

THE PROBLEM OF PENAL LAW

INTRODUCTION

There are few questions in Moral Theology about which so many disputes have arisen, as the question of the purely penal law. It is obvious that some laws simply command or forbid an act, and attach no penalty here for its violation—the law of Sunday Mass attendance, for example. There are other laws which impose both a direct obligation in conscience and a penalty on transgressors. Thus, for example, where the obligation of the Divine Office arises from a benefice, omission of it is sinful and is punished by the loss of the right to the income from the benefice, in proportion to the length of time during which the Office is omitted. (Canon 1474) Laws of this type usually are called “mixed-penal.”

It has been commonly accepted that there is another type of law, called the purely penal law, in which the legislator apparently seeks obedience to his will, not by commanding an act which binds his subject in conscience, but rather by threatening to impose a penalty upon a subject who will not perform the act (or will not omit it, if the law is negative rather than affirmative). And to undergo this penalty—so it is usually taught—binds the transgressor in conscience.

Those interested in the history of this question usually point to the prologue of the Dominican Constitutions of the General Chapter which convened in the year 1236. In the passage pertinent to this discussion, it was declared that the Rule did not bind *ad culpam*, but *ad poenam*.¹ A significant development is to be found in the pronouncement of the Council of Toledo, held in 1355. Here it was stated that the provincial Constitutions of its predecessors, and those which would be established in the future, would bind subjects, not *ad culpam*, but only *ad poenam*, unless specific provision was otherwise expressed.²

¹ *Monumenta Ordinis Praedicatorum Historia*, Tom. 3, Acta Capit. Gen., v. 1. 8.

² J. D. Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio* (Arnhem, 1901-1927), 26, 411.

In presenting briefly the problem of the purely penal law to be discussed by the panelists this afternoon, I would like to make mention of four points.

1. *The Concept of the Purely Penal Law*

According to D'Annibale, a purely penal law is one which disjunctively imposes either a precept or a penalty—in such wise that it is left to the choice of the subject either to perform the act commanded (or refrain from the act forbidden) or to submit to the penalty for failure to do so.³

Another explanation of the concept of the purely penal law is advanced by Suarez. According to his view, a purely penal law is one which really commands some act to be performed (or omitted); but this command is not imposed *sub culpa morali*. If a subject fails to perform the act, he is obligated in conscience to undergo the penalty for the juridic guilt which has arisen.⁴

Vermeersch explains the concept of a purely penal law in a different way. In his mind, a purely penal law as such and of itself gives rise to no obligation in conscience at all—and he quotes St. Alphonsus in support of this view. The source of the moral obligation to submit to the penalty imposed, is to be found—so Vermeersch believes—in the divine law which imposes the obligation of obedience to just laws.⁵

In recent years Rodrigo has proposed another view which is essentially Suarezian, but to some extent incorporates also the theory of Vermeersch—in that Rodrigo allows the obligation to submit to the penalty, to be either moral (as Suarez contends) or juridic (as Vermeersch maintains), according to the wish of the legislator.⁶

Recently McGarrigle has propounded a theory to the effect that

³ J. D'Annibale, *Summula Theologiae Moralis* (ed. 5; Romae, 1908), I, n. 207.

⁴ F. Suarez, *De Legibus et Legislatore Deo*, Lib. V, Cap. IV, n. 2.

⁵ A. Vermeersch, *Theologiae Moralis Principia, Responsa, Consilia* (ed. 3; Romae, 1933-1937), I, n. 172.

⁶ L. Rodrigo, *Praelectiones Theologico-Morales Comillenses*, Series I, *Theologia Moralis Fundamental*, Vol. II, *Tractatus de Legibus* (Santander: Editorial Sal Terrae, 1944), n. 346.

laws which are called purely penal, really do create an obligation in conscience to perform the act commanded—not involving sin, however, but imperfection. Now, since there is a moral obligation to avoid imperfection, violation of this obligation is a fault which, even though it is not sinful, is nevertheless punishable.⁷

In their explanations of the concept of the purely penal law, variations of some of these general theories are suggested by many moralists. But enough has already been said to make it clear that there exists no unanimity of opinion as to the nature of the purely penal law.

2. The Possibility of a Purely Penal Law

It seems to be true to say that most moralists are in agreement that purely penal laws can exist. But the arguments of the minority are not to be overlooked. In the main, they involve a consideration of the nature of law, and the fact that punishment necessarily supposes guilt. Hürth-Abellan sum up the arguments in favor of the possibility of the existence of a purely penal law by stating that in such a concept there is no repugnance—not from the viewpoint of the power to legislate (i. e., jurisdiction), not from the viewpoint of the effect of law (i. e., obligation), and not from the viewpoint of the nature of law.⁸

3. The Actual Existence of Purely Penal Laws

There seems to be rather general agreement that, with the exception of the Rules of some Religious Orders or Congregations, ecclesiastical laws are not merely penal. As to whether purely penal laws are to be found in civil legislation, the matter is widely disputed. Some of those who subscribe to the affirmative view maintain that, in the absence of any contrary provision expressly stated, those civil laws are to be considered purely penal whose purpose can be adequately achieved by threat of the penalty alone. In regard to the

⁷ F. McGarrigle, "It's All Right If You Can Get Away With It," *The American Ecclesiastical Review*, CXXVII (1952), 448-449.

⁸ F. Hürth-P. Abellan, *De Principiis, De Virtutibus et Praeceptis*, (Romae, 1948), I, nn. 247-248.

extent of such laws, even among those who maintain that they do exist, there seems to be current today, a movement away from the tendency to term most, or very many, civil laws as merely penal.

Of course there are some theologians who deny outright that purely penal laws actually exist. However, not all in this group would hold that the transgressor of every civil law commits sin. Lopez,⁹ for instance, is very liberal with regard to use of *epikeia*—although on this point he is frequently attacked, on the basis that of its nature *epikeia* is not an institute that may be resorted to with such frequency.

Woroniecki¹⁰ excuses from moral guilt transgressors of civil laws of no great consequence, by introducing the concept of self-dispensation. This explanation too has been assailed—on the ground that it is unjust that a person should be bound in conscience to undergo a penalty for the violation of a law from which he was legitimately dispensed.

4. *Dangers of the Purely Penal Law Theory*

Even here, there is much disagreement among theologians. Of course all concede that an excessively liberal use of the theory will result in harm. While some moralists maintain that the application of the purely penal law theory is resulting in a general disrespect for civil law, and hence urge that it be taught that all civil laws bind in conscience, nevertheless others point to the widespread violation of the gravest laws (even divine laws) which quite obviously bind in conscience—laws forbidding divorce and contraception, for example. In other words, to teach that a law binds in conscience is not to guarantee its observance, so it is alleged.

These then are four of the points concerning purely penal laws, in regard to which there is so much dispute among theologians.

- (1) The concept of such a law;
- (2) The possibility of such a law;

⁹ U. Lopez, "Theoria Legis Mere Poenalis et Hodiernae Leges Civiles," *Periodica*, XXIX (1940), 31.

¹⁰ H. Woroniecki, "De Legis Sic Dictae Poenalis Obligatione," *Angelicum*, XVIII (1941), 379-383.

- (3) Its actual existence;
- (4) Dangers arising from the purely penal law theory.

It is along these lines that our panelists will discuss the purely penal law this afternoon.

LAWRENCE J. RILEY,
St. John's Seminary,
Brighton, Mass.

I

1. THE DIFFERENT THEORIES

Despite the fact that theologians now reject the theory of penal laws in the sense Angelus, Henry de Gand, and Castro considered them, there is a great lack of harmony among them in explaining the theory. There are three major schools of thought regarding the precise nature of a penal law and many lesser opinions have been offered.

The first is what might be called the theory of the moral disjunctive obligation.¹ It is a throw-back 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 ob-

¹ D'Annibale, a patron of this theory, wrote: "Lex poenalis ea dicitur quae paenam irrogat transgressori; ideo duo semper continent, nempe rem aliquam (non faciendam vel faciendam) et poenam, itaque obligat pure poenalis vel ad rem vel ad poenam arbitrio nostro." *Summula*, Pars 1, 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, disjunctive tantum obliget vel ad actum ponendum vel saltem ad onus subeundum," no. 144, p. 353. Among others who favor the disjunctive theory are Maroto, *Inst. Juris Can.*, Tom 1, no. 221, p. 189. Tepe, *Inst. Theol. Moral.*, 1, 365; Lehmkuhl, 1, 310; Reuter, *Theol. Mor.*, 1, n. 214; Ferreres, 1, no. 205 (who calls this the most common opinion).

ligation to the act prescribed or prohibited 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. Prummer, a defender of this theory, says 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. Vermeersch³ 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 a debt contracted in their forum.⁴

Rodrigo⁵ perceives the inherent weakness of the three major theories. Still he refuses to abandon the purely penal theory; instead, he proposes 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 quite a difficult task he proposed 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

² *Theol. Moralís*, 1, no. 209; Suarez, *De Legibus*, 1, 5, C. 4, no. 4; Janssen, *Jus Pontificum* 4 (1924); Van Hove, *De Legibus Eccles.*, no. 150.

³ *Theol. Moralís*, 1, no. 172, "Lex mere poenalis nobis concipienda videtur ut lex quae tota quanta conscientiam non obligat; seu quae ut ait S. Alphonsus," *Theol. Moralís*, "De Legibus," no. 145, "non obligat in conscientia, i.e., quae tota quanta se continet in ordine iuridico seu fori exterioris."

⁴ Cf. Rodrigo, *Theol. Moralís*, no. 340 and Lopez, in *Periodica*, 1938, Fasc. III, p. 207, for an analysis of Vermeersch's view on this point.

⁵ *Prael. Theol. Moralís*, no. 346.

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 Woroniecki⁶ 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, a law binds proportionately according to the gravity of the matter prescribed for the common good and then goes on to say, 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.

2. 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 mere 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 accept-

⁶ *Angelicum* (1941), p. 379.

ance 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 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 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 penalty⁸ 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 Thomas⁹ a penalty is that which is contrary to the will, is afflictive and is imposed on account of a *culpa*. The *poena* 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 sponsors¹⁰ of the conditional obligation system seek refuge in the so-called juridical

⁷ Henry De Gand, *Aurea Quolib.*, *Quolib.*, III, q. 22.

⁸ Cf. Rodrigo, *Theol. Moralis*, no. 343.

⁹ I-II, q. 46, a. 6 ad 2.

¹⁰ Cf. Prummer, 1 no. 209.

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 did not have charge of human acts: an evidently false supposition.¹² Then, too, human acts *in concreto* are either evil or good. 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 insofar as it is not considered morally wrong, but it is also evil insofar 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, insofar 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 not too astonishing nor too suitable which denies the force of obliging to a principal part of the law, i.e., the norm, so that it makes this proper to the secondary part which is the exterior sanction."¹³ Although that statement

¹¹ I-II, q. 21, a. 2.

¹² I-II, q. 21, a. 4.

¹³ "Miram et parum congruam dixerimus voluntatem legislatoris qui parti

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 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 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

principali legis, i. e., *normae, negaret vim obligandi, ut hanc propriam faceret partis secundariae quae est sanctio exterior.*" *Theol. Moral.*, 1, no. 172.

¹⁴ *Theol. Moral.*, 1, no. 172.

not bound in conscience to obey a just law, fear would be the only motive, urging the observance of law. Fear, however, 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.¹⁶

. . . rulers in the midst of such threatening dangers have no remedy sufficient to restore discipline and tranquility. 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.

The compromise theory, which Rodrigo offers as a solution, must be rejected, as it is evident from what we have said above in refuting the conditional and the mere 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 legislators are not accustomed to discuss the nature of the penalty in the word-

¹⁵ *De Regimine Principum*, 1, C. 10.

¹⁶ *Encyclical*, "Diuturnum."

ing of the law. He calls the exterior sanction the subsidiary obligation and the act or omission the principal obligation. Since, however, the acceptance 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 attributed to them and leaves them only the power to punish evil doers.

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 from 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.

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 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 resume 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

¹⁷ Cf. John A. Ryan, *Ecclesiastical Review*, LXX, no. 4, (1924), p. 408.

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?

MICHAEL NOONAN, S.M.,
Framingham Centre, Mass.

II

It must be conceded that the mere 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 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 mere penal law theory and to examine its foundations. Some authors have changed their opinion to such an extent that one is amazed. The different systems, that authors use to defend the mere 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 mere penal law theory. Although they are unwilling to abandon the theory, these authors acknowledge that, if knowledge of it were widely diffused among the laity, the effect of it would injure civil society.

Certainly an impressive number of well-known authors advocate the mere penal law theory. All of them, however, are not 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.¹

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.² One is always permitted to examine and weigh the opinions of even the best of authors. Their opinions have no more probability than the intrinsic reasons which support them.

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 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, most of the laity do not ever have a clear concept of their ordinary duties in regard to the civil laws. The vast majority of them have never heard of the merely penal

¹ Cf. Aertnys-Damen, *Theol. Moralis*, Vol. I, no. 71.

² Merkelbach, *Theol. Moralis*, II, no. 101; Cf. Aertnys-Damen, *Theol. Moralis*, I, no. 93, 94.

theory. The theory is not of any value to them right now. For the most part, knowledge of the penal law theory is limited to professors of moral theology and their students. Often, as a result of that, 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 such a thing as a penal law exists, but expect priests to be good and obedient citizens.

Those who hold 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 the 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 overburdensome laws. Only real laws, true laws, just laws can bind the conscience of men.

A mark of a just law is that it is consistent with human nature. It insists that men act with reason. All civil law urges man toward a life in accord with reason, toward prudence, temperance, justice and fortitude. Law must be reasonable. The dignity of the human person demands that. An insight into the very purpose and the 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 ready 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 of the law."³

Not every regulation contained in a law is a moral norm. Many things in the body of a law have only the insignificant purpose of being means to an end. They have no real moral content. Consider, 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, matters touching the bureaucratic

³ *The Natural Law*, p. 199.

organization of certain sections of the government fall into this category.⁴ 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 admonition 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 in order 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 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 with a grave inconvenience out of proportion to the nature of the law. Then, if in a particular case, the observation 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 which are intrinsically evil, such as adultery, idolatry, etc.

Lopez proposes the application of a certain *epikeia*⁵ in civil matters, just as we do in matters 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.⁶

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 Rommen⁷ says, all laws require a moral foundation. The

⁴ *The Natural Law*, pp. 213-214; Peinador, *Theol. Moralis*, p. 393.

⁵ *Periodica*, (Feb., 1940), p. 31.

⁶ Rodrigo (*Praelectiones Theol. Moralis*, no. 355) criticises Lopez for carrying over the principle of *epikeia* into civil law. He says he would make what should be rarely applied a common occurrence. That does not seem to be a fair appraisal of Lopez's idea for he specifically states: "Neque existimandum est frequenter accidere casus si res bene perpendantur in quibus ad hoc temperamentum sit recurrendum."

⁷ *The Natural Law*, p. 213.

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 consistently refers to morality. Often the judge, as was the case even 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 law-maker, who is assumed to will only what is moral; or, if the literal meaning is impossible, he will put 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 official, the authority to inflict a reasonable penalty, if, in his judgment, a complete acquittal would have a harmful effect on the general public. Then, too, he has the duty of preventing any danger of abuses that might arise from the application or the misapplication of the above principle.⁸

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 if one should find riding a bicycle in the street dangerous, for one reason or another, and noticed there was no one on the sidewalk, he could 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,

⁸ Although there is a certain similarity between Lopez's 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.

that is, one may be ready to obey at the request of the authority, but do 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 needs only 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 enough distinctions and so leaves the way open for grave crimes against the welfare of a nation. Each country has the right to protect itself; and to disregard certain custom laws, by such an act as taking certain types and amounts of currency into a country, could strangle a 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. The members of the various professions become well acquainted with the laws which pertain to their work during their training period, or in colleges and universities.

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. But life in this world was not meant to be a bed of roses. The objection that it creates great burdens for honest people is useless. After all, when Saint Paul gave his famous admonition to the early Christians, even though the pagans then living knew of no such thing as conscience, that did not deter him. He knew the burden he was placing upon the Christians, 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 sanctioned by God 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 the civil rulers have authority from God to govern them; and that they must obey the reasonable commands of their rulers. They must be warned that unless they obey civil laws rightfully imposed, they cannot be called virtuous. They must be reminded that civil regulations are intended as a help toward their eternal and their temporal happiness. Citizens should be told, 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.

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 merely 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 will eventually begin to hold those laws in contempt. And their 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! 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 it holds that a penal law obliges in conscience only to accept 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, at least to the extent that it can be reduced to the same thing. Men can draw that conclusion from the theory. Then, too, the line separating the merely penal laws from the moral law is so vague, that grave abuse can creep into the conduct of men tending to regard truly moral laws as merely penal.

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. Merkelbach⁹ 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 toward one's self or others is injured. For, in this latter regard one imprudently exposes himself and his family to grave penalties and great dangers, to infamy and condemnation. Besides some would use violence, or they would be prepared to use violence against those who are held from duty to apply the law."

Aertnys-Damen¹⁰ gives practically the same admonition. "Confessors should not too easily nor imprudently state that civil laws are purely penal, lest they give scandal, or stir up false accusations and hatred toward the ministers of the Church and even toward the Church itself. Indeed, they should generally inculcate observance of civil laws in the manner which Saint Paul and Christ Himself did,¹¹ because, whatever be said of the intention of the legislator, often there is present in whole or in part, a natural obligation,¹² as happens in laws concerning a legal price, crops, workers; dominion of spouses, of children, of authors; 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."

After explaining the doctrine of purely penal laws and giving his approbation to it, Sabetti-Barrett¹³ gives this warning: "Whatsoever it is, nothing of this should ever be mentioned to the people, especially the less educated. They ought to be persuaded to fulfill all laws." That also seems to be an open admission that the theory is

⁹ *Summa Theol. Moralís*, I, no. 287.

¹⁰ *Theol. Moralís*, I, no. 160; Also Cf. Salsman, *N. R. Theol.* (1928), p. 139.

¹¹ That statement seems to be an admission that Christ and Saint Paul placed all civil laws in one classification, namely moral.

¹² That statement 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.

¹³ *Theol. Moralís*, tract III, C.V., no. 114.

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.

Genicot-Salsman¹⁴ 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 they are penal laws, but 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 citizens would try to circumvent the law, while the magistrates would try to enforce it. The theory offers an occasion of casting aside and neglecting attention to moral reasons in fulfilling laws. For the citizens would not be 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 would not oblige in conscience, unless it is imposed, it would be licit to use all ingenious and astute means to impede the pronouncement of the punishment. Hence, the obedience that should be given to civil authorities would be reduced to a certain kind of ridiculous contest. On one side the subjects would try to escape the burdens and punishment of the law. On the other side the police and the courts would stand, trying to wring from the subjects what the common good demands. Under that system the magistrates would have no more authority than the physical powers of a policeman or jailer.

If the penal law theory must be accepted, what becomes of our constant protestations of conscientious loyalty to the laws and insti-

¹⁴ *Theologia Moralís*, I, no. 574.

tutions of our country? If our moral obligation toward some 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 the jailer?¹⁵

In speaking of police power we might note that Catherin¹⁶ 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, he is unable to offer any higher motive to move men to obey those legitimate commands of a superior which are so classified.

Since in 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 the merely penal law theory would have. Therefore, it does not seem philosophically acceptable.

It seems that justice demands 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, while the *culpa* binds only externally. Therefore, in the penal law theory the grave character of the penalty does not seem to be justified.

The clause inserted in the rules and constitutions of many Religious Orders, limiting them *ad poenam*, has influenced many famous

¹⁵ Cf. J. A. Ryan, "Are our Prohibition Laws purely penal," *Ecclesiastical Review*, Vol. LXX (1924), 404-411.

¹⁶ Cf. Catherin's article on law in the *Catholic Encyclopedia*, IX, 53-56.

theologians to support the merely penal 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 than a civil state. Although they are both particular societies, yet one is a positive society and 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. They are determined by eternal law from which civil laws are derived. All civil laws are no more than an application of the eternal law, according to the prudent judgment of the authorities, to the every day life of the community. 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 rules 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 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 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. Apart from imposing a moral obligation, the only other recourse a ruler has, he says, is to inculcate fear. But the great Pontiff rejects fear 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 better fitted to 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.

MATTHEW HERRON, T.O.R.,
Mount Assisi Monastery,
Loretto, Pa.

DIGEST OF THE DISCUSSION

Although some few in the course of the discussion showed sympathy for the opinion which denies the possibility of penal law, the majority of those who expressed themselves did so in defense of the penal law theory. Several of the members challenged *Father Herron* on practical grounds, arguing that unless we admit the existence of some civil statutes which are purely penal in character, we find ourselves as moralists in an awkward position. Since there are some civil ordinances whose violation would not be alleged as theologically sinful by either school of thought, opponents of the penal law theory seem able to defend their position only by calling such statutes unjust—a more dangerous *refugium*, it was alleged, than is recourse to purely penal law.

On the other hand, comments by *Fathers Malone* and *Charles O'Leary, C.S.S.R.*, appealed to the teaching that law, being essentially an act of the intellect, obliges insofar as it commands what is essentially required for the common good. Since obligation has its source in the necessity of means to end, the legislator is powerless to decide whether his law, once established, shall oblige or not. Hence the concept of purely penal law is self-contradictory and inadmissible.

Father Joseph Duhamel, S.J., based his remarks on the demands of distributive justice. If, he contended, the theory of penal law is denied in a civilization such as ours, the burden of civil obligation will fall disproportionately on those who recognize such a thing as an obligation in conscience, for violation of which one must answer to God. Those who deny all such obligation will be burdened by the law only to the extent of a legal sanction—an inequality in violation of the demands of distributive justice. As for the claim that law must be considered as binding in conscience unless the legislator declares otherwise, *Father Duhamel* asserted that this intention of the legislator may be deduced indirectly from the jurists and legal commentators who limit their discussion to law in its juridic effects.

In support of *Father Duhamel's* position, *Father Gerald Kelly, S.J.*, emphasized the necessity of interpreting the law equally for all, and agreed that any theory which denies merely penal law results in an inequitable burden for Catholics and for perhaps a relatively few others. Even on the supposition that the average non-Catholic would think of law in terms of obligation in conscience, it is doubtful that he identifies that concept with our idea of binding under sin.

Father John Ford, S.J., called attention to the fact that the fundamental point at issue is whether the very concept of law, properly understood, necessarily implies moral obligation, i.e., an obligation binding in conscience under pain of sin. Some religious orders distinguish between their laws strictly so called and other ordinances which are not called laws. But even of their laws—the constitutions themselves, for instance—they declare that they do not bind the conscience under pain of sin. While St. Robert Bellarmine may explain even the constitutions as not being laws in the proper sense, and attribute their binding force to a contractual relationship, others insist that they lack nothing which is essential to the concept of law. And the Holy See approves constitutions which distinguish explicitly between laws properly so called and other ordinances of the religious institute.

The basic and essential issue, *Father Ford* continued, is a metaphysical and philosophical one. Every philosopher will admit, no doubt, that it is of the essence of law to bind, to impose a necessity on the human agent. But not all will admit that this necessity must

from the nature of the case be that absolute and imperative *ought* which is derived from a consideration of man's essential relation to God as his last end. Some continue to believe that a merely juridical or penal necessity satisfies the formal concept of law. The question of the possibility of a merely penal law cannot be satisfactorily decided unless one comes to a conclusion or takes a stand on this ultimate issue.

JOHN J. LYNCH, S.J.,
Weston College,
Weston, Mass.