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A PRACTICAL NOTE ON A TYPE OF JURIDICAL "POSITIVISM"†

REV. PETER HUIZING, S.J.*

Translated by

REV. WILLIAM C. CUNNINGHAM, S.J.**

THE PERPLEXING AND ALMOST ENDLESS discussions which seem to ensue whenever moralists and ethicists treat with lawyers about natural law and its juridical value have become almost proverbial. Moralists and ethicists vigorously defend the juridical value of natural law, while lawyers equally vigorously deny it. This happens not only when the lawyers are of the type who are unwilling to recognize natural law or any other absolute ethical norm, either because of their own moral indifference or because of a false philosophical doctrine. These lawyers need not detain us here. But also, one often finds very reputable lawyers, even good Christians, who defend some sort of juridical "positivism." In my experience, however, it seems that time and again discussions of this sort prove fruitless, not because their opinions do not agree with the objective truth, but because the disputants, using words and concepts in a different sense, are seemingly contradicting each other, while in reality the opinions they are expressing are not in conflict, but beside the question.

For those who maintain that all law is positive by no means wish to deny the existence of norms of ethics which oblige the conscience absolutely. They admit that even in the matter of justice there are principles which, independently of any positive law or even contrary to positive

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*Professor of History of Canon Law and Dean of the Faculty of Canon Law of the Gregorian University; Corresponding Member of the Institute of Research and Study in Medieval Canon Law (Washington, D. C.).

**Father William Cunningham graduated from Marquette University, Ph.B. (1951); LL.B. (1953). He is a member of the Bar of Illinois and Wisconsin and at present, is a student in the Graduate School of Law, Georgetown University Law Center, Washington, D. C.

law, should be kept inviolate. They admit that among the ends and motives of positive law the preservation of justice and equity holds a prominent place.

Furthermore, they themselves attribute an ethical force to just positive laws, to the extent that precepts given to subjects by legitimate authority bind the subjects in conscience to carry out the precepts. Further, according to those positivists, the legislator in drafting laws is required to consider the norms of justice and equity, and in general of all decency. If the legislator has not done that but has prescribed something unjust, it would not oblige the subjects in conscience; indeed, they would be bound to resist the law. Moreover, those lawyers, if they are Catholics, will readily grant to moralists and canonists that Catholics are bound in conscience to execute last wills made in favor of charitable causes, even if the formalities requisite for validity in civil law are missing; and that in conscience civil divorce has no value, etc. In a word, whatever ethics or moral theology teaches about objective truth, Catholic lawyers, recognizing its normative value, staunchly support.

The only point at issue with such positivists is whether or not what is ethical in law should itself even be called law, that is, whether it should be subsumed under the notion of law, or, rather, under the notion of ethics or moral theology. These positivists do not deny that natural law exists, obligates, and has value, but they deny that it may fittingly be called law.¹

¹ In their denial they use the word law as the object of juridical science. The word will be taken in this sense throughout the entire course of this article. For there is question not of whether men have true and proper rights from the nature of things themselves, but whether it would be suit-

In like manner, they do not reduce to the concept of law the ethical value inherent in positive law established by statutes, custom, or the repeated decisions of judges; but they leave to ethics that element with which moralists, not the lawyers, should deal.

They say that law, in its true and proper sense, the formal object of juridical science, should be distinguished from its ethical aspect which pertains to the formal object of another science. Law consists, they say, in a set of norms which define how public authority and its juridical and administrative agencies work in the event of certain actions and omissions by the citizens (or other facts) which are called juridical because they have effects recognized by public authority and rendered secure by its agencies, using even coercion. Juridical science is the ordered and systematic knowledge of these norms and their effects. This law and juridical science, it is held, are wholly positive since they omit the consideration of the ethical aspects of law without, to reiterate, in any way disparaging or denying those aspects. On the contrary, these aspects are considered of greater importance and value than even positive juridical norms in the strict sense.

Put thusly, the question is not one of objective truth but of the means by which that truth may be more aptly expressed in our concepts. It is a question of methodology, not of ontology. That is, is it actu-

able to subsume these rights, as such, under the object of juridical sciences. The word law taken absolutely may be used in two ways: first, for signifying the ethical law; and second, the positive law. Here, rather, the treatment concerns the word used in the relative sense, as the science of law, the study of law, lawyer, legal aspect, etc. (This note, though it does not appear in the original, was added at the instruction of the author.)

ally more fitting to treat ethical elements and the judgments of ethics under the notion of law and juridical science, or rather to restrict law and juridical science to positive norms, leaving ethical judgments to the sciences of ethics and moral theology?

It seems reasonable to conclude that the juridical positivism which many Christian civil lawyers defend is methodological, not ontological.

To clarify this juridical positivism, let us look at a concrete example. Many modern codes of law permit divorce. Those positive codes establish the requisite conditions which, once fulfilled, enable both husband and wife or either of them to seek and obtain from a judge an absolute divorce, so that rights and obligations flowing from that bond can no longer be invoked before a public authority. Moralists and students of Christian ethics will say that such a divorce does not exist; that it has no juridical effect since public authority has no right to dissolve marriages. A Catholic lawyer who is a "positivist," as far as the objective truth is concerned, will dissent in no particular from the moralist; he differs only in the manner in which he conceives that truth, and in the words he uses to express it. He will say that no ruler has the moral power of proposing a divorce law; that husband and wife, notwithstanding a decree of divorce by the judge, are bound in conscience by the matrimonial contract, and that they are also obliged to refrain from contracting another marriage; that a new marriage contract, if one be attempted, has no moral value, etc. All these, however, are not juridical judgments, but ethical; and to the extent that they view the rights and mutual obligations of husband and wife they are, indeed, judgments of the highest value which husband and wife

are strictly bound to observe. Divorce, however, is a positive law; for, once the decree is rendered, divorce, not marriage, is the norm which public authority and its agencies follow. In fact, to safeguard this norm they can even invoke public means of coercion. To deny the juridical value of divorce is to deny an evident fact, for its value consists solely in an assurance of the intervention of public agencies. It is the business of a lawyer to have an exact and ordered knowledge of these laws, their conditions, and their effects. To be sure, a lawyer should use this knowledge for good, not evil; the knowledge itself, however, is neither good nor evil, but merely a knowledge of facts.

If the reader has followed the discussion closely thus far, he now understands that neither juridical positivism, taken in the sense in which we have used it, nor the doctrine of natural law can be said to be true or false. The sole question at issue is whether it is methodologically more fitting to select one or the other method of expressing the same reality.

But there is no dearth of reasons which seem to urge the method of juridical positivism, especially if the matter is considered from the standpoint of lawyers.

Lawyers who are engaged in practice as advocates, trustees, judges, public officials, house counsel for commercial business firms, tax experts, executors, and the like, by virtue of their work, or in their professional capacity, concern themselves solely with solving questions of positive law. They themselves are, of course, bound to observe ethical professional norms just as those whom they advise. But in so far as they are jurists, they do not give ethical advice, and their clients do not seek such

advice from them. If doubts arise about the moral licitness of their actions, lawyers commonly consult moralists or send their clients to them. What does this imply but that ethical norms (the norms of natural law not excluded) do not pertain to the law of jurists, or that the formal object of their science and special competence is not natural law, but positive law?

Now that, and nothing more, is what many reputable Christian jurists intend to say if they maintain that natural law is not law in the true and proper sense, or if they deny that natural law has juridical value. Indeed, very often they intend to affirm no more if they say that natural law does not exist, even though they signify their opinion at the time in words which are utterly inept and in themselves destined to create confusion. Their real intention, however, is to affirm that what is usually called natural law certainly exists, but is not aptly termed law, or that it is termed law only by analogy. This is not to say that that intention is always clearly conceived by those jurists; on the contrary, very often it is not. It seems, however, that such an intention is in harmony with their thought, and that they would agree with such an interpretation if it were explained to them.

Civil lawyers, especially those practicing private civil law, who not only engage in practice but whose particular duty it is to teach and develop the juridical *science*, experience somewhat greater difficulties in admitting the juridical character of natural law. For the method by which fundamental concepts are formulated, especially in modern teaching, is worlds apart from the method which ethics and moral theology follow in defining their notions.

For example, let us take the notion of obligation. Juridical science cannot operate

with the notion of a moral duty of doing or omitting something; still less can the science of private patrimonial law. The elements which constitute a kind of juridical obligation are several. In the first place, there is a requirement that a given precept proceed from one of the sources of positive law, such as statute, custom, or judicial decision. Not infrequently, even a source of positive law, by ordering something or establishing a norm, has recourse to an ethical norm such as good morals, equity, decency, good faith, etc.; but one cannot appeal to these norms in law except through some source of positive law, which is itself recognized by positive law.

Further, it is necessary that the nonfulfillment of a precept have a juridical effect; without this, no juridical obligation can be conceived. That effect can be another subsidiary precept of law, by dint of which one who did not fulfill the primary obligation contracts a secondary obligation, namely, that of making restitution to the creditor for any damage arising from an unfulfilled obligation, or of paying him a certain sum of money as damages. The effect of nonfulfillment can also be that the creditor gains the right to invoke the aid of public authority, which uses its own power of coercion to force the debtor, by direct or indirect means, to fulfill the obligation. Furthermore, there are or can be other effects of nonfulfillment: the debtor loses certain rights such as using his own property which the creditor possesses and can retain, exacting counter-performance in bilateral contracts; or finally, the loss of her right to support by a wife who does not observe the obligation of married life, etc.

Then too, it is characteristic of a juridical patrimonial obligation to be supplemented by a secondary obligation, such as

suretyship, pledge, or mortgage; or to be susceptible of new causes of action or to the change of an existing cause of action to a new cause of action; or to render valid the transfer of a right brought about by an obligation; or to cause the payment of a debt to be considered the fulfillment of an obligation (not an optional act) because, again, it carries with it numerous juridical effects.

If these positive elements which constitute juridical obligation are lacking, there can be a moral duty of doing or omitting something, but not a juridical duty. Obligations which arise from a source other than those of positive law, to which positive law grants no cause of action and gives no juridical effect, would not properly be called juridical obligations. For the transition from a merely moral obligation to a juridical obligation in the full sense is not sudden; the notion of obligation flows gradually from one type to the other. The reason for this is that the juridical effects of a juridical obligation are separable from one another; so we have different cases in which some effects are present, others absent. Thus it happens that even obligations which do not flow from the source of positive law, and for whose creditors no cause of action against a debtor exists at law, are in some way recognized in law or have certain juridical effects.

In all positive rights one finds the sort of *natural obligations* which, in teaching or even in the statutes themselves, are called natural obligations for the precise reason that they do not arise from law, but from a merely moral or ethical duty or from decency. Nevertheless, they are accepted in law because they do not remain merely natural, but become more or less juridical because of the effects that even

positive law recognizes in them, whether those effects be few or many. The first effect is that a debtor, against whom the creditor cannot institute an action, if of his own accord he nevertheless pays the debt, cannot then bring an action of condiction for unnecessary payment,² even if by chance he mistakenly believed he was liable for the debt at law, and because of this belief paid the debt. Now the effect is more complete if to the creditor by natural obligation one concedes the right of compensation³ and the right of retention.⁴ Thus in German law, after a statute of limitations has run, while the natural obligation still remains, the creditor can demand compensation if he is also bound to pay the debtor. Furthermore, the fulfillment of the natural obligation can be considered a necessary act — not a gratuity or donation — and thus the norms that determine the conditions and formalities for giving gifts do not apply. Yet the payment of a natural debt is often considered an unnecessary act because of the *actio pauliana*,⁵ which cred-

² The action *condictio indebiti* is an action in personam based upon a quasi-contractual duty to restore the amount of a sum of money or other thing paid by mistake; it is a formal claim of restitution. This article, abounding in civil law terms, presents difficulties to a lawyer trained almost exclusively in common-law. When there is no suitable common-law equivalent for a civil law term, there will be an attempted explanation in the footnotes.

³ "A reciprocal liberation between two persons who are both creditors and debtors of each other. . . . It resembles in many respects the common-law set-off. The principal difference is that a set-off must be pleaded to be effectual; whereas compensation is effectual without any such plea." 1 BOUVIER, LAW DICTIONARY (8th ed. 1914).

⁴ A lien.

⁵ There is at civil law an *actio pauliana* in rem which is given to recover property alienated in fraud of creditors on the assumption that aliena-

itors can institute against debtors (wholly "juridical") to prevent the waste of unnecessary expenditures by a debtor.

From this it follows that various grades of juridical obligation exist which fall between an obligation from natural law alone and an obligation which is in the full sense juridical.

Other notions which juridical science uses are analogous, such as those of subjective law (subjects of law or juridical persons), juridical acts, etc. In law such notions are ineffectual if they fail to signify determined juridical effects. In fact, it can generally be said that many juridical notions are formulated not to signify a necessary truth — not even deontological — but to signify juridical effects proper to individual notions. The complexus or system of those notions will be more perfect to the extent that it has gathered to a focal point in a simple, clear, and efficacious manner various juridical facts and the effects which follow from those facts. There are, so to speak, notions which are operative, not speculative, whether they concern an ordered knowledge of a single determined juridical order, or the science of positive law in general.

The ultimate explanation of the positive *nature* of law, and hence, of juridical science, is itself the ultimate explanation of positive law. Many modern juridical orders are "closed systems." The codifications of different sections of law in many nations were the greatest but not the sole contributors to the formation of such a concept. The essential element of the closed system is that judges in formulating and writing

opinions can appeal to no argument or precept of law which is not found in positive law and in other sources of law, if, and only to the extent that those other sources are recognized by positive law.

In many older juridical orders this principle did not prevail; nor does it prevail even today, since the judge has greater freedom to find the decision which in each case seems to him more just and equitable. Where juridical relations have become more complicated, however, particularly through the evolution of commercial law, the definiteness of objective law has taken on such value that it has been preferred to the freedom of a judge to find the just result in each case. To be sure, the law preferred has in most cases been just, but in some cases it has not. An added reason is that in a pluralistic society people do not rely on the opinion of each judge, but as far as possible they want to order all things by a common law. Hence, the judge, and consequently all lawyers, ought to ground every right in statutes, and for them no right is given outside of those statutes.

No one fails to see that in modern developed states the closed system should not be disapproved; on the contrary, it is absolutely inevitable. Indeed, it is of itself desirable that canon law become binding for its own Catholic subjects everywhere even in civil law, at least in special matters such as matrimonial questions. However, this cannot be achieved today by virtue of canon law alone, still less by virtue of the free opinion of a judge; but it can be achieved by virtue of a concordat or a positive law in which canon law is accepted into and acquires the efficacy of civil law. This effect, in other respects, is established

tion had not taken place. It was probably named for Paulus, a third century Roman jurist and contemporary of Ulpian.

rather than confirmed by the concordatory law itself.

Once one admits a necessary positivity of law as a methodological postulate for the purpose of suitably distinguishing one science from another, it does not follow that every ethical element must be banished methodologically and systematically from the science of law. Among those who have strenuously defended the doctrine that ethical elements contained in positive law itself should be subsumed under the notion of law is the famous jurist, E. M. Meijers, formerly a professor at the University of Leiden,⁶ recently deceased. His arguments will be sketched briefly.

In lectures concerning the general doctrine of private civil law, Professor Meijers frequently treated the question of whether a juridical obligation is solely a norm whose transgression causes determined reactions of public authority and its agencies; or whether it is not also, or rather primarily, a norm which directly regards the person himself as the subject of the obligation, so as to furnish an ethical motive for acting according to the norm, even prescinding from the reaction of authority.

There is no doubt that, objectively speaking, juridical elements have that ethical

value. This, not only in so far as those precepts flow directly from ethical norms, such as "thou shalt not steal," or simply fall back on those norms such as "good morals," "good faith," "equity," "decency," etc., but also in so far as they are the so-called heteronomous norms, mere positive law, formulated by statute, custom, and prevailing judicial decisions. One who breaks the law, then, acts imprudently not only because authority will react on him unpleasantly; but also he acts unethically. The responsible citizen holds law and statute in such high regard that they furnish him with a motive of acting according to them.

This is an objective truth which is clear to all conscientious men. There is, however, another question (merely of system or method) of whether the ethical force of a juridical precept should be considered the object of juridical science, and be subsumed under the notion of law, or rather, should the notion of law be restricted to obtaining effects by the intervention or coercion of public authority, leaving the ethical element to ethics and the students of ethics?

If the second method is accepted, one must say that law in its entirety consists in the reactions of public authority caused by the acts of the subjects of law. Precepts given to the citizens considered *juridically* are not precepts, but merely communications or announcements given to them telling under what conditions what sort of interventions of judges or other agencies of the state can be expected. If certain acts are performed, definite results will follow. Nothing more. Juridically speaking, it is a matter of indifference what happens then, whether it be observance or violation of the norms; juridically speaking, it is impor-

⁶ Meijers, Edward Maurice (1880-1954), LL.D., University of Amsterdam (1903); Professor of Civil Law and Private International Law in the University of Leiden (1910-1950). As president of the Royal Dutch Academy of Science (1945-1949) he started work on a new civil code, the commission of which had been granted to him by Royal Decree (April 25, 1947). His writings include, among others: *L'HISTOIRE DE PRINCIPES FONDAMENTAUX DU DROIT INTERNATIONAL PRIVE A PARTIR DU MOYEN AGE* (1934). He drew up the bill of the treaty about the introduction into Holland, Belgium, and Luxemburg of a uniform law concerning private international law (1951). WINKLER PRINS ENCYCLOPAEDIA.

tant only that the previously announced effects will follow accurately.

Professor Meijers strenuously defended the methodological soundness of subsuming the ethical element under the notion of law or under the object of juridical science.

In the first place, the value of every juridical order relies more on the moral force of precepts than on fear of the reactions of the state's agencies. But it is not a scientifically sound method to separate norms in so far as they are the conditions for the intervention of authority from norms in so far as they have moral force, because this is the special foundation of the real value of law.

On the other hand, that separation can harm the dignity and authority of law, if not so much logically, then at least practically. If the proper note of law and its norms consists in rules which define the conditions under which public force can be invoked or applied, it will be difficult to avoid the conclusion that literally every precept issued by a ruler in the necessary form is law, whatever may be its status concerning ethical value; or, further, that law is whatever a usurper, tyrant, or criminal leader orders done as long as they have the power to force men to observe their commands. Certainly those who admit this consequence will not maintain that citizens are held to obey an unjust precept of a ruler or the precepts of a usurper, a tyrant, or a criminal leader. The extent to which they are held to obey or not obey the law is, however, a question which concerns moralists, not jurists. This solution, however, leaves something to be desired.

It is not sound methodologically, in one and the same reality, to separate substance or what is primary from what is consequent or secondary and to assign those things to

different sciences. The object of juridical science is positive law. That object, however, really contains ethical elements which are also important. Consequently juridical science should consider those elements too. The complex system of public coercion in its entirety subserves the protection and conservation of a juridical order which, of itself, aims directly at protecting and promoting justice, peace, good morals, security and, in general, both human and ethical social welfare. If that system of coercion is consistently dissociated from its singular and immediate end, again not by a logical necessity but practically, one might fear that that essential and intrinsic finality may be forgotten and finally lead to a definition of juridical science which would sound something like this: "the science of law is that science which teaches the social means by which men may be more efficaciously forced to do something"; or "the object of juridical science is the machinery of force in the hands of those who are stronger in a society." If juridical science would put the normative strength of law in first place in its own formal object, and relegate the coercive function to second place, it would choose a much safer way to a fuller understanding of its object, which is positive law.

A second conception or notion of law generally carries with it other specific juridical notions and another method for defining them. Let us take certain examples.

Questions of this sort are posed by jurists: if an heir accepts an inheritance under benefit of inventory,⁷ does he have the obligation of paying the debts of the testator; or if someone is made the propri-

⁷ An heir, either testamentary or *ab intestato*, who had doubts about accepting or refusing could accept with benefit of inventory. If he did so, he

ctor of some real property encumbered by a mortgage, does he have the obligation of paying the debt for which the mortgage was given?

Lawyers, in order to respond to questions of this sort, usually inquire immediately into the legal effects which will follow if the beneficiary heir or proprietor does not pay the debts. Can he be forced by a court order to make restitution to the creditors for damages resulting from the unpaid debts? Can the creditors ask the judge to declare them bankrupt? Or, if the heir or proprietor has mistakenly paid the debts, can he, with the support of the judge, seek to regain the sum?

Professor Meijers rejected this method, which is still followed in different jurisdictions both by lawyers and judges. One should first carefully determine whether the primary norm is present, namely: "you are held to pay the debt." Are the beneficiary heirs or proprietors of goods which are encumbered by the mortgages of other debtors subject to censure if they do not pay the debt? Only if this norm were present, which immediately regards the subjects, could the remaining legal effects be said to spring from their *obligation*.

In any case, if the heir or the proprietor does not pay the debt, the creditors can seek an execution of the inheritance or the real property encumbered by the mortgage. Indeed, it follows then that it is of interest to the heir or the proprietor that the debt be paid, but he is not obligated to do this. By no means are they acting unethically if they allow the inheritance or the real prop-

erty to be sequestered without paying anything for it themselves.

had to begin within a stated number of days after becoming aware of his right to claim the inheritance; and the inventory then had to be completed in a definite time. By satisfying these requirements, the heir escaped liability for the debts of the deceased beyond the extent of the assets.

erty to be sequestered without paying anything for it themselves.

In the statutes themselves, for the most part, a more accurate method in drafting them would be desirable. Often the same words are used in norms which intend to impose obligations as in those which do not have that intention. For instance, if a statute so provides, the plaintiff in a trial must prove the facts alleged by him. The plaintiff who fails to prove the facts must certainly suffer the unpleasant consequences which the statute attaches to the failure of proof; but the statute by no means wishes to declare that plaintiff subject to censure who is neither able nor willing to give proof. Similarly, if a statute provides that the creditor should prevent or mitigate the damage or delay of the debtor when he can prevent it without excessive labor or expense, it does not intend to establish a norm which looks directly to the creditor as though he would do some injustice by not mitigating the damage. It merely wishes to decide that restitution for the loss is not to be made by the debtor. One could hope that these statutes would more accurately distinguish between norms which intend to impose an obligation on subjects, and norms which are really nothing but the conditions for juridical effects.

A significant reason why jurists in practice separate the ethical element from juridical duty and judicial obligation is this: in recent laws of various jurisdictions the insane, infants, and juridical persons succeed to obligations which the representative persons had before them. The obligation is considered to remain the same and to pass from one subject to the other. It seems difficult to conceive of such a passage if the notion of obligation also includes, or rather primarily includes, an

ethical element or norm according to which the subject is bound in conscience in cases where that subject lacks a conscience. Thus, in older laws guardians or trustees or executors of a will were considered the subjects of obligations. The modern construction which gives obligations directly to the insane, infants, and juridical persons is preferable, because it orders juridical effects more simply and easily.

Nothing prevents the use of this modern construction, however, even if the notion of juridical obligation contains a norm of acting for the subject. For if the juridical effects of the obligation of an unwitting subject are the same as the effects of an intelligent subject, the practical nature itself of juridical notions demands that an "unknown obligation" be subsumed under the notion of a normal obligation. This can be done either with the aid of a fiction of law, or by admitting an imperfect analogy of obligation or by other means which in objective meaning would amount substantively to the same thing. But by no means are we forced to remove the ethical element from the notion of juridical obligation in general for the sole reason that we sometimes use this notion independently of the ethical element.

The difference between the two conceptions of law and obligation appears clearly in the distinction which jurists make between primary and secondary obligations.

A primary obligation is that which directly and of itself constitutes a norm of acting for the subject, such as paying a debt, fulfilling a contract, etc.

A secondary obligation is that by which someone, if he has acted contrary to the primary norm, is bound to make restitution to a creditor for any damage arising from an unpaid debt or to another con-

tracting party from an unfulfilled contract, to pay a fine, or to remove something constructed unlawfully in the field of another, etc.

A secondary obligation does not exist for its own sake, but for the sake of a primary obligation — for urging its execution. The primary obligation itself, however, is often not subject to the coercion of public authority; only the secondary obligation is.

This distinction, obvious and clear enough, is completely reversed by those who place the notion of law in coercion alone. The secondary obligation is, so they say, to pay the debt or to fulfill the contract. This juridical obligation is sufficiently unimportant since it does not have an immediate juridical effect, namely, intervention of the agencies of the state. There are those who have called the contract a "juridical non-entity" (*ein juristisches Nichts*), since the only notable effect it would have in law would be an action to recover damages if the contract itself is breached. We draw closer to the field of law now if that secondary obligation does not have a necessary effect. For indeed there arises then a genuine juridical obligation which should be called primary, because it is immediately subject to public coercion.

Again, if this method were carried to its logical conclusion, the last and only true juridical obligation would be that which, following the decision of the judge and its execution, we are forced by physical necessity to fulfill. For in this method, obligations are derived from the ability to coerce; the ability to coerce is not derived from a pre-existing obligation.

Thus, certain jurists, in other respects outstanding, have thought that a bond

posted by a guardian of a minor ward at the beginning of his accepted duties is accessory of the obligation to make restitution for the damage if he maladministered the property of the ward. It would then be a bond posted for a future possible debt — as if it were the primary obligation of the guardian to make restitution for the loss resulting from a poor administration. Such a bond seeks rather to insure the faithful execution of the primary and immediate obligation, that of careful administration.

The same reversal is significant in definitions of positive rights. There are, for example, those who place the right of real property in the fact that the possessor has an action against those who unlawfully disturb his possession. This, as if he had not primarily had a right that others might not unlawfully disturb his possession!

There is also a significant diversity in the notion of law and obligation in solving the question of whether a judicial decision is declarative of existing law, or constitutive of new law.

Those who favor the opinion which conceives rights and juridical obligations primarily as conditions for public coercion consider a definitive decision (*i.e.*, a *res judicata* whose truth is presumed by a presumption of law and according to law) constitutive of right and obligation. For the norm which public coercion follows is the decision of the judge, whether this decision concurs with prior precedents or not. Certainly the debtor will have the ethical obligation to pay the debt which actually existed; but the juridical obligation is now urged by the decision alone. The decision creates the right; it does not merely declare it.

The opinion which sees in juridical obligation something more than the effects of

a threatened public coercion will not judge in this manner. Judicial decision does not have a value apart from the cases about which it judges. If the decision is correct, it adds a measure of coercion for enforcing the pre-existing obligation. If it is not correct, the obligation is not of itself extinguished, but *per accidens* no coercive measure is granted to enforce that obligation. The right of a creditor does not depend on the decision. The obligation of a debtor, however, after a definitive decision which does not grant a means of coercion to the creditor for enforcing the obligation, should be called not only ethical, but also juridical, provided only that it may continue to have certain juridical effects. It is enough, for instance, that a payment made by a debtor whom a decision mistakenly absolved from debt is not considered a gratuitous act or a gift; moreover, if it is not a donation, then it is a restitution of what someone received by virtue of an unjust decision. Or is it enough that a defendant who had previously won a decision favorable to himself, but acknowledges afterwards in a later suit that that decision was erroneous, can still be condemned. And, conversely, it is enough that the execution of an erroneous decision, carried into effect by one who is aware of this error and then acknowledges his awareness, furnishes cause to prevent him from profiting from that unjust act. But if the ethical obligation, still existing after the erroneous decision, is absolutely unsupported by any positive juridical measure, then truly it may well be called merely ethical and no longer juridical, since the entire obligation is now treated outside the field of positive law, and hence lies outside the object of juridical science.

Finally, there is a significant diversity

in the notion of law in the following problem. We have many juridical facts which have juridical effects with a retroactive force. In many cases this retroactivity depends upon the complaint of those who are interested parties. Thus, in recognizing natural sons, the complaint of the father establishes the paternity retroactively to the moment of the birth of the son. In accepting or repudiating inheritances, the complaint of the heir has the effect of acceptance or repudiation retroactively to the moment at which the testator died. In rescinding bilateral contracts for the poor performance of one of the parties, the complaint of the other party has the effect of rescission retroactively to the moment of the drawing up of the contract. In repayment of joint loans, the complaint of one debtor has the effect of compensation retroactively to the moment at which the debt existed jointly, etc. In many cases the question can be posed: are those effects the effects of the complaint which has retroactive force, or are they the effects of the very fact from which they are considered to originate; that is, the coexistence of the two debts, the poor performance, and the birth of the son?

The same question can be posed in all those cases in which the judge is obliged to allow juridical effects of juridical actions, not by virtue of his duty as judge, but only when one who is an interested party pleads those facts, such as the statute of limitations once the time prescribed in the statute has run. Is the debt abolished by the statute, or, rather, by the complaint of that person who pleaded the statute?

One who is of the opinion that right consists in the ability to exert force will even more readily believe that complaints are the immediate causes of effects, since they

themselves are the immediate conditions for the forceful intervention of public authority. On the contrary, one who is of the opinion that rights and juridical obligations have their own immediate value independently of public coercion will believe rather that the complaints are not necessarily the causes of juridical effects, but can even be the mere conditions that enable someone to secure public protection for the insurance and protection of his rights which he has already derived from another source. The requirement for a complaint, by itself, in order that effects may be recognized in law or before a judge, does not prove that those effects necessarily come from the complaint.

From the explanation already given it seems the following conclusions can be drawn:

1. Juridical ontological positivism, which consists in an unwillingness to admit the very existence of ethical norms, either in the matter of law or of justice, is inadmissible for Catholic jurists.

2. Juridical methodological positivism, which consists in wishing to restrict the name and notion of law to those phenomena only whose effects, enforcible with the aid of the public agencies of the state, are given by positive law, and in so far as they are given, is not entirely inadmissible for Catholic jurists, because in and of itself it does not contain any thesis which contradicts sound Catholic doctrine.

If this is still on the whole less satisfactory, it is for practical reasons and reasons of scientific methodology. For it is not fitting *methodologically* that a system of public enforcement, which depends intrinsically on and is wholly ordered to a system of rights and obligations, should be considered only in itself, and made the

formal object of juridical science with its rights and obligations in so far as they have ethical and human value left to other disciplines. Practically speaking, this method should be discouraged. For if young students of juridical science — students who scarcely receive any training in the study of ethics and moral theology — begin their study according to that method, certainly their knowledge of the juridical order and its true value will remain stunted and imperfect.

3. Juridical methodological positivism, which consists in limiting law and the study of law to positive law, in such a way, however, that the ethical elements which the juridical order itself contains may be encompassed in that formal object, seems to be a wholly appropriate method that should be considered by Catholic jurists. Modern juridical science must of necessity be positive, because the rights themselves are positive or closed systems which do not admit of other sources of right except positive law.

However, since even the norms of positive law primarily and immediately regard persons, the subjects of rights and obligations for whom law stands as an ethical motive for acting, and only secondarily regard the means of public enforcement, it follows:

1. *Negatively*: a norm which lacks the normative value for human acts, whether because it is not given by legitimate authority, or because it is repugnant to higher

principles of ethics or morals, preferably should not be called law; nor is it fitting that it be subsumed under the notion of law, even though it has the effect of enforcement in a given positive juridical order.

2. *Positively*: the normative value of positive law falls under the formal object of juridical science. Therefore it is the duty of jurists not only to inquire into the means which insure the observance of rights and obligations, but even more to inquire into the value of those rights and obligations themselves by judging their justice, equity, prudence, clarity, etc.

A certain corollary will perhaps not be entirely superfluous. If the ethical aspects of laws and their precepts also constitute part of the formal object of juridical science, it should be not only desirable but even necessary for the scientific training of jurists that even students of civil law be instructed carefully in the science of ethics and its method, especially to the extent that it regards the treatment of law and justice. This postulate, moreover, will benefit not only the science of law; it will be no less profitable to the science of ethics and its treatment of law and justice. For it is one thing to have heard in schools and read in books about the norms of justice, and quite another to engage in a practice which must deal exclusively in safeguarding and promoting law and justice. In this teaching, then, many of the finest and most useful works of Catholic action still remain the hope and vision of the future.

