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Religion, Morality, and Law

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RELIGION, MORALITY, AND LAW (Volume III, Southern Methodist University Studies in Jurisprudence), edited by Arthur L. Harding. Southern Methodist University Press, Dallas, Texas, 1956. Pp. x, 109. \$3.00.*

Reviewed by

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Less and less is the stigma of antiquarianism being attached to studies and scholars who in increasing numbers are turning their attention to the philosophical and religious background of law. *Religion, Morality, and Law* represents the third in a series of studies emerging from the annual Conference on Law in Society, edited by Arthur L. Harding, Professor of Law at Southern Methodist University. The scholarly jurists whose views are presented in these volumes have taken a scientific and modern approach to many fundamental problems in jurisprudence, thereby filling a growing demand caused by the long-standing disregard American law schools and law journals have had of research in this area of jurisprudence. The present volume differs from its predecessors in the series in that religion and morality, rather than the natural law, are viewed as the basis of law.

This difference of emphasis is particularly patent in the first essay, "Can There Be Morality without Religion," in which Robert E. Fitch disassociates natural law ethics from either morality or religion, though natural law has been found deeply bedded in the finest moral and religious traditions of the West since the days of St. Paul. In the brief scope of his paper the author concentrates on the empirical aspects of his hypotheses that there can be no morality without religion, tracing through history the

failures of eighteenth century Enlightenment, English Utilitarianism, and secularized Protestantism. His arguments are clear and incontestable. The case he presents against humanism is not so concisely formulated. Instead of demonstrating the inadequacy of humanism as a sole basis of morality, the author pictures it as opposed to religion, and consequently disregards the great contributions Christian humanism has made to a reasonable and realistic morality through its philosophy, its art, and its science, the best of which have generally been accepted as an integral part of our culture.

For a brief exposition of the Aristotelian-Thomistic theory of universal order, reason, and permanent values as the foundation of both law and morality, Arthur Harding's essay "Law Without Morality" is highly commendable. The treatment is broad enough to indicate the point of departure and insufficiency of other theories that have influenced modern legal concepts: the various forms of determinism which have undermined the psychology of human choice in law and morality; the absolutist's jurisprudence of John Austin which, reminiscent of Machiavelli, Hobbes, and Rousseau, ultimately identifies law with the will or aggregate commands of the sovereign; the pure theory of law devised by Hans Kelsen, which logically seeks a more inclusive norm of law but is left wavering without a solid basis. The ethical "right," essential to both law and morality as a starting point, is equally important as a norm and guide of legal development. Without moral values law floun-

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ders in its legislative formation, its effective sanctions, and its administration. The dual role of law as the operation of the eternal law in human society and as the governance of the people by the people does not present a dilemma for the author. It is the only rational explanation of the source and function of law and morality.

A problem much closer to the legal practitioner is discussed in Wilber G. Katz's paper, "Christian Morality and Criminal Law." The point at issue is immediately narrowed down to the purpose of legal punishment according to classical Protestant tradition, originally expressed in the writings of Luther and Calvin. Retribution, or the exercise of justice, for a criminal act freely chosen, is discounted as a basis for punishment in as much as the author attributes to "realistic" Judeo-Christian tradition, supported by dynamic psychology, an insight into human nature which recognizes the relatively fixed character of youth that renders personal responsibility inappropriate to the issue. To the extent that criminal behavior is conditioned, responsibility is imposed upon the criminal with no fault of his own, only the vicarious responsibility of those determining his conduct. Rehabilitation emerges as the prime purpose of punishment, with the prevention of crime as a necessary result. An indirect appeal is made to the reader for support of, or at least sympathy with, a penal reform that will embody the theories here expounded. Many will be slow to answer the appeal, particularly those who are less deterministic in their ideas of human behavior and are more appalled at the facility of delinquents and criminals to blame others for their conduct. The evidence presented from Protestant tradition is far

from convincing; a stronger case can be made for the author's theories on the basis of behavioristic psychology.

Natural law has never found a secure position within the framework of Protestant theology. By theologians such as Karl Barth it is rejected when the Christian is forced to make the inevitable choice between Jesus Christ and natural law. Ernst Troeltsch attributes to it an importance equal to the doctrine of the Trinity. In his paper entitled "Theological Analysis of Natural Law," Joseph D. Quillian, Jr., formulates a theory of Christian Natural Law that is essentially different from the pagan concepts introduced by Aristotle and the Stoic philosophers. This natural law is "completely converted." Since human reason is incapable of knowing the essential nature of natural law, basic natural precepts are matters of faith rather than reason, part of divine revelation. This theory of natural law is in complete harmony with the author's concept of the doctrine of grace, pointing, as it does, to the benevolent sovereignty of God and the responsibility of man. Natural law has, however, lost its philosophical foundation; it is no longer shared by all men; it is ultimately a religious law in the supernatural order of grace.

Regardless of the lawyer's personal position in matters philosophical and religious, he must eventually recognize the extent the present status of law has been shaped by the philosophy and religion of Western society. It is very likely that law will continue to be influenced by these same factors. Objective studies along these lines, particularly if they are as thought-provoking as the ones reviewed here, contribute greatly, therefore, to the legal science of this country.