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Bayne: Conscience, Obligation, and the Law

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CONSCIENCE, OBLIGATION, AND THE LAW. By *David Cowan Bayne, S.J.* Chicago: Loyola University Press. 1966. Pp. xiv, 287. $8.

I

Father Bayne, amidst "the signs of incipient national decadence appearing in the communication arts, entertainment, domestic relations and government—visible like beacons in the events surrounding the assassination of President Kennedy"—detects "perhaps" a "marked resurgence" of interest in the question of whether the civil law binds in conscience (p. 3). His answer is a resounding affirmative, and his tract aims to destroy the theory that there is such a thing as a purely penal law which does not oblige obedience under pain of sin. The devil in the piece is the idea that tax laws, traffic regulations, and liquor controls can be ignored if the violator is willing to accept the risk of civil punishment. In brief Father Bayne's argument is that the entire theory of an amoral penal law was the product of an historical accident in the first place, that such laws do not in fact exist, that the whole idea that they do is logically unsound, and that the utility of the concept is absolute zero in any event since there are other tools with which to solve any moral problems that might exist relative to the obligation to obey the law.

The theory behind the concept of the *lex pure poenalis* "has been almost the exclusive concern of Roman Catholic theologians and jurists" (pp. 3-4), and it is important to understand the basic assumptions underlying the theory in order to set the stage for our discussion. First, one must accept the idea that the law is simply "an ordinance of reason for the common good, promulgated by him who has care of the community" (p. 16). Further, it is necessary to assume that God exists, that God's plan for the universe is forever fixed in eternal law, that God created man, that man has a human nature, and that this human nature is the same in all men (pp. 15-16). God's eternal law is reflected in the human nature of the men he created, and the

intellectual distillation of this reflection is the natural law. The natural law includes a precept that men must obey the ordinations of duly constituted authority. This is so because man, being by nature a social animal, needs to live in society, and society, being a part of God's plan, simply will not work unless people obey the law. It would seem to follow, therefore, that any properly promulgated law merits obedience as a moral imperative, and, perforce, that the *lex pure poenalis* is a logical absurdity. Suarez (1548-1617), however, proved the existence of such a body of law, and Suarez, after all, was "the greatest Jesuit theologian to the present day" (p. 16).

The real origins of the idea of a *lex pure poenalis* may have been rooted in clerical pragmatism. One authority, for example, observed that civil laws are so numerous and complex that the consequence of imposing a moral obligation to obey them all would be tantamount to saying that a man runs the risk of venial sin every time he turns around (p. 55). Moreover, if law required moral obedience, the legislator may not have been willing to assume the awesome responsibility of binding his subjects "under the pain of mortal sin" (p. 48). Interestingly enough some of the religious orders seem first to have devised the doctrine of non-morally binding law to soften the impact of their own internal rules (p. 50). Be that as it may, out of some felt need to separate at least some of the law from morals, and upon the analogy to the tactic adopted by the orders, Suarez formulated a theory to prove the possibility of nonmoral civil guilt. True, if law is an ordinance of reason performing a function in God's plan, it seemingly carries with it enough reflection of the eternal verities to compel moral obedience. But, according to Suarez, this conclusion overlooks the metaphysic of the law-making function (pp. 41-45). Thinking about what laws are needed, drafting laws, and settling upon the best law to solve a given problem are intellectual activities and reflect the divine plan. Actually choosing to promulgate a law, however, is an act of the will. Granting the existence of free will, therefore, it follows that the legislator must be free to promulgate a law to which he does not intend to have any moral sanction attach. Ergo, such laws are indeed possible.

Having accepted the idea that a *lex pure poenalis* can exist, it still has remained a problem to settle upon the particular laws which might fall within the doctrine. A law condemning murder or fornication would not, since these prohibitions simply repeat the imperatives of the eternal law which already carries its own moral sanctions (p. 32). Granted that a tax law might not figure in the master plans of Providence and is morally neutral, the problem reduces itself to determining whether the legislator intended the law to carry a moral sanction or not (p. 34). To this end a series of canons of construction (pp. 35-38) were created to facilitate inquiry into whether the pur-

pose of the law was purely temporal, whether the populace believed that the measure was nonmoral, whether the civil sanction was so severe that a moral sanction would be an unfair addendum, and whether the language of the particular law was moral ("No one shall . . .") or purely penal ("Whoever shall commit . . ."). These canons, however, are merely indicia and, absent any litmus test, the debate could go on ad infinitum.

Father Bayne's attack on Suarez is really twofold. First, he demonstrates that the practice within the orders was not an appropriate precedent from which to draw an analogy (pp. 81-85). Unlike civil society, the "religious order is an arbitrary, free, positive society . . . . If they wish to exclude conscience obligation by agreement, no matter" (p. 85). Second, he rejects Suarez's legislative free will gambit which removed law from direct involvement in the eternal and necessarily moral plan of things. Here we reach the heart of the matter because "the ultimate focus of the entire question of the moral binding power of the civil law lies in the true nature of intellect and will in the lawmaking process" (p. 106). The truth is, apparently, that the legislator's intellect perceives that a certain goal is desirable; the will, since it necessarily inclines toward good, inclines toward the intellectually perceived end; the intellect next judges that the end can be achieved; and next the will intends the end. But these are only the first four steps in the process. Once the determination is made that some legislation is fitting and proper, the intellect begins to evaluate the various means available to achieve the perceived end; the will then approves this decision to find a means; and the lawmaker makes a "practical judgment," selecting the precise means. This last judgment, crucial to the Suarez thesis, is merely the denouement in this series of acts, and the election of will "follows . . . like the conclusion of a practical syllogism" (p. 112). The point of all of this is that "the lawmaker's intellect is the all important instant of freedom in the lawmaking act" (p. 112). Since law is the product of intellect, it partakes of the divine plan and, hence, carries with it a moral obligation upon the part of the people to obey it.

If law penalized people without regard to fault, of course, there would be something to be said for a body of nonmoral law. The law, however, has moved toward "the pervasive philosophy of liability founded on fault" (p. 149): witness such landmarks as *Brown v. Kendall*[1] and *Randall v. Shelton*.[2] The trend of current thinking toward strict liability does not detract from this thesis one iota since this trend has proceeded on the "assumption really . . . that there is fault, somewhere, somehow, of some kind" (p. 176). Indeed, it is plain that

1. 60 Mass. (6 Cush.) 292 (1850).
2. 293 S.W.2d 559 (Ky. 1956).

the "mere penalist position can in fact find little solace in the Anglo-Saxon common law" (p. 188).

Lastly, there is no need for a theory of mere penal law. A Jewish merchant, for example, can in good conscience violate a Sunday closing law because these laws oppugn the traditional principle that the law must not foster religion (p. 197). Similarly, even though one concluded that it would violate the law to utilize the classrooms in public buildings for released time classes in religion, "an able moralist" could nonetheless conclude that doing so "would entail no obligation of the conscience obligation" (p. 198). Moreover, since only reasonable laws are laws at all, violations of a prohibition enactment create no moral problem because they are "an incursion of the right of a citizen to make even moderate use of a legitimate product of the land provided by the Creator" (p. 199). If the multitudes have flagrantly violated a law and the legislature has not reacted, this "notorious conduct of the people" (p. 201) apparently repeals any moral obligation that otherwise might be present.

Suffice it to report, Father Bayne enumerates several other interesting canons all of which do seem to compel agreement with his assertion that the pure penal theory was never a necessary ingredient in the moralist's tool kit in the first place.

II

What is one to make of all this? It seems clear that Father Bayne is not alone in attacking the idea of a purely penal law. McGarricle is mentioned as having published an "incisive polemic" in 1952 that was "brashly but well written" (p. 94); but then this work appeared in the *American Ecclesiastical Review* which is merely a "popular semi-learned" journal "for the day-to-day guidance of the parish priest" (p. 8). T. E. Davitt, S.J., wrote an entire book capsulizing the philosophies of a number of theologians in both the free will and intellectual camps, and came down on the side of the intellectuals.[3] Davitt merits fleeting mention in the text twice (pp. 94, 106), and he is cited in the index not merely for the mention but for the supporting notes and his appearance in the bibliography (p. 275). In two footnotes not flagged by Davitt's name in the text (pp. 85 n.37, 246 n.37), however, Bayne does inform us that Davitt had analyzed the positions of the great philosophers. Nevertheless, one gathers that McGarricle was somewhat flippant and Davitt popularized philosophers, playing the role of a Catholic Will Durant, while Father Bayne's book is "exacting and meticulous in its scholarship" (p. xi).

The scholarship was certainly exacting and meticulous: witness the fact that the notes contain verbatim texts of the original Latin

3. T. DAVITT, THE NATURE OF LAW (1951).

sources. The facile conclusion that the fault principle is the culmination of Anglo-Saxon legal evolution, however, causes one to pause. We are all so ingrained with the language of fault that this bit of conventional wisdom may, in the light of recent warranty and strict tort developments, be more the product of a desire for the familiar than of a concerted effort to face the facts of twentieth century life. In any event, until we sort out our ideology of accident law, this is a pretty shaky pillar upon which to build support for any thesis. The idea, moreover, that "able moralists" can excuse violations of current church-state conventions raises even more doubts about the whole enterprise. Indeed, "able moralists" have supported both the free will and intellectual lawmaking theories, reminding this reader of nothing quite so much as a dialectical dispute between Moscow and Peking over the "true" meaning of Marxist-Leninism. The truth may exist, not in the texts cited by either camp, but, like beauty, in the eye of the beholder.

Indeed, an interesting book might be written about the why's and wherefore's of the rise and fall of the pure penal law theory. Why should Suarez's thesis have apparently gained such popularity with the parish priests? Was it simply because they were sick and tired of hearing about petty misdemeanors at confession? Did lawmakers really once believe in sin, heaven, and hell to the extent that they thought twice about making crime also a sin? Does the current decline in pure penal theory parallel any decline in a literal belief in sin even among the clergy? What is the correlation between the demise of pure penal theory and the rise of peripatetic Jesuit law teachers wandering around outside the Catholic law school league? Is the theory somehow so alien that it has proved an embarrassment? Or does the interment of the theory create a range of new opportunities for "able moralists" to review the entire corpus of the law in order to come up with a theological restatement of what does and does not merit obedience as a question of conscience? There are questions of mood and outlook here which ought to challenge a scholar. If Father Bayne can tear himself away from his ancient texts and acquire a flair for empiricism, sociology, secular history, and the like, perhaps he is the candidate for the job.

Some hint that we are in for a theologian's restatement of law and morals may be found in the wholly gratuitous attack on the legal realists which includes even that old chestnut about "Hobbes, Holmes and Hitler" (p. 20). It may be that the rise of penal theory paralleled the divorce of the church from the evolving capitalist state and was somehow related to the divorce between law and morals common to Anglo-Saxon legal history. If this was the case, we now have the Jesuits coming to the defense of the modern welfare-capitalist-consumer state, again adding sin to the sanctions of its burgeoning law, but

apparently reserving the right to edit obedience to reflect their own views of a proper society. Whether this reflects the emergence of the Catholics from an intellectual ghetto, a facet in the struggle with "aetheist Communism," a deep urge on the part of all religions to sustain the pillars of any established order, an effort to prove that theologians still have something to say, or an admixture of all these factors remains to be seen. Suffice it to say that this book is a symptom of something, but that it is still too early in the game to diagnose whether this symptom bodes good or evil for the healthy, pragmatic development of the corpus juris in this last third of the century.

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