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SOLUTION OF “DEFENSE OF THE GUILTY”*

WILLIAM F. CAHILL, B.A., LL.B., J.C.D.

OUR RESOLUTION OF THE PROBLEM of what Mr. Justin may or must do in the case of Peter Beet will be clearer and more meaningful if we begin our discussion by setting out a general statement of the moral duties of an attorney in Mr. Justin's position.

The moralists¹ summarize under the four heads of *knowledge, probity, diligence* and the charging of *fees that are not excessive*, the duties of an attorney who is asked to represent a client. Only the first three of these duties are referred to in the Moral Question here proposed.

The attorney sins if he has not, and does not timely procure, sufficient knowledge both of the law and of the facts.² This knowledge must be sufficient for three purposes: to guide the attorney's decision that he will take the case or refuse it, to enable the attorney to advise the client on his rights and the best means to secure them, and to make it possible for the attorney to present the client's cause adequately in court.

The attorney violates the duties of probity if he advises or undertakes litigation which is unjust, or if he advises or uses unjust means to further even a just cause.³

The attorney fails in his duties of diligence if he does not exercise the care and energy without which his advice and advocacy will be ineffective. Usually, the duty of diligence arises out of the attorney-client

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¹ See ST. ALPHONSUS LIGUORI, I THEOLOGIA MORALIS §§ 218-26, at 427 (1839); AERTNYS-DAMEN, I THEOLOGIA MORALIS § 1236, at 869 (1947); PRÜMMER, HANDBOOK OF MORAL THEOLOGY § 289, at 133 (1957).

² See Canon 8, AMERICAN BAR ASSOCIATION CANONS OF PROFESSIONAL ETHICS.

³ See Canons 15, 16, 30, *supra* note 2.

relationship established by voluntary engagement. Extraordinarily, however, an attorney is bound by his professional status not to refuse his advice or his advocacy in certain cases.

Viewing the given factual statements in Peter Beet's case in the light of these general principles, we see that certain questions of fact are material to a judgment that Mr. Justin should not undertake to advise or defend Peter, or that Mr. Justin should or may do so upon certain conditions.

It seems that the general statement of the case, thus viewed, raises the following questions of material fact:

- (a) Did Peter drive the "death car"?
- (b) Will Peter plead "not guilty"?
- (c) At Peter's trial, will he or his friends:
 - (1) offer false evidence,
 - (2) or offer true evidence harmful to other persons?
- (d) If Mr. Justin refuses to defend Peter, will the defense have competent counsel?
- (e) If Mr. Justin delays until tomorrow's hearing his decision to take the case or to refuse it, will that delay occasion injustice or handicap the defense?

When Peter's additional statements postulated in Moral Question 4 are assumed, the questions of fact labeled (a) and (b) are resolved affirmatively. With this change in the factual situation, the principle of probity must be examined with greater pre-

cision: will the principle permit an attorney to defend a person whose guilt is not doubtful but certain, when it is also certain that the guilty person will plead "not guilty"?

To answer the five Moral Questions in the order and form in which they were proposed would require much repetition or cross references. We prefer to offer first a composite answer to all five Moral Questions, and then to relate the answer's several clauses to our general statement of the attorney's duties.

In our opinion, Mr. Justin is morally warranted to accept the case, either before or after Peter's new statements postulated in Question 4, provided that the attorney takes effective steps to prevent any offer of false evidence for the defense. He need not exclude offers of true evidence harmful to other persons, if the defense's employment of such offers is justified by proportionate necessity.

Further, we believe that Mr. Justin is morally warranted to refuse the case immediately if other competent counsel is available to Peter.⁴ But if such counsel is not available, the attorney must find justification for his refusal.

Finally, it seems to us that if Mr. Justin wishes to postpone his decision to accept the case or refuse it until tomorrow's hearing, he is obliged to take care that his conduct does not occasion injustice, or put in jeopardy Peter's rights or his attorney's control of the incidents of the trial.

⁴ See Canon 31, *supra* note 2.

**Peter's Case is Just and Maintainable
by Just Means**

When we answer that Mr. Justin is morally warranted to accept Peter's case, even after receiving Peter's new statements postulated by Question 4, we judge that the case is not unjust and that Peter's not guilty plea can be maintained by just means.

A man who knows he is guilty of a crime violates no moral duty when he pleads "not guilty." A fortiori, his plea would not be unjust if he were unsure of his guilt. In either case, his cause is not unjust and the attorney who undertakes it does not sin against the duty of probity.⁵

The moral position of the guilty man who pleads "not guilty" to a criminal accusation is clearly distinguishable from that of the defendant in a civil suit who is resisting a just claim. Usually, the civil defendant is resisting claims to things of economic value only. Usually he is morally free to let the plaintiff have the thing he claims; rarely, as when the statute of limitations has run in his favor, does he have a moral right to resist the plaintiff's suit. The accused, on the other hand, by his plea of "not guilty" is vindicating his claim to enjoy life itself, or liberty or good reputation. Normally he has not only a right, but even a duty to make this vindication; only rarely and exceptionally is he morally bound not to do so.

When one pleads guilty to a serious crime he seriously risks moral corruption through the despair, the discouragement and the evil associations which are the nor-

mal sequelae of conviction of crime and of the penal discipline which follows upon conviction. For anyone who is not well advanced toward sanctity, this risk seems so great as to gravely jeopardize salvation itself. So to jeopardize one's self is immoral unless a very grave duty binds one to assume the risk.⁶ No man simply because he has violated a penal law, is morally obliged to assume that risk.

The law of our states, like the law of most modern nations and the present Canon Law of the Church,⁷ does not oblige the criminal to admit his guilt. Nor does the law oblige him to accept penal discipline until he has been convicted in a proceeding in which he may deny his guilt, honestly challenge the evidence offered against him, and claim every benefit of the law—not the least of which is the requirement that the prosecution establish his guilt beyond reasonable doubt.

The law cannot put itself in the place of God Who punishes guilt as guilt, for the law lacks God's omniscience and omnipotence. The law must find guilt before it punishes. Yet the law must punish guilt, not as guilt, but as a disturbance of social order.⁸ Thus it cannot use methods of de-

⁶ St. Alphonsus accepted as probable, and therefore safely followed in practice, the opinion of theologians who said that no one who can escape the death penalty and other severe forms of punishment by withholding his confession is morally bound to confess, even when the law purports to oblige him to confess. ST. ALPHONSUS LIGUORI, I THEOLOGIA MORALIS § 274, at 438 (1839).

⁷ See CODEX JURIS CANONICI, Can. 1743, § 1; Can. 1744; Can. 1748; Can. 1827; Can. 1830, § 2.

⁸ On the relation of justice and social necessity, as bases of society's right to punish, see 1 ROBERTI. DE DELICTIS ET POENIS § 32. at 45.

⁵ See Canon 5, *supra* note 2.

termining guilt which themselves disturb the social order and alienate from the law the minds of free and fair-minded men. This is the reason why the law must, in our world, assume the entire burden of establishing criminal guilt and cast none of that burden upon the accused.

Of course, the guilty can waive the benefit of the law by confessing or pleading guilty when charged. But neither the law of man nor the law of God directly obliges him to do so. The law of God requires of the sinner repentance, reformation, reparation of damage and penitential satisfaction, but it does not require that, to accomplish these, the sinner shall voluntarily take upon himself human society's penal discipline.

It is only indirectly that God's law, through the duties it imposes upon men with respect to their neighbors, sometimes obliges a guilty man to confess or to plead guilty when charged with crime. When his failure to confess or plead will certainly harm another unjustly, or will leave the wrongdoer a prey to harmful impulses he cannot control, the criminal is morally obliged to confess or to plead guilty and so subject himself to penal discipline.

Under the facts presented, it does not appear that Peter is a compulsive criminal. Nor does it seem that if he pleads "not guilty" he will become morally responsible for another's being unjustly accused. True, there is some ground for a suspicion that it was Jimmy Patter who drove his sister to her death, but the grounds seems slight. More important the factual statement does not show that Peter, by moral fault direct or wanton, created or enhanced the suspicion which may be directed against Jimmy.

Peter's defense can, without injustice, maintain that the evidence to be submitted by the prosecution does not prove beyond reasonable doubt that Peter drove the "death car." It can point out that Patricia's remark "License or no license, I ought to drive us home" indicates that the girl may well have been driving when the crash occurred.

Clearly, it is Mr. Justin's responsibility, if he takes the case, to use the knowledge he has acquired as an assistant prosecutor to estimate the likelihood that this defense will succeed, and to decide whether Peter may not get off with a lighter punishment by pleading guilty. He should advise Peter on these matters before Peter pleads at tomorrow's hearing.⁹

The Defense Must Exclude False Evidence

Mr. Beet's plan to consult his out-of-state friends and to enlist the "loyal co-operation" of Jimmy Patter and his father looks very much like an attempt to put into the mouths of Peter and Jimmy false statements tending to exculpate Peter. Mr. Justin, if he takes Peter's case, must not permit such statements to be offered in court.¹⁰ He cannot discharge this responsibility by simply warning Peter and Jimmy to tell only the truth. He should insist that, as Peter's attorney, he shall be present when Mr. Beet talks to Peter and when he talks to Jimmy and Jimmy's father. This is required not only by the attorney's duty to exclude unjust means to advance a just

⁹ See Canon 8, *supra* note 2.

¹⁰ See Canons 16, 22, *supra* note 2.

defense,¹¹ but also by his duty to save Peter and Jimmy from the harmful effects of such advice as Mr. Beet may offer. If he leaves the boys to Mr. Beet, they may evolve a story which, if it does not cause them to be prosecuted for perjury, may at least prejudice the jury against Peter.

Now that Peter is sure he was the driver of the "death car" and will plead "not guilty" to the manslaughter charge, Mr. Justin cannot permit him to take the witness stand. Some moralists hold that an accused person is not guilty of lying when he, in the face of questioning by the authorities, denies facts from which his guilt could be inferred, and even makes assertions which are not true, to establish an "alibi" or to otherwise weaken the force of evidence against him.¹² This, they say, is not lying, because the questioners have no reasonable expectation that the accused will tell them the truth and, they say further, there is no lie when false statements are made to one who does not expect or who has no reason to expect, that the speaker tells the truth.¹³ Even if this view of lying be assumed as correct, it certainly has no application to statements made by a defendant in our courts. Our law, unlike the law of many European countries, does not permit a defendant to be questioned in court if he refuses to be sworn, and does

not permit him to make statements in court unless he has taken the witnesses's oath. Once he is voluntarily sworn to "tell the truth, the whole truth, and nothing but the truth," the court has every reason to expect that he shall not make any false statements. Therefore he cannot, without incurring the moral guilt of perjury, make such false statements as he might have made, without moral fault, in a preliminary investigation conducted by the police or by the prosecutor.

The Defense May Offer True Evidence Which is Harmful to Others

For example, Peter's defense may call Jimmy Patter as a witness, and elicit from him admissions tending to show that his activities on the night of the tragedy are not so clearly accounted for as to exclude some probability that he, rather than Peter, was the driver of the "death car."

This is no abuse of the truth, because the question in issue is not the question of who actually drove the car, but the question of whether the evidence put in by the prosecution proves beyond reasonable doubt that Peter drove the car. Probity requires that the defense attorney shall not, in questioning the witness or in argument, declare or suggest that Jimmy actually drove the car, but probity does not forbid questioning or argument to the point that the evidence of Peter's driving is inconclusive.

When the defense undertakes this line in questioning and in argument, it must foresee that Jimmy will be harmed thereby. Some people may well believe that Jimmy is lying, and the police may be led to

¹¹ See ST. ALPHONSUS LIGUORI, *op. cit. supra* note 1, § 226, at 428.

¹² See NOLDIN AND SCHMITT, II SUMMA THEOLOGIAE MORALIS § 732, at 672 (1951).

¹³ See NOLDIN AND SCHMITT, *op. cit. supra* note 12, § 638, at 578; CONNELL, OUTLINES OF MORAL THEOLOGY 158 (1953); DORZYNSKI, CATHOLIC TEACHING ABOUT THE MORALITY OF FALSEHOOD 49-64 (1948).

harass him with further questioning and investigation; possibly they may seek to have him indicted if Peter is acquitted. Yet, it seems to us, the defense may morally use the questions and arguments which have these evil indirect effects. The harm that may come to Jimmy is not a direct effect of the defense attorney's attack on the prosecution's evidence, nor is it a means used to free Peter, nor does the defense intend that Jimmy be suspected or harassed. To free Peter, the defense shows the court that the evidence against him is not so conclusive as to warrant his conviction; this showing is made by indicating that the evidence is patient of a reasonably probable inference that Jimmy drove the car. That Jimmy drove is not urged as a certainty or as a probability so strong as to found an indictment against Jimmy, or even so strong as to warrant a founded suspicion that Jimmy's denial that he drove is a lie. These evil effects, if they follow on the defense argument, will follow only indirectly.

Thus, three of the four conditions which justify an act having an indirect evil effect are satisfied: "1. The act itself is morally permissible. . . . 2. The evil effect is not in the actor's intent. . . . 3. The evil effect is not, in fact, a cause of the good effects. . . ." ¹⁴

The remaining condition, "4. There is just and proportionate reason for permitting the evil effect. . . ." ¹⁵ seems also to be satisfied if Mr. Justin conscientiously finds that he cannot reasonably hope to make

the court see the inadequacy of the evidence against Peter without bringing before it the evidence and argument which indirectly embarrass Jimmy Patter. If the circumstances were such that we could seriously expect that Jimmy would be unjustly convicted of perjury or manslaughter, we would not say that the good effect of freeing Peter was proportionate to the evil effect of the defense tactic. But since probabilities here are that Jimmy will suffer harm in a degree much less than Peter would if his defense failed because his attorney did not attack the prosecution's evidence in the way here proposed, we believe that there is cause, both just and proportionate, for undertaking the attack which will have an indirect evil effect upon Jimmy Patter.

Justin May Refuse the Case If Other Counsel is Available

An attorney, by reason of his office or by reason of his special competence has no moral duty to take any case offered to him. ¹⁶

If he has a duty to take a given case, the duty will arise from previous dealing with the client, or from the virtue of charity which obliges us to help our fellow man in his necessities. ¹⁷ The duty of charity generally does not bind us to meet the necessities of particular individuals, and it is commonly discharged by help offered to necessitous persons whom we freely choose. Sometimes, however, our freedom to choose the beneficiaries of our charity is limited.

Danger sometimes does more than invite

¹⁴ See PRÜMMER, *op. cit. supra* note 1, § 23, at 13; Cahill, *Some General Criteria of Morality*, 4 CATHOLIC LAWYER 51-52 (Winter 1958).

¹⁵ *Ibid.*

¹⁶ See Canon 31, *supra* note 2.

¹⁷ See PRÜMMER, *op. cit. supra* note 1, §§ 223-24, at 97-99.

rescue—danger obliges rescue when the danger is very grave and at the same time remediable, if the circumstances indicate that there is only one competent rescuer certainly available, and the task of rescue puts upon him no burden seriously disproportionate to the victim's danger.

Here Peter's danger seems grave and remediable. He is in danger of conviction of manslaughter and his father may lead him to commit perjury. It seems that a competent and conscientious attorney can save Peter from further crime and perhaps procure at least a significant mitigation of disgrace and punishment.

Is Mr. Justin the only competent rescuer certainly available? Before he can answer that question, Mr. Justin must use his intelligence and experience to decide another problem. It seems to us that the conduct of the leaders of the Green County Bar indicates such a sensitiveness to popular opinion that we may reasonably fear that even when assigned by the court to the defense they may not find in themselves the courage and the proper single-mindedness which the effective presentation of a defense requires. The attitude of attorneys toward unpopular clients, sometimes expressed "I will see that he gets a fair trial, but I will not try to get him off" seems so negative in spirit that it is not likely to inspire that diligence which the client, the law itself, and good morals, expect of a defense attorney.¹⁸

Finally, Mr. Justin must weigh for himself his probable cost in assuming to defend Peter Beet. If it will quite probably and seriously jeopardize his career, he has

cause proportionate to Peter's danger for declining the invitation to rescue. We can say only that Mr. Justin is morally bound to use his best knowledge and a very high degree of diligence in making that determination.

**If Mr. Justin Postpones his Decision,
He Must Forestall Evil Effects of
That Postponement**

Mr. Justin cannot, without injustice, permit his postponement of decision to operate as a connivance with Mr. Beet's project.¹⁹ He must either dissuade Mr. Beet from his proposal, or insist on being present when Mr. Beet sees Peter and Jimmy. If Mr. Justin does neither, his postponement tends to encourage Mr. Beet to put false evidence into the mouths of the boys. Further, the fact that Mr. Justin will have been in contact with the case throughout this period is calculated to mislead the boys, the court, and any attorney who may later assume to defend Peter Beet.

To stay in the case, even tentatively, while leaving Mr. Beet free to carry out his plan, may well forestall the court's quite reasonable suspicions that the evidence had been tampered with. It may well cause Peter and Jimmy to commit perjury, perhaps without realizing the wrongfulness of their conduct or the risks it will involve for them. It will leave Mr. Justin and any other attorney defending Peter in ignorance of the true state of the facts, and consequently liable to seriously harmful errors in planning the defense and its presentation.

¹⁹ This discussion's moral premise is the moral doctrine of indirect evil effects, on which see note 14, *supra*.

¹⁸ See Canon 15, *supra* note 2.