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Conscience, Obligation, and the Law. By David Cowan Bayne, S.J. Chicago: Loyola University Press, 1966. Pp. xiv, 287. $8.00.

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Book Reviews

CONSCIENCE, OBLIGATION, AND THE LAW. By David Cowan Bayne, S.J. Chicago: Loyola University Press, 1966. Pp. xiv, 287. $8.00.

THIS IS A BOOK devoted to the proposition that the civil law binds in conscience. The author, professor at St. Louis University Law School, develops his thesis polemically with the "mere penalists" as his adversaries. These moralists hold the doctrine of Lex Pure Poenalis; the belief in "a merely penal law . . . one that obliges subjects to do what is prescribed, not under pain of sin, but under penalty of having to submit to whatever punishment is inflicted for violation."[1] Concretely applied, the theory would categorize as penal certain forms of taxation, hunting and fishing laws, and minor traffic regulations.

The doctrine, while apparently anarchial, is justified by the assumption of its proponents that such laws are evaded by large groups of citizens; therefore it would be unduly burdensome to expect exact compliance from a conscientious minority. Fr. Bayne considers the existence of "mere penalism" as a principal obstacle to the establishment of a clear obligation of obedience to the civil law. The author makes his arguments from a great variety of perspectives: theological, philosophical, historical, jurisprudential, even linguistical. On the whole, the points are persuasively made.

I.

In tracing historical antecedents of the penal law theory, he demonstrates that its roots lie in portions of ecclesiastical history which make a civil law transformation dubious. The prevailing maxim of the mere penalists *"sine culpa sed non sine causa,"* (without fault but not without cause) is traced to the Dominican constitutions, where as a voluntarily accepted device for spiritual perfection[2] it had a religious significance quite different from the usual civil law situation. Other contextual distinctions are highlighted, particularly stressing different theological meanings which gave life to the maxim, such as the normal difficulties in a life measured by Divine Providence. A linguistical analysis of the Latin word *poena* is given with the

[1] P. 4.
[2] P. 71.

development of its two meanings: a primary sense of penalty and a transferred sense of hardship interestingly demonstrated.[3]

The strongest attack is upon the theology of Suarez, a major proponent of the penal law theory. This is the high point of the book for here the author effectively combats Suarezian theory with that of a contemporary fellow Jesuit, St. Robert Cardinal Bellarmine. Connecting the latter's thought with the natural law Aristotelian-Thomistic tradition, Fr. Bayne makes explicit the Cardinal's perception of the sociability of man and the necessity of obedience to legitimate authority.[4]

II.

It is the author's obvious competence in abstract sciences and his conviction of his cause which is his undoing when this argument moves to the jurisprudential level. Here he attempts a moralistic interpretation of positive law; and in his zeal to firmly establish a duty of obedience he fails to treat fully factors which ostensibly are at variance with his thesis. He also fails to see that the predominance of reason in law-making, which he has brilliantly demonstrated,[5] does not necessarily require a duty of obedience measured by individual fault.

A primary difficulty lies with the author's inability to grasp the significance of the autonomy of the civil law, a difficulty which flows from a failure to grasp the limits of a theologically and ethically based argument. In his anxiety to establish the obligation to obey the civil law, Fr. Bayne treats instances where the law penalizes without fault as aberrations necessitated by the external character of the common law.[6] The root of the difficulty lies with his understanding of sanction which he insists is not an essential part of law. At a theological level that may be true; it is arguable that the natural law is law even though no immediate sanction exists, but with human law it is difficult to generalize, especially since formidable contemporaries such as Kelsen have made a strong argument that sanctioning is essential to law as we know it in the context of social life.[7] Assuming the sanction is not indispensable, it nevertheless is a positive quality rather than deficiency. For it is a means of realization which assures the autonomy of a human legal system.[8]

This imperative will, at certain junctures, prescind from the personal fault of the subject, not necessarily because of imperfections in the civil law, but rather as a proof of its wholeness. Moreover, this methodology is not, as the author suggests, an intrinsically immoral theory, in spite of Holmesian dictums to the contrary. Austin

[3] Page 78.
[4] *E.g.*, pp. 96-100.
[5] Pp. 105-21.
[6] Chapter VIII.
[7] KELSEN, GENERAL THEORY OF LAW AND THE STATE 18-20 (1945). Compare HART, THE CONCEPT OF LAW Chs. VI & VII (1961).
[8] Holland stated the point cogently, adopting the imperative thesis he held that commands, ". . . are accompanied by a sanction; that is to say they imply, if they do not express, an intimation that their author will see to their being obeyed. Not necessarily by a threat of punishment as such, but also by a promise of interference to prevent disobedience, or to reinstate things in the position in which they were before the act of disobedience." HOLLAND, JURISPRUDENCE 22 (9th ed. 1895). Compare Dabin, *General Theory of Law*, TWENTIETH CENTURY LEGAL PHILOSOPHY SERIES 250-89.

was seriously committed to theological and moral presuppositions[9] and it is arguable that analytical jurisprudence requires a moral dimension.[10]

Father Bayne's treatment of the obligatory aspects of the law of torts is also defective. Principally, this lies in reliance upon traditional moral perspectives in evaluating the growth of tort theories. He correctly points out that the development of the common law out of the medieval period was characterized by an ability to disentangle the efficient, morally responsible causes of injury from those purely mechanical. In the eighteenth and nineteenth centuries this focusing upon individual fault was a substantial achievement and *Brown v. Kendall*[11] is rightfully considered by the author as a high point in American jurisprudence. But to treat it as a focal point or measure for subsequent developments evidences a failure to grasp the growth of the common law at deeper levels.

It is well established that the maturity of the law of torts in the twentieth century is evidenced by its ability to go beyond an individualistic fault criteria. Strict liability, especially in the realm of ultra hazardous activities, represents an attempt to deal with a phenomena of modern life in a manner most conducive to the common good. Recognizing that the nature of many modern activities, although accompanied by due care, necessarily involve a risk of harm to others, the law has begun to require one who wishes to engage in such enterprises to pay for injuries which may inevitably ensue. This is not an obligation based upon individual fault.[12] But neither is it grist for the mere penalists mill. It conforms to the author's insistence upon the rationality of law, since it expresses a heightened sense of responsibility: imposing in the interests of the common good a reasonable condition upon certain limited human activities. The obligation does not lie merely in the penalty or liability, its moral content lies in the ulterior justification for the imposition of liability without fault.

Similarly with developments in negligence liability. The original personal fault origins of the theory have been substantially modified by subsequent developments judicial, historical, and sociological. The evolution of legal negligence has been considerably objectified, making questionable, in many cases, the degree of personal responsibility.[13] Complexity of modern life has made proof of fault extremely difficult, and there is growing consciousness that other techniques for settling disputes traditionally treated as negligence cases may be in the public interest. Workmen's Compensation is the obvious example and variants for automobile accident cases

[9] *Cf.* my article *Austinian Natural Law*, 39 DET. L. J. 650 (1962).
[10] *Cf.* HOLLAND, JURISPRUDENCE ch. III (9th ed. 1895).
[11] 60 Mass. (6 Cush.) 292 (1850).
[12] Father Bayne correctly points out that many strict liability situations involve some fault, but the distinctive aspect of the ultrahazardous activity theory is its non-fault hypothesis. For example, the American Law Institute Restatement (Second) Draft Article 519 provides "(1) one who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has *exercised the utmost care to prevent such harm.*" RESTATEMENT (SECOND) TORTS (Tent. Draft No. 10, p. 52). (Emphasis added).
[13] See, *e.g.*, Seavey, *Negligence—Subjective or Objective?* 41 HARV. L. REV. 1 (1927).

are becoming more commonplace.[14] Through all these factors runs the influence of the social fact of the insurance industry and the potentials of risk sharing it possesses.

A study of the obligation to obey the law should come to grips with all these factors. If the trend is towards liability without fault what is its significance for a thesis which asserts the obligatory force of civil law? Does it not suggest that, in addition to individual responsibility as an index of obligation, one must also consider social duties which prescind, in some measure, from an individualistic ethic?[15] Is not such a change compatible with an insistence upon law as reason? And since some socialization of civil law has papal approval[16] it would be more fruitful to carefully work out its boundaries rather than ignore its presence.

III.

Father Bayne concludes his book with some counter-proposals to mere penalist attempts to solve the moral dilemmas of obedience faced by the individual in a civil law system. On the whole, the proposals are meritorious. Emphasizing the necessity of reasonableness,[17] the author supplements this norm with a discussion of the maxims *nemo tenetur ad impossible* (no one is held to the impossible);[18] the doctrine of *consuetudo*[19] *de minimus*[20] and *epikeia*.[21] An explanation of *Lex Dubia Non Obligat*[22] (a doubtful law does not oblige) is particularly interesting especially as it is applied to tax law.

One principle—the law must foster religion—gives rise to considerable difficulties. Is one disadvantaged by judicial opinions in the realm of the first amendment's religion provisions obliged to obey? Quoting the traditional norm that positive law must, in its broadest purposes, foster religion, Father Bayne refers to two examples wherein he believes that the conscientious citizen may disobey: Jewish merchants faced with Sunday blue laws, and school board members faced with demands by religious sects for permission to utilize classrooms in public school buildings during released time for religious instructions.[23] His justification combines a moral norm with judicial proof. Moralists could submit a probable opinion that disobedience is justified, in spite of decisions by the Supreme Court to the contrary, because disobedience has sufficiently competent authoritative support in the cogency of dissenting opinions in the controlling cases.

[14] A bibliography appears in Conard & Jacobs, *New Hope for Consensus in the Automobile Injury Impasse*, 52 A.B.A.J. 533 n.2 (1966).

[15] A comprehensive treatment requires an analysis of the non-fault aspects in other areas of civil law. A good introduction to the criminal law side of the problem is Glassman, *Why Don't we Teach Criminal Law?* 15 J. LEGAL ED. 37 (1962).

[16] *Cf. Pacem in Terris* §§ 60-63. Father Bayne has not considered the relevance of Pope John's thought to the subject matter of this book.

[17] Pp. 198-99.

[18] *Id.* at 201.

[19] *Ibid.*

[20] *Id.* at 215.

[21] *Id.* at 220.

[22] *Id.* at 205-10.

[23] *Id.* at 192-98.

In raising this point Father Bayne has put his finger on a weak spot in our constitutional tradition. The law-mindedness of the people has made possible a virtually legislative dimension to constitutional adjudication. One by-product has been a fairly high degree of uncritical acceptance of results. This is particularly true in the religious aspects of first amendment litigation. Put more bluntly, disobedience or even disapproval is often considered un-American. It is difficult to justify this attitude; nothing in the nature of things suggests the need for the citizen adversely affected by Church-State decisions to automatically acquiesce, while one with other civil rights expectations is practically expected to protest an adverse opinion.

On the other hand, the matter needs more extensive treatment than it is given in this book. One obvious contrary consideration is the overall interests of the community. The needs of the common good may suggest that acquiescence is the proper path to pursue even where an infringement upon religious liberty is significant. Also, the intrinsic pattern of constitutional decision making as an authoritative process should be fully considered before any conclusions should be offered.[24]

Perhaps my central objection is the manner of resolution that is proposed, particularly with the question of religious use of public school facilities. The growth of the common law occurs in individual, concrete, cases and situations. Because of this it is arguable that throughout this development, even with constitutional problems, the influence of morals and religion should also be particularized. The concrete case can be paralleled by an individual opinion by a priest to persons interested in the controversy that a probable opinion of obedience or disobedience does or does not apply.

Such an approach does not come to grips with the true exigencies of the situation. To preclude religious instructions on public school property does injure the individual person, since it forces upon him a false dichotomy where there should be a unity of experience. But the rule also deeply affects the teaching role of the church. If the rights of the Church are substantially hindered by the *McCollum* decision,[25] then the matter should be faced directly and openly by ecclesiastical persons who bear the appropriate responsibility. Techniques of indirection only dilute the authoritativeness of the Church's viewpoints, as the strategy towards government aid to birth control has recently demonstrated.[26]

IV.

This study, particularly in its philosophical and theological dimensions, should prove to clarify the fundamental postulates of the mere penalists and on a broader level, it should serve to reconcile Suarezian and Thomistic thought in a manner similar to the earlier work by Father Davitt.[27] Subsequent studies should grasp more firmly

[24] I have tried to trace the general outlines of an authoritative critique of Supreme Court decisions in *The Supreme Court and Democratic Theory*, 17 SYRACUSE L. REV. 642 (1966).

[25] 330 U.S. 203 (1947).

[26] *I.e.*, treating it as an invasion of privacy rather than attending directly to the licitness of birth control, per se. *Cf.* the editorial comment in *The Commonweal*, Dec. 2, 1966, pp. 245-46.

[27] DAVITT, THE NATURE OF LAW (1951).

the modalities of positive law and thus bring the problems of obedience to civil law into a more contemporary perspective. In the meantime, both moralists and lawyers are indebted to Father Bayne for his scholarly treatment of a difficult topic.

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STATE LEGISLATURES IN AMERICAN POLITICS. Edited by Alexander Heard. Englewood Cliffs, N.J.: The American Assembly, Prentice Hall, Inc., 1966. Pp. 192. Paper: $1.95, Cloth: $3.95.

"LIKE TRYING TO GET A DRINK OF WATER from a firehose," was the descriptive simile a student wag used to describe the process of getting educated at a prominent American university. Much the same comment could be made about getting educated to state legislatures and their problems through this volume—except that the water is dehydrated.

This is an observation, not a criticism. Chancellor Heard and his editors have tried, in brief compass, to both describe and analyze American state legislatures. To do so, they have been forced to relegate to a sentence or paragraph topics suitable for book-length treatment. Had they not done so, they would have produced a shelf of books—and who, other than the practicing academician, can read a shelf of books in this age of information inundation?

By and large their product is a good one—well and incisively written, with balance and perspective. Some of the descriptive passages, compressed as they are, cause one to think of high school government books. Some of the analytical passages, suffering from telescoped logical development, provide less than the full discussion one would like. But these are minor, understandable and forgiveable defects. Organizationally, the volume begins with an introduction by Chancellor Heard and closes with an assessment by him of the prospects of reform. In between are five pieces by individual political scientists. They consider, with some overlapping, the dimensions of state politics, functions and powers of the legislature, organization and procedure in state legislatures, the political setting, and legislators themselves.

The picture painted is a depressing one: Legislatures peopled with many who are at best inexperienced or inept; at worst stupid, obstructive or venal. Sessions too short, too infrequent. High vulnerability to pressure groups—sometime more politely called "interest" groups—organized around nuclei of self-interest which galvanize action toward goals inconsistent with thoughtful government or the interests of John Q. Public. Inadequate compensation. Little, if any staff support. Probably no office for the legislator to use.

Perhaps the most vividly depressing statistics are those found in Professor John Wahlke's chapter on organization and procedure. Think for a moment of the im-

portant issues state legislatures decide, even in this era of an enlarged federal role. Then think of a legislator who typically has only a small desk on the crowded floor of a legislative chamber as an office. Who has no one to type his letters, or to call around the capital to find what state agency can assist a constituent who has dumped a real or imagined grievance on his doorstep (an inaccurate figure of speech, since he doesn't even have a doorstep to call his own). Who, in ten states, does not receive copies—even mimeographed copies—of the bills upon which he is to vote. All is not deprivation and hardship, however; there is a good chance that our lawgiving friend will have a private cuspidor.

All this amply supports Professor Wahlke's conclusion that "[a] modern business attempting to carry on under comparable circumstances would be thought hopelessly out of date,"[1] as well as his conclusion that "[t]o a surprising degree . . . every American state legislature depends upon individual legislators taking on a variety of tedious and frequently menial chores."[2]

Of only minor significance in any overview of the book, but of some indignation value to the lawyers, are Professor Duane Lockard's observations concerning the charge that lawyer-legislators abuse their insider positions to push through legislation benefitting their profession. Professor Lockard, speaking from his own "insider" experience as a former member of a Connecticut legislature judiciary committee—the only non-lawyer then on that committee, by the way—apparently acquits lawyer-legislators of pernicious conspiracy in feathering lawyer-nests, while finding them guilty of the lesser included offense of bias where professional interests conflict with public ones.

The critical facilities of reviewers are suspect if a volume is permitted to pass without some remarks indicating what he, safe from dangers inherent in taking his own advice, would have done differently had fate entrusted the preparation of the volume to his care. I would opt for a chapter in which the generalities concerning state legislature, which necessarily had to be left standing elsewhere in the book, could be brought into sharper relief by examining a single state legislature with an eye toward assessing the impact of various factors. In such a chapter the characteristics of the legislator, the state political situation, and the functions, powers, organization and procedure of a single state system might be measured against the other systemic paramenters which Professor Jacob explored in the first chapter. This would have made the generalities more meaningful, while bridging the areas discussed by the individual contributors.

In particular, greater specificity might have improved the chapter describing legislators. As written, it focuses upon such things as legislators' self-perceptions of their role, amateurism, and social and economic backgrounds. While I acknowledge the risk that a more detailed examination might border on *ad hominem* comments, or upon group libel, I think it would have been more interesting and informative than some of the material Professor Lockard included, a good bit of which was covered elsewhere in the book. Conclusions which might follow so specific a treatment—per-

[1] P. 136.
[2] P. 132.

haps that chicken farmers make better legislators than economists, or the reverse—would have a greater potential for giving offense than blander overviews. But so long as state legislatures reflect anomalies wrapped in absurdities, progress will require measures offensive to many of the "in-group."

A final critical remark: Nowhere in the volume is there a discussion of the costs of legislative activity in gross, although Professor Lockard does discuss the scale of compensation of legislators. It would have been informative to have included more of the available data on the total cost of supporting the legislature, and compared this with the cost of state programs, and perhaps some local programs closely affected by state legislative activity. Viewed in this light, the price the public pays for ill-considered legislation may qualify better salaries and improved staffs for legislators as the bargain of the year.

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