

BOOK REVIEWS

THE CONSTITUTION AND THE SUPREME COURT: A DOCUMENTARY HISTORY. EDITED BY LOUIS H. POLLAK. Cleveland: The World Publishing Company, 1966. Volume I, pp. xxvii, 440; Volume II, pp. xxiii, 483. \$15.00.

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At the Tenth Yale Conference on the Teaching of Social Studies, Dean Louis H. Pollak said:

It has been my feeling as a lawyer that public exposition of the fundamental principles of constitutional law which structure our democratic society has been notably lacking. We have all kinds of studies which make it amply clear that the general level of public understanding of our basic constitutional rights and freedoms is low. And this, I take it, is a very direct commentary upon the quality of our general education.¹

Recent efforts, including institutes on the order of the Yale Conferences, to remedy these deficiencies in public knowledge, understanding and education are many and promising. In the District of Columbia, for example, the Younger Lawyers Committee of the Federal Bar Association, in cooperation with the District high schools, administers and staffs a program whereby young attorneys enter the high schools and, using specially prepared materials, teach short courses in constitutional law that concentrate on the Bill of Rights.²

But even heroic efforts to bring the Constitution into formal public (and private) education will not by themselves be sufficient for the task of raising "the general level of public understanding of our basic constitutional rights and freedoms,"³ because in large measure our deficiencies⁴ in this area result from an insufficient number of useful books focusing on constitutional law and the Supreme Court for the understanding of the student-citizen. As Dean Pollak wrote in 1962, although "specialists in constitutional law have few, if any, more important responsibilities than providing an informed basis for public discussion of the great civil liberties issues of our day . . . books that fulfill this function in a significant way . . . are all too few."⁴

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¹ Pollak, *Exposition and Defense of the Supreme Court's Position in the Recent School Prayer Cases*, in THE CONSTITUTION AND CONSTITUTIONALISM: A REPORT OF THE TENTH YALE CONFERENCE ON THE TEACHING OF SOCIAL STUDIES 59 (1965).

² See THESE UNALIENABLE RIGHTS: A HANDBOOK OF THE BILL OF RIGHTS FOR HIGH SCHOOL STUDENTS (The Younger Lawyers Comm. of the Federal Bar Ass'n ed. 1965).

³ Pollak, *supra* note 1, at 59.

⁴ Pollak, Book Review, 62 COLUM. L. REV. 1536 (1962).

Unlike the few outstanding books Dean Pollak mentions to illustrate his point,⁵ his two volumes are not wholly concerned with "the great civil liberties issues of our day." His extensive treatment of that area, however, should provide "an informed basis for public discussion" of these issues. As the title of his work indicates, Dean Pollak has compiled a documentary history of the Constitution and the Supreme Court. In producing these volumes, he has been responsive to his own criticism; he has presented these volumes to serve the "intended function of communicating to the non-lawyer some understanding of the development of the American Constitution."⁶ I am pleased to report that the effort should be successful. Although its length may discourage casual reading by many laymen, this compilation should provide a useful basis for high school courses in civics and college courses in constitutional law and government. Moreover, like the two excellent studies of the contemporary operation of the Supreme Court and constitutional law that were recently written by the journalists Anthony Lewis⁷ and James Clayton,⁸ Dean Pollak's work has succeeded in communicating much of value not only for laymen, but for lawyers as well.⁹

Fortunately, in these two volumes we have not been presented with the usual compilation of documents which, while useful and convenient for the scholar and judge, is too dry and dull for the average concerned layman.¹⁰ This is no mere collection of documents preceded by an introductory and analytical chapter. There is almost as much of Dean Pollak's probing, yet casual prose in these two volumes as there is quoted material and judicial opinions. Moreover, the materials and the unifying commentary wear well together.

Occasionally Dean Pollak neglected to include material I would have included¹¹—in one notable instance¹² to the point of being

⁵ CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); GREENBERG, *RACE RELATIONS AND AMERICAN LAW* (1959).

⁶ Vol. 1, p. xxii.

⁷ LEWIS, *GIDEON'S TRUMPET* (1964).

⁸ CLAYTON, *THE MAKING OF JUSTICE: THE SUPREME COURT IN ACTION* (1964).

⁹ See also BLACK, *THE PEOPLE AND THE COURT* (1960).

¹⁰ See, e.g., *DOCUMENTS ON FUNDAMENTAL HUMAN RIGHTS* (Chafee ed. 1963). It is also more readable than, though not as deep as, Professor Sutherland's recent survey, *SUTHERLAND, CONSTITUTIONALISM IN AMERICA: ORIGIN AND EVOLUTION OF ITS FUNDAMENTAL IDEAS* (1965).

¹¹ Generally the neglect is quite minor. For example, in discussing the Great Steamboat Monopoly case, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), vol. 1, pp. 236-47, he might have clarified the issues more if he had included some mention of the extent to which not only New York but many other states had granted (often retaliatory) monopolies that were inconsistent with those of other states. See, e.g., *BARRETT, BRUTON & HONNOLD, CONSTITUTIONAL LAW* 159 (2d ed. 1963); *SUTHERLAND, op. cit. supra* note 10, at 343. One or two of the deficiencies is major. For example, in dealing with freedom of speech and of the press, vol. 2, pp. 1-51, he does not take up obscenity and libel.

¹² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The concept of "inherent" presidential powers was taken up as a brief postscript to the general survey of national power. Vol. 1, pp. 342-47. In the introductory note to this postscript, Dean Pollak wrote: "Lack of space prevents exploration here of the breadth

misleading. Ordinarily, however, his selection of materials is unexceptionable. Moreover, where possible, the selection not only illustrates and illuminates historic developments, but also highlights and places in a larger historic-legal matrix issues of contemporary relevance. For example, certain broad developments under the commerce clause were illustrated by cases involving racial discrimination.¹³

Generally following the traditional and functionally oriented outline of most good constitutional law casebooks and law school courses,¹⁴

and the subtleties of the President's powers. But it is possible and appropriate to set forth the Court's opinion rebutting the most recent Presidential claim to "inherent powers." Vol. 1, p. 343. After briefly relating the background of the Steel Seizure case, only Mr. Justice Black's opinion for the Court was set forth—with the apology that "regrettably, there is not room to include the several concurring and dissenting opinions." Vol. 1, p. 343. The lack of space was more than regrettable, for in my view, presentation of Mr. Justice Black's opinion without qualification by the five concurring and one dissenting opinions was misleading. Mr. Justice Black, finding that President Truman's seizure of the steel mills involved an exercise of the lawmaking power, concluded that, absent congressional authority, the President could not seize (despite the existence of the Korean War) because "the Founders of this Nation entrusted the lawmaking power to Congress alone in both good and bad times." 343 U.S. at 589. But, in articulating this broad principle, Mr. Justice Black spoke at most for himself and perhaps for Mr. Justice Douglas. See 343 U.S. at 629 (Douglas, J., concurring). Mr. Chief Justice Vinson, joined by Justices Reed and Minton, dissented. Justices Jackson, Clark, Frankfurter and Burton each concurred in separate opinions. None of these concurrences adopted the broad ramifications of Mr. Justice Black's opinion. Each instead essentially went off on the ground that, in the circumstances of the particular case, the President could not constitutionally seize the steel mills as he had because either Congress had (almost) expressly denied this power to him, or he had failed to follow the procedures prescribed by Congress for resolution of the kinds of problems that were involved in the conflict.

¹³ See vol. 1, pp. 260-74. Of course, much of the creative and far-reaching federal civil rights legislation of the past few years has been well-founded on the commerce clause. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), as deepened and extended, with periods of retrogression from *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824) through *Katzenbach v. McClung*, 379 U.S. 294 (1964), to encompass even the operation of Ollie's Barbecue, a family-owned restaurant whose only relation to interstate commerce was approximately \$70,000 (of a total of \$150,000) of food stuffs that had moved in interstate commerce.

¹⁴ The Preface to volume 1 contains an illustrative outline of the two volumes:

The first volume begins with the Declaration of Independence, for the obvious reason that the act of denying continued British dominion forced the American states to develop new political relationships among themselves and with other nations. To formulate—to *constitute*—these new relationships was a two-phased process.

The first phase—the drawing up and ratification of Articles of Confederation which "shall be inviolably observed" by states constituting a "Union [which] shall be perpetual"—in retrospect seems abortive. For the Articles of Confederation were superseded within a decade. But if the Articles were not "inviolably observed," the union nonetheless has continued in being to this day.

In short, the states' unsuccessful attempt to live together under the Articles of Confederation was the necessary historic precondition of the second phase of America's political development: the negotiation and adoption of the Constitution.

The adoption of the Constitution is only the preface to America's constitutional history. The history itself has been the development of institutions—primarily, the United States Supreme Court—capable of giving continuity and contemporary force to generalizations about the politics of freedom which were crystallized in the eighteenth century.

To make this history meaningful (and simultaneously, to convey some sense of the actual workings of the judicial process) a considerable portion

Dean Pollak has performed skillfully—rather like Leonard Bernstein—placing in proper perspective and explaining the basic materials of constitutional law, history and development as they are played. It is in fact a virtuoso performance in which the materials are presented, without hesitation or apology, against the clear motif provided by Dean Pollak's own well-formulated philosophy of law, government and judicial review.

of the first volume is devoted to the Supreme Court's early and fundamental assertions of authority:

First, there is the history of *Marbury v. Madison*, which gave John Marshall a platform for claiming vast judicial power while eschewing the hazards of its immediate and almost assuredly unsuccessful exercise.

Second, there is the history of the Bank of the United States: a constitutional debate which began with the first Congress; a constitutional debate in which Alexander Hamilton, James Madison, Thomas Jefferson, George Washington, Daniel Webster, Andrew Jackson, and Roger B. Taney all played major roles; a constitutional debate in which, nevertheless, as our national myths have evolved, Marshall occupies the center of the stage alone. It is a history which began to shape the concurrent responsibilities of Congress, the President, and the federal courts, for declaring the nation's fundamental law. And it is a history which largely settled the supremacy of federal over state law, and the correlative authority of the Supreme Court as the ultimate arbiter between them.

Third, there is the history of *Gibbons v. Ogden*, in which the Supreme Court again speaking through Marshall, put itself into the business of reviewing state economic policies assertedly inconsistent with the national free market embodied in the Constitution. The later history of the case shows the compliance of state judicial authority with the Supreme Court's mandate, a compliance which has been customary (though not invariable) and for lack of which the American constitutional experiment would long since have been liquidated. Cases subsequent to *Gibbons v. Ogden*, under both the commerce clause and the Fourteenth Amendment, show something of the Court's periodic wisdom, and something of the Court's periodic folly, as reviser of state economic policy and hence as shaper of national economic policy.

Next, the first volume considers the role of the Supreme Court in relation to the slow-in-coming, but ultimately massive, assertion by Congress and the President of the power to govern the whole United States, internally and as a nation in the world. Here, the limits of judicial competence—especially as illustrated by the Supreme Court's calamitous war with Franklin D. Roosevelt—are etched most sharply.

The first volume closes with a brief look at the United Nations and the International Court of Justice—supranational institutions which have thus far acquired very little real authority but which may, in the long future, become the instrumentalities of a viable and world-wide constitutionalism.

The second volume then concentrates on those phases of America's constitutional development in which claims to personal freedom have been juxtaposed against the powers to govern. Here, in accommodating democratic aspirations with one another and with the pragmatic demands of effective government, the Constitution and the Supreme Court have perhaps achieved their most considerable successes. The materials canvass familiar and currently compelling issues—issues of free speech; issues of freedom of religion and its correlative separation of church and state; and, at considerable length, issues of racial equality and of legislative reapportionment which are today the first order of judicial business. Also, the materials consider, in some detail, cases raising questions as to the procedures constitutionally required in order to assure a fair trial for one charged with crime. Underlying this extended treatment of due-process questions are the recognition that the criminal process has direct impact on hundreds of thousands of Americans every year, and the cognate hope that ruminating about these questions will yield some rudimentary understanding of what is at once the law's most threatening and most familiar face.

Dean Pollak, like many of his colleagues on the Yale Law School faculty,¹⁵ is a so-called "judicial activist"; he not only accepts the legitimacy of judicial review as being beyond meaningful contest,¹⁶ but he also does not shy from its application, and generally he approves of the far-reaching and creative use to which it has been put in recent years.¹⁷ Even in his activism, however, he takes pains to make it clear that

by and large, it is not the business of federal judges to propound the broad social policies which are to give direction to the American community. This is the business of elective officials, Congress and the President. The principal judicial function is to apply laws enacted by Congress and approved by the President in the particular factual situations—the particular litigated "cases" or "controversies" (to use the words of article III of the Constitution)—which reach the courts.¹⁸

Obviously, Dean Pollak is speaking comparatively. Supporting, as he does, the school desegregation decisions and their progeny,¹⁹ he does not deny that on notable occasions the Supreme Court in fact propounds (or at very least significantly affects) our broad social policies.²⁰ And he certainly does not deny that in the course of construing the Constitution, the Court conducts a continuous national seminar on our society's postulates²¹ and articulates fundamental principles for its governance.²² In making his statement on the limited function of judicial review, Dean Pollak is merely reflecting his acute value judgment or accurate insight that in a democracy most governing and policy-making must be performed by officials more directly responsive to electoral processes than are judges. He is also giving recognition to the reality that "the political victories won

¹⁵ See, e.g., BLACK, *op. cit. supra* note 9; RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955* (1955); ROSTOW, *THE SOVEREIGN PREROGATIVE: THE SUPREME COURT AND THE QUEST FOR LAW* (1962).

¹⁶ See, e.g., vol. 1, pp. 75-84, 95-96, 151-58.

¹⁷ Indicative of Dean Pollak's deep commitment to the Supreme Court and judicial review is his dismissal of President Roosevelt's Court-packing efforts with the curt statement: "It was a bold and malicious stroke and it deserved to fail." Vol. 1, p. 337. His commitment on visceral as well as intellectual levels is evident throughout the two volumes and is highlighted at the end of the second volume by a lyric presentation of the official correspondence incidental to the resignation of Mr. Justice Frankfurter from the Court and his subsequent death. Vol. 2, pp. 422-28.

¹⁸ Vol. 1, p. 153.

¹⁹ *Brown v. Board of Education*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Education*, 349 U.S. 294 (1955). See also Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959).

²⁰ See, e.g., vol. 1, pp. 191-92.

²¹ See ROSTOW, *op. cit. supra* note 15, at 167-68.

²² As Dean Pollak said: In *Brown*, "the Court was simply making a judgment about the dominant moral values of the American community, values which have altered in substantial measure since *Plessy* was decided in 1896. Weighing such moral values is an accredited, indeed essential, part of constitutional adjudication." Vol. 2, pp. 266-67. See also BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

in court are purely defensive in character. Judges cannot clear slums or build public hospitals and public schools or alter the tax structure."²³ And further, he is reminding us that "courts which enter the lists against the President and Congress have only their prestige as armament."²⁴

Like most contemporary exponents of "judicial activism," Dean Pollak finds judicial review useful (more than that, acceptable) only because he believes that it is consonant with and promotes the purposes and forms of democracy. He believes in majority rule, but fully understands that "in the short run, popular majorities can be, and have been, indifferent and even hostile to other crucial democratic values—especially the rights of minorities to dissent, or merely survive, with dignity and respect."²⁵ Consequently, he celebrates the fact that "in time judicial review embraced, as a matter of prime judicial responsibility, the protection of the ingredients of a free society."²⁶ But he leaves no doubt that in his opinion the members of past Courts were wrong in acting on the belief that "economic liberties," broadly defined, are included in the "essential ingredients of a free society." As he put it, "The economic liberties, once enforced, had behind them only the transient momentum of a single era's devotion to doctrines of *laissez faire*—doctrines not contained in the Constitution except as particular Justices chose to place them there."²⁷ On the other hand, Dean Pollak skillfully applauds the view prevailing on the contemporary Court that

by contrast, the basic personal liberties, including freedom of speech and thought, are a permanent and central element of our nation's democratic commitment. They were—as *laissez faire* economics was not—written into the Bill of Rights. And though the Bill of Rights did then, and does now, limit only the national government, it furnishes a philosophically valid, if not an exclusive, guide to the definition of the non-self-defining word "liberty" in the Fourteenth Amendment.²⁸

It is when the Court is protecting and elaborating the "crucial democratic values" generally described as "civil liberties and rights" that Dean Pollak believes it is at its best and most creative. Not only does he approve of the Court's generous application of the express

²³ Vol. 2, p. 344. See also BICKEL, *op. cit. supra* note 21; Black, *Inequities in Districting for Congress: Baker v. Carr and Colegrove v. Green*, 72 YALE L.J. 13 (1962).

²⁴ Vol. 2, p. 124; see also BICKEL, *op. cit. supra* note 21.

²⁵ Vol. 1, p. 155.

²⁶ Vol. 1, p. 21.

²⁷ Vol. 2, p. 15. See also McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, in 1962 SUPREME COURT REVIEW 34 (Kurland ed. 1963). But cf. SUTHERLAND, *op. cit. supra* note 10, at 453-67.

²⁸ Vol. 2, pp. 15-16; *accord*, vol. 1, pp. 301-08. See also vol. 1, pp. 154-55, 327, 338-39; Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U.L. REV. 13, 226 (1958). It is notable that Dean Pollak is also a believer in the firstness of the First Amendment. See vol. 2, pp. 3-4.

guarantees encapsulated in the first eight amendments, but he treasures "flexibility in judicial reading of the 'liberty' protected by the due process clause[s]." ²⁹ He plays no anxious games to justify or camouflage judicial decision-making employed to secure personal liberties against contemporary threat. As already noted, he approves broad judicial use of the concept of "due process of law" to preserve these interests, while he simultaneously deplores judicial use of the due process clause to promote the transient philosophy of *laissez faire* economics. He finds, in fact, "singularly" unpersuasive the convoluted "rationales advanced for five members of the Court, by Justices Douglas and Goldberg" in the Connecticut birth control case ³⁰ to discover or justify some new fount for judicial creativity. Unlike those Justices, most of whom have bitter personal memories of the mischief wrought by the *laissez faire* judges of old, Dean Pollak labors under no compulsion to disdain and forswear use of the old wineskins that are the due process clauses ³¹ and to search instead for new and uncontaminated skins, such as the ninth amendment and the penumbras of all constitutional provisions, to contain the old and heady wine of judicial creativity and activism. ³²

Although understanding the importance of mythology (*e.g.*, the notion that the Constitution is immutable) Dean Pollak is both result-oriented and honest. He wants the job to be done and done well. He cares, therefore, comparatively little what precise theory is employed to accomplish the task. ³³ And yet, in his honesty, and his healthy sense of democracy he prefers that the Court and others use those theories that reveal best what the Court in fact does with the Constitution ³⁴—continually blowing into its spare and flexible provisions the life and winds of the present, as revealed in our society, while auditing, as best it is able, both the past and the future. This, among others, is the story that Dean Pollak nicely unfolds and the service that perhaps he best performs for those who will read his well-made book. Communicating on many levels, he provides substantial insight into the uses of law as our primary battleground for resolution of the twin social drives for stability and change and the uses of the Constitution and the Supreme Court as critical agencies for the constant rejuvenation and articulation of principle in our society.

²⁹ Vol. 1, p. 301.

³⁰ Vol. 2, p. 445. *Griswold v. Connecticut*, 381 U.S. 479 (1965). The remaining Justices in the group of five were Mr. Justice Clark, who evidently agreed with Mr. Justice Douglas' opinion for the Court, and Mr. Chief Justice Warren and Mr. Justice Brennan who joined Mr. Justice Goldberg's concurring opinion.

³¹ Obviously, Dean Pollak does not approve of the general rejection of this kind of judicial creativity that Justices Black and Stewart demanded in dissent.

³² See the concurring opinions of Justices Harlan and White, urging that the due process clause of the fourteenth amendment stands on its own feet as a protection of the basic values implicit in the concept of ordered liberty.

³³ See, *e.g.*, vol. 2, p. 179.

³⁴ *But cf.* Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56 (1965).

CONSCIENCE, OBLIGATION, AND THE LAW: THE MORAL BINDING POWER OF THE CIVIL LAW. BY DAVID COWAN BAYNE. Chicago: Loyola University Press, 1966. Pp. xiv, 287. \$8.00.

Brendan F. Brown†

Father David Cowan Bayne's¹ treatise "is an attempt to formulate a positive philosophy of the civil law,"² by showing that the doctrine of purely penal law is unnecessary, historically ill-founded and inherently untenable. By a purely penal law is meant "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."³ By civil law is meant the Anglo-American legal system, and systems founded on the Justinian and Napoleonic Codes. It encompasses both criminal and noncriminal elements, but excludes divine positive law, natural law and ecclesiastical law.

The author is vexed, if not irritated, by the fact that after a family controversy among scholastic philosophers and Catholic theologians, which has lasted for over 400 years, the overwhelming weight of authority is still on the side of the purely penal law doctrine. It is his opinion that such a doctrine is often against the common good, insofar as it encourages laxity toward the payment of taxes, for example, and the performance of other social obligations. The reason is that right order in a society depends on effective self-policing by the citizens, who are "conscious of moral values and the moral obligation of law."⁴ He admits, however, that as the situation now stands, it is morally allowable for a person to follow the purely penal law theory, if he is certain that it is well-founded.

In this family controversy, there is agreement that a personal God exists who is Author of a divine plan or law for all creation, including man and is knowable by reason; that God created man and endowed him with a distinctively human nature, which is essentially the same in all men; and that the part of the eternal law which is applicable to man is the natural law, which demands that men obey duly

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² Preface, p. x.

³ P. 4.

⁴ P. 13.

constituted authority. All agree that human will and reason interact in the lawmaking process, disagreeing only as to whether the controlling emphasis should be on the will or the reason.

Indeed, the family quarrel must be still further narrowed. The controversialists agree that all just laws possess morally binding force as a matter of conscience. There is disagreement only about that type of state law which is morally neutral before the state speaks by enacting the law in question. Therefore, the doctrine of penal law is restricted even by its own scholastic exponents to those laws which derive their efficacy "from the fact that they are prescribed by the law of the duly constituted state and not directly from the natural law."⁵

Generally speaking, the reviewer agrees with Jesuit Bayne as against Jesuit Suarez, who, in the middle of the sixteenth century, gave the penal law doctrine its full flowering, and endowed it with its greatest prestige. The Suarez position stipulates that "the ordination itself does not bind in conscience but that the second command, the sanction, once the law has been violated and the penalty imposed, does carry a moral obligation."⁶ The fallacy of this system is that the human positive law-maker does not have the authority to will that a just law, necessary for the common good in the judgment of the law-maker, does *not* morally bind the citizen. All law rests primarily on reason or intellect, and only secondarily on will, although both faculties interact in the genesis of law. Therefore, as soon as a just law is violated, moral guilt arises independently of the will of the law-maker because the law's first claim to obedience is its objective reasonableness. Since the state's will is only secondarily responsible for obedience to the law, it is beyond the power of the human legislator to absolve a citizen from moral guilt resulting from the conscious violation of the law in the internal forum of the conscience. This subjective culpability is more than merely juridical, political or civil. Hence, all true law binds in conscience, so that violation results in moral fault, however small.

Of course, all scholastic natural law jurists agree that there is no moral wrong in conscience in disobeying a law which is unjust; impossible; not enforced, but openly and continuously disobeyed by the greater part of the community as a matter of long custom; doubtful; or not intended by the legislator to be applicable in a specific, unforeseeable situation because of resulting injustice (*Doctrine of Epikeia*). Certainly, the author is correct in maintaining that these broad limitations upon the moral blameworthiness of the citizen in the field of legal justice are sufficient to mitigate the ethical hardship sought to be avoided by the scholastic theory of penal law. These

⁵ P. 33.

⁶ P. 26.

are all exonerations of the citizen from moral guilt resulting in final analysis from the dictates of objective natural law. To go further, and to admit the power of the will of the political sovereign to eliminate the moral duty of obeying just law, is to open the door, though perhaps but a little, to a legal philosophy which would entirely separate law from morals, both in the internal and external forums.

The chief limitations of the book perhaps are its failure to distinguish adequately between the penal theory of law of positivists and the theories of certain scholastics, and its failure to differentiate violations of commutative justice from those of social justice. In the first place, if a jurist is a positivist—*i.e.*, one who locates the essence of all law in the will of the political sovereign, who can and does enforce his commands—he will hold that no law binds in conscience. If he is a natural law jurist, he may contend that a certain small area of the law may not bind in conscience, if this is the will of the law-maker, or he may hold, like the author, that all just law binds in conscience. But under all theories, if a person violates the law, he will be punished, or liability will be imposed.

The reviewer disagrees with the author when he undertakes to prove that Mr. Justice Holmes, a positivist, was really not an exponent of the penal law doctrine. The following quotation from Holmes' *Common Law* is cited four times in chapter VIII:

While the terminology of morals is still retained, and while the law does still and always, in a certain sense, measure legal liability by moral standards, it nevertheless, by the very necessity of its nature, is continually transmuting those moral standards into external or objective ones, from which the actual guilt of the party concerned is wholly eliminated.⁷

The reviewer cannot agree that Holmes only meant "that the exigencies of the external forum demand rules . . . which cannot always and everywhere meet with complete success in penetrating to the actual moral guilt or innocence of the parties."⁸ It is difficult to understand how the author can make this evaluation of the legal philosophy of Holmes, after having quoted him in an earlier chapter as writing: "I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or to a grain of sand,"⁹ and again, "it would be a gain, at least for the educated, to get rid of the word and notion Sin."¹⁰ Certainly, the well known "bad man theory" of Mr. Justice Holmes shows his preference for a penal theory of state law. Thus, Holmes, a typical positivist, has in fact gone far beyond the

⁷ Pp. 142, 151, 163, 187.

⁸ P. 163.

⁹ P. 21.

¹⁰ *Ibid.*

scholastic penal doctrine by extending that doctrine to all law. For such jurists, therefore, no problem of moral guilt is created when liability in tort is imposed, or punishment in criminal law is inflicted, or when there is a judgment for damages for breach of contract. For positivists it is not a matter of how or why moral guilt arises when law is violated, but simply a matter of no moral guilt at all, because man is significantly no different from a baboon or a grain of sand. Accordingly, to Holmes, all moral standards are eliminated in the process by which these standards are transmuted into law, which, is therefore, amoral. Law and morals are separated.

In the second place, the author's failure to distinguish between violations of social and commutative justice has led him to the erroneous thesis that the Anglo-American legal system generally should be interpreted as eventually having come to follow the principle that an individual should be held responsible only when there is subjective moral guilt. Father Bayne's attempt to explain the many exceptions as the result of "the necessary infirmities of the external forums,"¹¹ or "the lamentable aberrations of the external forum"¹² are not convincing. It is true that on the level of *commutative* justice, *i.e.*, between individual and individual, the Anglo-American legal system did come to recognize, after many centuries, that a person should be held responsible for a violation of law only if there is the subjective moral guilt of willfulness or negligence. But, on the level of *social justice*, it is morally just for society to hold the individual responsible, in many situations, even though there is no subjective guilt. Of course, if there is no individual moral guilt, and no violation of social justice in a particular case, the state would not be justified in holding the individual accountable under a theory of scholastic natural law.

Liability without personal, individual, subjective moral culpability is *not* fundamentally repugnant to the Anglo-American legal system. An individual, subjectively innocent, may nevertheless be the instrument of social injustice, a moral concept, and, hence, justly be held liable in torts, or punished in criminal law.

Certainly the doctrine of liability without fault does not operate on the assumption that the defendant is actually, or most probably, at fault as a matter of subjective moral guilt. The author has cited no convincing authority to this effect. It is true, of course, that "never is the blameless person subjected to liability on the theory that virtue should be punished, but rather that some other seemingly higher principle should prevail."¹³ It is submitted that this higher principle may be a theory of social justice, or one of materialistic, social utility, such as the "deep pocket" theory, but it is never a theory of individual

¹¹ P. 154.

¹² P. 163.

¹³ P. 165.

subjective moral guilt, actual, assumed or fictionalized, under either of the two dominant theories of scholastic natural law or positivism.

The phrase "liability without fault" is valid in its literal meaning only for those who refuse to integrate law and morals. The reviewer agrees with the author that "strict liability is only apparently liability without fault and that in rigid logic it should not be so described."¹⁴ But neither is it true that the fault involved is individual, subjective, moral guilt under either natural law doctrine or positivist theory. The moral fault required to satisfy justice when liability is imposed may be subjective or objective. There is personal, individual guilt (or "sin" on the theological level) only when the illegal act is done willfully or negligently, even though the subjectively, morally blameless individual has been the cause of a socially unjust act on the objective level. Thus civil liability is imposed or criminal punishment is inflicted in spite of the subjective, moral innocence of the actor, because in certain situations the common good requires that a higher moral value be given to social justice than to commutative justice.

The theory of social justice is to be distinguished, however, from that of the scholastic "merepenalists" because under the former theory the justification of liability or punishment is found, not in the subjective will of the law-maker, but rather in the objective criterion of reason, dictated by the requirements of the common good of society. The theory of social justice does not mean that a person may sometimes willfully or negligently violate the law without incurring subjective moral guilt. It simply affirms that social justice may require that a subjectively innocent individual should incur sanction for moral fault arising from not rendering to the entity known as society that to which it is entitled. Something of this type of thinking may have been the reason why even the "merepenalists" attached moral obligation to sanction in reference to all just law, including purely penal law.

The reviewer agrees with the author that all just civil law is morally binding in conscience. But this does not mean that liability or punishment may not be justly imposed despite internal subjective moral innocence. The most significant moral question here for the jurist, as distinguished from the moralist and the theologian, chiefly concerned with the internal forum, is whether the liability or punishment has been justly imposed in the external forum, not whether the penal law is morally binding in conscience. Indeed, it is not a case of willful or negligent violation of a law at all. Hence, it is difficult to understand how the "merepenalists" can find "solace in the civil law itself for their inexplicable imposition of punishment without guilt."¹⁵ Such imposition, which Father Bayne tries unsuccessfully to disprove, does not prove, in the opinion of the reviewer, their point anyway: that the civil law sometimes is not binding in conscience.

¹⁴ P. 176.

¹⁵ P. 142.

The civil law justly punishes when just law is violated with personal "guilt." It may never justly punish without such "guilt," unless of course there is such social "fault" as to require such punishment in order to give society its due.

In conclusion, this scholarly book is to be welcomed as an important contribution to the age-old controversy whether objective natural law thinking can accommodate a merely penal law theory as to man-made, as distinguished from divine law, natural or supernatural. Father Bayne is to be congratulated for this original effort to explain the modern significance of this controversy, in the field of contemporary Anglo-American law and legal doctrine. The book demonstrates the inevitable relevance of natural law thinking to a proper understanding and solution of problems of law enforcement, by showing that positive law loses its authority as soon as its moral power to bind the conscience is denied even to a limited extent.