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Purely penal law a Suarezian defence.

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LA THÈSE A ÉTÉ MICROFILMÉE TELLE QUE NOUS L'AVONS REÇUE
PURELY PENAL LAW:
A SUAREZIAN DEFENCE

by

Mauro Raffaele Mavrinac

A Thesis submitted to the
Faculty of Graduate Studies and Research
through the Department of
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the University of Windsor

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ABSTRACT

PURELY PENAL LAW:
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Mauro Raffaele Mavrinac

The purpose of this thesis is to understand what it means for someone to transgress the law "without fault", something permitted by Suarez's concept of "purely penal law". My thesis, however, is that the purely penal law of Suarez does not permit deliberate disobedience to law.

By citing from Suarez's Tractatus De Legibus Ac Deo Legislatore (Coimbra, 1612) I attempt to show that the will of the Suarezian lawgiver is not an absolutely sovereign will but a will subjugated to the common good. Secondly, I attempt to show that his purely penal law does not permit any moral freedom to disobedience. As a consequence of this textual interpretation the traditional but embarassing maxim "sine culpa non tamen sine causa" may be seen as a morally sound one and therefore not repugnant to the common good.

The conclusion of the thesis is that the destruction of the purely penal law theory of Francisco Suarez is not warranted.
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CHAPTER I

PURELY PENAL LAW EXISTS FOR THE COMMON GOOD

Introduction
This is a thesis on the purely penal law theory of Francisco Suarez, S.J., (1548 - 1617). As the title suggests it is still the subject of a controversy, one I intend to address. By "controversy" here I mean a long list of objections cited against Suarez's theory, and without altering the gravity of the charges the list may be reduced to two.

First, Suarez holds that the will has primacy over the intellect in the lawmaking act. Secondly, and as a consequence of this primacy, a law may, he says, bind ad poenam but not ad culpam. Objections to these claims are found in a representative and scholarly work by David Cowan Bayne, titled Conscience, Obligation, and the Law. My treatment of Suarez is largely restricted to De Legibus Ac Deo Legislatore (1612).

Statement of Purpose and Thesis
My aim in what follows is to understand what it means for someone to transgress the law "without fault."
something permitted by Suarez's concept of "purely penal law". My thesis however, is that the purely penal law of Suarez does not permit deliberate disobedience to law.

Purely Penal Law: the Definitions

When the definition of the purely penal law is extricated and its roots shaken clean of the original Suarezian theory of law the result is astonishing. This process of extrication is presented below through three texts. The first text is perhaps the clearest Suarezian statement of the purely penal law and is firmly embedded in the theory itself.

Some background here will prove helpful. In his text Suarez discusses tax laws, and at this particular point he is concerned with the justice of such laws. His consideration leads him to say that although some tax laws bind in conscience it cannot be denied that others do not bind in this manner because neither

... the prescriptions of the law say that this is the intention of the legislator nor can there be any certainty through these prescriptions (that this is the intention), because, in order that the law may not result in unreasonableness [in excess], it is licit to moderate [alter] the words of the law (and) attach them to that which the matter demands, and then this interpretation [i.e., the alteration] is made -- let us say it like this according to the dictates of justice.

... Neither will this benign interpretation be opposed in which the contribution of the tax is (seen as) the payment of a debt, because it is not essential to a debt that it consist of a fixed quantity [in terms of repayment]; this quantity is indicated by the human law, and it may happen that, (by) indicating (payment) with an absolute
obligation to pay, results in (an) excess (obligation), but by its weakening [i.e., making the obligation light] it still fulfills its purpose. This -- I repeat -- is not a difficulty, because even if the prince always resists (non-payment of a fixed quantity) with moderate penalties up to the point where the subjects do not acquire excessive liberty, it can be presumed with good reason that this coercion is purely penal and directed in this way towards compensating the decrease [partial loss] in tax; in spite of this (loss), custom will hold virtuous the lightening of the obligation in conscience to the law, and the prince either cannot or must not resist this (lightening of the obligation in conscience). 2

The second text is a refined statement of the first. The purely penal law is a law

in which the express intention of the legislator is to give a purely penal law -- as it was said before -- this intention produces a change in the matter of the law, a change which is in the power of the legislator (to make); in effect, he can order this or that matter in a determined, disjunctive, (or) absolute way, although, if he wishes to pass a true law, he cannot completely exclude all obligation in conscience from the matter.

When the intention is not to bind in conscience but to the sanction then this can be understood with regard to the deed which is commanded or prohibited; however the prohibition is not in itself the adequate matter of the law but rather (it) is the disjunction to do the deed or to suffer or bear the penalty, or -- and this amounts to the same thing -- it involves a conditional law to pay the penalty if the deed is not done, and then the obligation in conscience cannot be excluded from the total disjunction. 3

The third text, a refining gloss on the second, is from Bayne.

A purely penal law is 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. 4
The Moral Implications

The moral implications of the purely penal law may be cited from the De Legibus itself.

It can be proven that those transgressors do not (strictly) sin because they prudently conform the dictates of their conscience to the intention of the legislator: well then, (the legislator) declares that by virtue of the law the transgression has no (moral) fault; therefore the subjects form the judgement of their conscience prudently from which no sin follows: therefore in reality they do not sin, because that which proceeds from a legitimate conscience is not a sin.6

Nevertheless, the purely purely penal law is not completely without some sort of obligation. The purely penal law can be reduced to an obligation in conscience to pay or suffer the penalty. This is sufficient for it to be true law even though it does not oblige in conscience to the condition which is under threat of a penalty: with respect to this condition it is called purely penal, although with respect to the penalty itself it has the efficacy of commanding [Latin text: efficaciam habeat obligandi modo].6

Now these two texts have proven to be an embarrassment to the theory of purely penal law, and that embarrassment is caused by the statement, sine culpa, non tamen sine causa: "without fault - not, however, without cause". Thus the cause for punishment is not a moral fault but a culpa civilis, seu politica, a civil or political fault.

This statement allegedly justifies the imposed sanction. It is not evident, however, that it justifies the transgression itself. Thus, when the intricacy of the purely penal law is reduced to the simplicity of Bayne's
text quoted above, Suarez may be accused of two errors. Bayne states the charges with destructive clarity.

This twin sin of the Suarezians can be visualized by the juxtaposition of the two major conclusions of the theory:

Disobedience of true law, yet no sin.
No sin, yet true punishment.

The phrases "no sin" in these two premises is the focus of the error. Removal of the word "no" would cure the difficulty in both instances. It would also destroy the purely penal law. The two premises then would read:

Disobedience engenders sin.
Sin warrants punishment.\(^7\)

Bayne translates the original second premise to mean "punishment is not intrinsically repugnant to virtue".

If the order of the state has been maintained, if the subject has accepted the means to the end, the common good, the necessity for punishment ceases. Punishment might be unnecessary for obedience, but it is inconceivable as a necessity for obedience. Although punishment might not be an essential correlative to sin, it is intrinsically repugnant to virtue.\(^8\)

This last quotation would lead one to believe that the purely penal law of Suarez permits disobedience, that this disobedient act is a means to the common good, that an act which has regard for the common good is virtuous, and that the purely penal law permits punishment of virtuous acts. To make such assumptions, however, requires a thorough transformation of the first text from Suarez cited above in this thesis. And the fact that such a radical transformation is possible, especially coming as it does from Bayne, warrants a reassessment of the philosophical adequacy of the conceptual implications of Suarez's theory of purely penal law. I shall begin this reassessment by
going to the source of the purely penal law, namely the will of the legislator and the end for which his law is promulgated, the common good.

Will and the Common Good

A full defence of purely penal law should meet two challenges. First, the doctrine of the primacy of the will must be sufficiently vindicated. Secondly, the law at issue must be shown to be a true law. My thesis is concerned primarily with the second challenge although given the fact that purely penal law is a creature of the will some consideration of the will's primacy in lawmaking will of course be necessary. By inspecting the text on this subject matter and then comparing it to non-Suarezian texts I hope that the voluntarism of Suarez will be seen in its proper political and moral perspectives, perspectives that will later help isolate the subject matter of purely penal law itself.

The first thing to say, then, is that if the Suarezian will is truly sovereign, the charges against Suarez remain unaltered in their gravity. If it is not, then a defence of the validity of purely penal law is at least conceivable.

Now, I submit that the psychological primacy of the will does not warrant absolute political or moral supremacy even though logically, absolute sovereignty fully expresses the primacy of the will in the lawmaking process. An
example of such sovereignty might be the following and is contained in a speech by King James to the Lords and Commons. There the King proclaimed that

Kings are justly called Gods, for that they exercise a manner or resemblance of Divine power upon earth... And the like power have Kings: they make and unmake their subjects; they have the power of raising, and casting down: of life, and of death. ... They have the power to exalt low things, and abase high things, and make their subjects like men at the Chess.²

Hugo Grotius brings this power full circle when he says that "the exercise of sovereign power is not lost by wrongdoing". ³

This concept of absolute sovereignty stands in stark contrast to that of the twelfth century which, Thomas Gilby says, "was prepared to disobey openly tyrannical edicts."⁴ He explains:

The civil lawyers hastened the process ... to establish the condition of a State which acknowledged no authority but its own ... A purely secular social morality proved unable to stand on its own and Natural Law sentiments were to persist ... All the same when Machiavelli separated diplomacy and the mechanics of government from morals he split apart what had been cracked already two centuries before, and so prepared for the positivism of modern times. ⁵

That split from morality had come into the open by Suarez's time. Meinecke recounts the popular feelings of the seventeenth century by alluding to Gustav Freytag's Bilder Aus deutschen Vergangenheit.⁶ Freytag gives the impression that the political power perverted itself under the intoxicating influence of this new constitution, absolute sovereignty. Saint Thomas Aquinas, on the other
hand, saw it as the lust of the will. "Therefore this kind of government is to be avoided as the Wise man admonishes: 'Keep thee far away from the man who has the power to kill', because, forsooth, he kills not for justice' sake but by his power, for the lust of his will."\textsuperscript{14}

Prudence demands that this admonishment be respected. In fact we could go much further and say that Aquinas counsels rulers to direct their subjects to the attaining of the common good. It is therefore a great irony that tyranny should be seen as the lust of the will while in the Suarezian system the will should be seen as the source both of civil law and obligations of conscience. That same irony becomes more pronounced when the judgement of Gilby is vindicated by the law text of Suarez himself, for without a doubt there does appear to be a separation between morals and the purely penal law. In the third book of \textit{De Legibus} he says "it is not essential to the law that it bind in conscience."\textsuperscript{15}

In short, the Suarezian system will by some be declared to be dangerous and dissemination of the purely penal law doctrine and the primacy of the will unadvisable. Thus Bayne quoting Sabetti-Barrett: "... it is certain that nothing of this should ever be mentioned to the people" because the doctrines foster civil disobedience.\textsuperscript{16}

To be fair such harsh accusations should be softened. The Suarezian text on law is by no means a confederate appendix to the \textit{Principe}. In fact the contrary is true
and a strong kinship between Aquinas and Suarez exists. This can be seen in the following way. The seed of society is in every man and the flower of temporal life is the perfect community sustained and nourished for its greater perfection by the common good. From seed to flower there are four stages whose end is the common good: the peaceful unity of individuals, the prudence of consent, natural authority and government. The purpose of government, the exercise of legitimate authority through law, is to secure the welfare of all. The Thomistic text On Kingship has this to say:

The chief concern of the ruler of a multitude, therefore, is to procure the unity of peace. It is not even legitimate for him to deliberate whether he shall establish peace in the multitude subject to him . . . for no one should deliberate about an end which he is obliged to seek.17

The Suarezian text on law offers unrestrained support:

... the common good . . . is the final end of the state . . . hence, this common good should be the first principle of (human) law; and therefore, law should exist for the common good.18

Thus prince, law and subject serve one end, the perfection of human unity. This service affects the power of the will.

The will of the Suarezian lawgiver has regard for the common good. The exercise of its authority is a duty, not a privilege. The Suarezian state, no matter what its political constitution, is founded on the consent to an end which is not subject to deliberation because it belongs to man's nature and superior obligation to be social within the limits of his moral and practical abilities. Without
consent perfect human communities would be non-existent.

The text on civil law states:

... supreme power does not reside only in the prince or only in the community ... but in the whole body together with the head. (In this type of government) the power to make laws resides in the whole in such a way that neither the community is capable of making laws without the prince nor the prince without the community.19

The purely penal law of Suarez is no exception. In fact it could be singled out as the law with the hallmark of democracy.

The text on law below is almost sacrificial in tone, a pure act of humility. The purely penal law

... depends on the will of the prince, and (the law) does not contain injustice or severity but rather much leniency [Latin: potius lenitatem], for it seems that the prince in making (this law), instead of exceeding his power, partly cedes [yields] his power of right [Latin: potius ex parte cedere iuri suo].20

To yield the full use of power is not consistent with absolute sovereignty or with the primacy of the will. Such yielding is repugnant to an absolute sovereign. But it is not repugnant to the Suarezian lawmaker, and there is cause for this cession. That cause is his subordination to the common good. Therefore it is incorrect to think of the purely penal law as a creature of power. The purely penal law has its source in an act of submission.

This submission is not without tension, one between the validity of the law on the one hand and its necessity on the other. Validity is not sufficient for promulgation. All laws must be valid. But not all valid
laws should be promulgated, only those that are just. The reason for this is that only they can be said to promote the common good. Those that do will be instrumental in fulfilling the purpose for which they ought to have been promulgated. Of all valid laws they will be the most useful for this fulfillment. Thus three restrictions bear upon the lawmaking power of the will: validity, utility and justice. The will is not morally free to promulgate any valid-law. The law must be useful. Lastly, that utility must be tempered by justice, by prudence which has regard for the frailty of the temporal order.

For instance, though nature commands all to contribute to the public good and prosperity, still whatever belongs to the manner and circumstances, and conditions under which such service is to be rendered must be determined by the wisdom of men, and not by nature herself. It is in the constitution of these particular rules of life, suggested by reason and prudence, and put forth by competent authority, that human law, properly so called, consists.21

Concern for the means is a dictate of prudence, of practical judgements pertaining to the temporal order of man. The purpose of this concern is to promote the greater perfection of the community. This greater perfection is not commanded by the natural law because there are natural impediments and hardships ready to prevent the fulfillment of these added perfections. Thus, greater perfection is measured and executed according to the needs and practical abilities of the community.

Implementing the means for a greater perfection demands the active or passive consent of the community.
Thus, we may conclude that purely penal laws have regard for the conditions permitting this added perfection. The purely penal law is an added perfection in the body of law and promulgated according to the needs and practical ability of the community. A lawmaker is not obligated in conscience to make such a law. A promulgation which has the form of a command does not receive its binding power from the form alone. Therefore when the conditions for the practical possibility for adding a perfection are met then it is permitted to add this perfection or to do without it depending on the utility of the law and the justice of implementing this utility.

Therefore when a perfect community considers an assessment of its needs beyond those demanded by the natural end of a perfect community it must have regard for its ability to satisfy these needs through an act of legislation which necessarily requires prudential consent. Consent in a political setting must always have regard for the common good. This prudential consent permits the addition of non-obligatory perfection but it does not permit undue hardship.

Added perfections do not warrant undue hardships for the perfect community as a whole. To impose hardships through a law is to have contempt for justice, for the common good. But esteem for the common good and for the frailty and constitution of human nature demands righteous submission not to a superior but to the temporal order
itself, an order whose happiness is nourished by the possible and not by the impossible.

Civil Law and the Common Good

In the last section we have seen that the will of the legislator is not an absolutely sovereign will in the lawmaking process so that whatever meaning he will give to the notion of "primacy of the will" it is not that. This section addresses the civil law of Suarez with reference to those characteristics of the law which pertain to the common good. Eventually these characteristics will appear in the purely penal law itself because the purely penal law is part of the civil law.

The civil law is part of positive human law. Suarez explains why a law may be called "human". Its being imposed by humans is not enough; nor is it "human" because it exists in human subjects. Other laws may exist in human subjects as well. Nor is this law called "human" because its subject matter pertains to human affairs. All these things can be said of other types of law as well. The reason for this kind of law being called "human" is rather this:

... that itself which is called human is an act of man, and accordingly, it is proximately established by him; for which reason it is given this epithet of 'human'... Human law is therefore the work of man, derived proximately from his power and wisdom, and ordained for its subjects as a rule and measure of their actions. 22

Thus the human law itself is the work of man. It is a
work especially suited to the temporal order, to the human community. It is the law devoted to the "political government of the state, the guarding of temporal rights, and the preservation of the commonwealth in peace and justice."\(^{23}\)

But this concern for the temporal affairs of man is not without moral obligations. The name "law" says Suarez

\[ \ldots \text{is properly applied, in an absolute sense, to that which pertains to moral conduct.} \ldots \text{law is a certain measure of moral acts, in the sense that such acts are characterized by moral rectitude through their conformity to law, and by perversity, if they are out of harmony with law.}^{24} \]

Not only is the law a measure of moral rectitude but by this rectitude it "impels one to perform these actions."\(^{25}\) In other words the law cannot command obedience to any except moral acts. In addition, however, it must be noted that although the law impels the performance of moral acts the act of commanding itself must be just. For example a tyrant may oblige to moral matters but the hardships endured for the fulfillment of the law make it unjust. This last consideration is vital for the purely penal law. In fact when making purely penal law the legislator must hold procedural justice in high esteem.

Tempering the human law with this sort of justice raises questions about the nature of law itself. For example, if a law is truly the measure of a moral act then it would seem that it ought to be obeyed. Altering or influencing the
force of these precepts through considerations of "justice" would be contrary to the nature and purpose of law. For example, here one may cite the extreme case of Cardinal Bellarmine who maintains that neither the essence of law nor its binding force can be altered by an agent.

It must be noted that as other things depend on an agent for their existence -- not, however, for their essence, since essences are eternal ... But as far as essence is concerned it (the law) does not depend on him since the fact that law obliges is eternal and immutable and a participation, as it were, in the eternal law of God.26

But Suarez appears at variance with this view. The subject matter of the law and the circumstances within which the law applies are mutable. If some difficulty arises out of this mutability then justice must be restored. If justice cannot be restored or the hardship alleviated then the law is unreasonable.

From the very nature of the thing (the law) it is understood that if there are no such conditions or exceptions to the human law, even if these are not explained in detail, the law will not be just and reasonable. Therefore, from the justice of the human law -- considering the natural condition of the material which it treats --, it follows necessarily that its obligation ceases sometimes in particular cases, not from a suppression imposed extrinsically but through some change in the matter or the circumstances.27

The Suarezian position forces the law to have regard for the temporal order and all its peculiar imperfections. Thus Suarez makes the necessity for the human law depend on its utility for the common good. Indeed it is just this that permits the existence of the purely penal law. To see this requires further inquiry into the nature of human law.
There is no doubt that for Suarez law is necessary. A human community needs laws as measures for moral acts. However there are two senses of "necessity" according to Suarez. There is "absolute necessity" and "relative necessity". The latter sort pertains to the law. It is the necessity "for the attainment of the better state."^28

This necessity in strict terminology is called "utility". Utility is a relative necessity in contradiction to absolute necessity. The latter kind pertains to God. For example, God is attributed an absolute necessity for His existence. But this kind of necessity cannot be attributed to positive human law. Indeed it is repugnant to human reason to conceive God as being subjugated under the positive human law, and if such law cannot bind God then this law cannot be absolutely necessary. But the law is necessary for men living in community with one another. Therefore if there is a necessity for this law it must be a relative one.

... law in the strict sense ... can exist only in view of some rational creature; for law is imposed only upon a nature that is free, and has for its subject-matter free acts alone ... accordingly, law cannot be more necessary than a rational or intellectual creature; and rational creatures are not characterized by an absolute necessity for their existence; therefore, neither is law itself characterized by this sort of necessity.^29

Suarez draws another important distinction. He said that the law is relatively necessary. It would seem then that obligation to the law is subject to the same
sort of necessity. This is only partially correct, for although the relative necessity of the law influences the civil and political obligations pertaining to it, it does not affect the ultimate obligation in conscience to fulfill the purpose of the law. The reason for this is that even though the law itself is not characterized by absolute necessity, the existence of free and rational creatures has made the purpose of law absolutely necessary. In other words, moral subjugation to the laws' contents, wherein their purposes are expressed, is absolutely necessary for man.

Though Suarez makes the peculiar claim that it is not essential to every law that it bind in conscience he is able to preserve the moral efficacy of law by citing the purpose of the law as being absolutely necessary. It would follow then that the transgression of the law is permissible only if the purpose of the law is fulfilled by some other acceptable means. Because the purpose is absolutely necessary there is an obligation in conscience to fulfill it. There is, however, no obligation in conscience to fulfill it in an exclusive manner. Thus the prince and the subject may deliberate about the means to an end but never about the end itself. However when the lawmaker promulgates a non-exclusive means he intends to bind but not absolutely. Again, however, he does intend to bind absolutely to the purpose of the law.

Thus the law itself as distinct from its purpose
has a relative necessity. In simple terms the law has a utility which is suited for a particular community. This part of the law which is relatively necessary is the work of man. It is a work made fit for the common needs and abilities of the community. But the purpose of the law is not a work of man. This purpose is a direct result of there being a superior to whose providence and control man is subject. In other words the absolute necessity of the purpose of law must flow from an equal or greater necessity. God Himself. 30

The relative necessity of the law is founded on the fact that man is a social animal. It is the diversity of this social life and the possibility of further diversification in private and social living which cannot permit the human law to be absolute. If it were absolute it would be repugnant to the motions of daily living. Thus this law by being relatively necessary serves the community. Through this service the community attempts to fulfill the purpose of the law.

Though man requires a civil life and intercourse with other fellow creatures he must also live rightly both as a private person and as a member of his community. The law must have regard for both aspects of living. Proper fulfillment of the obligation to live rightly depends to a large extent upon the laws of the individual community. These laws are meant to enlighten as to what is most expedient for the common good with the least hardship on
the individual person. Thus the law enlightens the subject as to what obligations exist for the common good and by compelling the performance of obligatory acts which fulfill this purpose. Thus Suarez says that...

... it was necessary for human reason to determine more particularly certain points relating to those matters which cannot be determined through the natural reason alone, a determination that is effected by human law, and therefore, such a law was most necessary.

The civil law is devoted to the political government of the state, the guarding of temporal rights and the preservation of the commonwealth in peace and justice. It is chiefly concerned with the bodily or temporal goods of individuals and the community. The implication of this task of the law is important. It means that the human community ought not to be forced to adapt to the law. On the contrary the human law must be adapted to the temper of the community. In other words the law must be adapted to the common good of the community. Since the needs and abilities of the community are subject to change the human law must change accordingly. If the law does not change when it is required to it loses its utility and may create an injustice, an unnecessary burden.

An obvious consequence of all this is that the law cannot exist for some private good. It is contrary to rectitude for the human law to exist for this purpose. Laws are promulgated for the common good of the community; therefore they should be directed primarily toward the good
of the community.

The claim that it is inherent in law to be enacted for the common good is supported by other claims regarding the end of law. Ends should be in due proportion to acts as well as to the original principles and faculties pertaining to these acts. Once it is admitted that the law is the common rule of moral operations then the principle of moral operations should also be the first principle of law. The end of moral operations is happiness. Thus it is proper to say that the first principle of moral operations is happiness. Happiness is such a first principle because the end to be attained is the principle of action. Suarez summarizes this with regard to the law:

... so that the final end is (also) the first principle of such acts; and the common good, or happiness of the state, is the final end of that state, in its own sphere; hence, this common good should be the first principle of (human) law; and therefore, law should exist for the sake of the common good.32

Suarez offers other reasons in support of the position that the human law is to be enacted for the common good. First, the purely temporal power that resides in men flows from men themselves. When this power is granted by the members of the community under their consent a legitimate superior is established. Secondly this power is given for the general good of the community.

It is the duty of the superior to exercise moral influence impelling his subjects to live rightly. This exercise is mainly executed through the making of the law.
Law is made because there already exists an end toward which this law must impel. In other words the utility and fitness of this end for the community is a guide or a measure of the law to be made by the superior. This utility and fitness of the common good is not bestowed by the lawgiver. On the contrary the utility and fitness of the common good are already assumed to exist, and these the lawgiver cannot alter. Indeed they have the power to oblige the lawmaker to alter the law itself when such alteration is requisite for the preservation and protection of the common good.

The primacy of the purpose of law over the will of the legislator reveals an interesting implication. If the purely penal law, which is a creature of this primacy, were promulgated as an absolute precept it would not be a true, just and common precept. To make a law against the common good of the state and one's fellow men is either an indication of contempt, an act of tyranny, or it is an error requiring immediate correction by altering its interpretation into a benign form.

Suarez is so adamant on this position that he gives an example where the intention of the legislator has no bearing whatsoever on the validity of the law. He claims that a law made from hatred, even if the hateful intention is public knowledge, is a valid law if it works for the common good. Thus it is sufficient that the subject matter of the law be advantageous and suitable for the common
good in order for the law to be valid and to have the essence of law. This is why Suarez says that the prince "either cannot or must not resist this." 33

The above quotation does not leave room for any deliberation. Those strict words permit the prince to alter the law without fault and it permits the subject to transgress that law without fault. A most significant implication of the purely penal law is the right to resist an injustice. Resistance to undue hardship is justifiable. If those words have any moral force then that moral force applies to the conscience of the subject as well as to the prince. A conscience which forms a judgment according to the dictates of the common good cannot sin, cannot be at fault. The subject matter of the law must be answerable to the common good and it must always adapt itself to this good.

... since every useful good as such is fit to be directed to the end for which it is useful, and in this sense, the aim of the work imposed and not of the agent, is the necessary factor in the matter under discussion. 34

In other words the human law does not receive its power to bind from man himself but from the relationship between man and his natural end as a social creature. Thus the purpose of law is to enlighten man on the means for fulfilling and perfecting his nature as a moral being. Nevertheless the frailty of man demands that the means be just, that it be justly established and that it be practicable.

Regard for the common good and the frailty of human
nature is of such importance to the Suarezian system of law that a definition of law would not be possible without it. His concern for a "benign interpretation" makes the "prescription of just things" the essence of law. The moral richness of this essence will permit Suarez to deny that it is essential to the law that it bind in conscience. A work of man must be worthy of moral esteem before it can bind in conscience. Thus it is essential to a law that it be just and not blind to the imperfections of the temporal order. To defend the thesis that the human law binds in conscience without exception may involve the conclusion that there is an obligation in conscience to any or all political constitutions. But if the essence of law is justice neither man nor state can "posit" what is binding.

If the purely penal law is to be recognized as a true law then it must be seen whether this law has the inherent characteristics of a true law. Suarez offers three assertions concerning what is inherent in the nature of law. First, that it is inherent in the nature and essence of law that it shall prescribe just things. Second, that it is inherent in the nature of law that it be justly established; and if it is established in any other way it will not be a true law. Third, that it is inherent in the nature of law that it shall relate to a practicable object. I shall treat these assertions in order.

The first assertion, concerning the prescription of just things, relates to justice in two ways. First,
justice may be viewed with regard to the act which the subject is obliged to perform according to the law. This act as required by the law must be justly executed. Justice may also be viewed with regard to the law itself. But this second view permits the possibility of a just law inflicting injury on the obedient subject. For example, the second view would permit a fast which may injure the subject under some conditions. Therefore this sort of justice may not have complete regard for the act in question. Injury without regard to utility and fitness is repugnant to justice. Therefore Suarez accepts the first view of justice, i.e., with the righteous execution of an act prescribed by the law.

However Suarez indicates that this righteous execution is subject to two interpretations. First, it may indicate that what is prescribed by the law shall not be unjust. Second, it may mean that what is prescribed shall be just. Considering that Suarez always has the well-being of the subject in mind it is not surprising that he prefers the first interpretation. Again, this interpretation of justice is favourable for the purely penal law.

If justice is to be strictly looked upon as the absence of unjust prescriptions in the law then this is an open admission that a human person does not have a perfect will to legislate. Only God would not command anything evil. But a human legislator may sometimes prescribe
unjust things. That which is unjust is an effect of an inferior. An inferior cannot bind. Consequently an unjust law is not ever the measure of an act. On the other hand if the act prescribed by a right superior is not itself evil it may be righteously executed.

The absence of an unjust prescription increases the range of the matter capable of being legislated. For example, if the prescriptions to be legislated must be inherently just then a significant body of the civil law would not be, strictly speaking, true law. This means that a limited or restricted sense of "justice" would not permit the lawmaker the moral efficacy to legislate required political or moral matters. Nevertheless it cannot be denied that the proper subject matter of the civil law need not be purely moral. There are other considerations which warrant the making of a law e.g., considerations pertaining to the utility and fitness of the matter. Yet it would be false to say that any such utility is inherently just. Thus, to insure the justice of some civil laws it is sufficient that they are not inherently unjust. If the matter is not unjust then the lawmaker may command to this matter if such matter is fit and useful for causing a good through a justly prescribed law. By this reasoning it follows that the law always relates to a good act or causes the act to be good. Thus an act which is in itself indifferent but is prescribed by the civil law becomes characterized by positive righteousness even though it
lacks the quality of righteousness inherently. This lack is not an obstacle to legislation. However this lack does permit inquiry concerning the injustice of a prescription and therefore deliberation about obedience. In other words it appears as though this sense of justice may warrant transgression of the law when there is doubt about the law's lack of injustice. This is partially correct.

Suarez admits that there is a problem here. This sense of justice may lead to lawlessness if merely doubting the justice of the law warrants disobedience. To preserve this sense of justice and the purely penal law Suarez must be able to provide some criteria other than "doubt" for warranting transgression. Suarez therefore takes the position that the evidence of injustice in the law must constitute a moral certainty. This position, says Suarez, is in agreement with all the Doctors. Thus if there is any doubt about the injustice of the law a presumption must be made in favour of the lawgiver.

Three reasons are given for this. First, the lawgiver is in permanent possession of a superior right; secondly, the lawgiver is directed by superior counsel and may therefore act on reasons hidden from his subjects; third, some people would assume an excessive licence to disregard the law. Thus with this sense of justice Suarez is able to strike the middle point between excessive obligation and excessive liberty. This middle path is one that the prince "either cannot or must not resist".35
A further explication of justice occurs in the second assertion. The second assertion states that it is inherent in the nature of law that it be justly established and if it is established in any other way, it will not be true law.

There are three phases of justice which must be observed in order that a law may be made justly. These are the legal, the commutative and the distributive phase.

The first phase to be observed in order to make a law justly is the legal phase. This phase seeks the common good and guards the rights of the community. Therefore law should be made in a just manner with regard to this good and these rights. For example, a law is to be a common precept and not for the benefit of a single individual.

The second phase of justice is the commutative phase. This phase of justice demands that the legislator shall not exceed his own power in giving commands. Commutative justice is essential, in the highest degree, for the validity of the law. Through the use of excessive power a prince sins against this justice even though he may promulgate a law requiring an act that is in itself righteous and advantageous. Though the law itself may be valid the use of excessive power is not valid. The use of excessive power places undue burdens on the subjects. When this occurs the subjects are faced with an illegitimate superior. Therefore justice on the part of the legislator
is requisite in a law for a perfect human community.

The third phase of justice is the distributive phase. For the good of the state law must distribute equally the burden imposed among various parts of the state. Thus a law which apports burdens unequally will be unjust even if what it prescribes is not inequitable. Suarez explains this below.

If it so happens, however, that a law is in itself useful, while some exceptional instance to which it applies involves injustices, the law would not on that account be entirely null, nor would it cease to bind the other subjects. For strictly speaking, no positive injustice (as it were) is done . . . since the burden would not in itself be wrongful and since there results simply a measure of disproportion which would seem insufficient to nullify the law.36

In other words the purpose of the law is still useful and has regard for the common good. Therefore the law is not entirely null. It would be helpful to ask now 'is there some part of the law which may be null?'. If the answer is 'yes' then the purely penal law is not only possible but it becomes a true law albeit appearing somewhat imperfect. This imperfection is compensated by not commanding obedience to the prescription but to the purpose of the prescription. In other words a law is not entirely null if the purpose of the law requires fulfillment.

While some laws clearly exceed the bounds of equity they will nevertheless be able to bind in other ways that are not unjust. Tax laws, Suarez says, are an example of this sort. But tax laws also admit of being purely penal
laws. Clarification of this point requires that the Practicability of the law be looked at as it appears in the third assertion.

This assertion states that it is inherent in the nature of law that it shall relate to a practicable object. First Suarez properly limits the meaning of practicability. The practicable must fall within the realm of the possibilis. There are two senses to possibilis. The first sense may be understood as that which is opposed to the impossibilis; the second may be understood as that which is opposed to what is difficult, oppressive and burdensome.

The first sense is of significant importance because it pertains to the realm of human freedom. For example, that which does not fall within this realm does not pertain to the law because the law by its very nature demands the power to choose. Thus what is impossible in the first sense cannot purport to be the subject matter of the law. With respect to this sense of possibility what is absolutely necessary cannot be subject to some obligation. The impossible, therefore, cannot ever involve guilt or warrant punishment. Nor does it involve reward. Therefore the law cannot have the impossibilis as its subject matter. Only what is opposed to the impossibilis can rightly pertain to the subject matter of the law.

In consideration of the fact that human laws are
derived from an imperfect power, from human power, it is
necessary that they be practicable because this power
pertains to what man is capable of doing both morally and
physically. In order to explain this kind of practicabi-
li ty regard must be had

... for the frailty and the constitution of
nature. This condition, God Himself, in His
own way observes ... So, also, the canon law
refrains from prescribing that communion be
received on all feast days, because such a
practice could not be worthily observed, in
view of the conditions inherent in nature. The
same argument applies to other instances.
Under this head comes the contention (upheld by
St. Thomas) that law should be adapted to the
subjects, in accordance with their varying
capacities, so that the same fasts are not
imposed upon children as upon their elders. 37

This notion of practicability extends to that of
custom. Custom is also an expression of the varying
capacity of the community. Custom, says Suarez, is a
second nature "and therefore, that which is repugnant to
custom is held to be decidedly repugnant to nature and,
consequently, almost morally impossible." 38 That this
practicability is inherent in the purely penal law is
undisputable. Suarez clearly says that "custom will hold
virtuous the lightening of the obligation in conscience
to the law." 39 However it is to be understood that the
custom in question be righteous and advantageous to the
state, for the common good. Customs which are evil, on
the other hand, should be amended by the law. Thus the
force and importance of custom for the purely penal law
cannot be overlooked. His text on law is clear on this
... therefore through custom the law can be derogated even though it (the law) is not abrogated... therefore if the law is divisible in some way, it can be derogated in one part but not in the other. Well then, the penalty of the law is separable from the fault; therefore custom can derogate the law with respect to imposing the penalty by removing the obligation under fault. In effect, this penalty is not in itself attached to the fault but (is attached) by the will of the prince... Furthermore the prince is obligated to the law through its directive force even though he is not obligated to the penalty. In this sense... custom excuses the temporal penalty but not the infernal punishment.

The last sentence of this text is an important clue to the moral nature of the purely penal law. Though the purely penal law requires a benign interpretation of its binding force its jurisdiction is limited to the temporal order, to the acts of the subjects. This law does not excuse the fault in case there is one. It merely does not punish under fault but imposes a sanction in order that the purpose of the law may be fulfilled without the obligation to fulfillment being an excessive burden.

Ultimately the success of purely penal law depends on the righteousness of the punishment. But can a true law punish without fault? Bayne says 'no' and, to be sure, we ought to agree with him because punishment without fault appears heinous. Yet we may also agree with Suarez that it is repugnant to be burdened by excessive obligations. These two cases constitute a dilemma only if one equates "without fault" with "virtue"
as does Bayne. However we shall see in the third chapter that a transgression is not a virtuous act and that if it is not it may warrant some punishment even though fault is absent. In other words the transgression is neither virtuous nor evil but an imperfection in the temporal order of the perfect community. In the eyes of man, that is to say as this matter pertains to legislating within the human community, this imperfection is a cause for punishment. Thus Suarez says that a punishment is due *sine culpa non tamen sine causa*. This maxim, addressed in the next chapter, is the key to understanding the possibility of nonmoral guilt in purely penal law.
CHAPTER II

PURELY PENAL LAW: CULPA OR CAUSA

In the first chapter we have seen that human law should exist for the common good, that the prince sometimes should not or must not exercise absolute legislative sovereignty, that the making of some laws requires a cession of power on the part of the lawmaker and that this cession permits a benign interpretation of the binding force of purely penal law.

In my estimation the purely penal law of Suarez appears to be wrought with difficulties mainly because of its complexity. Understandably Bayne reduces this complexity to three basic elements, transgression with or without fault and the sanction. This reduction is highly misleading because it makes Suarez's purely penal law stand out as a makeshift construction amidst much excellence.

To alleviate at least part of the burden of grasping this complexity I have provided a chart indicating the elements of purely penal law. It is strictly based on the De Legibus.
This, then, is the complete picture of purely penal law. The most striking fact about it is that it shows how purely penal law binds in conscience.

The left side of the chart shows that when the law is not a burden disobedience results in true fault. The right side shows that when the circumstances make it
difficult and burdensome to obey, transgression does not result in fault. But because the law is true and just its purpose ought to be fulfilled. Since it was impossible to fulfill the purpose a sanction is imposed in such a manner that it is possible to fulfill the purpose of the law without hardship. In other words the sanction is designed to create just and tolerable conditions for obedience. In essence, the law is altered to the needs and abilities of the community without altering its moral efficacy. Because it is now possible to fulfill the purpose of the law any resistance is immediately subject to fault. Thus Suarez restores moral efficacy to purely penal law and the result is that it inevitably binds in conscience. On the other hand, if the sanction is truly burdensome resistance is permitted.

However, much of all this anticipates the work ahead. To reach the conclusion that purely penal law binds in conscience and that it is a true law two paradoxes have to be confronted. These are transgression in conjunction with no fault and punishment without fault. Central to their resolution is the notion of causa. But before any attempt is made to defend the binding force of purely penal law it must be shown that the civil law binds in conscience.

Obligation and the Civil Law

A legitimate superior can bind to purely moral
matters. But can a human legislator bind to purely civil matters? Answer 'yes' and the purely penal law is no longer purely penal. Answer 'no' and purely penal law becomes an impossibility. In other words the survival of purely penal law appears unlikely for two reasons, the inferior nature of a human legislator and the requirement that all laws bind morally. Concerning the first case Suarez raises an objection:

The reason for the problem could be that the forum of the conscience is the forum of God; well then, man cannot bind in the forum of God; then neither can (he) bind in the forum of the conscience.\(^{41}\)

Suarez meets this objection that an inferior cannot bind in the forum of a superior by first describing further the forum of the conscience. This forum may be described as internal. "The internal is that which is exercised in the mind of man where the conscience resides, and because of this it is called the forum of the conscience."\(^{42}\) Once a law pertaining to a deed is given externally there follows in the internal forum of the subject a different judgement about this deed because the law has the power to place the deed within the required subject matter of virtue. This power of the law alters the deed in terms of its moral worth. On realizing this alteration the subject's conscience dictates that doing or not doing the deed is subject to moral judgement. Thus the subject is enlightened as to the moral worth of purely civil matters through the law.

The subject is able to realize the moral worth of
purely civil matters even though these matters are not absolute because they may be characterized by "decency", honestas. 43 Thus to the extent that such matter may be characterized by decency then to that extent it binds.

When civil matters are subject to honestas they may be said to be in some way "spiritual", 44 to be in some way binding. Similarly Suarez claims that the human conscience itself is somewhat spiritual because it is capable of noticing a change in temporal matters concerning decency and foulness.

Given that the law has the power to alter a temporal matter in terms of moral worth and our ability to distinguish between the decent and the foul it seems that legitimate civil power seeks to direct toward a good end through law in an efficient manner. If civil law were divorced from this end and if we did not have this valuing ability then this law would be ordained uniquely for our external government. If this were the case then there would be no obligation to obey the law. Without this obligation the peace and justice of the state could not be preserved because it is the conscience which immediately directs men in their deeds. Thus it is necessary that civil power bind in conscience.

Even if it assumed that civil power does bind in conscience there still remains the severe objection that...

... no one can bind in the forum in which (he) cannot initiate a judicial investigation, because (he) cannot bind where (he) cannot judge ...
well then, man cannot judge a foreign conscience because (he) cannot know it.\textsuperscript{15}

What Suarez does with his reply to this objection is unexpected.

He admits that the objection is informative about the nature of an act subject to law. First, such an act must be identifiable as concurring with or transgressing the law. Second, the obligation to perform the deed under the law must be known. The first case, he says, is self-evident because the civil law is directed only to those acts which are external. But the second case is neither self-evident nor necessary because the civil law, strictly speaking, does not judge the conscience itself. This means that even though the civil law may bind in conscience it does not judge concerning transgressions in the internal forum. Its judgements strictly pertain to the external deeds or omissions.

When Suarez agrees with the objection that we do not have access to another's conscience as we do to external acts he appears to have weakened his position considerably. But, surprisingly, he reverses the position to his advantage.

Though it may happen that a subject is not sufficiently enlightened as to why he has a certain obligation or even whether he does the law may still retain its binding power if the legislator knows and judges in his own internal forum that his law binds in conscience with respect to some subject matter. Therefore, because the
legislator knows the law and judges it to be binding he must enforce it. Consequently, even the subject's use of reason may not be sufficient to enlighten him on the moral efficacy of the law.

Nevertheless the subject must be made aware that the law is binding. This is essentially accomplished by binding to the sanction. In such a case obligation to the sanction fulfills the purpose of the law.

If the law is binding and the transgression results when obedience is impossible then the transgression cannot be traced to the internal forum. Transgression is gauged by the external act. Because the transgression is merely external a punishment ought not to be imposed for an internal transgression, for true fault. Indeed it seems unjust to punish for an act which cannot be judged. Nevertheless the legislator must make it known that his intention is to command. Thus Suarez insists that

It is also necessary that (the civil law) is given with the will to command and with the intention to bind, because precept is essential to law and the words without intention are inefficient; because of this a law given without the intention to bind is not true law but false or apparent (law), or at most it is a simple guidance or directing in the manner of counsel.46

Not only must a legislator intend to command but, in a sense, he must command. If he judges the law to bind then he is obligated to command that obligation and make his intention known. He cannot command and then deny his subjects the intention to bind. Thus a legitimate command necessarily entails the intention to bind. About
this Suarez is exceptionally clear when he says that the legislator "does not hold in his hand the will to give a law which does not bind in conscience." 47

If the civil law does bind in conscience as Suarez insists then the fate of his purely penal law is an unhappy one. He is therefore faced with the most difficult task in his De Legibus, that of salvaging the purely penal law. In order to do this he will present the astonishing view that a legislator may make a true and just law with the intention to command but not with the intention to bind in conscience. In the section that follows we will see that Suarez has some compelling reasons for this view.

Purely Penal Law

Suarez shows no hesitation in holding that purely penal law is true law. Purely penal laws "are true laws, and nevertheless (they) may not bind in conscience; then, it is not essential to law that it bind in conscience." 48 Taken by itself this last opinion is consistent. But it is not consistent with the subject matter of the previous section.

When Suarez claims that an obligation in conscience is not essential to law he does not mean that the law may be devoid of obligation. On the contrary he still insists that the law compel in some way but that it need not compel in an absolute way. It is clear that

... some obligation is essential to the law,
however the manner of being of this obligation depends on the intention of he who commands; from which it follows that even though the matter of the law is grave, the legislator may not will to bind under pain of mortal sin.\textsuperscript{49}

On this point it might be helpful to recall the reply to the objection that "man cannot judge a foreign conscience because (he) cannot know it."\textsuperscript{50} There we saw that Suarez was unwilling to judge the transgression as originating in the internal forum. Though the transgression has an external obviousness about it the legislator, in some instances, cannot punish this transgression under true fault because to do so would constitute an injustice. For this reason the legislator may wish to bind to another kind of necessity rather than the absolute one.

Even though it may be admitted that the law can bind to another kind of necessity it remains to be shown that no sin issues from disobedience to the law itself. It is important to show this because the absence of sin is taken by Suarez to indicate absence of fault and therefore absence of the obligation in conscience.

Suarez offers three conditions when a disobedience to the purely penal law is not a sin. First, a subject may prudently conform the dictates of his conscience with the intention of the legislator. This conforming is prudent because he is also obligated to obey his superiors. In such a case I assume that to conform the dictates of one's conscience to the will of the legislator is an act of obedience and not of fault. Taken in this sense it
may be said that Suarez has provided us with a sufficient definition of obedience when he says that the subject may "prudently conform the dictates of his conscience with the intention of the legislator." Thus if the subject conforms in the above manner the transgression should not result in true fault because the law expresses the intention of the legislator.

"In the second place, penal laws . . . are true laws, nevertheless they need not bind in conscience . . . because for it to be law, it is enough that it coerce in some way . . .". Thirdly, "in reality (they) do not sin, because that which proceeds from a legitimate conscience is not a sin." 52

Now that Suarez has given his reasons as to why this sort of transgression is not a sin but a prudent act he will show that the purely penal law does oblige in some way because a true law must have some obligation attached. If the purely penal law can be shown to have some obligation then it may be called a true law.

By way of example Suarez discusses the making of a promise. The purpose of the example is to show the hypothetical nature of purely penal law and that this hypothetical form may be subject to a true obligation. For example, someone who plays for money may promise to give alms whenever he plays. This means that he who promises donations to charity promises absolutely that he will not play unless this conditional is met. The
analogy is carried over to the purely penal law:

... even though the law which we are treating
does not bind in conscience in an absolute way
to do or to omit this, nevertheless it binds to
do this or to suffer the penalty or another
effect of the law if the law is not observed in
its first part.53

Now Suarez is ready to elevate the purely penal law,
attach a moral obligation to it and make it true.

In effect, I say that all true human law
necessarily resolves itself into some obligation
in conscience. Proof: It is necessary that the
law bind to the deed in an absolute manner or at
least under some penalty. The first manner... binds in conscience to the said act..., and if
the law is given in the second manner in the
form which is purely penal, it binds either to
the payment of the penalty -- assuming
transgression, given that the law is given with
rigour -- or it binds to the penal vow or at
least to suffer the penalty.54

Even though the penal law does not oblige in an absolute
manner to do or not to do something it does oblige to do
what the law prescribes or to suffer the penalty.

It should be noted here that the term "penalty"
(poena) is not limited to the ordinary meaning of
punishment. Punishment as "pain" or "inconvenience" is
imposed as an alternative to fulfilling the purpose of the
law. For example, a poena which attempts to fulfill the
purpose of the law is not a punishment but an opportunity
to fulfill an obligation which could not have been
fulfilled due to circumstantial hardships. Once the
circumstances are sufficient for obedience the sanction is
binding. When such optimal circumstances for obedience
are again not possible the legislator may punish, but not
harshly, in the form of an inconvenience in order to indicate that the law is binding and that it ought to be fulfilled.

Thus one is bound in conscience to the sanction without fault but not without cause because the poena, in this case, does not indicate true fault. In order to make this clear it is of course necessary to firm up Suarez's concept of "cause". Before doing that, however, I should like to analyze what he says about the gravity of the fault, the culpa civili.

Gravity of Obligation

In the first chapter we noted that law is the measure of deeds and that this measure is the norm for those deeds. The law commands to this norm. If the law commands in an absolute way then anything the law prescribes will bind in conscience. But if the law commands with a conditional then the simple act commanded must be distinguished from the total obligation of the law or the norm i.e., from the purpose of the law. This distinction will prove helpful in understanding the meaning of causa.

Transgression of a purely penal law may not be a grave matter because it is merely a minor deviation which can be put right again. This is how Suarez explains it:

With respect only to the act this law is not an absolute norm of decency, and a minor deviation from this norm by this act is not a moral evil, but is in itself grave only as much as it makes
one susceptible to that burden or penalty; on the other hand in view of the complete matter of this law, it can be upheld by the norm of this decency because it binds to the whole disjunctively in such a way that one cannot act against both parts of the law without sinning against the decency and good customs, and it is then understood that one cannot disobey the law in the first part without further submitting to the penalty and the suffering of it.\textsuperscript{55}

The English word "suffering" is misleading here. For example, if the legislator enforces a purely penal tax law

\ldots with moderate penalties up to the point where the subjects do not acquire excessive liberty, it can be presumed with good reason that this coercion is purely penal and directed in this way toward compensating the [partial loss] decrease in tax.\textsuperscript{56}

Therefore the possibility of compensation warrants the absence of true fault.

There is another reason why the transgression is called a minor deviation. Because civil law is not necessary in an absolute sense\textsuperscript{57} transgression against it may not result in an absolute fault. Connected with this is the view that

\[t\]he obligation is a moral effect which must be expressed by man and which cannot be brought about without the consent of the human will.\textsuperscript{58}

Once there is the will to give a law, "the natural law compels in such a way that the obligation be grave."\textsuperscript{59} Ultimately the obligation must be grave. But the issue for Suarez is 'at what point should an obligation be grave?' There is no doubt that if Suarez had not seen this
to be a question and had thought that the legislator permits the natural law to compel indiscriminately -- which it does -- then every civil law would be either a mixed law or purely moral. However he did see the question, and what prompted him to is his observation that it is not absolutely necessary that a law should be given. He is quite clear about this: "this will to give the law is not absolute but limited." 60 This statement relates to his seeing the question as follows.

Two things may be deduced from that last quotation. First, the legislator may not have the power to bind absolutely to some subject matter. Second, the legislator may not be bound in conscience to make some civil laws. Thus, from the negative point of view it may be said that a law is absolutely necessary if the legislator is guilty of a true culpa whenever he does not legislate that law with its full moral binding force. On the other hand some laws to be legislated do not bind the legislator in conscience to promulgate them.

... because this manner of commanding can be demonstrated to have neither any intrinsic inconvenience nor any transgression of some obligation; in effect, the superior is not always obligated to do all what he can do, nor is he obligated to abstain from commanding ... 61

It can be further assumed that when a law does not bind the legislator to promulgate it then when that law is promulgated in the form of a purely penal law it cannot bind the subjects in conscience because the legislator may consent to impose it "with the condition not to impose
an obligation under mortal sin" simply because he is free not to impose it absolutely. 62

Suarez supports and strengthens this view by saying that "it is impossible that a conditional will has effect" in the absolute sense. A will which is not absolutely obligated cannot bind absolutely. There cannot be any doubt that this is the true position of Suarez. In fact he takes the more adamant position and says that such a law -- a law not bound to be given, but given as binding -- "is impossible ... and consequently gives nothing." At most such an act might be "a counsel or simple guidance" and it would be an "error" to call it a law. 63

On the other hand if the legislator is not under a true poena to make a law he may decide to will a purely penal law with just cause. There would be cause for such a law because the subjects will not be bound in conscience falsely; and, the affairs of the temporal order compel him to act prudently for the common good. This last consideration is sufficient to warrant some obligation.

The intention not to bind in conscience except to the sanction produces a change or alteration in the matter of the law. An example of this alteration may be seen in the case of a tax law. Such a law may stipulate that a fixed quantity is to be paid. If it is not paid the law permits alteration of this quantity. For example, a smaller sum through longer periods may be imposed by the
sanction. This is one aspect of the alteration. The other is expressed through the conditional as a whole. For example, the law itself is altered so that it does not bind absolutely. But under no condition can the legislator exclude the obligation in conscience from the total subject matter of the law. Thus Suarez explains that:

[w]hen the intention is not to bind in conscience but to the sanction then this can be understood with regard to the deed which is immediately commanded or prohibited; however the prohibition is not in itself the adequate matter of the law; but rather it is the disjunction to do the deed or to suffer or bear the penalty, or -- and this amounts to the same thing -- it involves a conditional law to pay the penalty if the deed is not done, and then the obligation in conscience cannot be excluded from the total disjunction.64

What Suarez says next cannot be taken lightly nor should it be missed if one is to have a complete account of the gravity of obligation. The passage is important.

... in this case the gravity and the type of obligation imposed in this manner must be determined by the subject-matter, to be in agreement with that which we finally must decide about any other law which is given indeterminately with the sole intention to give the law.65

Here, then, Suarez has offered a rule by which the gravity of an obligation is to be determined. Two things can be derived from it.

First, a law which is given for a specific matter and has no penalty attached must be a purely moral law. The law is meant to bind absolutely and, in this particular case, punishment rests with God. Secondly, the gravity of the obligation is or ought to be a function of the moral
worth of the subject matter.

By combining these inferences we arrive at the conclusion that purely penal law cannot bind absolutely to its subject matter because it admits of alternatives to fulfillment. The existence of alternatives reduces the gravity of the specific prescription but not of the prescription's purpose. Therefore as long as the purpose has not been violated the transgression is a minor imperfection admitting compensation and therefore the fulfillment of the purpose. However transgression of the sanction is a true fault because it shows contempt for compensation, for the law, for legitimate power and ultimately for God.

Though the specific subject matter in a purely penal law is strictly civil or temporal, or relative as opposed to absolute, the complete transgression of this law does not and cannot rest with that law's subject matter. If it did an obligation in conscience would be impossible. Thus the gravity of an obligation does not rest solely with the temporal circumstances. Gravity must pertain to something more perfect than the corruptible; i.e., gravity under fault must pertain either to something purely moral or to abstaining from something purely immoral.

Through the rule derivable from the last quotation it can be assumed that Suarez considers the whole system of civil laws as supportive of non-human, that is to say
moral, laws. The rule that purely penal laws are to agree
with non-human laws in terms of gravity does seem to be a
worthy gauge for the gravity of temporally induced
obligations because even civil laws are measures of
moral rectitude. Thus, only when purely penal law is in
agreement with moral law does it enjoin an obligation
because it directs those subject to it to the common good.

On this issue of gravity we must acknowledge Bayne
who argues from a different perspective when he treats of
Suarez. "The gravity of the penalty", says Bayne,

would be an excellent gauge both of the seriousness
of the offence (which would be all the more reason
to assume a moral obligation) and of the legislative
intent to bind in conscience as well.66

What I want to point out however is that the Suarezian
position on gravity cannot be so limited. The gravity of
the penalty is strictly a human creation; whereas the
gravity which results from the rule that there must be
agreement between purely human and purely moral laws is
not subject, nor can it ever be, to the will of the
legislator. In fact Suarez makes it quite clear that the
poena is not to be a pain; and therefore the absence of
gravity as a "pain" or "burden" dissolves any notion of
Bayne's "seriousness". If Bayne is correct then the poena
of purely penal law could never indicate the seriousness
of the offence. The offence, the transgression, is not
a serious matter. What is serious is the refusal to
compensate through submission. But the seriousness of this
refusal has, in fact, nothing to do with the first transgression. The first transgression, by itself, is never grave and therefore it cannot be a true gauge of gravity as Bayne thinks it is for Suarez. Perhaps the point here can be seen more clearly in the following way. If the Suarezian prince truly had power to determine the obligation through the imposed gravity of the penalty then a barbarian prince could be the most righteous of princes; and this, clearly, is an absurdity.

Furthermore Suarez insists that "the legislator can make a law bind under venial sin even in case the matter is capable of being a greater obligation." In other words, then, when the matter is capable of being grave under true fault the legislator may not wish to make it grave because it may not be necessary to do so. Capacity for gravity is not the same as inherent gravity. Therefore the absence of an absolute characteristic warrants binding under another kind of necessity. Thus, when the subject matter is capable of being ordained a moral matter then that fact constitutes evidence that the subject matter has remained morally indeterminate and that its moral determination depends on two things: the utility of it as determined by the needs of the perfect community, and the will of the legislator on whose existence this legitimate determination depends. Only that which is already morally determined by itself may be characterized by serious gravity. Understood in this way Suarez can now
complete this task and show that there is no sin in a civil
transgression. Capacity for gravity cannot be denied, but

... from this it neither follows that the human
law commands acts absolutely virtuous nor that they
be virtuously executed; it is sufficient that it
commands to that which is virtuous in itself and
indicates the mid-way in this type of virtue. This
appears clear in matters of justice; (it) commands
the deeds of justice indicating the middle point
in the matter (of justice); by observing this
middle point one does not sin against such a
law ... 68

If there is no sin and no true culpa what does Suarez
mean by 'cause for punishment'? Answering this is
important because it will reveal the nature of the
transgression.

We will see in the next section that cause for
punishment without fault is not unjust, that something
other than fault may suppose punishment and that, in fact,
some fault is presumed. By understanding the causa sense
can be made of the transgression because Suarez says more
about the former than the latter.

Sine Culpa non Sine Causa

In the fifth book of his De Legibus Suarez treats
exclusively of purely penal law. When he asks the
question 'can there be penal laws which bind in
conscience?' his answer, which is yes, involves treatments
of the concepts of poena, culpa and causa.

There are two elements to be distinguished in
purely penal law. First, that which pertains to what is
to be done; second, the penalty against those who disobey
the substantive part of the law.

Suarez begins developing his answer to the question by citing three reasons for implementing purely penal law. First, purely penal law "may be very convenient for the state" and sometimes, as was noted in the first chapter, it may be necessary to enact such legislation. The second reason pertains to the poena in the following way. Spiritual poena "are medicinal and primarily attempt to cure the soul and correct the fault." The effect of spiritual poena is similar to the temporal one in temporal life. Thus it becomes morally necessary to impose temporal punishment. Thirdly, not only can the human legislator bind in conscience with the law itself but he can also bind through a sanction. For example, the human legislator can add a temporal punishment to the natural law. Capital punishment may be added to homicide without altering the moral efficacy of the law. This addition of the penalty, however, is accidental to the law.

When a precept is without this addition Suarez characterizes the law as being singular in form, that is it is not a disjunctive but a single precept. However the law may be given a plural form by some change or addition. But because this plural form is accidental neither justice nor legitimate power is affected by it. In other words the command to moral rectitude remains intact. This in turn means that the legitimacy of the command and the righteousness of the purpose of law are unaltered.
By citing changes and additions as accidental Suarez prepares to show that a law with some changes or alterations is not unjust. Nevertheless one may object to such changes on the grounds that because the addition of a penalty is not absolutely necessary adding it is unjust.

Suarez approaches this problem in an interesting manner. First, he asks, 'can there be many punishments for one fault?' He is concerned with many punishments because transgression of a single precept is subject to punishment by God. Therefore every precept may have at least one punishment. But if punishment rests in the hands of God there seems to be no reason why a legislator should in addition inflict a temporal punishment because punishment is already and ultimately inescapable. Yet Suarez proposes that fault may warrant many punishments.

This affirmative answer is obviously favourable to the success of purely penal law in the following way. For example, a mortal sin binds under eternal punishment. If the poena is eternal then no injustice can issue by the addition of temporal punishments. Though one may be able to grasp the significance of this, the addition of unnecessary punishment still appears repugnant in principle and, furthermore, this sort of reasoning may result in aberration through misuse of power. But we shall see that Suarez is highly sensitive to this frightening prospect of excessive and unnecessary coercion.

A second example of an added temporal punishment
is excommunication. A deed warranting punishment by God is also one which is repugnant to man and therefore man may also punish for sin. In both examples the punishment imposed in the temporal order is an added one. Therefore a mortal sin, because of its eternal gravity, warrants both the temporal and the eternal poena without these multiple poena causing injustice. But, Suarez adds, the violation of human law may also be a transgression against God and both God and the prince may then rightly join in the punishment of the disobedient. Suarez ends this section with an interesting persuasion. But it is more than merely interesting. It shows, I assume, that the addition of a poena is not necessarily a perversion. He says that "those who in this life are obliged to suffer true penance will not suffer a second time in the next life." I assume then that if the temporal poena does not do justice to the culpa or causa then the completion of the temporally induced poena may await one as well.

Punishment supposes fault. However not all fault is directly against God. Some fault may be civil and human. Therefore poena may justly pertain to a just cause but without fault against God Himself.

Although it can be said that all penalty is for a fault, it is not always for a fault against God since it only need be a fault -- as it is called -- civil and human.  

In one sentence Suarez affirms and alters the affirmation by distinguishing culpa civil from culpa contra Dios. In both cases fault warrants punishment. His further
reasoning towards showing that *culpa* warrants *poena* is derived from the fact that invincible ignorance warrants dispensation from *poena*. From this Suarez can confirm that "it is an indication that this penalty binds to the fault" because such a dispensation indicates the contrary for invincible ignorance.72

When Suarez says "it need only be a fault . . . civil and human" he throws the *culpa* into the realm of relative necessity, utility, because nothing temporal is absolute. That much is clear. The problem arises, however, when the purely penal law always shows itself as binding not to the law but to the *poena*. This demands that the penal *poena*73 be justly founded. At this point Suarez merely says that the addition of a *poena* to a law is not contrary to it. However, because purely penal law is not a purely moral law with an added sanction, Suarez must explain what he means by "the addition of a penalty". In other words, I assume, some deficiency must exist for the legislator to alter the form of the law.74 Although this problem of deficiency may be essentially reduced to the problem of doubt on the part of the legislator, it makes the forging of purely penal law somewhat of a difficulty. The difficulty lies in finding the median between excessive liberty and excessive obligation. But practical judgements must be made.

But to this we reply that if the law that puts such a price-value on a thing which makes it not worth much it is because (the law) indicates the mid-point of justice; it can well be, in
that the other laws in the same manner indicate the mid-point of virtue, be it in matters of justice, in matters of religion or of other virtues, because this is the efficacy of the human law . . . through this law, consequently, a contrary act is treated as vice; then it also binds in conscience to observe the mid-point and avoid such vice.75

Suarez is not saying here that a legislated price-value binds in conscience. At this point he is merely showing the similarity between two sorts of human law in terms of the utility of the mid-point. He is showing that the common ground of human law is the realm of relative necessity and that this necessity is capable of binding in conscience.

What Suarez is doing here is preparing the way for showing that a purely penal law binds in conscience. Because God is the superior lawgiver in the Suarezian theory of law Suarez gives an understandable warning: "the addition of a penalty is not any indication that the fault has been eliminated."76 In other words only God may see directly into man's conscience, the internal forum. There can be no doubt then that with this claim Suarez is on the brink of proving that purely penal law can bind in conscience. What remains to be shown is under what conditions this binding is effective. This must be shown because it is also true that purely penal law does not bind under true fault. Eventually we will see that these two seemingly opposing notions -- that purely penal law does bind, and that it does so without fault -- can be reconciled.

Evidence of Suarez's genius is that he is not guilty of
contradiction here.

As a matter of interest the last quotation alone warrants a re-thinking on the nature of purely penal law and the foundations of civil power. The Suarezian prince, by that claim alone, is disrobed of any absolute moral sovereignty and releases the subjects, ultimately, from an absolute and morally binding obedience to anyone except God Himself. Precisely for this reason human law ought to prescribe to median and not absolute matters.77

The median path means that transgression of the law does not fit into the definition of sin even though it may be capable of it under certain conditions. The difficulty encountered in describing the transgression as sinful warrants dispensation from a conscience obligation. I.e., the mere act of violating the law itself is sinful if and only if the subject matter of the law pertains to virtue in an obvious way. It is, perhaps, morally unsound to bind in conscience to the indifferent, the doubtful and the experimental. Yet it does not appear unsound at first sight to bind to a utility, to a temporally practical certainty which may, unexpectedly and without intention, detract from it.78 On the other hand a purely moral law is a stable precept whose conscience obligation is not determined by the will of man. Man is bound by it but does not bind by it. On the other hand, some positive human laws are temporal in the extreme, being subject to time, geography, ability and
so on.

But these limitations on law do not affect its efficacy as a measure of moral rectitude. Nor is Suarez advocating civil disobedience by substituting causa for culpa. On the contrary he does want the obligation in conscience to be obvious. In support of this he says that

"... it cannot be said that this law threatens with the penalty by removing the threat of fault, because the only way to formulate atonement for fault is by command."

In other words, the command to the sanction is indicative of some fault. Thus purely penal law and purely moral law bind at least through one common element, the legitimate command. This, I assume, means that the force of either the causa or culpa which compels the legislator to command the disobedient to punishment are equal in terms of sufficiency for the legislator to will righteously to command to the poena under either purely moral or purely penal law.

It seems then that for Suarez a poena cannot exist without some prior fault. First, a fault must be prior to the punishment. Second, punishment may accompany fault. It follows then that the prince can issue a command pertaining to the punishment because a punishment is always founded on some fault. By a prudent judgement a legislator may bind to either because ultimately both are always present.

Suarez is being extremely careful here. He does not permit the command to the poena the power to pardon
the fault. This command merely refuses to bring a judgement about the *culpa* into existence through the law. I.e., the law is not used as a vehicle for expression of all relevant judgements pertaining to deeds commanded or prohibited. It has, for example, no power to enlighten the subject because it is not revealed to him through the will of the legislator in the law. Nevertheless we may rightly assume that this unrevealed judgement must exist because it is essential to the validity of purely penal law that a *culpa* be capable of being revealed. We can further assume that this unrevealed judgement must also exist in the mind of God because He can complete the unfinished temporal *poena*. This does not mean that purely penal law judges tacitly that there is no obligation to the law. Though the command binds only to the *poena*, the law itself if it is just, also binds but not as an exclusive command to an exclusive subject matter performed by an exclusive deed. That sort of a privilege is strictly reserved for purely moral laws.

Even though something does not bind through a human command that does not mean it dispenses with the obligation to an uncommanded virtuous deed. Quite simply the obligation does not pertain to the law. Thus

> [t]his manner of commanding is neither contrary to the essence of law nor the essence of justice; the legislator can, through his prudent judgement, will (to command) only in this manner and no other; when he makes the law in this way, he creates the purely penal law which obliges to the act commanded not in conscience but only to the sanction.81
This is clear because both obligations depend upon the power of the legislator and such power may be used when it is just.

It is now possible to understand what Suarez means by "sometimes a penalty is incurred without fault although not without cause." The true position here can be stated as follows: a penalty is commanded by the law to be incurred for transgression without commanding that a deed is to be done or not done such that a deed which is not commanded could have been and still can be commanded. It could have been and can be commanded because the alternatives were never exclusive. Some deed which was or is or will be capable of fulfilling the purpose of the law never left the realm of practical possibility. Therefore the command to the poena is never without cause as long as fulfillment is possible.

A further explication is: a poena may be just and imposed without indicating fault against God but not without some defect or imperfection in the eyes of man. Thus, 'but not without fault' can at least mean 'but not without defect'. 'Not without defect' means that the purpose of the law has not been completely violated. For example, the non-payment of a tax is an imperfection relative to a specific law and not necessarily with regard to the purpose of that law because another manner of payment is permissible if the tax law is purely penal. In such a case only partial violation has occurred. Partial
violation expresses the fact that some other means to fulfillment of the law are still practicably possible. Practical possibility to fulfillment indicates two things. First, the specific and singular prescribed deed is not done. Second, there are alternative deeds which are not specified in the law itself but are nevertheless capable of fulfilling the purpose of the law.

This new element of *causa* also becomes a criterion for the magnitude of the penalty. I.e., the gravity must be formally dependent upon the *causa*. A grave penalty indicates, but not necessarily absolutely, that the *causa* is similarly grave. The criterion for the gravity of the penalty, in the absence of a true *culpa*, is the necessity arising from the *causa* for imposing the *poena*. This sufficient cause for *poena* is expressed as *non tamen sine culpa civili, seu politica* -- not without civil or political fault. 83

We noted that Suarez wants purely penal law to bind in conscience. In a sense it is disappointing that he should place this obligation in the sanction and not in the law itself. But neither can it be said that he underestimated the obligatory power of purely penal law. The truth of the matter is that Suarez underplays the conscience obligation in the law itself in order to highlight in the extreme the frailty of human nature when faced with excessive obligations.

If, now, we recall the left side of the chart in
this chapter we will note a conscience obligation to the law itself. That there is such will be shown in the next and final chapter. Indeed, the purpose of that chapter is to show that transgression has two senses for Suarez. Transgression under duress invites no fault in the eyes of the legislator. But transgression without cause constitutes true fault. This second sort of transgression is not explicitly included in the definitions of purely penal law, and its exclusion may have led some thinkers, such as Bayne, to oppose the theory itself. There may be good reasons for doing so. But those reasons ought to be divorced from the text of De Legibus. We shall see that Suarez himself places an obligation in conscience against deliberate contempt for a purely penal law.
CHAPTER III

THE GRAVITY OF TRANSGRESSION

Contempt

According to Suarez some are of the opinion that transgression of the law in itself is not a grave matter unless it is committed with contempt which then results in mortal sin. Suarez does not object to this view as such but rather to the assumptions held or derivable from it. For example, one such derivation is that contempt can alter a venial sin into mortal sin. Indeed it is the general opinion that transgression of the law committed with contempt constitutes a mortal sin even if the matter is not grave in itself. Saint Bernard, for example, holds that there cannot be contempt without sin, that contempt is equally grave with respect to all commands and that a light transgression committed with contempt becomes a grave one. But for Suarez it does not appear admissible that contempt is always a mortal sin.

The deduction is clear because (if) that thing through which another thing is what it is, (then) that (first) thing is more (than the second thing) [e.g., a cause cannot produce a greater effect than itself] therefore if the transgression of a light matter is always mortal by virtue of contempt, then contempt itself must always be a mortal sin.85
If it is true that contempt is always a mortal sin then certain contemptible acts such as disobedience, sacrilege and similar things would always be mortal sins. But they are not. He goes on to cite examples showing that contempt does not add to the gravity of a light matter.

I want to explain this with some examples. If one causes an injury to his fellow man through contempt, then this act along with the characterisation of contempt does not pass as injury, because the matter of the act is light. In the same way, if one does not wish to obey his superior in a light matter only to show that he cares little, it does not appear to be a mortal sin because all that is a light injury. 86

With the second example cited above Suarez has prepared his case to show that obedience does not always bind in conscience to all matters. Next Suarez defends his view by providing an analysis of contempt.

According to Suarez some authors think that to sin by contempt is to sin with a clear understanding and without the influence of passion or some other cause. I.e., the gravity of contempt lies in its freedom. It is a true culpa, they say, because it is a free and cognitive act. This distinction permits a difference between sins committed through ignorance and those committed with the clear intention to sin. Here the intention to sin is equated with a disobedience which has no cause i.e., it is a wilfull disobedience such that the absence of a cause made it possible not to disobey. In other words the transgression cannot be righteously excused or overlooked.

This clear intention to sin is further explained by
Suárez. Here he cites the view of Aquinas that it appears that to sin with contempt is to sin with perfect deliberation; and Saint Bernard is again cited as holding the view that to disobey as such is distinct from willing to disobey. For Suárez these last two distinctions become important because they will permit him to retain venial sin without alteration into mortal sin. Thus, so far, Suárez seems to accept that perfect deliberation and willingness to disobey are contempt in the grave sense.

Though Suárez sees merit in this account of contempt he has difficulty with it. He does because he thinks it leads to a distortion. The distortion encourages making a light matter grave. Thus his first objection concerns some characteristics of venial sin, of light matters, because

... a venial sin can be committed with certain understanding and perfect deliberation and (still) not be a mortal (sin) even though there is no interference by the passion but only free will.\(^{87}\)

Therefore, if venial sin can be committed with perfect deliberation and without passion and still remain venial, contempt cannot be a mortal sin simply by being characterized by the absence of passion and the presence of the will to sin. Suárez continues:

... because the absence of passion does not place maliciousness in a new class -- as is evident -- neither can it infinitely increase a maliciousness which is light by its nature and remaining circumstances.\(^{88}\)

In other words no amount of liberty or understanding can change a venial sin into a mortal sin because these things
by themselves cannot affect the subject matter or the object of the sin. This does not mean that no alteration can occur. Venial sins may increase quantitatively, for example, but "not to the point that something which is not mortal becomes mortal." 89

Now that Suarez has established that a sin without cause, i.e., without passion and therefore with freedom and understanding, does not constitute contempt he cites another case which might be mistaken for contempt. This case appeals to transgression of the law through habit or personal custom. Such transgression, he says, is not contempt. He also says that this opinion is completely false because there are other sources of contempt, namely pride, indignation and similar vices. In other words, there is no venial sin which can become mortal through continual usage or habit. Suarez comments on this:

The reason is that custom is not contempt; then to sin through custom, is in itself not to sin formally through contempt because habit can be prepared by contempt and little by little it can make habit produce (contempt) . . . . . . . . Well then, there is no doubt that habit is not contempt . . . 90

Granted, a sin can increase to the extent that it becomes engrained in a habit, "but not to the extent of being a maliciousness of a distinct class or species." 91 In other words the boundary between venial sin and mortal sin is fixed. Thus the alteration which does occur does not affect the gravity of the venial sin so as to warrant a culpa against God.
Suarez draws a clear distinction between a sin against God and a sin against man. This distinction must run throughout his theory of human positive law because transgression of human law may not be as grave as transgression of divine law and because "a venial sin is not contempt for God even though it is committed with perfect understanding." Therefore to sin with perfect deliberation and freedom does not constitute contempt as such. Because of this Suarez chooses to describe contempt in more general terms.

When one sins against the law without cause, it is presumed that there is contempt, but not when one sins with cause even though it is unjust, for example, through pleasure. From this we can arrive at the position that not all unjust deeds are a form of contempt and that contempt is not the only form of maliciousness which can be committed with perfect deliberation.

This position regarding the change of a light matter into a grave one is perhaps the most essential for the possibility of purely penal law. An attack on Suarez must be able to handle certain embarrassing consequences that follow from asserting that a venial sin can be transformed into a mortal one. If it were true that a habit could alter a venial sin into a mortal one then the lightest matter would place man in a state of mortal sin. According to Suarez this is theoretically unacceptable and an equally unacceptable burden for the venially disobedient subject.
Recall that for Suarez the law cannot possibly be an excessive burden if it is just. His view on this is very clear.

To be this way, all habit of sinning venially would place man in a state of mortal sin, and thus the habit of telling lies or -- idle words and similar things would be mortal sins, and would normally place men in danger of sinning mortally, and also of not being able to indicate [i.e., not being able to tell] when the number of acts of such sins begin to be mortal by reason of their frequency or habit, it follows that one sins sins mortally by force of such custom and by the danger of arriving at the number of acts by which one sins mortally. This consequence is most absurd and contrary to the sentiments of all the Church.94

Note that Suarez has just cited the highest moral authority of his time. He then continues:

The reason of the principle is that the habit of sinning venially in itself only increases in extension the number of venial sins and (indicates) the element of freedom of the past sins, but from neither of these arguments can it be deduced that there is a mortal sin ... nor is a greater intensity of freedom enough to make a sin mortal if the matter and the object and other circumstances of the sin are the same.95

The problem, then, is to discover at what point contempt is recognizable as warranting a true culpa if the characteristics of venial gravity are not to be shared with those of mortal gravity.

In order to be temporally punished for contempt one must first manifest contempt externally through word or deed. But a word or deed may not appear to be grave in itself. Nevertheless some words or deeds are quite grave in their maliciousness even if their subject matter
is light. Suarez must be able to explain this distinction without altering the nature of a venial sin. He does so as follows: if the external transgression originates from an internal contempt in such a way that it is forced to become external then the transgression is a grave one because it receives its maliciousness from that internal contempt even though the transgression by itself is not grave. Thus, any act which receives its maliciousness by some internal act is called contempt. 96

This internal act is described by Suarez as the will not to subjugate oneself to the law. I.e., to sin through contempt is to sin by willing not to be subjugated to a superior when subjugation is legitimate and just. This act of will not to submit is an act of pride. 97 Another way of expressing this is to say that contempt is an injustice. More precisely, it is the low esteem of the just. To diminish the esteem of another is contrary to justice. Thus, contempt is an act whereby low esteem is manifest against the law or the legislator.

... it appears to me that contempt of the person formally and properly pertains to an injustice. ... I say this last thing because the contempt for God is formally contrary to religion. 98

This type of contempt is unjust because it works against the rights of another. It is one's right to be treated with due esteem. To violate this right is to strike against a great utility among men.

... this is necessary for honour and considera-
ration which is due to each man and (which) can
be a great utility among men, to have contempt for this is not a small injustice, and consequently it is a mortal sin in itself.99

In other words, the mere form of the law does not exonerate one from an obligation in conscience. One is bound in conscience to meet the demands of purely penal law when disobedience would constitute grave contempt.

**Absolute and Relative Contempt**

Suarez holds the opinion that transgression of the law through contempt "is not always and in every case a mortal sin."100 He thinks it proper to hold this opinion because "contempt for the thing can be minimal or it can pertain to some small virtue, and in this case harm against the legislator is neither done nor attempted."101

Absolute contempt may be understood as contempt for God the lawgiver. Such contempt is always a mortal sin. On the other hand relative contempt pertains to a specific thing under particular circumstances. It is, therefore, not contempt of power as such but of a particular law or particular use of power. The distinction here enables Suarez to permit some dislike towards a legislator as long as this dislike is not contempt for the office and the power of the office:

... the human legislator is not as excellent a person as God, and furthermore some type of hate towards him could be venial. In this way we can distinguish formally between the superior and the superior as a determined man. To break his law by contempt for him as superior, I think is always a mortal sin ... 102
This contempt is grave because it is contempt for what is ordained by God and therefore, indirectly contempt for God. On the other hand if contempt is not for God or of what is ordained by Him, such contempt is not punishable by pain of mortal sin. If the subject has some contempt for a legislator who has some defect, nothing prevents this contempt from being venial. In this case the subject does not have contempt for the subjugating person who he does not wish to please in matters that are not grave. In other words, Suarez permits the subject the civil liberty of disobeying in light matters in order to show in an obvious way whether one consents to the will of the superior on some or all matters. Furthermore this activity may lead to mortal sin, and for this reason it is to avoided. Nevertheless Suarez does permit a species of contempt against the prince because

... it is one thing not to wish to subjugate oneself or not to wish to obey merely not to obey and (it is) another thing not to wish to comfort the superior ... this last thing may only be a venial sin even though because of it one does not carry out the will of the superior, because this is not a contempt for his power but a demonstration of some bitterness of mind toward his person.103

Though the cause for the transgression may not be just, as in this case of venial sinning, the punishment ought not to exceed the gravity of the transgression. Here Suarez is limiting the gravity of transgressing a purely penal law so that it does not exceed the gravity of a transgression against an obligation in conscience. This
aspect of the purely penal law substantiates the claim that a subject is obligated in conscience to the sanction. Transgression is permitted only when the circumstances warrant no obligation in conscience. On the other hand to avoid the punishment or refuse subjugation, even under the force of legitimate coercion, is contempt for power, for law and ultimately for God. Absolute contempt warrants punishment under mortal sin. Therefore a purely penal law may be transgressed with just cause whereas a righteously imposed sanction of the purely penal law cannot be transgressed with any cause, for no cause whatsoever can alter the obligation in conscience of a grave matter. The sanction binds in conscience because its transgression constitutes absolute contempt for subjugation. However, should the sanction be excessive the subject is permitted resistance and even escape.

Prudence of the Poena

Since the poena does pertain strictly to the culpa we must understand what Suarez further means by the concept if we are fully to understand how it can be imposed without fault but not without cause. First, Suarez says that ignorance is neither a culpa nor a just cause for punishment. The accused must know that he has disobeyed and that his disobedience warrants punishment. On the other hand the subject may argue that if he is not bound in conscience to obey the law itself then he has remained virtuous in the eyes of the law and that, furthermore,
punishment would in his case be repugnant to virtue. He has here an excellent defence, and may further add that because the legislator is an absolute sovereign over neither temporal nor spiritual matters only God can look into the conscience of man.

Suarez would agree with this line of argument but only after certain clarifications have been made. First, the law does not hold the transgression to be virtuous or evil. The purely penal law refuses to judge in matters of conscience, for these lead to accusation of a culpa in the absence of absolute contempt. Similarly, the law does not proclaim an act virtuous, for again a purely penal law does not judge purely moral matters. Since it does not, it cannot pardon, for it cannot pardon what it has not judged. Therefore, although the law does punish without culpa it does not punish virtue. I.e., it does not punish an evil arising from a vice but rather, and more precisely, it punishes the omission of a median virtue or prudent act.

But the disobedient subject has not lost his case. He can still hold fast to the claim that if there is neither vice nor virtue there cannot be true culpa. Suarez must concede the point. There is no true culpa. However there is a poena. This problem may be resolved in one of two ways. Either the punishment can be seen as a true poena or it can be asserted that something other than sin warrants punishment. In either case an obligation in conscience must take effect or the law is not binding and
thus not true law. Yet it is already clear that for Suarez something other than sin warrants punishment. Nevertheless this punishment cannot exceed the gravity of a poena which is inflicted by way of a culpa.

Suarez is clear on this point. In fact any temporal punishment imposed by the purely penal law is not binding in conscience if it is too grave. For example, he says "when the punishment is corporeal and harsh ... escape is not prohibited in conscience." But this reply should not satisfy the disobedient subject because he does not wish to be punished without a culpa and, besides, escape leads to other problems. At this point Suarez must alter the meaning of poena and its strict relation to sin, culpa. His intention is to make the poena a new means for the practical possibility for obedience and not to inflict a harm. Thus he says that

... the penalty ... is said to be in relation to a true fault. However in this present case it is not necessary to call it that in this sense, (since) in a very general sense all the natural harm, from whatever cause it proceeds, enters into the harm of the penalty, and in particular and normally all affliction that takes place in the form of coercion through which the law is executed, is called true penalty.

In other words any affliction imposed by an authorized human lawmaker to compel obedience to the law is true punishment. Thus the penalty of a purely penal law, taken in this sense, cannot ever pertain to a true culpa because not all punishments compel to obedience.

By making the punishment a form of coercion through
which the law is executed Suarez is able to bind to that sanction in conscience. He is not binding to a pain but rather to a painless fulfillment of the law. This sort of fulfillment insures that there be a moral obligation. For example:

... if the matter is moral — that is to say, directly in contact with the good customs of the community and the repression of vices — and it is judged necessary for those ends or for peace or for avoiding some great inconvenience for the state, it is much presumed that the law is given with the intention to bind in conscience even though the manner of commanding is neither so expressed and explicit nor the penalty too grave. 107

Now Suarez can finally answer the subject and say that

... the penal law is reduced to an obligation in conscience to pay or suffer the penalty. This is enough for it to be a true law even though it does not bind to the condition which threatens with the penalty ... [which is imposed] without fault, however it is not imposed without cause, or, even though it is imposed without moral fault ... it is not imposed without civil or political fault ... 108

This civil fault is an imperfection, not in the eyes of God, but of man. An obvious imperfection is transgression. But transgression may not constitute absolute contempt. Thus, the subject can be informed that even though he has not sinned with absolute contempt he will sin with absolute contempt if he does not accept the obligation in conscience to the sanction, an obligation to fulfill the purpose of the law under new conditions.

To refuse submission to this poena would constitute complete transgression of the law. The subject can be informed that submission to the poena does not constitute
or indicate his moral inferiority because he had cause to transgress the law and, more important, because obedience is still possible. If the subject persists in refusing to submit to the sanction he will be accused of absolute contemp and, therefore, a true culpa. But the subject has one appeal left.

Non Auditus, non Convictus

In a purely penal law whose binding force issues strictly from a true causa, strictly from matters which do not pertain to anything purely moral, the obligation in conscience does not occur until after the judge has passed sentence. There is no doubt that Suarez has the protection of the individual in mind. A man who is convicted but not judged cannot be bound in conscience. He must be judged to be guilty i.e., accused by the due process of law through the civil courts. Only then is he obligated to accept the judgement.

Because the cause for punishment is a relative necessity there is too much room for doubt to permit the full weight of a culpa on a man who may have acted morally but found himself convicted of disobedience. Thus the necessity for a judge here points to the imperfection of the human law, for the human law cannot embrace, nor is meant to, the complete circumstances of the disobedient act. It must be recalled that civil disobedience is permissible when necessary and that sometimes it is morally binding to disobey. For these reasons Suarez
says that "it is contrary to justice that one be convicted without being accused if (he) is condemned before hearing (him); all the laws condemn this." Stated in a more fundamental way:

... the human law is not as immutable as the natural law, and through the matter of its utility, with changing times such actions can vary, since they are for a time useful and convenient, in another time they may become useless or too grave.

Thus the validity of the purely penal law depends on the just cause which is relative to the common good of the perfect human community. But a law which does not become part of the good customs of the community or which is incorporated with difficulty may be repealed because it is irrational and contrary to the common good to enforce the law.
CONCLUSION

The burdens imposed upon the Coimbra purely penal law may have been lightened. Therefore destruction of the Coimbra view, something attempted by Bayne, may not be fully warranted.

The charge that purely penal law may create moral and civil disorder by binding in conscience to the poena rather than to the law itself is supported by Davitt:

The theory of purely penal laws does not promote civic-mindedness and cooperative civic behaviour for the common good. If a citizen believes he is not obliged to obey a tax law but is obliged merely to pay penalties if caught evading it, he can ignore the demands of such a law with a good conscience. . . . The inevitable consequences of such a theory is that in vast segments of civic activities, citizens . . . may feel that they are not obliged in conscience to contribute to the common good by doing what the law decrees for the common good.111

But Suarez does say that purely penal law exists for the common good. In fact the Coimbra poena is not repugnant to the common good. A paraphrase of Davitt's charge illustrates the case: 'The purely penal law does promote civic-mindedness and cooperative civic behaviour for the common good. If a citizen knows he is obligated to obey a tax law and also obligated to pay the penalty if obedience is an excessive burden, he can ignore the
demands of such a law with good conscience because he has an opportunity to fulfill the purpose of the law through the sanction. . . . The inevitable consequences of such a theory is that in vast segments of civic activities, citizens . . . know that they are obliged in conscience to contribute to the common good by doing what the law decrees except in cases of hardship so that there is an obligation in conscience to fulfill the purpose of the law by some other acceptable means.' This poena, this other acceptable means, is a compensation that fulfills the purpose of the law. This benign characteristic of the Coimbra poena cannot make it repugnant to the common good.

Furthermore, the purely penal law of Suarez does bind in conscience. Because it does those who have no cause for transgressing it commit an act of grave contempt, a true culpa. But when the law cannot be obeyed due to some cause, it may be interpreted benignly so as to warrant an alternative obligation. Thus the subject is never without an obligation in conscience. There is never any moral freedom to disobedience.

The second charge, that of the primacy and supremacy of the will, is addressed by Bourke:

In conclusion, what is generally characteristic of this theory of the legislative will? It appears that the will becomes that faculty, power, . . . which admits of no superior standard. Whatever edict such a will issues is ipso facto legal and right. . . . Such an understanding of will can . . . end in the sophistries of penal thinking, in the rejection of all permanent codes of human conduct, in the superficiality of legal positivism . . . 112.
But the Suarezian will does admit of a superior standard, the common good. The will is not sovereign, absolute. In fact it was seen that this will "partly cedes" its power.

If this will is not sovereign then the following cannot pertain to Suarez:

We may observe how necessary to legal positivism is the acceptance of a sovereign will which is governed by, and grounded in, nothing but itself. ... Legal positivism, then leaves no room for a philosophy of law.113

This charge is put on grounds that the Suarezian theory implies "that the human will always retains, even in the very exercise of its action, the active power to cease or modify its activity."114 Whatever freedom the Suarezian will may have, it is certainly not moral freedom.

If all of the above charges apply to Kant or Austin because they are legal voluntarists then Suarez, who advocates the primacy of the will, must also be guilty of the same charges. This reasoning detracts from the genius of Suarez. Can man create laws perfectly? Can man obey perfectly in all circumstances? Because nature is frail, and because the common good demands that care must be had for this frailty, the answer is no. Transgression caused by this frailty warrants an opportunity to complete the purpose of the law. Thus the Suarezian theory of law also considers the happiness of the state by not taxing this frailty excessively. It is a theory where the prince and the subject are equals in the face of the common good. This should warrant the theory's existence.
FOOTNOTES

1. The theory is found in his De Legibus ac Deo Legislatore, Coimbra, 1612. English quotations were provided by translating from the Spanish version, Tratado De Las Leyes y De Dios Legislador, trans. José Ramón Eguillar Munozguren, S.J., Instituto de Estudios Políticos (Sección de Teólogos Juristas), (Madrid, 1967), and by consulting the Latin of the Coimbra edition in the Tratado. References to these texts will be given as: De Leg., 5, 18, 22. Numbers refer to Book, Chapter and Section.

2. ... las fórmulas de la ley no lo digan expresamente ni que sea esa intención del legislador; porque, para que la ley no resulte desmesurada, es lícito medir las palabras acoplándolas a lo que la materia exija, y entonces esa interpretación se hace -- digámoslo así -- al dictado de la justicia ... . Tampoco se opondrá a esa interpretación benigna el que la contribución del tributo es el pago de una deuda, porque no es esencial a la deuda el que consista en una cantidad fija: esta cantidad señala la ley humana, y puede suceder que, señalada con obligación absoluta de pagarla, resulta excesiva, pero que con esa atenuación puede en su punto ... . Esto -- repito -- no hace dificultad, porque aunque el príncipe se oponga siempre con penas moderadas a fin que los súbditos no cobren una libertad excesiva, puede fundadamente presumirse que esa coacción es puramente penal y dirigida a compensar de esa manera la merma de los tributos; a pesar de esto, la costumbre tendrá virtud para eternar la obligación en conciencia de la ley, y el príncipe o no puede o no debe hacerle resistencia en esto ... . " De Leg., 5, 18, 22 and 23.

3. ... cuando la intención expresa del legislador es dar una puramente penal, pues -- según dije antes -- esa intención produce un cambio en la materia de la ley, cambio que está en manos del legislador; en efecto, este puede mandar esta o aquella materia de una manera determinada, disyuntiva, absoluta o condicional, por más que, si quiere dar verdadera ley, no puede excluir de toda materia toda obligación en conciencia. Así pues, cuando dice que su intención es no obligar in conciencia más que a la pena, esto se entiende con relación al acto que se manda o prohíbe a las inmediatas; sin embargo -- por ese hecho no es tal acto materia completa de esa ley: su materia completa es, la disyuntiva de hacer tal obra o de sufrir o cumplir tal pena si no se hace tal cosa; y entonces no queda excluida de toda la disyuntiva la obligación en conciencia." Ibid., 3, 27, 3.

4. David Cowan Bayne, Conscience, Obligation, and
5"Y que esos trasgresores de suyo no pecan, se prueba porque prudentemente conforman el dictamen de su consciencia con la intención de su legislador; ahora bien... esté declaró que en aquella trasgresión, en virtud de la ley no había culpa; luego prudentemente los súbditos forman el juicio de consciencia de que allí no hay pecado; luego en realidad no pecan, porque lo que procede de una consciencia legítima no es pecado." De Leg., 3. 22. 6.

6... la ley penal se reduce a una obligación de consciencia de pagar o sufrir la pena. Esto basta para que sea verdadera ley aunque no oblige en consciencia a la condición bajo la cual amenaza con la pena; respecto de esa condición se llama puramente penal, por más que respecto de la pena misma tiene eficacia para mandar del modo dicho." Ibid., 5. 4. 13.


8Ibid., p. 129.


12Ibid.

13Friedrich Meinecke, Machiavellism, (London: Routledge and Kegan Paul, 1962), p. 399. Gustav Freytag wrote: "In this a young and promising counsellor of the ruler is taken into the secret chambers where the arcana status are to be found: the cloaks of State, masks of State, beautifully trimmed on the outside but shabby on the inside, with names like salus populi, bonum publicum, conservationis, etc., are used when one goes to meet the representatives of the people, when one wishes to make the subjects agree to pay subsidies, or when, under the pretext of a false doctrine, one wants to drive someone out of house and home. One completely threadbare cloak, which is in daily use is called Intentio, good intentions: This is worn when one is laying new insupportable burdens on the subjects, impoverishing them with forced labour, or
inaugurating unnecessary wars. With the various spectacles of State, midges can be made into elephants; or little kindness on the part of the ruler can be made into supreme acts of mercy. There is an iron instrument with which the ruler can enlarge the gullets of the counsellors, so that they can swallow great pumpkins. Finally, a ball of knotted wire, furnished with sharp needles and heated by a fire within, so that it draws tears from the eyes of the beholder, represents the Principe of Maciavelli."


15 De Leg., 3. 22. 3.


18 De Leg., 1. 7. 4.

19 "... el poder soberano ni halla solamente en el príncipe ni solamente en la comunidad... sino en todo el corpo juntamente con la cabeza. De esta forma el poder de legislar reside en todo el, de tal manera que ni la comunidad es capaz de dar leyes sin el príncipe ni el príncipe sin la comunidad." Ibid., 3. 9. 6.

20 "... pues ello depende de la voluntad del príncipe y no contiene injusticia ni rigor sino mas bien suavidad, ya que parece parece que el príncipe al hacerlo, mas que excederse en algo, cede en parte su derecho." Ibid., 5. 13. 11.


22 De Leg., 1. 3. 17.

23 Ibid., 1. 3. 20.

24 Ibid., 1. 1. 5.

25 Ibid., 1. 1. 7.

26 Idem, Conscience, Obligation, and the Law, (Chicago: Loyola University Press, 1966), p. 120.
27"Por tanto, por la naturaleza de la cosa, en la ley humana se sobreentiende esa condición o excepción, aunque no se explique detalladamente, pues de no ser así, la ley no sería justa y razonable. Luego, de la justicia misma de la ley humana —teniendo en cuenta la condición natural de la materia de que se trata—, se sigue necesariamente que su obligación cesa algunas veces en casos particulares, no por supresión impuesta desde fuera sino por sólo el cambio de la materia o de las cosas." De Leg., 6. 6. 4.

28Ibid., 1. 3. 1.
29Ibid., 1. 3. 2.
30Ibid., 1. 3. 3.
31Ibid., 1. 3. 18.
32Ibid., 1. 7. 4.
33Ibid., 5. 18. 23.
34Ibid., 1. 7. 9.
35Ibid., 5. 18. 23.
36Ibid., 1. 9. 16. But Latin text has 1. 9. 14.
38Ibid.
39Ibid., 5. 18. 3.

40"... luego también por la costumbre se podrá derogar una ley aunque no se la abrogue, ... luego si la ley es divisible de cualquier manera, se podrá derogar en cuanto a una parte y no en cuanto a otra. Ahora bien, la pena de la ley es separable de la culpa; luego la costumbre puede derogar la ley en cuanto a la imposición de la pena dejando la obligación bajo culpa. En efecto, tal pena no va aneja a la culpa de suyo sino por voluntad del príncipe ... . Además el príncipe está obligado a la ley en cuanto a su fuerza directiva aunque no esté obligado a la pena. En este sentido ... algunas veces la costumbre excusa de la pena temporal aunque no excuse la infraval." Ibid., 7. 19. 3.

41"La razón del problema puede ser que el fuero de la conciencia es el fuero de Dios; ahora bien, el hombre no puede obligar en el fuero de Dios; luego tampoco en en el fuero de la conciencia." Ibid., 3. 21. 2.
42. "El interno es el que se ejerce dentro en la mente del hombre en donde reside la conciencia, y por eso se llama fuera de la conciencia..." Ibid.

43. I translate honestas as "decency". Here, decency pertains to both the moral and civil good. Having a right conscience is an example of moral decency. Acting according to good custom and law is civil decency. The Shorter Oxford English Dictionary, 1936, gives the following: "Decency... 1567. [ad.L. decencia, f. decentem] 1. Appropriateness to the circumstances of the case; fitness, seemliness, propriety; what is appropriate - 1762. 2. Orderly condition of civil or social life - 1705. 3. Propriety of demeanour; due regard to what is becoming; esp. freedom from impropriety 1639; respectability 1751. 4. pl. The observances of decorum; proprieties 1667; the outward requirements of a decent life 1798."

The Oxford Latin Dictionary, ed. P.G.W. Glare, 1973, gives the following: "decen... . 1. Conforming to an approved standard, seemly, fitting, appropriate... . . . .
2. Having a pleasing appearance, becoming, graceful... . . .
decenter... . . In a manner conforming to good taste, becomingly, gracefully, decently... . . .
dectia... . . Propriety, becomingness... .
decor... . . A pleasing appearance, good looks, beauty, grace... . . . Non-visual beauty, elegance, charm; adornment, distinction... . . . Seemliness, propriety, rightness. . . . Pleasing to the senses, beautiful... . .
honestas... . . 1. Title to respect, honourableness, honour. . . . 2. Moral rectitude, integrity. . . . Decency, seemliness."

44. The internal forum is a spiritual one because it is capable of noticing virtue and vice. Vice is morally prohibited. This prohibition is binding in conscience. Therefore this obligation is somewhat spiritual because it binds in the internal forum.

45. "... nadie puede obligar en un fuero en el que no puede entablar una investigación judicial, porque no puede obligar en donde no puede juzgar... . ahora bien, el hombre no puede juzgar de la conciencia ajena, porque no pueda conocerla." De Leg., 3. 21. 2.

46. También es necesario que se haya dado con voluntad de mandar y con intención de obligar, porque el precepto es esencial a la ley y las palabras sin intención son ineficaces; por esa ley dada sin intención tampoco es verdadera ley sino fingida o aparente, o a lo más será una sencilla orientación y dirección a manera de consejo." Ibid., 3. 21. 1.
47"… no está en su mano el no querer obligarse en conciencia. " Ibid., 3. 22. 2.

48"… las leyes penales, como es manifestó, son verdaderas leyes, y sin embargo pueden no obligar en conciencia; luego no es esencial a la ley el obligar en conciencia. " Ibid., 3. 22. 3.

49"… aunque sea esencial a la ley alguna obligación, pero la manera de ser de esa obligación depende de la intención del que manda, de donde se sigue que, aunque la materia de la ley sea grave, puede el legislador no querer obligar bajo pecado mortal. " Ibid.

50Ibid., 3. 21. 2.

51"… prudentemente conforman el dictamen de su conciencia con la intención de su legislador. " Ibid., 3. 22. 6.

52"… en realidad no pecan, porque lo que procede de una conciencia legítima no es pecado. " Ibid.

53"… aunque la ley que tratamos no obligue de una manera absoluta a hacer o omitir esto, sin embargo obliga a a hacer esto o a aguantar la pena u otro efecto de la ley si no se observa la ley en su primera parte. " Ibid., 3. 22. 8.

54"En efecto, digo que toda verdadera ley humana se resuelve necesariamente en alguna obligación de conciencia. Prueba: Es necesario que la ley obligue al acto de una manera absoluta o al menos bajo algunas penas. De la primera manera… obliga en conciencia a tal acto… y si la ley se da de la segunda manera de forma que sea puramente penal, obligara a a pagar la pena — supuesta la trasgresión, si es que la ley se ha dado con ese rigor — lo mismo que obliga el voto penal, o por lo menos a soportar la pena… " Ibid., 3. 22. 9.

55"Respecto de solo el acto, esa ley no es una norma absoluta de honestidad, y el apartarse sin mas de tal norma en tal acto no es malo moralmente, pero es de suyo gravenso en cuanto que le hace a uno susceptible de tal carga o pena; en cambio respecto de toda la materia de tal ley, se la puede tener por norma de honestidad, porque obliga al conjunto disyuntivamente, de tal manera que no puede obrarse contra tal ley en ambas formas sin pecar contra la honestidad y las buenas costumbres, entiendese si no solo no se cumple la ley en el primer acto sino que además uno quiere someterse a la pena y se resiste a ella. " Ibid., 3. 22. 11.
56"... con penas moderadas a fin de que los subditos no cobren una libertad excesiva, puede fundadamente presumirse que esa coacción es puramente penal y dirigida a compensar de esa manera la merma de los tributos... " Ibid., 5. 18. 23.

57See section "Civil Law and the Common Good" of the first chapter, p.13. See pp. 16-19 for the distinction between absolute and relative.

58"La obligación es un efecto moral que no puede producirse sin el consentimiento de la voluntad humana... " Ibid., 3. 27. 7.

59"... el derecho natural fuerza a que la obligación de la ley sea grave." Ibid.

60"... esa voluntad de dar la ley no es absoluta sino limitada... " Ibid.

61"... porque en tal manera de mandar no puede demostrarse que haya ninguna inconveniencia intrínseca ni transgresión de ninguna obligación: en efecto, el superior no está obligado a mandar siempre todo lo que puede, ni tampoco está obligado a abstenerse de mandar... " Ibid., 3. 27. 14.

62"... con la condición de no imponer obligación bajo pecado mortal... " Ibid., 3. 27. 7.

63Ibid.

64"Así pues, cuando dice que su intención es no obligar en conciencia más que a la pena, esto se entiende con relación al acto que se manda o prohíbe a las inmediatas; sin embargo por ese hecho no es tal acto materia completa de esa ley: su materia completa es, la disyuntiva de hacer tal obra o de sufrir o cumplir tal pena, o -- lo que viene a ser lo mismo -- se trata de una ley condicional de pagar tal pena si no se hace tal cosa, y entonces no pueda excluida de toda la disyuntiva la obligación en conciencia." Ibid., 3. 27. 3.

65"... en eso caso la gravedad y la clase de la obligación impuesta de esta manera se ha de determinar por la materia, conforme a lo que se de indeterminadamente con la sola intención de dar la ley." Ibid.

67". . . legislador puede hacer que la ley oblige bajo venial aun en el caso de que la materia fuera capaz de una obligación mayor." De Leg., 3. 27. 12.

68". . . de ahí no se sigue que la ley humana mande actos absolutamente virtuosos ni tampoco que se ejecuten virtuosamente, basta que manda lo que es virtuoso por su género y señalando tal punto medio en tal especie de virtud. Esto aparece claro en materia de justicia; manda el acto de justicia señalando el punto medio en la materia de ella; observando esa punto medio no se peca contra esa ley . . . " Ibid., 3.29.12.

69Ibid., 5. 3. 2.

70Ibid., 5. 3 - 3.

71"También puede decirse que aunque toda pena es por una culpa, pero no siempre por una culpa contra Dios sino que a veces basta una culpa — como se dice — civil y humana." Ibid., 5. 3. 7.

72Ibid.

73By 'penal poena' I mean the sort of punishment found in purely penal law and not a punishment attached to a purely moral law.

74Also, "The law should not be made so difficult that only a few can obey." Ibid., 5. 3. 10. See also 7. 15. 12.

75"Pero a eso se responde que si la ley que tasa el precio de una cosa hace qué no valga más es porque señala el punto medio de la justicia; pues bien, de la misma manera las otras leyes señalan el punto medio de la virtud, sea en materia de justicia, sea en materia de religión o de otras virtudes, porque esta es la eficacia de la ley humana . . . por eso, en consecuencia, coloca al acto contrario en la especie del vicio contrario; luego obliga también en conciencia a observar tal punto medio de la virtud . . . " Ibid., 5. 3. 10.

76". . . la añadura de la pena no es ningún indicio de que la culpa quede eliminada." Ibid., 5. 3. 11.

77"Hence the actually being virtuous is not the content of what the law prescribes. Therefore human law does not prescribe the actual performance for every virtue. . . . Nevertheless human law does not enjoin every act of every virtue, but those acts only which serve the common good, either immediately, as when the social order is directly involved from the nature of things, or mediately, as when measures of good discipline are passed by the
legislator to train citizens to maintain justice and peace in the community." 1a2ae. 96. 3. Gilby's footnote to this text reads: "The laws are directly a matter of justice, which is social virtue of its nature; the other three cardinal virtues, namely prudence, courage, and temperance, together with their associated virtues, are involved in their outward and social manifestations ... These as such ... are not enforceable by positive law." St. Thomas Aquinas, Summa Theologiae, (Cambridge: Blackfriars, 1966), XXVIII, 1a2ae. 96. 3., p. 127.

78"... any other precept about more particular business will not have the nature of law except in so far as it enters into this plan for the common good." Ibid., 1a2ae. 90. 2.

79"... no puede decirse que esa ley amenace con la pena dejando la amenaza de la culpa, porque la única manera como suele formularse el reato de culpa es mandando." De Leg., 5. 3. 11.

80Ibid., 5. 4. 3.

81"Esa manera de mandar no es contraria a la esencia de la ley ni a la esencia de la justicia; luego puede el legislador, a su prudente arbitrio, querer sola esa manera y no otra; luego en el caso de que lo haga así, creará una ley puramente penal que oblige al acto mandado no en conciencia sino solamente bajo pena." Ibid.

82"... a veces se incurre en pena sin culpa aunque no sin causa," Ibid., 5. 4. 5.

83Ibid., 5. 4. 13.

84See page 34 of this thesis.

85"La deducción es clara porque aquello por lo cual una cosa es lo que es, ello mismo es más; si, pues, la trasgresión de un precepto leve o en materia leve es siempre mortal por razón del desprecio mismo sera siempre pecado mortal." Ibid., 3. 28. 3.

86"Voy explicar esto con algunos ejemplos. Si uno dice a su prójimo una injuria leve par desprecio suyo, solo por eso no peca gravemente, porque toda esa acción con esa modalidad del desprecio no pasa de ser una injuria, la cual en esa materia es leve. Asimismo, si uno no quiere obedecer a su superior en una cosa pequeñísima sólo para demostrar que le tiene en poco, no parece pecar mortalmente, porque todo ello puede ser una injuria leve." Ibid.
87"... también un pecado venial puede cometerse con conocimiento cierto y perfecta deliberación y no por eso ser mortal aunque no intervenga la pasión sino solo la voluntad." Ibid., 3. 28. 5.

88"... porque la ausencia de pasión no caloca de suyo a la malicia en una nueva especie -- como es evidente -- ni puede aumentar infinitamente una malicia que por su naturaleza y demás circunstancias es leve ..." Ibid.

89"... no tanto que haga mortal una cosa que por lo demás no sería mortal ..." Ibid.

90"La razón es que la costumbre no es desprecio; luego pecar por costumbre, formalmente y de suyo no es pecar por desprecio. He dicho formalmente y de suyo porque la costumbre puede preparar para el desprecio y poco a poco llegar a producirlo ..." Ibid., 3. 28. 8.

91"... pero no en cuanto a una malicia de distinta clase o especie ..." Ibid.

92"... el pecado venial no es desprecio a Dios aunque se cometa con perfecto conocimiento." Ibid., 3. 28. 6.

93"... Cuando se peca contra la ley sin causa, se presume que hay desprecio, pero no lo hay cuando se peca con causa aunque ésta sea injusta, por ejemplo, por placer ..." Ibid., 3. 28. 6.

94"De ser así, toda costumbre de pecar venialmente calocará a los hombres en estado de pecado mortal, y así la costumbre de decir mentiras pequeñas o palabras ociosas y cosas semejantes, pondría normalmente a los hombres en peligro de pecar mortalmente, porque esos pecados, por razón de la costumbre, serían pecados mortales, y no pudiéndose señalar el número de actos en que tales pecados comienzan a ser mortales por razón de la frecuencia o costumbre, se sigue que se peca mortalmente en fuerza de tal costumbre y del peligro de llegar al número de actos en el cual se peca mortalmente. Esta consecuencia es absurísima e contraria al sentir de toda la Iglesia ..." Ibid., 3. 28. 9.

95"La razón de principio es que la costumbre de pecar venialmente de suyo solo aumenta en extensión el número de los pecados veniales y también el elemento voluntario en los pecados posteriores, pero de ninguno de estos dos argumentos puede deducirse que haya pecado mortal ... ni la mayor intensidad de la voluntad baste para el objeto y las otras circunstancias del pecado son mismos." Ibid.
96. Ibid., 3. 28. 12.

97. Ibid., 3. 28. 13.

98. ... el desprecio de la persona me parece a mí que formalmente y con toda propiedad pertenece a la injusticia. ... Digo esto último porque el desprecio de Dios será formalmente contrario a la religión." Ibid., 3. 28. 16.

99. ... esto es necesario para el honor y consideración que se le debe a cada uno y puede tener gran utilidad entre los hombres; por eso a ese desprecio se le tiene por una no pequeña injusticia, y en consecuencia es un pecado de suyo mortal." Ibid.

100. ... no es siempre y en cada caso particular es pecado mortal." Ibid., 3. 28. 22.

101. ... que la cosa despreciada puede ser mínima o pertenecer a alguna virtud pequeñísima, y que en ese caso de suyo ni se hace ni se pretende hacer injuria al legislador." Ibid.

102. ... el legislador humano no es una persona tan excelente como Dios, y además alguna clase de odio a él puede ser venial. Así que podemos distinguir entre el superior formalmente en cuanto superior y el superior en cuanto determinado hombre. Pues bien, quebrantar su ley por desprecio de él en cuanto superior, pienso que siempre es pecado mortal." Ibid., 3. 28. 2nd. 23rd. section.

103. ... una cosa es no querer someterse a no querer obedecer, y otra no querer consultar al superior. ... este último puede ser sólo pecado venial aunque por esa causa como tal no se cumpla la voluntad del superior, porque no es que se desprecie su poder sino que se muestra cierta amargura de ánimo para con su persona." Ibid.

104. Ibid., 5. 3. 7.

105. ... la fuga no está prohibido en conciencia cuando la pena es corporal y dura." Ibid., 5. 10. 2.

106. ... la pena ... dice relación a una verdadera culpa. Sin embargo en el caso presente no es necesario tomarla en ese sentido, pues en un sentido más general todo daño de la naturaleza, de cualquier causa que proceda, entra en el mal de pena, y en particular y normalmente toda aflicción para que se cumpla una ley, se llama verdadera pena." Ibid., 5. 4. 5.
107°. . . si la materia es moral -- es decir, directamente tocante a las buenas costumbres de la comunidad y a la represión de los vicios -- y se la juzga necesaria para esos fines o para la paz o para evitar algún grave inconveniente del estado, es muy de presumir que la ley se da con intención de obligar en conciencia aunque la manera de mandar no sea tan expresa y explícita ni la pena demasiado grave." Ibid., 5. 4. 12.

108°. . . la ley penal se reduce a una obligación de conciencia de pagar o sufrir la pena. Esto basta para que sea verdadera ley aunque no obliga en conciencia a la condición bajo la cual amenaza con la pena respecto de esa condición se llama puramente penal . . . la cual es impuesta sin causa, o aunque la imponga sin culpa moral, pero no la impone sin culpa civil o política." Ibid., 5. 4. 13.

109°. . . es contrario a la justicia el que a uno, sin ser acusado ni quedas convicto, se le condene antes le oirlle; por eso todos los derechos condenan esto." Ibid., 5. 5. 4.

110°. . . la ley humana no es tan inmutable como la ley natural, y por el capítulo de su utilidad, con el cambio de los tiempos tales acciones pueden variar, pues las que en un tiempo son útiles o convienen, en otro resultan inútiles o demasiado gravosas." Ibid., 6. 25. 3.


113 Ibid., p. 184.

114 Ibid., p. 178.

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VITA AUCTORIS

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