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# SOME GENERAL CRITERIA OF MORALITY

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**T**HE MORALITY OF the conduct of men practicing law must be assessed upon the same general standards and principles which are the criteria of morality for all human conduct. The particular obligations of a man acting as attorney differ from the particular obligations of the same man acting as a parent. The acts involved are different and, in the degree of that difference, cannot have the same relation to the ultimate good of man. But the acts of a man, in whatever capacity he functions, are still the acts of a man and are therefore subject to the general standards and principles which determine the morality of all human conduct.

Any reasoned evaluation of the attorney's professional conduct must refer to these general criteria of morality. To state and explain these generalities while answering particular problems would involve repetition or difficult cross-reference. Therefore, it is proposed to set out in this separate treatment at least the basic general concepts and those other general concepts which are most likely to be referred to when the moral quality of a lawyer's professional activity is discussed.

## **Morality and Moral Systems**

Morality is the relation which a conscious and willful act or omission of man bears to man's ultimate end. Systems of morality are conceptions of morality, with bodies of moral principles, standards and rules derived from and organized with reference to those conceptions. The systems differ principally in respect to their views upon two basic problems.

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Systems which hold man's ultimate end and his supreme good to be pleasure are called hedonistic; systems in which utility is the ultimate and supreme good are utilitarian; systems whose supreme good is rightness are designated as systems of virtue. This classification of systems of morality is subject to modification by the fact that many systems incorporate more than one of the elements named — pleasure, utility, and rightness — and give varying emphasis to the elements incorporated, as characterizing the supreme moral good.

The division of ethical systems thus established is further modified by the answers given by the several systems to the question of how man acquires knowledge of the moral good. There are systems in which this knowledge is held to be, either wholly or partially, instinctive, reasoned, intellectually innate or supernaturally revealed.

From what has been said in the discussion of natural law jurisprudence, it should be clear that any natural law system of morality is one of reasoned virtue, and that the Christian moral system is one of virtue in which the objects of virtue are known by reason, either from its own examination of nature, or from revelation, or from both.

### **Abstract Morality, Intrinsic and Extrinsic**

All moral systems reach some kind of imperative, some obligatory command urging man to conform his conduct to achieving the supreme good. The imperative is always practically obligatory, for if it were not obligatory in the moment of action, it could not be called either moral or imperative. In natural law and in Christian morality, the imperative is, in reference to some forms of conduct, not only obligatory, but absolutely so.

For man, the nature of God, the nature of man himself, and the very structure of human acts are necessary facts. In the order of morals, they cannot be other than they are in the order of creation. Viewed in reference to these necessary facts, some forms of human conduct are seen to be essentially required for man's achievement of his ultimate end, and others are perceived to be essentially adverse to that achievement. These lines of conduct are said to have intrinsic morality. Thus, for example, the act by which man's will loves God is an intrinsically good act, and the act by which man willfully hates another man is intrinsically evil. These are deductive conclusions from necessary facts. The essential function of man's will is to embrace what is good; God is supremely good; men, as God's creatures, are essentially good. All of these facts are necessary, either because God cannot alter them or because they are unalterable while His creative act remains what it is.

Clearly, some acts of man, when viewed in their essence or nature, are seen neither to advance man toward his ultimate end nor to divert him from it. For example, the act of giving food to another, considered apart from any concrete concomitant circumstance and from the motives of donor and donee, is such an act. Without knowing the circumstances and motives, we cannot say that the act advances either party in the love of God, or that it turns him from that basic moral obligation.

On the other hand, a moral precept may be imposed by God or by a man commissioned by God in nature or in revelation. The precept may reiterate the intrinsic morality of certain conduct. Or the precept may urge or forbid conduct which is neither good nor evil intrinsically — because this

conduct, as such, is neither absolutely necessary to the achievement of man's end, nor necessarily adverse thereto. The acts prescribed or forbidden by such precepts are said to have extrinsic morality. The obligation to give one day of the week to worship, and the obligation to drive no faster than the legal limit on highways, are examples.

Acts which have neither intrinsic nor extrinsic morality are called morally indifferent.

These considerations of human acts, in which the essence of the act is referred to a necessary fact of the orders of being and of morals, or in which the act in gross is referred to a precept validated within the moral order are the considerations of abstract morality. They take no account of the subjective dispositions of the person who does the act in the concrete. Intrinsic morality takes no concrete circumstances into account, and extrinsic morality takes account of only those circumstances adverted to in the precept. These considerations are necessary steps in constructing the rules which guide human conduct in the concrete. But those rules can be established only when the application of abstract morality to actual human conduct is determined by principles and rules which take account of those aspects of the concrete human act which are not included in or directly derived from its essence, and to which the positive moral precepts do not advert when they command or forbid the act itself.

### **A Justification of Casuistry**

When all possible consideration has been given to an act's intrinsic and extrinsic morality, the act may yet be found to be morally indifferent — to be, abstractly,

neither good nor evil. But no act, as it proceeds in fact from the will of a man, can be morally indifferent. The act of a man's will is not an abstract essence or a clause in a precept — it is a concrete reality.

The human will's essential psychological function is to choose the good. The will cannot choose anything which is not presented to it by the mind as possessing some goodness. The result of the will's satisfaction of its appetite for goodness is happiness.

Goods, or values, as goods are sometimes called, are of different orders. In the order of being, everything is good because there is no being which is not the product of God's creation and God can not make anything which is not essentially good. The moral order deals not with things as such, but with the acts by which man uses things. These acts are not good, for man by his acts can use things, good in themselves, in a manner contrary to the way he should use them, and he can employ good things to produce effects which he should not produce. It is man's function and duty in the moral order to use what God has made for the purpose of bringing himself closer to God and to use the things God has made in manners consonant with the nature God has given man. It is the acts by which man uses God's creatures, himself included, which are good or evil in the moral order — the creatures themselves are good in the order of being, but we cannot predicate of them moral goodness or badness unless we look to the manner in which, or the effect with which, some man uses them. Those acts of man are good — morally good — which advance man toward his ultimate end of loving God perfectly; those acts which turn man from that end are evil, morally. The basic test of any

concrete human act's moral quality is this: "Does the will of this man, when he chooses to do this act here and now, embrace moral evil?" If, in any of its aspects, this concrete act diverts man from God as his moral end, then this man's will, in choosing to do this act, embraces evil.

This test is validated by reference to the nature of the man-God relationship of union to which man is destined. That union is a union of love. The word "love" is used here in its most proper intendment, as it was used by Christ: "If you love me, keep my commandments." "He who does not love me does not keep my words." (John 14:15, 21.) A man loves God by willing conduct that conforms fully to God's plan for him.

The science of casuistry seeks to implement that basic test of concrete morality. This is done by analyzing in an orderly way the psychological elements of the deliberate and willful act of man, and the external facts which enter into this act; referring each of these elements and factors, in its bearing upon the complete act, to the principles of the moral order. The several factors of the concrete human act are collected under three general heads — the object of the act, the intent of the actor, and the act's circumstances. These three are said to be the sources from which the concrete act draws its moral character.

### **The Moral Object of the Act**

These considerations of the moral object of the human act, the actor's intent and the act's accidental circumstances are undertaken in view of a practical problem. Given that a man, when he deliberates upon choosing a given act or omission, is confronted with an entire concrete situation in which the act or omission itself is only one

factor, one may ask whether it is more helpful to resolve the deliberation by applying moral rules which test the entire situation, or to analyze the situation into its reasonably distinguishable factors and to test each factor by the moral rules.

The entire situation can, of course, be tested by asking: "Does the will of this man, when he chooses to do this act here and now, embrace moral evil?" The casuist will suggest that the task of moral judgment is facilitated by analyzing the broad object of the will's choice, and by testing the resulting factors separately. Taking the whole moral situation, he first sets aside for later evaluation the purposes for which the actor may choose to do the act in question. These purposes may include, in any given case, those which only this act will serve, those which this act will best serve, and those which would be served equally well or better by an act different from the act here proposed. In any case, the actor's purpose or purposes can be clearly distinguished from the substance of the act he contemplates. What one does is related to, yet distinguishable from, why he does it.

Then those remaining factors, whose removal from the present situation would not alter the primary impact which the choice of this act will have upon the moral order, are set aside to be tested separately as accidental circumstances of the act. What remains after this second process of analysis and abstraction is the moral object or moral substance of the act itself.

In the broad but philosophically accurate sense, the object of any function includes everything which offers material upon which the function may operate and everything which affords the function a goal. Thus, in the physical order, the function of

assimilation has food and drink as the materials upon which it operates, and the production of substances suited to the body's needs is the function's goal. In the moral order, the broad object of the will's function includes all the elements of the concrete situation which in any way influence or morally qualify the act's choice of conduct. Included are all the physical, emotional and spiritual factors of the situation which may influence the will to choose or to reject a line of conduct, and all the factors which may determine that conduct's capacity and tendency to advance man toward, or turn him from, the perfection which is his goal in the moral order.

The casuist uses the term "moral object of the act" in a narrower sense. It is the object of the act, thus narrowly taken, which is referred to the principles and precepts of the moral order to establish the act's abstract morality. When we discuss abstract morality, the term, "object of the act," does not give us great trouble. We can say that the act's object is what the act does in the moral order. We describe the object of the act of murder as "the unjustified killing of a human being," and the object of the act of blasphemy as "the conduct of a creature which directly derogates from the honor due to his Creator." But when we start from the act which Jones did at the corner of X and Y streets yesterday at 11:31 a.m. and then attempt to establish what elements of the concrete situation, existing in that place at that moment, pertain to the moral object or the moral substance of Jones' act, and what other elements of the situation are morally accidental circumstances of Jones' act, the task is not so easy.

There are cases in which reasonable men will differ in resolving this problem, but in most practical cases a thorough canvassing

of the situation and careful consideration of its elements will enable one to make a reasonably clear and reliably confident resolution. Many practical difficulties arise from a failure to relate properly facts of the physical order, which are known to us through the key concepts of cause and effect, to acts of the moral order which are intelligently understood only in terms of ends and means.

Such difficulties arise particularly when the act examined is one whose abstract moral quality is intrinsic and the act is not clearly described in the terms of any precept. Thus, hatred is an evil act primarily because it is a perverse, unnatural use of a faculty God has created. By hatred we mean hatred of a man — a voluntary detestation of a person, as distinguished from a detestation of his evil qualities or evil conduct and from merely physical or emotional revulsion against him. The human will is made to embrace good and to reject evil. Hatred of a man, who, as God's creature, shares some of his Creator's goodness is a perverse use of the will and therefore is evil. Hatred of any man is an intrinsically evil act for the secondary reason that it tends necessarily to produce evil effects. It diminishes the will's capacity to love what is good, even the capacity to love God. Given opportunity and means, and absent restraint and interference, hatred leads also to the production of external unjust harm. The investigator whose preoccupation is cause and effect will give attention only to the secondary reason for hatred's evil quality. And because he does not test for ends and means, he may judge hatred good when its effects are happy, useful or beneficial, and find it evil only when its effects are dolorous, troublesome or harmful.

To avoid errors in morally evaluating

human acts, we give especially close attention to the moralists' doctrine on the bearing which an act's effects have upon its moral object. What the moralist first wants to know about an effect is whether this effect has followed from a necessary or non-necessary tendency of the act. The tendency is called necessary when the effect to which it is directed will follow in any case where the act is perfected — in any case where the act is willed and fully implemented by its author and no cause independent of him intervenes to frustrate the act's tendencies to produce effects. For example, the act of looking tends, with physical necessity, to produce a mental image, and always has this effect unless the visual function is defective, or the external conditions for seeing are not present. We can also speak of psychologically necessary tendencies (though the moralists will usually group these with the physically necessary tendencies). The repetition of omissions to control an emotion tends necessarily to decrease the ability of reason to exercise control of that emotion.

When an effect of an act violates a moral principle or precept, any act whose necessary tendency is to produce that effect is evil in its moral object. This is so because the person who does such an act puts into operation the act's necessary tendency to produce evil. If the tendency fails to produce fully the evil effect, that effect is not barred by the will of the man who acted. Rather, the full effect of the necessary tendency which the actor put in motion is frustrated by the inadequacy of the energies and other means employed by the actor, or by the intervention of a cause independent of him. By putting the necessary tendency into operation when he chose to act, the actor's will embraced the moral

evil of the effect. For that evil is, so to speak, drawn from the effect in prospect, through the necessary tendency of the act to produce it, to the act itself in whose object the tendency is a factor. Effects, to the production of which an act tends necessarily, are called direct effects of the act.

Such tendencies in the act's physical object may bring the act within a contingent principle or precept of the moral order. Thus, the physical object of the act of injecting a large amount of morphine into a patient's body includes the necessary tendency of that act to produce the effect of the patient's temporary loss of reasoned control of his own actions. This tendency may bring the act of administering the drug within the moral principles and precepts which forbid even temporary direct deprivation or relinquishment of rational control except in the presence of proportionate cause. The presence or absence, in the same act, of tendencies to produce other effects, such as relieving pain or minimizing shock, will be factors in the moral determination that proportionate cause exists for depriving the patient directly, though temporarily, of rational control.

Where the necessary physical tendencies of an act are seen to be directed to produce a direct effect whose voluntary production contravenes an absolute moral duty, this aspect of the act's physical object determines the moral object of the act. The act of misrepresenting the truth to another has, in the physical or psychological order, the necessary tendency to produce in the mind of anyone to whom the act is addressed an intellectual assent to a falsity. Because misrepresentation has this physical object, the act falls under the absolute and specific moral principle which prohibits lying. Thus, the physical or psychological object of this

act is an essential factor in the act's moral object.

Where an effect follows on an act, but is not the product of a necessary tendency of the act, the effect is called an indirect effect of the act. In contrast to the direct effects of an act, its indirect effects do not follow in every case where the act is perfected. For example, speaking the truth may harm another in some cases, but the act of speaking the truth has no necessary tendency to harm anyone. Causing harm is not a factor in the object of that act. If the act of speaking the truth does harm in a given case, this happens by reason of the intervention of some cause distinguishable from the act itself. Such intervening causes are called morally accidental circumstances.

No act is subject, immediately and conclusively, to an absolute principle of the moral order, such as the principle that lying is intrinsically evil, merely because the act has a non-necessary tendency to produce an evil effect. Yet an act which has an accidental tendency to produce evil indirect effects does come under the basic moral principle that man should always act reasonably. But a conclusion condemning the act as evil cannot be derived from that principle without the intervention of further premises. A man does not act reasonably when he does not take pains, proportionate to the evil effect, to prevent that effect from following indirectly or accidentally upon his conduct.

Finally, an act may be forbidden or proscribed by a positive moral precept, precisely because it has a tendency, though not a necessary tendency, to produce certain evil effects. In this last case only does the act's tendency to produce indirect effects determine immediately the act's moral object, because here it is the non-necessary

tendency which brings the act under the terms of the precept. An obvious example is the law which makes reckless driving a crime. The law as a reasonable exercise of human authority is morally binding. The term, "reckless driving," describes a sort of driving which tends, though not necessarily, to produce harm to persons and property.

Thus, by way of further example, a natural physical or psychological tendency of a seller's marking up retail prices and inviting the buyer to "dicker" as to the final price is to overcharge the buyer. The tendency is not necessary where the invitation is not illusory. Therefore, such conduct is not evil by the test of any absolute moral principle. In situations where buyers' purchasers include a great number of items and they have little or no time to "dicker," the seller's invitation to "dicker" does not reasonably control the tendency of his conduct to result in overcharging. The seller acts unreasonably and, therefore, immorally if he continues to mark up in this situation. Further, in a situation where the immoral tendency of the practice of marking up prices may be controlled by a conscientious seller, a legal precept may quite reasonably forbid the practice altogether.

In establishing the moral object of an act, we must refer to the moral principles, not the act's effects as such, but the act's capacity and necessary tendency to produce the effects; or we must refer to the moral precepts, the act's capacity and non-necessary tendency to produce the effect. The will of man, when he determines to do an act, embraces immediately the act itself. The effect of the act is embraced only to the extent that its effect is implicit in the act's capacities and tendencies.

Every willful determination to do an act has the capacity and the necessary tendency



to realize concretely the entire moral object of that act and to produce the direct effects of that act. We may distinguish the primary effect realized in the will faculty itself, when it chooses to do the act, from the effects realizable in the actor's other mental and physical faculties or in the external world. Where, in a given case, an act is willed and none but its primary effect is realized, it is either because the actor does not employ means adequate to perfect the other effects which his act tends to produce in his mental and physical faculties and in the world outside him, or it is because some agency independent of the actor intervenes to frustrate his efforts. But in every case where a man has determined to do an act his will has embraced any good or evil which is found in the act's object. This is a logical implication of Christ's words, ". . . anyone who even looks with lust at a woman has already committed adultery with her in his heart." (Matt. 5:28.) The concrete realization of those necessary moral effects of an act which are ulterior to the effect of the act of choice upon the will itself, adds to the morality of the concrete act only by prolonging and intensifying the will's embrace of good or evil.

### **The Intent of the Actor**

Every concrete act of man, if it is deliberate and free, is done with a purpose or intent. If the act is not deliberate and free, and therefore purposeful, it is not a human act. This principle, induced from the facts of human psychology and deduced from the nature of human freedom, is analogous to the principle of physical inertia. As a body at rest or in motion tends to retain its present state unless an opposed force intervenes, the will, not acting or acting in a given direction, does not begin to will any-

thing or give over its willing or change its object unless some purpose intervenes.

The purpose is offered to the will by the intellect, in the process of deliberation. Only after the will chooses the purpose, does the will choose to do the act which the intellect, in the earlier deliberation which presented the purpose, or in a new deliberation, has judged appropriate as a means for achieving the purpose. Physically, the temporal sequence of the will processes — choosing the end and electing the act as a means thereto — may be imperceptible, but causally the former process is always antecedent to the latter. The intellect finds purposes for the will's choice in one or more of three areas of its knowledge: in the will's desire which arise apart from its deliberation upon this concrete act or in effects which the act deliberated is capable of producing directly; or in the indirect effects which the intellect judges will follow, at least probably, from the performance of this act in the present circumstances. A man chooses to do an act in the concrete either because he perceives the act's own capacity and necessary tendency to produce effects which he desires, or because he perceives that the concurrence of some accidental circumstances makes it certain or probable that the act, in this case, will produce such an effect. The effect he desires is the actor's end in acting — this desire is the intent, or purpose or motive of his act.

No man's intent or purpose in doing a concrete act is, or can be, morally indifferent. Every choice of purpose by the human will is either a good or an evil choice from the viewpoint of virtue. Whatever purpose the will chooses is good, either really or apparently. The purpose chosen is truly a moral good if, by choosing it, man advances toward his ultimate end; it is apparently

good if, though it contains some reflection of the Creator's goodness, the present choice of it diverts man from his ultimate end of achieving the union of love with God which is his supreme good.

Having chosen a purpose, the human will next chooses an act as a means of realizing that purpose. At this point, we should advert to the principle, "a good end does not justify evil means." The act done is evil intrinsically if, when viewed in reference to necessary facts of the moral order, the act's essence is seen to be adverse to man's achievement of his ultimate end. It is evil extrinsically if the act violates a precept valid in the moral order. In either case, the will's adoption of the act as a means to achieve a good purpose does not purge the act of its evil character. Rather, the will by determining to give concrete existence to an evil act, embraces evil, albeit reluctantly — with regret that it cannot achieve its desired good end by good means.

The solution of "conflicts of obligation" offered by the moralists may occasion a misconception that a good end does, sometimes, justify evil means. Where one of the "conflicting obligations" is a negative or prohibitory one imposed by a principle of intrinsic morality — like the obligation not to kill an innocent person directly — that obligation prevails over any precept and over any affirmative obligation of intrinsic morality. Where both of the obligations said to be in conflict are imposed by precepts or by affirmative intrinsic morality, the conflict may be resolved upon certain general moral principles.

Appeal may be made to the greater dignity, strictness or urgency of one obligation. A man's duty to feed his family prevails over his duty to pay his debts, and the latter duty prevails over the duty to give

alms — unless the donee of the alms is in dire necessity and the creditor is not. Fulfillment of one's affirmative duty to worship God is justly and obligatorily omitted while one is bound by justice or even by charity to attend the sick.

The principle of *epikeia* or that of the "excusing cause" may also be invoked. These principles have application where an affirmative duty of natural law or any duty of precept is excused in an individual case because its performance will entail an altogether extraordinary hardship. It is considered that no lawmaker intends his law to oblige in such circumstances. Either *epikeia* or a balancing of moral values might permit a man to exceed the speed limit while driving a critically injured person to a hospital.

In all these cases, the end does not justify the means, but the principle which made the means evil is overruled by a principle which makes the means permissible.

It will be noted that the obligations of any law, natural, divine positive or human, whose non-observance involves serious harm to others, individually or in community, are not held waived by *epikeia*. The speeder en route to the hospital cannot disregard the duties, imposed by natural law and by the law of the state, to drive with reasonable care for the safety of the patient and of the public.

It is, of course, true that a good end "justifies" an act which, abstractly considered, is morally indifferent. The act of giving food to another is morally indifferent in the abstract. But where, in the concrete, it is done for a morally good purpose, the act is made virtuous by the act's purpose — the actor's end "justifies" the act; provided, however, that there is present no

accidental circumstances which makes his act immoral.

### **The Circumstances of the Act**

Every concrete human act comes into existence in circumstances which may affect the act's moral character. If, in determining to do the act in these circumstances the actor's will embraces evil, then his concrete act is a morally evil act though, in his intent and in the moral object of the act, there be no evil.

The circumstances which may modify the morality with which an act is endowed by its object and its author's intent are classified by the moralists under seven heads: "the mode," "the person," "the matter," "the place," "the time," "the means," "the effects." The mode and the effects will be considered in some detail; the other five circumstances can be explained and exemplified summarily.

"The person" indicates considerations of a special duty in the author of the act or of a special right in a person affected by the act. The moral quality of a lawyer's act may differ accordingly as he acts in the character of attorney or in that of executor, and accordingly as his act is directed to a client or to a stranger. "The time" and "the place" of an act's performance may alter its morality or its efficacy to produce or discharge moral obligations. The passage of time may, by force of just law, extinguish moral rights and duties. The place where process is served may determine that the service imposes no moral obligation to obey its mandate. "The means" here do not refer to the act itself which is always a means to achieve the actor's purpose, but to subordinate means, by which the act principally considered is to be accomplished in a given case. Thus, in considering the morality of

making a statutory defense, we must attend to the moral character of the offers of proof which will be made to effectuate the defense.

### **The Circumstance of Indirect Effect**

In the enumeration of circumstances, "the effect" refers to the act's accidental or indirect effects. An indirect effect is one which follows from an act though the act has no necessary tendency to produce it. In the physical order of causality, the act may be the entire efficient cause of the effect, or it may contribute only part of the efficient causality which produces the effect. Furthermore, the act may be only a disposing cause where the activity does not produce the effect either wholly or partially, but removes obstacles or creates conditions permitting the efficient causes to operate effectively. In any of these cases, the effect is indirect as to the act in question, if the act has no necessary tendency to produce this effect.

To illustrate the three ways in which an effect may follow upon an act, we will take it that the buyer in three different cases fails to understand his seller's clearly spoken invitation to "dicker." The seller's act of marking up prices may be the full physical or psychological cause of the buyer's misunderstanding that the prices marked are fixed prices. Or the seller's act of marking up may join with the statements volunteered by a third person as a partial cause of the buyer's misunderstanding that the prices are fixed. Or it may be that the buyer, looking at the price tags, written in characters unfamiliar to him, takes them to be written in code. This misapprehension does not lead him to make any judgment as to the fixed or tentative character of the prices. But this misapprehension, arising

out of the seller's act, does leave the tourist buyer at the mercy of his guide who, in hope of compensation from the shopkeeper, calls off to his client prices higher than those marked and then effects the sale at prices marked. The effect in all cases is that the buyer is overcharged. But in none of these cases is the overcharge an effect following from a necessary tendency in the seller's act of marking up the prices — it is always an indirect effect of that act.

Where the actor intends the indirect effect there is no doubt of its influence upon the morality of his choosing to act. Here he has made the indirect effect his purpose for choosing the act. If the effect is evil, his intent is evil, and his will to act for this purpose embraces evil.

The moralists say that where an effect is thus taken into the actor's intent, the effect is "*voluntarium in se*." An effect which the actor does not thus intend is said to be "*voluntarium in causa*."

Where the actor does not intend an indirect effect of his act, the moral quality of that effect does not necessarily influence the moral quality of the concrete act. But where such effect is morally evil, this moral evil may be embraced by the actor's determination to do the act or by his determination to permit his past act to realize its indirect evil effects. He thus embraces the evil of the indirect effect if all three of the following conditions are fulfilled:

1. That the actor, when he makes either determination, foresees that the evil effect will follow, at least probably, upon his act.
2. That the actor can, without hardship proportionate to the evil effect, either prevent the effect from following his act or abstain from acting.
3. That the actor has a moral obligation to prevent or not to cause the evil effect.

The seller, for example, who has no intimation of his buyer's failure to understand the invitation to "dicker," and who has no other reason to know that the buyer cannot "dicker" to a fair price, does not foresee the evil indirect effect of his act of marking up prices.

When a buyer voluntarily ignores or rejects the seller's offer to "dicker," the seller can cut the price to the minimum he would be willing to accept after bargaining.

The seller has a duty, in charity and in justice, not to take from the buyer more than the goods are fairly worth. But one factor in the determination of a fair price is the buyer's willingness to pay. Though the marked price, as an asking price, may be higher than the price the seller hopes to get, it will usually be a just price where it is paid by one who voluntarily ignores the opportunity to bargain. Injustice would enter if bargaining imposed upon the buyer some unreasonable hardship, so that his failure to bargain was not truly voluntary.

Some of the moralists present their doctrine on acts having evil effects apart from their doctrine on the object, intent and circumstances as the sources of morality in the concrete act. They postulate a situation in which a concrete act has two effects, one evil, and the other good or at least morally indifferent. The conditions they require for acting in such a situation, or for permitting an act already done to perfect its evil effects, are broader than the conditions stated above, because in this presentation of the doctrine the act's object, the actor's intent and the circumstances other than "effect" must be adverted to explicitly. The conditions are these:

1. The act itself is morally permissible. (Its moral object and its circumstances are not evil.)

2. The evil effect is not in the actor's intent. (He foresees it as a probable consequence of his act, but he does not choose the act as a means to achieve the evil effect as an end. It is assumed that his purpose, whatever it be, is not evil.)

3. The evil effect is not, in fact, a cause of the good or indifferent effect. (If it were, then one who chose to do the act would truly, though perhaps reluctantly, employ the evil effect as a means to achieve the good effect, and his will would thus embrace evil.)

4. There is just and proportionate reason for permitting the evil effect.

The problem of proportion, which arises in applying the fourth condition just stated and the second of the three conditions enumerated previously, requires particular examination. The burden of the first three conditions set out immediately above is to establish that the actor's will has embraced evil in no direct way, in the object of his act, in his purpose, or in the means he elects to employ. That being settled, it may be said fairly that the actor does no more than permit evil to follow from his act. The will to permit evil does not, in and of itself, embrace evil. God permits evil to follow from his act of creation — He foresees evil and does not prevent it.

A man's determination to permit evil to follow on his act must be subjected to the basic moral test of reasonableness which applies to all human acts. If that determination is made without comparing the interests the actor pursues with the moral values violated by the indirect effects of his act, the determination to act evinces an unreasonable state of mind. Such a state of mind, if voluntary, is morally evil. Further, if a man acts in disregard of the evil indirect effects of his act, or in the face of a serious

disproportion between its evil and good effects, an ulterior question is raised. Is the subject's disposition to merely permit the evil, or is it to embrace the evil, as his purpose or as a means to his purpose?

To permit one's act, present or past, to produce evil effects, even indirectly, is immoral, unless one judges that he has just and proportionate reason to permit the occurrence of the evil effects. The principal elements in which the justifying reason is to be proportioned to the evil effects are the following: (1) The species and dignity of the virtues against which the evil offends and the greater or less gravity of that offense — as against the importance, in the moral, intellectual and material orders, of the act's good and beneficial effects which the actor desires; (2) The immediacy or remoteness with which the act or its good effect causes or occasions the evil effect; (3) The greater or less probability that the effects, good and evil, will ensue from the concrete act.

### **Scandal and Cooperation in Wrongdoing**

While the primary purpose of this article is to summarize the general principles of the moral system and particularly the principles of casuistry, two rather specific principles which have frequent application to moral situations which arise in legal practice will be presented in this section and in the section following.

Any act by which one person concurs in another's wrongdoing has, as at least one of its effects, the other's wrongdoing. Of course, the wrongdoing may enter also into the concurring act's other moral circumstances, into the object of the concurring act, or into the intent of the person concurring.

The concurrence in wrongdoing is classified by the moralists either as scandal or as cooperation in wrongdoing, according as the concurrence is given to one not yet resolved upon doing evil, or to one already determined to do wrong. Cooperation or scandal which truly causes the wrongful act is said to be affirmative. If it is not causal, merely establishing conditions which facilitate the wrongdoer's causal production of the wrong, the concurring act is called affirmatively or negatively occasional, accordingly as it removes obstacles or offers opportunities. Concurrence which affects material causes and conditions — furnishing tools, opening locks, and the like — is physical concurrence. Moral concurrence exercises such influences as advice, example and encouragement. All these various forms of concurrence in evil doing are governed by the same moral principles.

Where the concurrence is formal, that is, where the person concurring intends the evil which the other's act involves, there is no question that the act of concurrence is an evil act. But to the malice which such evil intent confers upon the concurring act, a further evil quality is added. The duty imposed by charity to procure not only the material but also the spiritual welfare of all men is breached when one concurs intentionally in another's act of wrongdoing. The malice of the act of concurring formally with a wrongdoer is further increased where that act, in view of its object or circumstances, violates obligations imposed by other virtues. Such obligations arise when the concurring person is subject to a duty to prevent the wrongdoing or its evil effects, by reason of a special moral relation between him and the wrongdoer or between him and those harmed by the

wrongdoing. They arise also where the concurring act is evil by reason of its own object.

Where the concurrence is material; because the person concurring does not intend, but merely permits, the evil which the other's act involves; the cooperators in evil or the person who gives scandal does not, in his purpose, embrace evil. If he does embrace evil, it must be in the object or in the circumstances of his concurring act.

If the concurring act is evil because its object is evil, or because of evil found in its circumstances apart from the circumstances of concurrence, the malice of the concurring act is aggravated by the accidental circumstance that it concurs with another's wrongdoing, though the wrong done by the other is not intended by the person who concurs with his act. So, though a burglar makes his unlawful entry, having no desire or purpose that a rape shall occur in the house, yet knowing that his breaking will facilitate the entry of a rapist, the burglar's sin against moral principles and precepts which protect property rights takes on added malice by breaching the duty of charity which binds him to both the rapist and the victim, and by breaching also the duties imposed by those virtues whose object is the victim's right of physical and moral personal integrity.

The evil found in the object of the concurring act may, of course, be precisely the same as that which is the object of the other's wrongdoing. In such case, the other's wrongdoing is embraced directly by the concurring person's will. Though it is not his purpose that the wrong shall occur, he elects the wrong as a means to the end he intends. For example, take the concurring act of a person who, to prevent a

libertine from desiring his sister, pays a prostitute whom the libertine desires but cannot afford.

But if the concurring act is not evil — in its intent, in its object, or in those of its circumstances which have not reference to its influence upon another's wrongdoing — that circumstance of reference does not make the concurring act evil in every case. In view of that circumstance, the other's wrongdoing is, in such case, an indirect effect of the concurring act. The wrongdoing is not a direct effect of the concurring act, because the case postulates that the act's object does not include a necessary tendency to produce the other's wrongdoing. Thus, the act of supplying a drug or an instrument which has no moral use is evil in its object, whereas the act of supplying a drug or instrument which has uses, some of which are moral and some immoral, is not evil in its object. The latter act may be evil in its indirect effects.

So we apply to the acts of material concurrence in wrongdoing the moral doctrine on indirect effects. Material concurrence in the wrongdoing of another is morally permissible where these conditions are verified:

1. The concurring act itself is not evil in its object, in its author's purpose, or in some of its circumstances apart from its reference to the other's wrongdoing, *and*
2. The concurring person, when he chooses to act, does not foresee that the other's wrongdoing will follow, at least probably, upon his act, *or*
3. The concurring person cannot, without hardship proportionate to the evil of the other's wrongdoing and its effects, either prevent the wrongdoing or its evil effects, or abstain from his own act.

The proportion to be established between the concurring person's hardship and the evil which the other's wrongdoing involves has the following as its principal elements:

- (1) The seriousness and strictness of the moral obligations breached by the other's wrongdoing, and of those which bind the concurring person to prevent the wrongdoing, or its evil effects, are weighed against the importance, in the moral, intellectual and material orders, of the hardship involved in preventing the wrongdoing or its evil effects or in abstaining from the concurring act.
- (2) The immediacy or remoteness which characterizes the reference of the wrongdoing or its evil effects to the concurring act as a cause or occasion is considered.
- (3) The greater or less probability that the wrongdoing and its evil effects will ensue from the act of concurrence, also the greater or less probability that the hardship to the concurring person will ensue from his determination to prevent the wrongdoing or its evil effects or from his determination to abstain from the concurring act, are estimated.

In evaluating the hardship referred to in item (1) *supra*, two special considerations are helpful in many cases. A hardship which affects the concurring person's ordinary and honest means of livelihood weighs more heavily than a hardship, quantitatively similar, which affects his extraordinary income or profit. A concurring act which is one done in the normal and honest course of the cooperator's profession or business is more easily excused, when a wrongdoer adapts it to his evil purposes, than a concurring act which is extraordinary to the cooperator's usual occupation.

### The Circumstance of Mode

The moral mode of a concrete human act consists in the advertence and freedom with which the act is done. Without these qualities, or either of them, the act is not truly a human act. Yet human acts differ in the degree of advertence and freedom which accompany them.

For our purposes, the human act's qualities of advertence and freedom may be illustrated best by referring to acts of restitution of damage. For the moralists, the term restitution describes not only any act by which, under the impulse of the virtue of commutative justice, a thing or a right is given to the person entitled to own or possess it after it had been taken unjustly, but also any act by which, under the impulse of the same virtue, damage unjustly inflicted is repaired or compensated. In reference to the reparation of damage, the duty which arises immediately out of moral principles is quite different from the moral duty which is created by a just human law or by a just judgment applying human law. The moral duty which has a legal basis is established by reference to the just, but objective, standards of conduct imposed by law; the moral duty which concerns us here is established by reference to just standards applied subjectively, for this is a duty which is created in the forum of conscience, and conscience applies all criteria subjectively.

Any duty to repair or compensate damages which arises immediately in the forum of conscience has three necessary premises:

1. The damage is caused in violation of a strict right of the person harmed. Thus, for example, one has no duty to restore the loss caused by denying alms.
2. The person obliged must have caused

the damage efficaciously, and not — in the moral sense of the word — accidentally; the act must have had at least a probable tendency to cause the harm.

The moralist would find liability in very few of the allergy cases which have succeeded under the tests of tort law.

3. The person obliged must have caused the unjust damage with "theological fault." This fault may have been incurred by the act which caused the damage or in some subsequent neglect to take an opportunity to prevent the damage.

Theological fault is a consequence of a sinful act — it is the duty to account to God for an act in which moral evil was wilfully embraced. Any act or omission is sinful if it violates some obligation imposed by God, through the natural law or divine positive law or just human law, and provided that the act or omission is done with knowledge that it violates the obligation, and with psychological freedom.

When there is lacking all such knowledge, by reason of ignorance or inadvertence, there is no sin and no theological fault. Any earlier act or omission which was done voluntarily and undutifully with knowledge that it would likely cause the ignorance or inadvertence here intervening was, of course, sinful and involved fault.

Where the knowledge of the act's malice is imperfect, the sin and the fault are correspondingly diminished.

When psychological freedom is entirely lacking, because of a drug which removes inhibitions, for instance, the act or omission is not sinful and has no fault. Any earlier act or omission done voluntarily and undutifully with knowledge that it would likely cause the present lack of freedom was sinful and involved fault.



Where the psychological freedom is partly impaired, by a neurosis, for example, the sin and the fault are diminished in proportion to the impairment of freedom.

Problems arising under the moral duty to repair or compensate damage caused efficaciously and unjustly will illustrate the rules relating knowledge and freedom to sin and fault.

Where one damages another, knowing he efficaciously causes damage but believing, because of ignorance which arose without his fault, that the person damaged has no strict right in the object damaged, he does not incur the obligation to repair the damage.

For the purpose of making a picnic fire, a vacationist burns an old and dilapidated boat which he knows could be of considerable service to a local fisherman, but which he honestly believes to be a derelict, though it is actually the property of the fisherman. Though the vacationist has acted uncharitably, he has no obligation to repair the damage done the fisherman.

When one acts in the honest belief that the act he does, though it might possibly cause a given harm, is not at all likely to do so, he has no obligation to repair or compensate the damage which in fact fol-

lows upon his act. The man who flicks a cigarette into a street gutter is not obliged to compensate passersby for damage caused to their clothing by a fire which his cigarette started by falling upon gasoline which, unknown to him, floated upon the water flowing in the gutter.

Similar to ignorance and inadvertence, in their moral effects of barring or diminishing sin and theological fault, are the defects of freedom. A threat which so frightens as to upset one's voluntary control of his actions, removes all sinful character and all fault from those actions, and therefore bars the imposition by conscience of a duty to repair the damage caused efficaciously and with objective injustice. A lesser threat will diminish sin, fault and the obligation to repair or compensate.

*Bonum ex integra causa, malum ex quocumque defectu.* This axiom summarizes the moral doctrines stated in this article. In the context of the sources of the morality of the human act, the axiom declares that a good act is one whose every element is good or at least permissible, and that an act is bad whose author's will embraces evil in the act's moral object, in the author's purpose, or in any accidental moral circumstance of the act.

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