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I

"POWER, UNQUALIFIED AND UNSPECIFIED, is one of the vaguest notions in the history of human thought."[1] But power, elusive though it may be, is clearly operative in law. The word may mean simply what H. L. A. Hart means when he calls the Austinian imperative theory, "the gunman situation writ large."[2] Or it may mean what Coke meant when he answered James I and his claim to rule by divine right by quoting Brackton's: *"Ipse enim rex non debet sub homine sed sub deo et lege, quia lex facit regem."*[3] Whether power is on the physical level of force or the moral level of authority, whether it is on both levels or whether the two levels are equivalent, power is of utmost juridical importance.

Arrest, which puts a person in the control and custody of the law, is a crucial instance of power in action. The elements apparent here are significant. The one who arrests must be authorized by a special warrant or by the general law permitting an officer or private person to arrest without a warrant under certain circumstances. When the arrest is made, the authority and intention of the one arresting must be communicated to the suspect.[4] But

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[1] Hall, *Unification of Political and Legal Theory*, 69 POLITICAL SCIENCE QUARTERLY 15, 17 (1954).

[2] Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958).

[3] Coke, *Prohibitions Del Roy*, 12 Co. Rep. 63 (K.B. 1612).

[4] *E.g.*, 18 U.S.C. § 3109 (1961) provides: "The officer may break any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." *Miller v. United States*, 357 U.S. 301 (1958), applies these requirements to an entry for the purpose of making of an arrest without a warrant. *Keiningham v. United States*, 109 U.S. App. D.C. 272, 287 F. 2d 126 (1960), applies these requirements to an entry for the purpose of making an arrest with a valid arrest warrant.

authority and intention are not enough; physical force, actual or constructive, is required. A true arrest is always a privileged imprisonment and may involve a privileged assault or battery. In *Kelly v. United States,* the Court spelled out the coercive element in arrest:

> In order for there to be an arrest it is not necessary for there to be an application of actual force, or manual touching of the body or physical restraint which may be visible to the eye. It is sufficient if the person arrested understand that he is in the power of the one arresting and submits in consequence.[5]

The touching is token force, the submission is the acknowledgement of superior power. The touching is sufficient without submission, the submission is sufficient without a touching. However, some situations require more than a symbolic use of coercion. The one who arrests has the right to use all the force that is reasonably necessary if the suspect resists arrest or merely flees lawful arrest, but he cannot use deadly force unless the suspect is charged with a felony dangerous to life. Once the arrest has been made and the suspect is in legal custody, reasonable force may be used to prevent escape. If the prisoner attacks the one who arrested him, all reasonable and even deadly force may be used. If the prisoner merely flees, only reasonable and non-deadly force may be used unless the crime is a felony dangerous to life.

The problem of arrest with its complexus of authority and coercion, of rights and duties, shows vividly the strong arm of the law. A man may follow his own will for years without any concern for law or its power. So long as he does not happen to violate a law or to be apprehended doing so, the law for him may, subjectively, be non-existent. But once arrested, he is no longer his own man. The law now painfully impinges on his life. Legal phenomena become existential realities to be coped with at his peril. No longer fully free, he becomes subject to the machinery of justice, to authority and coercion and the indignities of police administration. He must face up to the fact of power.

II

Power, according to the Aristotelian categories, is a species of quality, an accident consequent on form. "A power or capacity is a proper qualitative accident which makes an agent immediately able to perform a certain type of action."[6] Another species of quality is the passive power which is defined as "the state resulting in a corporeal being from the action of its environment upon it."[7] When these two species are actualized, they must be reclassified in

[5] 111 U.S. App. D.C. 396, 398, 298 F. 2d 310, 312 (1961).
[6] HART, THOMISTIC METAPHYSICS 226 (1959).
[7] *Ibid.*

the categories of action and passion respectively. These distinctions are important to the general problem of power. For example, Aquinas states, in terms of the eternal law, a principle which is applied analogously on other levels:

> The good are perfectly subject to the eternal law, as always *acting* according to it; whereas the wicked are subject to the eternal law, imperfectly as to their *actions*, indeed, since both their knowledge of good and their inclination thereto are imperfect. But this imperfection on the part of *action* is supplied on the part of *passion*, in so far as they suffer what the eternal law decrees concerning them, according as they fail to *act* in harmony with that law.[8]

Man is gifted with many powers. Some he shares with other beings, the chemical and physical, the vegetative, and the animal powers. But some are exclusively human. It is this type of power that is our primary concern. As Tillich observes, "Physicists are usually conscious of the fact that they use an anthropomorphic metaphor when they use the term 'power.' Power is a sociological category and from there it is transferred to nature (just as is law . . .)."[9] When Russell defines power as "the production of intended effects,"[10] he is, by his use of the word "intended," thinking of power on the human level. The implications in such power are brought out by Guardini: "We may speak of power in the true sense of the word only when two elements are present: real energies capable of changing the reality of things, of determining their conditions and interrelations; and awareness of those energies, the will to establish specific goals and to launch and direct energies toward these goals."[11] These two elements, intelligence and responsibility, give power a truly human dimension. The goal, which is first in the order of intention, is finally achieved through the human actualization of those powers which move reality. Since the action is freely intended, and is neither determined nor accidental, it can be predicated of the agent as his own action.

Power can be directed towards persons or things. Our main concern is power over human beings without forgetting that "the chief cause of change in the modern world is the increased power over matter that we owe to science."[12] Since Russell wrote those words, the "Second Industrial Revolution," based on cybernetics and the "intelligent machines" of automation have extended not only the frontiers of man's mastery of nature, but also the areas of communication and control of other men. Machines will not, as Samuel Butler envisaged in *Erewhon*, enslave mankind all by themselves; but

[8] ST. THOMAS, SUMMA THEOLOGIAE, I-II, 93, 6 c [Hereafter cited S. TH.].
[9] TILLICH, LOVE, POWER, AND JUSTICE 7 (1954).
[10] RUSSELL, POWER 25 (1938).
[11] GUARDINI, POWER AND RESPONSIBILITY 2 (1961).
[12] RUSSELL, *op. cit. supra* note 10, at 25.

machines à gouverner may well augment, in a way not hitherto experienced in history, the power of state influence in politics, economics, and public opinion, creating thereby a growing threat to future liberty.[13]

Jurists and political scientists use the word power to refer primarily to heteronomous decision: "The distinction and noteworthy sign of power consists in the power to choose for others."[14] Lasswell develops, in an empirical context, this notion of power as a decision-making function, a special kind of policy-making. "When the policies are expected to be enforced against an obstructor by the imposition of extreme deprivations, we have decision, which is a power relation."[15] If law is defined as "authoritative decision,"[16] and decision as "a policy involving severe sanctions (deprivations),"[17] and power as "participation in the making of decisions,"[18] then we have a fundamental juridic relationship: "G has power over H with respect to the values k, if G participates in the making of decisions affecting the k policies of H."[19] In other words, policy implies a value judgment applied to facts, which policy is established as a legal norm when it is authoritatively implemented by the imposition of severe sanctions for its violation. The law so established makes a choice: it commands or forbids specified conduct under pain of punishment.

So far, this analysis of power has not given a definitive answer to a question which is basic: why does one man obey another? This question has special cogency today in this country where political equality and civil rights are part of the charter of democracy. The easy answer might be the *Staatszwang*, the coercive power of the civil authority. This answer is unsatisfying; it fails to correspond with the facts of society as we know them. Yves Simon phrases the problem more pointedly: "On the one hand, it seems to be impossible to account for social life without assuming that one man can bind the conscience of his neighbor; on the other hand, it is not easy to see how a man can ever enjoy such power."[20] What exactly is the basis of civil authority? Coercion, moral obligation, or a combination of both?

[13] *Cf*, BELL, INTELLIGENT MACHINES (1962); WIENER, THE HUMAN USE OF HUMAN BEINGS (2d ed. 1954); SIMON, PHILOSOPHY OF DEMOCRACY, Ch. 5: *Democracy and Technology* 260 (1951).

[14] Reale, *Law and Power and their Correlatives*, ESSAYS IN JURISPRUDENCE IN HONOR OF ROSCOE POUND 247 (Newman ed. 1962).

[15] LASSWELL, POWER AND PERSONALITY 18 (1948).

[16] ARENS & LASSWELL, IN DEFENSE OF THE PUBLIC ORDER 9 (1961). This book is a stimulating and comprehensive study of the "emerging field of sanction law." An older, but still important book, written more from a jurisprudential than a sociological point of view is ROONEY, LAWLESSNESS, LAW, AND SANCTION (1937).

[17] LASSWELL, *op. cit. supra* note 15, at 223.

[18] *Ibid.*

[19] *Ibid.*

[20] SIMON, PHILOSOPHY OF DEMOCRACY 145 (1951).

III

Russell's use of the term "naked power" is helpful. He defines it thus: "Power is naked when its subjects respect it solely because it is power and not for any other reason."[21] And again: "I call power naked when it results from the power-loving impulses of individuals or groups, and wins from its subjects only submission through fear, not active cooperation."[22] The classic formulation of this position is found in Plato. In the *Republic,* Thrasymachus says, "My doctrine is that justice is simply the interest of the stronger."[23] In the *Gorgias,* Callicles says, "It is just that the stronger dominate the weaker."[24]

What happens if naked power becomes its own justification? Del Vecchio answers succinctly: "If one asserts that Law is equal to force one takes away the possibility of any distinction between right and wrong and, consequently, of any evaluation of justice and injustice."[25] Far from might making right, the sovereignty of might would destroy right. When force is the paramount value to which all else is subordinated, rule by law becomes meaningless. "We can," insists Del Vecchio, "conceive, by hypothesis, the absence of any Law, but if there be a right, it is superior, logically, to force and the simple physical possibility of a fact cannot in any case signify conformity to a juridical criterion."[26] Law cannot be identified with force and still preserve its existence. Nevertheless, he states, "Law is essentially coercible; that is, in case of non-observance, it is possible to make it prevail by force."[27] The basis for this position is that law is an imperative which establishes a relationship between persons in terms of rights and duties. For example, the ancient right to torture a suspect was based on the legal duty of the suspect to tell the truth. When the problem was formulated as the defendant's right to silence or right against self-incrimination, "third degree" techniques, modern or medieval, were not justifiable. The duty of the state would be to refrain from trying to elicit coerced confessions.[28] A legal right can be promoted and protected by the use of force. In fact, without coercibility, law and order would degenerate into anarchy. Ihering makes this point vividly: "Powerlessness, impotence of the State force, is the capital sin of the State, from which there is no absolution; a sin which society neither forgives nor tolerates. It is an inner contradiction: *State force* without *force*!"[29]

[21] RUSSELL, *op. cit. supra* note 10, at 66 (1938).
[22] *Id.* at 28.
[23] PLATO, REPUBLIC 338 c.
[24] PLATO, GORGIAS 483 d.
[25] DEL VECCHIO, PHILOSOPHY OF LAW 260 (8th ed. Martin transl. 1953).
[26] *Id.* at 261.
[27] *Id.* at 297.
[28] See P. GRANFIELD, THE THEOLOGICAL DEVELOPMENT OF THE DEFENDANT'S OBLIGATION TO REPLY IN A CIVIL COURT (1962).
[29] IHERING, LAW AS A MEANS TO AN END 234 (1924).

A hasty analysis of the coercive aspect of power might seem to limit it to criminal law. Force is most obviously present in this area of public law, yet it is fundamental to all law. When the plaintiff gets an award in a tort case because of the harm that resulted from the defendant's negligence, the state deprives the defendant of his property as truly as if it had imposed a fine on him. The loss may be labelled compensatory rather than punitive, yet the deprivation is wrought by means of the coercive power of the state, without which laws and judgments would be no more effective than the advice of the man next door.

Coercibility underlies all law, but physical force is of itself incapable of guaranteeing obedience. "No community can stand the social cost of coercing forty-nine percent of its citizens to do something they do not want to do, except on very rare occasions."[30] Even if cost were no object, there would still be the fact that all human force is limited. "There exists no pure coercion, no more than there exists full consent. The militarist's dream of power enough to force his own unimpeded way is as hypothetical as the ideal of anarchy. Neither has ever existed. Neither now exists. Neither can exist."[31] Nikolai Berdyaev remarks, "But life is full of unnoticed, more refined forms of violence."[32] Among others, he mentions the power of opinion and the power of money. Power over minds and power over property implement strict political power.[33] They tend to develop the consent which is even more necessary than coercion to the existence of the state. Russell wrote: "Power not based on tradition or assent, I call 'naked' power."[34] For him, traditional power has the habitual or customary assent of the governed. Revolutionary power, though newly acquired and lacking the tradition of respect and obedience, is based on assent to a new creed or program or sentiment. It replaces traditional authority and in its turn tends to become traditional, though in the face of opposition it may have the qualities of naked power. Naked power acts without assent or tradition and rests on naked force. But that, too, tends to become traditional[35] or to be replaced. In fact, for a regime of naked power to perdure, there must be, at least, half-hearted support. Berdyaev writes of a great anomaly. "Man seeks freedom. There is within him

[30] COHEN, THE MEANING OF HUMAN HISTORY 245 (4th ed. Husick Transl., vol. I, DER ZWECK IM RECHT 1903).

[31] Smith, *Consent and Coercion in Governing*, 1 THE PACIFIC SPECTATOR 317 (1947).

[32] BERDYAEV, SLAVERY AND FREEDOM 64 (1944).

[33] See BERLE, POWER WITHOUT PROPERTY (1959); MILLS, THE POWER ELITE (1956).

[34] RUSSELL, POWER 27 (1938).

[35] See STONE, THE PROVINCE AND FUNCTION OF LAW 709-12 (1961) on depersonalization of power: "the readiness of an individual to submit to authority is increased by the awareness of similar submission by others and decreased by awareness of their resistance"; and trans-personalization of power: "the reinforcement of power by associating it with some idea or principle which transcends the dominating persons."

an immense drive towards freedom, and yet not only does he easily fall into slavery, but he even loves slavery. Man is a king and a slave."[36] If a man is not truly a free man, if he is exteriorized, objectivized, or alienated, then he falls into one or the other of the two correlatives: master or slave.

> If the consciousness of a master is consciousness of the existence of some other for him, the consciousness of the slave is the existence of himself for the other. The consciousness of the free man, on the other hand, is consciousness of the existence of each one for himself, but with a free outgoing from himself to the other and to all. The boundary of a state of slavery is the absence of awareness of it.[37]

If in society some coercion is always necessary, it is even truer that some element of consent is necessary or there can be no society to coerce. Coercion may preserve society, but it is consent which establishes it. Only through continuously present consent can society be conserved in existence; on this consensual foundation does coercion play its limited part.

Paul Tillich tries to work out the relationship of power and compulsion. He begins with the notion of ontological power which includes "sociological power, namely the chance to carry through one's will against social resistance."[38] His basic notion is this: "The power of being is its possibility to affirm itself against the non-being within it and against it. The power of a being is the greater the more non-being is taken into its self-affirmation."[39] This affirming of one's own worth and dignity in spite of surrounding evils, is the courage to be. Yet courage and power are not separate from love. Self-affirmation is needed in order to destroy what is against love. Tillich adopts Luther's phrase that compulsion is the strange work of love. He points out that "the basic formula of power and the basic formula of love are identical: Separation and Reunion or Being taking Non-Being into itself."[40] In this, he parallels the words of Berdyaev: "Power in a most profound sense means the taking possession of that to which it is directed; not domination, in which externality is always maintained, but a persuasive, inwardly subjugating union. Christ speaks with power. A tyrant never speaks with power."[41]

In speaking of the "courage to be a part," Tillich develops that aspect of power which is the concern of law and politics. He writes: "The self affirmation of the self as an individual self always includes the affirmation of the power of being in which the self participates. The self affirms itself as partici-

[36] BERDYAEV, *op. cit. Supra* note 32 at 59.
[37] *Id.* at 60.
[38] TILLICH, LOVE, POWER, AND JUSTICE 36 (1960).
[39] *Id.* at 48.
[40] *Id.* at 49.
[41] BERDYAEV, *op. cit. supra* note 32, at 66-67.

pant in the power of a group, of a movement, of essences, of the power of being as such."[42] Compulsion on the part of society is justified by its self-affirmation against the evils which threaten it from within and without. Yet always the aim is positive, directed toward good, for it is the strange, often tragic, but necessary work of love.

IV

Luther's reference to compulsion as love's strange work makes the thomistic "virtue of vengeance" sound less paradoxical. Perhaps we have seen too much of organized sadism to feel easy about calling vengeance virtuous. Actually, the *vindicatio* that St. Thomas praises has not the pejorative connotations of revenge or vindictiveness. The word comes from *vindicare,* to punish, and refers to punishment inflicted for a wrong done even when the purpose is, as for St. Thomas, rehabilitative and medicinal. Vengeance is a virtue concerned with the moderate use of authorized coercion, with the proper function of punishment. The virtue shines forth when we remove the dark vices related to it: "one by way of excess, namely, the sin of cruelty or brutality, which exceeds the measure in punishing; while the other is a vice by way of deficiency and consists in being remiss in punishing."[43] The former leads to tyranny, the latter to anarchy; but true vengeance to peace and order. "For the virtue of vengeance consists in observing the due measure of vengeance with regard to all the circumstances."[44]

The touchstone of the virtue is the end or purpose for which coercion is used. "Vengeance is lawful and virtuous so far as it tends to the prevention of evil."[45] St. Thomas examines the avenger to see if his intentions are honorable. "If the avenger's intention be directed chiefly to some good to be obtained by means of the punishment of the person who has sinned (for instance that the sinner may amend or at least that he may be restrained and others be not disturbed, that justice may be upheld, and God honored), then vengeance may be lawful, provided other due circumstances be observed."[46] Note that the first purpose expressed by Aquinas is the rehabilitation of the offender; for this is a work of vengeance.

The harmony that exists between true vengeance and the natural law rests, for St. Thomas, on those elemental human drives or tendencies which are common to all men. He gives here a rationale which lifted to the political level justifies state coercion.

[42] TILLICH, THE COURAGE TO BE 87 (1959).
[43] S.TH., II-II, 108, 2 ad 3.
[44] *Ibid.*
[45] *Id.* at 3 c.
[46] *Id.* at 1 c.

> Aptitude to virtue is in us by nature, but the complement of virtue is in us through habituation or some other cause. Hence, it is evident that virtues perfect us so that we follow in due manner our natural inclinations, which belong to the natural law. Wherefore to every definite natural inclination there corresponds a special virtue. Now there is a special inclination of nature to remove harm, for which reason animals have the irascible power distinct from the concupiscible. Man resists harm by defending himself against wrongs lest they be inflicted upon him, with the intention, not of harming but of removing the harm done. And this belongs to vengeance.[47]

In *De Regimine Principum,* St. Thomas indicates the role of coercion in a well-ordered state. In the fifteenth chapter he writes of the principal concern of the ruler—"the means by which the multitude subject to him may live well."[48] First of all, the ruler must establish the life of virtue in his people, by uniting them in peace, by guiding them to good deeds, and by providing a sufficiency of things necessary for good living. Secondly, he must conserve public virtue by replacing sick or deceased officials and by protecting the multitude from crime within the community and from war outside it. Thirdly, he must be solicitous for social betterment by correcting disorders, supplying defects, and by doing everything as well as possible.

Our main concern is the power of the ruler against those impediments to the common good which "consist in the perversity of the wills of men, inasmuch as they are either too lazy to perform what the state demands, or still further, they are harmful to the peace of society because, by transgressing justice, they disturb the peace of their neighbors."[49] The solution for this perennial social problem is found in the use of negative and positive sanctions. "By his law and orders, punishments and rewards, he restrains the men subject to him from wickedness, and encourages them to works of virtue, following the example of God, Who gave His law to man and requites those who observe it with rewards and those who transgress it with punishments."[50] As for war, the enemy without, Aquinas says, "It would be useless to prevent internal dangers if the multitude could not be defended against external dangers."[51]

The power of coercion or the right to vengeance clearly must be the prerogative of the state if the people are to live well. While recognizing the medicinal character of the punishments of this life,[52] Aquinas does not overlook the more fundamental reasons of prevention and deterrence, the psycho-

[47] *Id.* at 2 c.
[48] ST. THOMAS, DE REGIMINE PRINCIPUM 102, ch 15 (Phelan transl. 1938).
[49] *Id.* at 104.
[50] *Ibid.*
[51] *Id.* at 105.
[52] S.TH., II-II, 108, 3 ad 2.

logical basis of which together with its typical modes, he spells out in the following passage.

> Vengeance is lawful and virtuous so far as it tends to the prevention of evil. Now some who are not influenced by motives of virtue are prevented from committing sin, through fear of losing those things which they love more than those they obtain by sinning, else fear would be no restraint to sin. Consequently, vengeance for sin should be taken by depriving a man of what he loves most. Now the things which man loves most are life, bodily safety, his own freedom, and external goods such as riches, his country, and his good name. Wherefore, according to Augustine's reckoning (*De Civ. Dei,* XXI), Tully writes that the laws recognize either kinds of punishment: namely, death whereby a man is deprived of his life; stripes, retaliation or the loss of eye for eye, whereby man forfeits his bodily safety; slavery and imprisonment, whereby he is deprived of freedom; exile, whereby he is banished from his country; fines whereby he is mulcted in his riches; ignominy whereby he loses his good name.[53]

As might be expected, the relationship between power and law is implicit in St. Thomas' classic definition of law: "An ordinance of reason for the common good, made by him who has care of the community and promulgated."[54] Law is a *rationis ordinatio.* Law is more than a speculative judgment or intellectual grasp of truth. "Law is a rule and measure of acts, whereby a man is induced to act or is restrained from acting; for *lex* (law) is derived from *ligare* (to bind), because it binds one to act."[55] Yet the law is more than the mere will of the sovereign, a voluntaristic fiat. "In order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. And in this sense is to be understood the saying that the will of the sovereign has the force of law; otherwise the sovereign's will would savour of lawlessness rather than law."[56] The second and third elements of the definition together, also, imply coercibility. "To order anything to the common good belongs either to the whole people or to someone who is the vicegerent of the whole people."[57] Not anyone can make a law. "A private person cannot lead another to virtue efficaciously; for he can only advise and if his advice is not taken, it has no coercive power, such as the law should have in order to prove an efficacious inducement to virtue. But this coercive power is vested in the whole people or in some public personage to whom it belongs to inflict penalties."[58]

[53] *Id.* at 3 c.
[54] S.TH., I-II, 90, 4 c.
[55] *Id.* at 1 c.
[56] *Id.* at ad 3.
[57] *Id.* at 3 c.
[58] *Id.* at ad 2; *cf.* S.TH., II-II, 64 c.

Aquinas' position on power and the law is clear. "The notion of law contains two things: first that it is a rule of human acts; secondly, that it has coercive power."[59] He asserts that all are subject to the law either as the regulated are subject to the regulator, or as the coerced are subject to the coercer. Ihering's analysis of the formal elements of law help us grasp the full implications of St. Thomas' legal theory. Ihering says that law includes three things, norm, coercion and content. The first two are the formal elements, the norm containing the inner side of law, coercion the outer. He shows the relation of these two elements:

> The content of the norm is an idea, a proposition (legal rule), but a proposition of a *practical* kind, *i.e.*, a direction for human conduct... it designates a direction for another's will, which he should follow, *i.e.*, every norm is an imperative (positive—command, negative—prohibition). An imperative has meaning only in the mouth of him who has the power to impose such a limitation upon another's will; it is the stronger will that designates the line of conduct for the weaker. An imperative presupposes a double will; it passes from a *person* to a *person*; nature herself knows no imperatives.[60]

To grasp the relationship of law and power, it is necessary to conceive of law dynamically. Law is not simply a statement of policy, an appeal to reasonableness; it is a formative instrument which gets results either by regulating conduct or by coercing where there is misconduct. Law gives the state its structure, its ordered harmony. Without coercibility there is no law. Without law there is anarchy. Law sets up a pattern of achievement as a practical ideal, in that it moves those subject to it toward the realization of that complex goal which is the common good. The rule of law may be accepted because of virtue, because of fear, or because of reason,[61] but if it is rejected, the coercive power of the state is there to protect the common good despite the deviations of its subjects. Law is an imperative—a command backed by force. It is more than a mere imperative; it is an ordinance of reason, a reasonable command and not just an authoritative one. With reasonableness alone, it would not be a command. With only imperativeness, it would not be a law. Law is a rational imperative. Yet without coercibility essentially united with it, it would be an empty wish, a powerless precept.

[59] *Id.* at 96, 5 c.

[60] IHERING, LAW AS A MEANS TO AN END 247 (4th ed. Husik transl. Vol. I, DER ZWECK IM RECHT 1903) In a note on p. 161 Vol. II of the 1886 edition Ihering wrote of Aquinas: "Now that I have come to know this vigorous thinker, I cannot help asking myself how it was possible that truths such as he has taught have been so completely forgotten among our Protestant scholars. What errors could have been avoided if people kept these doctrines!... For my part, if I had known them earlier, I probably would not have written my whole book; for the fundamental ideas which I have treated here are found expressed in full clarity and in a convincing manner by this powerful thinker."

[61] S.TH., I-II, 90, 1, ad 2.

V

A command may be reasonable and be backed by severe sanctions without being a law, if it lacks authority. Leo XIII gives us the structure in which is found the rightful use of power:

> No man has in himself or of himself the power of constraining the free will of others by bonds of authority of this nature. This power resides solely in God, the Creator and Legislator of all things, and it is necessary that those who exercise it should do so as having received it from God. "There is one lawgiver and judge who is able to destroy and deliver." James 4:12. And this is clearly evident in every kind of power.[62]

The philosophic basis for this statement is in the overlordship of God as Creator. "God has full and principal dominion over each and every creature, totally subjected to his power."[63] Although His dominion is perfect, it exists in a participated form among men. "Man shares a certain similitude of divine dominion, according to which he has a particular power over some man or some creature."[64] To understand the vertical aspects of power is to think not in terms of material goods or material force but rather in terms of rights possessed by essence or by participation. Maritain gives the basic insight by speaking of vicariousness instead of physical transfer. He writes:

> If a material good is owned by the one, it cannot be owned by the other and there can only be the question of transfer of ownership or a donation. But a right can be possessed by the one as belonging to his nature, and by the other as participated in by him. God is possessed by essence of the right to command; the people are possessed of this right both by participation in the divine right, and by essence insofar as it is a human right. The "vicars" of the people or deputies for the people are possessed (really possessed) of this right only by participation in the people's right.[65]

Power, like law, is an analogous term. It may refer to brute force; it may refer to divine omnipotence. Juridical power is on two levels: it gets its authority from God, yet it depends on coercion for its full effectiveness. Even when the balance of physical power is weighted against what is right, might does not fully triumph. "There is no power but from God, and those that are, are ordained of God."[66] However limited the sanctions that legitimate author-

[62] Leo XIII, Encyclical, *Diuturnum,* (June 29, 1881).
[63] S.TH., III, 35, 5 c.
[64] *Ibid.*
[65] MARITAIN, MAN AND THE STATE 35 (1951).
[66] ROM. 13:1.

ity can muster, the established law binds in conscience. In other words, God, who has shared his power with human beings, implements their own weak coercive strength with His omnipotence. Divine coercibility is the ultimate sanction which makes human rights inalienable. No matter how great the force used against it, right is right. What legitimate human power cannot protect, is protected by divine vengeance. And yet neither divine nor human power are ordained toward vengeance, but rather toward man's full realization of perfection and happiness.