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The Nature of Law (Book Review)

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the empirical methods characteristic of Aquinas. (The new book by T. E. Davitt, S.J., on *The Nature of Law* is helpful here.)[9]

It is unfortunate that the late James Brown Scott, who did so much to make known the work of both Vitoria and Suarez in international law, apparently had himself no more first-hand acquaintance nor training in Thomistic philosophy than Dean Pound, and so has confused many students on these points by his interpretations of excerpts of their writings taken out of context.

Apparently the chief source of Dean Pound's misunderstanding of the Thomistic doctrine of natural law is due to his own view of natural law as an ideal. Although adopting the Hegelian dialectic of synthesis—following thesis and antithesis—he appears to have veered away from the absolutism implicit in Hegel's thought in the realization of the ideal and back toward Kant, with the latter's distinction between will and idea, which has been transmitted to us by Schopenhauer as well as by Radbruch. However, he is beginning to indicate in his later books a dissatisfaction with these German philosophies as explanatory of the taught tradition he serves and venerates in the common law. His renewed attention to Aristotle, instead of to Plato's idealism, may help him to see his way out of the fallacy implicit in his oft-repeated phrase about "received ideals." But it is submitted that not until he glimpses the reality that natural law is nothing more nor less than a term used to describe the existent relationship between the Creator and the universe He created, which creatures must discover at their peril, will the author find a satisfactory key to his great loyalty to the law. Law is not a means of realizing the ideal which is never quite attainable, as pessimism teaches, any more than the Creator is nothing but a postulate from which conclusions can be derived. God defined Himself in terms of Being, as "I am Who am," and in accordance with that revealed definition, the identity of essence and existence in God was recognized in the Thomistic system. Not the ideal but the real is what matters, and the natural law is a term descriptive of this fact. No legal rules which ignore or deny it can endure. Until the Pragmatists, Neo-Idealists, and the "Thomists" Dean Pound is conversant with, agree on existence, in which man participates, there is bound to be confusion with respect to the nature of law and the law of nature which the distinguished teacher has not yet been able to clear up.

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THE NATURE OF LAW. By Thomas E. Davitt, S.J. St. Louis: B. Herder Book Co., 1951. Pp. v, 274. $4.00.

Father Davitt, who is Assistant Professor of Jurisprudence, Philosophy and Ethics at the Law School of St. Louis University, maintains that law is

[9] See Brown, Book Review, 26 ST. JOHN'S L. REV. 399 (1952). [Ed. note.]

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of the intellect, rather than of the will, either human or divine. Before reaching this conclusion, he critically examines the works of six famous philosopher-theologians, who stood for the primacy of the will, between the thirteenth and seventeenth centuries.[1] Of these, Francis Suarez was perhaps the foremost. The arguments of these six authorities are contrasted with those of six other outstanding philosopher-theologians who advocated the superiority of the intellect during the same period.[2] Of these, Saints Thomas Aquinas and Robert Bellarmine were probably the most famous.

The first group vindicated ". . . the will's freedom of election by a complete causal independence of the will from the intellect." [3] William Ockham reached the most extreme position, within this group, by logical fidelity to the premises of the "will theory," when he contended ". . . that even if God should will that the hatred of Himself be a good act, then it would be a good act." [4]

> Father Davitt has summarized the "will theory" as follows:
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> If the will is conceived as autonomous, then it alone can direct and command . . . . Further, because the will can be put under no physical necessity by the intellect, neither can it be subjected to moral necessity by the intellect presenting means as necessary for an end. Hence the source of moral necessity, of obligation, is subjective—the will itself! In this system of thought, order and finality are to be found within the will.[5]

The second group contends that ". . . interaction of the intellect and will is one of mutual causality . . . ," [6] and that the "[f]reedom of election has its metaphysical source in the intellect." [7] Father Davitt has thus described the "intellect theory":

> And since the intellect is allowed a causal interaction with the will, it can impose upon the will the moral necessity of acting according to the relation of means to an end that it might propose. The source of obligation is, then, for this group the objective relation of means necessary to attain an end. Here objective order and finality, attained by the intellect, are outside the will.[8]

It follows from the philosophy of intellect and will of the "intellect" group that law is an act of the intellect, and the source of command and obligation, and that there cannot be a purely penal law in civil society, *i.e.*, a law which

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[1] *Namely:* Henry of Ghent (1217-1293); John Duns Scotus, O.F.M. (1266-1308); William Ockham, O.F.M. (1299-1349); Gabriel Biel (1425-1495); Alphonse de Castro, O.F.M. (1495-1558); and Francis Suarez, S.J. (1548-1617).

[2] *Namely:* St. Albert the Great, O.P. (1206-1280); St. Thomas Aquinas, O.P. (1225-1274); Thomas de Vio (Cajetan), O.P. (1469-1534); Dominic Soto, O.P. (1494-1560); Bartholomew Medina, O.P. (1528-1580); and St. Robert Bellarmine, S.J. (1542-1621).

[3] P. 2.

[4] P. 220.

[5] P. 3.

[6] *Ibid.*

[7] *Ibid.*

[8] P. 4. Footnotes omitted.

provides a penalty for breach, but does not bind in conscience. But the philosophy of the "will" group leads to the conclusion that law is an act of the will which is the source of authority and the duty of obedience, and that wholly penal laws are possible not only in religious communities, but also in civil society.

The two groups are in disagreement as to whether or not the purely penal regulations which are binding upon the members of a religious community are actually "law." The "will" school maintains that these regulations are genuine penal laws. But Father Davitt and the "intellect" school argue that such regulations cannot be laws in the true sense, for they are for the good of the individual members, and not for the common good, and bind only as agreements or pacts.

Since there are no purely penal civil laws, according to Father Davitt, "[a] violation of law is wrong and is therefore a bad act and consequently some kind of sin, grave or slight." [9] Law always binds in conscience at least to some extent. But unfortunately this proposition is not universally recognized as true in contemporary society, with resulting undesirable, anti-social consequence. Indeed, it is not accepted unanimously as valid even by Catholics and scholastic philosophers, so that "[a] glance at most manuals of moral theology and canon law . . ." [10] will show that "[m]any who hold Aquinas' and Bellarmine's philosophy of intellect and will are holding Scotus' and Suarez' concept of law and obligation." [11] It is but logical for those who accept the philosophy that law is reason rather than will to deny the existence of purely penal laws. It is not logical for those ". . . who feel that there is something wrong with purely penal law . . . to locate it in the difficulty of knowing the intention of the lawgiver . . . ." [12]

Although freedom of choice still remains for Catholics and scholastic philosophers in this matter, nevertheless, it is significant that recent pontiffs have found it necessary repeatedly to emphasize the fact that certain aspects of civil life are morally binding. Perhaps this would not have been necessary if the doctrine that purely penal law does not exist ". . . had been consistently taught for the last six hundred years and men had been shown their full obligation in civil life . . . ." [13] The doctrine which approves penal law has tended to lessen the citizen's sense of social responsibility and duty. The book has effectively combined idealistic with empirical arguments to sustain its principal thesis.

Specific historical examples of laws which were regarded by some as obliging in conscience, as such, but by others only in regard to the payment of the penalty, have been discussed. Thus there is a statement of the reasons why Alphonse de Castro believed that a law, passed in 1539, in the reign of Charles, prescribing a fine in case of violation by persons who bought or sold scarce grain beyond the ceiling price established by the law, was binding in con-

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[9] Pp. 225-26. Footnote omitted.
[10] P. 226.
[11] *Ibid.*
[12] *Ibid.*
[13] Pp. 225-26 n. 2.

science, and hence not completely penal. There is also a discussion of the opinion of Bartholomew Medina that a law which prohibited the cutting of wood in a public forest and attached a penalty for its violation was not a true law, with Father Davitt's qualification that this was not correct "[i]f the public forest is so important that it is necessary for the common good . . . ." [14] In this connection, the book might possibly have been made somewhat more attractive to the lawyer and jurist, as distinguished from the historian, the moralist, and the legal philosopher, if the discussion of penal law had been directed to the moral aspects of the violations of specific, contemporary laws, such as those pertaining to smuggling, black marketing, the payment of taxes of various kinds, and the administrative regulations, which have been necessitated by the transformation of a national economy geared for peace to one based on preparedness against potential aggression by Communism.

In the middle ages, the fundamental dispute as to the nature of law was whether law was an act of the will or intellect of the law-maker. But today a much more radical issue has arisen. Certain schools of jurisprudence now maintain that although law is an act of the will in the sense that legislation is obviously enacted voluntarily, nevertheless, it obtains its authority to compel obedience neither from will nor reason, either human or divine, but from the implicit assertion of physical force, so that law is caused essentially by the attachment of the penalty, or sanction, and by the necessary implementing power. In effect, this is the position of the Analytical and Realist Schools.

This book has performed a very valuable service to the cause of the philosophy of scholastic natural law by calling attention to the essential factors of will and reason in relation to the positive legal order, considered generally. The general knowledge which it communicates, principally historical and philosophical, will be most useful as a preliminary to ". . . the great work yet to be done . . . ," [15] *i.e.*, "[t]he complete presentation of St. Thomas' concept of law and obligation as founded upon his philosophy of intellect and will . . . ." [16] It is to be hoped that Father Davitt will continue his profound study of the inter-relation of will and reason by relating them to specific legal doctrines, so as to refute the strictly utilitarian explanation of those doctrines which has been given in terms of a materialistic social interest, by those who would conceal the leading historical role played by the psychological factors in the modification and ameliorations of the great juridical regimes of the world, particularly the Roman and the Anglo-American. The gradual realization that the introduction of these factors into the methodology of problem-solving on the legal level was indispensable, for a socially workable and satisfying medium of order and justice, coincided with the imperative ideal of an imposed moral order to be implemented by political authority.

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[14] P. 193.

[15] P. 229.

[16] *Ibid.*