THE CATHOLIC UNIVERSITY OF AMERICA
STUDIES IN SACRED THEOLOGY
(Second Series)
No. 28

Moral Aspects of Dishonesty In Public Office

by the

REV. WILLIAM JOSEPH KING, A. B., S.T.L.

A DISSERTATION

Submitted to the Faculty of the School of Sacred Theology of the Catholic University of America in Partial Fulfillment of the Requirements for the Degree of Doctor of Sacred Theology

THE CATHOLIC UNIVERSITY OF AMERICA PRESS
WASHINGTON, D. C.
1949

Nihil Obstat:

Franciscus J. Connell, C. SS. R., S. T. D.
Censor Deputatus
Washington™, D. C., die 3 .ebruarii 19^9

Imprimatur:

Ψ Thomas A. Boland, S.T.D.
Episcopus Patersonensis
Patersonii, die 8 februarii 19^9

PRINTED BY
THE TIMES TRIBUNE COMPANY
ALTOONA, PA.

TO MY MOTHER
AND TO THE MEMORY OF
MY FATHER

TABLE OF CONTENTS

CHAPTER IV

CHAPTER V

CHAPTER VI

CHAPTER VII

INTRODUCTION

In their treatment of the duties of certain states of life among the laity, moralists have confined themselves almost exclusively to a consideration of the obligations of judges, witnesses, plaintiffs, defendants, lawyers and doctors.[1] The obligations of public officials have not been treated in our manuals of Moral Theology in a manner adequate to our present needs, particularly in the United States. Certain circumstances exist in our country that create problems quite different from those that prevail in other lands. Consequently, an effort must be made to adapt general principles to our particular needs.[2]

As Luigi Sturzo has observed: "the problem of morality in public life deserves a special and profound treatment all the more necessary today since, in one way, public life tends to embrace the main part of human activity as it interferes ever more intensely with individual relations and local groups."[3] One aspect of morality in public life will be considered in this dissertation, namely, the dishonest practices at times engaged in by public officials. Our particular concern will be those instances in which public officials have used their offices in a manner detrimental to the common good due to a selfish desire to further their own interests. The benefit achieved through

1. Cf. any of the modern manuals of Moral Theology. For example, D. Prümmer, *Manuale Theologiae Moralis* (7ed., 3 vols.; Friburgi Brisgoviae: Herder & Co. 1928-1933) II, ŋ. 153-164; B. Merkelbach, *Summa Theologiae Moralis* (3 ed.; Parisiis: Desclee, De Brouwer et Soc., 1938-1939) II, n. 635-644; H. Davis, *Moral and Pastoral Theology* (4 ed., 4 vols.; New York: Sheed & Ward, 1943) IV, pp. 373-385.

2. A recent work of the Reverend Francis J. Connell, C. SS. R., *Morals in Politics and Professions* (Westminster, Md.: The Newman Bookshop, 1946), has applied general principles to various groups of persons intimately connected with public life.

3. L. Sturzo, "Political Duties of Citizens," *The Epistle,* XII (1946), p. 108.

this abuse of a public office has commonly become known as *graft.*

Unfortunately the consciences of some public officials have become calloused to the sinfulness of such practices. They are prone to believe that they may accept or seek graft "because everybody is doing it." They fail to realize, of course, that the law of God is universal and remains the same regardless of how widely it may be transgressed. There are not two standards of morality: one for the governing of one's private life and another, more liberal, directing the activities of public life.

The acceptance of graft on the part of a public official is a violation of the obligations of his office. Those holding public office have obligations flowing from legal and distributive justice which cannot be reconciled with dishonest practices. Furthermore, it is our contention that in many instances the failure of a civil officeholder to measure up to the moral integrity demanded of those in public life can extend beyond the limits of violations of legal and distributive justice and can transgress the more important virtue of commutative justice. Of course, once it is established that such practices are a violation of commutative justice, there is the consequent obligation of restitution.

In order to give practical application to the problem under consideration an effort has been made to cite examples of situations that have been brought forth in public investigations and by students of political science.[4] It is our intention, not to pass judgment on particular persons or communities, but merely to use what others have presented as facts for the purpose of example, sometimes with additional circumstances to illustrate a point.

The writer takes this occasion to express publicly his sincere gratitude to His Excellency, the Most Reverend Thomas

4. In this regard the unpublished doctoral dissertation of Valdimer Orlando Key, *The Techniques of Political Graft in the United States* (Department of Political Science, The University of Chicago, 1934) has been of valuable assistance.

Henry McLaughlin, S.T.D., first Bishop of Paterson, of happy memory, for the privilege of pursuing higher studies in the Sacred Sciences at the Catholic University of America and for his many acts of kindness: to His Excellency, the Most Reverend Thomas Aloysius Boland, S.T.D., Bishop of the Diocese of Paterson, for the opportunity to complete his studies. His gratitude is also due to the Faculty of the School of Sacred Theology of the Catholic University of America and more particularly to the Very Reverend Francis J. Connell, C. SS. R., S.T.D., under whose direction this dissertation has been prepared, for his unfailing interest and generous assistance: to the Reverend Alfred C. Rush, C.SS.R., S.T.D. and the Reverend Thomas Owen Martin, Ph.D., S.T.D., J.C.D., LL.B, for their careful reading of the dissertation and for their many helpful suggestions. Likewise a sincere word of appreciation is extended to the librarians of the Catholic University, the Fordham University Law Library, and the New York County Lawyers' Library, for their willing assistance and to many friends, too numerous to mention specifically, who so generously lent their time and aid in the preparation of the manuscript.

CHAPTER I

NOTION AND DIVISION OF GRAFT

In political history corruption has always maintained a prominent place. No political group has been entirely free from it. However, corruption has not prevailed to the same extent at all times and under all conditions. The earliest known legal code, that of Hammurabi, King of Babylon, recognized the existence of corruption and contained provisions determining punishment for the age old crime of the bribing of judges.[1] "Among the great modern nations the United States has had perhaps the least enviable reputation as regards the probity of its political life. For this the American form of government is partially accountable."[2] The democratic form of government seems to offer more opportunities and greater incentives to corrupt practices among its public officials than other forms do. This is probably due in a large measure to the diffusion of responsibility among many officials, to the increasing range of governmental functions and to the intense materialism prevalent in our midst. Peter Odegard summarized the situation very well when he wrote:

> Beyond the opportunities that the expanding economic life of America has offered to corruption and the defects of American political organization in the control of it, there is the general cultural milieu which has made corruption and racketeering an integral part of American society. Corruption is in a sense a product of the way of life of an acquisitive society where "money talks," where that which "works" is justified, and where people are judged by what they have rather than what they are.

1. "If a man [in a easel bears witness for grain or money [as a bribe], he shall himself bear the penalty imposed in that case."—Robert Francis Harper, *The Code of Hammurabi King of Babylon about 2250 B.C.* (Chicago: The University of Chicago Press, Callaghan & Company,1904), p. 11.

2. Peter J. Odegard, "Corruption, Political," *Encyclopaedia of the Social Sciences* (15 vols., New York: Macmillan Company, 1931) IV, 452.

> The growth and consolidation of American business into ever larger units have increased the pressure of private interests upon public servants. But even more important is the fact that they have created a society in which pecuniary values are dominant. In such a society prestige is measured in terms of wealth. Successful grafters and corruptionists become respected, and a million dollars covers a multitude of sins.[3]

Detailed definitions of corrupt practices are, of course, to be found in highly developed legal codes, but these are scarcely extensive enough to cover the whole concept as seen from the viewpoint of moral theology or ethics. The sanctions of positive law are applied only to the more flagrant practices, which previous experience has shown to be so pernicious that public sentiment has crystallized into statutory prohibitions and adverse juridical decisions. Even within this rather limited sphere clearness and precision are only imperfectly attained. Frequently popular disgust is expressed at the ineptitude of the law's definitions and the labyrinthian ways of legal procedure, as a result of which prosecution of notoriously delinquent officials and politicians so often results in failure in our courts.[4]

Considering other than the legal concept of corruption, however, we find extremely confused, conflicting, and even unfair states of moral opinion regarding corruption. Political corruption has been defined as the misuse of public power for private profit.[5] In an effort to clarify the issue, Robert C. Brooks has proposed the following, more exact definition of corruption: "the intentional misperformance or neglect of a recognized duty, or the unwarranted exercise of power, with

3. *Ibid.,* p. 453.

4. The efforts of Circuit Attorney Joseph W. Folk to prosecute grafters in St. Louis around the turn of the century is an example. Cf. Lincoln Steffens, *The Shame of the Cities* (New York: McClure, Phillips & Co., 1904), pp. 101-143.

the motive of gaining some advantage more or less directly personal."[6] This definition, of set purpose, has not been so constructed as to confine corruption to the field of politics. Yet to make it applicable more particularly to political corruption it is only necessary to qualify the word 'duty' by the phrase 'to the state'. Elsewhere in the same work[7] graft is considered as a slang equivalent of corruption. The latter is more extensive in its connotation than graft—graft is but a species of corruption. It might also be added that the fact that a public officer acts corruptly or is guilty of corruption does not necessarily import that he has obtained any personal advantage from the act.[8]*

Definition of Graft

As a preliminary to our discussion of the morality of graft it would be well to formulate some fairly definite concept of graft, applicable, in a general way, to the various forms which evils of this sort assume in practice. Graft has become so much a part of American life that the definition of the term is presupposed by the majority that have written on the subject. In popular usage the term is used quite indiscriminately to cover a diverse number of practices. This has caused many things to be labeled 'graft' that do not rightfully deserve the opprobrium of that name.

6. Robert C. Brooks, *Corruption in American Politics and Life* (New York: Dodd Mead and Co., 1910), p. 46. At the time this book was written the author was Professor of Political Science at the University of Cincinnati. Dr. Valdimer Orlando Key in a foot-note to his definition of graft gives this definition of corruption proposed by Dr. Brooks. No explanation is given so that one might be led to believe that he considers graft and corruption equivalent terms.—*The Techniques of Political Graft in the United States* (Chicago: The University of Chicago Libraries, 1936—Private edition), p. 5.

7. Brooks, *op. tit.,* p. 42.

8. Cf. *Burkarth* v. *Stephens,* 94 S.W. 720, 722, 117 Mo. App. 425. It has been said that "All is corruption in politics that influences opinion and action for reasons extraneous to the matter at issue."—"Corruption in Public Life," *The Saturday Review of Politics, Literature, Science and Art,* CXLII (London, July 17, 1926), p. 60.

Escape from such confusion can hardly come from the accepted formulas of the dictionaries. Webster's New International Dictionary defines graft as the "acqusition of money, position etc. by dishonest, or questionable means, as by actual theft, or by taking advantage of a public office or any position of trust or employment to obtain fees, perquisites, profits on contracts, or legislation, pay for work not done or service not performed etc.; illegal or unfair practices for profit or personal advantage."[9] This is a descriptive definition made ready for further amplification by the inclusion of a few "et cetera's." Admittedly a definition of graft is difficult to construct since the term is used for a multiplicity of transactions seemingly quite different.

leather McHugh, O.P., describes graft as *"the use of a position of public service in a way, which, though outwardly lawful, subordinates the service of the public to the service of some private interest."*[10] By the use of the phrase "position of public service" the author intended to include all fiduciary relationships, whether they be political or non-political, that is, duties of trust, which one owes to a particular group of persons from an agreement, explicit or implicit, to act as their employee or agent.

Treating of the same subject, Father John C. Ford, S. J., rather than give a definition, sought out the elements that were common to cases of graft. He determined that there were three factors that recur in the transactions to which the term is commonly applied, namely, secrecy, violation of trust and easy money. However, the fact that any one of them may be wanting in a given transaction does not, of itself, preclude the presence of graft.[11]

9. 1944 edition, (Springfield: G. and C. Merriam Co.)

10. John A. McHugh, "Graft and Its Morality," *The Homiletic and Pastoral Review*, XXXVIII (1937), p. 242.

11. John C. Ford, "Notes on Moral Theology, 1945," *Theological Studies*, VI (1945), p. 545.

In each case of graft, whether it involves two or more individuals or is an instance of 'auto-corruption',12 there is "something covert and underhanded." The methods of maintaining secrecy, which is essential in most types of graft, are fairly simple. As little evidence as possible is created. When money changes hands only the giver and the receiver are present, or perhaps the money passes through several hands. Some of the individuals through whose hands it passes may be more or less ignorant of what the purpose is—it may be given a euphemistic name, for example, "a contribution to the campaign fund" or "a donation to the Police Benevolent Association." The terms of an agreement to give some particular privilege may be vague or merely implied. Little, if any, documentary evidence is made available.

This element of graft seems to parallel in some way the clause "though outwardly lawful" as given in Father McHugh's definition quoted above. He maintains that the techniques of graft are either really or seemingly lawful as far as human law is concerned. In some cases the letter of the law is lived up to. Other cases have the appearance of legality and, inasmuch as officials are involved, are held by the courts as presumptively legal because the burden of proof lies with those who accuse an official, for his public conduct is presumed to be normal. In other instances there are practices which have not been authorized by law and yet lawmakers have hesitated to condemn them because they felt public sentiment was not sufficiently

12. In 'auto-corruption' the public official or person exercising the power of such official in a sense plays the role of both parties in the other situations involving two or more persons. He secures for himself the adminstrative privilege which would be secured by an outsider through bribery. He awards contracts to himself, perhaps using dummy corporations. This term was coined by Dr. Brooks to take care of those cases in which there are no personal tempters or guilty confederates. He gives the illustration of "legislators, acting wholly on their own initiative and regardless of their duty to the state, [who] vote favorably or unfavorably on pending bills, endeavouring at the same time to profit financially by their action, or by the knowledge of the resultant action of the body to which they belong, by speculation in the open market." *Corruption in American Politics and Life,* p. 45.

developed to ensure enforcement. Legislation cannot anticipate every possible contingency and there are always those who are waiting to take advantage of every loophole. Consequently, the appearance or color of legality is used as a cloak to conceal transactions involving graft. For Father McHugh "the distinctive feature of graft is that it is done not only through a position of public office, but also under color of the lawful exercise of that office. This outside veneer of legality may be very thin sometimes, and it may be difficult to determine in some cases just where graft ends and clear illegality begins."[13] However, is this really a distinctive feature of graft? Is every transaction involving graft performed under the color of the lawful exercise of an office? Is not the distinctive feature rather the official's abuse of the powers invested in him?

We shall define *graft* as *the abuse, by a public official, of his control over the power and resources of government for the purpose of serving some private or party interest.* This is not to deny that there is graft in other than political life—the business world is beset with the same cancer.[14] The opinion is becoming more prevalent that much of the impetus to wrong doing in the political sphere comes originally from business interests. For the scope of this dissertation, however, it is necessary to define the term with a relatively high degree of precision. It will be used here to designate certain types of unbecoming behavior on the part of public officials or those exercising their power.

The term "graft," as used in the present connection, is of rather recent origin. It is believed that the expression origi-

13. McHugh, *loc. cit., p. 246.*

14. For a treatment of this phase of graft consult John T. Flynn, *Graft in Business* (New York: The Vanguard Press, 1931). He does not hesitate to say that "The average politician is the merest amateur in the gentle art of graft compared with his brother in the field of business." (p. 55)"In one particular at least—in respect for the trust relationship—political life, I firmly believe, exacts a higher standard of honesty than business." (p. 34)

nated in the circus world forty or more years ago.[15] At that time there were many that followed the circuses, conducting their own little trades or side shows near the big tents and drawing their business from the crowds going in and out. In a certain sense they were parasitical even though they were respectable and independent of the circus company. They made their living by drawing on the patrons of another business, just as the shoot of a tree which is grafted into another tree draws its nourishment from that other. Consequently they were called "grafts." From the circus world it seems the word passed into politics and came to be used quite widely to describe certain types of disreputable or unearned profits, which like an unhealthy growth fattened on the body politic. It was next applied, not merely to money gains, but to any kind of political advantage.

Classifications of Graft

In the concept of graft there are, what one may call, three degrees or phases, namely, the gift, the bribe, and extortion. Any transaction classified as graft can usually be put under one of these classifications. By a gift we mean "something that is freely and spontaneously offered without any agreement to do what is evil and without any hope of recompense, at least in the near future."[16] A gift, taken strictly, excludes any preceding debt of justice on the part of the donor. However, by

15. Flynn, (op. cit, pp. 39-40) and McHugh, (loc. *cit.,* pp. 248-249) give this explanation of the history and development of the word used in this sense but they verify it only with its plausibility. Webster's New International Dictionary gives a probable origin of the word akin to the one mentioned. Graft, in the sense in which we are using it, is "so called because illegitimate or improper profit was looked upon as 'graft', or sort of excrescence on a legitimate business undertaking."

16. Ford, *loc. cit.,* p. 546. The perfection of the gift, as a gift, varies in proportion to the freeness and spontaneousness present in the giving. V. Heylen defines a gift as "a contract in which one actually and irrevocably transfers dominion of something that is his to another who receives it gratuitously."—(*"contractus quo quis aclualiter et irrevocabiliter dominium rei suae alteri acceptanti gratuito transfert."*) cf. *De Jure et Justitia* (2 vols., 4 ed., Mechliniae: H. Dessain, 1943) I, 272.

chance, some debt of gratitude or dutifulness may intervene but then the gift could not be said to be entirely free. Among the various divisions of gifts A. Vermeersch speaks of the "Donatio *allectiva*" by which he understands a gift given with the hope of some other action or gift in return.[17] This hope in the mind of the donor does not make the gift a conditional one nor does it give the donor the right to demand anything back should his hopes be frustrated.

Bribery is "the practice of tendering and accepting private advantage as a reward for the violation of duty."[18] Involved in the very concept of it there is the intention to influence and to be influenced in a sense incompatible with good faith. The duty involved is clearly understood, but it is neglected or misperformed in view of the personal advantage gained in the acceptance of the bribe. The bribed official knows the better and chooses the worse.

Bribery contains the element of choice and when that factor is seriously curtailed we have extortion. The common law of England considered extortion as the act of an officer in "unlawfully taking, by color of his office, from any man any money or thing of value that is not due him, or more than is due, or before it is due."[19] In the United States the term has been broadened in scope so as to include "the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, under circumstances not amounting to robbery."[20] It will be in this broader sense that we shall use this term.

17. Arthurus Vermeersch, S. J., *Theologia Moralis Principia-Responsa-Concilia* (4 vols., 3 ed., Romae: Pont. Universita Gregoriana, 1933-37), II, 411.

18. Harold S. Lasswell, "Bribery," *Encyclopaedia of the Social Sciences,* II, 690. Webster's New International Dictionary defines a bribe as "a price, reward, gift or favor bestowed or promised with a view to pervert the judgment or corrupt the conduct of a person in a position of trust, as an official or voter."

19. Sir William Blackstone, *Commentaries on the Laws of England in Four Books,* edited by George Sharwood (2 vols., Philadelphia: J. B. Lippincott Company, 1900), Bk. IV, pp. 139-40.

20. *Ruling Case Law,* edited by William M. McKinney and Burdett A. Rich (28 vols., Northport, N. Y.: Edward Thompson Co., 1915), 8, n. 315.

CHAPTER II

SOCIETY AND THE COMMON GOOD

Man's Need of Society

The natural aptitude of man to live in society was discussed by Aristotle. He indicates that man is not only social by nature but that he is to live in a particular kind of society, a political society for "man is by nature a political animal."[1] Saint Thomas adopted this teaching of Aristotle[2] and said that:

> If any man is not social by nature, it is either because he is wicked, as when this results from a perversion of human nature, or because he is better than man, having a nature more perfect than other men generally so that he is sufficient to himself without the society of men, as were John the Baptist and Blessed Anthony the hermit.[3]

There are at least two necessary communities in the process of the development of man's social nature. The first and more natural is the family. It preceded the state, but inasmuch as families rapidly increased in number their original self-sufficiency was only ephemeral. The family has not that self-sufficiency which human nature demands as the ideal, for family cooperation could scarcely supply even the helps that are essential. Man requires peace in his possessions and ade-

1. Aristotle, *Politica,* Bk. I, ch. 2, 1253 a. 2. Quoted from *The Basic Works of Aristotle* (ed. Richard McKeon; trans. Benjamin Jowett, New York: Random House, 1941),p. 1129.

2. "Homo habet naturalem inclinationem - - - ad hoc quod in societate vivat."—St. Thomas Aquinas, *Summa Theologia,* I, II, q. 94, a. 2.

3. "Si aliquis homo habeat quod non sit civilis, propter naturam, aut nequam est, utpote cum hoc contingit ex corruptione naturae humanae; aut est melior quam homo, inquantum scilicet habet naturam perfectiorem aliis hominibus communiter, ita quod per se sibi possit sufficere absque hominum societate; sicut fuit in Joanne Baptista, et beato Antonio heremita."—St. Thomas Aquinas, *Politicorum Aristotelis Expositio seu De Rebus Civilibus,* Liber I, lectio 1 (Quebeci: Editio Alumnis Universitatis Lavallensis, 1940) p. 14.

quate protection for his rights. These cannot ordinarily be secured without the assistance and cooperation of a considerable number of people. Thus "the family is frequently referred to as the social cell, out of which the community develops. The metaphor accurately describes the relation of the family to the body politic."[4] Pope Pius XI has pointed out that:

> The family is an imperfect society, since it has not in itself all the means for its own complete development; whereas civil society is a perfect society, having in itself all the means for its peculiar end, which is the temporal well-being of the community; and so, in this respect, that is, in view of the common good, it has pre-eminence over the family, which finds its own suitable temporal perfection precisely in civil society.[5]

The state, then, derives its purpose from the nature and destiny of man. Man is able to fulfill his life's task only in the framework of the community. In his individuality, man is incompetent to provide adequately for the satisfaction of his legitimate desires; of himself he is insufficient to carry on human life properly. Thus men associate in order to preserve the good which is their life. As Pope Leo XIII expressed it:

> Man's natural instinct moves him to live in civil society. Isolated, he cannot provide himself with the necessary requirements of life, nor procure the means of developing his mental and moral faculties. It is, therefore, divinely ordained that he should lead his life—be it domestic, social, or civil—in contact with his fellow men, where alone his several wants can be adequately supplied.[6]

4. Francis J. Haas, *Man and Society* (New York: The Century Company, 1930), 109.

5. "Rappresentanti in Terra," *Acta Apostolicae Sedis,* XXI (1929), 726. The *Acta Apostolicae Sedis* will hereafter be cited *AAS*. The original Italian text appears in the *AAS* but it was followed by an official Latin translation, "Divini Illius Magistri," which was declared to be an authorized and authentic version. The translation given here is from *Social Wellsprings* (2 vols., Milwaukee: The Bruce Publishing Company, 1940-42), II, 92.

6. "Immortale Dei," *Acta Sanctae Sedis,* XVIII (1885), 162. (translation is that given in *Social Wellsprings,* I, 66). The *Acta Sanctae Sedis* will here-

The community, called the state, is "a perfect and self sufficient society, consisting of many families, united under a common ruler, for the attainment of the complete welfare and life of the community."[7] As a corporate body it comes into existence solely with a view to the welfare of the members and has no interests or rights of its own which are not founded upon the rights and interests of the families and individuals that compose it.

It is a perfect or supreme society in the sense that it is sovereign in its own sphere[8] and does not depend in any way upon

7. Michael Cronin, *The Science of Ethics* (2 vols., Dublin: M. H. Gill and Son, 1939), 11,461. Guenechea, S. J. gives a slightly more detailed definition: "Status est *coetus stabilis, naturalis, perfectus, organicus, familiarum vel personarum sui iuris, aliorumque elementorum seu organismorum sodalium, iuris fruendi et communione utilitatis seu prosperitatis publicae gratia institutus."—Principia Iuris Politici* (Romae: Apud Aedes Universitatis Gregorianae, 1939), I, 131.

8. "The Almighty has appointed the charge of the human race between two powers, the ecclesiastical and the civil, the one being set over the divine, and the other over human, things. Each in its kind is supreme, each has fixed limits within which it is contained, limits which are defined by the nature and special object of the province of each, so that there is, we may say, an orbit traced out within which the action of each is brought into play by its own native right."—Pope Leo XIII, "Immortale Dei," *ASS,* XVIII (1885), 166 (translation is that given in *Social Wellsprings,* I, 71). Aristotle's idea of man reaches its highest and ultimate realization in the citizen of the *polis.* But the idea of Christian personality, the belief that the ultimate end of man is the salvation of his soul, which is beyond the reach of the state, necessitated a change in the concept of the state as a perfect society. Elevated to a supernatural end, man could not obtain through the state the means necessary for the attainment of his ultimate end. He had need of a spiritual society which was realized in the institution by Christ of the Church as a perfect society. Cf. Ad. Tanquerey, *Synopsis Theologiae Dogmaticae Fundamentalis* (24 ed., Parisiis: Desclee et Socii, 1937), p. 420. The Church moves at the side of the state, independent, related to the citizens of all states, to the members of all cultures, races and civilizations. Although its sphere has been limited, the state still retains its character of being a perfect society. Secular happiness is the end of the state; its goal is the perfect sufficiency of earthly life, founded on the basis of the Christian idea of man.

a super-state or any other higher power save God alone, although it has relations of interdependence with the Church and with other states. Without the existence of some kind of authority, whether of a political or religious nature, and regardless of its origin, no social group could be organized and held together with sufficient continuity to constitute a state.[9] Ruling authority comes into existence as a necessary consequence of the nature and end of human beings/^In the state there can be only one supreme authority directing the community to its end, and the supreme ruler will be that person, or body, or group of bodies in whom the supreme authority resides. All sharers in the supreme governing authority, all those who exercise governmental authority which is not delegated authority, are sharers in the sovereignty of the state, and these constitute between them the seat of sovereignty.[10] If there were many supreme authorities in the state the people would be constituted into many states, not one, and the whole community would be directed not to one but to many and opposing objects. As Pope Leo XIII in the Encyclical *Immortale Dei,* one of the most important pronouncements of his pontificate, states:

> No society can remain united without some one in command, directing all to strive earnestly for the common good. Hence every civilized community must have a ruling authority, and this authority, no less than society itself, has its source in nature, and consequently has God for its author. It follows, then, that all public power must proceed from God: for God alone is the true and supreme Lord of the world. Everything, without exception, must be subject to Him, and must serve Him, so

9. "Socialis . . vita multorum esse non posset, nisi aliquis praesideret, qui ad bonum commune intenderet. Multi enim per se intendunt ad multa, unus vero ad unum. Et ideo Philosophus dicit, (prine. Politic.) quod quandocumque multa ordinantur ad unum, semper invenitur unum ut principale et dirigens."—St. Thomas, *Summa Theologica,* I, q. 96, a. 4.

10. Cronin, *op. cit.,* II, 553.

that whosoever holds the right to govern, holds it from one sole and single source, namely God, the Sovereign Ruler of all.[11]

The Common Good

The raison d'être of the state is the procuring of the common good of its members. Since the family is capable of acquiring no more than the ordinary daily necessities[12] it becomes the function and the end of the state to supply the things that are necessary for the more perfect or more developed life. "Civil society exists for the common good, and, therefore, is concerned with the interests of all in general, and with the individual interests in their due place and proportion."[13]* The success of its efforts can be judged and evaluated in the light of the opportunities it affords its citizens for living their personal lives more fully, by the assistance it gives them to progress in the virtuous and happy life. It is a maxim of economic theory and a practical observation in daily life that a man's interests are, generally speaking, looked after more effectively

11. The pertinent part of the text reads: "Quoniam non potest societas ulla consistere, nisi si aliquis omnibus praesit efficaci simiique movens singulos ad commune propositum impulsione, efficitur, civili hominum communitati necessariam esse auctoritatem, qua regatur; quae non secus ac societas, a natura proptereaque a Deo ipso oriatur auctore."—*ASS.,* XVIII (1885), 162. This translation is from *Social Wellsprings,* I, 66.

12. Aristotle tells us that "the family is the association established by nature for the supply of man's everyday wants."—*Politica,* I, 2, 1252 b. 11-12; *The Basic Works of Aristotle,* p. 1128. The things necessary for the more perfect life are not confined merely to the things of the material order. Pope Leo XIII wrote: "When different families, without giving up the rights and duties of domestic society, unite under the inspiration of nature, in order to constitute themselves members of another larger family circle called civil society, their object is not only to find therein the means of providing for their material welfare, but, above all, to draw thence the boon of moral improvement."—"Au milieu des sollicitudes," *ASS.,* XXIV (1892), 520. Translation taken from *The Great Encyclical Letters of Pope Leo XIII* (New York: Benziger Brothers, 1903), pp. 250-51.

13. Pope Leo XIII, "Rerum novarum," *ASS.,* XXIII (1891), 664; *Social Wellsprings,* I, 196-97.

by himself than by others. Thus it can be no part of the natural end of the state to foster the private interest of any individual or family, or to take over the control of things that are strictly and naturally their private good. However, there is a common good as well as a private good; and just as the individual good ought to be entrusted to the individual, so too the attainment of the common good ought to be entrusted to the state or community under whose tutelage alone it can be properly secured.

We have summarized the functions of the state in the formula—the *common good* or the *general welfare.* In what precisely does the common good consist? We speak of it in contradistinction to the varying and variable interests of the multitude of individual subjects. It is not a question of a common element in all individual goods or in the things that all men in common require. The *common* good and the good *of many* formally differ although materially they may be the same.[14] Jacques Maritain maintains that "the common good of society is neither a mere collection of private goods, nor the good proper to a whole, which . . . draws the parts to itself alone, and sacrifices these parts to itself."[15*] Normally, however, the common good and the private good coincide; the common good of the state and the private good of the citizen are interdependent; normally the common good and the citizen's private good can not widely diverge—in fact they converge so strongly that we rightly speak of them as coinciding. "The likeness of the whole to the part, of the general good to the

14. Arthurus Vermeersch, S. J., *Quaestiones De Justitia* (2 ed., Brugis: Carolus Beyaert, 1904), p. 702; Cf. *Summa Theologica,* II, II, q. 58, a. 7, ad 2: "Bonum commune civitatis et bonum singulare unius personae non differunt solum secundum *multum* et *paucum,* sed secundum formalem differentiam. Alia enim est ratio boni communis et boni singularis, sicut alia est ratio totius et partis."

15. Maritain, *The Rights of Man and the Natural Law* (New York: Charles Scribner's Sons, 1945), p. 8.

particular good, of the common interest to the private interest, is, then, principally a likeness, not of quantity, but of quality."[16]

The common good refers rather to the good of society as such.[17] For example, it is the business of the state to protect the community from enemies from within and from without and to make all the provisions necessary for this protection, namely, by the furnishing of men and materials. Again, it is the business of the state to make laws for the community in order to ensure peace between citizens, to set up tribunals for administering justice, to establish a proper educational system,[18] to regulate commerce so that the whole community may not suffer by the inordinate actions of a few individuals. Things of such a nature pertain to the common good of the community as such. The state strives to make these goods

16. "Le rapport du tout à la partie, du bien général au bien particulier, de l'intérêt commun à l'intérêt privé, est donc principalement un rapport, non de quantité, mais de qualité."— A. Michel, *La question sociale et les principes Théologiques, Justice Légale et Charité* (Paris: Gabriel Beauchesne, 1921), 29.

17. Cronin, *Science of Ethics,* II, 473. The older idea of the common good consisted in peace; in recent times the emphasis has been placed on material goods. Cf. W. Merk, *La pensée du bien commun dans le développement de l'État et du droit allemand* (Weimar, 1934), 451-520.

18. The educational function of the state is to help the family fulfill its mission and to compliment it. "Education which is concerned with man as a whole, individually and socially, in the order of nature and in the order of grace, necessarily belongs to all these three societies (namely, the family, Church and state) in due proportion, corresponding, according to the disposition of Divine Providence, to the coordination of their respective ends." —Pope Pius XI, "Divini Illius Magistri" ("Rappresentanti in Terra"), AAS XXI (1929), 727: *Social Wellsprings,* II, 92. "It also belongs to the state to protect the rights of the child itself when the parents are found wanting . . . whether by default, incapacity, or misconduct . . . In such cases, exceptional no doubt, the state does not put itself in the place of the family, but merely supplies deficiencies, and provides suitable means, always in conformity with the natural rights of the child and the supernatural rights of the Church."—Pope Pius XI, *Ibid,* XXI, 738; *Social Wellsprings,* II, 101.

available. It can bring them within reach of the individual only through general acts which aim to produce a common effect. The individual must take advantage of the common opportunities and make them fruitful for his particular needs. Monsignor Cronin points out that it is the further obligation of the state "to provide and maintain such an environment, physical and moral, as is required for the welfare of individuals, physical and moral, for though individuals may benefit by such an environment, it really is, properly speaking, a 'good' of the whole community, and the providing of it is wholly outside the capacity of individuals."[19]

The common good, then, may be said to be *"all those helps and facilities which are reasonably necessary for the temporal happiness of the individual but which are unattainable without the assistance of the State."*[20] Suarez speaks of it as having as its end or purpose,

> the natural happiness of the perfect human society, for whose cares it provides, and also (the natural happiness) of every single man as the members of such a community so that they might live in that happiness, that is, in peace and in justice, and also with a sufficiency of those material goods which look to the conservation and convenience of their corporal life, and also with .that blamelessness of morals which is necessary for this external

19. Cronin, *Science of Ethics,* II, 473.

20. E. Cahill, S. J., *The Framework of a Christian State, An Introduction to Social Science* (Dublin: M. H. Gill & Son, Ltd., 1932), p. 463. Father Delos seems to summarize the doctrine of the Papal Encyclicals when he writes that, for the purposes of sociology, the common good may be defined as "the complexus of those goods in the material or moral order which society puts at the disposition of its members in order that they may achieve their personal destinies."—"Le bien commun international et les enseignements du Saint Siège," *Compte Rendu de la Semaine Sociale de France* (Lille, 1932,) p. 191, cited by John J. Wright, *National Patriotism in Papal Teaching* (Westminster, Md: The Newman Book Shop, 1943), p. 206.

peace and happiness of the state besides the proper conservation of human nature.[21]

It sometimes happens that special benefits or advantages^, accrue to individuals as a result of the state's effort to bring about the common good. Such services rendered by the state do not intentionally aim at these particular advantages but rather at the convenience of the whole body. For example, good roads and bridges are necessary for travellers, for commercial vehicles and for people of the immediate locality. The making of them could not be left to private individuals for no one would derive sufficient advantage from them to construct them at his own expense. Or, if he did undertake the work, his personal needs would naturally be the prime determinant of his action and the public would be badly served.[22] The state then must perform such works or at least have them provided for by some other organization.

We said above that it can be no part of the natural end of the state to foster the private interest of any individual or family.[23] How strictly is this to be interpreted? The fundamental purpose of the state is to help individuals and families in the pursuit of temporal happiness. The extent of her functions, therefore, is to be determined by the necessities of man and the inability of the individual or the family to provide these necessities. Thus the proper function of the state is supplementary, not primary. The individual is primarily responsible

21. ". . . ejus finem esse felicitatem naturalem communitatis humanae perfectae, cujus curam gerit, et singulorum hominum ut sunt membra talis communitatis, ut in ea, scilicet in pace et justitia vivant, et cum sufficientia bonorum quae ad vitae corporalis conservationem et commoditatem spectant, et cum ea probitate morum quae ad hanc externam pacem et felicitatem reipublicae, et convenientem humanae naturae conservationem necessaria est." Cf. Suarez, *De Legibus,* lib. III, c. 11. n. 7, *(Opera Omnia,* V, p. 213, ed. Berton, Parisiis, 1856).

22. The situation today is vastly different from the Middle Ages when the feudal system was in vogue. A feudal lord could adequately provide for his own needs and those of his vassals for they formed a community.

23. Cf. Supra p. 14.

for his own well-being. The state's legitimate sphere of activity may be said to include all those helps and facilities, reasonably necessary, whether for the individual or for society at large, which the individual or the family is not in a position to supply. Of necessity this has to be more carefully restricted in its interpretation because the rights of the state in regard to individual interests must be confined within the narrowest possible limits. Any violation of the balance between what belongs to private interest and to public concern is detrimental to the individual and introduces strain into the working of society. It is necessary, in the present order of things, for men to have the power and the will to strive against difficulties to a certain extent without the intervention of any pampering action on the part of the state. This is not sufficiently realized by those who clamor, especially in our own day, for state intervention to smooth out every social inequality.

The attainment of the common good is not the work of one, or of a group, but demands the united and cooperative effort of all the members of the community. It is a common good to be procured not by one, but by all; and likewise it is a good to be enjoyed by all.

> It is the good human life of the multitude, of a multitude of persons, the good life of totalities at once carnal and spiritual, and principally spiritual, although they more often happen to live by the flesh than by the spirit. The common good of society is their communion in the good life; it is therefore common *to the whole and to the parts,* to the parts, which are in themselves wholes, since the very notion of *person* means totality; it is common to the whole and to the parts, over which it flows back and which must all benefit from it.[24]

All the members of society are ordained to the common good as an end inasmuch as they ought to act for the common good

24. Maritain, *The Rights of Man and the Natural Law,* pp. 8-9. Thus he considers it an essential characteristic of the common good that there be a *redistribution*—the good must be redistributed among the persons, and it must aid their development.

by operating in accordance with the law.[25] In the common good realized each individual citizen deserves to participate.

Function of Authority

If the common good is to be achieved, a particular mode of action must be pursued by those for whom it is the goal. The whole community, then, is constrained by moral necessity to the performance of actions conducive to the common good—for that is its goal. "To ordain something to the common good," says St. Thomas, "is the right of the entire community, or of one who acts as vicegerent of the community."[26]

The exercise of authority is the prerogative of no individual member unless he be designated by the community for this particular office in the manner provided for by the constitution of the particular state. The demand for a government is set up by the need for an agency to look after the common good of all the members.

> For where there are many men together and each one is looking after his own interest, the group would be broken up and scattered unless there were also some one to take care of what appertains to the common weal.[27]

In other words, that element in the community which divides the individuals must be corrected by the central power which looks only to the common good. Thus St. Thomas could say

25. Cf. Philip Hyland, "The Field of Social Justice," *The Thomist,* I (1939), p. 320.

26. "Ordinare aliquid in bonum commune est vel totius multitudinis, vel alicuius gerentis vicem totius multitudinis."—*Summa Theologica* I, II,q. 90, a. 3. In a case where the authority would be exercised directly by the people the community, of necessity, would have to be very small and leading a comparatively simple life.

27. "Multis enim existentibus hominibus, et unoquoque id quod est sibi congruum providente, multitudo in diversa dispergeretur nisi esset aliquis de eo quod ad bonum multitudinis pertinet, curam habens."—Thomas Aquinas, *De Regimine Principium,* I, 1. The translation given in the text is that of Gerald B. Phelan, in *Saint Thomas Aquinas—On the Governance of Rulers* (London and New York: Sheed and Ward, 1938), p. 35.

that the common good was really the good of the ruler, *bonum principis,* and not only the good of the whole, *bonum totius.*[28]

> The common good is the foundation of authority; for indeed leading a community of human persons towards their common good, towards the good of the whole as such, requires that certain individuals be charged with this guidance, and that the directions which they determine, the decisions which they make to this end, be followed or obeyed by the other members of the community.[29]*

Thus the common good of its very nature requires that the right of authoritative direction be consigned to public officials who are charged with the duty of having immediate care of the community.

Especially in countries like our own where the functions of government are so expansive and so complex, it is quite natural that there be a vast number of persons in government service. Now the question arises: are all of them to be considered as public officials? Obviously not! A large percentage of the persons concerned are either government appointees serving ends that are essentially private or employees sustaining the mechanism of our vast governmental structure far removed from duties which concern the public.

Public Officials

There is much confusion over the question of who are public officials and who are not. Little is said in works of moral theology but Vermeersch, mentioning the fact that a moral person is of necessity constrained to do everything through legitimately deputized (physical) persons, defines a public

28. Cf. Hans Meyer, *The Philosophy of Saint Thomas Aquinas,* translated by Rev. Frederic Eckoff (St. Louis: Herder, 1945), 430. In other words, the common good looked at as the object of his acts is the good of the ruler as well as of the whole.

29. Maritain, *op. cit.,* pp. 9-10. Maritain gives three characteristics of the common good, namely, redistribution of the common good, authority in society, and the intrinsic morality of the common good.

office as *"any combination of the rights and duties that are entrusted to a physical person for the carrying out of some part of the public function;* and briefly may be defined: *public management or administration."*[30] It is difficult to determine the confines of this definition because the meaning of "some part of the public function" *(ad partem aliquam actionis publicae)* is not very clear, although the fact that the office confers "rights and duties" would seem to indicate that the public official is endowed with a portion of the governmental authority.

In the broadest sense of the term, public officials are those who represent public bodies and carry out or fulfill their interests or purposes in any way. Blackstone defines an office as "a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging . . . whether public, as those of magistrates; or private, as those of bailiffs, receivers, and the like."[31] Of course this does not limit itself to public office and helped to give occasion to such complaints as "much of the difficulty arises from the fact that the terminology and the precedents relied upon in interpretation developed before public administration had acquired its present scope and perplexity."[32]

This vast growth in administrative functions has necessitated a threefold division of persons: "first, the changeable group who, whether choosen by election or appointment, are the means by which electoral forces control major governmental policies; second, the larger and more stable group of those who work under conditions standardized by laws and regulations; and, third, a heterogeneous fringe, ranging from experts to day laborers, who are engaged on formal or informal contracts similar to those in private employment."[33] The

30. *"Munus* igitur *publicum* dicit *summam quondam iurium et officiorum personae physicae commissam ad partem aliquam actionis publicae exercendum;* et breviter definiri potest: *publica procuratio seu administratio."*— Vermeersch, *Theologiae Moralis Principia— Responsa— Consilia,* II, 479.

31. Blackstone, *Commentaries on the Laws of England,* II, 36.

32. Arthur W. Macmahon, "Public Office," *Encyc. Soc. Sci.,* XII, 665.

33. Macmahon, *Ibid.*

legal concept of public office would seem to include the first and second groups and the third would come under the classification of employment. An employee is one occupying a permanent position and performing a continuing service— but the duties and services are purely ministerial. The employee is not clothed with discretion and has no power to represent or bind his employer.[34]

In American jurisprudence it has been said that "public offices are created for the purpose of effecting the ends for which government has been instituted, which are the common good, and not the profit, honor, or private interest of any man, family, or class of men. In our form of government it is fundamental that public offices are a public trust, and that the person to be appointed should be selected solely with a view to the public welfare."[35]

In our federal Constitution the manner of selection is the criterion by which a federal office is distinguished from employment. The Constitution of the United States provides four ways of choosing "officers"—by the president with or without confirmation of the Senate, by heads of various departments and by the courts.[36] The Corrupt Practices Act, Section ten, states that the term "public office" shall apply to any national, state, county, or city office to which a salary attaches.[37] Here the broad application of the term is due to the very purpose of the law.

Only the Constitution of the State of Illinois carries its own definition of office. "An office is a public position created by the Constitution or law, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed. An employment is an agency, for a temporary purpose, which ceases when the purpose is accomplished."[38]

34. *Fletcher* v. *City of Lowell,* 15 Gray (Mass.) 103.

35. C. J. Field, in *Brown* v. *Russell,* 166 Mass. 14, 43 N. E. 1005, 32 L. R. A. 253, 55 Am. St. Rep. 357.

36. *The United States Constitution,* Art. 2, Sec. 2, Cl. 2.

37. *Laws,* 1913, p. 612.

38. *The Constitution of the State of Illinois,* Art. V, Sec. 24.

Other states limit the manner of the choice of officers,[39] the tenure of office,[40] or the amount of compensation that may be received.[41]

Outside the United States, in England for example, there does not seem to be quite as much confusion. British statutes have implied a distinction between officer and servant. In a court decision "a public officer" was described as "an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public"[42][43] and it was added that "every officer who is not a judicial is a ministerial officer."[44] Australia probably gives the broadest application to the term "officer" for according to the Commonwealth Public Service Act[41] it is extended explicitly to "any person employed in any capacity in the public service" except those temporarily engaged.

In as much as we wish to include all those in public service that are unjustly taking advantage of their position for personal gain, our concept of public official will necessarily be broader than some of those found in legal sources. Then too, the basis of our definition will be different—our criterion will not be the manner of appointment, the possession of a share in the exercise of sovereign power,[45] or some provision of law providing for a definite position. Our concept of office depends a great deal upon the character of the duties to be performed. Consequently, we shall consider as a public official any person engaged in the public service in an administrative, judicial or ministerial capacity.

39. Cf. *Deade County* v. *State,* 116 So. 72, Florida (1928).

40. Illustrated in *State* v. *McLaurin,* 131 So. 89, Mississippi (1930).

41. For example in Kentucky there is a constitutional prohibition against the creation of offices with a salary of more than five thousand dollars.

42. *Rex* v. *Whitaker,* 3 K. B. 1283 (1914).

43. *Ibid.* This is a principle of American Law too. Cf. *Corpus Juris,* XLVI, 927.

44. No. 21 of 1922; cited by Macmahon, *Encyc. Soc. Sci.,* vol. XII, p. 667.

45. A standard urged by Floyd R. Mechem in his *Treatise on the Law of Public Offices and Officers* (Chicago: Callaghan and Co., 1890), Chap. I, Sec. 4, p. 5.

CHAPTER III

NOTION OF JUSTICE AND ITS DIVISIONS

Treating a question of a social nature and intending to discuss its morality, we must turn to a consideration of that social virtue regulating our relations with the rest of society, namely, justice. The virtue of charity also takes into account our relations with others but under a different aspect. Charity imposes obligations on us towards our fellow men which are based on the fact that we are one with them in human nature, in nationality, or in some other common possession.[1]

Supernatural charity is in itself more excellent than justice, since it is a theological virtue. As such it embraces primarily the love of God and secondarily the love of ourselves and of our neighbor for God's sake. Charity is also more universal inasmuch as it imposes many more acts than justice does. However, when the duties of charity and justice conflict, justice *per se* takes precedence since its duties are stricter.

If I do a work of charity, I give to my neighbor what is *mine;* on the other hand, if I perform a work of justice, I give to my neighbor what is *his.* Charity rests entirely on a relationship between the lover and the one loved. Hence, he who rightly loves his neighbor, loves him as another self. Justice, however, on the contrary, depends on the distinction of one man

1. Cronin, *The Science of Ethics,* II, 80. Of course, for the Catholic the fundamental motive of charity is supernatural. "You will love one another," Christ said, "as I have loved you." (St. Matthew, XXII, 39) We love, then, "not as men love each other simply because they are fellows of the same human race; but as they love, who know and profess that all men are kin to God, sons of the most high in whom must be formed and perfected a brother's likeness to the only begotten son." (St. Augustine, *In Joannis Evangelium,* tract 65, c. 13 (Migne, *PL* XXXV. col. 1808-09) cited by Pope Pius XII in his radio address to the National Conference of Catholic Charities and the St. Vincent de Paul Society in convention at New Orleans, Oct. 12, 1947).

from another. Each man has his own independence and his own inviolable rights. Therefore man is able to violate charity in his own regard but not justice strictly so called.

The classic definition of justice is that given by Ulpian who defines it as *the perpetual and constant will to render to each his right.*[2] The definition "mentions first the *will,* in order to show that the act of justice must be voluntary; and mention is made afterwards of its *constancy* and *perpetuity* in order to indicate the firmness of the act."[3] Reducing the definition to its proper form, Saint Thomas says *"that justice is a habit whereby a man renders to each one his due by a constant and perpetual will"*[4]

The essential element of justice is the *debitum alteri*— that due to another. The foundation of the *debitum* is the existence of a right on the part of the one to whom something is due.

The moral faculty on which justice is based is called a right—*ius.*[5]* It has a twofold aspect, namely, active, as it is found in the possessor of the right, and passive in those that must respect that right. Actively considered a right is known as *ius subjectivum* and is commonly defined as the inviolable and legitimate moral power of possessing, doing or exacting some-

2. "Iustitia est constans et perpetua voluntas ius suum cuique tribuendi." *Corpus Iuris Civilis,* Vol. II., Digesta Iustinian Augusti (ed. Theodorus Mommsen), lib. I, tit. 1, η. 10.

3. *Summa Theologica,* II, II, q. 58, a. 1; translation is that of the Fathers of the English Dominican Province, Vol. X, 114-115.

4. "Justitia est habitus secundum quem aliquis constanti et perpetua voluntate jus suum unicuique tribuit." *Ibid.* Saint Ambrose defined it—"Justitia est quae suum cuique tribuit, alienum non vindicat, utilitatem propriam neglegit, ut communem aequitatem custodiat." Cf. Ambrose, *De officiis ministrorum,* L.I. c. 24, n. 115 *(PL.* XVI, 57). According to Saint Augustine "Justitia porro ea virtus est quae sua cuique distribuit." Cf. *De Civitate Dei,* L. XIX, c. 21, n. 1 *(CSEL,* XL2, p. 408 f., Hoffmann).

5. It is sometimes refered to as ius *dominativum. Cf.* Irenaeus G. Moral, S. J., *Philosophia Moralis* (Santander: Editorialis Sal Terrae, 1945), n. 529, c.

thing.[6] It is said to be a *power* to indicate that *ius* is not a mere fact but the real moral capacity of doing something; *moral* inasmuch as it conforms to the rules of morals and remains even though here and now it may be physically impeded; *legitimate* inasmuch as it is something which is conceded by the natural or positive law and which the law itself protects; *inviolable* in that it cannot be violated licitly and with impunity, which expresses the inevitable effectiveness of this power. To put it in other words the *ius subjectivum* is "the moral faculty or power of pursuing one's own end by appropriate means with no one reasonably objecting."[7]

In a passive sense *ius* (known as *ius objectivum)* may be defined as the obligation imposed on everyone of respecting the rights of others and abstaining from any action which would impede their legitimate use. The active power as had in the possessor of a right would be useless if, at the same time, there was not the corresponding obligation imposed on others to respect that right. Therefore, active and passive right ought to be considered *per modum unius,* inasmuch as they are essentially correlative, since one necessarily supposes the other. In the words of Father Meyer, S.J.: "Clearly, no inviolable, moral power with which man is endowed by the force of the right moral order, either exists or can be conceived, to which there does not correspond by reason of the same order a moral obligation imposed on other men of either omitting or pre-

6. *"Moralis et legitima potestas inviolabilis aliquid habendi vel agendi vel exigendi."* Cf. Seraphinus A. Loiano, O.M. Cap., *Institutiones Theologiae Moralis* (5 vols., Taurini: Marietti, 1937)—III, p. 11. Vermeersch defines it somewhat differently. *"Ius formale seu subiectivum, est inviolabilis autonomia personae, seu entis sibi exsistentis, in persequendo fine proprio propter quem existit, et inviolabilis relatio praevalentiae seu quasi dominii in res quae ad finem seu bonum istius personae destinatae sunt." Ci.* Vermeersch, *Theologiae Moralis, Principia—Responsa—Consilia,* II, n. 315, n. 2.

7. "Ius subiectivum . . . est *facultas seu potentia moralis prosequendi proprium finem per media ad hunc ordinata nemine rationabiliter refragante." Ci.* Loiano, *Ibid.*

serving all those things which are necessary so that the former will not be frustrated in his power."[8]

In justice, as in the other virtues, especially the cardinal virtues, a distinction is made between the integral, subjective and potential parts. Of the three parts of the virtue of justice our principal concern will be with the subjective parts. Justice, strictly speaking, is divided into two species: *legal* or general and *particular;* and the latter is subdivided into two others: *distributive* and *commutative.* The three constitute the species or subjective parts of justice.

Legal Justice

Of the three species of justice that we are to consider, legal justice creates more difficulty than either of the others. Aristotle seems to have introduced the term and also posited the cause for much of the confusion regarding the exact meaning of it.[9] "This form of justice, then, is complete virtue, but not absolutely, but in relation to our neighbor . . . And it is complete virtue in its fullest sense, because it is the actual exercise of complete virtue."[10] This justice is not specifically referred to as legal justice but Aristotle states that "all lawful acts are in a sense just acts"[11] and later, speaking of political justice, he says, "part is natural, part legal . . . legal, that which is originally indifferent, but when it has been laid down is not indifferent"[12]—which would seem to identify it with the ob-

8. "Nulla videlicet potestas moralis inviolabilis, qua homo vi recti ordinis moralis praeditus sit, vel esse vel concipi potest, cui non respondeat vi eiusdem ordinis imposita aliis hominibus obligatio moralis, ea omnia aut omittendi aut praestandi, quae necessaria sunt, ne ille sua potestate frustretur." Theodorus Meyer, S. J., *Institutiones Juris Naturalis* (2 vols., Friburgi Brisgoviae: Herder, 1885), I, n. 458.

9. *Nicomachean Ethics,* V. 1. Lessius maintains that Aristotle was the first to use the term. Cf. *Tractatus de Justitia,* Sec. 1, *De Justitia el Jure,* c. I, dub. III, n. 10 (*TCC* XV, p. 450).

10. Aristotle, *Ibid,* V, 1: 1129b—translation of W. D. Ross in *The Basic Works of Aristotle,* p. 1003.

11. *Ibid.,* 1129b; p. 1003.

12. *Ibid.,* V, 6: 1134b; p. 1014.

servance of positive law. Apparently Aristotle merely introduced the subject of justice in the sense of "virtue entire" in order to explain the meaning of the expression "just man" for he states his main concern "is that justice which is a *part* of virtue."[13]

It was left for Saint Thomas to elaborate on and to clarify in some measure Aristotle's meager treatment of legal justice. He distinguished between general and particular justice and further reduced particular justice into two species, namely, distributive and commutative justice. Describing general or legal justice, he wrote:

> It follows therefore that the good of any virtue, whether such virtue direct man in relation to himself, or in relation to certain other individual persons, is referable to the common good, to which justice directs: so that all acts of virtue can pertain to justice, insofar as it directs man to the common good. It is in this sense that justice is called a general Virtue. And since it belongs to the law to direct to the common good ... it follows that the justice which is in this way styled general, is called *legal justice,* because thereby man is in harmony with the law which directs the acts of all the virtues to the common good.[14]

It should be noted, however, that inasmuch as legal justice is founded upon the natural law, its scope is not confined within the limits of positive law and extends to matters which positive law may not have defined. It is prior to civil law and in order to be valid civil law must be in conformity with legal justice, that is, it must be ordained to the common good.

Legal justice was something specific for Saint Thomas, having more than the generic quality of all justice—that it be *towards another.* "But, because where there is a special consideration of the object in a general matter, there must necessarily be a special habit, from this it follows, that *legal justice* itself *is a determined virtue* having its species from this

13. *Ibid.,* V, 1: 1130a: p. 1004.

14. *Sumina Theologica,* II, II, q. 58, a. 5.

that *it tends to the common good."*[15] Consequently, "legal justice is a special virtue in respect of its essence, insofar as it regards the common good as its proper object."[16] By making the common good the proper object of legal justice, Saint Thomas made legal justice a specifically distinct virtue, for virtues are specified by their objects, and the common good is an object specifically distinct from the object of every other virtue. Some theologians[17] maintained that if legal justice could be considered as a particular virtue it would seem to fit the virtue of obedience. However, legal justice differs from the duty of obedience. The ultimate motive of obedience to the law is the conviction that those in lawful authority have the right to command their subjects. On the other hand, the motive underlying the duties of legal justice is the realization that the part must function for the good of the whole. From this it follows that every member of the civil community is bound to promote the welfare of the body of which he is a part.

There has been much discussion about the possibility of there being a proper act of legal justice. The majority of authors[18] deny the possibility, basing themselves on what they believed Saint Thomas taught. The texts usually referred to are statements such as: " . . .all acts of virtue can pertain

15. "Verum, quia ubi est specialis ratio objecti etiam in materia generali, oportet esse specialem habitum, inde est, quod ipsa *justitia legalis est determinata virtus* habens speciem ex hoc quod *intendit ad bonum commune."* Saint Thomas, *In Decem Libros Ethicorum Aristotelis ad Nicomachum Expositio* (Taurini: Marietti, 1934), Lib. V, Lect. 2, n. 912.

16. *Summa Theologica,* II, II, q. 58, a. 6.

17. Leonardus Lessius, S.J., *op. cit.,* c. I, dub. III, n. 19 *(TCC,* XV, coi. 453).

18. Cf., e.g., Leo W. Shields, *The History and Meaning of the Term Social Justice* (South Bend, Ind.: Notre Dame University Press, 1941), p. 16; Vermeersch, *op. cit.,* II, n. 320; Cornelius Damen, C.SS.R., "De recto usu bonorum superfluorum," in *Miscellanea Vermeersch* (2 vols., Roma: Pontificia Université Gregoriana, 1935), I, 72; Hyacinthus M. Hering,"De genuina notione Justitiae Generalis seu Legalis juxta S. Thomam," *Angelicum,* Vol. XIV (1937), p. 486; Loiano, *op. cit.,* III, n. 5; A. Pettier, *De Jure et Justitia* (Leodii: R. Ancion, 1900), p. 131.

to justice, insofar as it directs man to the common good"[19] and "there is no virtue concerning whose acts the law cannot prescribe."[20] From these texts they draw the conclusion that Saint Thomas considered legal justice a "determined virtue having a species,"[21] which, however, has not and cannot have a proper and immediate act of its own which it elicits. Its function, they claim, is to direct the acts of the other virtues to the common good. Recently, Father William Ferree advanced the opinion that there is an act proper to legal justice, namely, the act of social organization.[22]

The foundation of legal justice lies in the fact that the state is a creation of nature like the family, and needs the cooperation of its members in order to perform its essential function, namely, to procure the common good. The citizens of the state, then, are bound by the natural law to give that cooperation: and the state has the duty and the right to exact it. This obligation binds all the members of the state, both rulers and subjects, to cooperate toward the common good.

The distinction between the person bound by legal justice and the one toward whom the duties are directed is not a perfect one; for the citizens who are bound by the duties, themselves make up the civil community towards which they are duty bound. The goods and powers accruing to the state as a result of the cooperation of its members are not meant for the exclusive use of the government, but are for the common good.

Concerning the subject of legal justice, Saint Thomas states that "it is in the sovereign principally and by way of a mastercraft, while it is secondarily and administratively in his sub-

19. *Summa Theologica,* II, II, q. 58, a. 5.

20. *Ibid.,* I, II, q. 96, a. 3.

21. " . . . determinata virtus habens speciem."—*In Decem Libros Ethicorum Aristotelis ad Nicomachum Expositio,* V, 2, n. 912.

22. *The Act of Social Justice* (Washington: Catholic University of America Press, 1942), Chapter II.

jects."[23] He likens the common good, which is the end and object of the state, to a building. The whole community as a moral unit has the right and the duty to erect and maintain it. Upon the individual members falls the obligation to provide the manpower and the funds required for the work. Inasmuch as the community as such cannot carry out the function of an architect—planning the details, supervising the construction and giving out the assignments for each of the workmen—it commits these duties to physical persons—the public officials or rulers—who exercise them in the name of the state. To the other members of the community is given the task of carrying out the work as directed by the public officials. Thus the duties of legal justice belong to the rulers of the state as well as to the subjects. These duties are founded upon the rights of a naturally constituted whole to the due cooperation of its several parts.[24] The type and degree of cooperation which each part is bound to give will vary in accordance with the natural capacity of that part, and the role it has to fill in the civil organism.

> Although all citizens, without exception, can and ought to contribute to that common good in which individuals share so profitably to themselves, yet it is not to be supposed that all can contribute in the same way and to the same extent.[25*]

Consequently, each unit is bound to do its share in accordance with its capacity and in proportion to the needs of the state.

Distributive Justice

Particular justice is commonly divided into distributive and commutative justice. Distributive justice has reference

23. "Est in principe principaliter et quasi architectonice; in subditis autem secundario et quasi administrative."—*Summa Theologica* II, II, q. 58, a. 6.

24. Cf. *Ibid.,* a. 5: "Manifestum est autem quod omnes qui sub communitate aliqua continentur, comparantur ad communitatem sicut partes ad totum; pars autem id quod est, totius est; unde et quodlibet bonum partis est ordinabile in bonum totius."

25. Leo XIII, "Rerum novarum," ASS., XXIII (1891), 657; *Social Wellsprings,* I, 186.

to the indirect right[26] which the individual citizen has, in virtue of his citizenship, to his due participation in the goods and advantages controlled by the state. These goods and advantages are the means which the state has—due to the cooperation of its members—of securing peace and prosperity for the citizens.[27] It is the function of distributive justice to provide for their equitable distribution. Thus, distributive justice may be defined as: *The law of nature by which the State is bound to secure for each of the citizens his due and proportionate share of the advantages and helps which are the end and purpose of civil society; and to allot the public burdens*[28] *in due and equitable proportion.*[29]

The duties, then, of distributive justice are those of the state towards its members. And since the state acts through its rulers, the actual exercise of this type of justice in practice belongs to the rulers. The ruler is the dispenser of distribu-

26. It is indirect in the sense that it is due him not as an individual but as a part of society.

27. Years ago the idea of the common good was embodied in the possession of peace but more recently the emphasis has been placed on material goods. Cf. W. Merk, *La pensée du bien commun dans le développement de l'État et du droit allemand,* Festshrift A. Schultze (Weimar, 1934), pp. 451-520; V. Heylen, *De Justitia et Jure,* II, 735 note. This trend is principally due to the more active part played by the state in the every day-lives of the members of society. Cf. Ignatius Moral, *Philosophia Moralis,* η. 541, par. 2.

28. The public burdens are considered by some to belong to legal justice inasmuch as they exact a debt of society. Cf. Ludovicus Wouters, C. SS. R., *Manuale Theologiae Moralis* (2 vols., Brugis: Carolus Beyaert, 1932), I, 283 note. However, the majority consider the public burdens as indirectly flowing from distributive justice: "quatenus princeps imponendo onus uni, alterum ab onere liberat; quod habet rationem boni." Cf. *Ibid.,* I, 283-284 note; J. Aertnys, C. SS. R.—C. A. Damen, C. SS. R-, *Theologia Moralis* (2 vols., 14 ed., Torino: Marietti, 1944.) I, 239.

29. Cahill, *The Framework of a Christian State,* 514. Vermeersch defines it as the *"aequa proportione, quae pro natura rerum et ipsius Societatis variat, quantum id sinat bonum commune, bona directe, et indirecte onera communia inter cives partitur."* Cf. *Theologiae Moralis,* II, n. 322.

tive justice, for the distribution of the common good pertains to the one possessing public authority.[30] Saint Thomas writes:

> The act of distributing the goods of the community, belongs to none but those who exercise authority over those goods; and yet distributive justice is also in the subjects to whom those goods are distributed insofar as they are contented by a just distribution.[31]

The rulers are bound to secure for each member of the community a fair and proportionate share of the advantages that are included in the common good. The advantages are directed to individual men, not because they are individuals, but inasmuch as they are a part of their particular society.

> In distributive justice something is given to a private individual insofar as what belongs to the whole is due to the parts, and in a quantity that is proportionate to the importance of the position of that part in respect of the whole. Consequently in distributive justice a person receives all the more of the common goods, according as he holds a more prominent position in the community . . . Hence in distributive justice the mean is observed, not according to equality between thing and thing, but according to proportion between things and persons: in such a way that even as one person surpasses another, so that which is given to one person surpasses that which is allotted to another.[32]

30. "Justitiam distributivam proprie et formaliter semper residere in superiore; nam distribuere bona communia inter membra communitatis est actus potestatis publicae et superioris: quod si aliquando ea distributio exerceatur per aliquem privatum, jam ille operatur ex commissione et facultate sibi facta a superiore, et in illo actu représentât superiorem." Joannes De Lugo, S. J., *Disputationes Scholasticae et Morales* (8 vols., Paris: Vives, 1869), *Tractatus De Justitia,* V, disp. I, see. 3, n. 55.

31. *Summa Theologica,* II, II, q. 61, a. 1, ad 3.

32. *Ibid.,* a. 2. To quote from De Lugo: "hinc est justitiam distributivam proprie reperiri in superiore . . . qui sub se habet subditos quibus pro ineritis distribuit, ergo justitia distributiva per se exigit plures qui inter se comparentur: nam distributor, ut bene se gerat, debet attendere ad merita singulorum, et dare dignioribus; ergo illa comparatio plurium inter se spectat ad honestatem iustitiae distributivae."—*Op. cit.,* disp. I, see. 3, n. 43.

This fact caused Aristotle to refer to the relation as one of geometrical proportion.[33]

Basing himself principally on John of Saint Thomas, Father Faidherbe, O.P. maintains that the right *(droit)* of distributive justice is a legal right.[34] The right, that which is due to some one, and the right, the moral faculty of exacting something, are correlatives. Thus he says that "the debt and the right of distributive justice are a legal debt and right."[35] The foundation of this right of distributive justice is the law of the common good distributed.[36] "Distributive justice has a right and a due based not on something received or given by another, but on the natural theory of the common good itself."[37]

In distributive justice the *terminus a quo,* the one on whom the debt, that is, the obligation, is incumbent, is the community or the person in authority who represents it. The law of the common good is imposed on the person in authority who makes the distribution.[38] This law requires of him the proportionate

33. *Nich. Ethics,* V, 3 and 4; 1131b; *Basic Wks. Arist.* p. 1007.

34. A.—J. Faidherbe, O.P., "Le Droit de la Justice Distributive," *Revue des Sciences Philosophiques et Théologiques,* vol. XXII (1933), pp. 47-70. Saint Thomas refers to a "legal due" in *Summa Theologica,* II, II, q. 80: "A falling short of the just due may be considered in respect of a twofold due, moral or legal: wherefore the Philosopher *(Ethic.* VIII, 13) assigns a corresponding twofold just. The legal due is that which one is bound to render by reason of a legal obligation; and this due is chiefly the concern of justice, which is the principal virtue."

35. "Le du et le droit de la justice distributive sont un du et un droit légal."—Faidherbe, *loc. cil.,* p. 53.

36. Cf. Joannes a Sancto Thoma, O.P., *Cursus Theologici* (3 vols., Parisiis: Desclee et Sociorum, 1937), III, q. 21, disp. 26, art. 4, n. 2, p. 308. N.B. Disp. 26 was at one time designated as No. 6.

37. "Habet justitia distributiva jus et debitum fundatum non in aliquo accepto vel dato ab alio, sed in ipsa naturali ratione boni communis."—*Ibid.,* n. lObis, p. 312.

38. Faidherbe, throughout the article, considere the official as incarnating the community; if it be a question of an inferior official the obligation does not reside in him but in the community to which he must necessarily trace back.—*RSPhTh,* p. 57.

distribution among the members of the rewards, burdens and duties which constitute the common good administered by society.

The *terminus ad quem,* the one in whom resides the right, the moral faculty of exacting something, is the member of the community. On the question of the foundation of the active right in the *terminus ad quem,* John of Saint Thomas is not as precise as Faidherbe would like.[39] In distributive justice "the total burden arises from the need of the common good itself."[40] (But this same need includes the obligation of giving to each person by reason of his position in the society. Since distributive justice is "toward another," it is necessary that the obligation imposed on the *terminus a quo* (i.e. the community or the person in authority who represents it) have as a correlative a right in the *terminus ad- quem* (the member of the community). In commutative justice the right bases itself on the dignity of the person, the subject of this active right, in disfributive justice it is based on the need of the common good. It is a strict right also, but different from that which resides in the *terminus ad quem* of commutative justice. This latter is a real right *(ius in re)* or a *dominium.* In the case of distributive justice the member of the community is the subject of a personal right *(ius ad rem).*[41]

> . . . Distributive justice per se and ab intrinseco looks only to this, that something is given to someone on account of a debt arising from worthiness and proportion, not by reason of a right of ownership, or a *jus in re* which he may have, but because of a *jus ad rem.*[42]

39. "Ce point embarrasse Jean de Saint-Thomas et il préférerait le passer sous silence."—*Ibid.*

40. "... distributive, in qua totum onus nascitur ex ipsa exigentia boni communis."—John of Saint Thomas, *op. cil.,* η. 27, p. 321.

41. Faidherbe, *loc. cil.,* p. 58. It should be noted that commutative justice can also involve a *ius ad rem.*

42. "... Justitia distributiva per se, et ab intrinseco solum respicit, quod reddatur aliquid alicui propter debitum dignitatis, et proportionis suae, non propter jus proprietatis, seu jus in re quod habeat, sed propter jus ad rem."—John of Saint Thomas, *op. cil.,* η. 15, p. 315.

A personal right *(ius ad rem)* is that right whereby a person has a claim that something not yet possessed by him shall become his. This confers a right to personal action which directly touches the person who holds the thing, the object of the right, and mediately the thing itself. The subject of the right may not seize the thing, but he ought from the very first, if it is possible, take legal action against the person who withholds it and refuses to hand it over to him.[43]

Faidherbe also quotes Billuart in defense of his position.

> In distributive (justice) there is rendered to each that which is his and is due him not simply but relatively speaking, namely, by virtue of his co-fitness and share in the community of which he is a part; for things proper to the whole belong also in some manner to the parts: but, as is evident, this quality of being due (to the whole and to the parts) is varied; for in one respect is a thing due which is proper to a creditor and has already been placed in his ownership; but in so far as it is due to the whole community of which he is a part, having regard for his co-fitness, he has the right that it should become his own. Therefore.....[44]

In this text he sees a confirmation of his conclusions.[45] "We find the common good distributed as the basis of the obligation and of the right. With regard to their nature we believe we can conclude that it is a question of a legal due and a legal right. More than that, this right, which resides in the member of the community, is a personal right. The text ends in these words "habet jus ut fiat propria"; compare it to the definition

43. Cf. Prümmer, *Manuale Theologiae Moralis,* II, p. 5.

44. "In distributiva vero redditur cuique quod suum est et debitum non simpliciter, sed secundum quid, jure scilicet condignitatis et communitatis cujus est pars; quae enim sunt totius, quodammodo sunt partium: atqui haec ratio debiti est diversa, *ut patet;* alia enim ratione debetur res quae est propria creditoris et jam in ejus dominium immissa, alia quia est totius communitatis cujus est membrum, est ea ratione, attenta ejus condignitate, habet jus ut fiat propria. Ergo."—*F.* Carolus Renatus Billuart, O.P., *Summa Sancti Thomae* (Paris: Lecoffre, 1886), t. VI, disp. V, art. 3, p. 94.

45. Faidherbe, *loc. cit.,* p. 62.

of personal right in Billuart: "*Jus ad rem* is that right which one has that some thing may become his . . . It does not give an action with regard to the thing itself, but with regard to the person only."[46] Of course, the similarity in terminology is quite apparent and it would seem to increase the value of this text in this particular application inasmuch as it is Faidherbe's desire to show that distributive justice does bestow a *ius ad rem* on the *terminus ad quern,* that is, the individual member of the community.

However, Faidherbe readily admits that there are many places where Billuart adopts a viewpoint directly counter to his interpretation. He looks to the social milieu in which Billuart lived for a partial answer for the sudden change of opinion in his writing.[47][48] Billuart, though imbued with the Thomist tradition, in reality lived under Louis XIV and Louis XV (from 1685 to 1757), during the period of absolutism. As Faidherbe expresses it: "The subjects ought to bow their heads and had not the right to question. Who would dare to assert that the king had obligations of strict justice towards his subjects? Who would claim for them a personal action against the king, the head of the State, in case of an unjust distribution?"[46]

Commutative Justice

When the relation of justice is between man and man we speak of commutative justice. In the words of Saint Thomas: "There is the order of one part to another, to which corresponds the order of one private individual to another. This order is directed by commutative justice, which is concerned about the mutual dealings between two persons."[49] It may be

46. "Jus ad rem est, quod quis habet ut res aliqua fiat sua . . . Non dat actionem in rem ipsam, sed in personam tantum."—*op. cil.,* t. VI, disp. I, art. 1, p. 10.

47. Cf., e.g., Billuart, *op. cit., t. VI,* disp. VIII, art. 1, pp. 114-115; art. 12, p. 147.

48. Faidherbe, *loc. cit.,* p. 65.

49. *Summa Theologica,* II, II, q. 61, a. 1.

defined as the "habit by which man, with a constant and perpetual will, renders to each individual, according to complete equality,[50] that which is due to him by strict right."[51]

In defining commutative justice, Iorio states that "it looks only to private or *individual* persons be they physical or moral, as distinct from one another, and *metaphysically* independent."[52] He would distinguish between moral and metaphysical independence. Metaphysical independence implies the freedom from all subjection to others in those things which pertain to one's own proper and absolute[53] being *(ad esse).* The example given is that of a man metaphysically independent from any other man as to body, soul and all other things which constitute his being. Moral independence, on the other hand, is the exemption from any obligation to another in those things which pertain to the being relative to the individual *(ad esse individui relativum).* Such would be, for example, the independence of a man if he was not destined for the social status.

Saint Thomas says that the object of justice is *ius.*[54] Then it must be the object of each species of justice. It is here that

50. It is better to speak of commutative justice in this way as complete or absolute equality, rather than referring to it as maintaining an arithmetic proportion. In the present day an arithmetic proportion is referred to as an arithmetic progression. We might say, then, that distributive justice strives after proportional equality.

51. Justitia commutativa . . . quae definitur: *"habitus supernaturalis quo homo constanti ac perpetua voluntate reddit unicuique particulari, secundum aequalitatem omnimodam, quod ipsi exjure stricto debetur."*—G. J. Waffelaert, *Tractatus Theologici De Virtutibus Cardinalibus, Tractatus II, De Justitia* (2 vols., Brugis: Beyaert-Storie, 1885), I, 19.

52. "Spectat tantum privatos seu *individuas* personas sive physicas sive morales, ut a se invicem distinctas, et *metaphysice* independentes."—Iorio, *Theologia Moralis* (4 vols., 6 ed., Neapoli: M. D'Auria, 1938.), II, n. 580.

53. *Absolutum*—that which is not bound up with anything else, which is in some sense self-sufficing, independent. Cf. P. Coffey, *Ontology* (New York: Peter Smith, 1938), pp. 46-47.

54. . . . specialiter justitiae prae aliis virtutibus determinatur, secundum se objectum, quod vocatur *justum:* et hoc quidem est jus; unde manifestum est, quod jus est objectum justitae."—*Summa Theologica,* II, II,

we have right in the strict sense, defined by De Lugo as "a certain moral perference *(praelationem')* whereby this man is morally preferred to others in the use of this thing because of a peculiar connection which the thing has with him."[55][56] The question of the application of this definition to the relationship between a superior and his subjects presents a difficulty but De Lugo answers,

> that not every preference in relation to something is the *ius* with which commutative justice is concerned, but only that preference whereby this man ought to be preferred to others in the *use* of a certain thing; since by reason of the peculiar connection which the thing has with him, the entire thing ought to be referred and ordained to his *utility*. This ordination is very aptly signified when something is said to be *mine* or *thine*

A complete definition of it (that is, in its amended form) as the object of commutative justice, might be that offered by Crowe, namely, "a certain moral preference whereby this man is preferred to others regarding the use of a certain thing because of a peculiar connection which the thing has with him, so that the entire thing ought to be referred to and ordinated to his utility, to the exclusion of all others."[57] Hence we have in commutative justice what is referred to as a strict right.

The *terminus a quo* and the *terminus ad quern* of commutative justice are distinct persons. However, the person does not have to be a physical person but may be a moral person which

55. "- - - hoc jus quod respicitur a justitia commutativa . . . esse praelationem quamdam moralem, qua hic homo praefertur moraliter aliis in usu talis rei propter peculiarem connexionem quam res habet cum eo."—De Lugo, *De Justitia et Jure,* disp. I, sec. 1, n. 5.

56. " . . . Non quamcumque praelationem in ordine ad aliquam rem esse jus illud, quod respicit justitia commutativa, sed praelationem, qua in usu talis rei debet hic homo praeferri aliis; quia propter peculiarem connexionem quam haec habet cum ipso, tota debet ad ejus utilitatem referri et ordinari; quae ordinatio potissimum significatur quando aliquid dicitur *meum* vel *tuum."—Ibid.,* disp. I, sec. 1, η. 6.

57. Martin T. Crowe, C. SS. R., *The Moral Obligation of Paying Just Taxes* (Washington: Catholic University of America Press, 1944), p. 116.

may be defined as *"a juridical being, endowed with the capacity of acquiring a right, by reason of the honest end to ivhich it is ordained."*[58] Thus when the state enters a contract with an individual it is acting itself as an individual moral person. "Commutative justice governs the relations of parties to parties. It would be a mistake, however, to reduce its matter solely to relations of individuals among themselves . . . Party is not necessarily synonymous with individual; it would be inexact then to conceive commutative justice as intervening only between individuals."[59]

Restitution

Inasmuch as commutative justice is directive of one's actions in relation to the strict right of another person it may be prohibitive or preceptive: prohibitive in that it forbids the doing of anything injurious to the strict right of another; preceptive because it may command a positive act in deference to the strict right of another person. Saint Thomas calls this preceptive phase of commutative justice restitution.

> To restore is seemingly the same as to reinstate a person in the possession or dominion of his thing, so that in restitution we consider the equality of justice attending the payment of one thing for another, and this belongs to commutative justice. Hence restitution is an act of commutative justice, occasioned by one person having what belongs to another, either with his consent, for instance

58. *"Ens juridicum, capacitate juris acquirendi donatum, ratione finis honesti ad quem ordinatum est."*—Ad. Tanquerey, S.S., *Synopsis Theologiae Moralis et Pastoralis* (3 vols., 10 ed., Paris: Desclee et Socii, 1937.), III, p. 91.

59. "La justice commutative règle . . . les rapports de parties à parties. Il serait faux toutefois d'en réduire la matière aux seuls rapports des *individus* entre eux . . . Partie n'est pas nécessairement synonyme d' individu; il serait donc inexact de concevoir la justice commutative comme n'intervenant qu'entre les individus."—A. Michel, *La question sociale et les principes Théologiques—Justice Légale et Charité* (Paris: Gabriel Beauchesne, 1921), pp. 128-129.

on loan or deposit, or against his will, as in robbery or theft.[60]

Only commutative justice gives rise to an obligation of restitution because it alone demands a "recompence of thing to thing." Other virtues, for example, charity and even legal and distributive justice demand restitution only if at the same time commutative justice is violated, and then *per accidens.*

At one time it was held by some that a violation of distributive justice also demanded restitution. Saint Thomas might be said to imply this for he said that "compensation is made by the distributor to the man to whom less was given than his due, by comparison of thing with thing, when the latter receives so much the more according as he received less than his due: and

60. *Summa Theologica,* II, II, q. 62, a. 1. Carriere defines restitution as "actus quo res aliena injuste detenta domino redditur, vel damnum injuste illatum reparatur."—*Disputationes Theologicae de Justitia et Jure* (3 vols., Dublinii: M. H. Gill, 1877), III, ŋ. 453. Saint Alphonsus has it a little more briefly—"actus justitiae commutativae, quo reparatur damnum proximo illatum per injuriam."—*Homo Apostolicus,* Cap. III, 36. And a more accurate definition is that given by Waffelaert: "*actus justitiae commutativae, quo alteri ex aequalitate redditur, in se vel in aequivalenti, id quod ipsi sive formali injuria, sive materialiter saltem injuste, ablatum est.*"—*De Justitia et Jure,* II, ŋ. 223. See De Lugo, *De Justitia et Jure,* disp. VIII, secs. 1 and 2. Whether this precept of restitution is affirmative or negative is a question of some dispute: e. g. De Lugo says it is negative even though in form it is positive *{Ibid.,* disp. VIII, sec. 2, n. 18) and Lessius maintains that it is affirmative *{De Justitia el Jure,* Lib. II, c. 7, nn. 49-50). Saint Thomas states: "Although the precept about the making of restitution is affirmative in form, it implies a negative precept forbidding us to withhold another's property." —*Summa Theologica, II, II, q. 62,* a. 8, ad 1. It is Gury's opinion that, "the precept of restitution is immediately founded on the obligation of not violating the right of another, or on the obligation of not receiving or retaining a thing belonging to another. This obligation, however, is primarily *negative* and thus it urges *semper et pro semper* i.e. it urges every moment until restitution has been made. It is secondarily affirmative because it cannot be fulfilled without a positive act by which that which belongs to the owner is returned to him."—Ioannes Petrus Gury, S.I., (ed. A. Ballerini et D. Palmieri), *Compendium Theologiae Moralis,* (13 ed., 2 vols., Prati: Libraria Giachetti, 1898), I, n. 627.

consequently it pertains to commutative justice."[61] Cajetan,[62] Molina,[63] and Vasquez[64] contend that the inequality induced by the "respect of persons" *(acceptione personarum)* ought to be removed through restitution: the distributor is personally bound by the obligation of repairing the damage of which he was the cause.

The present day exponent of this viewpoint is Father A. J. Faidherbe, O.P. Commenting on the above text of Saint Thomas, he writes:

> From this text, restitution, even made in order to repair an injustice against distributive justice, is an act of commutative justice; and we have never denied it. To give compensation equal to the damage caused is the role of commutative justice and may not be dependent on distributive justice, for it (i.e., distributive justice) establishes the equality of proportion, and not arithmetic equality. One may not conclude from these lines, however, that the reparation for damage caused by an unjust distribution is obligatory in virtue of commutative justice. Distributive justice imposes the restitution and commutative justice executes it.[65]*

61. *Summa Theologica,* II, II, q. 62, a. 1, ad 3.

62. Thomas a Vio Caietanus, *Secunda Secundae Partis Summae Sacrosanctae Theologiae Sancti Thomae Aquinatis, Doctoris Angelice* (Lugduni: lacobus lunta, 1572), II, II, q. 62, art. 2. Priimmer denies that he can be cited as a proponent of this view. Cf. *Manuale Theologiae Moralis,* II, 182 - 183 note.

63. Ludovicus Molina, S.J., *Opera Omnia* (5 vols., Coloniae Allobrogum: Fratrum de Tournes, 1754), t. III, *De Justitia et Jure,* disp. 714, n. 1.

64. ". . . Sola violatae iustitiae distributivae ratio natura sua inducere potest obligationem restituendi."—Gabriel Vasquez, *Opuscula de Restitutione,* c. 1, n. 6, *(Opera Omnia,* VIII, Lugduni, 1631). Cf. *ibid.,* n. 8.

65. "D'après ce texte, la restitution, même faite en vue de réparer une injustice contre la distributive, est un acte de la justice commutative; et nous n'en avons jamais douté. Donner une compensation égale au dommage causé est du role de la commutative et ne peut relever de la distributive, car elle établit l'égalité de proportion, et non l'égalité arithmétique. On ne peut cependant conclure de ces lignes que la réparation du dommage fait par une distribution injuste soit obligatorie en vertu de la commutative. La distributive impose la restitution, et la commutative l'execute."—Faidherbe, *RSPhTh.,* XXII, pp. 68-69.

He calls upon Cajetan and Soto[66] to substantiate his position for both of them comment on the particular section of Saint Thomas and maintain that a violation of distributive justice can be the basis for an obligation of restitution. Cajetan states that the one who makes the distribution is held to restitution for two reasons: "in virtue of the violation of due proportion and the omission of due distribution."[67] Again, speaking of the two roots of restitution, he specifically mentions "unequal distribution:" " . . . the first (root) is *acceptio,* the second is the *res accepta.* And in the proposition the name of *acceptio* extends to every act by which the neighbor has less of his own than he ought to have: for the fire of passion, contumely, unequal distribution, and others of this kind, are included under *acceptio."*[68]

Dominic Soto is equally to the point:

> To the latter, however, Saint Thomas rightly answers that restitution of that, which failed to be handed over through distributive justice, looks to commutative justice. For although that was never possessed by him, to whom it was to be given, nevertheless it was due and therefore in some way withheld from him, and the immediate function of commutative justice is to repay the same.[69]*

66. Dominicus Soto, O.P., *De lustitia el lure* (Venetiis, 1586).

67. "Ratione violatae appropriationis debitae, et omissae distributionis debitae."—Cajetan, *op. cil.,* II, II, q. 62, a. 2, η. 9.

68. "Duae sunt radices ad quarum alteram restitutionem omnem oportet reduci: prima est acceptio: secunda est res accepta. Et extenditur in propositio acceptionis nomen ad omnem actum quo proximus minus habet de suo quam habere debeat. Incendium enim, contumelia, iniqua distributio, et alia hujusmodi sub acceptione comprehenduntur."—*Ibid.,* II, II, q. 62, art. 6, com. η. 1.

69. "Ad posterius autem probe respondet sanctus Thomas quod per justitiam distributivam conferri omissum est, ad justitiam spectat commutativam. Nam quamvis illud numquam fuerit ab illo, cui dandum erat, possessum, fuit tamen debitum: et ideo quodammodo sublatum, ac subinde functio commutativae justitiae est idem rependere."—Soto, *op. cit.,* lib. IV, q. 6, a. 1, p. 242.

He makes it quite evident that the violation of distributive justice imposes restitution and it would seem that the individual has more than a moral right to that which is due to out in another quotation from the same author:

> Wherefore it happens that if a leader or ruler neglected distribution for some years, which he was obliged to make among the citizens, and afterwards, led by penance, he arranged to make restitution, he ought not make restitution, then, to the present citizens, but to the heirs of those deceased, to whom it was due when living.[70]

The point to be noted here is the implication of an individual right in conjunction with distributive justice for, if there were not this individual right inherent in each person with a claim to participation in the distribution of the goods, it would suffice, in order to satisfy the obligation imposed by the law of the common good, to make restitution to the actual members of the community. However, according to this view the obligation would seem to be founded on the demands of the common good at the time of the distribution, so that it would be necessary then to make restitution to the heirs of those who had a strict right to procure such goods at the time of the distribution and who had been deprived of them.[71]

Whether this is sufficient proof in order to establish an obligation of restitution flowing from a violation of distributive justice is debatable. Surely the more active participation of government in the every day lives of men provides examples of situations which would seem to benefit Faidherbe's theory. However, it is the far more common teaching that the viola-

70. "Quo fit quod si princeps aut dominus aliquot annis distributionem praetermiserit, quam inter conscriptos cives facere tenebatur, et postea poenitentia ductus restituere constituerit, non debet praesentibus tunc civibus restitutionem facere, sed eorum defunctorum haeredibus, quibus viventibus debebatur."—*Ibid.,* lib. IV, q. 6, a. 1.

71. Cf. Faidherbe, *loc. cit.,* p. 70.

tion of distributive justice, as such, does not entail a demand for restitution. De Lugo, for example, argues that once an unjust distribution has been made, the official, whose duty it was to make the distribution, is unable to remove the inequality.[72] Granted that the official could repair the damage done as a result of an unjust distribution through the use of his own goods, still that which distributive justice intends, namely, that the common goods be distributed equally according to due proportion, would not be accomplished. The reason is quite obvious for the individual would have received it, not from the common goods, but from the official's own private funds and, therefore, the common good will always remain unequally distributed. If, on the other hand, the official did not use his own funds but made restitution from the common goods by taking the excess of one who had received more than he deserved, in order to give it to the victim of the unfair distribution, commutative justice would be violated. For, even if a distribution is made contrary to due proportion, dominion is transferred in the receiving *of* that which is distributed and one may not despoil him of it without injustice on account of the right once acquired.[73] Hence, on this supposition, one cannot attain that equality intended by distributive justice. Therefore, justice, inasmuch as it is distributive, only obliges to the making of due distribution, although it may

72. De Lugo, *De Justitia et Jure,* Disp. I, sec. 3, n. 53.

73. According to the principles of American civil law the explanation given by De Lugo is not entirely valid. The individual who profits by the unjust distribution would seem to hold the excess of what he deserved in trust for the one really entitled to it. Where, through a mistake of fact, title to, and apparent ownership of, property rightfully belonging to one person is obtained by another, a constructive trust ordinarily arises in favor of the rightful owner of such property. So where, by mistake, one obtains a conveyance of more land, or a greater interest or estate, than that to which he is entitled, he becomes a constructive trustee of the excess. Likewise, one who receives money to which he is not entitled, through mistake of fact, may be treated as a trustee thereof for the rightful owner. Cf. *Corpus Juris* (New York: the American Law Book Co., 1931), vol. 65, n. 218.

happen at times that an unjust distributor is obliged to restitution, either to the community, or even to the individual injured, on account of some right from commutative justice which he also incidentally violated.

Restitution is necessary for salvation by necessity of precept which *per se* obliges one *sub gravi* to restore, *in re* or *in vote,* that to which a neighbor has a strict right.[74] If a man is able to make restitution, he is bound to do so. Should the external act *{restitutio in re)* be either physically or morally impossible the individual must have the firm intention of making restitution as soon as an opportunity presents itself *(restitutio in voto).*

Constructive trusts arise by operation of law regardless of, and ordinarily contrary to, any intention to create a trust. Fraud, actual or constructive, is an essential element in the creation or existence of a constructive trust, and no such trust arises where there are no circumstances which make it inequitable for one to hold absolute title to property against another; but, strictly speaking, constructive trusts have no element of fraud in them, the court merely using the machinery of a trust to afford redress in cases of fraud. Actual or intentional fraud is not necessary, nor is it necessary that any express or conventional trust relation shall exist between the parties, or that any promise shall have been made by the one for the benefit of the other, but, as a general principle, a constructive trust will arise whenever the circumstances under which property was acquired make it inequitable that it should be retained by him who holds the legal title, as against another, providing some confidential relation exists between the two, and providing the raising of a trust is necessary to prevent a failure of justice. Cf. *Corpus Juris,* vol. 65, n. 215.

Inasmuch as the amount in question is being held in trust for the rightful owner the disbursing officer can recover the amount and make the proper distribution. This could be done at any time for it is a recognized principle of law that an American state and the federal government are similarly exempt from the operation of the statute of limitation unless it contains an express contrary provision. Cf. Samuel Williston, *A. Treatise on the Law of Contracts,* ed. S. Williston—George J. Thompson (8 vols., New York: Baker, Voorhis & Co., 1938), vol. VI, n. 2003. If the object has perished in the possession of the trustee he is said to be judgment proof. Under such circumstances the damage would be rectified by calling upon the official's bond.

11 J

74. Cf. Prümmer, *op. cit.,* II, PP- 184-185.

This is said to be by necessity of precept and not by necessity of means because restitution of itself contributes nothing positive to salvation but is merely a condition just as the fulfilling of every grave precept.[75] Inasmuch as the damage wrought was in itself gravely prohibited so too the reparation for it is in itself gravely prescribed.

The necessity of making restitution is easily established from the sources of revelation and from reason. In Ezechiel it is said: "if that wicked man restore the pledge, and render what he had robbed, and walk in the commandments of life, and do no unjust thing; he shall surely live, and shall not die."[76] And in the New Testament, Saint Paul tells us: "Render to all men whatever is their due."[77] The classic reference from tradition is from Saint Augustine—"if one acts in accordance with truth, than a sin will not be remitted, unless the thing taken away is restored."[78] This was incorporated into the Decree of Gratian.[79] The duty of making restitution is

75. Some have held that restitution is necessary by a necessity of means e.g. H. Noldin, S.J., *Summa Theologiae Moralis, De Praeceptis* (26 ed., Oeniponte: Rauch, 1939,) n. 433; Prümmer, *op. cit.,* II, 206. Carriere, *Disputationes Theologiae de Justitia et Jure,* III, n. 460; Waffelaert, *op. cil.,* II, 227; Merkelbach, *Summa Theologiae Moralis,* II, n. 282 maintain that it does not oblige by necessity of means. "Etenim, restituere nolens non videtur damnandus propter omissionem actionis *positive conducentis* ad salutem, sed potius quia non restituendo, seu omittendo actionem ex praecepto naturali et divino positivo, ergo necessitate praecepti obligatoriam, *ponit obicem* ad salutem, continuando nempe suam peccaminosam voluntatem in damnum proximi. Unde censemus restitutionem, saltem in voto, potius dicendum esse *conditionem sine qua non."* Cf. Waffelaert, *Annotationes in tract, de virtute Theologica,* n. 158, IV as quoted by St. Willems, "De necessitate restitutionis post laesam justitiam," *Collationes Brugenses,* 'XXXVI (1936), 489.

76. *Ezechiel,* XXXIII, 15. Cf. also *Exodus,* XXII, 1-5.

77. *Bomans* XIII, 7. Cf. also *James* V, 4.

78. "si autem veraciter agitur, non remittetur peccatum, nisi restituatur ablatum."—Epistle CLIU ad Macedonium, c. 6, n. 20 *(CSEL,* 40-2, 419, Goldbacher). This Epistle is designated as number LIV by some.

79. *Decretum Gratiani,* Cap. *Si res aliena,* I, Caus. XIV, q. 6.

also based upon the natural law. For he who does not restore to his neighbor, when he is able, the property which he has unjustly taken from him or has unjustly damaged, inflicts upon him additional injury by continuing to withhold from him what is his or by delaying in making good the damage or loss and thereby hindering his unqualified possession of that which is rightfully his.

Conditions Requisite for Restitution

In order to incur the obligation of making restitution, when it is a question of unjust damage, three things are necessary: the damaging action must be truly unjust; it must be the efficacious cause of the damage; and there must be theological culpability.[80] The three factors must be present simultaneously.

For an action tb be truly unjust it must violate the strict right of another and hence offend against commutative justice. Otherwise it would not be an injury strictly speaking nor would it give rise to an obligation of making restitution. It is, however, unjust if it takes away or destroys a thing in which another has a *ius in re;* if in any way it prevents another from having a thing to which that other has a *ius ad rem;* or if, by unjust means, it prevents another from justly obtaining some good even though one has not a strict right to it, because each one has a strict right that he be not prevented from obtaining some good by the use of unjust means. In the latter case, it is not so much the good itself which the one causing the damage or injustice ought to restore, unless it would undoubtedly be obtained, but rather the chance of obtaining it which was wrongfully taken away from another.[81]

80. Cf. Iorio, *Theologia Moralis,* II, η. 706.

81. Cf. Merkelbach, *op. cit.,* II, n. 291.

Secondly, it is required, in order that there be an obligation to make restitution, that the action be the efficacious cause of the damage. No one is bound to repair damage of which he was not the author or true cause.[82] The cause, however, is truly *efficacious* when it *directly* influences the damage either physically or morally, or when there is had a real immediate and necessary connection between the cause and the damage inasmuch as the cause has the power of itself of determining the damage, and truly determines and produces it.[83] The damage must, in fact, follow and not merely be intended, for if there was only the intention there would be the internal sin but no obligation to make restitution. It is not sufficient that one be the occasion, the *conditio sine qua non,* or the accidental cause of the damage in order to incur the obligation of making restitution.

Finally, the action must be theologically culpable for if moral blame is lacking, injustice is wanting in the internal forum, and thus there is no obligation in conscience of repairing the damage. As Prümmer points out: "An action that is not voluntary conveys no morality nor obligation . . . Finally, restitution on the part of the individual inflicting the damage is a kind of punishment. But punishment supposes blame. Therefore, where there is no moral fault, there is no moral obligation of restitution."[84] It must be formally unjust, that is, theologically culpable, in order that there be an obligation to make restitution. At least the indirect will to harm is required for injustice or some foresight, at least confused, of the unjust damage.[85]

82. "Non enim reparare damnum tenetur nisi qui vere sit damni auctor, i.e. qui physice vel moraliter, per se vel per alium fuerit vera eius causa efficiens totalis aut partialis."—Merkelbach, *op. cit.,* II, n. 292.

83. Loiano, *op. cit.,* III, p. 201, n. 136.

84. "lamvero actio non voluntaria nullam moralitatem nullamque obligationem importat . . . Demum restitutio pro damnificatore est quaedam poena. Atqui poena supponit culpam. Ergo ubi nulla est culpa moralis, ibi nec est moralis obligatio restitutionis."—Prümmer, *op. cit.,* II, n. 96.

85. Iorio, *op. cit.,* II, n. 706.

Theologians distinguish two types of culpability, namely, theological[86] and juridical. Theological culpability is identified with formal or subjective sin and may be a mortal or venial sin in the sight of God. What is done is done with advertence to the unjust harm on the part of the intellect and with consent on the part of the will. Or it can be the omission, voluntary *in se* or in its cause, of the *ordinary* care of another's property which a matter demands and which is accustomed to be used by the conscientious in the discharge of a particular duty.[87] Juridical or civil culpability, on the other hand, can be even the *indeliberate* omission of that diligence which is required by the civil laws in order to avert injuries to another's property.[88]

Therefore, when the omission of diligence is indeliberate, as regards the internal forum, it is not imputable in the sight of God; but that indeliberateness is not allowed in the external forum in an agent who in his act enjoys the use of reason for in such circumstances the agent is presumed to have been at fault when that which he could have foreseen, was not foreseen. It is possible to have only juridical culpability and then the damage would be purely material. However, juridical culpability is frequently joined with theological culpability more or less grave, for not only positive human law, but also the natural law itself demands that in our actions we use all the diligence which at least *per se* is sufficient to guard against damage to another man's property.[89]

When culpability is at the same time juridical and theological, the obligation of restitution must be measured only from

86. Some moralists refer to this as moral culpability. E. g., Merkelbach, *op. cit.,* II, n. 293. Jurdical culpability is sometimes referred to civilly as liability without fault.

87. Cf. Cl. Marc—Fr. X. Gestermann, *Institutiones Morales Alphonsianae iuxta Doctrinam ac Principia Aquinatis* (20 ed., 2 vols., Lugduni: Emmanuel Vitte, 1940), I, p. 265.

88. Loiano, *op. cit.,* III, p. 203, n. 137.

89. Cf. Prümmer, *op. cit.,* II, n. 92.

the moral fault; because a moral obligation, as the burden of restitution is, can only be founded on a moral fault. Juridical culpability in itself does not give rise to an obligation in conscience of making restitution for it is not a human act but an act of man. *Per accidens,* however, one may be obliged in conscience to make restitution even for jurdicial fault, for example, by reason of a contract. Thus, those whose positions are contractual are bound in conscience to exercise more than ordinary diligence, and are obliged to make restitution for even juridical negligence before judgment is given.[90]

In Roman Law the idea of an obligation based on a contract was contained in each violation of the right of another. Rights were considered to be of two main kinds: *in rem,* available against all the world; *in personam,* available against a particular individual. Among the rights *in rem* are included those which a man enjoys to safety and reputation.

> The Roman lawyers, however, did not regard these rights in the abstract; for, as abstractions, they are comparatively unimportant; such a right becomes legally important only when a wrong has been done to it, i. e. at the moment when the person entitled to the right *in rem* acquires, by reason of its infringement by some definite individual, a right *in personam* against that individual. The infringement of certain rights *in rem* was at Rome called a delict, which, therefore, bound the offender to the person wronged by the same kind of *juris vinculum* as that to which contract gave rise, viz. an obligation; but the obligation was not to perform an agreement, it was to make satisfaction for an unlawful act.[91]

Civil laws determining an obligation of repairing damage resulting from mere juridical fault do not oblige in conscience before the sentence of a judge, because by the natural law such an obligation does not exist. Once sentence has been passed,

90. Henry Davis, *Moral and Pastoral Theology* (4ed., 4 vols., New York: Sheed and Ward, 1943), II, p. 328.

91. R. W. Leage, βωηαη *Private Law* (2 ed., London: Macmillan and Co., 1946), p. 361.

however, there is an obligation in conscience to make the restitution that the court demands because such laws are just "since they favor all citizens equally and they cause men to be more careful lest they bring harm to others."[92]

Determining the Gravity of the Obligation

Although the obligation of making restitution binds *per se* under pain of mortal sin, the omission of restitution can be a venial sin if the quantity is not grave. In computing what constitutes grave matter the norms provided for determining the gravity of a theft are applicable for these norms are not concerned with the gravity of the sin but rather with the obligation of making restitution arising from the taking of something belonging to another.

Theologians generally speak of two standards—the relative and the absolute standards. Matter relatively grave concerns the injustice done to the individual and must be determined by the harm actually done. Only objective, concrete and actual injustice is at issue, precinding from the inconvenience suffered by the individual, the sentimental value of the thing taken, etc. for although these additional circumstances may beget sins against the virtue of charity[93] they do not increase the gravity of the sin of injustice. In determining the amount that would constitute relatively grave matter the living conditions of the individual must be taken into consideration. Consequently, it can vary considerably, for what would constitute a serious loss for an office clerk earning twenty-five dollars a week would be of little consequence to a broker with a salary of two hundred dollars a week. \It seems to be the accepted teaching that relatively grave matter is the amount that an individual who has to work for his living earns in a day or the amount that would suffice for a day's expenses for himself and

92. ". . . cum omnibus civibus pariter faveant, et homines vigilantiores reddant ne damnum aliis inferant."—Tanquerey, op. *cit.,* III, p. 223, n. 444.

S3. Cf. Prümmei·, op. *cit.,* II, n. 80.

his family.[94] It may be said, then, to constitute about one seventh of one's weekly salary for ordinarily that is the sum on which a family has to arrange its budget. In those cases where there is no question of having any dependents to support the amount constituting relatively grave matter should be doubled and thus it would be two sevenths of a week's wage.[95]

The absolute grave matter considers not only corporations and the wealthy who would suffer no grave loss from being deprived of a limited amount of money, but also society in general for it is "that amount of money, the stealing of which constitutes a mortal sin, irrespective of the financial status of the individual or corporation from whom it is taken, however wealthy they may be."[96] Some absolute norm must be had to protect society, otherwise the taking of a sum of money, without grave moral fault "would tend to make property insecure, and render men generally unwilling to undertake the labour necessary to advance their own welfare and that of the state."[97] There is, then, an absolute sum, the unjust taking of which is certainly a grave violation of the virtue of justice demanding restitution.

The absolute standard depends on the conditions in a particular country, the standard of living, etc. Some years ago Sabetti-Barrett,[98] writing for the United States, suggested the sum of thirty-five dollars as the absolute norm. That was in 1919 and it has not been changed considerably since. As Doctor Connell has remarked:

94. Davis, op. *cit.,* II, pp. 301-302; Prümmer, op. *cit.,* II, n. 80; Merkelbach, op. *cit.,* II, n. 405; Vermeersch, *op. cit.,* II, n. 597; Noldin, *Summa Theologiae Moralis,* II, η. 415; Loiano, *op. cit.,* III, n. 124.

95. Vermeersch, *op. cit.,* II, n. 597; Davis, op. *cit.,* II, p. 302.

96. Francis J. Connell, "Absolute sum for grave theft," *American Ecclesiastical Review,* CXII (1945), pp. 68-69.

97. Davis, *op. cit.,* II, p. 301.

98. Sabetti-Barrett, *Compendium Theologiae Moralis (New* York: Pustet, 1939), n. 404, q. 1, p. 369.

> Naturally this sum varies with the fluctuation of the value, or the purchasing power of money. In a large country like ours it is quite possible that this sum might be different in different sections. To lay down a general norm, in view of actual conditions and the value of money, it would seem that the absolute sum for grave theft would be about $40.00."

However, when an act of injustice has been done by a number of separate small violations—e.g. through repeated thefts of small sums—the amount required for grave injustices can be one and a half times the amount stated above, and sometimes even twice as much.

Inasmuch as it is agreed that the determination of the absolute norm depends upon actual conditions and the value of money and consequently may differ in various sections of the country the question might be asked if we may be guided by elements contained in the civil laws of the various states. The majority of states, for example, distinguish between grand and petit larceny.[100] If this distinction is not had, then an

99. Connell, *loc. cit.,* pp. 68-69. Father Joseph P. Donovan has suggested a much larger sum: "That would make one hundred dollars now the least that we could fix as the absolute amount; for now policemen and street-car men are getting something like three times as much in pay as they did then (i.e., in 1919 when Sabetti-Barrett put forth $35. as the absolute amount), and certain excursion boat rates for a round trip between two lake cities have risen from one dollar to three dollars fifty cents. If a month's pay for a laboring man is taken as a gauge of the absolute, then it is surely hard to see how less than a hundred dollars could be absolutely grave with the chances of a higher amount being probably so." Cf. *Homiletic and Pastoral Review,* vol. XLVI (1946), p. 964-965. This figure, however, seems entirely too high. First of all it must be realized that, to a great extent at least, the increased income is to compensate for the higher cost of living. Nor does it seem reasonable to accept as the absolute sum the amount a laboring man receives in a month for if the absolute sum is determined for the protection of society in general it should be placed at a lower figure.

100. Thus Florida, Montana, Nevada, Utah, Arizona, California, Missouri, Mississippi, Indiana, Washington, Wyoming, Minnesota, New York, Alabama, West Virginia, Kansas, Louisiana, Idaho, Tennessee, South Carolina, Oklahoma, New Mexico, North Dakota, and South Dakota.

effort is mad© to stipulate an amount, the stealing *of* which would distinguish a misdemeanor from a felony[101] or the severity of penalties to be imposed for larceny is increased for thefts over a specified amount.[102] Of the statutes of the forty-eight states only the statutes of the States of Pennsylvania and Delaware fail to provide us with a norm of some kind.[103]

It must be remembered that legislative bodies and moral theologians have similar purposes in mind. The legislators have as their motive the protection of private property and of society itself when they enact laws for their penal code.[104] They take into consideration, therefore, the requirements that the conditions prevalent in their own state demand. The sum established in the penal code might seem, then, to be a safe norm for the moralist to follow in determining the gravity of a theft.[105] We propose this as a working hypothesis, though we do not uphold it as a certain norm.

101. Thus North Carolina, Georgia and New Jersey. New Jersey distinguishes between a misdemeanor and a high misdemeanor.

102. For example in Nebraska, Oregon, Vermont, Illinois, Iowa, Kentucky, Texas, Wisconsin, Ohio, Rhode Island, Arkansas, New Hampshire, Maryland, Maine, District of Columbia, Massachusetts, Connecticut, Colorado, Michigan and Virginia.

103. Ci. *Pardon's Pennsylvania Statutes 1936* (Philadelphia: George T. BiselCo., 1936), tit. 18, n. 2771; *Revised Code of Delaware 1935* (Wilmington, Del.: The Star Publishing Co., 1936), Chap. 150, sec. 20, n. 5200.

104. In the words of Father Donovan, C.M.: "The State is really seeking to reach by its grand larceny minimum what the theologians speaking for the Church are trying to reach in the absolute amount of grave matter in commutative injustice. The State seeks to deter thieves by making truly deterrent the taking of an amount of another's property large enough in principle, if multiplied, to destroy the whole commonweal by making ownership perilously insecure."—"The Determinant of the Absolute Amount," *HPR,* XLVII, 383.

105. It is Father Donovan's contention that the norms provided as the statutory minimum for grand larceny in the civil codes are themselves eeventy years old in some cases. He would seem to discredit the use of any such norms unless revised in accord with the present day wage scale.—Loe. *at.,* 384.

Ordinarily the sum constituting grand larceny, or the sum the taking of which would increase the punishment inflicted upon conviction, is low in the poorer states and somewhat higher in richer states. In the State of Arkansas, for example, the stealing of ten dollars or its equivalent brings with it a more severe penalty[106] whereas, in the State of Massachusetts the punishment is increased for thefts in excess of one hundred dollars.[107] In other states, the sum varies, thus Maine[108] and Louisiana[109] in addition to Massachusetts, use one hundred dollars as their norm: Idaho[110] and Tennessee[111] consider the theft of sixty dollars or more as grand larceny; Florida,[112] Montana,[113] Nevada,[114] Utah,[115] Virginia[116] and Arizona,[117] fix fifty dollars as the sum the stealing of which constitutes grand

106. Cf. *A Digest of the Statutes of Arkansas,* Embracing All Laws of a General Nature (Little Rock, Ark.: Published by Authority of the General Assembly, 1921), Chap. 43, n. 2488.

107. Cf. *Annotated Laws of Massachusetts* (10 vols., Rochester, N.Y.: The Lawyers Co-operative Publishing Co., 1933), vol. IX, Chap. 266, n. 30.

108. Cf. *The Revised Statutes of the State of Maine, 1930* (Augusta, Me.: Kennebec Journal Print, 1930), Chap. 131, sec. 1, p. 1556.

109. Cf. *Constitution and Statutes of Louisiana* (3 vols., Indianapolis: The Bobbs Merrill Co., 1920), vol. I, p. 404.

110. Cf. *Idaho Code of 1932,* containing the General Laws of Idaho Annotated (4 vols., Indianapolis: The Bobbs Merrill Co., 1932), vol. I, 17—3504.

111. Cf. *The Code of Tennessee 1932* (3 vols., Kingsport, Tenn.: Southern Publishers Inc., 1931), n. 10921.

112. Cf. *The Compiled General Laws of Florida, 1927* (Atlanta, Ga.: The Harrison Co., 1929), n. 7223.

113. Cf. *The Revised Codes of Montana of 1921* (4 vols., San Francisco: Bancroft-Whiting Co., 1921), vol. IV, n. 11371.

114. Cf. *Nevada Compiled Laws 1929* (6 vols., San Francisco: Bender-Moss Co., 1930), vol. V, n. 10323.

115. Cf. *Revised Statutes of Utah 1933* (Kaysville, Utah; Inland Printing Co., 1933), 103-36-4.

116. Cf, *The Virginia Code of 191,2* (Charlottesville, Va. 1942), n. 4440.

117. Cf. *The Revised Code of Arizona 1928* (Phoenix: The Manufacturing Stationers, Inc., printer, 1930), n. 4757.

larceny, and Georgia,[118] Michigan[119] and Texas[129] increase the punishment for the stealing of a like amount; Nebraska,[121] Ohio,[122] Oregon[123] and the District of Columbia[124] specify a more serious punishment for thefts of thirty-five dollars or more; Missouri defines a theft the value of which is thirty dollars or more as grand larceny; Mississippi,[125] Indiana,[126] Washington,[127] Wyoming,[128] Alabama[129] and Vermont[130] place the theft of twenty-five dollars in the category of grand larceny;

118. Cf. *The Code of Georgia of 1933* (Atlanta: The Harrison Co., 1935), n. 26—2626.

119. Cf. *The Compiled Laws of the State of Michigan 1929* (4 vols., Lansing: Franklin DeKleine Co., printer, 1930), vol. III, n. 16899.

120. Cf. *Vernon's Texas Statutes 1936* (Kansas City, Mo.: Vernon Law Book Co., 1936), Penal Code, Art. 1421.

121. Cf. *Revised Statutes of Nebraska 19^3* (4 vols.), Chap. 28, n. 506.

122. Cf. *Page's New Annotated Ohio General Code* (3 vols., Cincinnati: The W. H. Anderson Co., 1936), vol. II, n. 12447.

123. Cf. *Oregon Code 1930 Containing the General Laws of Oregon* (Indianapolis: The Bobbs Merrill Co., 1930), sec. 14315, p. 1271.

124. Cf. *The Code of the District of Columbia* (Washington: United States Government Printing Office, 1930), tit. 6, n. 60.

125. Cf. *Mississippi Code of 1930 of the Public Statute Laws of the State of Mississippi* (2 vols. Atlanta, Ga.: The Harrison Co. 1930), vol. I, Chap. 20, n. 1009.

126. Cf. *Annotated Indiana Statutes 1933, 19^2 Replacement Volume* (12 vols., Indianapolis: The Bobbs-Merrill Co., 1942), vol. IV, 10—3001.

127. Cf. *Remington's Revised Statutes of Washington Annotated* (12 vols., San Francisco: Bancroft-Whitney Co., 1932), vol. IV, n. 2605.

128. Cf. *Wyoming Revised Statutes 1931 Annotated* (Cheyenne: Office of Secretary of State, 1931), 32-313.

129. Cf. *The Code of Alabama Adopted by Act of the Legislature of Alabama, Approved July 2,19Ifi* (10 vols., St. Paul, Minn.: The West Publishing Co., 1941), vol. IV, tit. 14, n. 331.

130. Cf. *The Public Laws of Vermont 1933* (Published by Authority, 1934), sec. 8440, p. 1401.

Kansas,[131] Oklahoma,[132] North Dakota,[133] West Virginia,[134] South Dakota[135] and South Carolina[136] consider the theft of twenty dollars or over grand larceny, while Iowa,[137] Colorado[138] and Kentucky[139] specify the minimum punishment that can be imposed for thefts of like amount. North Carolina has abolished the distinction between grand and petit larceny[140] but provides that a larceny that does not exceed twenty dollars is a misdemeanor.[141] New Jersey fixes twenty dollars as the line of demarcation between a misdemeanor and a high misdemeanor[142] and New Mexico gives jurisdiction over thefts to a justice of the peace when they do not exceed this amount.[143] The State of Illinois demands a more severe punish-

131. Cf. *General Statutes of Kansas (Annotated) 1935* (Topeka: The Kansas State Printing Plant, 1936), 21-533.

132. Cf. *Oklahoma Statutes Annotated* (St. Paul, Minn.: The West Publishing Co., 1937), Title 21, Crimes and Punishment, n. 1704.

133. Cf. *The Compiled Laws of the State of North Dakota 1913* (2 vols., Rochester, N.Y.: The Lawyers Co-operative Publishing Co., 1914), vol. II, n. 9916.

134. Cf. *Official Code of West Virginia* (1930), 61—3—13, p. 1466.

135. Cf. *South Dakota Compiled Laws 1929* (2 vols., Pierre, So. Dak.: Hippie Printing Co., 1929), vol. I, sec. 4213.

136. Cf. *Code of Laws of South Carolina 1932* (4 vols., Charlottesville, Va.: The Michie Co., printers, 1932), vol. I, n. 1160.

137. Cf. *Code of Iowa 1935* (Des Moines: Wallace Homestead Co., printers, 1935), Chap. 577, n. 13006.

138. Cf. *1935 Colorado Statutes Annotated* (5 vols., Denver: The Bradford-Robinson Printing Co., 1936), vol. II, Chap. 48, n. 85.

139. Cf. *Carroll's Kentucky Statutes Annotated* (Cleveland: Banks-Baldwin Co., 1936), n. 1194.

140. Cf. *The North Carolina Code of 1935* (Charlottesville, Va.: The Michie Co., 1935), n. 4249.

141. Cf. *ibid,* n. 4251.

142. Cf. *New Jersey Statutes Annotated* (61 vols., St. Paul, Minn.: The West Publishing Co., 1939), Title 2, Administration of Civil and Criminal Justice, 145—2.

143. Cf. *New Mexico Statutes Annotated 1929* (Denver: The W. H. Courtright Publishing Co., 1929), 35—1604.

ment when the value of property stolen exceeds fifteen dollars.[144] Perhaps, in the case of Maryland, the sum at which the severity of the punishment is specified, namely for all thefts of five dollars or more,[145] is too small for use as a norm in determining the gravity of a theft. However, certain discretionary powers are extended to the judge when the amount stolen is less than fifty dollars[146] and that figure could be used as a norm.

In the statutes of the States considered so far some definite norm is provided that might be used as the absolute sum for grave theft. But what about those States that use a sliding scale,[147] establish a sum entirely too high for our purposes,[148] or set no norm at all?[149] In the case of the States using a sliding scale, that is, basing the penalty on the amount stolen, we can find a norm by comparing the punishments determined in other States. In most instances the minimum punishment for thefts that constitute grand larceny is not less than one

144. Cf. *Illinois Revised Statutes 1939* (Chicago: Burdette Smith Co., 1939), Chap. 38, n. 389.

145. Cf. *The Annotated Code of the Public General Laws of Maryland* (2 vole., Baltimore: The Lord Baltimore Press, 1925), vol. I, Art. 27, sec. 818.

146. *Ibid.*

147. In the State of Wisconsin, for example, penalties are prescribed depending upon the amount of the theft. The stealing of a sum in excess of twenty-five thousand dollars brings, upon conviction, ten to twenty-five years in prison; amounts from ten to twenty-five thousand carry prison sentences of five to twenty years; amounts between one and ten thousand demands one to ten years in prison; more than one hundred but less than one thousand is punishable with one to five years in prison; sums between twenty and one hundred dollars may result in a prison sentence of six months to a year or a fine not to exceed two hundred dollars; if the amount is less than twenty dollars the punishment may be up to six months in prison or a fine of one hundred dollars or less. Cf. *Wisconsin Statutes* 1939, 343. 17.

148. Thus the amount specified in the statutes of Rhode Island, namely, five hundred dollars, would be unreasonable. Cf. *General Laws of Rhode Island, Revision of 1923* (Pawtucket: Eugene T. Dion, printer, 1923), n. 6075.

149. As in the case of Pennsylvania and Delaware.

year imprisonment. Where that punishment is specified as not less than one year imprisonment for the theft of a certain amount, according to a sliding scale, that amount can be selected as our norm for determining the moral gravity of a theft. Thus the norm for Wisconsin would be one hundred dollars;[150] for New Hampshire twenty dollars[151]; for Minnesota twenty-five dollars[152]; and for Connecticut fifty dollars[153]. New York and California consider five hundred dollars and two hundred dollars respectively as constituting grand larceny. Naturally, a moralist would have to consider the taking of far less a grave violation of the virtue of justice demanding restitution. However, in each instance the legislator has specified smaller amounts when circumstances necessitate a change. Thus in New York, a person is guilty of grand larceny if he steals "property of the value of more than twenty-five dollars, by taking the same in the night time from any dwelling house"[154] and in California "when domestic fowls, avocados, citrus or deciduous fruits, nuts and artichokes are taken of a value exceeding fifty dollars the same shall constitute grand theft."[155] The moralist could use these figures as his norm. Rhode Island presents somewhat of a problem for it increases punishment for thefts over five hundred dollars and establishes no other norm. In the case of Rhode Island, then, and Delaware and Pennsylvania, which consider all thefts in a single classification, we would suggest the use of the general norm of forty dollars.

150. Cf. *Wisconsin Statutes 1939,* 343-17.

151. Cf. *The Public Laws of the State of New Hampshire* (2 vols., Manchester: The Clarke Press, printer, 1925), Chap. 389, n. 3, p. 1503.

152. Cf. *Mason's Minnesota Statutes 1927* (2 vols., St. Paul: Citer-Digest Co., 1927), n. 10362.

153. Cf. *The General Statutes of Connecticut Revision of 1930* (3 vols.), vol. II, sec. 6111.

154. Cf. *The Consolidated Laws of New York Annotated* (Brooklyn: Edward Thompson Co., 1944), Bk. 39, Penal Law, Part 2, n. 1294.

The use of the civil code of the various States is suggested as the basis for a norm to be used by the moralist in determining the gravity of a theft because it represents what value the ruling authority in that particular State has placed on money. Where its use as a norm is not feasible, the absolute norm suggested by Doctor Connell, namely forty dollars, may always be employed.

CHAPTER IV

LEGISLATIVE ABUSES

Obligation of a Legislator

Saint Thomas exalts the office of the ruler for:

> He is to be in the kingdom what the soul is in the body and what God is in the world. If he reflect seriously upon this, from one motive, a zeal for justice will be enkindled in him, when he contemplates that he has been appointed to this position in place of God, to exercise judgment in his kingdom; from another, he acquires the gentleness of clemency and mildness, when he considers as his own members, those individuals who are subject to his rulership.[1]

Interested in their own rise to a position of esteem in the community, not to mention the personal financial betterment, many officials in positions of authority apparently fail to see the nature of their high calling.[2] Seized by the philosophy of materialism they do not pause to realize that they share with the State, God-given authority. "By me kings reign, and lawgivers decree just things," says the *Book of Proverbs.*[3] Pope Leo XIII expressed it well when he wrote:

1. *On the Governance of Rulers,* Bk. I, ch. XII, p. 90. The authenticity of this work has been widely discussed. It is, however, sufficiently established to-day that the whole first book and the second book as far as the middle of the fourth chapter were written by St. Thomas, the remainder of the work being from the pen of his pupil, Ptolemy of Lucca. Cf. the discussion of the authenticity of this work in the preface of Gerald B. Phelan's translation—Saint Thomas Aquinas—*On the Governance of Rulers* (New York: Sheed and Ward, 1938), pp. 5-8.

2. Cf. Robert Card. Bellarmine, *De Officio Principis Christiani,* Ch. 1—III in *Opera Omnia* (ed. Sforza; Neapoli: C. Pedone Lauriel, 1772), VIII, pp. 505-509.

3. *Book of Proverbs,* Chap. VIII, v. 15.

> The gift of authority is from God, and is, as it were, a participation of the highest of all sovereignties. It should be exercised, therefore, as the power of God is exercised—with a fatherly solicitude which not only guides the whole but reaches to details as well.[4]

And in another place he says that:

> Every civilized community must have a ruling authority, and this authority, no less than society itself, has its source in nature, and consequently has God for its author..... Whosoever holds the right to govern, holds it from one sole and single source, namely God, the Sovereign Ruler of all.[5]

If only they realized the source of this authority they possess, officials would be more conscious of the weighty responsibilities that rests upon their shoulders in public office.

The obligation of legal justice, says Saint Thomas, binds both ruler and subject and it belongs in the first place to the ruler—principally and by way of a master-craft—"principaliter et quasi architectonice."[6] To the ruler, since it falls upon him principally to care for the common good, which he accomplishes especially through legislative power, by enacting laws concerning acts of all virtues in reference to the common good.[7] Every legislative act emanating from this law-making power should be directed to the common good. For by its very definition law tends to this end. Law, according to Saint Thomas, is:

> A regulation in accordance with reason promulgated by the head of the community for the sake of the common welfare.[8]

4. "Rerum Novarum," *ASS.* XXIII (1891), 658; *Social Wellsprings, I,* 188.

6. "Immortale Dei," *ASS,* XVIII (1885), 162; *Social Wellsprings,* I, p. 66.

6. *Summa Theologica,* II, II, q. 58, a 6.

7. Hyacinthus—M. Hering, O.P., *De Justitia Legali* (Friburgi Helvetiarum: Typis Consociationis Sancti Pauli, 1944), p. 49.

8. "Quaedam rationis ordinatio ad bonum commune, ab eo, qui curam, communitatis habet, promulgata."—*Summa Theologica,* I, II, q. 90, a. 4.

Thus legislative power is usually defined as:

> The right of imposing in an obligatory way those things necessary and useful in order to attain the end of society.[9]

It is this need of a directing force toward the attainment of the end of society that makes authority necessary. The diversity of the human intellect and the instability of the will along with the unrestrained heat of ambition make it necessary in every group that someone have the power whereby he has the right of *designating* the *means* to attain an end and of obligating all to apply those means.[10] The extent of the legislative power is limited to those things necessary or useful in helping society attain its end in conformity with the natural law. This does not mean that it is restricted to reiterating the natural law—"the rational creature's participation in the eternal law."[11] There are various ways of accomplishing the same purpose and the natural law leaves it to the competent authority to choose the means and impose its observance on the community. There is proof enough of this in the variety of the civil laws in various communities even in our own country. Nor does the natural law prescribe things that are merely suitable yet, through the legislative power, civil laws can impose such things merely on the basis of their usefulness in furthering the common good.[12] The only other limit placed upon this legislative power is that it must not enact into law anything that would violate the right of another superior society.[13]

9. *"Ius proponendi obligatorio modo quae necessaria et utilia sunt ad finem societatis assequendum."*—Alaphridus Ottaviani, *Institutiones Juris Publici Ecclesiastici* (Romae: Typis Polyglottis Vaticanis, 1936), I, n. 42.

10. Cf. Camillus Cardinalis Tarquini, S.J., *Institutiones Juris Publici Ecclesiastici* (Romae: Ex Typographia Polyglotta, 1885), p. 9.

11. St. Thomas, *Summa Theologica,* I, II, q. 91, a. 2.

12. Cf. Lucius Rodrigo, S.J., *Praelectiones Theologico-Morales Comillenses,* Tomus II, *Tractatus De Legibus* (Santander: Editorialis Sal Terrae, 1944), n. 36.

13. Ottaviani, *op. cit.,* I, n. 44.

The Legislature

The framers of our Constitution distributed the power conferred upon the Federal Government among three separate departments: legislative, judicial, and executive; and in the states the same principle is applied in the construction of central governments.[14] Thus the opening sentence of Article I of the Constitution of the United States states:

> All legislative power herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

This method was devised as a system of checks and balances and subdivision of power in an attempt to prevent the concentration of power in legislative majorities or in a strong executive.[15] It was understood, of course, that a complete separation of powers was impossible nor was such intended for James Madison maintained that:

> Unless these three departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government can never in practice be duly maintained.[16]

The interdependence of the three branches of government is implicitly contained in some of their respective functions.[17]

14. This doctrine came into our law and practice from Montesquieu, whose treatise on the *Spirit of the Laws* was widely used by statesmen in the eighteenth century. He is supposed to have derived it from his study of the English constitution, but Charles Beard maintains that he read it into his study of the institutions of England.—Cf. Charles A. Beard, *American Government and Politics* (New York: The Macmillan Company, 1910), p. 152.

15. Cf. Cahill, *The Framework of a Christian State,* p. 481.

16. Cf. Charles A. Beard, William Beard and Wilfred E. Binkley, *American Government and Politics* (9th ed., New York: The Macmillan Company, 1946), p. 13.

17. For example, various executive appointments are subject to Senate approval (Art. II, sec. 2, par. 2); the Executive may veto legislation (Art. I, sec. 7, par. 2); treaties must be made by the President and the Senate (Art. II, sec. 2, par. 2); the Congress may establish inferior courts (Art. III, sec. 1).

Whenever anything is done by any agency of the Federal Government, warrant must be found for it in some provision or provisions of the Constitution. The government, then, has only those powers which are vested in it by the supreme law of the land.

> In this respect it differs from the government of the state, for the latter enjoys all powers not denied to it by the constitution of the state or by the federal Constitution.[18]

However, the powers given to Congress are quite flexible for in Article I, Section 8, Paragraph 18 it is authorized:

> To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

Congress is bicameral, that is, it is divided into two chambers. In the Senate each state has two members and in the House membership is apportioned among the states according to population. This one fact alone has been the seed of much of the corruption that has at times been resorted to in order to influence legislators. Representation on the basis of population has excluded from our political system representation of economic interests as such. In fact there seems to be a direct prejudice against persons connected with important economic interests so that they are considered a poor choice for a party ticket no matter how excellent their personal qualities may be.

Yet:

> By a curious inversion these very interests which are in theory excluded from a direct influence upon our democratic institutions, have in practice in many commonwealths acquired an absolute control of political action. Indeed by force of circumstances there has been evolved a system of representation of interests, in which unfortunately the general interests of the state does not always hold its own. For the interests represented are special, being composed of powerful economic combinations which use the political machinery of republican institutions for

18. Beard et al, *op. cil.,* p. 10.

> the purpose of procuring exemptions and privileges which serve still further to augment and to entrench their preponderance. Thus it has come about that the very institutions which are founded on the idea of a common welfare, developed and protected by the action of the general will, have in many cases been made the instruments for the creation of a regime of special privilege. This is due to the simple fact that while people in general are busily pursuing their own private affairs, the public interest is allowed to fall into the hands of men who see in it simply the source of private advantages and who are ready to permit their political action to be controlled by whatever interest or group is more liberal in its treatment of the practical politician.[19]

All of our state legislatures, with the exception of Nebraska,[20] are divided into two houses. Again, the purpose of the division seems to be to check hasty and ill-considered measures and to secure a more careful consideration of the laws. But here, too, there is that weakness, for, modeled on the Federal Constitution, representation is determined by population[21]* and economic interests have no formal constitutional representation. In addition, state legislatures are often empowered to enact special laws favoring a particular group or even an individual, and this power has resulted in corrupt influences being exerted on legislators.

Lobbyists

Wishing to influence the action of legislators either to pass a particular bill or to keep one from passing, groups with

19. Paul S. Reinsch, *American Legislatures and Legislative Methods* (New York: The Century Company, 1907), pp. 228-229.

20. Three of our states began with single chambers: Georgia, Pennsylvania and Vermont. It was not abandoned in Vermont until 1836. Nebraska adopted it in 1934 providing for a unicameral legislature selected on a non-partisan ballot.

21. Many state constitutions even restrict the principle of representation according to population by limiting the number originating from any one area thus favoring rural areas and discriminating against cities. Cf. Beard et al, *op. cit.,* pp. 595-596.

peculiar economic or other interests in the bills under consideration, engage men to "lobby" for them. Lobbyists, then, consist not so much of persons seeking favors directly for themselves but rather of professional paid agents of great interests or organizations, whose business it is to haunt the legislative halls, the committee rooms and even the floor of the legislative chambers, operating directly on the legislator.[22] The means used to influence them are too numerous to mention but it should be noted that the lobbyists are more subtle in their procedure now than they were fifty or sixty years ago. The direct bribe is not as frequent as it was, yet that does not necessarily mean that it can be considered a thing of the past.

Not all lobbying is to be condemned, either in object or in method. There are lobbyists for the most worthy causes as well as for the least worthy; and their work may be entirely open and above-board and may have a beneficial educational effect,[23] just as it may follow devious courses, by dubious means, toward mercenary, or even corrupt, ends. "It would, therefore, be a most serious mistake to attempt to 'bar lobbyists from Capitol Hill,' as some have suggested.[24] It would be

22. The professional lobbyists are often ex-congressmen and ex-senators, presumed to know the right method of approach.

23. The lobbyist usually has all the matter pertaining to the bill in which he is interested. Legislators, not having the services of a research staff, often have to depend on them for their information on a particular measure. In fact lobbyists have even drafted bills to be presented by legislators. The danger in this situation is that the bills will be bound to represent first the interest of the group the lobbyist represents, and second, the public interest. Cf. Dayton David McKean, *Pressure on the Legislature of New Jersey* (New York: Columbia University Press. 1938), pp. 203-204.

24. Speaking of the "lobbying" done by unions in the United States and Switzerland, Emil Brunner remarks: "Its dangers have hardly been fully recognized. But is it only a symptom of a much more deepseated malady. The neglected factor of economic power takes this anonymous and illegitimate way in order to assert itself in our democracies."—*Justice and the Social Order,* trans. Mary Hattinzer (New York: Harper & Brothers, 1945), p. 217-218.

impossible to draw a line between 'bad' lobbyists and 'good' ones, between big-business lobbyists and little-business lobbyists, between lobbyists for special interests and lobbyists for the people."[25] Lobbyists are, then, part and parcel of our democratic system of government.

> The lobby is to-day as much a part of the legislative process as are the political parties. As needs felt by the citizens produced parties, so needs that are not gratified by the parties have produced group representation.[26]

It is the assertion of a right granted by the Constitution, for the constitution contains a guarantee "of the right of the people ^peaceably to assemble, and to petition the government for a redress of grievances."[27]

The advent of improved means of communication has done a great deal to change the tactics of the lobbyists. Propaganda[28]* plays an important role using the media of the press and the radio. People interested in the passage of a particular measure or its defeat are urged to influence the legislators with telegrams and letters. Such measures are taken when the bill in question is one of more general interests to some particular group of citizens or to some particular area of the country. The lobbyist engaged for such work is one skilled in journalism and "high-pressure" tactics.

However, we are more concerned with situations in which:

> At least one of the parties whose rights are at issue is either a single corporation, an individual, or a small group with closely knit interests able to act as an individual.

25. Jerry Voorhis, *Confessions of a Congressman* (Garden City, N. Y.: Doubleday & Company, 1948), p. 318.

26. McKean, *op. cit.,* p. 318.

27. *Constitution of the United Slates,* Amendment I.

28. This is not meant in an odius sense: it is simply an attempt to influence public opinion. The effectiveness of letters and telegrams is almost nil when they are identical in text. Cf. Voorhis, *op. cit.,* pp. 53-54. Letters written on the same paper, mailed in the same envelopes are in some instances never opened. Cf. McKean, *op. cit., p.* 208.

> Often the opposing interest is the "general public" or some other poorly organized group with a slight consciousness of a community of interest.[29]

For in such instances bribery and other corrupt tactics may be employed. The bill that the lobbyists attempt to have passed or defeated is not a general law but rather a decree beneficial to only a very few individuals. Yet it is quite possible that, from another point of view, the effects of the bill will be felt by a great many. Or it may be a question of a conflict between two special interests involving the public interest only incidentally and more remotely.

As a natural outcome of the competition between powerful corporations for legislative favor some particularly powerful interests become controlling) Until the turn of the century or shortly thereafter the railroads, on account of the extent of their business and their quasi-public character, had most to gain or lose through legislative action and naturally they strove for the primacy of influence. Their legal status still largely remained to be determined. There were franchises to seek; attempts to tax the railroads on the same basis as other property to be fought; and privileges, such as easements,[30] to be bargained for.[31] When they had gained whatever the legislature could bestow, the railroads began to take a somewhat less direct interest in politics, confining their activity principally to the prevention of unfavorable legislation.

29. Valdimer Orlando Key, *Political Parties and Pressure Groups* (New York: Thomas G. Crowell Company, 1946), p. 732.

30. A right in the owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose, not inconsistent with a general property in the owner.—2 Washb. R.P. 25, 60 Vt. 702. Cf. *Bouvier's Law Dictionary,* ed. by William E. Baldwin (Cleveland: Banks-Baldwin Law Publishing Co., 1946), p. 332.

31. The railroads sought powers of eminent domain—a term applied in law to the sovereign right of a state to appropriate private property to public uses, whether the owner consents or not. Cf. *Encyclopaedia Britannica* (11th ed., Cambridge, England, 1910), Vol. IX, p. 339.

Occasionally an open bribe has been resorted to. The owners of a railroad attempted to get through a bill in a state legislature to grant them easements which would permit their shutting off waterfront streets through their yards and terminals. The bill passed but was vetoed. In the course of the debate on the passage of the bill over the veto, one of the Assemblymen showed five one-hundred-dollar bills which he said had been paid him toward a whole bribe of a thousand dollars for his vote. An investigation brought out testimony that the lobbyist for the railroad had offered a thousand dollars for every vote.[32]

In one of the mid-western states it is claimed that a railroad distributed $900,000 worth of bonds among legislators and prominent politicians in the state.[33]

By the very nature of his office the legislator finds himself in a unique situation. The greater part of his day, particularly when the legislature is in session, is spent listening to arguments for and against pending legislation.[34] People from every walk of life approach him to express their viewpoints. It is all part of a legislator's work. He is meant to be a representative of the people and consequently there are very few people that the legislator does not feel some obligation to meet, if they wish to see him. It is one way in which to avail himself of opinions pro and con in regard to pending measures.

There is no injustice in this but there is a grave harm done if the legislator is influenced in his decision, not by the merit of the arguments presented, but by selfish ambition. /The primary consideration of the legislator should be the common good and his decision to vote for or against a measure should be made bn the basis of this consideration. Even the measures that are of a special nature have repercussions that affect the common good even though their effect be remote.

32. Cf. William E. Sackett, *Modern Battles of Trenton* (2 vols., Trenton, N.J.: J. L. Murphy, printer, 1895-1914), I, pp. 197-198.

33. Reinsch, *op. cit.,* p. 231.

34. Cf. Voorhis, *op. cit.,* p. 298.

The official who permits a bribe to be the determining factor in his action on a particular measure is failing in his obligation to the state if the measure is not in conformity with the best interest of the community. We have reference, therefore, to a bribe in the strict sense, namely, a situation in which the money received furnishes the motive for an action which otherwise would not be performed.' It is to be clearly distinguished from the receiving of a gift, freely and spontaneously offered by the donor with no intention on the part of the recipient of doing anything in anyway evil. His obligation to the community, assumed when he accepted public office, is an obligation of legal justice. Thus he would commit a serious sin if he voted for some unjust measure that would be of social or financial detriment to the people. But over and above the obligation in legal justice there is the obligation of commutative justice, for the legislator is bound by contract to work for the common good.[35] Consequently, if, through some fault of his, an injustice is done to the community he is bound to repair the damage done.

Whether the measure is just or unjust the legislator has no just title to any bribe that he might demand. American civil law considers any bargain, the tendency of which is to lead a public official to violate his duty for money or favor, as opposed to public policy.[36] In the case of a perfectly lawful and helpful measure, the legislator should act favorably to the measure independent of any bribe—that is, if he considered it a beneficial bill and intended to vote for it anyway. This duty is included

35. Older theologians looked upon this as a *quasi-contract.* Others have called it a compact (conventionem) which is more of a real contract although implicit or tacit. Cf. St. Willems, "De restitutione facienda pro damnificatione materialiter injusta," *Collectanea Brugenses,* XXXVIII (1938), 15-16. Vermeersch writes that, "from the very nature of the thing, *one who undertakes to hold public office is bound in justice toward the community . . .* When one voluntarily accepts an office, he enters upon his work by reason of the contract with the Superior who confers the office." Cf. Vermeersch, *Theologiae Moralis Principia—Responsa—Concilia,* II, n. 471.

36. Cf. Samuel Williston, *A Treatise on the Law of Contracts,* VI, n. 1726.

in the scope of his salary. There can be no consideration in the bargain for he is already bound to act. Accordingly, he would be obliged to restore any money that he had demanded as a bribe. The same holds true if the measure did not become law, even though some legislators were paid to vote for it, as in the case outlined above where a railroad sought easements that were in themselves just or at least indifferent. They, too, would have to make restitution to the railroad because they had no just title to the money received in return for their vote. They should not have taken it in the first place.

American civil law also forbids any kind of bargain to influence the action of a legislator whether it be for good or evil. It is vital

> that legislative bodies from the highest to the lowest shall exercise their functions with a single purpose of achieving results that they believe without bias to be most desirable for the public which they serve, any bargain that has for its purpose or tendency the inducing of legislators to act from other motives, is illegal.[37]

From this principle it follows that a bargain by a legislator to exercise his judgment in a particular way is not binding at law. His promise is illegal if he bargains for consideration.[38]

Ecclesiastical law also takes cognizance of actions intended to influence unduly the decision of others in spiritual matters. Buying what is spiritual with what is temporal is called simony.[39] Simony of its very nature implies complicity and thus there is a contract or agreement between the parties. In both somony of the divine law[40] and simony of the eccesiastical

37. *Restatement of the Law of Contracts* (St. Paul: American Law Institute Publishers, 1936), n. 559 Comment a.

38. Samuel Williston, *op. cit.,* VI, n. 1727.

39. Cf. *Acts of the Apostles,* VIII, 18 sqq.

40. Simony of the divine law (i.e. the divine natural law) is a deliberate design of buying or selling, for a temporal price, such things as are spiritual in themselves or annexed to spirituals; or of making the spiritual thing at least the partial object of the contract. Cf. Raymond A. Ryder, *Simony,* An Historical Synopsis and Commentary (Washington: The Catholic University of America, 1931), p. 52.

law,[41] the object of the contract is not salable. It follows as a natural consequence that any negotiations regarding such an object are invalid.[42] The Church lays down as one of the requisities for the acquisition of benefices, offices and dignities, that appointments be free from venality.[43] Simony in such matters would render the subsequent provisions null and void, even if the appointee had been ignorant of the crime.[44]

On the other hand, suppose the legislator accepted a bribe for his vote favoring a measure which he knows would be financially detrimental to the community. The money received would furnish the motive for an action that would not otherwise be performed. He would be voting for an unjust bill and, in so doing, would violate commutative justice in regard to his relationship to the state. If the bill failed to become law, even though he voted for it, there would be no obligation to make restitution to the state because the harm was not actually inflicted.[45][46] Even though there is no restitution due to the state the legislator is still in possession of the bribe. Would he be permitted to keep it? Inasmuch as he did what he was paid to do, namely, vote for a particular measure we are inclined to think that he could keep it. He entered into a base contract *(contractus turpis)* and having fulfilled his part of the agreement he can retain the bribe. In his action no third party was injured.[47] If the official had demanded payment, in other words,

41. There are some actions which, although they do not constitute a comparison between the spiritual and the temporal and the consequent reduction of the spiritual to the level of the temporal, nevertheless might lead to simony of the divine law. These actions constitute simony of the purely ecclesiastical law. Cf. Ryder, *op. cit.,* p. 64.

42. St. Thomas, *Summa Theologica,* II, II, q. 100, a. 6.

43. "Si simonia committatur circa beneficia, officia, dignitates, subsequens provisio omni vi caret."—*CIC,* can. 729.

44. Ryder, *op. cit.,* p. 72.

45. "Actio damnificativa debet esse efficaciter iniusta; ad quod requiritur damnum *de facto* secutum,—et non solum intentum . . ." Merkelbach, *op. cit.,* II, n. 292.

46. Cf. Prümmer, *Manuale Theologiae Moralis,* II, η. 253.

if it was a question of extortion of money in compensation for his act of voting unjustly the element of force would be present. In such a case the victim would have the right to recover his money at his demand.[47] Should his vote be efficacious in passing the bill he would be obliged to make restitution to the state for he was aware of the damage that would follow. When all vote conjointly for the bill they equally concur in the damage and are held to restitution.[48][49] If all the legislators at fault make restitution it should be done on a *pro rata* basis; otherwise those prepared to make restitution would have to make up for those who refused to fulfill their obligation.[19]

Should the corporation or group giving the bribe gain financially through the unjust legislation—that is, if the state's loss was their gain—the bribe should be given in partial payment to the state for the damage incurred. It should not, under such circumstances, be given to the briber for then the bribe can be rightfully considered a portion of the profit made at the expense of the public welfare. Of course, if the company takes steps to pay back funds unjustly received through legislative action, the bribe should then be returned by the legislator to the company.

Even though direct bribery may not be as common as it was, the principles enunciated above apply equally as well to the more modem technique. It is said that a friendly game of poker is a means used by lobbyists to transfer money to legislators.[50] A legislator, who has been allowed to win large sums of money, would hardly dare go back upon his lobbyist friend when

47. Cf. Merkelbach, *op. cit.,* II, n. 462.

48. "Consentiens tenetur ad restitutionem, quando consensus eius fuit causa efficax et culpabilis damni iniuste illati. Hinc si plures sunt consentientes, et *omnes simul* iniustum suffragium ferunt, sive schedulam ponendo secretam, sive surgendo, omnes pariter ad damnum concurrunt et ad restitutionem tenentur."—Merkelbach, *op. cil.,* II, n. 313.

49. If the vote was public e.g. by roll call, one who knew that his vote was not efficacious because enough votes had been cast to pass the bill would not be morally obliged to make restitution.

50. Reinsch, *op. cit.,* p. 248-249.

the critical vote comes to the floor of the legislature. Lawyers in the legislature may be effectively bribed by the promise of a certain amount of business. Thus, Ben Lindsay says that he and his law partner, a state senator, were approached when promoting a measure permitting verdicts by three-fourths of the jury.[51] Streetcar companies were severely opposed to the bill because of the number of accident cases that went before the courts in which they were defendants. The two lawyers were promised at least four thousand dollars worth of litigation a year to handle if the bill should be dropped. In other cases legislators have been promised positions in some large corporations when their political career terminates. These are but a few instances of how bribery is effected. In each instance the idea is expressed or implied that if the action desired is not made to benefit the official in some way, it will not be acted upon. In other words, the element of personal gain furnishes The motive for the officials action.

In such cases it is quite evident that the promises made are the equivalent of a bribe for they are intended as motivating causes in the attainment of the end desired. However, to what extent restitution is demanded and to whom it should be paid presents some question. It is our opinion that the obligation of the beneficiaries would be satisfied if the amount over and above what was needed for their support was paid out in restitution. For example, in the case of the senator with a practice: he is entitled to retain what might be needed for expenses but what was clear profit would be subject to restitution. The legislator who accepts the position in the large corporation in return for his co-operation while in public office would probably have no other source of income. If such is the case surely he can use what is necessary for him to live in the manner in which he is accustomed; but what remains in excess of that must be paid out in restitution. Now, to whom is this restitution to be paid? Not to the streetcar company for the lawyer

51. Lindsay, *The Beast* (New York: Doubleday, Page and Co., 1910), p. 32.

is giving a *quid pro quo.* They would have had to pay another lawyer to take those cases for them. In the case of the ex-legislator employed by a corporation, if the corporation has no real need of the man's services the amount over and above that needed for his sustenance should be paid back to the corporation. It may have been that they created a position for him so that the salary given him is in virtue of a promise made to him in return for favorable action in legislative matters in which they were interested. The restitution is due to the corporation on the condition, of course, that the acts performed by the ex-legislator when in office were not detrimental to the common good but were to its advantages or at least indifferent. If, on the other hand, the corporation did not create a position for the ex-legislator but awarded him an appointment to a vacant position in virtue of his legislative assistance in the past there is no question of restitution to the corporation because they were supplying a need in their own organization. It would seem to us, then, that when the original briber in the fulfillment of his promise suffers no loss, any restitution to be made should be paid to the public treasury, if the common good had suffered by the actions of the legislator in favor of a corporation.

Occasionally a legislative body will order an investigation into the activities of some government department or into some extra-governmental sphere that in some way pertains to the common welfare. The fear of disclosure, at times, prompts individuals or corporations to attempt to stop the investigation. If other means fail bribery of the investigator may be resorted to.[52] The official has no right to the bribe. The duties of his office extend to the work entailed in such investigations and it is included, therefore, in the scope of his salary. The bribe must be restored to the one who paid it to the investigator, and the investigation conducted honestly. If the time for the investigation has passed, the official must, then, pay the money into the public treasury for his action is equiva-

52. Cf. *People* v. *Bunkers,* 84 Pa. 364 (1905).

lent to selling immunity—a matter that we will treat at length in the next chapter. The money would have to be paid to the public treasury even if some other government agency has caused the briber to be indicted independent of the investigation.

What has been said in reference to federal and state legislators is equally applicable to members of a city council. Occasionally graft has been received by councilmen from public utilities desiring franchises.[53] The technique is the same in most cases and the moral principles are the same.

Legislative Extortion

It has not always been a question of the reception of a bribe. Occasionally legislatures have found ways and means of extorting money for their own personal gain from the manipulation of proposed legislation desired or very much opposed by some corporation or group with well knit interests. One method was to have a bill possessing some merit introduced by some well intentioned but naive member, ease it along toward final passage, and then negotiate with the affected interests in order to procure a fee to defeat the measure. This is referred to as "strike legislation" or "sandbagging."[54] Reinsch has observed that:

> It is conceivable that a smaller corporation may be forced to buy immunity in individual cases, but the more powerful interests which exercise the real control must certainly know that the money spent to avoid vicious legislation is worse than wasted, since the appetite grows by what it feeds on.[55]

53. Cf. Harry J. Carman, *The Street Surface Railway Franchises of New York City* (New York: Columbia University, 1919), pp. 46-49; 66-67: Lincoln Steffens, *The Shame of the Cities,* pp. 104-118.

54. Cf. Charles N. Fay, *Big Business and Government* (New York: Moffat, Yard and Co., 1912), p. 150.

55. Reinsch, *op. cit.,* p. 254

A case that may very well be considered an example of "strike legislation" is described by Lincoln Steffens.[56] In the Missouri Legislature a bill had been passed prohibiting the use of poisons, including "arsenic, calomel, bismuth, ammonia, or alum," in food. The inclusion of alum was the controverted point for it prohibited its use in the making of baking powder. The Royal Baking Powder Company had the control of the cream of tartar and, consequently, the bill was not without benefit to them. However, in 1901 a bill was introduced in the senate to repeal this act. The lieutenant governor, presiding over the senate at the time, stated that a member of the committee in charge of the bill came to him—

> and said that it ought to be worth a good deal to the Royal Baking Powder Company to keep the anti-alum law on the statute books; and that the boys on the committee did not think that they ought to prevent its repeal without some compensation. I asked him what the boys wanted. He said they wanted $1,000 a piece for six of the committee, which was all of the committee except Senator Dowdall, and $1,000 for the Senator who introduced the bill.[57]

Apparently the proposition was agreeable to the company and $8,500 was received by the lieutenant governor and, according to his own admission, he received $1,500 and the others $1,000 each.

Little or no harm was done to the community through this incident. It was a relationship between a group of the legislators controlling the bill in committee and the company whose interests would be affected by the proposed legislation. Yet it was a mis-use of their official position—the fact that it was legislation of a special nature does not change the situation.

The legislator is bound by virtue of his office to function in a manner suited to the best interests of the community. He is obligated to participate in the formation and enactment into

56. Steffens, *The Struggle for Self Government,* (New York: McClure, Phillips, 1906), pp. 32-35.

57. Steffens, *Ibid.,* p. 34.

law of those just measures, not at variance with the natural law, concerning which he is authorized to legislate—and this independently of any personal gain. This duty is included in the scope of his salary, and by demanding payment for the defeat of a piece of legislation he is seizing a sum of money to which he has no title.

It is an evident case of extortion for the commercial interest affected realizes that it must meet the demands made upon it or else be penalized to the extent of having undesirable legislation passed. Whether the legislators actually intend to pass the bill is immaterial because the introduction of it is sufficient, in most cases, to induce payment.

On the supposition then, that the lieutenant governor received $1,500 and the senators introducing the bill and the six on the committee received the sum of $1,000 each there would be an obligation of making restitution. In each case there would be a grave obligation to restore the entire amount received to the Royal Baking Powder Company inasmuch as it had been extorted from them.

Improper Use of Official Secrets

Members of state legislatures, county boards and city councils have at times divulged secret information for their own profit. The information usually pertains to some intended improvement which will necessitate the acquisition of new property by the state or the city e.g., for a highway, a school, or a hospital. The acquisition of valuable lands for resale for public purposes offers a ready and easy way to enrich oneself and some favored member of the political organization.

In such cases the more common practice is to purchase property on the basis of inside information that the site has been selected or will be selected for a certain improvement and then to sell it to the city at an inflated figure. Of course, it takes a little capital, but the turnover is rapid and the profit is usually considerable.

In one of our large cities an individual from another state purchased a tract of land for $218,500. It was then conveyed to a realty company in which the purchaser, along with a political associate of a high official in this city, was the controlling stockholder. Condemnation proceedings were instituted for the acquisition of about one twelfth of the area of the property originally acquired. The land was needed for the approach to a bridge. The condemnation resulted in an award of $320,430 for one twelfth of a tract that had cost $218,500. The money specified in the award was paid to the realty company and the next day it transferred $200,000 to the personal account of the original purchaser and principal stockholder of the company. Against this deposit, on the same day, he drew five checks totaling $85,000.[58]

Let us imagine that a check for $13,000 was given to the individual who supplied the information on the basis of which the property was purchased. What obligation would he have in regard to the amount he had received?

1 It must be noted, first of all, that the official in selling information is violating his obligation of secrecy. The information that comes into his possession is received in an official capacity and is matter of an *implicit* entrusted secret.

> An entrusted or committed secret is one in which the obligation of secrecy arises primarily from an agreement before communication that secrecy shall be preserved.[59]

In our case no explicit antecedent pledge of secrecy is demanded, for the office of the person to whom the secret is communicated makes it clear that the confidence is to be carefully guarded.[60] Among the various grades of the entrusted secret Regan cites:

> The entrusted secret received in the course of duty by persons exercising public offices directly associated with

58. Case Committee Report, *Senate Journal* (N.J.) (1929), pp. 1133-1134.

59. Henry Davis, S.J., *Moral and Pastoral Theology* (4 vols., 4 ed., New York: Sheed and Ward, 1943), II, pp. 422-423.

60. Cf. De Lugo, *De Justitia et Jure,* disp. XIV, sec. IX, n. 135.

> the public good *(bonum commune),* such as Secretaries of State, Counsellors to rulers, Commanders in armed forces, etc.[61]

'The moral obligation of guarding the entrusted or committed secret is, *per se,* a serious one inasmuch as it involves a contract binding toward the people in commutative justice.[62] As Regan points out:

> To the extent that an entrusted secret obliges in commutative justice, the violator of such a secret would incur the obligation of restitution for damage caused to the proprietor of the secret.[63]

In addition this official secret begets an obligation in legal justice, for its observance is necessary for the common good.[64]

It must be admitted that the individual in question was able to purchase the land for much less than would have been demanded had the original owners been aware of the plans to build the bridge. An injustice was done the original owner through the use of the secret information on the part of the purchaser. The official, then, co-operated in a sin against commutative justice toward the original owner.

Vermeersch, without any qualification; makes the statement that things for sale may be bought at a cheaper price without injustice at a time when they will be worth less.[65] This is indeed true, but not when an unjust means is used in order to obtain the object at the cheaper price. As Merkelbach points out:

> It is an injustice if *by an unjust means* one impedes another from obtaining some just good to which he has not a strict right, because each one has a strict right that he be

61. Regan, *The Moral Principles Governing Professional Secrecy,* p. 10.

62. Prümmer, *Manuale Theologia Moralis,* II, η. 179.

63. Regan, *op. cil.,* p. 21.

64. Cf. John A. McHugh, O.P. and Charles J. Callan, O.P., *Moral Theology* (2 vols., New York: Joseph F. Wagner, 1930), II, n. 2414, c.

65. "*Viliore pretio* sine iniustitia *emi* possunt . . . res tradendae tempore quo minus valebunt."—Vermeersch, *Theologiae Moralis Principia Responsa—Consilia,* II, n. 426.

> not impeded by an unjust means from obtaining a good. In this case, the one causing the damage is bound to restore, not so much the good itself, *unless it certainly would be obtained* [italics added] but rather the hope of obtaining it which he wrongfully took away from another.[66]

In the case that we have put forth the means employed to obtain a large profit in this real estate transaction unjustly deprives the original owner of a chance of receiving a higher price for his property. The unjust means, of course, is the unlawful manifestation of an official secret. The manifestation of the secret is primarily an injury to a right of the state, namely, that the confidential information entrusted to officials be kept inviolate. However, it is also unjust in its use against the original owner of the property in question for by means of it unjust advantage is taken of him. Secondarily, then, it may be said to work an injustice to the original property owner. It would follow that the official, who sells a secret whereby profit accrues to the buyer of property, is bound to recompense those who were induced to sell the property by the recipient of the "tip."[67]

The first obligation to recompense the original owner belongs to the profiteers involved in the transaction. Inasmuch as he would certainly have obtained a far better price than he did, if the unjust act of violating a secret had not been used to his detriment, the amount to be restored is not to be judged on the basis of "the hope of obtaining it"[68] but on the basis of what he actually lost. If the profiteers fulfill this obligation the official should restore to them the bribe he received in return for the secret information, for he has no just title to it.

66. "Est autem iniusta ... si *medio iniusto* alterum impediat ab aliquo bono iuste consequendo ad quod ius strictum non habet, quia unicuique ius strictum est ne iniusto medio a bono consequendo impediatur. In hoc casu, non tam ipsum bonum, nisi certo obtineretur, damnificator resarcire debet, sed potius spem illud consequendi quam alteri iniuriose eripuit." —Merkelbach, *Summa Theologiae Moralis,* II, n. 291.

67. Connell, *Morals in Politics and Professions,* p. 83.

68. Cf. quotation from Merkelbach above.

Should they default in their obligation then the official must use the money he has received to discharge his indebtedness to the previous owner.

It is not necessary that the property for a public project be obtained through the condemnation procedure. The value of the land may be determined by direct negotiation with the owner. Suppose, for example, in the case we outlined the property was obtained, not in the courts through condemnation, but by direct negotiations with the realty company holding title to the land. It is expected, of course, that it will be sold at an inflated figure, for the valuation increases when the need for the property becomes known. However, would the obligation of the official be altered any, if the price demanded was *excessive* and was approved only because of the political connections of the vendor? On this supposition the official secret that he divulged ultimately brought damage to the community in the excessive price paid for the land. His first obligation is to repair the damage caused by his violation of the quasi-contract entailed in the entrusted secret. By reason of his office, too, he is obligated to provide for the common good, and certainly cooperating to defraud the government of funds is a violation of it. It would seem to us then, if there was theological culpability on his part, that he should, if the others default, restore to the government the amount in excess of a fair price for the land and whatever is left should be used toward discharging his indebtedness to the original owners. If the realty company restored sufficient amounts to both injured parties—the community and the original owner—then the official should repay the company the amount he had received.

There would be no injustice done to the individual if the community purchased a tract of land for some proposed improvement through an agent in order to obtain it at current prices—understanding, of course, that there was no question of gain on the part of a public official.

It is very seldom that an official having information on a proposed improvement by reason of his office, would attempt to purchase property himself in order to re-sell it to the city or the

state as the case may be. Where it is not forbidden by positive law, public opinion would be so adverse to it that few would dare attempt it. However, it might happen in cases of projected improvements such as the building of new roads, the construction of railroad terminals, which will enhance the value of neighboring real estate, that councilmen, mayors, legislators, freeholders, as the case may be, will use the official information they have to make personal investments in real estate. Wouters[69] apparently sees no wrong in this and Tanquerey considers it a disputed point[70] Consequently,

> An official who would act thus could not be obliged to restitution, at least if no positive law forbade him to participate in such a deal.[71]

The fact that restitution is not obligatory does not make such a practice approved for it is far from honorable and certainly detrimental to the best interests of the community.

69. Wouters, *Manuale Theologiae Moralis,* I, η. 895.

70. "Si vero officiales . . . hanc notitiam acquisierint *vi officii sui,* controvertitur utrum ea uti possint in proprium commodum, cum aliorum detrimento, antequam res publice divulgetur."—Tanquerey, *op. cit.,* III, n. 737.

71. Connell, *op. cit.,* p. 84.

CHAPTER V

PURCHASE OF IMMUNITY

Police Officials

Prominent among the various forms of graft is the selling of protection or, what may be termed, the purchasing of immunity from certain existing laws and ordinances. In any community there are always those who are anxious to engage in some profitable enterprise that operates contrary to law. Precisely because they are violating the law they turn to law enforcement agencies to purchase for themselves the protection necessary to continue in business. Naturally the group harassed most by this external influence from questionable sources is the police—whether they be municipal, city, county or state police.

The policeman is a public official entrusted with the duty of preserving the peace within his jurisdiction. Thus the municipal police officer is placed on the same plane as the state police, sheriff and constable as far as state and federal laws are concerned and is therefore assigned the broad duty of keeping the peace within the limits of his territorial jurisdiction. In addition the municipal police are charged with the duty of enforcing city ordinances. The police officer is directed to arrest all violators "charged with an offense against the ordinances or laws of the city." By virtue of these requirements the authority of the municipal police officer is extended to include the various regulatory acts of the city, and his jurisdiction thus is much broader than that assigned to county and state police officers.

It is easy to see that unless a police officer is very conscientious in the performance of his duties there will be numerous opportunities offered him to neglect his duties particularly through violations of justice. The purchasing of immunity is an outstanding example of this. Its importance as a source

of possible corruption can be estimated from the following statement made by Theodore A. Bingham, a former head of the New York City Police Department:[1] "During my first year as head of the Police Department it would have been an easy matter for me to have made $600,000 in bribe money, and $1,000,000 would not have been an excessive figure at all."[2] Thus the police department is under constant pressure from those who want no molestation in plying illegal trades.

There are a number of techniques employed—the choice in any particular instance depending on the circumstances involved. In small communities, of course, the protective system results from relationships directly between the police and individual operators of small businesses in the underworld, and even in the large cities it got its start in this way.[3] The entire police hierarchy may be involved, the patrolmen collecting from individual operators and relaying the proceeds, or a part thereof, up the ranks with a division eventually between high police officials and politicians.[4]

The underworld can be organized into trusts and syndicates for the purpose of providing assurance of its continuance of operation. Under the big business regime in the underworld several patterns of protection are discernible. One of these is the "downtown fix" in which the granting of protection is centralized for the entire city in the hands of a powerful politician, the chief of police, the chief of detectives, or the mayor,

1. It must be noted here that many of our examples will pertain to large cities. We do not intend to imply in any way that smaller communities are free from such corruption. It merely happens that there is more material available in regard to large cities due to public investigations etc.

2. Theodore A. Bingham, "The Organized Criminals of New York," *McClure's Magazine,* XXXIV (1909-10), p. 62.

3. Cf. *Report and Proceedings of the Senate Committee Appointed to Investigate the Police Department of the City of New York* (5 vols., Albany, N. Y., 1895).

4. Cf. *ibid.,* pp. 5323, 5340; see also, Steffens, *Autobiography* (New York: Harcourt, Brace and Co., 1931), p. 272.

depending upon the time, place, or type of protection desired. These individuals deal, usually through intermediaries, with the syndicate head or heads.[5]

The general nature of such agreements can be illustrated with a rather ordinary case. Some years ago it was charged that the chief of the detective bureau in Chicago permitted, for some consideration, a particular individual, Bertsche by name, to operate certain confidence games. Subsequently others, through Bertsche's arrangement with the detective bureau, were permitted to go into the same business. The chief of detectives assigned two officers to the game involved. At least one of these men, it is said, received one hundred dollars each month. Thus Bertsche was the head of a syndicate with the power to "License" persons to enter the business, and no doubt to drive others out.[6]

When the chief of police or some other official high in law enforcement cannot be approached the situation is somewhat different. As John Landesco has observed:

> It is a curious anomaly in the history of organized crime that when there is an honest chief of police and no central downtown fix, the period is characterized as one "when the police get the graft," which means that the "small fry" get the graft. When the graft is centralized city-wide m the office of an important politician, the politicians get the graft and the police get only a lean skimming.[7]

In other words, the syndicate must deal with the individual police captains or the policemen themselves when a city-wide arrangement cannot be made. During the administration of Mayor Devers in Chicago, when the mayor and the chief of police could not be bribed, that was how it worked. The con-

5. Cf. C. E. Merriam, *Chicago* (New York: The Macmillan Co., 1929), Chap. II, "The Big Fix."

6. *People* v. *Halpin,* 114 N.E., 932 Illinois (1916); *People* v. *O'Brien,* 115 N.E., 123 Illinois (1917).

7. "Prohibition and Crime," *Annals,* CLXIII (1932), 123.

fession of an office manager of a liquor warehouse illustrates the type of arrangement. His confession was to the effect that each month the warehouse was visited by about four hundred policemen who were paid off, records being made for each transaction. In order to prevent imposition on the part of policemen not assigned to the district, a list of the badge numbers of the police in the district was sent from the station house to the warehouse each month.[8]

What is the morality of such acts on the part of our agents of law enforcement? Can such actions be condoned in the fight of Catholic moral principles? First of all let us state that the police officer, by reason of his promissory oath[9] to enforce the laws and ordinances of the community, fails against the virtue of religion when he substitutes personal gain for conscientious devotion to duty. The obligation is one of religion, because the significance of the oath is that it adds the duty of respect owed to God to the duty of fidelity owed to the promise. The policeman swears in order to make his promise more trustworthy by reason of the sacredness of the oath. The obligation arising therefrom is grave from the very nature of an oath[10] and grave also by reason of the matter involved.[11]

Over and above the infringement on the integrity of his oath, the police officer also violates the virtue of justice—not only legal justice but commutative justice. As a public official he

8. Cf. F. D. Pasley, *Al Capone* (Garden City: Garden City Publishing Co., 1930), pp. 93-95.

9. The following is the oath administered on the occasion of appointment or promotion in the Police Department of the City of New York: "Do you solemnly swear that you will support the Constitution of the United States, and the Constitution of the State of New York, and that you will faithfully discharge the duties of the office ... in the Police Department of the City of New York, according to the best of your ability."

10. In as much as the virtue of religion is preeminent among the moral virtues. Cf. *Summa. Theologica,* II, II, q. 81, a. 6.

11. This does not mean to imply that there can not be parvity of matter in the case of a promissory oath. Cf. Prümmer, *Manuale Theologiae Moralis,* II, η. 460.

has undertaken, in return for a salary, to fulfill an obligation to the community which he serves, namely to make the common welfare the object of all his official acts. The laws and ordinances that he has agreed to enforce were enacted for the common good and surely he must be said to fail in his duties if he neglects to enforce them—especially when the motive is his own personal gain in preference to the common good.

Out of regard for the dignity of their office, if for no other reason, particularly those higher up in the hierarchy of the police department should have foremost in their minds the desire to fulfill all the duties expected of them in the exercise of their office. Surely they should be worthy examples to their subordinates, even though the business of administering a police department is an exceedingly difficult one, and often the commissioner and the heads of the various divisions are subject to all kinds of pressure, control, and even removal—and that of the kind that, if submitted to, would not be conducive to the common good.

The ordinary patrolman must be made conscious of his obligation of legal justice. For he too, in the fulfilling of his office, must direct his actions toward the common good. In proportion his office is just as conducive to the needs of the community in the attainment of the common welfare.

Granted, then, that the police official who sells immunity is guilty of a violation of his oath and of legal justice, it may now be asked whether he is violating commutative justice and, if so, whether he is obliged to make restitution? Here the problem is a little more difficult, particularly in regard to the obligation of making restitution.

The very fact that the police official is directed to prevent all violations against the ordinances or laws of the city binds him by contract to the community whose officer he is. The contract in question is at least a quasi-contract as understood by moral theologians. The quasi-contract is the equivalent of an implicit contract—one in which, although expressed consent is not given, a person (here the police officer) freely consents to

assume an office to which there is annexed an obligation in justice to fulfill certain duties of that office.[12] By accepting the office one is said implicitly or virtually to accept the obligation connected with it. Consequently, when a person assumes an office "he virtually or implicitly agrees to perform all the duties which the nature of the office demands, or which are annexed to it by law or custom."[13] De Lugo says they are called *quasi* contracts because often there is not present the consent of both parties in that the will is not explicit.[14] Ordinarily the obligation of the *quasi* contract arises from the acceptance of an office but, as De Lugo adds, "sometimes it comes from the law, or from a superior imposing such a duty on you, even against your will to which duty there is attached an obligation of justice."[15] It should be noted that the same concept of *quasi* contract does not exist in American civil law. The equivalent of the *quasi* contract in American civil law, in the sense understood in moral theology, is the *contract implied in fact.*

> A contract implied in fact, or an implied contract in the proper sense, arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which according to the ordinary course of dealing and the

12. Merkelbach, *Summa Theologiae Moralis,* II, n. 453c.

13. Robert E. Regan, O.S.A., *The Moral Principles Governing Professional Secrecy with an Inquiry into Some of the More Important Professional Secrets* (Washington: The Catholic University of America, 1941), 56.

14. "Aliquando denique obligatio dicitur oriri non ex contractu, sed ex quasi contractu; tunc scilicet quando oritur ex officio, prout tenetur tutor, curator, negotiorum gestor, gubernator, medicus, et similes personae, quae ex officio tenentur ad procurandum bonum pupilli, subditi, et similium, et quidem ex justitia. Appellantur autem quasi contractus, quia saepe non intervenit voluntas utriusque partis . . DeLugo, *De Justitia et Jure,* disp. XXII, sec. 1, n. 5.

15. "Aliquando provenit ex lege, vel superiore imponente tibi etiam invito, et repugnandi tale officium, cui annexa est obligatio illa ex justitia." *ibid.*

> common understanding of men, show a mutual intent to contract.[16]

The quasi-contract spoken of in American civil law is a *contract implied in law*—"a duty imposed by the law and treated as a contract for the purpose of a remedy only."[17] "They are not contract obligations at all in the true sense, for there is no agreement."[18] Inasmuch as the police officer is bound at least by force of a *quasi* contract, or a contract implied in fact, actions on his part at variance with the duties laid upon him by virtue of his office entail a violation of commutative justice.

In the case in question, as regards the obligation of making restitution, some might argue that there is no restitution to be made after the immunity has been granted, for the negotiations between the police officer and the one seeking the illegal protection is tantamount to a *base contract (contractus turpis)*—a contract in which the public official consents to neglect his duty in return for a financial consideration of a personal nature. Now, in the case of a base contract, according to Catholic moral principles, the following rules prevail: Before the sinful act the contract is invalid inasmuch as the matter of the contract is something immoral. Thus, on the supposition that our case is an instance of a mere *contractus turpis,* the police officer would not be obliged to render the protection according to the terms of his agreement—indeed, he would be bound to abstain from giving immunity, and he would have to return any consideration that he had received to the source from which it came.[19] This has to do with the case *before* the officer has fulfilled the agreement. If the wrongful act agreed upon has been performed, then there is a question whether the considera-

te. Cf. *Corpus luris* (New York: The American Law Book Co., 1917), vol. 13, p. 241-42, n. 8.

17. *Ibid.,* vol. 13, p. 241, n. 7.

18. *Corpus luris Secundum* (Brooklyn: The American Law Book Co., 1939), vol. 17 C. 6, p. 323.

19. Aertnys-Damen, *Theologia Moralis,* I, n. 846. This is the common teaching of theologians.

tion provided for in the same agreement would have to be paid as promised and, if paid, whether it could be retained by the party having performed the wrongful act. The latter question is of importance here. According to the more common opinion[20] the one who has performed the action in question has a right to receive and retain the consideration involved. Those who hold this view argue that although the original contract providing for a wrongful act was invalid nevertheless there arises a new contract from this wrongful act having been performed, namely a *contractus innominatus, facio ut des.* This second contract is not invalid for although the base act inasmuch as it is base is not worthy of pay, nevertheless the pay is given for the risk assumed in the undertaking and now present.[21] The payment should be given and, therefore, when paid may be retained, unless by chance 1.) the pay is entirely too extravagant, in which case it should be reduced or 2.) the performance of such an evil deed for a price is prohibited by some positive law.[22] A response of the Sacred Penitentiary would seem to confirm this view in practice for it would allow a prostitute now repentant to retain the money she had gained in her trade but adds that she should be urged, according to the judgment of a prudent confessor, to put the money to pious uses.[23]

20. This opinion is held by S. Thomas, *Summa Theologica,* II, II, q. 32, a. 7; De Lugo, *De Justitia et Jure,* disp. XVIII, sec. III; Noldin, *Summa Theologiae Moralis, De Praeceptis,* η. 538; Prümmer, *op. cit.,* II, η. 253 and others.

21. Aertnys-Damen, *op. cit.,* I, n. 846.

22. Merkelbach, *Summa Theologiae Moralis,* II, η. 465 c. As regards the extravagance of the payment Koch notes: "He may retain the wage for his labor, even if that wage exceeds the one usually paid for similar material labors, because the risk involved is exceptional."—A *Handbook of Moral Theology* (Adopted and edited by Arthur Preuss, St. Louis: B. Herder Book Co., 1933), V, p. 244.

23. Declaratio S. Poenitentiariae diei 22 Aprilis 1822 quoad meretrices: "Mulier poenitens non cogenda, sed hortanda est, ut pretium meretricii, juxta prudentis confessarii judicium, eroget in usus pios." Quoted by Aertnys-Damen, *op. cit.,* I, n. 846. According to Saint Alphonsus this first opinion is the more probable. Cf. *Theologiae Moralis,* lib. III, tract V, c. III, n. 712.

Another opinion maintains that nothing may be retained by the individual who has performed the wrongful action. The authors[24] defending this opinion argue that if a contract is null before its fulfillment it does not become valid by reason of its fulfillment, for it is a common rule that that which does not hold from the beginning cannot gain strength by the passage of time.[25] In Tanquerey's opinion the proposed distinction of a double contract is not well -founded: "for the contract is *morally* one, and, since the act is *from its very nature* illicit, one cannot say the *work* annexed to it has a valuation in money."[26]

As was said above, some may argue, basing themselves on the more probable opinion, that there is no restitution to be made by the police officer in our case for they consider it a *contractus turpis.* However, this difference must be noted between our case and the ordinary *contractus turpis:* in the ordinary base contract there is no infringement on the right of a third party, whereas in the case of the police officer a right of society has been violated. The example usually given for the ordinary base contract is that of the prostitute who receives money for the commission of a sin. If she performs the sinful act demanded she may retain the money since in the fulfillment of her part $£.the bargain she has not deprived a third party of any right. (On the other hand, one who permits harm to a third party?in return for a consideration, when, by virtue of his office, he has a prior obligation to protect the rights of that third party, must make restitution to the injured party. Thus, if a *contractus turpis* involves a violation of a strict right of a third party restitution to the injured party is demanded. De Lugo mentions those who hold that "things received from a sin against justice must be restored, when they are at vari-

24. Cf. Tanquerey, *Synopsis Theologiae Moralis et Pastoralis,* III, nn. 626-629: Paulus Comitolus, S.J., *Responsa Moralia in Septem Libros Digesta,* lib. III, q. 5; Carriere, *De Contractibus,* n. 331-338.

25. St. Alphonsus, *Theologia Moralis,* lib. III, tract V, c. III, n. 712.

26. " . . . unus est enim *moraliter* contractus, et, cum actus sit *ex natura sua* illicitus, dici nequit *laborem* huic annexum esse pretio aestimabilem." Tanquerey, *op. cil.,* III, n. 628.

ance with the obligation of one's office/'[27] "In the case of the delinquent official . . . the right of society which has been violated is of the moral order; nevertheless, both parties to the unjust agreement evaluated it as something worth money."[28] The policeman, therefore, once he has violated that right, must make restitution to the extent of the money received in exchange for the violation of that right. The restitution should be made to the public treasury through the "conscience fund" or by any other means available. *Of* course, the more advisable solution and of obligation, if it can be done, is to refund the money to the source from which it came thereby recalling the immunity and then make the arrest in conformity with the duties of his office. There never was any real immunity, of course, but only immunity in a qualified sense as understood between the officer and the individual, that is, the officer would not press charges but that does not imply that the prosecutor could not indict the individual.

^From another aspect, it may be considered that the policeman, in selling immunity, is violating a right of society inasmuch as he sells that to which he has no right namely, freedom from indictment and from possible punishment. A rather common instance is found in the acceptance of a sum of money on the part of a policeman in lieu of a summons for a traffic violation. Certainly, the offense is not a transgression of a criminal nature, yet the officer is selling immunity.[29] Restitution to the city or state cannot have as its norm the fine the offender would have been obliged to pay on conviction, for the city or state has no right to the fine antecedent to its being imposed by a judge.[30] However, the policeman is not entitled to

27. "Alii dicunt, restituenda solum esse accepta ob peccata contra justitiam, quando sunt contra obligationem officii."—De Lugo, *op. cit.,* disp. XVIII, sec. III, n. 53.

28. Francis J. Connell, C.SS.R., *Morals in Politics and Professions,* 87.

29. The policeman may be said to be compounding a misdemeanor by his action.

30. Cf. Merkelbach, op. *cit.,* II, n. 638.

to keep the illgotten gain, and must give the agreed upon estimated price of immunity to the public treasury or use it for some pious cause.[31] There are also other occasions when the policeman's neglect of duty in accepting a bribe would not result in appreciable harm to anyone's material possessions as in the case mentioned, namely, that of the traffic violation. They must be treated in like manner. The circumstances in such cases do not allow the application of the principles concerning *post factum* restitution in sinful contracts for they involve certain features peculiar to public life.[32] What actually happens is that the policeman steals the government's exclusive right to grant immunity and proceeds to sell the use of that right. The right to dispense from a law or to grant a privilege belongs to the author of the law, his successor or superior or to one to whom he has delegated such power.[33] The policeman enjoys this power under no title. Consequently, he must make restitution to the government for the right that he has usurped according to the evaluation put on it in the sale price.[34] Of course, it would be preferable, if it could be done, to return the financial consideration to the one who gave it and then make the arrest, thereby recinding the unjust immunity.

In certain instances where immunity is sold there is the additional question of cooperation in the sin of another on the part of the one granting the immunity. This is a point to be considered in allowing houses of prostitution and abortion clinics to function. It is quite true that some communities allow brothels to operate in certain restricted areas on the assumption that this is the only way of controlling the vice and,

31. The obligation to give it to some pious cause is only *per accidens* for it is contingent on the inability to make restitution to the proper party.

32. Connell, op. *cit.,* 59.

33. Cf. Lucius Rodrigo, S.J., *Praelectiones Theologico-Morales Comillenses,* Tomus II, *Tractatus De Legibus* (Santander: Editorialis Sal Terrae, 1944), η. 456. and η. 859.

34. " . . . *venditor* tenetur *domino* refundere pretium rei quatenus ex eo factus est ditior, quia id est aequivalens rei."—Merkelbach, *op. cit.,* II, n. 300.

one of its adjuncts, the spread of venereal diseases. Whatever be the merits of such a procedure it is not for us to discuss here.[35] Let it suffice to say that where such a theory prevails the police could abide by the decision of their superiors but, of course, they could do nothing to advance the business of such places in any way—for example by directing anyone to such a place. However, there are far too many instances where such places are allowed to operate, not because of any desire to control the menace, but, because of the revenue involved in permitting them to continue. According to Morris R. Werner: 'One of the most important sources of graft for police and politicians in New York came from the unhampered practice of female prostitution."[36] Officials who allow such a situation to exist, because of the personal revenue that they gain from it, are guilty of negative material cooperation in the sins committed in those places. It is negative cooperation because of the omission of preventive action on the part of the official who is able to impede the sin and is obliged to do so.[37] Such an official can impede the commission of such sins to this extent at least—that he suppress by suitable means the organized functioning of such houses. Material cooperation with the sin of another is sometimes licit providing there is present a sufficient cause and a proper intention[38] but there is no sufficient cause present in the case at hand nor is there a proper intention. Consequently the cooperation provided by the police authorities would be illicit—a sin against charity, (because it promotes the spiritual harm of others) and justice (because it is a violation of their duty to the people).

35. Cf. J. O'Brien, "Can We Crush Commercialized Vice?" *The Homiletic and Pastoral Review,* XXXIX (1938-1939), p. 36

36. Morris R. Werner, *Tammany Hall* (Garden City, N. Y.: Doubleday, Doran and Company, 1928), p. 375.

37. "Cooperatio ad peccatum alterius est omnis concursus praestitus actioni malae alterius. *Ratione modi* quo fit . . . est *improprie dicta* et indirecte voluntaria quae fit omissione actionis impeditivae peccati ab illo qui impedire potest et ad hoc tenetur."—Merkelbach, *op. cit.,* I, n. 488.

38. Cf. Prümmer, *op. cit.,* I, n. 619.

The ordinary patrolman on duty in a neighborhood where such places are allowed to function has perhaps received oral instruction about particular places that are paying for protection. Such an officer would have to act very circumspectly, for if he chanced to raid a protected place, he may be promptly transferred to an undesirable post or even forced out of the department on some other pretense and not succeed in checking the abuse. Therefore, because of the grave inconvenience involved[39] (namely, the transfer to an undesirable post or dismissal) added to the fact that no good will be done, he may at times refrain from interference, staying aloof from any personal gain from such houses or their inmates. He should act in a manner similar to the patrolman in the case where the authorities look upon a restricted area for prostitution as the only control for the vice.

Should the patrolman in the area be the one that is selling protection to a disorderly house when he could make a raid on the establishment, then, he is obliged to the same degree as the higher police officers mentioned above. He too would be guilty of negative, material cooperation in the sins of impurity committed in that place.

It might be added that in many cases a high police official who engages in selling immunity will be guilty of a violation of distributive justice also. When the police executive, the commissioner, chief, or captain, is himself corruptible, the problem of managing the protective system is carried out through the instrumentality of control over assignments of the men to posts, control over their promotions, and the disciplinary powers. Men on the force who can be trusted to cooperate with their superiors in corrupt practices will be transferred to the most remunerative posts—the vice squad, the gambling squad, or to particular territorial districts.[40] On the other hand

39. The principle regarding *grave incommodum* with reference to the obliging force of law may be applied here. Cf. Vermeersch, *Theologiae Moralis Principia-Responsa-Consilia,* I, n. 214.

40. Walter C. Reckless, *Vice in Chicago* (Chicago: The University of

those who try to be conscientious and live up to the ideals that the community expects of them suffer by reason of demotions or transfer to some undesirable post.

The obligations of distributive justice are incumbent on civil authorities as regards their official activities. They are obliged to apportion the goods and the burdens to the members according to their merits, capacities, and needs. As Father Connell, C. SS. R. observes: "a civil official authorized to appoint someone to a subordinate post is bound in conscience to choose the candidate whom he considers most deserving and most, capable of performing the required tasks so as to promote the common welfare."[41] Thus a police official who adopts as the sole norm for the distribution of promotions and appointments to favored posts the willingness of the individual to cooperate in corrupt practices is failing gravely in the matter of distributive justice. Certainly the common good does not dominate nor is it even considered, in the making of such appointments.

The official is also violating commutative justice toward the people when he appoints one who is unworthy. And when the basis for appointment or advancement is the willingness of the individual to cooperate in corrupt practices, those appointed are generally unworthy of the post and the superior, in appointing that individual, violates commutative justice.

The Public Prosecutor

Closely akin to the police officer in our particular study is the public presecutor[42] whose official duty it is to prosecute on behalf of the state or nation, criminal proceedings initiated by him or by other public officials or by a private person.[43] He

41. Connell, *op. tit.,* p. 70.

42. Such an official is variously described in different parts of the United States as "district attorney," "prosecuting attorney," "state's attorney," "public commissioner" and by other terms. The name is of little importance. Our interest is in the function which he serves.

43. *Restatement of the Law of Torts,* n. 656.

must institute proceedings before magistrates for the arrest of persons charged with or reasonably suspected of public offenses, when he has information that such offenses have been committed.[44] It is his duty to use all fair, honorable, reasonable, and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law.[45] It is easy to see what an important cog the public prosecutor is in the law-enforcing machine. Efficient and honest prosecution constitutes the very essence of an adequate administration of the criminal law.

Unfortunately the incumbent of this office has not always maintained the standards set for him. Thus this position, too, has sometimes fallen prey to graft. In fact, a friendly or incompetent[46] prosecutor is said to be essential for the maintenance of an effective and enduring graft system. His importance for the success of any such system rests on the fact that it is in

44. *Kittier* v. *Kelsh,* 216 N.W. 898, 899, 56 N.D., 227, 56 A.L.R. 1217.

45. *Holder* v. *State,* 25 S.W. 279, 281, 58 Ark. 473.

46. The Cleveland Crime Survey stated the following: The force of the municipal prosecutor's office consists of the chief prosecutor and six assistants. The survey bases its estimate of the quality of the personnel of the prosecutor's office upon the replies which it recieved from a questionnaire sent to all members of the bar in Cleveland. The general opinion was expressed in May, 1921, that the men were selected for political reasons and that only one or two members of the office were capable of performing the work. The most severe criticism made in the survey concerning the personnel of the office was of the general practice of giving out appointments to the prosecutor's office, seemingly for no reason except to satisfy the requirements of large racial or national groups in the community ... At the time the survey was made the county prosecutor's office had seven assistants on the criminal side, in addition to the prosecutor himself. These assistants were all appointed on January 1, 1921, which indicates the fact that when the political complexion of the prosecutor's office changes, the entire force changes. According to the judgement of the 92 lawyers who replied to the questionnaire previously mentioned, only two expressed an opinion that the prosecutors were possessed of the necessary ability and competence. Cf. Raymond Moley, *An Outline of the Cleveland Crime Survey* (Cleveland: The Cleveland Foundation, 1922), pp. 27-29.

his power to initiate or refrain from prosecution. Therefore, for the public prosecutor to carry out his part of the bargain in any case of unlawful collaboration with an offender, he merely has to follow a policy of inaction. To furnish a smoke screen for such spurious activity, he may vigorously prosecute persons outside the protected group. The public prosecutor is the chief inquisitorial agent and, of course, he is not likely to instigate any publicized inquiries into the conduct of his own office. This accounts in great measure for the extreme paucity of material on the inside operations of the public prosecutor's office.

In some instances prosecution is abated as a political favor.[47] This is accomplished by having some political figure, e.g. a district leader, intercede in behalf of a particular individual. The public prosecutor, if he is at all weak, will possibly give ear to such intercession, for he as well as most of his assistants are selected as a result of their political activities. In some instances the prosecutor's office has been an outright agent of a political machine, and a powerful one.[48] Where such domination exists one would not ordinarily expect that the public prosecutor would put in motion proceedings against his political associates because of their illegitimate activities in other branches of the government. There are, of course, many exceptions or it may be said—the situation described is the exception, not the rule. Some years ago in St. Louis, Joseph W. Folk was asked to seek the position of prosecutor. "Very well," he said, "I will accept the nomination, but if elected I will do my duty. There must be no attempt to influence my actions when I am called upon to punish lawbreakers."[49] He fulfilled the office as he said he would much to the disgust of those who put him into office. On the other hand, a sensational

47. Cf. example of this in Lynch, *Criminals and Politicians,* pp. 219-223.

48. Cf. artièle by James Kerney, Jr. of the Trenton Times in "Will Hague Defeat F. D. R.?" *The Nation,* 156 (1944): 232-233.

49. Quoted by Lincoln Steffens, *The Shame of the Cities* (New York: McClure, Phillips & Co., 1904), p. 38.

case involving Governor Jackson of Indiana indicates the extreme measures which politicians will take, when pressed, to control the prosecuting office. It is said that Jackson and others had approached Governor McCray offering $10,000 and a guarantee of immunity from prosecution (he was accused of embezzling $50,000 from the funds of the state board of agriculture), if he would acquiesce to their request to appoint their nominee as prosecutor to succeed McCray's son-in-law.[50]

The Seabury Investigation in New York[51] brought to light the activities of Weston, the Deputy District Attorney of New York County assigned to the Women's Court. It is charged that during the period in which he was associated with that court he was instrumental in "throwing" six hundred cases and accumulated a tidy fortune in bribes. In Arizona recently an attorney general was convicted of conspiracy to violate state gambling laws on the grounds that he had accepted money from gamblers in exchange for protection.[52] The District Attorney, Asa Keyes, of Los Angeles County, California, was convicted of conspiracy with certain other persons to give and receive a bribe in order that the prosecution in certain cases would be conducted so as to free the defendant.[53] Such is the general pattern followed in similar instances.

It should be quite evident how intimately connected by force of circumstances the office of the public prosecutor and the police department can be—and that either for good or evil. Yet they are constituted as separate units and where there is a willingness to profit by corrupt practices on the part of both they may encroach on each other's graft and demand a share.

50. Cf. V. O. Key, *Techniques of Political Graft in the United States,* p. 296.

51. Seabury, *Final Report,* In the matter of Investigation of the Magistrate's Court in the First Judicial Department and the Magistrates Thereof, and of Attorney's-at-Law Practicing in said Courts (New York, 1932), p. 78-79.

52. *The New York Times,* November 23, 1947.

53. *People* v. *Keyes,* 103 Cal. App. 624 (1930).

There is this to be noted, however, that the police can do little to curb organized crime effectively (e.g. prostitution and gambling) without the aid of the public prosecutor, but the prosecutor may do much to embarrass a grafting police department.[54]

Obviously the public prosecutor grossly neglects his duty when he allows some personal motive to interfere with the prosecution of justice. The community looks to him to arrange for the arrest of individuals charged with, or reasonably suspected of, public offenses, when, of course, he has information that such offenses have been committed. In using his office for his own personal gain or for the advancement of the cause of his party he is seriously violating the trust placed in him. Legal justice demands that all the members of the state, both rulers and subjects, cooperate for the common good.[55] The measure of cooperation is to be determined according to the natural capacity of the individual and the role he has to fill in the civil organism. It is to be expected, then, that the public prosecutor should give full cooperation in working for the common good when his duties are so intimately connected with its procurement. Seriously to fail in this regard is to sin gravely against legal justice and there can be but little question that one who puts personal or party gain over the common good fails seriously.

Similar to the police officer, the public prosecutor usurps a power that is not his and consequently can sin against commutative justice. When he accepts a bribe to forestall prosecution he is selling immunity from the due process of the law.[56] He has infringed, for personal gain, on a right which belongs to

54. Cf. C. R. Atkinson, "Recent Graft Exposures and Prosecutions," *National Municipal Review,* I, (1912), 678.

55. Cf. *supra* p. 30.

56. The prosecutor, under such circumstances, would be guilty of compounding a felony in that he perverted public justice by bargaining to allow a criminal to escape, or by showing some favor to him for that purpose. Cf. *Words and Phrases,* VIII, p. 305

the state—namely, the right to indict and punish the offender. His first obligation is to restore the bribe and institute proceedings to bring the offender to trial. Ordinarily a public prosecutor should be able to do this without too much difficulty. If, however, that procedure is impossible, he must pay to the public treasury the amount he had acquired by encroaching on the rights of society. It is readily agreed that the immunity sold was something intangible, nevertheless, the individuals involved evaluated it as something worth money. Thus the money received in exchange for the immunity should be given as restitution.[57]

What is to be said of those cases in which the public prosecutor does not enrich himself but becomes the tool of a political machine? It should be noted that the public prosecutor who allows himself to be putty in the hands of politicians can be just as much bound by commutative justice as is his associate in office who accepts a bribe. The obligation of commutative justice stems, of course, from the contract or *quasi-contract* entered into when the office was accepted by the incumbent. Here, however, there has been no money evaluation put on the immunity granted at the request of some politician. Yet the public prosecutor is failing in his duties and should make restitution from his salary in proportion to his neglect of duty. This should be paid to the public treasury or, if this be impossible, it should be used for some pious cause.

It is difficult to determine just what amount must be paid in restitution. It might be suggested, however, that an amount could be arrived at from a consideration of the number of cases the public prosecutor handled in a year. Suppose, for example, that he acted on two hundred and twenty cases in the course of a year and failed to prosecute in eighty cases due to the influence of his political associates. His salary as public prosecutor was six thousand dollars a year. Thus he received twenty dollars a case, if it is figured on a *pro rata* basis and sixteen hundred dollars would have to be paid in restitution.

57. Connell, *op. cit.,* p. 87.

Of course, seldom if ever will all the cases handled by the prosecutor over the period of a year have the same merits. The relative merits of the cases would also have to be taken into consideration. Moreover, if his neglect results in giving a criminal freedom to continue a career of injustice, the prosecutor will be bound to restitution in regard to the victims of this injustice, as a cooperator.

The Judge

The Canons of Judicial Ethics state that the judge should be "indifferent to private political or partisan influences; he should administer justice according to law, and deal with his appointments as a public trust; he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity."[58] For the most part our judiciary in all jurisdictions—federal, state, and municipal—has measured up to the great dignity and responsibility of its office. Probably no branch of the government is looked upon with such respect and this can be attributed, not only to the very function of the court, but also to the manner in which that function has been carried out in the past.

No branch of the government stands in greater need of men of principle endowed with wisdom and prudence than the judiciary. For on the judgment of any one of these men may depend the property, the livelihood, the good name, the liberty, or even the life of the members of the community within his jurisdiction. Whether by election or appointment only those truly qualified should be given such a position in the community.

At times, however, men have aspired to and have received appointments to judgeships lacking the integrity that should be had in a judge. This happens more often in our lower courts where in petty criminal matters the judges of police courts,

58. *Canons of Professional Ethics, Canons of Judicial Ethics* (Chicago: American Bar Association, 1937) p. 38, n. 34.

municipal courts and other similar lower courts are in a position to favor political leaders in cases in which their constituents are involved. The judge may be influenced through appeals to his sympathy but more often he is moved by requests from the man who controlled his appointment or election, and more important his re-appointment or re-election. The clerk of the court may be the link between the political organization and the court because of his more or less intimate relationship with the judge.

Aware of the possible harmful influence of gifts on the impartiality of the judge the *Canons of Judicial Ethics* prescribe that "a judge should not accept any presents or favors from litigants, or from lawyers practising before him or from others whose interests are likely to be submitted to him for judgment."[59] The majority of legal codes forbid a member of the judiciary to receive gifts and Canon 1624 of the *Code of Canon Law* forbids it in the case of ecclesiastical judges. However, it sometimes happens that a judge will not only readily accept gifts but will even allow his decision to be influenced by the acceptance of an out and out bribe. Thus he may receive a bribe to render a decision that is already due the litigant in justice or he may accept it to give an unjust verdict.[60] In each case his conduct is reprehensible.

A judge should be "diligent in endeavoring to ascertain the facts"[61] in a particular case and his decision should be based upon those facts and not upon any external pressure. "Courts exist to promote justice, and thus to serve the public interest."[62] But the public interest is not being served if the judge

59. *Ibid.* n. 32.

60. In the first case there is no consideration, for the contract for "an act or forebearance required by a legal duty that is neither doubtful nor the subject of honest and reasonable dispute if the duty is owed either to the promisor or to the public, or, if imposed by the law of torts or crimes, is owed to any person" is not sufficient consideration for a contract. Cf. *Restatement of the Law of Contracts,* n. 76a.

61. *Canons of Judicial Ethics,* p. 29, n. 5.

62. *Ibid.,* p. 28, n. 2.

allows himself to be swayed by some personal gain or by partisan demands. He therefore violates legal justice if he subordinates the service of the common good to some personal aim. He is also under oath to fulfill the duties of his office and consequently sins against the virtue of religion when he fails to do so.

The judge is also obligated by reason of a contract. He is bound in commutative justice to fulfil] the duties expected of one in his office. When he fails, as he does when he accedes to the request of some political leader, he should compensate for his neglect of duty by returning to the public treasury a pro rata part of the remuneration he receives for his services. He has no just title to his full salary when he does not perform all his duties conscientiously.

When the judge accepts a bribe he sins gravely,[63] for in such cases the sentence is given in consideration of the bribe received. If the bribe was received or exacted for the rendering of a just decision, the judge must make restitution to the one who has paid the bribe. The judge, in virtue of the office he holds, is obliged to render a just sentence and therefore he is not at liberty to accept a bribe to do something that he is already obliged in justice to do by reason of some prior obligation.[64] Thus he has no just title to the bribe.[65] The same would be true if there was some doubt about the justice of a case. The judge could not accept a bribe from the party that he favored.[66]

When the judge has accepted a bribe to render an unjust decision he should return the bribe before he has imposed sentence thereby rescinding the pact that he had with the

63. Priimmer, *op. cit.,* II, n. 157.

64. "Judex igitur, qui ex justitia tenetur justas ferre sententias, certe restituere tenetur pretium acceptum pro justa sententia ferenda: et hoc etiamsi acceperit, non ab una ex partibus, sed ab extraneo, puta illius amico, familiari."—St. Alphonsus, *Theologia Moralis,* 1:8 IV, a. IV, n. 216.

65. F. Hurth, S. J., *De Statibus* (Romae: In Aedibus Pont. Universitatis Gregorianae, 1946—Ad usum privatum), n. 139.

66. *Ibid,* n. 216.

briber. He is then free, of course, to render a decision according to the law and the facts in the case independent of any undue external influence. If the unjust sentence has been passed and the judge is still in possession of the bribe, most moralists would allow him to retain it maintaining that it is a *contractus turpis.*[67] However, the judge would be obliged to repair the damage inflicted on the party in whose favor the decision should have been given.[68] In this case "the judge's obligation is secondary to that of the person who won the case unjustly."[69] The ideal solution, if it could be arranged, would be to have the individual unjustly awarded the decision surrender his unjust gain to the other litigant and in return he would receive back the bribe that he had paid to the judge. Where such an arrangement fails the judge stands to lose more than what he obtained through the bribe.

Where it is a criminal case, namely, the State versus the offender, the solution is somewhat different. Should the judge acquit a man whom he knows to be guilty[70] because he has been paid to do so, he must make restitution to the public treasury to the extent of the bribe received. The basis for this is the selling of immunity. The judge by his acquital gives freedom to one apprehended for an offense against society. He grants him immunity—for a price. It is not within his power to sell immunity—he is on the Bench "to administer the law and apply it to the facts."[71] Inasmuch as he has encroached on the rights of the law he must turn over the money he acquired to the public treasury for it is the price of the immunity agreed upon by the parties involved. If he should repent before he had actually acquited the man, he should return the bribe and

67. Thus Prümmer, op. *cit.,* II, n. 157; Heylen, *De Jure et Justitia,* I, p. 447; Merkelbach, *op. cit.,* II, n. 636 c.

68. Cf. Prümmer, *op. cit.,* II, n. 157.

69. Connell, *Morals in Politics and Professions,* p. 35.

70. The knowledge of his guilt having been derived from the evidence presented in the trial and not merely from private sources.

convict the man according to the evidence presented in the court. Saint Augustine, speaking of judges, wrote, "when they sell unjust and false judgments and testimony which must not be sold even if they are just and true, then surely money is taken much more criminally when given criminally even though by persons giving it willingly."[72] Antonius adds that he is bound to restore what was received because in receiving it unjustly he acts in a manner contrary to his office.[73] Ordinarily, once a man is acquitted, it is impossible to bring him to trial again for the same offense[74] and, then, the judge must make restitution to the government. It should be noted that, if the criminal continues to commit crimes as a result of his freedom, the judge, who failed to convict him because of a bribe, is 0 material cooperator. Inasmuch as the judge was culpable in releasing the man the effect, i.e. the committing of additional crime, will be *culpabilis in causa*. The judge sins against the virtue that is violated in the criminal's sin and at the same time against charity since by convicting him he would have been able to impede the sins.[75]

Taxes and the Question of Immunity

Situations in which immunity is sold are not confined to our police and law enforcement departments. There are representatives of other government agencies who have sought personal profit at the expense of the duties of their office. We shall consider two types: the tax assessor who, for a consideration, places a low assessment value on taxable possessions and

72. "Cum judicia, et testimonia, quae nec justa et vera vendenda sunt, iniqua et falsa venduntur, multo sceleratius utique pecunia sumitur, quia scelerate etiam quamvis a volentibus datur."—Epistle CLIU, Cap. VI, n. 23: *CSEL,* 44, p. 423, Goldbacher.

73. Cf. Paul G. Antonius, S.J., *De Obligationibus Specialibus Certorum Statuum et Officiorum, TCC,* vol. XVI, col. 1256.

74. Referred to in American civil law as double jeopardy and in common law as non *bis in idem*.

75. Cf. Merkelbach, *op. cit.,* I, n. 489, c.

the custom's inspector who is illegitimately paid to permit taxable merchandise to enter the country free of import duty.

Taxes play an important role in the financing of government—federal, state or municipal. The state[76] has the obligation of maintaining and promoting the common good. Possessed of this obligation it must have the right to the means necessary in order to attain this end. "The sovereign right vested in every state whereby it may requisition the services and goods of its citizens for the public good is called the taxing power."[77] In its more restricted sense, the taxing power denotes the power of the state to levy taxes. A tax may be defined as "a compulsory contribution to the government, imposed in the common interest of all, for the purpose of defraying the expenses incurred in carrying out the public functions, or imposed for the purpose of regulation, without reference to the special benefits conferred on the one making the payment."[78]

The tax to be paid is determined usually on the basis of income or/and property holdings. These are considered direct taxes.[79] Thus anyone with an income over a certain minimum, having made the deductions allowed or provided for by law, is obliged to pay a tax amounting to a specified percentage of his net income. Property is taxable according to its

76. State is understood here in the wide sense as meaning the governmental structure of a community.—Cf. Jean Dabin, *Doctrine Générale de l'État* (Bruxelles: Etablissements Emile Bruylant, 1939), n. 6.

77. Crowe, *The Moral Obligation of Paying Just Taxes,* p. 7.

78. *Ibid.,* p. 14-15. The most acceptable definition given by moralists, according to Father Crowe, is that offered by De Lugo: "Whatever the subjects or members of the state must contribute for the common usefulness and for the public necessities."—("Illud intelligitur quod subditi seu membra reipublicae ad communem utilitatem et publicas necessitates ex obligatione contribuunt." Cf. *De Justitia et Jure,* disp. XXXVI, sec. I, n. 1.) This definition admits of an interpretation which would include in the notion of a tax, customs, liquor taxes, etc. imposed for the purpose of regulation.

79. There are other types of special taxes e.g. gasoline tax, sales tax, luxury tax, liquor tax, etc. but we will not consider them here.

valuation which is determined by an officer whose duty it is to put an official valuation on property which it is called on to contribute to the public revenue.[80] Inasmuch as this valuation is often difficult to determine precisely, there is a wide range of administrative discretion which may be subject to abuse.

The fundamental types of graft in tax administration are bribery and extortion. The pressure exerted on the tax official is intended to relieve a particular individual of his share of taxation and thus to transfer it to others. Officials assessing the tax to be paid may be bribed in a variety of ways to reduce the amount of tax required. Payments may be made through the splitting of fees with "tax experts" who act as intermediaries between the person seeking the reduction and the assessor, through campaign contributions made by favored tax payers, through other disguised forms of bribery or through an out-and-out cash payment. The basic technique, as Key[81] points out, in any case is bribery, regardless of the particular mode of payment adopted. It may some times happen, however, that the taxing official may increase arbitrarily the amount of the tax to be collected. Such instances take on the semblance of extortion or perhaps more precisely intimidation in some cases—the object being to stimulate bribery.

No matter how conscientious the taxing officials may be, no matter how well intentioned, there will always be some dissatisfaction. But it is when the taxing official is subject to outside influences in the determination of individual valuations that the grossest forms of injustice occur.[82]

80. *Kuhlman* v. *Smellz,* 33A, 358, 171 Pa. 440.

81. Key, *Techniques of Political Graft in the United States,* p. 166.

82. We exclude from our consideration cases of tax avoidance and evasion. By avoidance is understood the utilization of all exemptions, exceptions and loop-holes in the law in a legal but perhaps highly technical way. Evasion consists in eluding the tax officials by some subterfuge or other so as to make one's self liable to the criminal laws. They are not our concern for in neither case is graft involved—graft must involve official complicity.

In the individual cases of assessment where some sort of arrangement is made between the taxpayer and the tax assessing official the presence of graft is easily discernable. The operation of the tax machinery in Chicago, before its reorganization, provides an example of graft in the tax assessment administration.[83] It is said that anyone desiring to have his tax assessment adjusted more to his liking could approach one of the eight assessing authorities through the proper intermediary. In many instances various attorneys had contacts with the assessor that they did not hesitate to use in behalf of a client in order to have their taxes reduced.

A former member of the board of assessors in Chicago was brought to trial for irregularities in connection with the performance of his duties. His salary as assessor was $9,000 a year and the government sought to prove that over a period of three years (1926-1928) he had a net income of over $270,000. The principal witness for the prosecution was W. A. Wieboldt, millionaire department store owner. He testified that he had paid $42,774.16 in return for "tax adjustment services."[84]

As already intimated it is not always a question of there being a financial profit here and now. There have been cases where one desiring a reduction in taxes directed business to the assessor in some other field of endeavor. Thus, a lawyer who was a tax official built up a stupendous clientele while in office and acquired a fortune.[85]

In still other cases the illicit actions of the tax assessors have been used to reward loyal party members and those who have made notable campaign contributions. Unfortunately, in our political system, there are far too many interested in politics, not for what they can do for better government and the com-

83. Cf. H. D. Simpson, *The Tax Situation in Illinois* (Chicago: Institute for Research in Land Economics and Public Utilities, 1929), p. 69 sqq.

84. *The Chicago Tribune,* November 23,1929: Quoted by Key, *op. cit.,* 171.

mon good, but for what such participation in politics will bring them personally. Substantial reductions in assessment values have been, at times, a means of compensating in part for their political services.

The income tax inspector may also fail in his duties for he, too, can be the recipient of a bribe. Inspectors, for example, have accepted bribes to influence their action in regard to failure to file income tax returns.[86]

It is readily admitted that it is almost impossible to enact tax laws that will not result in some inequalities.[87] But what is to be said of a situation where, despite the efforts of the legislator to be just, an assessing official brings about untold injustice in an effort to benefit himself? There is no question but that he seriously violates distributive justice.[88] As an official, it is his duty to cooperate with the state in allotting the public burdens in due and equitable proportion. Taxes are a public burden and, consequently, according to distributive justice, should be levied in due and equitable proportion. There is no ‘‘due and equitable proportion" in evidence if, despite the prescription of the law, the assessor takes to himself the prerogative of determining valuation of property, not on the basis of current actual or true value, but instead using as a norm benefit to himself personally or to his party. The equality demanded by distributive justice is one of geometric proportion,[89] or, as we have chosen to call it, proportional equality.[90] In the question of taxation all authors admit that

86. *McGrath v. United States,* 275 F. 294 (1921).

87. “In praxi est moraliter impossibile, ut revera singuli cives stricte iuxta debitam proportionem ad tributa adigantur.”—Prümmer, *op. cit.,* I. n. 292.

88. Furthermore the party unduly burdened because of the injustice of an assessment is deprived of a constitutional right, namely that given in the first section of the Fourteenth Amendment: “ . . . nor shall any State deprive any person of life, liberty, or property, without due process of law.”

89. S. Thomas, *Summa Theologica,* II, II, q. 61, a. 2.

90. Cf. *supra,* p. 38, n. 50.

there must be a proportion between the tax and the financial abilities of those who pay the tax. "The term that is universally used to express the basis of the ethical idea of distributive justice in taxation is "faculty" or "ability/' with the Germans "ability to pay" (Leistungsfahigkeit)."[91] This must be regarded as distinct from the benefit principle that was held as the basis of taxation by some economists. The general idea underlying this theory is that political basis which assumes that a tax is a payment for a service rendered by the state to the individual. That is, the basis of the tax is assumed to be a "service" or the "benefit" from a service; and hence it is concluded that the tax payment should be made in accordance with the "service" or the "benefit" received.[92] Some economists who have accepted the benefit principle have followed Adam Smith in making it equivalent to ability. That is, ability is determined by the benefit received, the benefit determining the ability. But this view of ability begs the question; it gives a new term but not a new basis.[93]

The moralists also teach that the ultimate basis of apportioning a tax is the ability of the citizen to pay. Thus, De Lugo, in outlining the conditions required for a just tax, writes:

> The third condition, which is required, is the geometric proportion that must be observed in imposing a tax: that namely, if there is imposed a necessity not common to all, but one that is a necessity to some, those, in the first place, are burdened to whom that necessity pertains: and if these are not able, it may be demanded from others, in as much as members of the same body ought to come to one another's aid. If the necessity is common, all jointly, and as far as it can be done, are equally burdened. Equality, I say,

91. Stephen F. Weston, *Principles of Justice in Taxation* (New York: Columbia University, 1903), p. 171.

92. Cf. Crowe, *op. cit.,* pp. 24-25.

93. Cf. Weston, *op. cit.,* p. 165 and 171.

> by equality and geometric proportion, so that those who have greater resources, pay more, and those who have less pay less.[94]*

This proportion is unjustly impaired when an assessor fails to be conscientious in his duties toward the members of the community.

Furthermore it must be noted that the tax assessor does more than violate distributive justice. He has an obligation, by reason of his office, not only to the individual citizens but to the state, and this latter obligation is one of commutative justice. The official is bound in commutative justice to care for the common good according to the purpose of the office which he fills. In respect of the common good the purpose of the office of the tax assessor is to determine equitably the valuation of property for the levying of taxes to defray the expenses incurred in carrying out the public functions. Not to assess property at its proper valuation, that is to undervaluate it, is to deprive the state of income that is depended upon for the expenses of government.

Answering an objection regarding the possibility of a violation of commutative justice on the part of one designated by the state to distribute the common goods, De Lugo writes:

> I answer, that distributor sinned against each justice: against distributee justice towards the subjects who have a less strict right, and against commutative justice towards the state, to whom he owes, by reason of contract,

94. "Tertia conditio, quae exigitur, est proportio geometrica in tributi impositione servanda: ut scilicet, si ad necessitatem non omnibus communem sed aliquorum imponitur, ii primo loco graventur ad quos necessitas illa spectat; iisque non potentibus, ab aliis exigatur, quatenus membra eiusdem corporis debent sibi invicem subvenire. Si vero necessitas est communis, omnes communiter et quoad fieri possit, aequaliter graventur. Aequalitas, inquam, aequalitate et proportione geometrica, ut ii, qui majores vires habent, plus solvant, et qui minores minus."—De Lugo, *De Justitia et Jure,* disp. XXXVI, sec. II, n. 23.

> the faithful distributing of the common goods, and to which the state has a strict and proper right.[95]

Just as the state has a strict and proper right to the faithful distribution of the common goods so too she has a strict and proper right to the faithful distribution of the common burdens. Thus when the tax assessor does not faithfully distribute the public burdens he is violating commutative justice and must make restitution to the state.

It is difficult to determine just how much damage is done through the corrupt practices of such officials. The source of the difficulty is the amount of variation in the determining of valuation. For example, in one state, it has been charged that "in the majority of municipalities the assessors attempt to evaluate property at from 70 to 85 per cent of what they consider to be current actual or true value."[96] If such is the general practice, the unjust damage to the state could be estimated for any particular case. To illustrate: If the true value of a piece of property is $10,000, according to the practice just mentioned the assessed value would be not less than $7,000. With a tax rate of twenty dollars per thousand of valuation the tax for the year would be $140. Now suppose the assessor was approached and agreed, for a consideration, to assess the property at $5,000. The tax would then be $100 and the state would be unjustly deprived of forty dollars. The tax official is obliged to make restitution for that amount. The obligation to make restitution is grave when the matter, according to the absolute norm, is grave.[97] In addition to the direct tax not received,

95. "Respondeo, illum distributorem peccare tunc contra utramque justitiam: contra distributivam quidem adversus subditos qui habent jus minus strictum, et contra commutativam adversus rempublicam, cui ex contractu debet fidelem dispensationem bonarum communium, et ad quam respublica habet jus strictum et proprium."—De Lugo, *op. cit.,* disp. I, sec. III, n. 48.

96. New Jersey State Chamber of Commerce *Research Bulletin* n. 102, p. 6.

97. Cf. *supra,* p. 53.

Merkelbach says, the official also ought to restore a pro rata part of his salary for his negligence.[98]

Whether the transaction has as its basis a bribe, a favor, a debt of gratitude or whatever else it might be, in each case the tax official is exceeding the powers of his office in granting partial exemption from taxation through low assessment values. Exemptions, if there be any, are given by the tax law itself and not through the ministration of the tax assessor. Taking this power to himself, the tax official is, in a sense, selling an immunity, partial at least, which is not his to sell. The restitution demanded is the equivalent of what the government was deprived of through the abuse of its prerogative.

The primary obligation of making restitution rests upon those who bribed the tax assessor to underestimate the value of their property. They violated, by unjust means, the right of the state treasury to receive a just tax[99] and consequently they must pay the entire amount that was fraudulently withheld. Should they fail in this obligation to make restitution the tax assessor, as a cooperator in defrauding the government, must make restitution. The tax assessor also has a primary obligation of restitution to the state arising from the maladministration of his office.

The restitution that is to be made should be paid to the government that was deprived through the maladministration of the tax assessor or collector—thus to the federal, state or municipal government. If it cannot be paid to the government then it should be given to charity.[100] This seems to be more acceptable in the present day, even though moralists have often suggested it in the past, because of the increased activity

98. Merkelbach, *op. cit.,* II, n. 630.

99. Merkelbach, *ibid.*

100. One would be justified, for example, in making restitution by means of a donation to some pious cause, if payment to the public treasury would result in the man losing his position. In order to conceal identity in such cases some governments have a department in their treasury known as the "conscience fund."

on the part of the government in fields that have heretofore been cared for by private agencies. Of course, where it can be done, the best solution would be to return to those who gave the bribe whatever had been received and adjust the assessment value to what it should be.

As in the case of most public officials, the tax assessor is bound by an oath of office. In this oath the assessor swears to execute the law faithfully. It is interesting to note that in addition to the usual oath of office the statutes of the State of Texas[101] prescribe a special oath for tax assessors:

> Every tax assessor and deputy tax assessor, in this State in addition to the oath prescribed by the Constitution of this State, shall, before entering upon the duties of his office, take and subscribe to the following oath: "I..... ., tax assessor (or deputy tax assessor, as the case may be) in and for..... County, Texas, do solemnly swear that I will personally view and inspect all the real estate and improvements thereon subject to taxation, lying in said county, that may be rendered to me for taxation by any corporation or individual, or by their agent or representative, as fully as may be practicable, and that I will, as fully as is practicable, view and inspect all other taxable property in said county rendered to me as aforesaid: that I will to the best of my ability make a true estimate of the cash value, the market value of such property, if such property has a market value, and if it has no market value, then the real value of all such property, both real and personal, on the first day of January next preceding; and that I will make up and attach to each rendition assessment sheet made up and sworn to by the said property owners, their agents or representatives, a true assessment and valuation of said property, together with a memoranda of all facts which I may learn bearing upon the value of said taxable property, and that I will make all possible inquiry relative to the true value of such property; and that I will attach said memoranda and statement of facts that I may ascertain as aforesaid to the said assessment sheets of the respective property owners. That I have read and understand the several provisions of the Constitution and laws of this State relative to the valuation of

101. *Vernon's Texas Statutes* (1936), art. 7214.

> taxable property, and that I wil] faithfully do and perform every duty required of me as a tax assessor (or deputy assessor) by the Constitution and laws of this State, so help me God.[102]

As in the case of the police officer, the tax assessor not only violates his promise when he fails to live up to the duties of his office, as he does when he undervaluates a piece of property to favor the owner for one reason or another, but he also sins against religion because of his oath.[103]

Custom Duty

In addition to the direct taxes that we have been considering there is one instance of a regulatory tax that deserves mention, namely, custom duties—the taxes on the importation and exportation of commodities. The purpose of such taxes is not only to increase the revenue for the state but principally to safeguard home trade.

To enforce the tariff regulations the government maintains a staff of custom inspectors connected with the Bureau of Customs. It is their duty to inspect all merchandise entering the Country and to collect the appropriate duty on taxable articles. Sometimes they are unduly influenced by importers or their agents to neglect their duties in this regard. In an investigation[104] conducted many years ago the evidence collected "seemed to justify the belief that 'nearly the entire body of subordinate officers in and about the custom house' were in one way or another in the habitual receipt of emoluments from importers or their agents."[105]

102. Quoted in M. G. Toepel, *The, Assessment of Property for Ad Valorem, Tax Purposes in Texas Cities* (Austin, Texas: The University of Texas Publication, August 15, 1939), pp. 67-68.

103. Merkelbach, *op. cit.,* II, n. 630.

104. Secretary of the Treasury, House *Miscellaneous Documents,* n. 18, 37th Congress, 3rd Session (1863), pp 5-6.

105. Key, *op. cit.,* p. 179.

In another case employees of a sugar company were convicted on a charge of manipulation of government scales installed to weigh incoming raw sugar. In the trial there was testimony offered that the company's cashier occasionally paid sums of money of undisclosed amounts to customs inspectors on their docks. The fact that the government weigher must have had knowledge of the fraud is indicated by the testimony of one of them to the effect that he had observed a strange wobbling of the scale's beam. Asked why he did not report it, he answered, "*I* didn't want to commit suicide, did I?"[106]

The port of New York was divided into five weighing districts, each in charge of a United States weigher. It was charged that three of the five weighers could be bribed. Assistant weighers returned the false weight and the resulting profit was divided equally between the importer and the assistant weigher. One half of the assistant weigher's share was paid to the foreman weigher who split with the weigher in charge of the district. The weighers in on "the fix" with the aid of an officer of the surveyor of the port were able to assign the "right" men to weigh under-invoiced cargoes.[107]

In each of the examples mentioned the customs inspector was negligent in his duties. It is his duty to inspect the merchandise and to exact the duty required on the importation of such articles. In neglecting to do so he is violating commutative justice and must make restitution to the federal government. The amount that is to be restored must be determined by the sum he received as a bribe and the amount of duty he neglected.[108]

Where there has been a division of the spoils between the assistant weigher and the importer each must make restitution

106. Key, *ibid.*, p. 181.

107. *House Document,* n. 901, 61st Congress, 2nd Session (1910); *Senate Document,* n. 60, 61st Congress, 1st Session, (1909).

108. Cf. p. 104.

for the proportion that he has received.[109] Those who knew of his activities and were willing to conceal them for a share in his profits, namely, the foreman weigher and the weigher in charge of the district, must make restitution according to what they had received.[110] The officer in the office the surveyor of the port is also a cooperator and must make restitution to the extent in which his cooperation was efficacious.

Granting Immunity In Administration

We must consider now a type of trafficking having slightly different implications, namely the selling of immunity in the administrative phase of the government on the part of building inspectors, health department officials, and various licensing agencies. The abuses occurring in these agencies usually concern themselves with the effort of some individual to avoid compliance with an ordinance pertaining to the administrative functions of a particular agency or the attempt, on the part of the representative of the agency, to extort money for something that he should grant, without any personal gain, according to the terms of a particular ordinance.

The Building Code

First let us treat of the abuses occurring in violation of a building code. Every city of any size has a building code in which there are elaborate ordinances dealing with minute details of construction, with methods of protection against fire hazards, structural safety, and protection against unsanitary conditions. In the majority of instances, even with the best of intentions, it is difficult for a building code to keep pace with the progress of events in the building trade. For this reason, then, some of its regulations are uncertain, unduly burdensome in some cases, and too precise about trivial details resulting in a great deal of pressure being exerted on the

109. "Si autem utrique diviserint, singuli pro eorum parte quam retinent in solidum et primo loco."—Merkelbach, *op. cil.,* II, n. 630.

110. Prümmer, *Manuale Theologiae Moralis, II, n.* 108.

inspectors and other officials by contractors, business men, and building owners. Contractors, because of hazardous and highly competitive business, are willing to pay in order to cut costs and to prevent delay and annoyances in the execution of their work. Business men selling materials and other building supplies want acceptance or approval of their products for construction purposes on the part of building inspectors. Owners are often more than willing to pay a bribe in order that a violation be overlooked so that they can save a greater amount of money.

The Chicago Civil Service Commission[111] made a thorough inquiry into the administration of the building department of that city. The method they followed was to reinspect some five hundred buildings. Approximately eighteen hundred violations of the ordinances were found in these structures. The customary attitude of the inspector of the building department could be gleaned from the fact that in many instances the contractors and building owners, thinking the investigators members of that department, offered bribes as a more or less matter of course. The commission also became aware of a situation in which "many inspectors consistently and regularly 'held up' *innocent* owners and contractors for amounts varying from $5 to $200 for tolerating certain *violations.*"[112] The issuance of a permit for construction work or alterations was a signal for some one to go out and extort a fee on some pretext or other.

The Seabury Investigation in New York uncovered a practice which "is illustrative of the newer and more subtle techniques of pecuniary control."[113] Instead of direct bribery, in this particular instance, the power of inspection and control over buildings of the fire department was utilized to derive profit for certain political leaders. The idea, then, is to favor the per-

111. *Report on the Department of Buildings* (1912): cited by Key, *op. cit.,* p. 327.

112. *Report on the Department of Buildings,* p. 17.

113. Key, *op. cit.,* p. 324.

son exercising power by turning business to him or to some concern in which he has an interest.

The Monroe Lamp and Equipment Company was an agent of the General Electric Company and was bound to sell their equipment at the prices specified by the manufacturer. The president of the concern was a district leader and had been a Deputy Fire Commissioner. It was charged that because of his political connections the company secured business by giving assurances that violations found in buildings owned or occupied by its customers by any department of the City of New York, and in particular by the fire department, would be taken care of.[114] On a capital of $50,000 the Monroe Company, according to their bank accounts, did a business of $5,549,457.88 in the period between 1925 and 1931.

The purpose of such regulatory measures, as found in building ordinances, is to protect the common good. This can no more clearly be brought to mind than by some tragedy occuring because of the failure of some contractor or owner to comply with the building regulations.[115] It is the duty, then, of the building inspector or fire inspector, as the case may be, to fulfill the duties of his office and see to it that the provisions for health and safety are observed. This is an obligation in commutative justice toward the public.

114. Samuel Seabury, *Intermediate Report,* Investigation of the Departments of the Government of the City of New York (1932), pp. 145-151. The correspondence of the General Electric Company officials indicated that this company had taken business away from their other agents in the city.

115. The Coconut Grove fire in Boston may be cited as an example of this. In this case doors were installed in a faulty manner and improper locks were used.—Cf. *The Coconut Grove Night Club Fire, Boston, November 28, 19i%* (Boston: National Fire Protection Association, 1943), pp. 15-16. The Hotel Winecoff Fire in Atlanta, Goergia may also be cited in which unprotected floor openings, inadecpiate exit facilities and light wooden doors with transoms were the major conditions contributing to the large loss of life.—Cf. *Hotel Winecoff Fire, Atlanta, Georgia, December 7, 194-6* (Report by South-Eastern Underwriters Association, Atlanta, Georgia, and The National Board of Fire Underwriters, New York), p. 15.

Consequently, if a building or fire inspector accepts a bribe to tolerate a violation he is violating commutative justice. He is selling immunity from an ordinance of the city. This power is not given to him as a building inspector and hence he is usurping a power that belongs to the legislative branch of the city government. His first obligation is to return the bribe and force compliance with the building code or the fire regulations as the case may be. Otherwise, he must make restitution to the city treasury for the violation of a right of the community. The money for which that right was sold should be given as restitution.

Ordinarily it is the obligation of the building inspector to enforce all the provisions of the building code. However, as we mentioned, there are some regulations that are unduly burdensome. It is clear enough that no bribe may be accepted by the building inspector so that he may overlook their enforcement. The question may be asked whether the inspector is permitted to tolerate violations of this type, without any personal gain, when the safety of the community is in no way jeopardized? In actual practice that which is done in violation of unduly burdensome regulations is often an improvement in structural safety. It would seem that the building inspector could justifiably use *epikeia* in such instances, that is, a benign interpretation of the law in a particular case against the word of the law, but according to the mind of the legislator.[116] Thus the building inspector occasionally may permit something to be done in violation of an unduly burdensome provision of the building code providing every measure is taken to ensure the public safety and if he is reasonably certain that the lawmaker would not reasonably have intended to extend the law so far.

For the building inspector to extort money from innocent contractors and building owners on the pretext that they are

116. Epiqueia definiri potest "benigna iegis mitigatio in casu particulari contra legis verba, sed secundum mentem legislatoris."—Lucius Rodrigo, *Tractatus de legibus,* p. 292.

violating some provisions of the building code (which actually are not being violated) is outright theft—highway robbery. Full restitution must be made to the person from whom the money was extorted. This obligation is grave when the matter is grave—the relative norm or the absolute norm should be used depending on the circumstances in a particular case.[117]

Zoning Ordinances

Rather closely allied to the various activities of the building department is the zoning board. The zoning ordinances are also of a regulatory nature, intended to restrict the type of structures that can be erected in a particular area. This is for the common good even though at times the ordinance may seem to favor particular interests. Speaking of the common good,[118] we quoted a passage from Monsignor Cronin in which it was said that even though an individual may benefit by something provided by the state, it really is, properly speaking, a "good" of the whole community, and the providing of it is wholly outside the capacity of individuals.

There have been many attempts made to obtain modifications of or exceptions to existing zoning ordinances and as might be expected bribery and extortion have not been altogether absent. A rather thorough inquiry was made of the operation of a zoning agency in that part of the Seabury Investigation pertaining to the New York Board of Standards and Appeals.

Seabury found that a Tammany Hall boss, a judge, was instrumental in obtaining variations in the zoning rules. His firm received at least $200,000 in fees from persons applying to the Board of Standards and Appeals in such cases. He frankly admitted that it was his custom to call the Chairman of the Board to his office in Tammany Hall and "discuss with him cases which were then actually pending before, and awaiting determination, by the Board of Standards and Appeals."

117. Cf. *supra,* Chapter III, p. 52 sqq.

118. Cf. *supra,* p. 16.

Now, while it was quite true, as the judge swore, that his own cases were not discussed it was only because it was so arranged that another attorney was retained to handle the clients that came to his office. A case disclosed by the Investigation will illustrate the pattern that was followed. A builder wanted an alteration for the height limits of a building. A member of the judge's law firm suggested that he engage a particular attorney, Boyle by name. According to Seabury, the builder placed $35,000 in escrow to be paid when the Board of Standards and Appeals granted the exception sought. When the relief was granted the attorney withdrew $25,000 and paid it in cash to a member of the judge's firm. As was agreed $5,000 was returned to the builder and $5,000 was left to compensate the attorney of record—Boyle.[119] With the transactions made in cash payments, thus avoiding written records, the identity of the recipient was concealed.[120]

There was another individual, for example, who secured for his clients, between June 1922 and December 1929, from the same Board, 244 permits for garages in restricted areas; 52 permits for gasoline stations which previously had been refused by the Fire Prevention Bureau; 187 alterations of orders under the labor law, the fire prevention rules, or the building and tenement house rules; and various and sundry other permits.[121] The man testified that he had not bribed any public official but there had been some instances of fee-splitting. Whether it be a bribe or fee-splitting is only accidential. The important point is the fact that the Board or some member of it received payment or the promise of payment for a decision favoring this individual's client.

119. Samuel Seabury *Intermediate Report,* pp. 9-18; William B. Northrop and John B. Northrop, *The Insolence of Office, The Story of the Seabury Investigation* (New York: G. P. Putnam's Sons, 1932), pp. 194-197.

120. Cf. *supra,* p. 5.

121. Figures given by Norman Thomas and Paul Blanshard, *What's the Matter With New York* (New York: The Macmillan Company, 1932), pp. 49-50.

It is the usual custom to have a zoning board or commission to review the individual cases that come up requesting relief from some existing zoning ordinance. The duty of the board, then, is to render a decision much in the same manner as a judge would do. The judgment to be made is whether or not in this case the petitioner, on the merits of the facts presented, has a justifiable claim to the relaxation of a particular ordinance in his regard. The norm, the measuring stick that must be used is the common good which must take precedence over the individual good—particularly where it is a matter of serious import.

In the first example cited, the Judge[122] may or may not have split the fee he received with the Chairman of the Board of Standards and Appeals. It may have been a case of taking dictation from a political boss in order to insure his re-appointment but perhaps he gained in a pecuniary manner too. On the supposition that he did, it constituted a bribe. No matter what the justice of the decision the bribe must be paid out in restitution. If the decision was justifiable it was due to the petitioner and in that case the chairman had no just title to the bribe and he must return it to the petitioner. While it is true what he sought was contrary to an existing ordinance, it must be remembered that the Board is empowered to grant exceptions when reasonable causes are presented—that is its *raison d'être*—and the personal gain of the members of the Board must not be the determining factor. On the other hand, if the decision of the board was unjust because of the harm that would ensue, an injustice is being done to a third party, namely the community. The particular case in question was a request for removal of the height restrictions on a building. The ordinance specifying the limit of the number of floors in a structure in a certain area could be enacted for many reasons. It might have been because of the proximity of an airport, insufficient water pressure in case of a fire, presence of a vein of

122. Surely the action on the part of the judge is reprehensible but it is not precisely our concern here inasmuch as he was not acting in his official capacity as a judge.

quicksand or sundry other reasons that would constitute a high building a hazard to the safety of the community. With such a real danger present the Board could not justifiably grant the request of the petitioner. To sell that permission in consideration of a bribe is a violation of commutative justice. The Board sells something that they have no right to sell because their first obligation is to protect the common good. The bribe, therefore, should be returned to the petitioner and the permission unjustifiably granted should be recinded. If this cannot be done because action has already been taken on the permission granted, then, restitution should be made to the public treasury. The amount to be paid should be governed by the bribe received, for the permission was exchanged for that amount.

It is possible to conceive of a situation in which the petitioner must pay in order to obtain a favorable decision on a matter that is not adverse to the common good. The implication, of course, is that if he did not make the payment the decision would not be made in his favor—the amount extorted, then, furnishes the motive for granting the permission desired. Under such circumstances the zoning board ought to have rendered a favorable decision independent of any financial consideration, for the petitioner was not requesting anything contrary to the common good. The money extorted, then, should be paid back in restitution to the petitioner, for prior to the demand for payment by the board or any of its members he had a right to favorable consideration.

The same solution would be adequate for the cases in which garages and gas stations were permitted even over the refusal of the Bureau of Fire Prevention. Not enough information is given about the circumstances of the other requests granted. This much is certain, however, if the request should have reasonably been granted the Members of the Board cannot retain the bribe because they would be selling something which they were bound to render by virtue of their official position. If the request was granted and should not have been because it would jeopardize the common good, then a strict right of the community was violated and restitution must be made to the public treasury.

Ordinances Pertaining to Public Health

Generally solicitous of the common good, all governments—federal, state, county and municipal—are interested in the health of the community. Each community has its health department reinforced with a group of ordinances designed to protect the members of the community so that their health will not be jeopardized by the unscrupulous practices of commercial concerns. Unfortunately, however, the desire for personal gain has occasionally made representatives of the health department equally unscrupulous. Of course, it is the exception but nevertheless from time to time a case of this nature is discovered.

Milk supplies and other food products are supervised and inspected so that they conform to certain standards in order to safeguard the public health. For example, a permit is required to ship cream into New York City. One of the large milk concerns was anxious to get such a permit and, it is charged, a representative of the company offered Harry Danziger, the milk "Czar" one dollar a can for all cream shipped into the city.[123] He secured the permit through Thomas Clougher, secretary of the Commissioner of Health of the City of New York who got a sanction for it on the representation that there was a shortage of cream in the city. Ninety per cent of the commission was paid to Clougher, Danziger swore, because "there were others he had to take care of." Danziger paid others including the superintendent of milk inspectors and various subordinate inspectors in connection with various angles of his business.[124]

123. It might be questioned whether the money was offered or extorted because the whole affair was brought to light when Danziger fell into a trap laid by milk dealers unwilling to pay him for protection and was arrested in the act of taking a bribe.—Cf. John Bakeless, "New York, The Nation's Prodigal" in *Forum,* October 1928, pp. 599-611.

124. *People* v. *Clougher,* 158 N.E. 38 (N. Y. 1927).

The investigation disclosed that one official with a comparatively small salary had banked about $50,000 the first year and from $70,000 to $80,000 the next. Another official, fearing to deposit such a suspiciously large sum, hid $92,168 in an attic.[125]

Adulterated milk was sold which had unfavorable effects when fed to babies. The Health Commissioner had evidence that some of the milk had been adulterated with water from a dirty stable hose. From the circumstances it appeared that all this became possible because of the pecuniary relationships between the racketeers and the milk inspectors.[126]

The inspector of the health department has been entrusted with a grave responsibility. Society expects of him more than the average amount of diligence in the performance of his duties and above all it demands in him an integrity that precludes any thought of subordinating the common good to any personal gain. By reason of his office the health inspector is bound in commutative justice to serve the best interests of the community in the matters given to his care. Grave negligence in this regard is a grave sin and brings with it the obligation of repairing the damage done.[127] It would seem that the health inspector would be bound to make restitution for the harm foreseen resulting from his culpable negligence.

But over and above this the health inspector permits milk or other food products to be brought into the city and put on the market even though the standards provided by the health ordinances are not met. He is selling immunity. The ordinances are given him to enforce in order that the health of the members of the community will be protected, to this extent at least, that they will not be exposed to unnecessary dangers. The power to revoke any part of the health code rests with the community

125. Bakeless, "New York, The Nation's Prodigal," *loc. cit.,* p. 602.

126. D. T. Lynch, *Criminals and Politicians* (New York: The Macmillan Co., 1932), pp. 158-172.

and the power to use persona] discretion in an individual case is not given to the health inspector. Out of a motive of personal gain, then, he sells a right which belongs to the community. His first obligation is to return the money he received as a bribe to the source from which it came, and then press charges for the violation of a city ordinance against the individual or company that sought to circumvent the law. Possibly it is too late to do this; the product may have been put on the market and sold already. Then, the bribe must be paid to the public treasury, for it is the evaluation, agreed upon by both parties to the agreement, for which that right was exchanged. If, however, the community, as a result of his negligence in the performance of his duties, suffers to a degree in excess of what he had received as a bribe, he is obliged to repair all the damage that he foresaw even in a confused manner.

Furthermore, legal justice would oblige the health inspector too, for he is supposed to labor for the welfare of the community, independent of the contractual nature of the duties of his office. The public official is bound to employ his authority, not for his own benefit, but for the advantage of the society. The concern of a ruler for the health of his community is of no little importance[128] and one whose sole charge is to protect this health through the enforcement of already enacted ordinances must consider his services as a distinct contribution to the common good. There is a grave obligation on his shoulders to use his authority properly, and not to do so in a matter of importance would be a mortal sin against the law of God.

128. Cf. St. Thomas, *On lhe Governance of Rulers,* Book II, c. II and III, pp 112-119.

CHAPTER VI

PATRONAGE

With the presidency of Andrew Jackson (1829-1837) the "spoils system" took its place in the American political scene and it has continued down to our own times, but to a lesser degree.. The term was first used by Senator William L. Marcy in 1832—"When they are contending for victory they avow their intention of enjoying the fruits of it. If they are defeated, they expect to retire from office. If they are successful, they claim as a matter of right the advantages of success. They see nothing wrong in the rule that to the victor belongs the spoils of the enemy." (It refers to the distribution of jobs in the public service to the supporters of the party in power.[1] The selection of officials is made on a party basis as distinguished from a purely merit basis. The idea of rotation in office—the intention being to educate citizens in the principles of government—was not new, for Jefferson had advocated it but not on a party basis. Washington and Jefferson believed in the training of young men "selected for genius and virtue" for the government service, by the colleges and universities, which should educate them in the principles of political science. They saw, then, a need for trained personnel even though the organization ot government was simple compared to what it was to become./ Jackson, however, felt that "The duties of all public officers are, or at least admit of being made, so plain and

1. L. D. White, "Spoils System," *Encyc. Soc. Sc., VII,* p. 301, The expression is also used authoritatively to describe the profit of many types which the abuse of official power may extort, not only through appointment but also through the award of contracts, the grant or refusal of licenses, the enforcement or non-enforcement of the law and other means. In this sense the meaning is substantially equivalent to graft.

simple that men of intelligence may readily qualify themselves for their performance; and I cannot but believe that more is lost by the long continuance of men in office than is generally gained by their experience."[2] As a result of this conviction and the attitude of the men around him, the "spoils system" seemed to take firm root in the federal government and, like a weed, was almost impossible to eradicate. "Spurred on by the example of the federal government, where for the next thirty years a rapid alternation of parties settled the spoils system deep in the political habits of the. nation, the states and cities generally followed suit."[3] Demands, however, on the part of the great body of the people have brought about concessions on the part of those in control. Then too, the rapidly expanding and increasingly technical functions of government call for special abilities and capacities that cannot always be supplied through the channels of patronage. The result has been the co-existence of the two systems, namely, one on the basis of patronage, the other on merit. As Mosher and Kingsley have pointed out: "Among the progressive nations of the world today, the United States stands almost alone in its quiescent acceptance of the present status of part spoils and part merit."[4]

Hn 1883, with the passage of the Pendleton Act, the merit system was launched in the federal government but applied only to about 14,000 workers, chiefly in the post office and

2. James D. Richardson, ed., *A Compilation of the Messages and Papers of the Presidents* (1908), Vol. II, p. 449.

3. L. D. White, *toe. cit.,* p. 303.

4. William E. Mosher and J. Donald Kingsley, *Public Personnel Administration* (New York: Harper and Brothers Publishers, 1936), p. 15.

customhouses.?; The President, however, was authorized to extend the new plan by executive order, and the great expansion of the federal classified service is due chiefly to the successive orders of each president from Grover Cleveland to the present day. itlongress extended the merit system to the Foreign Service^ by the Rogers Act of 1924, and to other agencies, including the Social Security Board." But the chief executive is mainly responsible *Or* the growth of the merit system from an original micieus of 14,000 to an army of 532,000 positions in 1937.8

practice of ousting thousands of public employees with a change of administration and of filling their places with loyal Democrats or Republicans, as the case may be, can result in the utilization of public funds to finance the party and compensate politicians,*f*

> With our immense resources on the one hand and relative isolation on the other, we have long been able to surmount

5. It is quite true that as early as 1853 by an act of Congress an effort was made to secure the appointment of qualified employees but it was ineffectual in its application. In 1871 (16 Stat. 514; 5 U.S.C. 631) the President was authorized: "to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of the service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries and may prescribe their duties and establish regulations for the conduct of persons who may receive appointments in the civil service."—M. Barris Taylor, *History of the. Federal Civil Service* (Washington: United States Civil Service Commission, 1941), pp. 40-41. This remains in effect today as Section 1753 of the Revised Statutes but at the time of its enactment it lacked sufficient appropriation to carry on the work and support from Congress was absent.

6. Although the Foreign Service is not part of the classified service, the Civil Service Commission, as a courtesy to the State Department, conducts the written examinations.

7. This latter is the largest agency ever set up from its beginning strictly under civil service laws.

>8. Leonard D. White, *Introduction to the Study of Public Administration* (New York: The Macmillan Company, 1939), p. 282.

> whatever.inefficiencies and wastes may have flowed from the practice of compensating professional politicians with public offices, whose incumbents owe a primary loyalty to the party in power and a secondary one to the public. To this conflict of loyalties must be added the wastes due to an intermittent turnover, in which officials of more or less experience and a modicum of competency because of it, give way to a new crop of novices.9

However capable the government may have been to withstand the defects of such a system it was an injustice to the public whom it served and it is becoming more evident that the public service of our day cannot stand the strain of wholesale replacements subsequent to an election.10

/To the politician "jobs" are part and parcel, a *sine qua non, 01* a political machine. They are a means of building around him a group of loyal workers who owe their election or appointment to him, a group of men who may be rewarded by promotion or punished by discharge or other appropriate method of discipline. To these men he looks for continuance of his power, and to him they look for opportunity and advancement.

^Obviously there are many opportunities of making the public service subservient to party or personal needs. There is, at times, the tendency to make party, factional or personal service the test to qualify for a position, abandoning any attempt to select competent men who may render public as well as party service. Under such conditions many appointments are made ofpersons wholly or very largely unfitted for the duties of the particular position. The average politician would find it hard to say to one of his constitutents: "Sorry, you don't have the qualifications, I can't give you the job which you say you need. I know you worked hard for me during the campaign but you are not good enough for this job. See me some other time."

9. Mosher and Kingsley, *op. cit.,* p. 15.

10. Cf. Leonard D. White and T. V. Smith, *Politics and Public Service, A Discussion of the Civic Art in America* (New York: Harper and Brothers Publishers, 1939), p. 123.

The higher ranking members of the party receive the more important public positions but even those of lower rank must have minor jobs for at least a part of the time with duties not too onerous to prevent their performing the work of the party. Where sinecures were not available in sufficient quantity it has occasionally happened that employees would hire substitutes to perform their duties at a lower rate than what they themselves receive and in this way they were free to care for the more pressing duties of the party.[11]

(Of the 1,999,183[12] federal employees approximately 130,000 are subject to removal and reappointment with a change of administration but, of course, the actual turn over is not that high. The power to appoint these officials is vested in the president and the department heads[13] but only a few can be personally appointed by the persons possessing formal legal authority to do so. Members of the president's party in Congress and state committeemen are the persons to whom the president turns for advice in making the majority of appointments.[14] The Congressmen or the local heads of the party organization, then, are able to use this opportunity to their own advantage or to that of the party.)

11. Public officials will admit that there have been instances of this from time to time, but only where political machines have become very corrupt.

12. Civil Service Commission figures as of December 31, 1947. Cf. *The New York Times,* February 10, 1948.

13. *Constitution of the United States,* Art. II, Section 2.

14. Some Congressmen have taken it upon themselves to volunteer advice in such matters and have expected, as a matter of prerogative, that their advice would be accepted without change. To enforce this prerogative the custom of "Senatorial Courtesy" was built up, which enables a Senator to prevent the confirmation to a federal position in his State of any nominee he declares personally obnoxious to him. When this formula is invoked, almost invariably all Senators of the objector's party refuse to vote to confirm the appointment of the nominee.

In state, county and municipal governments the merit system has made less progress. Fifteen States[15] have adopted it but in the counties the patronage system maintains almost complete sway.[16] Some cities have municipal civil service commissions and, in general, those cities that have adopted a city-manager form of government have excellent records in handling personnel problems.

/One of the important functions of party patronage is party finance and organization.[17] To perform the normal and legitimate functions of the party, it requires a tremenduous effort which is forthcoming, in large measure, only for reward, immediate or eventual. To secure the largest possible number of votes jobs are distributed to leaders, or nominees of leaders, of geographical and functional groups in an effort to link to the party whatever control these leaders have over their followers. As far as practicable every group and section must be appeased by the granting of "recognition." "With infinite patience and infinite skill this web is woven back and forth, until it covers every point on the political map."[18] Thus the politician is expected to pay a formidable part of his party's debts by appointing its creditors to public office or employment. I

^It should not be concluded that all the appointees of the patronage system are the unfits and discards—failures from the competitive world. For "party committees may and often do endorse and secure the appointment of men and women of

15. New York, Massachusetts, New Jersey, Maryland, Ohio, Illinois, Wisconsin, Colorado, California, Kansas, Arkansas, Tennessee, Michigan, Maine and Connecticut have merit systems. The last mentioned five adopted it as recently as 1937. New Hampshire, Vermont and Virginia have a partial merit system. *-

16. There are a few exceptions in New Jersey, Massachusetts, Los Angeles County, California and Hamilton County, Ohio.

lî.tzff. Valàimer O. Key, *Political Parties and Pressure Groups* (New York: Thomas Y. Crowell Company, 1946), p. 335.

lit. Charles Edward Merriam, *The American Party System* (New York: The Macmillan Company, 1922), p. 105.

first class ability, genuinely interested in the public service, blessed with a capacity for hard, sustained work and an abiding interest in the goal toward which they are working."[19] Of course, when appointees are of such a calibre there is little doubt that patronage can be handled consistently with the public interest. An example offered of a happy compromise between patronage and the public interest is that of the Resettlement Administration.[20] This organization was exempted from civil service and the Democratic National Committee promptly appointed a representative to "advise" the Administrator. The latter, anxious to build up an organization which could handle its huge job, negotiated an agreement with the Democratic National Committee. The terms of this compact gave the Administrator a free hand in *selecting* his top personnel, while it gave to the Committee a free hand in *nominating* to the lower and more numerous ranks. Here, however, the agreement provided that the party nominee *must meet the standards* prescribed by the Resettlement Administration.[21]

(gome of the contentions of the advocates of the patronage system are in themselves laudable. It seems quite reasonable that posts of authority and responsibility, particularly policy determining posts, which are to be conferred by executive appointment or by a department head, be distributed to members of the party in power. In this way the public service is benefited to the extent that harmony among those in administrative positions will result in greater unity, and strength in governmental endeavors. One elected on the basis of a

19. White-Smith, *Politics and Public Service,* p. 86.

20. An agency organized by Executive Order in 1935. It was transferred to the Department of Agriculture and its name changed to the Farm Security Administration in 1937. The functions of the Farm Security Administration and of the Emergency Crop and Feed Loan Division of the Farm Credit Administration were merged into a new agency, the Farmers Home Administration in 1946.—*United States Government Manual*—1947, 2nd ed. (Washington: Government Information Service, Office of Government Reports), p. 274.

21. Cf. White-Smith, *op. cit.,* p. 87.

"platform," e.g. the President, should be given the opportunity to choose his immediate aides in the execution of that "platform." "Furthermore, a public executive who sincerely believes that the political tenets of his party are most beneficial for the welfare of the country is quite consistent in regarding adherence to those tenets as an important factor toward the common good, rendering the party members much more worthy of public office than the members of the opposition?"[22] Thus St. Thomas says, "It may happen . . . that a circumstance of person makes a man worthy as regards one thing, but not as regards another."[23] The "circumstance of person" at issue here would be the adherence to the political tenets of the party. The obligations of distributive justice would not seem to be violated, then, *if* a federal or state official selected subordinate officeholders for positions of authority and responsibility from the ranks of his own political party.

However/it must be borne in mind that even though it may be legitimate to select an adherent of one's own party for a position of authority it would be wrong to select among the candidates available a candidate less capable than others. To select one less worthy is to make the appointment depend on the person^

> If, in conferring something on someone, you consider in him not the fact that what you give him is proportionate or due to him, but the fact that he is this particular man (e.g. Peter or Martin), then there is respect of the person, since you give him something not for some cause that renders him worthy of it, but simply because he is this person. And any circumstance that does not amount to a reason why this man be worthy of this gift, is to be referred to his person ... It follows, accordingly, that respect

22. Connell, *Morals in Politics and Professions,* p. 71.

23. "Contingit . . . aliquam conditionem personae facere eam dignam respectu unius rei, et non respectu alterius." St. Thomas, *Summa Theologica,* H, II, q. 63, a. 1.

of persons is opposed to distributive justice in that *it* fails to observe due proportion.[24]

Because *if* fails to observe this due proportion Merkelbach says *it is* "directly *and per se* opposed to distributive justice."[25] Favoritism or respect of persons is a sin of its nature mortal.[26] This, of course, is applicable to appointment to office as well as to the distribution of other phases of the common good.

(The public official's first obligation is to the state, for society has a strict right that it be administered well.[27][28] *It is to this end, then,* that the more worthy should *fye* appointed to available positions^) As De Lugo points out (these offices were instituted not as rewards but for *the utility* and the advantage of the state in order that *it be* governed well.[23]' Yet in the actions of some of our officials there is more evidence of a desire to reward than to ensure the welfare pf the state in their appointments.) DeLugo holds that in practice it is necessary that the common opinion *be followed,* namely, that the more worthy candidate be appointed on account of the grave evils that *commonly* befall the common *good when* candidates who appear worthy prove, in fact, to be unworthy.[29] j Sanchez,[30]

24. "Si autem aliquis consideret in eo, cui aliquid confert, non id propter quod id quod ei datur, esset ei proportionatum, *vel* debitum, sed solum hoc quod est iste homo (puta Petrus, *vel* Martinus), hic est acceptio personae; quia non attribuitur ei aliquid propter aliquam causam, quae faciat eum dignum, sed simpliciter attribuitur personae: ad personam autem refertur quaecumque conditio non faciens ad causam, propter quam sit dignus hoc dono ... sic ergo patet, quod personarum acceptio opponitur justitiae distributivae in hoc, quod praeter proportionem agitur."—St. Thomas, *ibid.*

25. Merkelbach, *op. cit.,* II, n. 617.

26. Petrus Lumbreras, O.P., *De Justitia* (Romae: Angelicum, 1938), n. 115.

27. Vermeersch, *Theologiae Maralis Principia—Responsa—Consilia,* II, n. 471.

28. Cf. *De Justitia et Jure,* disp. XXXIV, sec. II. *n. 19.*

29. Cf. *ibid., disp. XXXIII, sec. II, η.* 21.

30. Thomas Sanchez, S.J., *Consilia seu Opuscula Moralia (Lugduni:* Sumptibus lacobi Prost, 1635), lib. II, cap. 1, dub. XXXVI, η. 14.

referring to the selection of the more worthy candidate, argues that inasmuch as the offices in question pertain to the common goods they ought to be given to the subjects according to the laws of distributive justice, observing the due proportion toward whom it is due. A remark of St. Thomas is to the point:

> As regards the conscience of an elector, it is necessary to elect one who is better, either absolutely speaking, or in relation to the common good. For if it is possible to have one who is more competent for a post, and yet another be preferred, it is necessary to have some cause for this. If this cause have anything to do with the matter in point, he who is elected will, in this respect, be more competent; and if that which is taken for cause have nothing to do with the matter, it will clearly be respect of persons.[31]

DeLugo contends that there is no obligation to apply the principles of distributive justice because primarily the ruler (princeps primario) has the duty of ruling the state, and if he himself is able to provide for all the necessities of the state he should not appoint other officials. Nevertheless *de facto,* inasmuch as he is not able to do it all himself, he takes on assistants who do what he himself *per se* would do, if he were able. The ruler would satisfy his obligations if he exercised his office worthily and well, therefore he is bound to elect only those who are worthy.[32] Inasmuch as subordinate officials function as aides to the ruler to supply for his limitations, the positions cannot be considered as rewards to be distributed to the subjects and hence are outside the scope of distributive justice. (The official is entrusted with the government of the state and he ought to appoint assistants because of his obligation to the state, not on account of any obligation to the assistants to be chosen. Since his obligation is toward the state—that it be governed well—he ought to appoint the better applicant. This is a debt of fidelity toward the state. However, as we shall maintain later, in a democracy, as we know it in the United States today, it is difficult to imagine such posi-

31. St. Thomas, *Summa Theologica,* II, II, q. 63, a. 2 ad. 3.

32. De Lugo, *op. cit.,* disp. XXXIV, sec. II, n. 19.

' Γi

H

tions being outside the scope of distributive justice. It must be remembered, too, that the reasoning of the theologians in this period was influenced by their idea of an absolute monarchy.

Lessius maintains that one who appoints a person who is worthy in preference to one who is more worthy, because of friendship or some other private feeling, would not sin against the more worthy individual, nor against justice[33] towards the state, but he would sin against due fidelity towards the state. For one undertaking the administration of something tacitly obliges himself to two things: namely, to avoid damage, to which he obliges himself not from justice, but from fidelity, and to foster the advantage of those whom he serves as far as he is able to do so conveniently; for this seems to be the mind of the one entrusting it, and of the one undertaking the administration of the same.[34]

Using the same example as Lessius, namely that of an overseer, DeLugo, claims that even to impose a grave obligation out of fidelity to advance the good of his master, to the extent that he is able to do so conveniently, is without sufficient foundation. For, he argues, in such contracts or *quasi* contracts, the contracting party never regularly obliges himself, even tacitly, to the application of most exacting diligence, especially when the contract is an advantage to each of the contracting parties. In such a case the overseer obliges himself only to human, morally sufficient diligence. Therefore one who undertakes the administration of the state does not tacitly oblige himself to use exceptional diligence but to employ common, human diligence. Continuing the analogy, he says that the overseer is obliged to administer prudently in the way the owner would. From experience, we know that the owner, if he were doing the hiring, would not always select the best. Sometimes he would prudently select a worthy applicant over one more worthy because the job was sought by a friend or because the individual was worthy due to some private merit. Similarly a ruler might at times prudently select officials, as long as he can do it without detriment to the community, on the supposition that he is acting in the same way the state itself would act if it were electing the officials itself.[35]

33. Here he would seem to be referring to commutative justice.

34. Leonardus Lessius, S.J., *De Justitia et Jure Caeterisque Virtutibus Cardinalibus* (3rd. ed., Antwerpiae: Ex Officina Plantiniana, 1612), lib. II, c. XXXII, dub. III, n. 16.

It is well to mention again that although DeLugo saw many reasons why an official might not be obliged in theory to appoint a more worthy applicant to a position, he still confessed that in practice the more worthy had to be appointed. It is the opinion that we feel obliged to hold too, because only in that way will the true interests of the common weal be served. The official ought, then, to select the more worthy solely on the basis of distributive justice, not absolutely, but from among those who are available.[36] That is to say no other element save the worthiness of the applicant should be a basic consideration.

It is interesting to note, however, that DeLugo would demand restitution to the community when losses occurred because of the appointment of one less worthy than another applicant. The one rule that he would have the appointing official have before his eyes in the selection of an applicant is "that from the selection of such an officer there will not follow inconveniences to the community, for which, out of justice and fidelity, he must provide suitable officials for the political end of that community."[37] The object then is to act so that the common good will better be served—an obligation imposed on every official in the conduct of his office. From this obligation

35. Cf. De Lugo, *op. cit.,* disp. XXXIV, sec. II, n. 20.

36. Merkelbach, *op. cit.,* II, n. 619.

37. "Ut ex electione talis ministri non sequantur inconvenientia in communitate, cui ex fidelitate et justitia debet providere de ministris aptis ad finem politicum illius communitatis."—De Lugo, *op. cit.,* disp. XXXIV, sec. II, n. 17.

stems the further obligation of restoring losses to the community. In the words of De Lugo:

> Provided that the opinion is true, that the elector is bound to select the more worthy at least from an obligation toward the community; some say, as we have seen, that there is no obligation of restoring to the state the losses from the selection of one less worthy; because that obligation was not from justice but from fidelity. However, I think it must be said logically, there is an obligation of restoring the losses to the community, for if there is such an obligation of selecting the more worthy, it will be from a debt of justice to the community, whose well-being the elector must procure. Hence in these cases, in which it is not permissible to elect the worthy by the omission of the more worthy, on account of the losses which occur, the obligations arises, speaking *per se,* of restoring the losses to the community if the office is given by the elector to the worthy, because by reason of his office he is bound to prevent those losses to the state.[38]

Of course, where one actually unworthy is appointed there is, first of all, a mortal sin committed by the individual who made the appointment and he is obliged to make restitution for the damage done. It is a mortal sin because, inasmuch as an appointment of an unworthy person always results in damage or injury to others, it is always sinful and, since it is grave matter, it is a mortal sin. It is mainly a question of material cooperation indulged in by the official when he appoints one that is unworthy. At times, however, it may happen that a choice must be made between two unworthy individuals, in

38. "Si vera sit sententia, quod elector teneatur ex obligatione saltern erga communitatem eligere digniorem: aliqui adhuc dicunt, ut vidimus, non esse obligationem resarciendi reipublicae damna ob selectionem minus digni, quia obligatio illa non erat ex justitia sed ex fidelitate. Ego tamen consequenter dicendum puto, esse obligationem resarciendi damna communitatis, quia si est talis obligatio eligendi digniorem, erit ex debito justitiae erga communitatem, cujus bonum debet elector procurare. Unde in iis casibus, in quibus propter damna quae oriuntur, non licet eligere dignum omisso dignori . . . orietur, per se loquendo, obligatio resarciendi damna communitati, si ab electore officium detur . . . digno, quia ex munere suo debebat damna illa reipublicae impedire."—De Lugo, *ibid.,* disp. XXXIV, sec. IV, η. 42.

such a case it would be lawful to appoint the less unworthy. Legal justice demands that the official administer the duties of his office in behalf of the state prudently and in a fitting manner.[39] He also sins against commutative justice for the official is *ex officio* obligated to take into consideration the good of the state and to seek to impede and ward off any evil. The source of this obligation is found in the contract or *quasi* contract which the official enters into when he receives the office and the duty is embraced in the scope of his salary. If he defaults in this obligation by selecting a subordinate official who is unworthy he sins mortally against commutative justice. He is under a weighty obligation, then, to refrain from positive cooperation in anything that might bring the state harm.[40] Consequently he would be bound to make restitution or see that it is made to the state for the damage that occurred because of the appointment he made. This applies not only to the head of the state but also to other officials who are empowered to appoint subordinates, for they also are expected to appoint in the same manner as their superior from whom they received the power and the commission.[41] Of course, the first obligation to make restitution belongs to the unworthy individual for he was the physical and immediate cause of the loss suffered under his bad administration. If he does not repair the damage, then the appointing official is obligated to do so, for he was the mediate cause. This presupposes that the unworthy individual was aware of his unworthiness. It could happen that he thought himself worthy and capable, while the appointing official knew or ought to have known the contrary to be the case. Under such circumstances the unworthy appointee will be excused from making the restitution because of

39. Cf. Sanchez, *op. cit.,* lib. II, c. I., dub. XXXVI, n. 1. De Lugo states that in appointing such a person he sins mortally against the fidelity which he owes to the state. This must stem from his obligations flowing from legal justice.

40. De Lugo, *op. cit.,* disp. XXXIV, sec. II, n. 9.

41. De Lugo, *ibid.*

invincible ignorance and the appointor will have the primary obligations of making restitution for the entire damage.[42] Even if the appointee was in invincible ignorance he would not be excused from restoring to the community his salary or a part thereof depending upon the inefficiency with which he fulfilled the position. His invincible ignorance would only free him from the obligation of making restitution for the damage resulting to the community from his incumbency.

As far as the individual citizen is concerned there is no strict right to any position of appointment in the state and hence no restitution is due unless there was a compact entered into in which case the individual in question would beget a strict right. Where offices are created solely for the benefit of the people no one man has any more intrinsic right to an official position than another. Offices were not created, as we noted

42. "Primo ergo mihi videtur, quod ille qui vendidit officium indignis, et minus idoneis, si illud scivit, vel debuit, et potuit, tenetur rescindere contractum, et venditionem: imo etiamsi ignoraverit insufficientiam, quam habebat ille, cui venditum fuit officium, quoniam iste tenetur ministros idoneos Reipublicae eligere, ergo ille in conscientia non potest retinere officium, qui idoneus non est, cum ergo ab illo auferendum sit officium, oportet quod ille pretium restituat, siquidem non sua culpa illi aufertur officium, cum ergo primo constat de insufficientia, oportet illi pretium restituere. Sed respectu damnorum, quae Reipublicae sequuta sunt, aliter est dicendum; et primo de Rege, seu Principibus, Ducibus, etc. qui dominium habent Reipublicae. Si enim Rex aut qui vendidit officium indigno, sciebat, aut potuit scire, illum non esse idoneum, tenetur Rex, aut qui ipsum elegit, restituere damna sequuta Reipublicae; ita tamen, quod tam ille, qui obtinuit officium, quam ille qui dedit, teneantur in solidum, sed in primo loco tenetur ille, qui cum se insufficientem videret, nihilominus negotiis peragendis se ingessit cum damno proximi, et Reipublicae, sed si ille non solvit, tenetur elector restituere illa damna, qui tamen obtinuit officium, illi manebit obnoxius restituere totum, quoniam qui officium habebat, fuit praecipua, et physica causa illius damni, secundum doctrinam quam posuimus c. 9 de restitutione. Si vero qui officium vendidit, aut elegit bona fide, putavit sufficientem esse illum quem elegit, non tenetur restituere damna, que sequuta sunt ex insufficientia illius, sed solus ipse tenetur, qui cum idoneus non esset, voluit negotiis quibus erat impar, se ingerere." Gabriel Vasquez, *Opera Omnia,* VIII, *De Beneficiis,* cap. II, ŋ. III, dub. XV, par. 107.

above, to give support to particular men at public expense. Officials should be selected on the basis of their qualifications in order to benefit most the common good. Yet,

> a fair chance of obtaining these offices and appointments may be regarded, especially in modern times, as one of the normal advantages of citizenship, so that he who is unfairly shut out is more or less the victim of injustice—Hence, it is but right that all citizens who are suitable have a fair chance of obtaining these offices, and that in the selection of candidates nothing but the merits of the case be allowed to weigh.[43]

From what has been said we would maintain that patronage—the selection of candidates from the members of the political party in power—is quite legitimate for positions of authority and responsibility, particularly those of a policy determining nature whether it be in federal, state, county or municipal governments. The reasons offered above[44] seem weighty enough to warrant it.

^However, when an appointing official makes party membership a qualification, if not the determining factor, in appointment in government service to positions that cannot be classified as ones of authority or policy forming in nature, it is quite likely that the appointing official offends against distributive justice. In the majority of instances the positions are doled out as rewards for work done for the party and the comparative worthiness of the individual as far as the qualifications for the particular job are concerned is given little consideration. This, in the mind of Saffit Thomas, is a question of respect of persons and consequently a violation of distributive justice. It happens all too frequently that a person who is qualified to some degree, but not nearly as well qualified as others that are available,[45]

43. Cahill, *The Framework of the Christian State,* p. 536.

44. Cf. text pp. 138-139.

45. Availability must be considered because it might very well be that the more worthy person is being kept for a more important position or is already engaged in work of a greater good to the community. Or it may be that acceptance would certainly not profit the more worthy person. Cf. Heylen, *De Jure et Justitia,* II, p. 817.

will be appointed solely because he or she is a faithful Democrat or Republican, as the case may be. ; Lessius notes that if there is not too much of a distinction between the ability of each applicant and the worthy is appointed in preference to the more worthy there will often be a mortal sin but not always.46*

Nor is it in conformity with the demands of distributive justice to make appointments because of the vote getting ability of the person in question. Selection on such a basis is not made for the better interest of the state but for a selfish interest—to keep one's self in office or one's party in power.

; In cases where there is equality as to the qualifications presented it becomes a question of policy. It may not be the recommended procedure to make political adherence the norm of selection, yet justice would not be violated. Because in the case suggested both have the same measure of qualifications—thus the state will be served just as well if either one is appointed and inasmuch as both are equally worthy no injustice is done to the one not selected. It would be far better in such cases, however, if some other factor was considered in the manner of appointment, for example, order of application, age, etc.

It is understandable that for many positions a period of training is necessary to acquaint the individual with the characteristics or the particular mode of operation of an office or agency. This is to be expected even if the individual possesses all the qualifications required for the position. However, if the appointment of a less worthy person meant that he had to be given a much more extensive course of instruction at public expense, in order to fit him for his duties, an injustice is being done 'to the state. Not only is the state suffering the expenditure required for the special training of the person in question but also in regard to the inefficiency resulting from his inexperience. In an individual case the damage done might

46. "Idem dicendum, si non sit inter eos magnum discrimen aptitudinis, ita ut hie non putetur notabiliter minus bene functurus munere, quam ille, cui praefertur, unde diximus in propositione, *saepe* peccare mortifere, non *semper.*" Lessius, *op. cii.,* lib. II, cap. XXXII, dub. III, ŋ. 22.

be slight but if much damage was done there would be a grave obligation on the part of the appointing official to make restitution for the damage foreseen.[47]

Naturally/jf the appointee is unworthy there is a mortal sin and an obligation to make restitution for the damage done. For example in one of our large cities a man was appointed as keeper of the public records at a salary of $6,500 a year.[48] The appointee could neither read nor write English and was consequently incapable of performing properly the duties connected with his office. There is no question but that the official was at fault in making such an appointment. Lehmkuhl maintains that:

> An unjust distributor of offices is obliged to make restitution or to see that it is made to society or to the community, if he appoints *unworthy* and *unsuitable* officials, and this as regards those losses which bad officials through their own fault inflict either on the community in general or its individual members whose care they ought to have undertaken in their positions. For these losses can be foreseen by the distributor, at least in a confused manner, and they were sufficiently forseen and indeed they were mediately produced by him, but as a true moral cause.[49]

The official, then, is guilty of co-operation in injustice by consent, namely, by his appointment of the unsuitable applicant, and is obliged to make restitution when he is the culpable and

47. Cf. *supra,* p. 144.

48. Cf. *The Business Value of the Merit System* (New York: National Civil Service Reform League, 1940), p. 3.

49. "Iniquus distributor officiorum erga societatem seu communitatem tenetur ad restitutionem vel faciendam vel curandam, si ministros *indignos* et *ineptos* eligit, idque quoad damna illa, quae mali ministri vitio suo intulerunt sive communitati in genere, sive singulis ejus membris, quorum curam suscipere in suo munere debuerant. Haec enim damna a distributore in confuso praevideri poterant et satis praevidebantur atque ab ipso mediate quidem, sed ut a vera causa morali, effecta sunt."—Augustinus Lehmkuhl, S.J., *Theologia Moralis* (8th ed., Friburgi Brisgoviae: Sumptibus Herder, 1896), Vol. I, η. 971.

efficacious cause of the unjust damage inflicted.[50] The amount of the restitution to be made must be determined according to the particular case.

The official making such an appointment would also act unjustly toward the worthy applicants for that position. For, although the first obligation of the appointing official is to consider the common good of the state and to make his selection of officials accordingly, he ought to regard the merit of the applicants because such offices at the same time possess some semblance of a reward[51] and may be an incentive for other members of the community to work for the common good.

Particularly in state, county and city governments, there have been instances where loyal party workers have been rewarded at public expense. Jobs have been manufactured, so to speak, for the occasion without any consideration being given to the public need or utility. The founding of such jobs and the appointing of a loyal party worker to such sinecures is an outright theft from the public treasury. A person, knowing that there was no benefit accruing to the state from the position he held and realizing that it was created merely as a reward for his loyalty to the party, could not in good conscience retain such a position but would have to resign. The appointing official deserves severe condemnation for his action. He sins mortally, for it is grave matter and he must make restitution or see to it that it is made. Ordinarily the amount of restitution would be determined by the salary received by the individual so appointed. If the individual did some amount of work of benefit to the state but the salary received was greatly out of proportion to the work done and was clearly in consideration of the person in question justice would demand restitution of the equivalent of a percentage of the emolument received. The position of the appointing official does not entitle him to distribute public funds according to his own whims.

50. Cf. Merkelbach, op. *cit.,* II, 313.

51. Vermeersch, op. *cit.,* II, n. 322.

Officials have been known to pad payrolls by which is meant the inclusion on the payroll of names of persons, who either are not employed at ail, or are doing only a nominal amount of work[7] An example that might be cited is the situation that prevailed in the sanitation department of one of our large cities. One of the principals in the case estimated that the city's loss in this one department amounted to ten million dollars over a period of thirty years. A foreman estimated his weekly gross income from illicit sources as $2,500, but he explained that he had to share so much with his superiors that his own share was only from $500 to $1,800 a week. Annually he had to hand over a total sum of between fifty and sixty thousand dollars to superiors. Part of this was obtained by padding payrolls of emergency employees—men not under Civil Service but called in to help out.[52] This, again, is a case of theft. Those who received the money must make restitution to the public treasury, each according to the amount he had received. Ordinarily that will be the extent of their obligation, but should such thefts result in ensuing damage (which they have at least indistinctly foreseen) they are obliged to repair it for they are possessors in bad faith. It seems almost unnecessary to add that the public official also sins gravely against legal justice when he disregards the welfare of the community by seeking his own financial betterment.

The Sale of an Office

(it has been said that "the outright sale of an office is bad politics."[53] Let it suffice to say that many are willing to transgress the principles of proper political procedure where a sufficient amount of money is involved. To the politican, it seems a poor practice because the party loses control over the individual inasmuch as the purchaser feels that he owns his office. Then too, the party loses a certain measure of popular support from the outright sale of an office./

52. Gf. John Bakeless, "New York, The Nation's Prodigal, I, The City of Qlorious Graft," *Forum,* LXXX (1928), p. 602.

53. Key, *The Techniques of Political Graft in the United States,* p. 49.

In a Mid-Western city a Mayor was convicted on a charge of a pre-election sale of the Board of Public Works for the sum of $14,500.[54] Even the exalted positions of judgeship have been sold. It is reported that one judgeship sold for twenty-five thousand dollars—"that being the current quotation for judicial nomination." In another instance, it is said, a lower court judge freely admitted: "I could be on the Supreme Court bench if I paid the party fifty thousand dollars."[55] However, a far more common occurrence is the sale of appointments lower in the hierarchy of officialdom, for example, to the police force or to the fire department or to some clerical position.[56] It has been reported that appointments to the police and fire departments have been sold for amounts ranging up to $4,000 each. If the money is not paid prior to actual appointment agreement is made to pay it within a certain period of time thereafter. Whether it be the police department or a clerkship in the city hall the procedure is essentially the same—pay the stipulated amount or one will not receive the appointment he seeks.

The State of Texas has taken a measure to avoid such practices, but how effective it is in its application is a question. Article 993 of the Texas Statutes as amended November 8, 1938 requires that every preson *appointed* or *elected* must take the following oath:

> I.....do solemnly swear (or affirm) that I will faithfully execute the duties of the office of..... of the State of Texas, and will to the best of my ability pre-

54. Cf. Maurice Early, "Indianapolis Mayor Faces Jail Sentence," *National Municipal Review,* XVI (1924), pp. 684-687.

55. Cf. Howard Whitman, "Behind the Black Robes," *Woman's Home Companion,* LXXV (1948), n. 2, p. 112. The author of this article maintained that the information contained in it was obtained from members of the judiciary and other sources considered reliable. If the facts are true, to demand money for judicial appointments would be extortion.

56. Cf. "Inquiry into Graft and Gaming Begun," *The New York Times,* April 3, 1946, p. 28; "Mayor, Police Head Indicted in Jersey," *ibid.,* May 15, 1946, pp. 1 and 29.

serve, protect and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not directly or indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money or valuable thing, or promised any public office or employment as a reward for giving or withholding a vote at the election at which I was elected. So help me God.[57]

kPGpe Leo XIII, in the Encyclical *Rerum Novarum* pointed out that "Among the many and grave duties of rulers who would do their best for their people, the first and chief is to act with strict justice—with that justice which is called in the schools "distributive"—toward each and every class."[58] This type of justice is concerned, among other things, with the equitable distribution of benefits among the members of the community. In our day positions in public life must be considered among the benefits to be equitably distributed. Thus, the Pope's words rightfully can be directed to officials who have it Within their power to make the appointments to position in the government service that they may apply the norms of distributive justice in this phase of their work.

In those cases in which a fee is demanded in order to receive an appointment, distributive justice is violated if an individual not as well qualified is selected. Selection, as has been said before, should be based on merit and not on the personal gain of the one appointing. If the candidate is worthy, extortion money must be restored to him because the appointing official was bound by his office to make the appointment without recompense. It is hard to conceive of equal qualifications in applicants for appointment to the police force, for example, but, if such a case should arise, some objective standard should be applied as a basis of selection. In the case

?. 57. *Constitution of the State of Texas,* Article XVI, Sec. 1. This would bé equally applicable to an appointment, if not more so. And, of course, as indicated, it has been extended by the State to appointed as well as elected officers.

58, *ASS.,* XXIII (1891), 656-657; Husslein, *Social Wellsprings,* I, p. 186.

of a policeman, age would be a good basis for a choice, because the type of work a policeman is called upon to do could be done better probably by a younger man.

When an unworthy applicant is selected restitution would have to be made to the community for the harm done. The official has the obligation of procuring the wellbeing of the community. He fails in this regard when persons without the proper qualifications and capabilities are entrusted with positions whose duties they cannot satisfactorily perform.[59]

For an official to demand money for an appointment to a job is nothing less than extortion. To be sure, it might not have the appearance of a demand but it is a question of one paying the fee requested or suggested or one does not get the position. The applicants have not a strict right to any positions that might be vacant and, of course, those who take advantage of their official position in this manner, maintain that what is given them is given freely—it is merely an effort on the part of the appointee to show his gratitude in return for the favor accorded him. The willingness to pay is not to be attributed to good will but rather to an undercurrent of unjust coercion exerted on the applicant by direct and indirect means. In the majority of instances it is a means to an end. The individual, eager to receive the job, accepts the necessity of paying a certain fee as the equivalent of a qualification for it and, in that sense, is willing to pay it or, at least, promise to pay it within a short period of time. Dr. Connell likens it to the ransom paid by parents distraught over the loss of their child and the possibility that some grave harm will befall him if the money is not paid.[59] No reasonable man would say that money was given willingly and not as a result of coercion. One obtaining money through extortion has no just title to the amount received in that manner."[7]

59. Cf. *supra* p. 144 sq.

60/Connell, *Morals in Politics and Professions,* p. 81.

Kinder certain circumstances, a man may be obliged to pay in order to secure a position. Would a man be morally justified in doing such a thing? It would be a case of material cooperation which we know is sometimes licit providing there is a sufficient cause and a proper intention. The man in question would be permitted to pay the amount demanded for a position if it could not be secured otherwise and he was aware that he possessed the proper qualifications for the position.

^n official does not have iron clad rules that he must follow. In his choice of appointees he is given a sufficient amount of discretion but he is not empowered to make personal profit the norm of selection. "By virtue of his office, he is empowered and obliged to choose them without making personal gain a condition of selection."[61] The state reimburses him, by means of a salary, for his services. Included in the services required of him, by reason of his office, is the selection of suitable candidates for positions in public life. Consequently, in demanding payment in return for an appointment he is taking money to which he has no just title. The entire amount received would have to be returned to the individual from whom it was taken. The obligation is grave providing the matter is grave according to the relative nornQ

"It is the duty of a public officer charged with making appointments to make the best appointments possible without reference to private interests."[62] American civil law, in conformity with this principle, maintains that "it is expedient that those occupying public office shall have such inducements as its emoluments afford for the faithful performance of their duties, a bargain to make a certain appointment or to influence the making of an appointment by such an official, or that an official will share the emoluments of his office with another, is invalid."[63] For the same reason, "a bargain of one who holds

61p0onnell, *ibid.*

62. Samuel Williston, *A Treatise on the Law of Contracts* (8 vols., New York: Baker, Voorhis and Co., 1938), vol. VI, n. 1730.

63, *Ibid.* Cf. *Restatement of the Law of Contracts,* vol. II, n. 560; *Corpus luris Secundum,* vol. XVII, Contracts, n. 219.

a public office or of one who is a candidate *for* such an office the emoluments of which are fixed by law, to take less than legal compensation is invalid."[64]

Payment of Tribute

An some instances, after appointment has been made, subordinates have been obliged to pay tribute in order to retain their jobs. The tribute is used either for personal profit or for party needs. It is maintained that the political machine in one of our large *cities, for* example, normally controls from three to four thousand political appointments and a pay roll tax for party purposes ranging from three to five *per cent* is common.[65] Some cities in other sections of the country have the same custom.[66] In a county of one of our Eastern states, the Case Committee reported that "a pro rata part of the salaries of public employees . . . is systematically collected for campaign purposes. The Committee was unable to ascertain the ultimate depository of this fund . . . "[66] Even in New York State, and its political subdivisions, where the most stringent prohibitions against the assessment system have been imposed by law,[67] it is said "voluntary" contributions are still

64. *Ibid.* Cf. *Restatement of the Law of Contracts,* vol. II, n. 565; *Corpus luris Secundum,* vol. XVII, n. 220; *Miller* v. *United States,* 103 F. 413.

60. Leonard D. White, *Introduction to the Study of Public Administration* (New York: The Macmillan Co., 1939), p. 288.

66. Case Committee Report, *Senate Journal* of New Jersey (1929), p. 1117, as quoted by Dayton D^/id McKean, *The Boss, the Hague Machine in Action* (Boston: Houghton Mifflin Co., 1940), p. 146.

67. "No officer, agent, clerk or employee under the government of the State of New York or any civil division or city thereof shall, directly or indirectly, use his authority or official influence to compel or induce any other officer, clerk, agent or employee under said government, or any civil division or city thereof, to pay or promise to pay any political assessment, subscription or contribution . . . and no person shall knowingly send or present any political assessment, subscription or contribution to or request its payment of any said officer, agent or employee."—*Laws of the State of New York,* 1909, Chap. 15, sec. 26, enacted as a part of original statute in 1883.

the order of the day.[68] Some years ago notices for such "voluntary contributions" were sent to school teachers in another Eastern city but over the notices in blue pencil was written "2 per cent." When they asked directors and ward bosses what to do, they were advised that they had "better pay." Those that sent less than the amount suggested, got receipts: "check received; shall we hold for balance or enter on account."[69]

The Federal Government seems to be comparatively free from this abuse. The United States Civil Service Act embodied an act of Congress of 1876 in which "all executive officers or employees of the United States not appointed by the President, with the advice and consent of the Senate, are prohibiting from requesting, giving to, or receiving from any other officer or employee of the Government, any money or property,.or other thing of value for political purposes."[70] In 1939 the Hatch Act to Prevent Pernicious Political Activity became law. It is designed to prevent coercion of voters in Federal elections and to prohibit active participation in politics by employees and officials of the executive branch. The only officials of the executive branch excepted from this prohibition are the President, Vice President, employees of the President's office, heads and assistant heads of the executive departments, and officials appointed by the President with the confirmation of the Senate who determine foreign policy or policy in the nation-wide administration of Federal laws.[71] In addition, the Act contains several provisions to prevent political activity by persons paid from relief funds and to protect relief workers against political assessments. In 1940 the scope of the Act was extended, by amendment, to include the personnel of State and local agencies whose principal employment is in connection with activities financed in whole or in part by

(^Mosher and Kingsley, *Public Personnel Administration,* p. 23.

159. Steffens, *The Shame of the Cities,* p. 220.

70. 19 Stat. 169 (1876), 44th Cong. 1st. Session.

71. Taylor, *History of the Federal Civil Service,* p. 133.

Federal grants or loans. Those excepted are: governors, lieutenant governors, mayors, elected heads of departments whose positions are not within any State or municipal merit system, and officers holding elective offices.[72]

Where money is demanded from job holders, as described, either for the personal benefit of the individual or for the benefit of a political party it is extortion and must be judged in the same manner as the demand for a fee made by an official as a requisite for an appointment. It cannot be contended that the sums demanded are freely given. No doubt, many of the persons who are so taxed would give donations for campaign purposes but here, in many instances, the retaining of one's job depends on it and consequently, "a voluntary contribution" is a misnomer.] The example of the school teachers is an indication of this. In the Case Committee Report a fireman testified that he was "hounded" until he quit his job because he refused to pay the assessment demanded.[73] The public official has no more right to use his authority for the purpose of raising funds for the party than he has for his own personal gain. Restitution, therefore, must be made to the individuals from whom it was exacted.

The same solution holds for those instances in which human misery has been used as a pawn to obtain funds for the party or for personal aggrandizement. In late years, stemming from the years of great unemployment, relief has been handled by public authority to a greater extent and the funds have come more and more directly from the public funds. This, of course, affords rich opportunity for discrimination along political lines in administration. Aid has been given to persons not entitled to it, excessive assistance may be given in some cases, or other violations and exceptions may be made to the rules on the demands of party workers. Such cases at times result in a "kick back" to somebody.

72. *Ibid.,* p. 134.

'-73. McKean, *op. cit.,* p. 145.

Civil Service

[*Even* though the merit system has as its aim the elimination of the failings and abuses of patronage, politicians have found ways of circumventing its provisions. Evidence enough of their dislike of the merit system is had in the number of bills introduced injCpngress to abolish it or at least to restrict its effectiveness.[74] Under the provisions of the act of Congress approved January* 16, 1883[75] whereby the United States Civil Service Commission was created, a board of three men, not more than two of whom may be adherents of the same political party, was set up. It is the duty of this board to provide, in response to requests from appointing officers in the various Federal agencies, the best qualified available personnel to fill positions in those agencies. The custom of the Commission is to submit the names of the three highest on the examination list—the list is a result of an open competitive examination.[76] One of the three must be chosen. For the second vacancy selection is made from the group consisting of the remaining two and the next highest on the list of eligibles. The same procedure is followed for subsequent vacancies until each eligible candidate willing to accept is considered for three actual appointments. A probationary period before absolute appointment is provided for[77] and discrimination on the basis of race, color, or creed is expressly prohibited.[78] The systems maintained in the various states[79] are essentially the same as that in the Federal Government.

Taylor, *op. cit., p.* 56.

75. 22 Stat. 403; 5 *U.S.C.* 632-33, 635.

76. The Veterans' Preference Act of 1944 provides for the granting of preference to certain classes of persons because of military service. Thus the result of the examinations are not based solely on intellectual ability. "No reasonable objection could be raised to this method of advancing those who have fought for their country."—Connell, *op. cit.,* p. 76, note 18.

77. Executive Order of November 7, 1940.

78. The Ramspeck Act of 1940.

79. *Supra* note 15 of this chapter.

(In order to have jobs at their disposal officials make use of a provision for the appointment of temporary employees to fill positions which are usually subject to examination. Merit laws can be practically nullified by filling competitive positions with temporary employees in this manner.[80] In some cases positions requiring technical training and practical experience have been filled by inexperienced political temporaries who acquired experience at the expense of the public and then secured permanent appointment through examination.[81] Or, positions in the classified service may be left unfilled by the appointing authority and the duties performed by persons appointed under some title not subject to examination. In one city, for example, the license bureau, whose staff was in the classified service, was abolished by council action. Within a short time fifty clerks, selected by the fifty Democratic Ward Committeemen, were stationed in police stations to perform similar duties at a much higher cost and a reduction of license revenue.[82]

(Under the Civil Service laws of some jurisdictions it is possible to evade the requirement of a competitive examination prior to appointment by entering into a contract for services with an individual. Actually it is taking advantage of a "loop-hole," for the provision is intended to provide for the employment of various kinds of experts, e.g. attorneys and architects on a contractual basiso

The heads of departments and their immediate subordinates, such as deputy commissioners, are generally open to selection upon the basis of political considerations. Recently the city administration in New York City sponsored legislation that would enable the Fire Commissioner, independently of the existing Civil Service eligible list for fire chief, to appoint a deputy chief of his personal selection for the post.[83] The reason why

80. Cf. E. C. Griffenhagen, "The Merit System in Chicago and Cook County," *National Municipal Review,* XVIII (1929), 693-694.

81. Greater Cleveland V (1929), p. 11.

82. Cf. Key, *Techniques of Political Graft in the United States,* pp. 66-67.

83. Cf. *The New York Times,* February 7, 1948, p. 1.

the change was sought was the fact that "the fire chief occupies a position of special trust and confidence in relation to the Fire Commissioner and must possess many important qualities besides technical competence."[84]

[Various officials must have their confidential assistants, private secretaries, or some other attache and the reason propop-is similar in tone to the one offered above. Due to the intimate relationship and the delicate matters handled by these persons, it is argued that they should be selected by their superiors completely unhampered by any requirement for competitive examinations. This may be true in an isolated case but ordinarily, where there is a technically competent examining agency, this contention is groundless.[85]

/Our Federal officials, in taking office, are pledged "to protect and defend the Constitution and the laws of the United States," and if they be state officials they have the additional obligation to fulfill the same duties towards the laws of the state. They are negligent in this regard, then, if they act in such a manner as to defeat the very purpose of a law that they are supposed to see executed according to the mind of the lawmakers. In matters pertaining to Civil Service some officials are prone to put the good of the party or their own personal advancement over the common good?'·

(Of course, to place a man in a position requiring technical training and practical experience when he is unqualified is a grave injustice. Civil Service is meant to protect the community against such a possibility and its very purpose is defeated when a temporary appointment is made of one completely inexperienced in order that he may acquire experience at the expense of the public and then secure permanent ap-

84. *Ibid.*

85. fit might be objected, of course, that a confidential assistant or secretary may be competent and yet, because of a conflict of personalities, be unsuitable. Where that situation exists the common good would be served by a change of personnel in that particular position.

pointaient through examination.} Harm may be done to the common good in this way and, if so, restitution must be made. The first obligation belongs to the unsuitable appointee-providing that he is conscious of his unfitness he must repair the harm that he did. Should he default in this obligation or be invincibly ignorant of his unfitness the appointing officer must make full restitution. But even if he was invincibly ignorant of his unfitness he would be obliged to restore his salary or a part of it depending on the measure in which he failed to fulfill the duties expected of one holding that particular position.

Any measure to defeat the provisions of the Civil Service law which cost the community more, must be paid in restitution to the public treasury providing, of course, that no additional service was rendered to the common good because on this supposition the additional expenditure would be justifiable. The case in mind, however, is the one outlined above in which the position was abolished by council action so that political appointments could be made resulting in greater cost to the community. The change not only created an additional expense but it also lowered the revenue derived from this source.

In the other cases mentioned[86] there would seem to be no real injustice done even though the efforts of officials to have a number of positions that they can fill with appointees of their own choice is not in conformity with the spirit of the Civil Service system. But, no matter what the appointment, the official entrusted with its fulfillment is seriously bound in conscience to make his selection for the welfare of the common good, independent of any personal advantage, and if he should disregard this obligation he is guilty of grave sin.

The question arises as to whether there is a violation of commutative justice towards those on the Civil Service list

86. Namely, where a contract for service is made with an individual to avoid a competitive examination; appointments of private secretaries and confidential assistants; and those instances in which temporary employees are appointed who are not unqualified.

when they fail to receive an appointment in accordance with the rules of procedure governing such appointments. The better opinion would seem to be that there is no obligation in commutative justice toward the individual unless he actually suffered some injury or loss, for example, through the loss of his reputation in the community. Actually the only commitment made by the government to the top three on the Civil Service list is that they will be considered for three successive appointments. There is no guarantee of a position. Generally speaking, in the Civil Service system it is a question of the government agreeing to follow a certain procedure and the individual, if he fulfills all the requirements, has a reasonable expectancy of being appointed. Thus there is no contract or agreement to appoint a particular individual as a result of a Civil Service examination.[1]

CHAPTER VII

CORRUPTION IN CONTRACTS AND THE SERVICE RELATIONSHIP

Government Purchases and Contracts

In addition to the abuses in the administrative, legislative and judicial functions of government there are other instances when the state enters into contractual relations with individuals or corporations in which officials avail themselves of an opportunity for personal gain. The first matter to be treated will be the graft connected with purchases and contracts made by the government. Secondly, we shall consider the manipulation of public services for personal gain when the government renders a direct service, for example, in the renting of public market space, leasing of piers and the like.

Today governmental functions have taken on many of the aspects of big business. The government's activities necessitate huge purchases of all kinds and its ever expanding penetration into fields that heretofore have been considered beyond its scope has given rise to numerous contracts for construction of various kinds. Control of the power to purchase materials and to award contracts for construction work can be, and has been, a source of financial gain either to the party or to the individual.

The purchasing agent and the departmental heads empowered to award contracts hold positions of grave responsibility in the community. It is the obligation of each one to have foremost in his mind the good of the community whose agent he is. For the words of Leo XIII are as applicable to them in the execution of their duties as they are to men in the highest brackets of authority.

> Government should moreover be administered for the well-being of the citizens, because they who govern others possess authority solely for the welfare of the State. Furthermore, the civil power must not be subservient to

> the advantage of any individual, or of some few persons; in as much as it was established for the common good of all .... If their measures prove hurtful to the people, they must remember that the Almighty will one day bring them to account, the more strictly in proportion to the sacredness of their office and the preeminence of their dignity.[1]

In the days when there was no legislation controlling the discretion exercised by public purchasing agents it was a comparatively simple matter to place government business where it would yield the, highest personal return. However, with the adoption, by most communities, of laws requiring competition in awarding contracts for supplies or for work to be done the problem for the unscrupulous has been to devise methods enabling the discretionary award of contracts with the semblance of competition and at the same time to sustain the flow of illegitimate profits.

For all intents and purposes the public purchasing agents are subject to the same influences as buyers in private business. Efforts are made to influence the decision of buyers through entertainment of all kinds. Many concerns provide their salesmen with all types of novelties and trinkets which are thrust upon prospective buyers. This is in business an accepted practice in order to dispose the recipient favorably toward the concern making the gift. At times things are given which the manufacturer neither makes nor supplies. In some instances it has become virtually a custom of the trade to pay a "commission" to buyers.[2] Even to the conscientious buyer in the business world this presents a problem, for it is no kindness to the purchasing agent to thrust these gifts upon him. On the contrary, it merely puts him in the position where he has to choose between hurting a friend's feelings and running the risk of going against his conscience and of having his own mo-

1. "Immortale Dei," ASS., XVIII (1885), 163; Husslein, *Social Wellsprings,* I, 67.

2. Cf. Flynn, *Graft in Business,* p. 68-69.

tives questioned at some time in the future.[3] We are not so much concerned with the legitimacy of the reception of small gifts, such as the novelties and trinkets mentioned, for this influence on the public purchasing agent is not decisive, but we are interested in those situations in which there is a more or less deliberate attempt on the part of the purchasing official either to defraud his principal, namely, the community by whom he is paid, or to extort unjust payment from the vendor or his agent.

Where the purchasing official has complete discretion in selecting firms from which supplies will be furnished, it is comparatively easy to arrange for a rebate. During the reign of Boss Tweed in New York bills were approved by a board of audit. The members of the board, Tweed said, arranged with the companies from whom supplies were purchased, to:

> Advance bills for work purporting to be done for the city; more particularly for the county, and they should receive only fifty per cent of the amount of their bills.[4]

When payment was made the excess would be returned to the city auditor for distribution to the members of the ring.

In respect to small purchases and emergency purchases in some jurisdictions, complete discretion is permitted the purchasing agent. Laws governing public purchasing usually provide that contracts amounting to over $500 or $1,000 are to be submitted in sealed bids and awarded to the lowest responsible bidder.[5] In the case of small purchases then, under $500 or $1,000 as the case may be, the purchasing agent has con-

3. Cf. John C. Dinsmore, *Purchasing Principles and Practices* (New York: Prentice-Hall Inc., 1922), p. 21 sqq.

4. Werner, *Tammany Hall,* p. 185.

5. Cf. Russell Forbes, *Governmental Purchasing* (New York: Harper & Brothers Publishers, 1929), p. 174. Some cities receive sealed bids for all except emergency purchases. In Washington, D. C. and Louisville, all orders over $25.00 are the subject of sealed bids; in Nashville, all orders over $50.00. On the other hand Los Angeles uses sealed bids only for orders in excess of $2,000.

siderable freedom of choice and may use it to his advantage. Thus, for example, there may be a requisition for five typewriters. The cost of each unit is just under one hundred dollars, so the purchasing officer may procure them from anyone he pleases without obtaining sealed bids. The Ace Typewriter Exchange has done business with this official before and knows that he expects a "commission" on each purchase he makes for the state. Consequently a price of $495.00 is quoted with the assurance that he will be taken care of. Ace made the sale even though lower prices had been quoted by other companies for various makes. When the transaction had been completed the purchasing official received $45.00 in cash.

In the ordinary course of events, the fee paid to the purchasing official was either taken into consideration when the price for the five machines was quoted or the attitude of the official was equivalent to extortion. Not very much could be added to the price of a typewriter to balance off the fee required by the purchasing agent, because the price of a standard item of that nature is more or less fixed. It is unlikely, then, that the state suffered any loss in this case. However, the fee was paid and that must have been deducted by Ace Typewriter Exchange from its legitimate profit on the sale. The company knew from past experience what was expected of them and, if it was not forthcoming, the purchase would have been made elsewhere. It was, then, a case of extortion implicit extortion in which a share of the profits was demanded in return for the awarding of the sale. The agent is obliged, therefore, to make restitution to the Ace Typewriter Exchange for the amount that he received because he demanded payment for a service that should be rendered freely.

On the other hand, it may be argued that, if the Ace Typewriter Company was willing to pay the purchasing officer a commission, it would be reasonably willing to sell the typewriters at a lower price to the state. Under such circumstances restitution would be due to the state, the purchasing officer's principal, and not to the Ace Typewriter Company. In fact, American civil law would favor the agent's principal

in any case, for an agent may be held accountable for all profits in excess of his lawful compensation which he acquires during the course of his agency.[6] It matters not whether it is in the performance or in the violation of his duties.[7] The agent may be compelled to account for any secret commissions or any private collateral benefits which he receives for himself in contracting for his principal, as where, when authorized to purchase or sell for his principal, he receives from the purchaser or seller a commission in consideration of his making the purchase or sale.[8]

Sometimes the law regarding the maximum purchase that can be made without sealed bids is cleverly circumvented by dividing a purchase into units below the minimum amount requiring competition. An outstanding example of this type of practice is found in the construction of a million dollar bridle path in one of our large cities. The cost was paid almost entirely in vouchers of under $500 each with the exception of payroll vouchers which were not subject to this restriction.[9] In a more recent case a contract for almost ten thousand dollars for street repairs was broken down into twelve parts of less than $1,000 each for the purpose of evading a state law that required councilmanic bodies to advertise bids for all work amounting in fact to more than $1,000. Thus the city ostensibly prevented other contractors from bidding and was able to throw the work into the hands of a favored company.[10]

When open competition is required there are many methods that have been devised to put a contract in the hands of a favored bidder—one who can be trusted to rebate the desired proportion of the excess charges and maintain silence, or one who is a member of the organization.. Copies of the specifi-

6. *Corpus Juris Secundum,* ed. William Mack (Brooklyn: The American Law Book Company, 1937), III, n. 165.

7. *Linnemann* v. *Summers,* 123 A. 539, 95 N.J. Eq. 507.

8. *Graham* v. *Cummings,* 57 A. 943, 208 Pa. 516.

9. Cf. Key, *Techniques of Political Graft in the United States,* p. 91.

10. *New York Times,* November 20, 1947, p. 34.

cations or plans for a proposed improvement may be given to the favored bidder earlier, thus giving him the advantage, allowing more time for the preparation of his estimates. Determining of the "lowest responsible bidder" or the "lowest and best bid" allows the purchasing authority to exercise discretion—a power which in this case is abused.[11] The purchasing officer may employ his right to reject all bids and re-advertise.[12] In 1920 there was a large number of such cases in one city in which all bids were rejected apparently for no other reason than that an unwelcome bidder was the lowest.[13] With subsequent bids the favored bidder is usually able to place his bid low enough to secure the award, knowing approximately the estimates of his competitors. In each case the effort is to direct the bid to the concern that is going to "make it worth while" for the purchasing agent.

The end result in each device used is the same, solet us consider one as an example. The Highway Commissioner advertised for bids on a resurfacing job on seven miles of highway. Specifications were to be released on May seventh at his office and sealed bids were returnable on or before June fifteenth. Five construction companies entered bids on the job. The lowest estimate for $74,000 was made by the Di Balco Construction Company. The next two bids varied very little: one for $79,500 was entered by Maybe Brothers, and the other for $80,050 by McPike and Sons. Using his prerogative of selecting the lowest responsible bidder the commissioner re-

11. The governments formerly made the mistake of requiring orders and contracts to be let to the "lowest bidder." However, this ultimately resulted in no saving, for what was saved in the purchase price was sacrificed in quality in many instances. Under the present system the public official should determine the lowest responsible bidder only after fully weighing all the factors involved.

12. Usually this results in delay and added cost. Consequently, governments have often been compelled to purchase commodities at a higher-than-market price rather than run the risk of receiving, in a readvertisement, quotations perhaps less desirable, besides incurring extra delay and expense.

13. Cf. Boston Finance Commission, *Reports* XVI (1921), p. 270 cited by Key, *op. cit.,* p. 94.

commended acceptance of the bid given by McPike and Sons, Having implicit faith in the integrity of the Commissioner the Board granted the contract as recommended.

Di Balco protested, maintaining that his bid met all the specifications but he was informed that the contract was awarded to the concern considered more responsible after all the factors involved had been fully weighed. His first thought was to seek redress in Court but a firm can hardly expect to be able to carry out a contract profitably when it has been awarded by court order against the will of the contracting department—the methods of retaliation are too numerous.

Not long after the contract was awarded, one of the sons in the firm of McPike and Sons came to the office of the Commissioner. It was merely a social call to express the thanks of the firm for the contract that had been awarded them. However, when Mr. McPike left the office, the Commissioner was the possessor of sixteen hundred dollars that he did not have before.

In the contracts for the purchase of materials there is not much possibility of the government being overcharged, for the government is usually charged the full amount of the "market quotation" published in the trade journals.[14] But in the case of a contract for construction work, whether it be for a building or for roads, it is far easier to provide for a substantial "gift" for the commissioner because there are only general norms that can be followed in drawing up the estimates and there is no difficulty in making the government pay for the commissioner's fee. In this case then, the government is paying sixteen hundred dollars more than what the job is actually worth.

14. Cf. Morris A. Copeland, Clem C. Linnenberg, Dana M. Barbour. Investigation of Concentration of Economic Power, Monograph No. 19, Government Purchasing—An Economic Commentary (Washington: United States Government Printing Office, 1940), p. 79. This seems to be the accepted practice in all sales made to the government, but in sales to private buyers the journal's figure is simply a "starting point" in arriving at prices that are not that high "by a long shot."

It is, of course, the obligation of the purchasing agent to have foremost in mind the welfare of the state. To fulfill his obligation in this regard he must try to conserve the monetary resources of the state and at the same time secure the quality of materials and workmanship demanded by its needs. By reason of his office he is bound to perform his duties in the interest of the common good—an obligation in commutative justice. When he allows the state to be overcharged in order that he may benefit by such an action, he seriously violates the duties of his office and must make restitution to the public treasury. In the words of Leo XIII:

> The Administration of the State must be carried on to the profit of those who have been committed to their care, not to the profit of those to whom it has been committed.[15]

The amount of the restitution to be made must be governed by the amount the purchasing agent received—in this case sixteen hundred dollars. The circumstance of time, whether the graft was given before or after the awarding of the contract, does not alter the obligation of making restitution.

Competitors may be excluded so that the favored bidder will get the job and still have the appearance of competition preserved. This can be done by framing specifications for bids so that only one firm can meet the requirements. Or, patented articles or processes may be specified in carefully phrased general terms without employing trade names.

Lincoln Steffens cites an example from municipal affairs in Pittsburgh which would not be as blatant in the present day, but the pattern followed is still the same.[16] There were two political bosses of the city. One, let us call him Jones, had a construction concern under the name of Booth & Flinn, Ltd. which sought and obtained public contracts. It was argued that his was the only firm that had an adequate "plant" to do the work properly. The Director of Public Works was a

15. "Diuturnum Illud," *ASS.*, XIV (1881), 8; Husslein, *op. cil.*, I, p. 55.

16. *The Shame of the Cities,* p. 168 sqq.

cousin of the other political boss John Smith and the Director made the awards to the lowest *responsible* bidders, and he inspected and approved the work while in progress and when completed. The owner of the construction company had a quarry, the stone of which was specified for public buildings; he obtained a monopoly of a certain kind *of* asphalt, and that kind was specified.

> One firm (Booth & Flinn) received practically all the asphalt-paving contracts at prices ranging from $1.00 to $1.80 per square yard higher than the average price paid in neighboring cities.[17]

Nor was the work of the best quality for

> large stones, as they were excavated from sewer trenches, brick bats, and the debris of old coal-tar sidewalks were promiscuously dumped in to make foundations, with the result of an uneven settling of the foundation.[18]

Where such a situation exists it is not unlikely that the Director of Public Works received a share of the profits in the form of graft. Whatever he may have received in this manner must be paid in restitution to the public treasury. From a comparison with the cost of construction work of the same nature in other communities it is easy to see that the City was being grossly over-charged—a fact he must have known—and what he received came from the illegitimate profits taken by the political boss.

It would seem, too, that he was negligent in his duties toward the community for he should never have accepted, in behalf of the city, work that was below standard. Certainly he was not selecting the lowest *responsible* bidder if the roads that they constructed had poor foundations with "the sunken and worn places so conspicuous everywhere in the pavements."[19]

17. From a report of Oliver McClintock to the National Municipal League quoted by Steffens, *op. cil.,* p. 170.

18. *Ibid.,* p. 169.

19. ***Ibid.***

> The duties of his office which he undertook ought to be fulfilled with suitable diligence, for the duties must be performed faithfully; therefore grave negligence is a grave sin against justice and carries with it the obligation of repairing the damage.[20]

At times contracts are awarded on a cost plus basis i.e. it is agreed to pay the cost of the material and the labor plus a certain percentage as profit. Contracts of this nature are susceptible of manipulation for, through the use of subcontracts, the "costs" may be increased to an extravagant figure. There is little or no incentive for efficient operation in such a contract for the contractor's profit increases in proportion to the costs. In order to restrict the division of the profit in some instances dummy corporations have been organized by the contractors to supply them with materials and thereby increase the costs. When the costs are allowed to mount unrestrained the person accountable for the awarding of the contract frequently benefits. He expects to profit. Of course, on paper the profits are legitimate because the profits are a fixed percentage of the cost, but actually they are not when, by collusion, the costs have been increased with the sole purpose of inflating the profit. In such a case restitution would have to be made by the official to the community, for he has no just title to the money he has received.

Dummy corporations are used for other purposes, too, for the benefit of both the contractor and the official influencing the awarding of the contract. When a single concern is receiving a great deal of business, it may be found advisable to divide the work between several dummy corporations to prevent the appearance of favoritism. In this way suspicion of illegitimate practices is effectively removed from the public's eye. The public official can then continue to receive graft without the danger of a public investigation. A situation of

this kind was said to prevail in the practices of a municipal department in Chicago.[21]

Dummy corporations may be used to conceal the interest of officials in contracts awarded by a public body in which they hold office. Usually the officials are prohibited by law from having any interest in public orders or contracts. Thus the Kentucky statute establishing the state purchasing commission contains the stringent provision which prohibits any contract with:

> Any partnership, firm or corporation, in which any members of said commission shall have any interest, directly or indirectly, or shall be a stockholder, or with any relative of any member of said commission, either by blood or marriage within the third degree.[22]

This seems too severe for it may be, as sometimes happens, that such firms are the most satisfactory supply sources. However, it is sound in principle, for under such circumstances an official certainly might favor his own concern. Apart from any law prohibiting it or where there is no such law, there would certainly seem to be no objection to doing business with a firm in which an official had some interest, if it is proven to be the most satisfactory supply source and the most economical. If on the other hand, as is usually the case when a dummy corporation is introduced, the official favors the firm in which he has an interest solely because of the financial profit he will realize through such contracts, a distinction must be made.

If the price of the contract to the city or to the state, as the case may be, is just and the quality of the product or of the work done is satisfactory there is no injustice done to the community.[23] Distributive and legal justice would seem to be

21. Cf. Testimony of George B. Detrich, Transcript, Sanitary District case, pp. 3283-3362 cited by Key, op. cit., p. 106.

22. H. B. 227, laws of 1926, section 7.

23. We are precinding from the existence of laws prohibiting such contracts. It is interesting to note that some laws provide that an order or contract, awarded, in violation of the restriction, to a party in which the buyer is financially interested, may be voided. In New York City, the controller has this control over the legality of contracts.

violated, however, because the distribution of public contracts can be considered as pertaining to the common goods. This obligation can only be had when the bidders for the contract are members of the community awarding it. Thus, if the only other bidder was from another state there is no obligation toward him nor would there be any violation of this obligation if the bids of the other firms were considerably higher, even though they were local firms. Many governments give preference to local or state firms in preference to "out-of-town" or "out-of-state" competitors.[24] The purchasing ordinance of Galveston, Texas, is representative in providing that:

> All other things being equal, those bidders having an established local business in the city of Galveston are to be given preference.[25]

If the price of the contract to the city is exorbitant the official is abusing the authority vested in him and is doing an injustice to the community. The excessive profit is the equivalent of an out-and-out theft from the public funds. The amount over and above what can be considered as legitimate profit should be paid to the public treasury in restitution. This might be considered as a case of auto-corruption.[26]

Manipulation of Public Services

Now to consider the second phase of this chapter—the manipulation of public services. When the government renders a direct service—rents stalls in the public market, leases its piers, rents houses—its position in relation to the citizen is one of lessor, perhaps under monopolistic conditions, if the service is rendered for a fee.

24. In some instances a price differential is accorded to local firms. This would not be demanded by distributive justice for it may penalize the general tax paying public. The government should attempt to secure the best quality and service per dollar of expenditure.

25. Forbes, op. cit., pp. 178-179.

26. Cf. p. 5, note 12.

Public Markets

There is wide discretion in the rendering of service. A statute may be interpreted in any one of a variety of ways in return for a bribe or to reward a loyal party worker. Of course, this leads to a great deal of discriminatory application according to norms that were never intended by the designers of the statute pertaining to these matters.

The procedure is similar in the corrupt practices in each phase of the rendering of service, but we shall speak of the public markets first. To reduce the cost of the distribution of perishable food products some cities maintain public markets in which producers and tradesmen rent stalls from which to transact their business. These facilities are usually rented at less than cost which creates a situation wherein the market authority may be subjected to pecuniary inducements in selecting the successful applicants for market stalls.[27] Under public administration certain standards are considered essential for the management of the market and the tenants retain their rights subject to certain rules and regulations.

It is charged that an inspector of the Department of Markets, whose duty it was to discover violations of the city's regulations, received as much as $10,000 a year from dealers in the municipal poultry terminal.[28] He had accepted "gratuities" periodically in amounts ranging from $5.00 to $25.00 from the two hundred dealers in the terminal. That he neglected his duties is without question, if he accepted the money as bribes to overlook violations. Such a practice would be another case of immunity being sold—immunity from the ordinances which the inspector had no authority to sell because that power i.e. to grant immunity, belonged properly to the community. The bribes would then have to be paid into the public treasury as restitution — the sum of the bribes being the equivalent of the purchase price of something that it was not in the power of the inspector to sell.

27. Cf. Key, *op. cit., p.* 345.

28. *The New York Times,* February 8, 1946, p. 38.

If, on the other hand, it was a case of extortion-the obtaining *of* money from another, with his consent, induced by a wrongfufiise of force or fear—restitution would have to be made to the poultry dealers who paid the various sums. Many times innocent persons are threatened with charges of violations in order to create a situation in which they are willing to pay rather than be involved in a great deal of trouble. Among the officials who have so little principle that they would lower themselves to engage in such a practice this is referred to as a "shake down."

The question might arise as to whether the obligation of restitution in this case would be grave, inasmuch as the individual amounts received by the inspector, in some instances, might not have constituted grave matter. It would seem that the teaching of moralists on the matter of the coalescence of small thefts would apply here. The gravity of the amount extorted would have to be judged according to the relative norm, for the dealers are owners of small businesses. The amount therefore would have to be the equivalent of three-fourteenths of a week's income in order to constitute grave matter. Moralists teach that petty thefts coalesce to form a grave sin if one has the intention of accumulating a large sum whether the thefts be from one person or from many. In this case by the first theft he sins gravely, but he commits only one mortal sin, unless he revokes the intention and afterwards renews it.[29]

> It should be noted, however, that more is necessary to constitute a grave matter in case the amount is taken from different owners in a way that none suffers a grave injury, but the common welfare does.[30]

Here it would seem that the individual is sufficiently injured to constitute a grave injury through coalescence. If there was no

29. Merkelbach, *Summa Theologiae Moralis,* II, η. 407.

30. Heribert Jone, O.F.M. Cap., *Moral Theology,* Englished and Adapted to the code and customs of the United States by Urban Adelman, O.F.M. Cap. (Westminster, Md.: The Newman Bookshop, 1945), n. 329.

intention of accumulating a large sum, the petty thefts would, nevertheless, coalesce if they automatically add up to make a grave sum when the intervals between thefts are short. When the individual thefts approach grave matter the interval between thefts should be two months or less to have coalescence.[32] In this second instance mortal sin is committed when grave matter has been reached for then only is notable damage inflicted knowingly and willingly.[32] We are of the opinion that in the case we are considering there would be the intention present to accumulate as much as possible from the poultry dealers. Thus a mortal sin was committed with the first act of extortion with the intent to continue the corrupt practice regularly. The obligation to make restitution, consequently, would be grave.

The Commissioner of Markets in some administrations has been able to use his office to further his own private interest. In New York, for example, the markets were under the jurisdiction of the Department of Markets. The stalls in the markets were occupied under a revokable permit which could be assigned only with the consent of the Commissioner of Markets. Naturally, in a corrupt official, this power could be used to extort money from dealers in order to obtain a permit for a stall and to retain it once it had been obtained.

In such cases an injustice is done to the dealer, and the solution is similar to that in which an official receives payment from applicants seeking city employment. He must make restitution to the dealer from whom the money was received, for he is demanding payment for a service that should be rendered free of charge. It cannot be considered as a gift to the Commissioner because it is quite commonly understood that failure to renumerate will mean that the dealer will be refused a permit for space in the public market. The Commissioner receives a salary from the city to perform the duties of his office and he has no just title to money demanded for doing what is already his duty. Nor may he coerce a leasee in the public market, once the permit has been granted, on the pretext that his permit is revocable and may be recalled if he does not comply with the demands made upon him. Money gained through such intimidation must be returned to the party from whom it was unjustly extracted.

si. Merkelbach, op. cit., II, n. 407.

32. Merkelbach, ibid. Pope Innocent XI condemned the proposition: "A man is not obliged under pain of mortal sin to make restitution of that which he has stolen in small sums, even though the total amount be considerable." (Non tenetur quis sub poena peccati mortalis restituere, quod ablatum est per pauca furta, quantumcunque sit magna summa totalis.) Henricus Denzinger, Enchiridion Symbolorum, C. Bannwart and J. B. Umberg, editors, (21-23 ed., Friburgi Brisgoviae: Herder and Co., 1937), n. 1188.

Pier Leases

There is much similarity in the graft received in connection with the leasing of docks and piers and the graft accepted when a stall is rented in the public market. The number of individuals or concerns seeking the service is considerably smaller but the amount involved in a single transaction is much greater. It is again a question of an official demanding a personal fee for a service he is duty bound to render free of charge.

The effort of one of the trans-Atlantic steamship companies to obtain pier space is an example of extortion. Under the New York City charter applications for pier leases were to be made to the Commissioner of Docks and had to be approved by the Commissioners of the Sinking Fund. The steamship company made its application in 1922 and it did not receive approval until November 26, 1930. In the meantime a politician, it is said, offered to help consummate the deal for a fee of between $2,500 and $3,000. Then, he said it would be necessary to engage a lawyer "well connected politically in New York City" and the "fee" for services mounted to $25,000. The company finally wrote to the Tammany boss, in July, 1928 and in November of 1930 the Commissioners of the Sinking Fund adopted a resolution approving the lease. A fee of $50,000 was paid to the lawyer who deposited it and shortly afterwards drew two checks, one for $35,000, payable to "cash" and another for $10,000 payable to "bearer," both of which were cashed by him.

> A review of the situation made it perfectly clear that the "legal fee" was a subterfuge, under the guise of which a large sum of money was extorted from the steamship company as the price of political influence, without which the lease would not be granted.

Seabury looked upon this as:

> ' Evidence of the subtle system by which graft is now extorted—-to wit, the interposition of a lawyer to whom the money is passed under the guise of a legal fee.[33]

It is possible, from the circumstances in the case, that a percentage of the "legal fee" found its way into the hands of city officials finally granting the lease.[34]

On the supposition that it did, the members of the board that received the money were guilty of extortion for it was in their power to grant approval to the petition for the lease. The application had originally been made directly to the proper authority eight years before and almost immediately a politician intervened to consummate the deal for a price. The officials were receiving money for rendering a service for which they had no right to exact, or have anyone else exact, a fee. Restitution was due the steamship company from each official according to the amount they had received.

In another case recently exposed, it is claimed the Deputy Commissioner of Marine and Aviation, under whose jurisdiction the leasing of New York City piers now falls, rented piers to companies which neither owned nor operated ships, for $9,123, who in turn subleased them for which they received wharfage charges of $30,800. It is maintained that another deputy commissioner was responsible for transactions in which steamship agents paid $21,926 to the city for pier space that they re-rented to operating companies for $59,375.[35] It is

33. Samuel Seabury, *Intermediate Report.* In the matter of the Investigation of the Departments of the Government of the City of New York (1932), pp. 85-97.

34. The fee of $50,000 did not include the rental fee for the pier—a fee determined on the basis of the cost of the pier.

35. *New York Journal American,* May 13, 1947. p. 1.

estimated that there was a difference of $355,000 between the city's pier fees and the amounts paid by ship operators to intermediaries.[36] The Deputy Commissioner, it was testified, had refused piers to steamship companies and had instead rented it to a certain individual, who in turn leased the wharfage space at high rates to steamship companies.

If the charges are true, the Deputy Commissioners were negligent in their duties. The city maintains the wharfage space for the benefit of shipping and to bring business into the Port of New York. It is the city's intention that the docks and piers be rented to operators for a reasonable sum. Well could it be said, then, that "the Department of Marine and Aviation is not being efficiently administered."[37] Refusing to rent the piers to the steamship companies, the official [38] was defeating the very purpose of the department, for, under the direction of the United States Maritime Commission, operators were "to deal directly with the city on leasing piers for transient use."[39] The rental to persons neither owning nor operating ships would be a conspiracy in which the deputy commissioner personally profited.

As long as the deputy commissioner obtained the rent for the piers as fixed by the Department of Marine and Aviation there would be no violation of commutative justice as far as the city was concerned. However, any share of the money extorted from steamship companies that he received would have to be paid in restitution to the companies in question for he had no just title to the money.

Housing Projects

Since the war, in many areas, the governments have been more or less obligated to provide housing facilities in order to

36. *The New York Times,* May 14, 1947. p. 51.

37. Editorial, *The New York Times,* May 14, 1947, p. 24 quoting the report of John M. Murtagh, City Commissioner of Investigation.

38. This charge was directed against only one of the deputy commissioners.

39. *The New York Times,* May 14, 1947. p. 51.

help alleviate over-crowded conditions. In many instances they have been erected for veterans and their *families, but others have not been restricted in this way. When the demand is* so great the possibility of abuses becomes greater.

It has become quite common for *renting* agencies and building superintendents to demand an *additional fee for* leasing homes and apartments. The so called "bonus" is possible only because so many are clamoring for living quarters. This abuse has been reported *in the case of some* officials in government housing projects. Of course, *it is a case of extortion, for* the official is bound to give leases to *the deserving* applicants, to those first in the *order of application, or* according to any other just means but certainly not on the basis of the personal gain to the official. *He is* receiving *money* to render a service which he is supposed to *perform freely. Yet the* applicant knows that unless the *money is forthcoming the* apartment or house, as the case may be, will not be leased to him. The money extorted in this manner must *be* returned to the individual who *had paid it to the* official.

CONCLUSION

It does not seem necessary to restate in the form of conclusions the solutions that have been given in the various divisions of this work. From the many cases described and evaluated it should be evident that one who misuses the powers and resourses of a public office, in addition to a violation of legal justice and possibly distributive justice, is in many cases also guilty of a violation of commutative justice. The right violated may be that of the state or of some third party, depending upon the circumstances in the particular case. Consequent upon this violation of commutative justice there is the obligation to repair the harm done to the one possessing the right. Supposing the presence of the required conditions this obligation is grave. There are, no doubt, many instances where public officials have made illegitimate gains, but in good faith, If that which accrued to the official under such circumstances has been consumed in good faith there is no obligation to make restitution.[1]

As has been indicated, there have been situations in which public officials have not displayed the moral integrity that can rightfully be expected of those to whom such responsibility has been entrusted. Unfortunately some have made public office a private emolument and a few have even considered it a private key to the public treasury. Such persons should be made to see the injustice they are inflicting on others—either in the person of the community or an individual. Usually they are not totally unaware of it, but they look upon the graft they receive as part of the spoils, legitimate or otherwise, of public office. The prevalence of such practices permits them wrongfully to justify their actions in their own eyes.

Catholics especially should endeavour to give their attention to politics, considering public office as a public trust and not as an opportunity to amass personal wealth. They should

1. Merkelbach, *Summa Theologia Moralis,* II, η. 299.

consider it the duty of every office holder to *administer the affairs of the state as* conscientiously and *competently* as *he* administers his own. The civil office *holder* must bring to public *life, not selfishness, but the spirit of love.* This is the factor that distinguishes those who engage in politics for their own advantage from those who engage in politics to the advantage of the community. Catholics, *above all others,* should be so motivated because they "are *admonished by the very* doctrines which they *profess to be upright and faithful in the discharge of duty."*[2]

2. Pope Leo *XIII, "Immortale Dei," ASS., XVIII (1885), 178; Husslein, Social Wellsprings, I, 87.*

BIBLIOGRAPHY

Sources

Acta Apostolicae Sedis, Commentarium Officiale, Romae, 1909—

Acta Sanctae Sedis, 41 vols., Romae, 1865-1908.

Codex luris Canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus, Romae: Typis Polyglottis Vaticanis, 1934.

Corpus luris, being a complete and systematic statement of the whole body of the law, eds. William Mack, William Benjamin Hale and Donald Keser, 72 vols., New York: The American Law Book Co., 1914-1935.

Corpus luris Canonici, 2 ed. Lipsiensis, post Aemilii Ludovic! Richteri curas instruxit Aemilius Friedberg, 2 vols., Lipsiae, 1879-1881.

Corpus luris Secundum, ed. William Mack, 53 vols., Brooklyn: The American Law Book Co., 1937—

Carpus Scriptorum Ecclesiasticorum Latinorum Editum consilio et impensis Academiae litterarum caesareae vindobonensis, 68 vols., Vienna, 1866—

Denzinger, H.—Bannwart, C.—Umberg, J., *Enchiridion Symbolorum Definitionum et Declarationum de Rebus Fidei et Morum,* 21-23 ed., Friburgi Brisgoviae: Herder & Co., 1937.

Migne, J. P., *Patrologiae Cursus Completus, Series Latina,* 221 vols., Paris, 1844-1864.

Richardson, James D., *A Compilation of the Messages and Papers of the Presidents,* 18 vols., Washington: Government Printing Office, 1896.

Theological and Philosophical Works

Aertnys, Josephus—Damen, C. A., *Theologia Moralis',* 14 ed., 2 vols., Taurini: Marietta, 1944.

Alphonsus Liguori, St., *Theologia Moralis,* ed. L. Gaudé, 4 vols., Romae: Typis Polyglottis Vaticanis, 1905-1912.

_____, *Theologia Moralis,* 3 vols., 10 ed., Venetiis: Apud Remondini, 1793.

_____, *Homo Apostolicus* Instructus in sua vocatione ad Audiendas Confessiones, Bassani, 1833.

_____, *Praxis Confessarii ad Bene Excipiendas Confessiones,* ed. Gabrielis M. Blanc, Romae: Typis Polyglottis Vaticanis, 1912.

Aquinas, St, Thomas, *In Decem Libros Ethicorum Aristotelis Ad Nicomachum Expositio,* ed. Angelus *M.* Pirotta, Taurini: Marietti, 1934.

, *On the Governance of Rulers,* trans. Gerald B, Phelan, New York: Sheed and Ward, 1938.

, *Opera Omnia,* Vives ed., 34 vols., Paris, 1872-1880.

, *Politicorum Aristotelis Expositio seu De Rebus Civilibus,* Quebec, 1940.

_____, *Quaestiones Disputatae,* ed. Secunda Taurinensis, 5 vols., Augustae Taurinorum: Marietti, 1914.

__ , *Summa Theologica,* ed. Altera Romana, 6 vols., Romae: Ex Typographia Forzani et S., 1894.

_____, *Summa, Theologica, Literally Translated by Fathers of the English Dominican Province,* 3 vols., New York: Benziger Brothers, Inc., 1947-1948.

Arregui, Antonius M., *Summarium Theologiae Moralis,* 13 ed., Romae; Typis Pont. Universitatis Gregorianae, 1937.

Azpiazu, Joaquin, *La Moral del hombre de négocias,* Madrid: Editorial Razon Y Fe, 1944.

Ballerini, Antonius, *Opus Theologicum Morale in Busembaum Medullam,* ed. Dominicus Palmieri, 7 vols., Prati: Ex Officina Libraria Giochetti Filii et Soc., 1889-1892.

Billuart, Carolus Renatus, *Summa Sancti Thomae,* 10 vols., Paris: Lecoffre, 1886.

Bouquillon, Thomas J., *Theologia Moralis Fundamentalis,* 3 ed., Brugis: Carlo Beyaert, 1903.

Bucceroni, lanuarius, *Institutiones Theologiae Moralis,* 6 ed., 4 vols., Romae: Ex Typographia Pontificia in Institutis Pii IX, 1914.

Caietanus, Thomas a Vio, *Commentarii in Summam S. Thomae—Secunda Secundae Partis Summae Sacrosanctae Theologiae Sancti Thomae Acquinatis, Doctoris Angelici,* Lugduni: Apud haeredes lacobi luntae, 1572.

Carrière, Josephus, *De Contractibus,* 3 vols., Lovanii: C. J. Fonteyn, 1846.

------ — ---------- , *Disputationes Theologicae de Justitia et Jure,* 3 vols., Dublin: M. H. Gill, 1877.

Cathrein, Victor, *Philosophia Moralis,* 5 ed., Friburgi Brisgoviae: Herder, 1905.

Coffey, P., *Ontology or the Theory of Being,* New York: Peter Smith, 1938.

Colli-Lanzi, Camillus, *Theologia Moralis Universa,* 5 vols., Taurini: Marietti, 1928.

Connell, Francis J., *Morals in Politics and Professions,* Westminster, Md.: The Newman Bookshop, 1946.

Costa-Rossetti, Julius, *Philosophia Moralis seu Institutiones Ethicae et Juris Naturae,* 2 ed., Oeniponte: Feliciani Rauch, 1886.

Cox, John F., *A Thomistic Analysis of the Social Order,* Washington: The Catholic University of America Press, 1943.

Crolly, George, *Disputationes Theologiae de Justitia et Jure, ad Normam Juris Municipalis Britannici et Hibernici Conformatae, 2 vols.,* Dublinii: McGlashan et Gill, 1873.

Cronin, Michael, *The Science of Elides, 2* ed., 2 vols., Dublin: M. 11. Gill and Son, 1939.

Crowe, Martin T., *The Moral Obligation of Paying Just Taxes,* Washington: The Catholic University of America Press, 1944.

Dabin, Jean, *Doctrine générale de. l'État, éléments de philsosphie politique,* Bruxelles: Etablissements Emile Bruylant, 1939.

———— ———— ———, *La philosophie de l'ordre juridique positif, spécialement dans les rapports de droit privé,* Paris: Librairie du Recueil Sirey, 1929.

Davis, Henry, *Moral and Pastoral Theology,* 4 ed., 4 vols., New York: Sheed and Ward, 1943.

De Koninck, Charles, *De la primauté de bien commun contre les personnalistes, le principe de l'ordre nouveau,* Qubec: Editions de l'Universite Laval, 1943.

De Lugo, Joannes, *Disputationes Scholasticae et Morales,* Edited by J. B. Fournials, 8 vols., Parisiis: Apud Ludovicum Vives, 1868-1869.

Ferree, William, *The Act of Social Justice,* An Analysis of the Thomistic Concept of Legal Justice, with special reference to the doctrine of Social Justice proposed by His Holiness Pope Pius XI in his Encyclicals *Quadragesimo Anno* and *Divini Redemptoris,* to determine the precise nature of the Act of this virtue, Washington : The Catholic University of America Press, 1942.

Ferreres, loannes B., *Compendium Theologiae Moralis ad normam Codicis Canonici,* 16 ed., 2 vols., Barcinone: Eugenius Subirana, 1940.

Frassinetti, Giuseppe, *Compendio della teologia morale di S. Alfonso M. De'Liguori,* 11 ed., 2 vols., Torino: Société Editrice Internazionale, 1944.

Genicot, Eduardus—Salsmans, J., *Institutiones Theologiae Moralis,* 14 ed., 2 vols., Buenos Aires: Dedebec Ediciones Desclée, De Brouwer, 1939.

Güenechea, Josephus N., *Principia Iuris Politici,* 2 vols., Romae: Apud Aedes Universitatis Gregorianae, 1938.

Gury, Ioannes Petrus, *Casus Conscientiae in Praecipuas Quaestiones Theologiae Moralis,* Ratisbonae: Typis Georgii J. Manz, 1865.

---------- - *Compendium Theologiae Moralis,* Edited by Antonius Ballerini and Dominicus Palmieri, 2 vols., Prati: Giochetti, Filii et Soc., 1898.

Hering, Hyacinthus—M., *De Justitia Legali,* Friburgi, Helvetiorum: Typis Consociationis Sancti Pauli, 1944.

Heylen, V., *De Justitia et Jure,* 4 ed., 2 vols., Mechliniae: H. Dessain, 1943.

Hurth, F., *De Statibus, Notae ad Praelectiones Theologiae Moralis* (ad usum privatum), Romae: In Aedibus Pont. Universitatis Greorgorianae, 1946.

Hurth, F.—Abelian, P. M., *De Principiis, De Virtutibus et Praeceptis—Notae ad Praelectiones Theologiae Moralis* (ad usum privatum), 2 vols., Romae: In Aedibus Pont. Universitatis Gregorianae, 1948.

Joannes a Sancto Thoma, *Cursus Theologicus,* Opera et studio monachorum quorumdam Solesmensium O. S. B. editus, 4 vols., Parisiis: Desclee et Sociorum, 1937.

Iorio, Thomas A., *Compendium Theologiae Moralis iuxta methodum compendii Ioannis P. Gury, S.I. et Raphaelis Tummolo, S.I.,* 6 ed., 4 vols., Neapoli: M. D'Auria, 1936-1940.

Jone, Heribert, *Moral Theology,* Englished and adapted to the code and customs of the United States of America by Urban Adelman, Westminster, Md.: The Newman Bookshop, 1945

Joubert, Gerard, *Qualities of Citizenship in St Thomas,* Washington: The Catholic University of America Press, 1942.

Kenrick, Francis Patrick, *Theologia Moralis,* 3 vols., Philadelphiae: Apud Eugenium Cummiskey, 1842.

Koch, Antony, *A Handbook of Moral Theology,* Adapted and edited by Arthur Preuss, 3 ed., 5 vols., St. Louis: B. Herber Book Co., 1925-1933.

Konings, A., *Theologia Moralis S. Alphonsi in Compendium redacta et usui venerabilis cleri Americani accommodata,* 7 ed., 2 vols., Neo-Eboraci: Benziger Fratres, 1893.

Kreilkamp, Karl, *The Metaphysical Foundations of Thomistic Jurisprudence,* Washington: The Catholic University of America Press, 1939.

Lamont, W. D., *The Principles of Moral Judgment,* Oxford, 1946.

Lehmkuhl, Augustinus, *Casus Conscientiae ad usum Confessariorum compositi et soluti,* 2 vols., Friburgi Brisgoviae: Herder, 1903.

———, *Theologia Moralis,* 8 ed., 2 vols., Friburgi Brisgoviae: Herder, 1896.

Lehu, Leonardus, *Philosophia Moralis et Socialis,* 2 vois., Parisiis: Victor Lecoffre, 1914.

Lessius, Leonardus, *De Justitia et Jure Caeterisque Virtutibus Cardinalibus,* 3 ed., Antwerpiae: Ex officina Plantiniana, 1612.

Loiano, Seraphinus A., *Institutiones Theologiae Moralis ad normam luris Canonici,* 5 vols., Taurini: Marietti, 1934-1942.

Lyonnet, D., *Tractabis de Contractibus* in J. P. Migne's *Theologiae Cursus Completus,* vol. XVI, Parisiis: Apud J. P. Migne, 1859.

Lumbreras, Petrus, *Praelectiones Scholasticae in Secundum Partem D. Thomae:* Vol. X, *De Justitia,* Romae: Angelicum, 1938.

McHugh, John A.—Callan, Charles J., *Moral Theology,* 2 vols., New York: Joseph F. Wagner, 1930.

Malé, L'Abbé Georges, *La théologie de Saint Thomas ou exposition de la Somme Théologifae en français,* 2 vols., Paris: Librairie Catholique de Perisse Frèi^Lt857.

Marc, Cl.—GestermaeHjÈr. X., *Institutiones Morales Alphonsianae iuxta doctrinam ac prlsSgKki Aquinatis,* Recog. A. J. Raus, 20 ed., 2 vols., Lugduni: Typis ï|Seanuelis Vitte, 1940.

Maritain, Jacques, *The PÇjfgn and the Common Good,* Translated by John J. Fitzgerald, New York: Charles Scribner's Sons, 1947.

——— _____, *The Rights of Man and Natural Law,* Translated by Doris C. Anson, New York: Charles Scribner's Sons, 1945-

Marres, P. H., *De lustitia secundum Doctrinam Theologicam et Principia luris Recentioris, speciatim vero Neerlandici,* 2 vols., Ruraemundae: J. JURomen et Fils., 1888.

Merkell^^BLBenedictus Henricus, *Summa Theologiae Moralis ad mentem* ***I^KKfnhae*** *et ad normam luris Novi,* 3 ed., 3 vols., Parisiis: Typis Df^Hée De Brouwer et Soc., 1938-1939.

Meyer, Hans, *The Philosophy of St. Thomas Aquinas,* Translated by Frederic Eckhoff, St. Louis: B. Herder Book Co., 1944.

Meyer, Theodorus, *Igj&tutiones Juris Naturalis,* 2 vols., Friburgi Brisgoviae: Herder, 1885«F

Michel, A., *QuestioJfthéologiques du temps présent II—La question sociale et les principes#théologiques—Justice Légale et Charité,* 2 ed., Paris: Gabriel Beauçhesne, 1921.

Migne, J. P., Theologiae Cursus Completus, 28 vols., Parisiis: *1863-1866.*

Molina, Ludovicus, De Justitia et Jure, Opera Omnia, 5 *vols., Coloniae Allobrogum: Fratrum de Tournes, 1754.*

Monahan, William B., *The Moral Theology of St. Thomas Aquinas,* vol. *II, Worcester (England): Ebenezer Baylis* & Son, Ltd., (n.d.)

Moral, Irenaeus *Gonzalez, Philosophia Moralis,* Santander: Editorialis Sal Terre, *1945.*

Moran, Thomas *Francis, The Ethics of Politics, Lafayette, Ind.:* Purdue University *Press, 1927.*

Mortimer, R. *C., The Elements of Moral Theology,* London: Adam and Charles Black, *1947.*

Noldin, H., Summa Theologiae Moralis, Edited by A. Schmitt, 26 ed., 3 vols., Oeniponte; Typis Feliciani Rauch, 1939-1940.

O'Dea, Thomas, *De Justitia et Jure—Notulae,* Galway: *O'Gorman and Co., 1919.*

Ojetti, Benedictus, Synopsis Rerum Moralium et luris Pontificii, Romae: Ex Typographia Polyglotta S. C. De Propaganda Fide, *1899.*

Ottaviani, Alaphridus, Institutiones luris Publici Ecclesiastici, 2 vois., Romae: Typis *Polyglottis Vaticanis, 1936.*

Peinador, Antonius, Cursus Brevior Theologiae Moralis ex Divi Thomae principiis inconcussis, Madrid: Apud Coculsa, *1945.*

Pighi, Joanne Baptista—*Grazioli,* Angelus, *Cursus Theologiae Moralis, 6 ed., 4 vols.,* Verona: Scuola Tipografica Vescovile Casa *Buoni Fanciulli, 1946.*

Piscetta, A.—Gennaro, A., Elements Theologiae Moralis ad Codicem luris Canonici exacta, 4-6 eds., 7 vols., *Torino: Società Editrice Internazionale, 1938-1945.*

Pettier, A., De Jure et Justitia, Dissertationes de Notione Generali Juris el Justitiae et de Justitia Legali, Leodii: R. Ancion, 1900.

Proceedings of the American Catholic Philosophical Association, Vol., XV, *Philosophy of the State, Washington:* Catholic *University of* America, *1939.*

Prammer, Dominicus M., Manuale Theologiae Moralis secundum Principia S. Thomae Aquinatis, 7 ed., 3 vols., Friburgi Brisgoviae: Herder *& Co., 1928-1933.*

Rager, John *Clement, Political Philosophy of Bl. Card. Bellarmine,* Washington: *The Catholic University of America Press, 1926.*

Regan, Robert E., *The Moral Principles Governing Professional Secrecy with an Inquiry into Some of the More Important Professional Secrets,* Washington: The Catholic University of America Press, 1941.

Réiffenstuel, Anacletus, *Theologia Moralis,* 2 vols., Mutinae: Sumptibus Jo. Baptistae Albritii, 1758.

Rodrigo, Lucius, *Praelectiones Theologico—Morales Comillenses, Tomus II, Tractatus de Legibus,* Santander: Editorialis Sal Terrae, 1944.

Roland—Gosselin, Bernard, *La doctrine politique de Saint Thomas d'Aquin,* Paris: Marcel Rivière, 1928.

Rommen, Heinrich A., *The Natural Law,* A Study in Legal and Social History and Philosophy, Translated by Thomas R. Hanley, St. Louis: B. Herder Book Co., 1947.

———, *The State in Catholic Thought, A* Treatise in Political Philosophy, St. Louis: B. Herder Book Co., 1945.

Ruland, Ludwig, *Foundations of Morality,* Translated by T. A. Rattler, St. Louis: B. Herder Book Co., 1938.

———, *Morality and the Social Order,* Translated by T. A. Rattler, St. Louis: B. Herder Book Co., 1942.

Ryan, John A.—Boland, Francis J., *Catholic Principles of Politics,* New York: The Macmillan Co., 1943.

Ryan, John A., *The Norm of Morality Defined and Applied to Particular Actions,* Washington: The National Catholic Welfare Conference, 1946.

Ryder, Raymond A., *Simony,* An Historical Synopsis and Commentary, Washington: Catholic University of America Press, 1931.

Sabetti, Aloisius—Barrett, Timotheus, *Compendium Theologiae Moralis,* 34 ed., New York: Frederick Pustet Co., 1939.

Salmanticenses, *Cursus Theologiae Moralis,* 6 tomi, Venetiis: Apud Nicolaum Pezzana, 1714.

Sanchez, Thomas, *Consilia, seu Opuscula Moralis, 2* vols., Lugduni: Sumptibus Iacobi Prost, 1635.

Sebastiani, Nicolaus, *Summarium Theologiae Moralis,* 8 ed., Taurini: Marietti, 1925.

Shields, Leo W., *The History and Meaning of the Term Social Justice,* South Bend, Ind.: University of Notre Dame Press, 1941.

Soto, Dominicus, *De Justitia et Jure,* Venetiis, 1586.

Suarez, Franciscus, *Opera Omnia,* 28 vols., Parisiis: Vives, 1856-1861; Vol. V, *De legibus,* ed. C. Berton.

Talento, Petrus Aloysius, *Tractatus de Contractibus ad Albertini Codicis normam accomodatus,* Montergali: Petrus Rossi, 1846.

---------- *Tractatus de Justitia et Jure ad Albertini Codicis normam accomodatus, 2* ed., Montergali: Petrus Rossi, 1845.

Tanquerey, Ad., *Synopsis Theologiae Moralis et Pastoralis,* 10 ed., 3 vols., Parisiis: Desclée et Socii, 1937.

----------, *Synopsis Theologiae Dogmaticae Fundamentalis,* 24 ed., Parisiis: Desclée et Socii, 1937.

Taparelli, D'Azeglio, *Droit Naturel,* Translated from the Italian, 2 vols., Tournai: H. & L. Casterman, 1857.

Tarquini, Camillus Cardinalis, *Institutiones luris Publici Ecclesiastici,* Romae; Ex Typographia Polyglotta, 1885.

Ubach, Josephus, *Compendium Theologiae Moralis,* 2 vols., Friburgi Brisgoviae: Herder *& Co.,* 1926.

Van Hove, A., *De Legibus Ecclesiasticis,* Mechliniae: H. Dessain, 1930.

----------, *Prolegomena ad Codicem luris Canonici,* 2 ed., Mechliniae: H. Dessain, 1945.

Van Roey, J. E. Cardinal, *De Virtute Charitatis Questiones Selectae,* Mechliniae: H. Dessain, 1929.

Vasquez, Gabriel, *Opera Omnia,* Lugduni, 1631: Vol. VIII, *Opuscula de Restitutione.*

Vermeersch, Arthurus, *Quaestiones de Justitia ad usum hodiernum· Scholastice Disputatae,* 2 ed., Brugis: Carolus Beyaert, 1904.

---------- *Theologiae Moralis, Principia—Responsa—Consilia,* 3 ed., 4 vols., Romae: Universita Gregoriana, 1933-1937.

Vitoria, Franciscus de, *De Justitia,* Edited by Vicente Beltran de Heredia, 3 vols., Madrid, 1934-1935.

Waffelaert, G. J., *Tractatus Theologici de Virtutibus Cardinalibus, Tractatus II, De Justitia,* 2 vols., Brugis: Beyaert—Storie, 1885-1886.

Wouters, Ludovicos, *Manuale Theologiae Moralis, 2* vols., Brugis: Carolus Beyaert, 1932.

General Works

Allen, Robert S. (ed.), *Our Fair City,* New York: The Vanguard Press, 1947.

Beard, Charles A., *American Government and Politics,* New York: The Macmillan Co., 1910

Beard, Charles A.—Beard, William—Binkley, Wilfred E., *The American Government and Politics,* 9 ed., New York: The Macmillan Co., 1946.

Behind the Scenes in Politics; a Confession, New York: E. P. Dutton & Co., 1924.

Black, Henry Campbell, *Black's Law Dictionary* containing Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern, 3 ed., St. Paul, Minn.: West Publishing Co., 1933.

Blackstone, Sir William, *Commentaries on the Laws of England in Four Books,* Edited by George Sharwood, 2 vols., Philadelphia: J. P. Lippincott Co., 1900.

Blaisdell, Donald Christy, *Economic Power and Political Pressure,* Washington: United States Government Printing Office, 1941.

Brooks, Robert Clarkson, *Corruption in American Politics and Life,* New York: Dodd, Mead and Co., 1910.

Brunner, Emil, *Justice and the Social Order,* Translated by Mary Hottinger, New York: Harper and Brothers, 1945.

Bryce, James, *The Hindrances to Good Citizenship,* New Haven: Yale University Press, 1909.

Cahill, Edward, *The Framework of a Christian State,* An Introduction to Social Science, Dublin: M. H. Gill and Son, Ltd., 1932.

Canons of Professional Ethics—Canons of Juridical Ethics: as amended and revised by the House of Delegates at Kansas City, Missouri. Chicago: American Bar Association, 1937.

Carman, Harry James, *The Street Surface Railway Franchises of New York City,* New York: Columbia University, 1919.

Chamberlain, Joseph P., *Legislative Processes National and State,* New York: D. Appleton—Century Co., 1936.

Cooley, Roger W., *Handbook of the Law of Municipal Corporations,* St. Paul, Minn.: West Publishing Co., 1914.

Copeland, Morris A.—Linnenberg, Clem C.—Barbour, Dana M., *Investigation of Concentration of Economic Power,* Monograph no. 19, *Government Purchasing*—An Economic Commentary, Washington: United States Government Printing Office, 1940.

Dawson, Christopher, *Beyond Politics,* New York: Sheed and Ward, 1939.

Deming, Horace E., *The Government of American Cities,* New York: G. P. Putnam's Sons, 1909.

Dinsmore, John C., *Purchasing Principles and Practices,* New York: Prentice Hall, 1922.

Encyclopaedia of Religion and Ethics, Edited by James Hastings, 13 vols., New York: Charles Scribner's Sons, 1912.

Encyclopaedia of the Social Sciences, Edited by Edwin R. A. Seligman, *14 vols., New* York: The Macmillan Co., *1930.*

Farrington, Robert *L., The Limitations upon the Delegation of Power by the Federal Legislature,* Washington: The Catholic University of America Press, 1941.

Fay, Charles N., *Big Business and Government, New York: Moffat, Yard and Co., 1912.*

Fish, C. R., The Civil Service and the Patronage, New York: Longmans, *Green and Co., 1905.*

FitzGerald, Desmond, *Preface to Statecraft,* London: Sheed and Ward, *1939.*

Flowers, Elliott G-, *Municipal Officials in Texas, Austin: The* University of Texas Publication n. 3929, August *1, 1939.*

Flynn, *John* T., *Graft in Business, New York:* The Vanguard Press, 1931.

Forbes, Russell, *Governmental Purchasing, New York: Harper* and Brothers, 1929.

Garrigues, Charles Harris, *You're Paying For It! A Guide to Graft, New York:* Funk and Wagnails *Company, 1936.*

Gaus, John Merriman—White, Leonard D.—Dimock, Marshall Edward, *The Frontiers of Public Administration,* Chicago: The University of Chicago Press, 1936.

Goodnow, *Frank J., Principles of the Administrative Law of the United States, New* York: G. *P.* Putnam's Sons, *1905.*

Great Encyclical Letters of Pope Leo XIII. Translations from approved sources. New York: Benziger Brothers, *1903.*

Gunther, John, *Inside U, S. A., New* York: Harper and Brothers, 1947.

Haas, Francis J., *Man and Society, New York: The* Century Co., 1930.

Harper, *Robert Francis, The Code of Hammurabi King of Babylon about 2250 B. C., Chicago: The University of Chicago Press, 1904.*

Hoffman, Ross J. S., *The Organic State, New* York: Sheed and Ward, *1939.*

Hughes, Philip, The Pope's New Order—A Systematic Summary of the *Social Encyclicals and* Addresses, from Leo *XIII to Pius XII, New* York: The Macmillan Co., 1944.

Husslein, Joseph (ed.), *Social Wellsprings:* Vol. I—Fourteen Epochal Documents by Pope Leo *XIII; Vol. II—Eighteen Encyclicals of Social Reconstruction by Pope Pius XI, St.* Louis: Bruce Publishing *Co., 1943.*

Ise, John, The United States Oil Policy, New Haven: Yale University Press, 1926.

Kerby, William J., *The Social Mission of Charity,* A Study of Points of View in Catholic Charities, Washington: The Catholic University of America Press, 1944.

Kerwin, Jerome G., *The Great Tradition, the Democratic Idea,* New York: The Declan X. McMullen Co., 1948.

Key, Valdimer Orlando, *Political Parties and Pressure Groups,* New York: Thomas Y. Crowell Co., 1946.

, The Techniques of Political Graft in the United States. Unpublished Ph.D. dissertation, Department of Political Science, The University of Chicago, 1934. (Partially printed in a private edition distributed by The University of Chicago Libraries, 1936.).

Laski, Harold J., *The State in Theory and Practice,* New York: The Viking Press, 1938.

Le Buffe, Francis P—Hayes, James V., *Jurisprudence* with cases to illustrate principles, New York: Fordham University Press, 1938.

Lecky, William E. H., *History of European Morals from Augustine to Charlemagne, 2* vols., New York: D. Appleton and Co., 1890.

Leage, R. W., *Roman Private Law,* Founded on the Institutes of Gaius and Justinian, 2 ed., London: Macmillan and Co., Ltd., 1946.

Lindsay, Ben, *The Beast,* New York: Doubleday, Page and Co., 1910.

Loth, David, *Public Plunder,* A History of Graft in America, New York: Carrick and Evans, 1938.

Lynch, Denis Tilden, *"Boss" Tweed,* New York: Boni and Liveright, 1927.

———————————, *Criminals and Politicians,* New York: The Macmillan Co., 1932.

McBain, H. L., *DeWitt Clinton and the Origin of the Spoils System in New York,* New York: Columbia University Press, 1907.

McKean, Dayton David, *The Boss; the Hague Machine in Action,* Boston: Houghlin Mifflin Co., 1940.

, Pressure on the Legislature of New Jersey, New York: Columbia University, 1938.

McKeon, Richard (ed.), *The Basic Works of Aristotle,* New York: Random House, 1941.

McKevitt, Peter, *The Plan of Society,* Dublin: Catholic Truth Society of Ireland, 1944.

MacLeish, Archibald—Prichard, E. F., (ed.), *Law and Politics,* Occasional Papers of Felix Frankfurter 1913-1938. New York: Harcourt, Brace and Co., 1939.

Thomas, Norman—Blanshard, Paul, *What's the Matter with New York?,* New York: The Macmillan Co., 1932.

Toepel, M. G., *The Assessment of Property for Ad Valorem Tax Purposes in Texas Cities,* Austin, Texas: The University of Texas Publication, August, 15, 1939.

United States Government Manual— 1947, 2 ed., Washington: Government Information Service, Office of Government Reports.

Vernon's Texas Statutes— 1936, Kansas City: Vernon Law Book Co.

Voorhis, Jerry, *Confessions of a Congressman,* Garden City: Doubleday and Co., 1948.

Werner, Morris R., *Tammany Hall,* Garden City: Doubleday, Doran and Co., 1928.

Weston, Stephen F., *Principles of Justice in Taxation,* New York: Columbia University, 1903.

White, Leonard D., *Introduction to the Study of Public Administration, New* York: The Macmillan Co., 1939. Revised edition.

White, Leonard D.—Smith, T. V., *Politics and Public Service,* A Discussion of the Civic Art in America, New York: Harper and Brothers, 1939.

Williston, Samuel, *A Treatise on the Law of Contracts,* Rev. ed. S. Williston—George J. Thompson, 8 vols., New York: Baker, Voorhis and Co., 1938.

Willoughby, Westel Woodbury, *Social Justice; a* Critical Essay, New York: The Macmillan Co., 1900.

Wilmerding, Lucius, *Government by Merit, An* Analysis of the Problem of Government Personnel, New York: McGraw-Hill Book Company, 1935.

Words and Phrases; All Juridical Constructions and Definitions of Words and Phrases by the State and Federal Courts from the Earliest Times, Alphabetically Arranged and Indexed, Permanent Edition, 45 vols., St. Paul: West Publishing Co., 1940.

Wright, John J., *National Patriotism in Papal Teaching,* Westminster, Md.: The Newman Bookshop, 1943.

Zeller, Belle, Pressure Politics in New York, A Study Group Representation Before the Legislature, New York: Prentice-Hall, 1937.

Articles

Adler, M. J.—Farrell, Walter, "The Theory of Democracy," *The Thomist,* III (1941), pp. 588-652.

Atkinson, C. R., "Recent Graft Exposures and Prosecutions," *The National Municipal Review,* I (1912), 678.

Bakeless, John, "New York, The Nation's Prodigal," *Forum,* LXXX (1928), 599-611.

Bingham, Theodore A., "The Organized Criminals of New York," *McClure's Magazine,* XXXIV (1909-1910), 62-67.

——. , "Policing Our Lawless Cities," *Hampton's Magazine,* XXIII (September 1909), 289-300.

Bryan, William Jennings, *Thou Shalt Not Steal,* An Address Delivered before the Civic Forum in Carnegie Hall, New York City, February 4, 1908. New York: The Civic Forum, 1908.

Business Value of the Merit System, New York: National Civil Service Reform League, 1940.

Chicago Tribune, November 23, 1929.

"Corruption in Public Life," *Saturday Review of Politics, Literature, Science and Art* (London), CXLII (1926), 60 sqq.

Davies, W. R., "Why I Believe in Patronage," *The National Municipal Review,* XIX (1930), 18-21.

Donovan, Joseph P., "The Determinant of the Absolute Amount," *The Homiletic and Pastoral Review,* XLVII (1947), 380-385.

Early, Maurice, "Indianapolis Mayor Faces Jail Sentence," *The National Municipal Review,* XVI (1924), 684-687.

Faidherbe, A-J., "Le droit de la justice distributive," *Revue des sciences philosophiques et théologiques,* XXII (1933), 47-70.

Farley, James A., "Passing Out the Patronage," *American Magazine,* CXXVI (1938), 20-22.

Ford, John C., "Notes on Moral Theology, 1945," *Theological Studies,* VI (1945), 524-546.

Griffenhagen, E. C., "The Merit System in Chicago and Cook County," *The National Municipal Review,* XVIII (1929), 690-695.

Harmignie, Pierre, "La notion de justice distributive stricte," *Studia Catholica,* Nijmegen, XIII (1937), 329-340.

Hering, Hyacinthus M., "De acceptione personarum," *Angelicum,* XIX (1942), 119-138.

———————— ———————— "De genuina notione justitiae generalis seu legalis iuxta S. Thomam," *Angelicum,* XIV (1937), 464-487.

Hyland, Philip, "The Field of Social Justice," *The Thomist,* I (1939), 295-330.

Kerney, James, "Will Hague Defeat F.D.R.?," *The Nation,* CLIX (1944), 232-233.