed, tax laws are real laws and bind in conscience according to the gravity of the matter.

III. HUNTING AND FISHING LAWS

Practically every author who defends the existence of penal laws cites hunting and fishing laws as examples. It is such a common practice that there is no need to refer to any specific author. Laws regulating these matters differ in each locality, because of diverse conditions. Generally in the United States a permit is required and a small tax is imposed. The money collected forms only a small percentage of the expenditures necessary for the upkeep of a bureau charged with the task of

preserving wild life, keeping the lakes and streams clean, and protecting the hunting grounds. Surely it is just to demand that those who benefit from this service bear at least a part of the expense in a special manner. Undoubtedly it is not a grave obligation because of the poverty of matter; nevertheless, it is an obligation, even though a light one.

There are other laws which restrict the time, place and kind of animals that may be hunted or fished. It would be difficult to question the justice of such regulations. They are established in order to preserve wild life and to safeguard human life and property. If it were not for such laws, certain types of wild life would have become extinct long ago. God provided animals for the use of all men and also for future generations. His temporal ministers have a duty to see to it that animals will be preserved and not wantonly destroyed, as would easily happen if there were no regulations.[7] In places where hunting and fishing form a means of livelihood and food supply for a nation, naturally the obligations contained in hunting and fishing laws are proportionately graver.

IV. ANOTHER FAVORITE

Laws pertaining to the cutting of trees, restrictions on grazing privileges, and rotation of crops are likewise often cited as examples of purely penal laws, as though the object of these laws was of slight concern. Actually, these laws are framed in order to promote soil conservation, one of the greatest problems facing modern civilization. Soil conservation is very necessary for the welfare of mankind. Millions of people throughout the

7. As did happen in the case of the buffaloes in the Western part of the United States during the last century. The wanton destruction of buffaloes caused widespread starvation among the native Indians of the Northwestern part of the United States. It was not a matter of light concern.

world are hungry. Experts tell us that this condition will gradually grow worse unless steps are taken to remedy the situation. The sources of our food supply are low. Every nation in the world has an obligation to enforce these laws and to pass new laws to safeguard its water supply and farmlands. Nations must prevent floods and control rivers. Soil-conservation experts say that the first step in this direction is to prevent the needless cutting of trees, to promote rotation of crops, and to correct grazing laws.

It can be objected that moralists refer only to the cutting of branches for kindling wood in the wintertime, or that they restrict their comments to the grazing of sheep and goats on the lands of rich landlords. Perhaps that is what they had in mind, but they make no such distinctions in their manuals. In that case there are two possibilities. Either there is a proportionate cause and no sin is committed, or the matter is so insignificant that no grave immorality is implicated. In either case there is no obligation to undergo a penalty except *per accidens*.

V. AN ODD EXAMPLE

Davis[8] attributes a strange statement to Bucceroni: "Some laws, though once not merely penal, have become so, because they have been observed as penal only. Again, laws which are effectively enforced by public authority are to be considered penal." That statement seems absolutely incorrect. Can the observance or non-observance of a law change its essence, its nature, its object or the relationship between a necessary act and a necessary end? Either a specific act or the omission of a certain

8. Moral and Pastoral Theology, I, 147-148. Davis does not cite the place in Bucceroni where that passage can be found. I was not able to find it in Bucceroni's tract on laws (Tractatus de Legibus), but I did not have the opportunity of consulting the 1916 edition of Bucceroni's work which Davis used. In any case, I simply took the idea and estimated its worth even though I cannot definitely attribute it to anyone.

act is necessary for the common good or it is not. If it is necessary and a legitimate authority has properly commanded it, then it is a law which binds in conscience. If it is not necessary in any way, shape or form for the common good, then that particular regulation has lost its reason for being a law. As to the second half of the above statement, a simple example suffices to demonstrate that it is repugnant to common sense. If in a nation the law requires one to drive on the left hand side of the road and then if for a long while all automobile drivers obeyed this law, it could be considered to be efficaciously enforced by public authority. If, however, a man decided some morning to deliberately drive on the right hand side, endangering the lives of all the other motorists, would he be guilty of no more than a merely penal fault?

VI. WHICH AND HOW MANY LAWS ARE PENAL?

There has always been an idea abroad that all civil laws are penal, but it has never gained much popularity.[9]

A few authors assert that the majority of civil laws can be considered penal,[10] while others, seeing what an unwholesome effect such a view could have, declare that the majority of civil laws are moral and that the number of penal laws is rather limited. For instance, one well-known manual[11] contains the following restrictions: "Where the object of laws directly pertains to the promotion of moral virtue in the republic and to curbing vices; or, if something is necessary in order to protect

9. Konings, Theologia Moralis (New York, 1882), Tom. I, no. 178; Kenrick, Theologia Moralis (Mainz, 1860), Tom. I, Tract VI, c. iii.
10. Cf. Konings, *op. cit.*, Tom. I, no. 178; Kenrick, *op. cit.*, I, Tract VI, c. iii.
11. Sabetti-Barrett, Compendium Theologiae Moralis (New York, 1931), Tract III, c. v, no. 114, q. 1.

the rights of individuals and of the family, to maintain agreements formed by a contract, to enable public officials to fulfill their obligations in these and in similar cases, no law can be formed that will be merely penal; such laws will truly bind *'sub culpa et poena.'"* There is nothing wrong with the declaration which the author made, but one may ask how much further the authority of civil magistrates extends. The above enumeration seems to have exhausted the limits of civil jurisdiction. Practically every civil law in the civil code can be reduced to one or the other of the categories which Sabetti-Barrett mentions in the paragraph quoted above.

It is true that many exponents of the merely penal theory limit the application of their theory to things indifferent in themselves to the common good. Many actions truly have no essential relation to or connection with the common good from their intrinsic nature, but *in concreto,* when placed, their influence is always harmful or beneficial because of the circumstances of time, place, person, etc. For example, in traffic laws, the law of nature, the condition of the thoroughfares or the automobile do not demand that vehicles be driven on the right hand side or on the left hand side of the highway; it must be determined by law. Once it has been determined on which side of the road automobiles shall be driven, it certainly pertains to the common good that all obey the law.

CHAPTER VII

THE MERELY PENAL LAW THEORY IS NOT NECESSARY

FREQUENTLY when it is suggested that there is no such thing as a civil law which does not bind in conscience, such remarks as the following are sure to be heard: "If you say that penal laws bind in conscience, you have to distinguish between theory and practice. In practice you cannot place such a heavy burden on the shoulders of honest citizens. It would be imprudent. Civil laws are too multiplied and too complex. Every time a man turned around he would become guilty of a venial sin. A sane and happy life under such conditions would be next to impossible. Some people would become affected with a bad case of scrupulosity. Others would become as punctilious as the Scribes and Pharisees of old."

Although the above remarks are often heard, they need not be taken seriously. The plain fact is that most of the laity do not ever have a clear concept of their ordinary duties in regard to civil laws. The vast majority of them have never heard of the merely penal theory. The theory is not of any value to them right now. For the most part, the penal law theory is limited to professors of moral theology and their students. Often, as a result, when ecclesiastics disregard a law which they think is only penal, they cause scandal among the laity and especially among non-Catholics, who have no idea that a penal law exists, but who do expect priests to be good and obedient citizens.

Those who shout that a denial of the merely penal law theory would create unnecessary hardships on men seem to forget that only a just law binds in conscience. Ordinances which exceed the authority of the rulers have no binding force. It is obviously not sinful to violate enactments which prohibit citizens from attending church services or restrict their right to marry.

Decrees or acts which are for purely private gain of a ruler or a group have no power to bind the conscience of men. The same can be said of disproportionate taxes and other overburdensome laws. This powerful property is restricted to real laws, to true laws and just laws.

A mark of a just law is that it is consistent with man's human nature. It insists that he act with reason. All civil law urges man towards a life in accord with reason, towards prudence, temperance, justice and fortitude. Law must be reasonable. The dignity of the human person demands that. An insight into the very purpose and character of a just law always reveals that it is no more than a norm of a reasonable, prudent man. Legislators usually publicly announce the purpose of the law so that the citizens will understand the reasonableness of it and be more apt to observe it. Rommen says, "Hence the lawgiver precisely in those governments in which the laws do not originate in public deliberations, almost always adduces, generally in a detailed and solemn form, the motive for the law."[1]

Not every regulation contained in a law is a moral norm. Many things in the body of a law have only an insignificant purpose of being a means to an end. They have no real moral content — as for example, many of the technical rules governing legal procedure or organization of the law courts. These norms bear such a technical, formal character that the qualification of moral or immoral cannot be applied to them. Likewise, questions touching the bureaucratic organization of certain parts of the government fall into this category.[2] It is plain that these norms bear such an instrumental character in relation to the material law that we need not consider them in relation to morality except *per accidens*. Generally, if they are disregarded, an

1. The Natural Law (St. Louis, Mo., 1947), translated by Thomas R. Hanley, p. 199.
2. *Ibid.*, pp. 213-214, Peinador, *op. cit.*, Vol. I, no. 393.

admonishment from the authorities is sufficient to urge a more careful observance of such procedures.

It is not necessary to have recourse to the penal law theory to avoid placing too great a burden upon honest citizens. An application of the ordinary principles of moral theology suffices. For example, all will admit that human law does not oblige if the end of the law and the means necessary to achieve it are out of proportion. Human law does not oblige under a grave inconvenience out of proportion to the nature of the law. Then, if in a particular case the observing of a certain law would be simply useless, it does not oblige. In these instances it is not necessary to appeal to the penal law theory; because even the imposition of a penalty would be against reason. Of course, we exclude any case which involves acts that are intrinsically evil, such as adultery, idolatry, etc.

Lopez proposes the application of a certain epikeia[3] in civil matters just as we do in cases involving ecclesiastical law when the required conditions are present. The humanity of the law would seem to demand that its rigor be tempered in particular cases; where there is an evident reason and an impossibility of having recourse to the proper authority. The virtue of prudence — indeed, the natural law itself — would dictate the application of epikeia. After all, legislation exists for the welfare of men, not man for the legislation.[4]

It is true that generally the civil law does not recognize the principle of epikeia, but it does make use of it indirectly under another name. As Rommen[5] says, all laws require a moral foun-

3. Lopez, "Theoria Legis Mere Poenalis," Periodica de Re Morali Canonica, Vol. XXIX (1940), p. 31.
4. Rodrigo (*op. cit.*, Vol. II, no. 355) criticizes Lopez for carrying over the principle of epikeia into civil law. He says that he would make what should be rarely applied a common occurrence. That does not seem to be a fair appraisal of Lopez' idea, for he specifically states: "Neque existimandum est frequenter accidere casus si res bene perpendantur in quibus ad hoc temperamentum sit recurrendum."
5. The Natural Law, p. 213.

dation. The will to achieve an even greater approximation of the positive law to the norms of morality is so deeply rooted in man that even the positive law is always referring to morality. Often enough the judge, as was already the case among the Romans, with their doctrine of "aequitas," is not content with a mechanical subsuming of particular instances under the general norm, but allows equity to play its part. In extreme cases, however, he will go back to the intention of the lawmaker, who is assumed to will only what is moral; or, if the literal meaning is impossible to discern, he puts forward an independent interpretation of the meaning of the law on the ground that the lawgiver could not have willed anything unjust.

There always remains nevertheless, in the civil officials, the authority to inflict a reasonable penalty, if in their judgment a complete acquittal would have a harmful effect on the general public. Then, too, they have the duty of preventing any danger of abuses that might arise from the application or the misapplication of the above principle.[6]

In judging the binding force of a law, one should always examine its nature. Not all laws have the same connection with the natural law. There are some which pertain to the very essence of society. These must be observed. Likewise, laws pertaining to things which involve the rights of others must always be obeyed, but some laws, by their intrinsic nature, permit an exception. For instance, in some localities there is a law which forbids driving a bicycle on the sidewalk, yet in case one riding a bicycle in the street found it dangerous for one reason or another and noticed that no one was on the sidewalk, he could

6. Although there is a certain similarity between Lopez' idea and the theory of dispensability which Woroniecki proposes, they are really very different from one another. According to Woroniecki's theory, one could dispense himself; but he could not prove that a dispensation was ever granted by the superior. The natural law, however, permits, even sometimes demands, the application of epikeia when circumstances change the material of the law to such an extent that to act according to the letter of the law would be evil.

sidestep the law without being guilty of a moral fault. Even the obligation of submitting to a penalty would, from the very nature of his action, be doubtful; for, after all, the bicycle rider acted reasonably.

Many laws of slight social significance can be obeyed passively; that is, one is ready to obey at the request of the authority, but does nothing until asked. For instance, a man sitting in his automobile waiting for his wife to choose her new hat, would not be morally guilty if he overparked his car. He simply needs to hold himself ready to obey the police when they tell him to move on. Lopez attaches a great deal of importance to passive obedience, but in the example he gives, of passing through customs, he does not make sufficient distinctions and leaves the way open for grave crimes against the welfare of a nation. Each country has the right to protect itself; and disregard of some of the custom laws, such as taking certain types and amounts of currency into a country, could strangle the country economically.

The multiplicity of laws and their complexity in the modern world does not cause as grave a difficulty as it would seem at first glance. After all, we need only know and obey the laws which concern our own duties and privileges. And when we run into something complicated, we can always consult a prudent friend or an attorney. The general laws which apply to all people are well known to those who have average intelligence. It must be kept in mind that the vast bulk of laws framed by modern legislators apply only to special groups within the social body. During their training period or in colleges and universities, the members of the various professions become well acquainted with the laws which pertain to their work.

No one can deny that to observe the dictum of Christ, to render to Caesar the things that are Caesar's, is not always easy. By divine arrangement, life in this world, after the fall of man, was not meant to be a bed of roses. The objection that obe-

dience to civil authority makes great burdens for honest people is useless. After all, when Saint Paul gave his famous admonishment to the early Christians, the pagans surrounding them knew of no such thing as conscience, yet that did not deter Saint Paul. He knew the burden he was placing upon the Christian, but he also knew that justice demanded obedience to lawful authority, and he insisted upon it. Confessors and pastors must do likewise today. They must not minimize the obligations of civil law, but rather teach men that the commands of their civil magistrates are based on the foundations of divinity and that submission to their salutary commands is necessary in order to please God and avoid sin. After all, civil obedience is a part of the law of God. Pastors and confessors must teach the law of God in its totality.

The faithful need to be reminded from time to time that civil rulers have authority from God to govern them, and that they must obey the reasonable commands of these rulers. They must be warned that unless they obey the civil laws rightfully imposed they cannot be called virtuous. They must be reminded that civil regulations are intended as a help towards their eternal and their temporal happiness. Citizens should be told that if their actions conform to the true standards raised by their leaders no one will deny them the reward of virtue. Thus they can be called good. Those who refuse to recognize the divine authority which lies behind civil laws rightfully commanded, cannot be called virtuous.

CHAPTER VIII

A DANGEROUS THEORY

RESPECT for authority is an important factor in safeguarding public morals, in creating unity among the citizens of a country, in forming obedient subjects; but the purely penal law theory, in reducing a large part of the civil code to only the external forum, certainly seems to have an opposite effect. It relegates certain ordinances to a very unimportant position. If men begin to feel that certain laws which have been made by legitimate authority are not obligatory in conscience, they eventually begin to hold those laws in contempt. And that feeling of contempt is very apt to get out of control and spread to all laws until the only thing that restrains them is fear of the police. They will forget that they are duty-bound to obey just civil laws. Many people know of only one sin, i. e., being caught doing something wrong. They live by a code that has only one norm. "It is all right if you don't get caught." The merely penal law theory in practice could be reduced to the same thing in so far as a penal law obliges in conscience only as regards accepting the penalty, if the law is not observed. It would be absurd to say that the penal law theory is responsible for the axiom, "It is all right if you don't get caught," but it has an unwholesome relationship to it, in so far as it can be reduced to the same thing. Men can draw that conclusion from the merely penal law theory. Then too, the line separating merely penal laws and the moral law is so vague that grave abuse can creep into the conduct of men under the disguise of penal laws.

Theologians are aware of the dangers inherent in the theory. It is for this reason that many of them, although they defend the theory, warn their students not to teach it. Merkelbach says, "Nevertheless this (penal law theory) should not be taught to

the people publicly, but they are to be led to the observance of laws, especially since the violation of merely penal laws surely, if it is habitual, can become culpable *per accidens,* either because by the occasion of it the right of a third party is injured or scandal is given, or because charity towards oneself or others is impaired, since one imprudently exposes himself and his family to grave penalties and great dangers, infamy and condemnation, or because some would use violent resistance, or they would be prepared to use violence against those who are bound by duty to apply the law."[1]

Aertnys-Damen gives practically the same admonishment. "Confessors should not too easily or imprudently state that civil laws are purely penal, lest they give scandal or stir up false accusations and hatred towards the ministers of the Church and even towards the Church itself. Indeed, they should generally inculcate observance of civil laws in the manner which Saint Paul and Christ Himself did,[2] because whatever may be said of the intention of the legislator, often there is present, in whole or in part, a natural obligation,[3] as happens in laws concerning a legal price, crops, workers, dominion of spouses, of children, of authors, in defense of the country, hereditary rights and contracts, the right order in social economy, taxes; indeed, those things merely explain or determine the natural right itself."[4]

After explaining the doctrine of purely penal laws and giving his approbation to it, Sabetti-Barrett gives this admonishment: "Whatsoever it is, nothing of this should ever be mentioned to the people, especially the less-educated. They ought to be

1. Summa Theologiae Moralis, Vol. I, no. 287.
2. That statement seems to be an admission that Christ and Saint Paul placed all civil laws in one classification — namely, moral.
3. That seems to be an admission that very seldom *in concreto,* considering the actual circumstance, would the condition be present which permits a law to be called penal even if the theory were true.
4. Theologia Moralis, Vol. I, no. 160.

persuaded to fulfill all laws."[5] That also seems to be an open admission that the theory is both useless and dangerous. If it is true, why not tell the people? Are we to place them in the danger of committing a formal sin when there is insufficient matter? Why oblige them to more than the law calls for? We have no right to do that.

Génicot-Salsman,[6] after proposing the theory that tax laws in most countries today are merely penal, goes on to say that theologians agree that it is very much better that citizens pay just taxes, "legibus morem gerentes"; confessors, he says, should counsel this mode of acting. He seems to say that they are penal laws, but that in practice we are to act as though they were moral laws.

No one will question the prudence of those theologians who advise pastors and confessors to be careful and in general not to teach the penal law theory to the people. But the question naturally follows: Of what value is a principle in moral theology which cannot be put into practice? The theologians admit that it is too dangerous to teach it openly. Then, is it not also useless?

The theory of merely penal laws is dangerous because in practice it would reduce law enforcement to a kind of game in which the citizen would try to circumvent the law, while the magistrates try to enforce it. The theory offers an occasion for casting aside and neglecting to pay attention to moral reasons in fulfilling laws. For the citizens are not compelled to observe the law except from servile fear. Since they may disobey without sin, moral reasons and reasons from the consideration of virtue and honesty need not be attended to. And since fulfilling the penalty does not oblige in conscience unless it is imposed, it is licit to use all ingenious and astute means to impede the pronouncement of the punishment. Hence obedience that should be

5. Compendium Theologiae Moralis, Tract III, c. v, no. 114.
6. Theologia Moralis Vol. I, no. 574.

given to civil authorities is reduced to a certain kind of ridiculous contest. On one side the subjects try to escape the burdens and punishment of the law. On the other side stand the police and the courts, which try to twist from the subjects what the common good demands. Under that system the magistrates have no more authority than the physical powers of a policeman or a jailer.

If the penal law theory must be accepted, what becomes of our constant protestations of conscientious loyalty to the laws and institutions of our country? If our moral obligation towards a part of the laws in the civil code is only an obligation of not evading punishment, how can we claim to be better citizens than those who hold that civil legislation has no higher authority or greater sanction than the physical power of the policeman or jailer?[7]

In speaking of police power, we might note that Cathrein,[8] in rejecting the theory of Spenser concerning the origin and foundations of law, has this to say: "No one will assert of a man that he acts from duty if he abstains from certain actions through fear of police penalties or the anger of his fellow man." But in defending the theory of penal laws, Cathrein cannot offer any higher motive to move men to obey those legitimate commands of a superior which are classified as penal laws.

7. Cf. John A. Ryan, *op. cit.*, pp. 404-411.
8. Cf. Cathrein's article on law in the CATHOLIC ENCYCLOPEDIA, IX, 53-56.

CHAPTER IX

MERELY PENAL LAWS AND SAINT PAUL

IN CHAPTER XIII, verse 5, of the Epistle to the Romans, Saint Paul makes no distinction between laws that bind from the fear of the wrath of the rulers and laws which bind in conscience. All the commentators who give a complete exegesis of that passage[1] explain it in the sense of "not only for this reason but also for that reason" sense. According to the commentators, Saint Paul simply announced a twofold reason that obliges us to obey the civil authorities. None of them mentions anything at all about the possibility of proving the existence of merely penal law from the passage. They do not positively exclude it, but it is significant that not one of the five major commentators consulted makes any reference to the penal theory at all. If the penal law theory were in any way contained in Saint Paul's declaration on the duties we have towards the civil law, or if it flows naturally from it, or if it is a conclusion that can logically be drawn from the words of Saint Paul, why do such outstanding Scripture scholars as Père Lagrange, Prat, Estius, Cornely, and Cornelius a Lapide make no reference to such a possibility?

The early Christians were by their conversion freed from the slavery of sin and the yoke of the Old Law. In the thirteenth chapter of his Epistle to the Romans, Saint Paul reminded them that this freedom which they enjoyed as children of God, did not exempt them from the bonds of subordination and dependence, engagements and contracts, relationships and obligations, which either nature had established or circumstances created.

1. "Wherefore you must needs be subject not only because of the wrath but also for conscience' sake."

In no uncertain terms he told them that their privileges as children of God did not destroy or suppress the hierarchical relations of society.

The command of Jesus, "Render unto Caesar the things that are Caesar's and to God the things that are God's,"[2] was so incisive that it must have engraved itself deeply into the memory of all who heard it.[3] It was appropriate to inculcate this duty and to show the reason for it, and this is what Saint Paul does in Chapter XIII of his Epistle to the Romans.

Prat says that Saint Paul formulated these three propositions. "By right and in principle all power comes from God,[4] and in practice the established power is from God. Furthermore, the power is exercised in the name of God."[5] Prat adds: "The first two propositions were almost an axiom among Paul's Jewish contemporaries. The Apostle confines himself to proclaiming them and adding to them the evident consequence that to resist the power established by God is to resist the command of God. He insists even more upon the third proposition. The prince is the minister of God, whose duty it is to promote the welfare of society, especially to praise and reward good citizens and to terrify and punish the bad. It is necessary, therefore, to obey

2. Matt. 22:15-22.

3. Père Marie-Joseph Lagrange says: "When Jesus bade the Jews to render to Caesar the things that are Caesar's, He did more than give a permission: He laid down a rule to be followed, the rule that His disciples must submit to established order. Later, Saint Paul was to give the basic reason for this, which is that all authority is derived from God." — Cf. THE GOSPEL OF CHRIST, translated by members of the English Dominican Province (Westminster, Md., 1947), II, 140.

4. Christ confirmed this in His response to Pilate, "Thou wouldst have no power at all over Me were it not given thee from above." — JOHN 19:11.

5. We have already discussed that point in Chapters II and III; namely, a minister of God acts in God's name, binds in God's name. Therefore he cannot restrict the laws he makes to his own forum but necessarily they belong to the forum of God, which also necessarily excludes both a purely juridical fault and a merely penal law.

him, not only through fear of the punishment to be avoided, but also on account of the dictates of conscience."[6]

Even when the feelings of the authorities towards the Church changed, the teaching of the Church remained the same. In fact, it was then that Saint Paul enjoined upon Timothy to cause prayers to be said "for kings and for all in high positions"[7] — that is, in authority; and he ordered Titus: "Admonish them to be subject to princes and authorities, obeying commands, ready for every good work."[8] It was then that Saint Peter wrote: "Be subject therefore to every human creature for God's sake, whether to the king as supreme or to governors as sent by him for vengeance on evildoers and for the praise of the good. For such is the will of God."[9]

Prat makes only one exception for a civil law which would not bind in conscience; i. e., if a civil law would come into conflict with the divine law of God. If the case occurs, the faithful have the Gospel precepts for their guidance.[10] Their reason and the conduct of the Apostles before the Sanhedrin would tell them that the higher authority should prevail. With this exception, which does not detract from the general principle of obedience to established authority, the Christians of the first centuries were always distinguished for their submission; their deference to the public authorities was always the triumphant defense of the apologists and the immediate refutation of the popular calumnies about a pretended hostility of the Christians to the imperial institutions. The Fathers of the Church testify with what zeal the infant Church conformed to the instructions of Saint Paul. The adoption of the penal law theory could hardly be called a zealous adherence to the teachings of Saint Paul.

6. Cf. Prat, THE THEOLOGY OF SAINT PAUL, translated by John L. Stoddard (London, Burns Oates, 1945), II, 323-325.

7. I Tim. 2:2.

8. Titus 3:1.

9. I Peter 2:13-15.

10. Matt. 22:21; Mark 12:17; Luke 20:25.

Cornely says, "Whence it follows that laws from a legitimate power, whether civil, concerning what is treated here (Rom. 13: 1-7), or ecclesiastical laws legitimately formed, oblige in conscience, and transgressors of them are guilty before the human judges and especially before God, the Supreme Judge. The contrary doctrine, according to which the legitimate precepts of a legitimate power do not bind, not only is false and alien to the sense of Scripture, because we ought to be subject to every human authority on account of the Lord; it is also an injury and an enemy of every virtue, because it renders men hypocrites, or, according to the Apostle, 'ad oculum et non ex animo servientes' " (cf. Eph. 6:6; Col. 3:22).[11] Certainly all must admit that the penal law theory is both alien to the sense of Sacred Scriptures and to the exegesis of Cornely.

Estius has all the matter that is found in Cornely. In addition, Estius declares that our soul, informed by the natural law, dictates this to us (obedience to law) and says that the prince must be obeyed as the minister of God. He says that "political laws bind in conscience — i. e., before God, and not only in the forum called external, for that would be because of anger and not on account of the conscience of the subjects."[12] He does not make any exception or mention any laws that bind only to that forum called external which are called merely penal. He seems to exclude them, at least negatively.

Cornelius a Lapide says: "Not only on account of wrath, but also on account of conscience." Then he goes on to reject the explanation popular among the early Greek commentators, according to whom this passage (Rom. 13:5) meant that on account of the consciousness of the benefits which we receive

11. Commentarius in S. Pauli Epistolas ad Romanos (Paris, 1927), pp. 678-679.
12. Commentarius in Omnes S. Pauli Epistolas (Mainz, 1858), Tom. I, p. 293.

from the magistrates we pay tributes, but properly on account of our conscience, lest we be guilty before God; for the magistrate is the minister of God as was said in the (verses) preceding. Whence conscience dictates that the magistrate must be obeyed as a minister of God, and, consequently, he sins against God who does not obey him.[13]

Père Lagrange gives a scholarly explanation of the passage[14] in which he shows that the word "wherefore" in verse 5 is related to the principle given in verse 1 and to the twice-repeated affirmation that the civil power fulfills its role as minister of God. Consequently it is necessary, it is an inescapable obligation, to submit oneself. It is necessary, then, to obey not only, as one says, from fear of the police, but from a principle of conscience. It is the fundamental rule which includes the acceptance of judgment, even the submission to measures taken by the authorities. Père Lagrange demonstrates that the passage is much clearer and more forceful in the original Greek, but not a word does he mention about the possibility of any exception that would relegate laws to the external forum only.

A Lapide, Estius, and Cornely implicitly, at least, condemned the whole penal theory; because, as they finish their exegesis of this passage by saying, the doctrine limiting the force of laws to the external forum not binding in conscience, is an enemy of virtue; for "it renders men hypocrites or, according to the Apostle (cf. Eph. 6:6; Col. 3:22): 'ad oculum et non ex animo servientes.' "[15] The same condemnation can be applied to the penal law theory; because it does cut away the obligation in conscience from certain laws which oblige only "ad oculum et non ex animo." It is hard to reconcile the penal law theory with

13. Cf. Cornelius a Lapide, Commentaria in Omnes S. Pauli Epistolas (Turin, 1934), Tom. I, p. 176.
14. Cf. M. J. Lagrange, Aux Romains (Paris, 1916), p. 376, no. 5.
15. Cf. Cornely, Commentarius in S. Pauli Epistolas ad Romanos.

the warning that Saint Paul gave to the Colossians: "Slaves, *obey in all things* your masters according to the flesh, not with eye-service seeking to please men, but in singleness of heart, from fear of the Lord."[16] All must admit that if we accept the penal law theory in regard to the laws which fall into that classification, we need not obey in all things or in the singleness of our heart or from fear of God, but only obey when the police are watching.

16. Chapter III, verse 22.

CHAPTER X

SAINT THOMAS AND PENAL LAWS

IN ANALYZING the nature of law in the first five questions[1] of his tract on law, the Angelic Doctor shows that all law is a divine principle of human activity. For Saint Thomas, all law, natural as well as positive, is derived from the eternal plan of government existing in the mind of God. He proclaims God as the foundation of every true law. Divinity permeates every line of Saint Thomas' treatise on human laws which men make in imitation of their Divine Lawmaker. Whether Saint Thomas treats of the subject matter of laws formed by man, their binding force, or their permanence, he never divorces it from God. For him law is always a regulation given by God and bound to God; every law can be traced back to the essential order of things and ultimately to the mind of God, the supreme source of truth and law. That is why Father Farrell says, "From Saint Thomas' point of view, a law that does not oblige in conscience is, strictly speaking, not a law."[2] For the same reason we maintain that a merely penal law which would not bind in the forum of God is, strictly speaking, not a law.

Theologians who sponsor the merely penal theory naturally make a valiant attempt to build a solid Thomastic foundation for their thesis. They seem satisfied with their efforts to make Saint Thomas a patron of their theory. If one, however, examines the passages of Saint Thomas in the context of the *Summa Theologica* which they use, the relationship between the doctrine of the Angelic Doctor and penal laws appears obscure. The quotations have to be twisted out of their original signification in the articles of the *Summa* in order to create Thomastic proof for the merely

1. SUMMA THEOL., Ia IIae, q. 90-95.
2. A COMPANION TO THE SUMMA, p. 400.

penal law theory. The results seem impressive until the quotations are weighed in their original context; then their conclusion appears to be not drawn from Saint Thomas but forced out of him in a somewhat artificial manner.

Vangheluwe, although he too quotes Saint Thomas to defend the merely penal theory, candidly admits that Saint Thomas did not even think about such a theory, far less teach it.[3]

The most popular text, of course, is the response of Saint Thomas to the first objection of article nine, question one hundred and eighty-six of the "Secunda Secundae": "There is also a religious order, namely, that of the Friar Preachers, where suchlike transgressions or omissions do not oblige by their very nature under sin either mortal or venial, but only bind subjects to undergo the punishment affixed thereto, because in this way they are obliged to such things."[4]

Those who triumphantly refer to that passage or quote it as the last word seem to forget that although Saint Thomas spoke in this way of the rules of religious societies, it does not follow that the same measuring stick can be used on civil laws. They are two different types of societies entirely. A religious community is a particular, positive society. A civil community is a natural society. Saint Thomas had a perfect grasp of the matter contained in the *Summa.* When he wrote the tract on laws in "Prima Secundae," he knew that the rules and constitutions of the Dominican order did not bind under sin. He also knew the reason; namely, the will of the chapter of his community held in 1236. If he thought that a civil magistrate had the authority

3. "Tamen fatendum est S. Doctorem ipsum nondum cogitasse de applicatione talis modi obligandi (i.e., non obligandi in conscientia ad actum praeceptum) ad leges ecclesiasticas universales et ad leges civiles." — (From "De Lege Mere Poenali," EPHEMERIDES THEOLOGICAE LOVANIENSES, Vol. XVI (1939), p. 393.

4. "In aliqua tamen religione, scilicet Ordinis Fratrum Praedicatorum, transgressio talis vel omissio ex suo genere non obligat ad culpam neque mortalem neque venialem sed solum ad poenam taxatam sustinendam quia per hunc modum ad talia observanda obligantur." — SUMMA THEOL., IIa IIae, q. 186, a. 9.

to restrict the obligatory force of true laws, surely Saint Thomas would have said so in question ninety-six of the "Prima Secundae," where he treats of the obligatory force of civil laws. That would have been the logical thing to do. Saint Thomas was too thorough a teacher to be guilty of such an oversight.

In response to the second objection, article nine, question one hundred and eighty-six, "Secunda Secundae," Saint Thomas wrote another phrase which warms the hearts of the defenders of merely penal laws: "Not all things that are contained in the law are handed down through the manner of a precept, but certain things are proposed through the manner of a certain ordinance or statute obliging to a definite penalty."[5] This statement counts against the penal law theory. Saint Thomas merely says that everything contained in a code of law is not a law, that some things are merely directives and are not made in the manner of a law or precept. In the law formally promulgated may be contained both what is principally and primarily commanded or forbidden, and also those things which are convenient for the better observation of the law. For instance, in a certain state the law may declare that whoever wishes to drive an automobile must take a driver's test and obtain a license, and should carry the license with him when he drives an automobile. If a policeman demands it, he must show him his license. Now, the primary object of such a law is twofold: to collect the legitimate tax imposed upon automobile drivers and to force all to prove that they are competent, authorized drivers. However, since they must prove this on many occasions, they should always have the license available. If they put the civil authorities to some unnecessary expense in proving that they do have a license, they

5. "Non omnia, quae continentur in lege, traduntur per modum praecepti sed quaedam proponit per modum ordinationis cujusdam vel statui obligantis, ad certam poenam." — SUMMA THEOL., IIa IIae, q. 186, a. 9.

must accept the penalty inflicted for the inconvenience they have caused the officials. This would be a case where the *poena per accidens* does not correspond to a *culpa*.[6]

In his response to the question "Whether human laws bind a man in conscience,"[7] there is not the slightest indication that Saint Thomas had any idea of a civil law which binds only as regards the penalty. The burden of his answer is: "Laws framed by man are either just or unjust. If they are just they have the power of binding in conscience from the eternal law whence they are derived." In that clear-cut reply there is certainly no mention of a penal law or of the possibility of a law that does not bind in conscience. Nor does the phrase, "They have the power of binding in conscience," imply that although the power of binding is present, not all laws actually do bind in conscience. As Crowe points out,[8] the Latin is clearer: "Si quidem justae sunt habent vim obligandi in foro conscientiae." It is evident that "habent vim" is not equivalent to "possunt obligare."

In article four, question one hundred and eight, of "Secunda Secundae," there is a part of a paragraph which the patrons of the merely penal theory seize upon with great delight and flash about as though that one short statement of Saint Thomas ended the whole controversy. The hallowed words are, "And according to this sometimes one not guilty is punished, not, however, without a cause."[9] That is an outstanding example of taking a phrase out of its context and twisting it to suit one's own purpose. Those who would use that article to uphold the merely

6. Cf. Rodrigo, *op. cit.*, Vol. II, p. 393; Gotti, THEOLOGIAE SCHOLASTICO-DOGMATICO, Tom. I, Prima Secundae, q. 6, dub. 2, no. 2.
7. "Respondeo quod leges positae humanitus vel sunt justae vel injustae. Si quidem justae sint, habent vim obligandi in foro conscientiae a lege aeterna a qua derivantur." — SUMMA THEOL., Ia IIae, q. 96, a. 4.
8. THE MORAL OBLIGATION OF PAYING JUST TAXES, p. 85.
9. "Et secundum hoc aliquis interdum punitur sine culpa non tamen sine causa," SUMMA THEOL., IIa IIae, q. 108, a. 4.

penal law theory would have to ignore both the title and the subject matter of the article. The title of the article is, "Whether vindictiveness is to be exercised against those who sin involuntarily." In the body of the article, Saint Thomas declares that punishment, according to its proper nature, is not inflicted except on account of sin. A punishment of that kind is inflicted vindictively and no one receives it in that manner except for that which he did voluntarily. In the second part of his article he goes on to explain that sins committed involuntarily should be punished not vindictively but medicinally, in order to heal injuries caused by past sins, to prevent future sins, and to move men towards good. In other words, by making those guilty of an involuntary sin pay some penalty, the lawmaker forces them to be more careful and prudent in the future. The whole second part of the article treats of punishments inflicted for sins that were not voluntary. Saint Thomas also speaks of the many sufferings and humiliations we have to endure to acquire virtue but not of any guilt that man may acquire in the external forum. In the article Saint Thomas simply makes a contrast between punishments inflicted because of acts placed voluntarily and those placed involuntarily. In the first part of the article he shows that the punishments imposed for the former are always vindictive. In the second part he proves that penalties levied because of the latter are medicinal, not punitive. They are laid upon man as spiritual helps. Obviously, those words, "and according to this sometimes one not guilty is punished, not, however, with a cause," considered in their context, have no reference to merely penal laws as such, but only to penalties imposed because of involuntary acts.

Appeals are also made to article seven, question eighty-seven, of the "Prima Secundae." The title of the article "Whether every punishment is inflicted for a sin" looks promising, but

yields very little that can be used in building a Thomastic foundation for the merely penal theory. It is true that in the article Saint Thomas speaks of punishment not reduced to sin as a cause, but again he is not speaking of punishments inflicted because of personal voluntary offenses. He is speaking in that part of the article about things we have to endure because of the fall of our First Parents, which left man corrupt and infirm. Because of the debilitating effects of original sin, man cannot avoid sin and cannot progress in virtue, unless he endures privations and hardships. Hence Saint Thomas wishes to point out that man bears many ills which do not have a personal sin as a cause. A mere passing glance at the second part of the article shows that it has no real relationship to penal laws but is only a discussion of the effects of original sin.[10]

Nevertheless we must observe that sometimes a thing seems penal and yet has not the nature of punishment absolutely. For punishment is a species of evil, as was stated in the first part. Now evil is a privation of a good and since a man's good is manifold, viz., the good of the soul, the good of the body and external goods, it happens sometimes that a man suffers the loss of a lesser good that he may profit in a greater good; as when he suffers loss of money for the sake of bodily health, or loss of both of these for the sake of his soul's health and the glory of God. In such cases, the loss is an evil to a man not absolutely but relatively; and hence it does not answer to the name of punishment absolutely but of medicinal punishment, because a doctor prescribes bitter potions for his patients that he may restore them to health. And since such are not punishments properly speaking, they are not referred to sin as their cause, except in a restricted sense; because the very fact that human nature needs a treatment of penal medicines is due to the corruption of nature, which is itself the punishment of original sin. For there was no need in the state of innocence for penal exercises in

10. Cf. Billuart, Cursus Theologiae, Vol. IV, Tractatus de Peccatis, Dissert. VII, art. 4.

order to make progress in virtue, so that whatever is penal in the exercise of virtue is reduced to original sin as its cause.[11]

In article five, question one hundred and four, of the "Secunda Secundae," Saint Thomas asks the question "Whether subjects are held to obey their superiors in all things." Saint Thomas replies that subjects are held to obey their superior in those things which pertain to the disposition of human things and acts according to the nature of the superior's authority. He gives only two cases in which there is an exception: (1) If anyone demands something that is against the command of a greater superior (i. e., against the divine law), the subject is not held to obey. (2) If any superior commands that which is beyond his competence, subjects are not obliged. For instance, in those things which pertain to the interior acts of the will, subjects are not obliged to obey human superiors. No mention is made of any exception in which a subject is obliged only to undergo the penance prescribed.

The next article of the same question, entitled "Whether or not Christians are bound to obey the secular powers in all things," also provided Saint Thomas with an opportunity to mention something about penal laws, but he remained silent about such a possibility. He gave a straightforward reply without making any

11. "Sciendum tamen est quod quandoque aliquid videtur esse poenale, quod tamen non habet simpliciter rationem poenae. Poena enim est species mali, ut in Primo dictum est. Malum autem est privatio boni. Cum autem sint plura hominis bona, scilicet animae, corporis, et exteriorum rerum; contingit interdum quod homo patiatur detrimentum in minori bono, ut augeatur in maiori: sicut cum partitur detrimentum pecuniae propter sanitatem corporis, vel in utroque horum propter salutem animae et propter gloriam Dei. Et tunc tale detrimentum non est simpliciter malum hominis, sed secundum quid. Unde non habet simpliciter rationem poenae, sed medicinae: nam et medici austeras potiones propinant infirmis, ut conferant sanitatem. Et quia huiusmodi non proprie habent rationem poenae, non reducuntur ad culpam sicut ad causam, nisi pro tanto; quia hoc ipsum quod oportet humanae naturae medicinas poenales adhibere, est ex corruptione naturae, quae est poena originalis peccati. In statu enim innocentiae non oportuisset aliquem ad profectum virtutis inducere per poenalia exercitia. Unde hoc ipsum quod est poenale in talibus, reducitur ad originalem culpam sicut ad causam." — Summa Theol., Ia IIae, q. 87, a. 7.

distinctions: " . . . through the faith of Christ the order of justice is not taken away, but is made stronger. The order of justice requires that subjects obey their superiors; for otherwise the stability of human affairs could not be observed."[12]

Saint Thomas begins his treatise on law with the question "Whether or not law is something pertaining to reason."[13] In his affirmative reply the Angelic Doctor argues that the rule and measure of human acts is reasonable, for it pertains to reason to direct things to their end. Law is a rule and measure of acts whereby man is induced to do something or is restrained from placing an act. Therefore, law is something pertaining to reason. Saint Thomas not only speaks of the fact that a legislator must use his reason in making a law, but it is also evident that he holds that the law itself *in facto esse* pertains to reason. In other words, the law itself which is promulgated, always pertains to reason. The act commanded or the act forbidden is reasonable.

On that foundation those who oppose the merely penal theory lay their fundamental argument. A law is an ordinance of reason. But to act against reason is sinful. Therefore, to disobey a legitimately established law is sinful. The argumentation seems sound and logical. Every law is a rule or measure of human acts. Acts are good in so far as they conform to the standard established by a just law. They are evil in so far as they deviate from that rule or measure. Those who defend the merely penal theory attempt to refute that argument by insisting that the end of a law can be achieved by the threat of a penalty. We beg permission to remind them that a threat is not a command. A threat of punishment belongs to the sanction of the law. It is secondary and outside the essence of the law. The fundamental measure in determining the extent to which a law obliges is not the means

12. " . . . et ideo per fidem Christi non tollitur ordo justitiae sed magis firmatur. Ordo autem justitiae requiritur ut inferiores suis superioribus obediant; aliter enim non posset humanarum rerum status conservari."
13. SUMMA THEOL., Ia IIae, q. 90, a. 1.

used in achieving the end of the law. The obligatory force of a law is determined by its relation to the general object of all law — that is, to the common good. If an act or omission assists in promoting or maintaining something necessary for the common good, the act is virtuous. Then, since a true law is always established because the common good required it, breaking a law in some manner injures the general welfare and is sinful according to the gravity of the law. In other words, the obligatory force of a law is not dependent upon the sanction which the legislator attaches to a law. Its binding power is determined by the object, end and circumstances of the law itself. It can be objected that obedience to some civil laws would contribute very little to the common good. That is undeniably true. Since, however, the penalty is always in proportion to the sin, the obligation to undergo a penalty for disobeying a relatively unimportant law would correspond to the light obligatory force which the law itself possessed. Not every law binds *sub gravi.*

Saint Thomas' answer to the question "Whether an individual act can be indifferent" fortifies the above conclusion.[14] He says, "It sometimes happens that an act is indifferent in its species which yet is good or evil considered individually. . . . Every individual act must needs have some circumstance that makes it evil or good, at least with respect to intention of the end. For since

14. "Respondeo dicendum quod contingit quandoque aliquem actum esse indifferentem secundum speciem, qui tamen est bonus vel malus in individuo consideratus. Et hoc ideo, quia actus moralis, sicut dictum est, non solum habet bonitatem ex obiecto, a quo habet speciem; sed etiam ex circumstantiis, quae sunt quasi quaedam accidentia; sicut aliquid convenit individuo homini secundum accidentia individualia, quod non convenit homini secundum rationem speciei. Et oportet quod quilibet individualis actus habeat aliquam circumstantiam per quam trahatur ad bonum vel ad malum, ad minus ex parte intentionis finis. Cum enim rationis sit ordinare, actus a ratione deliberativa procedens, si non sit ad debitum finem ordinatus, ex hoc ipso repugnat rationi, et habet rationem mali. Si vero ordinetur ad debitum finem, convenit cum ordine rationis: unde habet rationem boni. Necesse est autem quod vel ordinetur, vel non ordinetur ad debitum finem. Unde necesse est omnem actum hominis a deliberativa ratione procedentem, in individuo consideratum, bonum esse vel malum." — SUMMA THEOL., Ia IIae, q. 18, a. 9.

it belongs to reason to direct, if an act that proceeds from deliberate reason be not directed to the due end, it is, by that fact alone, repugnant to reason, and has the character of evil. But if it be directed to a due end, it is in accord with the order of reason and hence has the character of good. Now it must needs be either directed or not directed to a due end. Consequently, every human act that proceeds from deliberate reason, if it be considered in the individual, must be good or evil."

Note these words, "not directed to a due end." If an act, by the very fact that it is not directed to a due end, must be considered sinful, then how is it possible for an individual to be free of fault if he ignores an authoritative direction to a due end? That, however, would be possible if we accepted the merely penal law theory.

CHAPTER XI

THE OPINIONS OF THEOLOGIANS WHO HAVE OPPOSED THE MERELY PENAL LAW THEORY

MANY — in fact, most — of the theologians and commentators, have favored the opinion of Henry of Ghent. They apply the merely penal law theory to civil laws as well as to rules and constitutions of religious orders when the same conditions[1] are present in civil society as in religious communities. Many other theologians have condemned the merely penal law theory and have demonstrated the weak foundations upon which it stands. No more will be attempted in this chapter than to give the opinions of a representative group who hold the theory that all just laws bind in conscience in proportion to the gravity of the matter.

I. SYLVESTER PRIERIAS (died circa 1526), according to Prümmer a very famous and fruitful author, whose works are well worthy of consideration in moral theology, very definitely rejected the purely penal idea. In his *Summa Summarum,*[2] he spoke of the fact that the author of the *Summa Angelica*[3] followed the opinion of Henry of Ghent. Both of them, he says, taught that there are two types of laws. One class of laws contains two precepts; that is, he who disobeys these laws acquires guilt both *ad culpam et ad poenam;* the other class of laws, which

1. It is well to note that all admit the main reason the rules and constitutions do not of themselves bind in conscience is simply because there is a clause inserted somewhere in the constitutions of religious orders which limits the obligatory force of the rules and constitutions to the external forum; but no such qualification is ever found in the constitution of a civil government. The same conditions, therefore, are never found.
2. Under the title "Inobedientia," no. 2.
3. Angelus Carletus a Clavasio.

contain only one precept, bind not in conscience but only *ad poenam*. Sylvester rejects this distinction. He says it was only verbal and childish, because no one establishes a penalty unless he wants something done or omitted. Then Sylvester added: "And so it is with Saint Thomas: All human laws if they are just bind in conscience." He says that Johannes Andreas also imitated Henry of Ghent on this question. But that is not true. Andreas restricted himself to a discussion of penal laws in relation to religious alone.[4] Sylvester may have been quoting Angelus a Clavasio, who attributed such an application of the theory to Andreas.

II. BARTOLOMAEUS MEDINA (died 1581) strongly defended the thesis that all just laws bind in conscience. He used a number of solid arguments; some of them have never been really refuted. First, he says that the fact that human laws bind in conscience is proved because every just law is derived from the eternal law according to what is said in Sacred Scripture: "By Me kings reign and lawgivers establish justice."[5] Since, therefore, that from which they are derived binds in conscience, these also ought to bind in conscience. Secondly, he states that this is the opinion of Saint Thomas as expressed in both "Prima Secunda," question eighty-seven, article seven, and in "Secunda Secundae," question one hundred and eight, article four. "This," he argues, "is known by the light of reason; for the explanation it must be observed that the *poena et supplicium* are spoken of in regard to the *culpa*. He then proceeds to develop an argument from the effects of original sin to demonstrate the fact that punishment is always inflicted in order to reduce the *culpa*

4. Cf. In Tertium Decretalium Novella Commentaria, c. VII, "Ne Clerici vel Monaci," III, l, no. 7.
5. Prov. 8:15.

to equality. He concludes that sin and punishment ought to correspond. For this reason, when a legislator establishes a penalty, he demonstrates that he wishes to bind *ad culpam*. To this, Medina says, Saint Augustine agreed, since he stated that every just penalty is for sin, and on this account it hangs over one's head."

Medina's final argument is cogent and logical. If a legislator establishes laws absolutely without a punishment, it is considered by all as obliging *ad culpam*. Then if he establishes a penalty for a transgressor, evidently he wishes it to bind *ad poenam et ad culpam;* for the punishment he establishes is a sign that he more ardently wishes that to be observed which he commands.[6]

III. BARTOLOMAEUS FUMUS (died 1545), the author of *Summa Armilla,*[7] is sometimes listed among those who hold that penal laws bind in conscience. It is true in so far as he teaches that, even though a law may contain only one precept, it nevertheless binds both as regards the act and the penalty. He qualifies his position by saying that laws bind in conscience unless the superior wills otherwise, as in the Dominican Constitutions. Whether or not he thought that all superiors, both religious and civil, enjoyed this power, he does not say. He makes a general statement that can be applied universally. He does, however, emphatically declare that the distinction which Henry of Ghent makes, is useless.

IV. DOMINICUS SOTO (died 1560) makes it clear that he does not think there is such a thing as a purely penal law, but he failed to say exactly what he means by a juridical fault. That makes it difficult to comprehend his full doctrine on this question. He gives all the usual arguments which show that the penal law theory is weak. He insists that the *poena* is inflicted

6. Bartolomaeus a Medina, Commentaria in Primam Secundae, q. 96, a. 4.
7. Under the title "Inobedentia."

because of the *culpa,* and must always be in proportion to it. In the closing paragraph of his article on the subject, he offers a solution for some of the difficulties which arise from the theory that all so-called penal laws bind in conscience. He says that certain acts of themselves are neither forbidden nor are they immoral, but he who wishes to place them must pay a certain tax or fine. In this case it would be the payment of the tax which would bind in conscience.[8]

Soto says that if it is objected that the Dominican Constitutions and that of other religious, do not bind in conscience because in them it is stated the Dominicans do not wish to oblige *ad culpam* but only *ad poenam* where the penalty without the fault is named, he answers that such are not proper and legitimate punishments, but are, as it were, agreements and pacts by which the Friars wish to bind themselves in such a manner that if they fail to observe the constitutions they will submit to the penalty. They are not called penalties without a cause; for they are exacted on account of something useful.

V. JOANNES AZORIUS (died 1603) discussed the question thoroughly and concluded that it seems more probable that human laws which have a punishment attached to them bind in conscience, for those laws are framed so as not merely to submit people to punishments. It is not that the legislator wishes the violator to be free of a fault; but by means of fear of punishment the legislator hopes to keep all within the bounds of due obedience.[9]

VI. GREGORIUS SAYRUS (died 1603), whose works, according to Prümmer, have always had great authority among

8. De Justitia et de Jure, I, i, q. 4, a. 5.
9. Institutiones Morales, Pars I, Lib. V, c. vi.

theologians, defended the theory that all just laws bind in conscience. His arguments are in substance the same as those which Medina offered. He too maintains that the infliction of a penalty necessarily implies an obligation both *ad poenam* and *ad culpam.* According to Sayrus, if the legislator does not wish to bind to the *culpa,* then he forms a rule that has only the force of a counsel, an exhortation, or an admonition. Such, he says, are the rules of religious communities in which the superior expressly states that he does not wish to bind *ad culpam.* The greater part of Sayrus' comments on penal laws are no more than an attack upon the theory of Castro.[10]

VII. SAINT ROBERT BELLARMINE (died 1621). Two points of Bellarmine's stand on the question of penal laws have been discussed in a previous chapter. In addition, he declared that since all law is a participation in the eternal law, anyone who sins against either the natural or the positive law, is guilty before God. Since no law can be made except by one having power and there is no power except from God, Bellarmine concludes that there is no law except from God. He, therefore, who disobeys a true law disobeys God and is guilty *ad culpam.* He ends this part of his argumentation with these words: "Tamen si (per impossibilem) esset lex non a Deo adhuc obligaret ad culpam sicut si (per impossibilem) homo existerit non factus a Deo adhuc esset rationalis."[11]

VIII. JOANNES WIGGERS (died 1624). This author, like most of the theologians of his time, was preoccupied with a consideration of laws according to the way in which they are

10. Sayrus, Clavis Regia Sacerdotium, Tom. I, Lib. III, c. ix, no. 14.
11. De Controversiis, Tom. II, Lib. III, c. xi, ad 6.

written. For instance, he declared that if a law was written disjunctively the subjects were bound either to obey the law or pay the penalty; but not definitely to one or the other. The legislator, he says, intended to bind that way; otherwise he would not have written the law disjunctively. He says, however, that a purely penal law binds in conscience, for the infliction of a penalty signifies that the superior wishes that to be done to which a penalty is attached. Furthermore, he states that the placing of a penalty does not take away the fault, but rather emphasizes it. Penalty and guilt are not repugnant to one another; therefore, Wiggers says, one does not exclude the other, but instead one is the complement of the other. It is unreasonable, he says, that a purely penal law should bind only to the acceptation of the penalty. In spite of those clear statements which seem to repudiate the entire penal law theory, he does not really reject it in the modern sense of the term, but only the old concept. His doctrine is almost the same as the one Billuart proposed.[12]

IX. HIERONYMUS DE MEDICIS A CAMERINO (died 1622) in his commentary simply says that a law which is derived from the eternal law has the power of binding in conscience. But just laws are derived from the eternal law according to Sacred Scripture: "By Me kings reign and lawgivers establish justice." Therefore human laws have the power of obliging in the forum of conscience. Laws not derived from the divine law are not laws but violence. The doctrine of Hieronymus de Medicis is clear. If the law is derived from the divine law, it binds in conscience; any law not derived from the divine law is really not a law. He therefore rules out any possibility of a law which would not bind in conscience.[13]

12. Wiggers, Commentarius in Totam Summam Theologicam, I, ii, q. 96, a. 4, dub. 7.
13. Summa Theologiae S. Thomae Aquinatis Doctoris Angelici Formalis, Explicatio, (Paris, 1507), Ia IIae, p. 402.

X. MARTINUS BECANUS[14] (died 1624). This author declared that it is not necessary that a prince intend to bind the conscience of his subjects; it is sufficient that he intend truly and properly speaking to institute a real law. He says that it is not possible to establish a law which does not oblige in conscience: "As it is not possible that I should bind myself by the vow of chastity to observe chastity and not bind myself in conscience." Becanus, however, considered the obligations of laws according to the way in which they were written. Thus he says, "A purely penal law prescribes or prohibits nothing but only ordains something and places a penalty." He made a distinction between laws which prohibit or command something and mere directions and ordinations which have a penalty attached to them. Many civil laws and rules in religious communities, he says, come under this classification. They are limited to things indifferent in themselves. He adds that the placing of a penalty does not take away the obligation which comes from the natural or divine law. The difficulty in his theory lies in the fact that he seems to have the idea that some acts, even when they are placed, remain indifferent.

In answering the third objection, Becanus removes some of the obscurity from his doctrine when he states that purely penal laws, if we speak properly, are not laws with regard to the subjects, because they do not have the power of a precept. They are called nevertheless purely penal laws, because they establish penalties. It is possible for them to be called laws in regard to the judges who are obliged to inflict punishments. It is evident that Becanus did not teach the theory of penal laws as it is taught today, but he did not condemn the theory entirely. The whole difficulty in placing him in a classification lies in the fact that he did not define or clarify the title under which the judge was obliged to inflict a punishment upon a man who disobeyed a mere direction.

14. Summae Theologiae Scholasticae, Pars II, Tr. iii, c. vii, q. 1, 2.

XI. FRANCISCUS SYLVIUS (died 1649). This great Dominican theologian, like others of his day, was preoccupied with the form of the law — that is, the manner in which it is written; but he did not allow that to sway his judgment. He admitted that it is not improbable that penal laws do not oblige in conscience, but the opposite view seems more probable: namely, that a penal law, if it is a true law strictly speaking, obliges *ad culpam*.[15]

The arguments Sylvius puts forward are no more than a clear and straightforward defense of the doctrine of Saint Thomas. "First, according to the doctrine of Saint Thomas in the body of this article (q. 96, a. 4), all laws, if they are just, oblige in the forum of conscience and unjust laws are the only exception to this obligation. Therefore, purely penal laws, which have the true nature of a law, oblige in the forum of conscience." He declares that they (penal laws) contain two things. One indeed virtually: the action or omission which is punished. The other expressly: namely, the punishment which is inflicted or is to be inflicted.

Sylvius did not overlook the exception Saint Thomas mentions (II a, II ae, q. 186, a. 9 ad 1), but explains: "It must be said that these are not truly laws but ordinations and directions moving and exhorting towards that which is fitting, nevertheless not prescribing. It so happens that statutes of this kind can be found in certain towns and other communities. Then he quotes Driedo (Lib. II, *De Libertate Christiana*): "A superior is able to give a certain constitution or ordination, willing the transgression of it to be obligatory not under sin but only as regards the temporal punishment in this life, if it is imposed; but such a constitution does not have the force of a law or a precept."[16]

15. Commentarii in Totam Primam Secundae, q. 96, a. 4.
16. Sylvius also cited Becanus and Vasquez as favoring this opinion.

In the first part of his commentary on article four of question ninety-six, Sylvius defends the existence of the disjunctive obligation, but that must be understood in the light of what he said at the end of his comments about certain laws which are made not to prohibit or command anything. They are not concerned with the morality of an act. They place a certain tax upon some acts in order to raise money for the government.

XII. DANIELUS CONCINA (died 1756), whose erudition Saint Alphonsus praised, was definitely opposed to the purely penal theory. He said that according to Scripture and Saint Thomas disobedience to the prince was disobedience to God. He sums up his idea in the following manner. The legislator is able to make a true law which imposes on the subjects the obligation of obeying. He is able to threaten them with punishments, but he cannot take away the obligation of obeying. In a previous chapter we have mentioned his idea on the rules of religious orders. He did not think that they were true laws, but only constitutions which are referred to as laws; and that, according to what they attain, they are more than sufficient.[17]

XIII. VINCENTIUS LUDOVICUS GOTTI (died 1742) says that all laws bind in conscience unless it is evident that in no manner does the legislator wish to oblige *ad culpam*;[18] nevertheless we say that such statutes would not be true laws but a mere direction or counsel. Of this Saint Thomas speaks: "There is also a religious order, namely, that of the Friar Preachers, where suchlike transgressions or omissions by their very

17. Concina, Theologia Christiana Dogmatico-Moralis, De Jure Nat. et Gentium, Tom. I, Ia IIae, q. 6, dub. 2, no. 1.
18. Theologica Scholastico-Dogmatica, Tom. I, Ia IIae, q. 6, dub. 2, no. 1.

nature do not oblige under pain of sin either mortal or venial, but bind one only to undergo the penalty imposed."[19] Gotti explains: "But this, therefore, is because legislators did not intend to make true laws, but only directive and hortatory ordinations and directions; because it is fitting that what is better should be done; but, nevertheless, they do not prescribe that it must be done, as the holy doctor likewise notes in the answer to the second objection."[20]

19. "In aliqua tamen religione, scilicet Ordinis Fratrum Praedicatorum, transgressio talis vel omissio ex suo genere non obligat ad culpam neque mortalem neque venialem sed solum ad poenam texatam sustinendam." SUMMA THEOL., IIa IIae, q. 186, a. 9 ad 1.

20. Cf. Chapter X for an explanation of q. 186, a. 9 ad 2.

CONCLUSION

Since according to the merely penal theory the obligation *ad poenam* is the more grave obligation, it automatically becomes the principal part of a penal law. According to this theory, a law would move men to act or restrain them by fear of punishments or by mere threats, but that is really not moving men by law. A law is an ordinance of right reason which authoritatively commands men to act for the common good. A sanction containing a punishment is something outside the essence of a law, added to it in order to move men whose reason might be blinded by passion. Any theory which would elevate a sanction to a point whereby it becomes the main force that a law would possess, seems illogical, but that is the effect which a merely penal law would have. Therefore it does not seem philosophically acceptable.

It seems justice demands that there be a proportion between the *poena* and the *culpa,* but in the merely penal law theory the *poena* is far more grave than the *culpa.* It is altogether out of proportion, for it binds both externally and internally, but the *culpa* binds only externally. Therefore, in the penal law theory the gravity of the penalty does not seem to have a just cause for its existence.

The clause inserted into the rules and constitutions of many religious orders, limiting them *ad poenam,* has influenced many famous theologians to support the merely penal law theory. They seemed to have overlooked or not to have adverted to the fact that a religious order is radically different in its nature and origin from that which gives rise to the existence of a civil state. Although they are both particular societies, yet one is a positive society and the other is a natural society. In a positive society men always retain the power to limit the obligations they will assume. In a natural society, such as the civil state, the force of the

obligations which man must assume, flows from the sociality of his nature. These obligations are determined by eternal law, from which civil laws are derived. All civil laws are no more than an application of the eternal law to the everyday life of the community, according to the prudent judgment of the authorities. Therefore, they should bind in the same manner as the eternal law — that is, in conscience. This is the conclusion which Saint Thomas expressed in discussing the obligations of civil law. He made an exception for the rule of a religious order, which is a positive society, but he made no provisions for an exception in the case of civil laws of the civil state, which is a natural society. And it does not seem that the exception can be validly transferred, because of the difference in the nature of the two societies. Furthermore, no clause limiting the obligations inherent in a true law is to be found in the constitution of any country. At least no author has been able to name one.

Neither does the merely penal law theory receive any support from Saint Paul, who clearly declared that the civil magistrates are ministers of God, whose laws bind not only for the sake of wrath but also for the sake of conscience. Since the civil magistrate is only a minister of God, he must always act in the name of God and in place of God for temporal things. Beyond the forum of God he has no authority.

The moral obligation theory seems to be in harmony with the social doctrine of Pope Leo XIII, who, in all his Encyclicals which treat specifically of the nature of the civil state, its authority, and the duties of citizens, never mentioned the possibility of a law which would not bind in conscience. Outside a moral obligation the only other means a ruler has, he says, is fear; but the great Pontiff rejects it as a weak foundation for the establishment of law and order in a civil society. He therefore implicitly rejects the merely penal law theory, for it would move

men by fear of the punishment they might have to undergo. Pope Leo XIII insists that only when rulers acknowledge that their authority comes from God and citizens recognize the fact that civil laws bind in conscience will it be possible to safeguard law and order and to promote justice and peace.

It also seems certain that the moral obligation theory is far more competent for the tremendous task of protecting individual rights and promoting the general welfare. If the moral obligation theory is kept within the acknowledged limitations which right reason demands, it will be neither unduly harsh nor overburdensome. And it will help to stem the tide toward laxity so prevalent in many parts of the world.

Although each of the systems[1] which theologians offer in defending the merely penal law theory can be disputed and seemingly refuted,[2] although it can be proved that the conditions they demand in order that a penal law might exist are *de facto* not present in present-day legislation,[3] although it can be demonstrated that the teaching of the merely penal law theory can endanger the common good of the State,[4] and although it can be shown that the merely penal law theory is not necessary in order to provide for the common good,[5] yet it would be foolhardy to condemn the merely penal law theory. Great and learned theologians have advocated it for centuries. The sheer weight of the external authority which supports the merely penal law theory gives it a high degree of probability. Throughout this thesis an attempt has been made to show that those who deny the merely penal law theory defend the stronger and more probable opinion.

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1. Chapters IV, V, VI.
2. Chapter IV, no. II.
3. Chapter V, no. VI.
4. Chapter VIII.
5. Chapter VII.

One is also forced to admit that civil magistrates can establish ordinances, directives, and regulations which would not oblige under pain of sin, but as regards fulfillment of the temporal punishment. If regulations were imposed in that manner, they would lack the force of a law or precept in the strict sense. It seems that they would be laws only in the wide sense of the term. Such regulations could be called merely penal laws. Lopez,[6] however, points out that the conditions which theologians generally require for merely penal laws cannot be found in present-day legislation. We, therefore, conclude that those who hold the theory that all civil laws participating of the true nature of a law bind in conscience both as to the act and to the penalty, according to the gravity of the matter, defend the more probable opinion.

6. Chapter V, no. VI.

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