

## ON THE ASYMMETRY OF VALUES AND DUTIES AND ITS IMPLICATIONS FOR LAW

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**Abstract.** The paper deals with the problem of the relationships between values and duties. Two views of these relationships are analyzed, which are called in the paper 'The Symmetry View' and 'The Asymmetry View'. It is argued that the latter view (which rejects, *inter alia*, the thesis that iff an act  $p$  is good,  $p$  is obligatory) is the correct one. The main goal of the paper is to provide a conceptual framework for presenting the Asymmetry View. The framework introduces, *inter alia*, a distinction between acts which are good in the supererogatory sense (which are called in the paper the 'acts of the Heroic Samaritans') and the acts which are good in the *quasi*-supererogatory sense (which are called in the paper 'the acts of the Good Samaritans'). The framework is also used to provide a classification of legal systems according to what types of acts they enforce by legal sanctions.

**Key words.** Values, duties, symmetry view, asymmetry view, supererogatory acts, *quasi*-supererogatory acts, legal systems

### 1. Introduction

The common-sense moral discourse can be pursued in the language of values (i.e., in terms of goodness and badness) or in the language of duties (i.e., in terms of injunctions and prohibitions). The main goal of this paper is to analyze the relationships between these two ways of conceptualizing common-sense moral discourse. In section 2 I present two views on the relationships between values and duties, which I shall call 'The Symmetry View' and 'The Asymmetry View'. I argue that the latter view is the correct one. In section 3 I propose a classification of moral acts which is intended to give justice to the complexity of the relationships between values and duties implied by the Asymmetry View. In section 4 I use this classification as a tool for comparing various legal systems.

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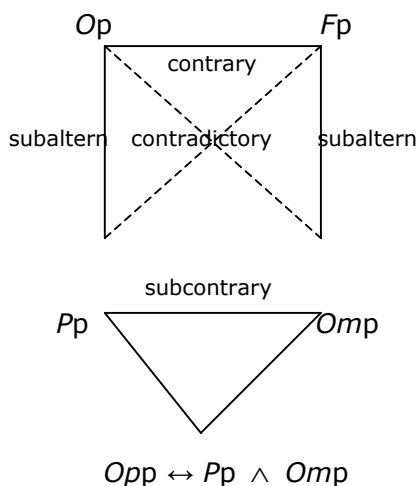
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## 2. Two views on the relationships between values and duties

One can distinguish two views on the relationships between values and duties, which I shall call 'The Symmetry View' and 'The Asymmetry View'.

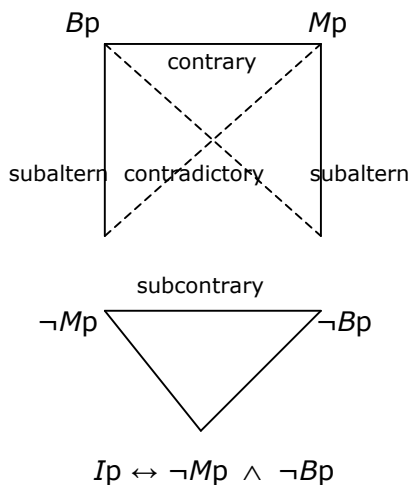
*The Symmetry View* assumes that there is a 'harmony' between values and duties. What is meant by 'harmony' here is that every value (positive or negative) implies a duty (respectively, positive or negative) and every duty (positive or negative) corresponds to a value (respectively, positive or negative). It is worth noting that, on the assumption that an essential part of the concept of duty is that its fulfillment can be required, the symmetry of values and duties implies the symmetry of values and claims. A classical statement of the Symmetry View is the famous Thomist dictum: *bonum est faciendum et prosequendum, et malum evitandum* (though I do not mean to suggest that the Thomist moral philosophy, when carefully read, can be rightly regarded as presupposing this view). The Symmetry View seems to be implicitly assumed in the traditional deontic logic: the traditional deontic logic does not allow for the so-called supererogatory acts and (as we shall see in the further part of this paper) the existence of this type of acts is one of the main arguments for the thesis about the asymmetry of values and duties. Let me now present the Symmetry View in a more precise way by using a simple logical tool: squares of oppositions. The deontic square of oppositions can be presented as follows:

Fig. 1: The deontic square of oppositions



The deontic operators are: *O* – obligatory, *F* – forbidden, *P* – permissible, *Om* – omissible, *Op* – optional; *p* denotes an act. *Pp* is called a ‘weak permission’, and *Op* is called a ‘strong permission’. I shall not comment on all the (well-known) logical relations between the operators (they are named in the square of oppositions, e.g., *Op* and *Omp* are contradictory sentences, i.e.,  $\neg(Op \leftrightarrow Omp)$ ); I shall just point at two of them which are not named in the square of oppositions:  $Fp \leftrightarrow O\neg p$ ,  $Pp \leftrightarrow \neg O\neg p$  (i.e., *Pp* implies that  $\neg p$  is not obligatory but does not imply that *p* cannot be obligatory). An analogous square of oppositions can be constructed for axiological categories.

Fig. 2: The axiological square of oppositions



The axiological operators are: *B* (*bona (actio)*) – good (action), *M* (*mala*) – bad, *I* (*indifferens*) – indifferent. ‘Good’, ‘bad’ and ‘indifferent’ are defined in terms of ‘ought to be’: an act *p* is good to do if the state of affairs that the act causes ought to exist; an act *p* is bad to do if the state of affairs that the act causes ought not to exist; an act *p* is indifferent to do if it is neither good or bad. Again, I shall not comment on all the (well-known) logical relations between the operators; I shall just point at one them which is not named in the square of oppositions:  $Mp \leftrightarrow B\neg p$ .

Now, having these two square of oppositions at one's disposal, one can precisely express the Symmetry View; this view assumes the following five theses:

- (a)  $Bp \rightarrow Op$
- (b)  $Mp \rightarrow Fp$
- (c)  $\neg Bp \rightarrow Omp$
- (d)  $\neg Mp \rightarrow Pp$
- (e)  $Ip \rightarrow Opp$

If these relations between axiological and deontic sentences held, then it might be justifiable to ignore the language of values while reconstructing the common-sense morality. However, the adherents of the Asymmetry View claim that these relations do not hold.

*The Asymmetry View* assumes that there is a 'disharmony' between values and duties. Thus, according to this view, it is not case that every value (positive or negative) implies a duty (respectively, positive or negative) and every duty (positive or negative) corresponds to a value (respectively, positive or negative). The Asymmetry View implies, then, that there is a gap, or rather a crack, in the very realm of moral normativity – a gap or crack between 'Good' and 'Ought'. It is worth noting that, on the assumption that an essential part of the concept of duty is that its fulfillment can be required, the asymmetry of values and duties implies the asymmetry of values and claims. The Asymmetry View can also be expressed in the following way: it is not generally true that *bonum est faciendum et prosequendum, et malum evitandum*.

The crucial question is which of the two views of the relationships between values and duties is the correct one. The adherents of the Asymmetry View argue against the Symmetry View by pointing to the existence of 'supererogatory acts', i.e., acts that 'go beyond the call of duty' (e.g. an act of sacrificing one's life to save another person's life) and 'lesser evil acts', i.e., acts in which an agent has to choose between two bad actions and chooses the action which is a 'lesser evil' (e.g., a poor person's act of stealing to get food for her starving child)<sup>1</sup>. The former acts are good but not obligatory, the latter are bad but not

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<sup>1</sup> These two arguments are presented with great lucidity and argumentative power by L. KOLAKOWSKI, *Etyka bez kodeksu (Ethics without a Codex)*, in: L. KOLAKOWSKI, *Kultura i fetysze (Culture and Fetishes)*, PIW, Warsaw, 1967, pp.147-190. The problem of supererogatory acts was revived in contemporary philosophy by J. URMSON, *Saints and Heroes*, in: A. MELDEN, *Essays in Moral Philosophy*, University of Washington Press, Seattle, 1958.

forbidden. Thus, the adherents of the Asymmetry view reject the theses (a) and (b) of the Symmetry View by claiming that:

(a)  $\exists p \neg (Bp \rightarrow Op)$  (these acts  $p$  are supererogatory acts)

(b)  $\exists p \neg (Mp \rightarrow Fp)$  (these acts  $p$  are 'lesser evil' acts).

These two arguments against the Symmetry View are cogent; indeed, it seems implausible to deny that the two types of acts which cannot be accommodated in the Symmetry View are deeply embedded in the common-sense moral discourse. The Asymmetry View therefore seems to be the correct account of the relationships between values and duties. However, this view needs to be worked out in greater detail. This is so for the following reason: the Asymmetry View implies that the classification of acts assumed within the traditional deontic logic is not satisfactory but does not specify how the proper classification of acts should look like. Therefore the main challenge faced by the adherents of the Asymmetry View is to provide a classification of acts which would properly take into account the two types of acts which pose an (arguably, insuperable) problem for the Symmetry View. The main goal of this paper is to propose such a classification. However, prior to presenting my own classification, I shall make some remarks on two other theoretical proposals of dealing with the problem of the asymmetry of values and duties<sup>2</sup>.

One such proposal was put forward by R. M. Chisholm (1963). Chisholm divided acts according to the goodness, badness, and neutrality of their performance and non-performance. These criteria give nine categories of acts:

*obligatory acts*: acts that are good to do and bad not to do

*indifferent acts*: acts that are neutral to do and neutral not to do

*wrong (prohibited) acts*: acts that are bad to do and good not to do

*supererogatory (in commission) acts*: acts that are good to do and neutral not to do

*supererogatory (in omission) acts*: acts that are neutral to do and good not to do

*totally supererogatory acts*: acts that are good to do and good not to do

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<sup>2</sup> It should be stressed, though, that the authors of these proposals do not write explicitly about the problem of asymmetry of values and duties; they see their proposals as ways of explicating the basic categories of common-sense morality. However, since one of the categories to which they devote especially much attention is the category of supererogation, it seems plausible to interpret their proposals in this way.

*offensive (in commission) acts*: acts that are bad to do and neutral not to do

*offensive (in omission) acts*: acts that are neutral to do and bad not to do

*totally offensive acts*: acts that are bad to do and bad not to do.

In my view, this proposal has three serious defects. First, it assumes that *bonum* and *malum* are undifferentiated categories and thereby fails to distinguish 'lesser evil acts'. Second, in this classification the relationships between axiological and deontic categories are not transparent, e.g., it is not clear whether the acts are classified primarily in axiological or deontic categories. Third, this classification does not provide material criteria for distinguishing between supererogatory acts and obligatory acts.

The second proposal on which I shall make some remarks was put forward by P. McNamara (1996). McNamara has introduced an additional deontic operator *MI* (p) (which should be read as meaning 'doing the minimum morality allows involves seeing to it that p') in order to precisely describe the concept of supererogatory acts *SU*. According to McNamara a supererogatory act can be defined in the following way:  $SUp \leftrightarrow Pp \wedge MI\neg p$ . This definition is very intuitive. However, it seems doubtful whether by adding this operator<sup>3</sup> to the traditional deontic logic one can obtain a sufficiently subtle classification of acts. For instance, this classification still does not permit to capture the specificity of 'lesser evil acts'. Furthermore, it does not provide any material criteria for distinguishing between supererogatory acts and obligatory acts. Of course, McNamara is perfectly aware of these features of his account and would not treat them as 'defects'. For his aim was to build a deontic logic that would enable one to define the category of supererogation (which, as was mentioned, cannot be defined within the traditional deontic logic). Nonetheless, he also claims that his logic can be regarded as 'a logic for common-sense morality'. And my point is that his classification fails in this regard because it fails to distinguish one of the important types of acts (lesser evil acts). Moreover, McNamara does not make clear the relationships between axiological and deontic categories.

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<sup>3</sup> In fact, McNamara adds two operators to the traditional deontic logic: not only *MI* but also *MA* (p), which is to be read as meaning 'doing the maximum morality allows involve seeing to it that p'. Only the former operator is important from the standpoint of the goals of my analyses.

In summary, the common defects of the above two attempts to provide a classification of acts are that: they fail to distinguish a category of lesser evil acts; they do not provide a clear account of the relationships between axiological and deontic part of morality; they do not provide material criteria for distinguishing between obligatory acts and supererogatory acts; they assume that the categories of good and bad are undifferentiated. As a result they provide a clear and simple but distorted picture of the categories of common-sense moral discourse. In the following section I shall propose an alternative classification.

### 3. A classification of acts

The classification will provide a less clear and less simple, but – arguably – also less distorted picture of the categories of moral discourse than the two classifications presented in the last section. It seems, given the Asymmetry View, that in order to provide a non-distorted picture of the categories of common-sense moral discourse, it is necessary to clearly distinguish axiological and deontic part of morality and to specify in detail the relationships between these two parts. I realize this task in the following way. I provide a classification of acts according to the criterion of their axiological evaluation, i.e., according to their goodness or badness. Thus, I treat the axiological categories as the basic ones. I argue that it is misleading to speak only about ‘good acts’, ‘bad acts’ (and ‘morally indifferent acts’) because these two categories are *internally differentiated*. I assume that the varieties of goodness and badness form a hierarchy: for *bonum*, in the sense that the best act that belongs to a higher variety of *bonum* is ‘morally better’ than the best act that belongs to a lower variety; for *malum*, in the sense that each act that belongs to a higher variety is ‘morally better’ (or ‘morally less worse’) than each act that belongs to a lower variety.<sup>4</sup> In the context of social morality (regulating interpersonal relations), *B* (*bonum*) refers to acts of helping (broadly understood) other persons and *M* (*malum*) refers to acts of harming (broadly understood) other persons; *malum* is therefore understood here as *malum morale* (harm caused by other persons), not *malum physicum* (harms not caused by persons). The meaning of *bonum* and *malum* in the context of individual morality (regulating the actions of an agent

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<sup>4</sup> However, I do not exclude that the first part of the previous sentence may be wrong: it may be that each act that belongs to a higher variety of *bonum* is *morally better* than the best act that belongs to a lower category. In point of fact, nothing in my further analysis depends on whether the former account is correct or the latter.

towards oneself) will be made precise at the end of this section. At this stage, I just want to note that there are two different types of individual morality: liberal and perfectionist. The former assumes that all acts toward oneself are morally indifferent, while the latter assumes that there are acts toward oneself which can be evaluated in terms of *bonum* and *malum*.

Fig. 3: A classification of acts according to their moral evaluation

Acts	toward others (the object of social morality)	toward oneself (the object of individual, liberal morality)	toward oneself (the object of individual, perfectionist morality)
(1) $B_{sup}$	+	-	+
(2) $B_{qsup}$	+	-	-
(3) $B_{rog}$	+	-	+
(4)	+	+	+
I			
(5)	+	-	-
$M_l$			
(6) $M_{ns}$	+	-	+
(7)	+	-	+
$M_s$			
(8) $M_{skand}$	+	-	-

I shall now characterize in more detail some of the acts enumerated in the table. The analysis will refer in the first place to social morality. As mentioned, I shall comment on the individual morality (the third and the fourth column of this table) at the end of this section.

(1)  $B_{sup}$  = acts which are *good in the supererogatory sense*.

Acts that are  $B_{sup}$  are glorious (praiseworthy, meritorious, heroic) acts. They can be called 'the acts of *the Heroic Samaritan*'. Material conditions of these acts are the following: there is no prior relation of responsibility between the beneficent and the beneficiary, and the beneficent incurs high risk in helping the beneficiary, i.e., personal costs of his/her act are high. One may argue that it is also necessary to



introduce another condition (which can be called 'internal', as opposed to the previous one, which can be called 'external') requiring that the beneficent's motives be unselfish. However, given that the knowledge of the other people's intentions can be known with certainty only in very rare cases (if ever), this condition seems to be too restrictive; were it assumed, one could hardly ever be certain that an agent has done a supererogatory act. It is not quite clear how to classify benefactor acts in the case of which there is a prior relation of responsibility between the beneficent and the beneficiary, and the beneficent incurs high risk. It seems that these acts are also good in the supererogatory sense (though one could argue that they are good in the rogatory sense – the sense of 'good' to be discussed below). It bears emphasizing that the above definition of acts which are good in the supererogatory sense may be too narrow; one may argue that acts which are good in the supererogatory sense are not only acts which satisfy this definition (though they assuredly constitute the overwhelming majority of acts which are good in the supererogatory sense) but also some omissions (I shall comment on the type of omissions which can be regarded as good in the supererogatory sense while presenting the category of lesser evil acts).  $B_{sup}$  does not imply  $Op$ ; thus, acts which are good in the supererogatory sense are 'beyond the call of duty'. It seems that their deontic character can be more precisely described by means of a term 'counseled' (*Couns*); i.e.,  $B_{sup}p \rightarrow Counsp$ . I have borrowed the term 'counseled' from the tradition of Christian philosophy, which distinguishes between *praecepta* (basic ethical requirements, e.g., ten commandments) and *consilia* (ethical rules that go beyond the basic ethical requirements, e.g., a counsel to live in poverty, a counsel to self-sacrifice for the sake of other people<sup>5</sup>). The distinction between *praecepta* and *consilia* is a basis for the distinction between lower Christian life (only in accordance with *praecepta*) and higher – more perfect – Christian life (in accordance with *praecepta* and *consilia*)<sup>6</sup>. Interestingly, acts which are good in the supererogatory sense constitute a problem not only for the traditional deontic logic but also for the philosophical analysis. As is well known, it is not easy to give a clear sense to or to justify acts which are good in the supererogatory sense on the grounds of two (arguably, dominant) moral philosophies, namely, utilitarianism

<sup>5</sup> It is worth noticing that it is not clear in Christian teaching whether "love thy enemies" is *praeceptum* or *consilium*.

<sup>6</sup> More information on the history of the concept of supererogation can be found, e.g., in: A.M. KANIOWSKI, *Supererogacja. Zagubiony wymiar etyki (Supererogation: A Lost Dimension of Ethics)*, Oficyna Naukowa, Warsaw, 1999.

and Kantianism. Utilitarianism asserts that if an act maximizes general happiness, then it is obligatory, and if it does not maximize general happiness it is forbidden. Thus, apparently, utilitarianism lacks conceptual resources to capture the special deontic character of acts which are good in the supererogatory sense. As for Kantianism, it is clear that acts which are moral in the Kantian sense, i.e., pass the test of the categorical imperative, are obligatory. It seems, then, that there is no place in Kantian moral philosophy for acts which are good in the supererogatory sense and thereby counseled (rather than obligatory). However, one may argue that the acts prescribed by Kant's imperfect duties are good in the supererogatory sense, and thereby counseled. In order to assess this argument, let me recall Kant's classification of moral duties<sup>7</sup>:

Fig. 4: Kant's classification of moral duties

Moral duties	Perfect (vollkommene Pflichten)	Imperfect (unvollkommene Pflichten)
Inner (toward oneself)	prohibition on committing suicide to avoid future unhappiness	prohibition on neglecting one's natural gifts
Outer (toward others)	prohibition on making false promises	prohibition on not helping others in need (whom one can easily help)

Kant writes: 'I understand here by a perfect duty one which allows no exception in the interests in inclination (1964, footnote to section 53)'. Therefore imperfect duties allow more latitude to inclination than perfect duties. A duty  $\neg p$  is perfect if, and only if, the maxim  $p$  cannot be *thought of as a general law* without contradiction (Kant considers the following maxims  $p$ : 'From self-love I make it my principle to shorten my life if its continuance threatens more evil than promises'; 'Whenever I believe myself short of money, I will borrow money and promise to pay

<sup>7</sup> Cf. I. KANT, *Groundwork of the Metaphysics of Morale (Grundlegung der Metaphysik der Sitten)*, 1785, transl. H.J. PATON, Harper Torchbooks, New York, 1964, sections 53-57.

it back, though I know that this will never be done'). A duty  $\neg p$  is imperfect if, and only if, the maxim  $p$  can be *thought of as a general law* without a contradiction but cannot be *willed as a general law* without contradiction (Kant considers the following maxims  $p$ : 'neglect your natural gifts'; 'Do not help others who struggle with great hardships (and whom you can easily help)'). It is not quite clear whether 'allowing no exception in the interests of inclination' is to be viewed as having significance only in the context of justifying maxims or also in the context of their application. If the latter is the case, then imperfect duties would be duties that ought to be fulfilled *to a certain extent*. But even then, they could not be treated as prescribing acts which are good in the supererogatory sense and thereby counseled rather than obligatory, since duties which ought to be fulfilled to a certain extent are still duties. In summary, acts prescribed by Kant's imperfect duties are not good in the supererogatory sense. Finally, it should be stressed that the fact that it is difficult to give a clear sense to or to justify on the grounds of utilitarianism and Kantianism acts which are good in the supererogatory sense should not be regarded as an argument against the plausibility of the concept of this type of acts (which is deeply embedded in our common-sense moral discourse) but, rather, as an argument against these two ethical theories as attempts to properly explicate our common-sense moral discourse.

(2)  $B_{qsup}$  = acts which are *good in the quasi-supererogatory sense*.

Acts which are good in the quasi-supererogatory sense can be called 'the acts of *the Good Samaritan*'. Material conditions of these acts are the following: there is no prior relation of responsibility between the beneficent and the beneficiary, and the beneficent incurs small or moderate risk in helping the beneficiary, i.e., personal costs of his/her act are not high. The previous remarks on the internal condition formulated in the context of acts which are good in the supererogatory sense apply also to acts which are good in the quasi-supererogatory sense. It is not clear whether  $B_{qsup}p \rightarrow Op$ . However, most thinkers seem to assume that  $B_{qsup}p \rightarrow Op$ . For instance, as we have just seen, Kant explicitly asserts that acts which I have called good in the quasi-supererogatory sense (helping others in need whom one can easily help) are obligatory (they are imperfect duties, but – as was mentioned – imperfect duties in Kant's moral philosophy cannot be identified with counseled acts). Thus, on this view, it can be said that the Biblical Good Samaritan just fulfilled his duty. An example of this type of act can be a

situation in which a person  $X$  helps, without sustaining high costs, a victim of a car accident which was not caused by  $X$  (since the accident was not caused by  $X$  there is no prior, i.e., preceding an act of helping, relation of responsibility between  $X$  and the victim of an accident).

(3)  $B_{rog}$  = acts which are *good in the rogatory sense*<sup>8</sup>.

Material conditions of these acts are the following: there is a prior relation of responsibility between the beneficent and the beneficiary, and the beneficent incurs small or moderate risk in helping the beneficiary. It is clear that:  $B_{rog}p \rightarrow Op$ . An example of this type of act can be a situation in which a person  $X$  helps, without sustaining high costs, a victim of a car accident caused by  $X$  (since the accident was caused by  $X$  there is a prior, i.e., preceding an act of helping, relation of responsibility between  $X$  and the victim of an accident).

To sum up, helping may be any one of the above three types of good acts. If it is  $B_r$ , then it is obligatory; if it is  $B_{sup}$ , then it is not obligatory; if it is  $B_{qsup}$ , then it is (arguably) obligatory.

(4)  $I$  = *morally indifferent* acts.

These acts are neither good nor bad. It is clear that a morally indifferent act is always morally optional, i.e.,  $M_{nsp} \rightarrow Opp$ . But, of course, a morally indifferent act may not be legally optional: law can make morally indifferent acts (legally) forbidden or (legally) obligatory.

(5)  $M_l$  = *lesser evil* acts.

Arguably, one can distinguish three different situations in which an agent can choose lesser evil  $p$ , i.e., can do a lesser evil act  $p$ : (1) in order to avoid greater evil to which other persons for whom he/she is responsible are exposed; (2) in order to avoid greater evil to which other persons for whom he/she is not responsible are exposed; (3) in order to avoid greater evil to which he/she is exposed. It seems that in the case (1) an agent is obliged to do  $p$ , in the case (2) an agent is counseled to do  $p$ , and in the case (3) an agent is allowed to do  $p$ . As a

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<sup>8</sup> "Rogatory" (from Latin "rogo, are" – ask, request) is a neologism which I have coined to describe good acts which can be asked, requested, required, i.e., which are *within the call of duty*.

result, we have three types of  $M_i$ :  $M_{i1}p \rightarrow Op$ ,  $M_{i2}p \rightarrow Counsp$ ,  $M_{i3}p \rightarrow Pp$ . Thus, interestingly, it turns out that counseled acts may be not only acts which are good in the supererogatory sense but also acts which are bad in the sense of the lesser evil  $M_{i2}$ . An additional comments on acts  $M_{i3}$  seems necessary. One could plausibly argue that a proper characterization of the deontic character of  $M_{i3}$  is:  $M_{i3}p \rightarrow Pp \wedge Couns\neg p$  (where  $p$  is, e.g., killing by person  $X$  in self-defence person  $Y$  who has intended to kill  $X$ , and thereby  $\neg p$  is *not* killing  $Y$  in self-defence against the threat of being killed by  $Y$ , and therefore allowing oneself by  $X$  to be killed by  $Y$ ) rather than:  $M_{i3}p \rightarrow Pp$ . Apparently, doing  $\neg p$  if  $M_{i3}p$  can be regarded as good in the supererogatory sense and thereby counseled. As we can see, the category of lesser evil acts involves particular theoretical difficulties.

(6)  $M_{ns}$  = acts which cause *non-substantial evil*.

(7)  $M_n$  = acts which cause *substantial evil*.

By non-substantial evil I mean non-substantial harm, by substantial evil I mean substantial harm. It would be rather difficult to try to formulate in a more precise way material conditions of this type of acts, given the vagueness of the notion of 'substantial harm'. However, I do not find it a serious problem for the classification, because in concrete cases we can usually quite readily distinguish between non-substantial harm and substantial harm. It is clear that:  $M_{ns}p \rightarrow Fp$ ,  $M_s p \rightarrow Fp$ .

(8)  $M_{skand}$  = acts which cause extreme – *skandalon* – evil.

The name *skandalon* (pl. *skandala*) is a old-Greek word denoting 'obstacle' and is used in the New Testament with reference to extremely bad acts which cannot be forgiven. The following quotations are relevant here:

'Whosoever shall offend one of these little ones that believe in me, it is better for him that a millstone were hanged about his neck, and he were cast into the sea (Mk, 9, 42)'; 'It is impossible but that offences will com: but woe unto him, through whom they come. It were better for him that a millstone were hanged about his neck, and he cast into the sea, than that he should offend one of these little ones (Lk, 17, 2)'

The *skandalon* evil can be understood in two slightly different ways (of course, on both understandings it is the case that  $M_{skand}p \rightarrow Fp$ ). First, a *skandalon* act can be understood as combining an *evil intention*

(*X* does an evil act *p* only because *p* is an evil act; thus evil is an end in itself for *X*, not a means for achieving some other end of *X*); and *atrocious*: *p* is an atrocious act. Second, a *skandalon* act can be understood as combining *atrocious* with *thoughtlessness* (*unwillingness or inability to pursue an internal dialogue with oneself*), *banality* of its perpetrator. This is H. Arendt's understanding of *skandala*<sup>9</sup>. For Arendt, an example of *skandalon* evil-doer was Eichmann. The evil he committed – the most extreme evil – was not 'radical' in the etymological sense, i.e., it had no 'roots', as it did not flow from the demonic nature of its perpetrator but from his banality, his lack of critical judgment. Eichmann's evil had no 'depth' because Eichmann himself lacked any 'depth'. Arendt stresses that *skandala* cannot be repaired by punishment or forgiving; they are 'obstacles' for all further acts.

The above varieties of goodness and badness were defined with reference to social morality. However, it appears that one can analogously apply some of these categories to individual, perfectionist morality. It seems that one can speak meaningfully about acts toward oneself which are good in the supererogatory self (e.g., in the Christian tradition it is assumed that a self-regarding activity which is good in the supererogatory sense is living in sexual chastity; one may also argue that leading a creative life is good in the supererogatory sense.), which are good in the rogatory self (e.g., taking care of one's health), which are bad in the sense of non-substantial or substantial evil. However, it does not seem possible to speak meaningfully about acts toward oneself which are good in the quasi-supererogatory sense or which are bad in the *skandalon* sense (though, perhaps, some philosophers would be inclined to treat suicide as bad in the *skandalon* sense).

I would like to finish this section by stressing that the above classification of moral acts is not a logic of moral discourse. It is not a logic because I have not specified logical relations between various axiological categories, i.e., various types of 'good' and 'bad'. Clearly, since I treat all the varieties of 'good' as mutually exclusive and exhaustive, a good act can be good only in one sense (the same applies to the category of 'bad'). This is an obvious logical relation between

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<sup>9</sup> See H. ARENDT, *Some Questions of Moral Philosophy*, in: H. ARENDT, *Responsibility and Judgment*, Schocken, New York, 2006, pp.49-146; H. ARENDT, *Thinking and Moral Considerations*, in: H. ARENDT, *Responsibility and Judgment*, Schocken, New York, 2006, pp.159-192.

specific categories of 'good' (and specific categories of 'bad'). What is more controversial is the problem of *mutual* relations between categories of 'good' and 'bad'. In the traditional account, which regards these categories as internally undifferentiated, the following equivalence is assumed:  $Mp \leftrightarrow B\neg p$ . In order to treat my classification as a logic, one would have to (among other things) specify analogous equivalences for various senses of 'good' and 'bad'. However, I doubt if this task is worth its efforts and, more importantly, if this task is a well-conceived one. I am inclined to believe that the task may be ill-conceived because the very equivalence  $Mp \leftrightarrow B\neg p$  (or, more generally, the very idea of inter-defining good and bad) is ill-conceived. It seems to me highly unintuitive to say that omission of a bad act (not harming another person) is a good act: if  $X$  does not steal or does not renege on her promises, etc., she does not thereby do good acts; she just does not do bad acts. A good act is *positive*: it consists in helping (broadly understood) another person; to refrain from doing a bad act is not to do a good act – it is what it is: not to do a bad act.

#### 4. The variety of legal systems

The above typology of acts can be used to classify legal systems according to what types of acts they make (legally) obligatory or forbidden. Two extreme legal systems can be dubbed 'a maximally moral legal system' and 'a minimally moral legal system'. A maximally moral legal system  $LS$  can be characterized in the following way:  $MS:\{B_{sup}, B_{qsup}, B_{rog}, M_{ns}, M_s, M_{skand}\}$  and  $MI:\{B_{sup}, B_{rog}, M_{ns}, M_s\}$  and/or  $I$ . Thus, this legal system makes (legally) obligatory or forbidden all the acts of social morality (I discount lesser evil acts because of their especially complicated and rather ambiguous character) and all the acts of individual, perfectionist morality. This legal system may also make (legally) obligatory or forbidden acts which are axiologically indifferent. A minimally moral legal system  $LS$  can be characterized in the following way:  $MS:\{M_s, M_{skand}\}$  and  $I$ . It is rather difficult to find real-life examples of these two types of legal systems. Let me now present theoretical models of contemporary Western legal systems. It seems that one can distinguish four basic models thereof:

(1) *The Continental law<sub>1</sub>*:  $MS:\{B_{qsup}, B_{rog}, M_s, M_{skand}\}$  and  $MI:\{M_s\}$  and  $I$ .

(2) *The Continental law<sub>2</sub>*:  $MS:\{B_{qsup}, B_{rog}, M_s, M_{skand}\}$  and  $I$ .

Thus, in the continental law systems there is usually a general duty to come to the rescue of strangers (i.e., legal systems enforce  $B_{qsup}$

acts), though there exist many differences between concrete continental law systems regarding the details of the regulation of this duty.<sup>10</sup> Some continental legal systems enforce individual, perfectionist morality to a certain degree (e.g., they enforce the norm of individual morality which condemns prostitution); I call these legal systems the Continental law<sub>1</sub>.

(3) The *American (US) legal system*:  $MS:\{B_{rog}, M_s, M_{skand}\}$  and  $MI:\{M_s\}$  and *I*. Thus, in this legal system, social morality is legally enforced to a smaller degree than in the Continental law<sub>1</sub> and the Continental law<sub>2</sub>: law does not enforce acts that are good in the quasi-supererogatory sense, i.e., there is no general duty to come to the rescue of strangers (there exist specific duties to aid others in relationships of dependence, e.g. parents-children, or by people occupying a special positions, e.g. policemen<sup>11</sup>, but these acts of aid are good in the rogatory sense, not in the quasi-supererogatory sense). In the American law system individual morality is legally enforced to a higher degree than in the Continental law<sub>2</sub>.

(4) *The British legal system*:  $MS:\{B_{rog}, M_s, M_{skand}\}$  and *I*. Thus, in the British legal system, social morality is legally enforced to a smaller degree than in the Continental law<sub>1</sub> and the Continental law<sub>2</sub>: law does not enforce acts that are good in the quasi-supererogatory sense, i.e., there is no general duty to come to the rescue of strangers (though, as

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<sup>10</sup> Cf. the following quotation: J.M. SMITS, *The Good Samaritan in Continental Private Law; On the Perils of Principles without a Programme and a Programme for the Future*, [http://works.bepress.com/jan\\_smits/8/](http://works.bepress.com/jan_smits/8/), 2000, p.6: "Differences exist, e.g., as to the question whether already danger to bodily integrity brings along a duty to rescue (as is the case in Italy, Germany and France) or only danger to life does so (as is the case in the Netherlands, but also in Norway and Denmark). Provisions also differ as to the persons who are bound to render assistance. These could be only witnesses (Netherlands and Italy), people to whom the danger is evident (Denmark) or everyone informed of the danger (Belgium). French law does not seem to take a stand on this point, while German law limits itself to the vague concept of *Zumutbarkeit*. And apparently, the risk that is to be taken by the rescuer also differs: in Germany and Belgium, a considerable danger would be enough not to intervene, in the Netherlands and France, the standard is lower because any personal risk would be sufficient reason or even any risk at all (France). The Italian provision is silent on this point. The question what the rescuer should do, is answered in different ways in different countries as well. Does the rescuer need to intervene personally or obtain help (like in the Netherlands and Belgium) or does he only need to notify the authorities (Italy)? Moreover: liability would only exist in the Netherlands in case the death of the person in need of aid occurs, while other countries do not know such a limitation. Penalties range from a fine or three months detention (the Netherlands and Italy) to a fine or 5 years imprisonment (France)".

<sup>11</sup> *Ivi*, pp. 6-7.



in the case of the American legal system, there exist specific duties to aid others in relationships of dependence, e.g. parents-children, or by people occupying a special positions, e.g. policemen).

It seems that in most (or, probably, all) legal systems acts that are good in the supererogatory sense belong only to the sphere of morality, whereas acts that are good in the rogatory sense as well as acts that are bad in the substantial evil or *skandalon* evil sense always belong to the sphere of law (in addition to their belonging to their sphere of morality). Thus, most (and, probably, all) legal systems do not require us to be the Heroic Samaritans (but some legal systems require us to be the Good Samaritans).

In the remainder of this section I shall present factors that determine the choice of one of the legal systems mentioned above. It seems that there are two main factors of this kind: dominant moral views in the society (broad or narrow social morality, broad or narrow individual morality), and the view on the limits of legal regulation (legal liberalism vs. legal moralism). Legal liberalism assumes *The Harm Principle*, which says that:

*"The only purpose for which power can be rightfully exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant"* (Mill, *On Liberty*, Ch. 1).

The Harm Principle excludes legal enforcement of individual morality but, assuming that harm can be caused not only by commission but also by omission (not-helping), does not exclude the enforcement of acts which are good in the quasi-supererogatory or supererogatory sense (though this may not be a reading of the Harm Principle that would be accepted by Mill himself). Legal moralism is the view that promoting moral virtue is a legitimate basis for coercion.

*Fig.5: A classification of legal systems*

	<i>The dominant moral views in society</i>	<i>The view on the limits of law</i>	<i>Additional arguments</i>	<i>Legal system</i>
1.	extremely broad MS + perfectionist MI	legal moralism	not needed	Maximally moral legal system
2.	extremely	legal	not needed	Minimally

	narrow MS + liberal MI	liberalism		moral legal system
3.	broad MS + perfectionist MI	legal moralism	not needed	The Continental legal system <sub>1</sub>
4.	broad MS + liberal MI	legal liberalism	not needed	The Continental legal system <sub>2</sub>
5.	broad MS + perfectionist MI	legal liberalism	not needed	The Continental legal system <sub>2</sub>
6.	narrow MS + perfectionist MI	legal moralism	not needed	The American legal system
7.	broad MS + perfectionist MI	legal moralism	needed	The American legal system
8.	narrow MS + narrow MI	legal liberalism	not needed	The British legal system

The additional argument in point 7 can be the following: legal enforcement of quasi-supererogatory acts is counterproductive, because it suppresses the altruistic motivation to help others and as a result decreases the frequency of altruistic acts<sup>12</sup>.

Let me conclude by noting that in order to provide a complete classification of legal systems and make a complete analysis of the factors that determine the choice of one of them, one would have to allow also for the dimension of legal paternalism. As is well known, legal liberalism has two dimensions: it can be opposed not only to legal moralism but also to legal paternalism. Thus, legal systems can be more or less paternalistic. However, the problem of legal paternalism lies beyond the scope of this paper (which was focused on the classification of acts according to their moral evaluation and on various ways in which these acts can be regulated by legal systems).

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<sup>12</sup> Cf. Landes, Posner 1978. It may also be argued that the fear of liability may induce potential rescuers to avoid places where their assistance may be needed.

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