IN DEFENSE OF THE PENAL LAW

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There has arisen among moralists in recent years a revival of the debate over the existence of the purely penal law. Such a law may be described as one which does not morally oblige its subjects to perform or to avoid a certain action, but merely to submit to the legal punishment meted out to apprehended and convicted offenders. A presentation of both sides of the question formed a panel discussion at the 1955 Convention of the Catholic Theological Society of America. One writer regards the subject as "an interminable discussion of an insoluble problem."[1] Another, in full agreement with that side of the debate which denies the validity of the penal law concept, looks forward to the day when he may applaud its demise,[2] an attitude which is neither uniquely modern nor devoid of corroborative argumentation. In fact, the theory of the purely penal law from its arrival on the scene in the thirteenth century has never lacked staunch opponents whose objections have neither varied in essentials nor have prevented it from becoming common moral teaching. However, since much recent writing on this subject has been inimical to the penal law, it will be the purpose of this article first to establish a rational definition of the concept of the penal law and secondly to answer some of the more common objections raised against it. The determination of what laws in the concrete are purely penal will follow as a corollary from a treatment of these two headings.

DEFINITION OF A PENAL LAW

We have already seen an initial description of the purely penal law. However, an opponent of the concept regards the diverse explanations given by moralists of its more intimate nature as a hall-mark of the invalidity of the concept itself.[3] While such an inference is not com-

[1] G. Tavard, "Une 'Semaine théologique' en Amérique," *La Croix,* July 26, 1955, quoted by J. C. Fenton, "Appraisal in Sacred Theology," *American Ecclesiastical Review* 134 (1955) 29.

[2] *America* 88 (Jan. 17, 1953) 415.

[3] F. McGarrigle, S.J., "It's All Right If You Can Get Away With It," *American Ecclesiastical Review* 127 (1952) 436.

pletely justified, it does point up the need for defenders of the penal law to examine these different explanations in order to select one that is logically coherent, lest their case appear hopeless from the start.

The variant conceptions of the nature of penal laws may be summed up, with exceptions to be noted later, under two generic groupings. The first of these we might call the "Either-Or" school, since it explains penal laws on the basis of a disjunctive obligation. In this system the lawmaker is considered as extending an option to his subjects. They may either obey the law, or disobey it and pay the penalty imposed for their disobedience. Hence the immediate and primary object of the law is neither the action enjoined nor the payment of the penalty but rather both indeterminately.[4]

This explanation seems untenable. It is attacked not only by opponents of the penal law[6] but also by some of the most stalwart defenders of such a law.[6] As Vermeersch rightly observes, "sententia ista hodie merito deseritur, quia nullus legislator observantiam et poenam aequali modo amat et vult, sed efficaciter saltem per poenam ordinationem suam urgere intendit."[7] In other words, a lawmaker in enacting a law desires principally and in a determinate manner the action enjoined by the law. Since the penalty is merely a means to this end, he must intend it as a means, i.e., secondarily.

The second school of thought on the nature of a penal law espouses an "If" explanation, a theory of conditional moral obligation.[8] In view of the difficulty urged against the previous theory, the advocates of this position concede that a legislator principally intends and consequently primarily obliges his subjects to the action prescribed by his law, but with a merely juridic non-moral obligation. Conditioned upon

4 J. D'Annibale, *Summula theologiae moralis 1* (4th ed.; Rome, 1896) 207; A. Lehmkuhl, *Theologia moralis* 1 (10th ed.; Freiburg, 1902) 146. For the same explanation among civil jurists cf. W. Blackstone, *Commentaries on the Laws of England* (Philadelphia, 1902), Introd., sec. 5, n. 58.

5 M. Herron, *The Binding Force of Civil Laws* (North Miami, Fla., 1952) p. 34.

6 A. Vermeersch, *Theologia moralis* 1 (3rd ed.; Rome, 1933) 172; L. Rodrigo, *Praelectiones theologico-morales Comillenses* 2 (Santander, 1944) 342.

7 Vermeersch, *loc. tit.*

8 Suarez, *Opera omnia* 5 (ed. Vives; Paris, 1856) lib. 5, c. 4, n. 2; G. Michiels, *Normae generales juris canonici* 1 (2nd ed.; Tournai, 1949) 304-8; P. Maroto, *Institutiones juris canonici* 1 (3rd ed.; Rome, 1921) 221; J. Giienechea, *Principia juris politici 2* (Rome, 1939) 246; D. Prümmer, *Manuale theologiae moralis* 1 (10th ed.; Barcelona, 1946) 209; cf. also Rodrigo, *op. tit.* 2, 304, note 2.

a lack of compliance with this principal object he obliges his subjects to undergo a penalty. This secondary obligation of submitting to a penalty is a moral obligation derived from the penal law itself.

A difficulty commonly raised against this explanation is the incongruity it seems to involve in withholding moral obligation from the primary end of a law while attaching it to a secondary one.[9] Such a procedure seems to violate the principle, *accessorium sequitur principale.* However, if we keep in mind the idea that in a penal law the penalty remains subordinated to the principal intent of the law, the performance of the act demanded, we will see that there is here no inversion of the natural order of things. It is difficult to see any contradiction involved when a juridico-moral obligation to accept a punishment is made to subserve the principal end of a law, compliance with a purely juridic duty.[10] Indeed, few will deny that penal sanctions are for the great run of mankind the most efficacious means of securing obedience to civil laws.

Güenechea, a defender of the penal law, meets the objection we have been considering in a slightly different manner.[11] He notes that it is not exact to assert that the act prescribed by a law is the principal end of that law, for the principal end of any law must be the promotion of the common good. The act enjoined by a particular law is a means to this end, a means, it is true, more immediate to the ultimate purpose of the law than the penalty, but a means none the less. The performance of a certain act, and as a consequence the promotion of the common good, can be effectively obtained by the enactment of a penalty, submission to which will be morally obligatory upon those who have failed to perform the legally prescribed action. Thus the common good, the ultimate end of any law, is safeguarded by moral obligation, and there is no question of withholding from the principal intent of a law the buttress of conscience obligation.

At this point, deferring until later solutions to the more common objections against the penal law itself, we may state that, with regard to its inner rationality at least, the conditional moral-obligation theory is both coherent and defensible. It is, moreover, the explanation adopted by the great majority of those who defend the concept of

9 Rodrigo, *op. cit.* 2, 343; Vermeersch, *loc. cit.*

10 Rodrigo, *loc. cil.*

11 Güenechea, *op. cit.* 2, 247.

penal law.[12] However, in order to present a more complete picture of the speculative work done on this subject, as well as to highlight some of the more important points at issue, we will now proceed to a delineation and critique of two recent explanations of the penal law, the theory of Vermeersch and that of Rodrigo, both of which constitute somewhat of a departure from the two schools of thought already considered.

Although in the earlier editions of his *Theologia moralis* Vermeersch had defended conditional moral obligation,[13] in the third edition of the same work he proposed his own purely juridic obligation theory.[14] This we may term a "Neither-Nor" explanation of penal law, since it holds that a penal law of itself produces a moral obligation neither to the performance of an act nor to the acceptance of the punishment. The obligation involved here is thus a purely external-forum affair. Conscience obligation enters the picture only when a competent superior exacts the penalty, and the source of this obligation is not the penal law itself, but rather the command of the superior to submit to the penalty, a command to which obedience is due "non vi ipsius legis humanae sed legis divinae quae obedientiam justis legibus imponit."[15]

The difficulty with this position is that it seems to deny that penal laws are really laws at all, since it explains them in such a way as to take from them the power of causing moral obligation; for the obligation to submit to the penalty (the only moral obligation involved) is effected not by the human law itself but by the natural law which demands obedience to the just commands of lawful superiors. The civil penal law would in this case seem to be merely a condition or an occasion of moral obligation, since given its violation the superior is enabled to issue an order to which obedience is due in virtue of the natural law. It is difficult to square such a concept of civil law with the almost universally admitted principle (Suarez calls it *proxima fidei*[16] that moral obligation is a necessary effect of any law, and that civil law is of itself the immediate cause of this obligation.[17] Thus, if we wish to regard all civil laws as merely penal and at the same time adopt

[12] Cf. *supra* n. 8.

[13] Cf. U. Lopez, S.J., "Theoria legis mere poenalis," *Periodica de re morali, canonica, liturgica* 27 (1938) 207.

[14] Vermeersch, *loc. cit.*

[15] Suarez, *op. cit.* 5, lib. 3, c. 21, n. 5.

[16] *Ibid.*

[17] Güenechea, *op. cit.* 2, 238, 248.

Vermeersch's purely juridic obligation theory, we are in effect dangerously close to Gerson's view that the ordinances of secular rulers could not of themselves induce moral obligation.[18]

Accepting Vermeersch's rejection of conditional moral obligation, Rodrigo has elaborated a theory of the nature of penal law which he feels embodies the best features of both conditional moral and purely juridic obligation.[19] In this theory the principal obligation of a penal law terminates in the act enjoined by the law but is merely juridic in nature. In a case where this obligation is not met, the law immediately and of itself confers upon the law enforcer the right to exact punishment from the guilty party either in the external forum alone or in both fora according as he wishes. Corresponding to this right the law also imposes upon the delinquent subject the duty of complying with these prescriptions, a duty which will be a conscience obligation if the superior so decides. In this system the law is of itself the cause and not merely the condition or occasion of moral obligation, since it establishes at least a potential moral obligation which can be actualized at the discretion of the superior.

However, if today at least we may legitimately presume that lawmakers do not impose upon their subjects a moral obligation to perform the act demanded by their law, there seems to be no cogent reason to assert that they impose such an obligation to undergo the penalties they impose so long as they are free to exclude moral obligation from this secondary objective of their law. Hence in practice civil laws, in Rodrigo's theory as well as in that of Vermeersch, will entail no conscience obligation, a contradiction to the principle already considered that such an obligation is an essential effect of all law. Rodrigo himself is not unaware of this difficulty; for he states that his notion of a law which induces a merely potential obligation capable of being actuated at the will of the superior "sufficiens esse videtur ut lex pure poenalis

[18] It is to be noted that Vermeersch did not so regard all civil laws; cf. *op. cit.* 1, 174-75. Moreover, for him as well as for Fr. Ford (as we shall see), a law need not entail moral obligation. Thus he writes: "Non est cur de nomine disputemus. Revera lex dicenda est omnis norma qua legislator... normam efficaciter suis subditis praescribere intendit. Talis autem sine inducta a legislatore obligatione conscientiae haberi potest" *(op. cit.* 1, 172). For a description and criticism of Gerson's opinion cf. Suarez, *op. cit.* 5, lib. 3, c. 21, nn. 4, 9.

[19] Rodrigo, *op. cit.* 2, 346.

salvet obligationem conscientiae quam veteres praesertim auctores reputarunt legi cuilibet essentialem."[20] However, he is not certain that it does. Still, the idea that a law need not entail conscience obligation, while not traditional, is not completely devoid of probability. In fact, John Ford, S.J., argues in favor of such a notion and regards its validity as the chief point at issue in any discussion of the penal law.[21]

THEORETICAL OBJECTIONS

A fundamental objection often raised against the penal law is that based upon St. Augustine's dictum, "omnis poena si justa est, poena est peccati."[22] From this statement we are invited to conclude that a penalty imposed without antecedent moral guilt is necessarily unj'ust.[23] One is tempted to remark here that this is the point at issue and that to state it as an objection is to beg the question. However, an explanation of the significance of the statement and its applicability will serve to underline the basic premises of the penal law.

Suarez explains the axiom in question by distinguishing between punishment in the strict or moral sense and in the wide or juridical sense.[24] He then states that the principle applies only to punishment in the moral sense. Thus it is equivalent to affirming that vindictive moral punishment demands antecedent moral culpability, and it does not touch upon the question of preventive punishment or of juridic guilt. Indeed, in the context from which the passage in question is taken, St. Augustine is dealing only with concepts relating directly to the moral sphere.[25]

The twofold guilt and punishment of which Suarez speaks is a reecho of St. Thomas' distinction between vindictive punishment, "quae non debetur nisi peccato," and preventive punishment, which is "preservativa a peccato futuro vel promotiva in aliquod bonum."[26] The former type of punishment obviously implies previous moral fault, the latter

[20] *Ibid.*

[21] "The Problem of the Purely Penal Law," *Catholic Theological Society of America, Proceedings of the Tenth Annual Convention* (New York, 1955) pp. 283-84.

[22] Augustine, *De libero arbitrio* 3, 8, 51 (*PL* 32, 1296).

[23] McGarrigle, *art. cit.*, p. 432.

[24] Suarez, *of. cit.* 5, lib. 5, c. 3, n. 7.

[25] St. Augustine is here treating of the question of free will and the punishment inflicted by God for sin. There is no reference made to civil punishment as such.

[26] *Summa theologica* 2, 2, q. 108, a. 4.

prescinds from such a fault and is a purely external-forum matter, juridic and not moral in nature. Such a distinction is not unknown in the sphere of civil law. The late Justice Holmes wrote:

> . . . while the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated.[27]

Our argument here is not that the element of vindictive punishment should in every instance be excluded from civil laws, nor should a reference to Holmes be construed as an approbation either of his legal positivism or of his implicit definition of moral standards as internal and subjective. His statement is invoked simply as a contemporary testimony to the existence in civil law of the notion of purely juridic guilt, a notion which was by no means original with him, but is to be found in more or less detail in such Scholastics as de Castro, Henry of Ghent, and Suarez.[28] More recently this concept of purely juridic guilt has been reiterated by a Catholic writer investigating the finality of state punishment:

> When a person knowingly and willingly violates a penal law and thus commits a crime, a second presumption arises, namely, that he has also committed a grave theological fault in the eyes of God. However, that is not a matter that can be proved or disproved in a court of law. It is of interest to the moralist or the confessor rather than to a human tribunal of justice. Hence, though a juridical crime is always accompanied by a presumption of a grave theological fault, the State does not punish the theological fault but the juridical crime. For that reason it is justified in punishing a juridical crime even though no theological fault has in fact been committed.[29]

To conclude, then, that this notion of juridic guilt as divorced from moral guilt smacks of Holmesian positivism is neither fair nor correct. In fact, the real crime of positivism consists not so much in separating the moral from the legal order as in destroying the moral order com-

27 O. W. Holmes, *The Common Law* (Boston, 1946) p. 38.

28 V. Vangheluwe, "De lege mere poenali," *Ephemerides theologicae Lovanienses* 16 (1939) 393-99, 426-29; Suarez, *loc. tit.*

22 J. Collins, "The Grounds and Purpose of State Punishment," *Irish Theological Quarterly* 19 (1952) 363.

pletely. Moreover, the penal law theory does not actually divorce the two orders, since it imposes a moral and not merely a juridic obligation to undergo the penalty.

Correlative to this denial of moral guilt as a prerequisite to penal action is the rejection of the notion that civil punishment is primarily and solely a retribution directed against a morally reprehensible action. This rejection is thoroughly consonant with the nature of the state, which is neither delegated nor equipped to judge in matters of conscience.[30] In fact, if the state were to have this power it could pass laws regarding purely internal matters, something expressly denied to it by St. Thomas.[31] Thus we need not be surprised at finding writers, both Catholic and non-Catholic, regarding deterrence or prevention rather than retribution as the primary purpose of civil punishment. Justice Holmes, consequent upon his already noted systematic precision from moral fault as an antecedent to judicial punishment, not only favors this deterrent explanation of state punishment, but holds that this is the opinion of most English-speaking lawyers.[32] The same idea is expressed by the eminent jurist, William Blackstone, a supporter of absolute moral values and hence a more unimpeachable witness than Holmes. In his *Commentaries,* which for generations formed an indispensable part in the training of American lawyers, he writes:

> Legislators and their laws are said to compel and oblige: not that by any natural violence they so constrain a man as to render it impossible for him to act otherwise which is the strict sense of obligation; but by declaring and exhibiting a penalty against offenders they bring it about that no man can easily choose to transgress the law; since by reason of the impending correction, compliance is in a high degree preferable to disobedience. And even were rewards to be proposed as well as punishments threatened, the obligation of the law consists chiefly in the penalty.[33]

From a Catholic viewpoint the deterrent nature of civil punishment, at least anterior to the infraction of the law, and the purely external-forum character of the retribution exacted from a convicted lawbreaker by the police power of the state are well summarized by Collins:

> . . . the primary purpose of threatening punishment is to deter people from breaking the law. When, however, the law has been broken and the threat of punishment

[30] *Ibid.,* p. 365.
[31] *Summa theologica* 2, 2, q. 104, a. 5.
[32] Holmes, *op. cit.,* p. 39.
[33] Blackstone, *loc. cit.*

has been carried into effect, it does not lose its deterrent character but this ceases to be primary. The primary aim of punishment that has been inflicted is retributive in a juridical sense. It is meant to undo as far as possible the social effects of the external crime. Emendation of the criminal is not the primary purpose of State inflicted punishment. ... If this explanation be correct, it is still true to say that punishment is only inflicted for a *peccatum,* in the case of State punishment, a *peccatum juridicum.* It is also true to say that in punishing juridical crimes the State uses delegated authority and acts as God's vicegerent in vindicating the external order in civil society.[84]

Indeed, from this principle that civil punishment is preventive rather than vindictive, and hence does not presuppose moral fault, one can with good reason reach the conclusion conceded as probable by two American moralists[86] that today all civil laws as such are merely penal. Blackstone voices the same opinion from the viewpoint of civil jurisprudence in a passage redolent of the classic moralists:

It is true, it hath been holden by the principal of our ethical writers, that human laws are binding upon men's consciences. But if that were the only or most forcible obligation, the good only would regard the laws and the bad would set them at defiance. And true as this principle is, still it must be understood with some restriction. It holds, I apprehend as to rights ... and such offences which are *mala in* se; here we are bound by conscience because we are bound by superior laws. But in relation to those laws which enjoin only positive duties, and forbid only such things as are not *mala in se* but only *mala prohibita* merely, here I apprehend conscience is no farther concerned than by directing a submission to the penalty in case of our breach of those laws, for otherwise the multitude of penal laws in a state would not only be looked upon as impolitic, but would also be a very wicked thing, if every law were a snare for the conscience of the subject.[86]

This inequity which Blackstone foresaw as resulting from a proliferation of conscience obligations is emphasized by a recent moralist who employs a consideration of the demands of distributive justice to defend the penal law.[87] For if in a civilization such as ours the penal law theory be denied, civil obedience will impose a disproportionately greater burden on those who believe in such a thing as moral obligation,

[84] Collins, *art. tit.,* p. 368.

[88] F. Kenrick, *Theologia moralis* 1 (Baltimore, 1861) 178; A. Konings, *Theologia moralis* (New York, 1882) p. 178.

[86] Blackstone, *loc. tit.*

[87] *Catholic Theological Society of America, Proceedings of the Tenth Annual Convention,* p. 283.

while those who repudiate such a notion will be burdened only to the extent of a legal sanction.

The authority of St. Thomas is, as might be expected, alleged by both sides in this dispute over the penal law in general and over the concept of purely juridic guilt in particular. However, it is difficult to classify him as an adversary of either concept; for, though he taught that guilt must precede punishment,[38] he both approved the principle upon which the penal law is based, declaring "quod non omnia quae continentur in lege proponuntur per modum praecepti, sed quaedam proponuntur per modum ordinationis vel statuti obligantis ad poenam,"[39] and he also clearly enunciated the possibility of a separation between the notions of guilt and punishment, affirming that "secundum hoc aliquis interdum punitur sine culpa non autem sine causa."[40]

Vangheluwe has shown that this axiom on the infliction of punishment without fault but not without reason originated from a gloss on a canon in the Decrees of Gratian.[41] The canon in question alluded to the promotion of Constantinople to the rank of second patriarchal see over that of Alexandria which had hitherto enjoyed that distinction. Obviously no fault was imputed to the Church of Alexandria, but then neither was the action a punishment in the strict sense. Later the expression was taken out of its original framework by Raymond of Penafort, applied by St. Thomas in a moral setting, and finally adduced by Henry of Ghent in support of his application to the field of civil law of the penal law theory which until his time was explicitly directed only to the laws of religious communities.

The first quotation from St. Thomas noted above alludes to the laws of his own order, and reference will be made later to this legal phenomenon. However, with regard to the second, as Matthew Herron, T.O.R., correctly observes, the distinction implied between medicinal and vindictive punishment seems of small direct support to the patrons of the penal law, since the immediate context refers to punishment for involuntary faults, and in the penal law theory infractions of penal

[38] *Summa theologica* 1, 2, q. 87, a. 7.

[39] *Ibid.* 2, 2, q. 186, a. 9. Although this article is entitled "Utrum religiosus semper peccet mortaliter transgrediendo ea quae sunt in regula," yet in the corpus of the article it is made clear that certain regulations oblige "ad culpam neque mortalem neque venialem sed solum ad poenam taxatam sustinendam."

[40] *Ibid.* 2, 2, q. 108, a. 4.

[41] Vangheluwe, *art. cit.,* p. 410.

laws need not be involuntary to be morally inculpable.[42] However, are we to conclude from this that involuntarily incurred guilt is the only merely juridic guilt that St. Thomas would admit? Since this conclusion is nowhere stated and since in the first passage considered he lays down the principle of a statute obliging merely *ad poenam,* one is strongly inclined to answer the question in the negative.

Besides the objection based upon the concept of juridic guilt as a foundation for punishment, which has just been treated at some length, another rather fundamental objection to the penal law arises from the very notion of law itself. Fr. Herron, working from a definition of law as essentially an act of the intellect, quotes with approval Bellarmine's statement that "once a legislator establishes a true law it is not in his power to limit its obligation."[43] This objection strikes at the idea central to any penal law theory of a lawmaker restricting the obligatory force of his laws merely to the penalty.[44] Such an attempt, we are left to conclude, is as ill fated as trying to enter a true marriage while at the same time excluding perpetuity and indissolubility from the contract. This same line of argumentation is employed by Brisbois in his review of Renard's *La théorie des "leges mere poenales":*

> Law for St. Thomas is formally an act of the reason judging what is required for an end to be attained, and expressing what an action must be in order to achieve that end. Thus we can see that for him the obligation of a law is derived from the necessity of the end and not from the will of the legislator. The legislative power is analogous, in the social order, to conscience in the sphere of the individual. It interprets for the members of society the requirements for the common good in the same way as conscience expresses for an individual the requirements for his last end. And as we cannot say that conscience creates these requirements, neither then does the legislative power create the requirements for the common good. Consequently it is not up to a legislator either to attach or withdraw obligation from his laws.[45]

Exception should be taken here to this categorical assertion of the merely probable Thomistic theory on the nature of law. Suarez, together with a host of older and modern writers, holds that a law consists

42 Herron, *op. cit.,* p. 64. 43 *Ibid.,* p. 9.

44 For a thorough presentation of the Thomistic view cf. T. Davitt, SJ., *The Nature of Law* (St. Louis, 1951).

45 E. Brisbois, "Note de philosophie morale," *Nouvelle revue théologique* 65 (1938) 1072.

formally in an act of the will, presupposing of course an antecedent act of the intellect.[46] Davitt, an opponent of the penal law, admits that, granted this Suarezian position on the nature of law, a purely penal law is "quite conceivable."[47] Moreover, while it is true, as Brisbois states, that conscience does not create but rather perceives what is required for the attainment of man's last end, a human lawmaker, on the other hand, in formulating an ordinance frequently does more than simply perceive and express what is already demanded for the common good. That a certain week in November be the only time during which deer hunting is permitted is certainly not determined by the common good in the way that the unchanging principles of the natural law are demanded by the nature of man's last end. Obviously a legislator does not create the ultimate end of society any more than conscience creates man's last end. However, unlike conscience, a human lawmaker can select out of a number of means capable of ordination to the common good one definite set of means and then declare these means to be obligatory upon his subjects. Thus, while not creating the last end of society, he does institute the means which in actual practice will be directed toward that end.

In other words, Brisbois appears to have failed to draw a necessary distinction between the respective roles of conscience and the human legislator; for the means perceived by conscience as ineluctably connected with man's last end, the dictates of the natural law, are morally binding because in this case the end is one of absolute necessity and these means are the only ones at hand. However, in the case of human law the goals immediately desired by the legislator are frequently ones of greater utility, not of absolute necessity, for the common good. The common good is assuredly an end of absolute necessity, but the immediate goal of many civil statutes hardly partakes of this same necessity. Indeed, even in the case of man's ultimate end not all the various means at hand to help him in its attainment partake in the absolute necessity of the end, but only those without which the end simply could not be had either because of the nature of things or because of a positive divine disposition.

46 Suarez, *op. cit.* 5, lib. 1, c. 5. For a list of the older authors who follow Suarez on this matter of. Giienechea, *op. cit. 2,* 220.

47 Davitt, *op. cit.,* p. 4.

Even where the object of a civil law is one without which the common welfare cannot exist, there are usually present, as we have noted, a number of ways to attain this object. A government must possess sufficient funds to support its manifold functions and activities. Yet the precise method of obtaining these funds is hardly determined by the nature of things. The personal income tax which now plays such a large role in the income of the Federal Government was not ratified as a constitutional amendment until 1913.[48] In this and similar instances the lawgiver will obtain his object simply by selecting one set of means and then sanctioning them either morally and juridically or merely juridically.[49] It is true that, where the end of a civil law is so bound up with the common welfare that it shares in the necessity of this ultimate end, there must exist an obligation in conscience upon the members of that society to perform the action required. However, in this case the human law is not purely penal because it is not purely human but rather an expression of the natural law itself.

PRACTICAL OBJECTIONS

In their understandable zeal for law observance adversaries of the penal law are accustomed to point to the dangerous consequences inherent in the concept of a purely penal law. A favorite charge, voiced in 1952 in the *Ecclesiastical Review,* is that the penal law doctrine engenders an "It's all right if you can get away with it" mentality.[60] Another writer asserts: "It would be absurd to say that the penal law theory is responsible for this axiom, but it has an unwholesome relation to it in so far as it can be reduced to the same thing."[61] Reflection will show that this is not quite true. No moralist who was at the same time an advocate of the penal law doctrine ever held that the moral species of an action was determined by anything as extrinsic to it as the apprehension of its perpetrator by the agencies of law enforcement. If the penal law were reduced to a formula, it would rather read: "it's all right even if you don't get away with it, but you must pay the penalty." Being caught does not alter the moral inculpability adhering

48 Morison and Commager, *The Growth of the American Republic 2* (New York, 1940) 414.

4# Rodrigo, *op. cit.* 2, 349; J. Connery, "Notes on Moral Theology," Theological Studies 16 (1955) 559.

M McGarrigle, *art. cit.,* p. 431. n Herron, *op. cit.,* p. 56.

to the initial violation of a penal law. Moreover, followers of the worldly maxim, "It's all right if you can get away with it," do not understand the expression "all right" in a moral sense.

A second allegedly pernicious effect of the penal law is deduced from the cautious attitude toward its diffusion counseled even by those authors who defend the concept. Fr. Herron reminds us that Aertnys-Damen, Merkelbach, Sabetti-Barrett, and Genicot-Salsmans dissuade their readers from public propaganda on the subject. From this fact he concludes:

> 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. Then, is it not also useless?[62]

The same conclusion could be drawn, with an equal weakness in logic, from a number of practices of which moralists approve in principle but in the application of which they advice caution. A well-known example of this attitude is found in their treatment of the question of occult compensation. The practice, though certainly licit, is fraught with danger,[63] whence the adage has sprung up as a norm for directors of souls in this matter, *raro toleranda, rarius consulenda, numquam praedicanda.* All this, however, does not militate against the intrinsic morality of the practice, nor is it something completely useless.

Opponents of the penal law foresee as a result of its widespread application a general breakdown in law observance,[64] attributing, no doubt, the present high level of observance to the fact that the masses are not aware of its existence. John Connery, S.J., in an article written apparently in rebuttal to an attack on the penal law, gives this realistic answer to the difficulty:

> Those who oppose penal law for practical reasons seem to work from the assumption that obligations in conscience give a far greater guarantee of law observance. When one considers the ease with which conscience obligations are

[62] *Ibid.*

[63] M Noldin-Schmitt, *Summa theologiae moralis 2* (27th ed.; Westminster, Md., 1950) 426.

[64] H Herron, *loc. tit.·,* McGarrigle, *art. tit.,* p. 442.

violated today there is good reason to wonder whether they are more effective than obligations at law.. . . Have purely penal laws fared much worse than natural law precepts? A comparison of purely penal obligations with obligations in conscience might show that in this day and age the former are at least as effective. It is hard to see, then, how any great upsurge in civic observance would result from scrapping the purely penal law.[66]

Moreover, law observance is a function of law enforcement. As Fr. Connery goes on to point out, a disobedient citizenry is the product of a weak or negligent government. "The effectiveness of purely penal laws depends in the last resort on the conscientious fulfillment of moral obligations on the part of the forces of law. It is because those entrusted with the duty of imposing penalties are not living up to their conscience obligations that penal laws are not effective."[66] This seems to be a point overlooked in an article in *Social Order* concerning the tax evasion movement which took place fairly recently in certain regions of France.[67] The writer of this article charges the penal law doctrine with being a contributory factor in this anarchy. The real cause seems to lie far deeper, in the perennial weakness of certain elements of the French Republic and in the unfortunate economic situation of certain classes of the French people. In this country, at any rate, the Bureau of Internal Revenue seems up to the task of collecting the government's slice of the national product, nor are Americans likely, for this reason, to imitate en masse the tactics of Pierre Poujade's recalcitrant taxpayers. In fact, Fr. Herron makes an observation anent the average citizen's attitude toward civil laws which seems highly prejudicial to his position that the penal law theory leads to civic disobedience:

> 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, which cause them some inconvenience, which they consider an infringement upon their liberty. If they are arrested and taken into court, they pay the 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.[68]

[66] J. Connery, S.J., "Shall We Scrap the Purely Penal Law?", *American Ecclesiastical Review* 129 (1953) 244-45.

[u] *Ibid.*

[87] P. Land, S.J., "Evading Taxes," *Social Order* 5 (1955) 122-25.

["] Herron, *op. cit.,* p. 40.

Given such a milieu, the penal law concept would seem as incapable of lowering the level of obedience to the laws as its abandonment would be of raising it.

Moreover, even though one were to regard all civil laws at present as merely penal, this would not involve a denial of all moral sanction to these laws. A point not sufficiently stressed by the opposition is that in any penal law system such sanction is removed from civil laws only to the extent that they are civil. Most of the laws upon whose observance the essential welfare of society rests are simply reaffirmations and applications of the natural law, which certainly obliges in conscience. Were the Ten Commandments more or less perfectly observed in any given society, that fortunate body politic would suffer little or no harm, even though its members felt no moral obligation to comply with those ordinances which concerned matters merely useful to the common good, or those which, though necessary, were not determinately postulated by the very structure of civil society. This is not to imply that these laws would go unobserved. They would in the main be observed, but their observance would be ensured by merely penal provisions, imposed by a prudent lawmaker either unwilling or uninterested in burdening the consciences of his subjects with a multiplication of moral obligations.[59]

Mention of the will of the legislator brings us to the objection of another antagonist of the penal law, who, bypassing the question of its possibility, employs an *ad hominem* syllogism to demonstrate that, practically speaking, such a law cannot exist in contemporary society. He argues that, if a legislator is to restrict the moral obligation of his law merely to the penalty, he must, on the admission of penal law protagonists themselves, expressly exclude moral obligation from the act. However, modern legislators prescind from any notion of moral obligation with regard to their laws, and therefore can scarcely be presumed to have made that explicit exclusion of conscience obligation from the act required to produce a penal law.[60]

Behind the major of this argument (that a lawmaker must expressly exclude moral obligation from the act) lies another major, i.e., that a lawmaker is normally presumed to wish moral obligation to apply to both the act and the penalty. Otherwise there would seem to be no need

[59] Suarez, *op. cit.* 5, lib. 5, c. 4, n. 6. [60] Lopez, *loc. cii.*

for an express exclusion of obligation from the act. This second major might well have been a valid presumption when the authors cited in proof of it wrote. However, can such a presumption be made today? In view of the indifference of contemporary lawmakers to conscience obligations it does not seem so. In fact, as a consequence of this indifference it would seem more correct to assert that at present a legislator would have to indicate expressly his wish that conscience obligation should adhere to the act envisaged by his law in order that such an obligation may exist.

The desire, adverted to above, not to heap up moral obligations where other sanctions would be equally effective was apparently the motive behind the first formulation of a set of purely penal laws; for in the prologue to the Dominican Constitutions written in the thirteenth century we read: "Ut igitur unitati et paci totius Ordinis promoveamus, volumus et declaramus ut constitutiones nostrae non obligent nos ad culpam sed ad poenam, nisi propter praeceptum aut contemptum."[61] Since the religious life is meant to be a state in which one's salvation and perfection are more safely attained, the enactment of purely penal precepts was an altogether realistic approach to the problem of avoiding the multiplying of at least venial sins which otherwise would almost necessarily have followed from the meticulous ordinations which must circumscribe life in religion. With this idea in mind Humbertus de Romanis, an early commentator on the passage just cited, wrote:

> Those of delicate consciences would perhaps avoid violating the constitutions if they were sanctioned by fear of both sin and punishment, but the damage and inconvenience which would follow for the entire community from such a course could not be justified on the score of a slight increase in fidelity in the case of a few. Hence this sort of an obligation is most wise, for it is a better thing that man's ordinations be violated than God's.[62]

Opponents of the penal law are not agreed in handling the thorny problem of penal laws in religious institutes. One writer admits their penal nature but denies that they are laws, since these institutes are not natural and perfect societies.[63] Another, apparently conceding that they are laws, regards their violation as "not a sin, yet morally wrong."[64] Concerning the first statement we should note that religious

• Vanghduwe, *art. cit.,* p. 383.
« Herron, *of. cit.,* p. 45.
91 *Ibid., p. 390.*
M McGarrigle, *art. cit.,* p. 449.

orders, though in themselves imperfect societies, share in the jurisdiction of the Roman Pontiff and in virtue of this are empowered to enact laws properly so called.[66] As to the question of fact, i.e., whether in enacting penal regulations these institutes intend that they be laws properly so called, there is a dispute. Some regard these ordinances as real laws and explain them on the basis of conditional moral obligation.[66] Others explain them on the basis of purely juridic obligation both to the act and to the penalty after the fashion of the theory of Vermeersch already dutlined.[67] It is well to remember, however, that this dispute is concerned merely with the de facto nature and source of the obligation to submit to the penalty, and not with the question as to whether a religious order can pass an ordinance which is merely penal and yet a law. Since the Dominican Constitutions are the prototype of the laws of succeeding institutes,[68] and since there it is clearly stated that "constitutiones ... obligant... ad poenam,"[69] it seems correct to regard these penal ordinations as strict laws, since they produce of themselves the moral obligation to submit to the penalty. With regard to the affirmation that the violation of these penal prescriptions is not sinful yet morally wrong, the difficulty can be urged that a sin is usually defined as an *actus humanus moraliier malus."*[70]

Some authors find in this concept of penal laws in religious life a cause for alarm. One of these writes: "si in familiis religiosis communis accepta esset opinio regulas et constitutiones quibus reguuntur non obligari in conscientia, necessario inde sequitur ruina virtutis oboedientiae."[71] On this point Fr. Connery makes the following eminently sensible observation:

> If the concept of the purely penal law has such disastrous effects on law observance as many of these authors maintain, it is difficult to see how religious institutes with such laws have lasted these many centuries. It is even more difficult

[66] Noldin-Schmitt, *op. cit.* 1, 132.

[··] Listed in Ferreres Mondria, *Compendium theologiae moralis* 1 (17th ed.; Barcelona, 1949) 178.

[87] *Ibid.*

[68] Cf. *supra* n. 61.

[**] *Ibid.*

[70] Noldin-Schmitt, *op. cit.* 1, 286.

[71] H. Woroniecki, in *Angelicum* 17 (1941) 386. In order to mitigate the severity of his anti-penal-law position, Woroniecki asserts that in certain circumstances the subject could dispense himself from a given law. Evidently our judges and police officers have not heard everything yet.

to understand how for the past five or six centuries religious founders have shown an almost unanimous preference for purely penal rules... . Moreover if one were to make a comparison between those institutes whose rules bind under pain of sin and those whose rules do not so bind, it would show that the level of observance does not differ appreciably.[72]

Neither can the absence of disastrous consequences so far have been due to the fact that religious are not acquainted with the notion that their rules are merely penal. Such information is a part of the training that they have a right to receive in order to form their consciences correctly.

There is undoubtedly a movement in certain quarters away from the purely penal explanation of civil laws especially. The rethinking of the penal law which such a movement brings about is all to the good. However—and this is something the opposition must and does admit—the extrinsic evidence is overwhelming on the side of the penal law. Less than twenty years ago Gtinechea wrote: "inter scriptores recentes vix est moralista et canonista alicuius nominis qui leges mere poenales rejiciat."[73] It is not enough to suggest, as has been done, that this consensus is due to a process of slavish imitation of earlier writers;[74] for we have seen moralists differ among themselves, at times radically, in explaining the inner rationale of the penal law, and there is as great a difference when they approach the question of applying the concept to actual practice. We have attempted to show the intrinsic probability which the penal law enjoys. It is now, and probably will continue to remain, "in possession."

72 Connery, *art. cit. supra* n. 55, pp. 245-46.

73 Güenechea, *op. cit. 2,* 244.

74 Herron, *op. cit.,* pp. 7-8.