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A CONCEPT OF ECCLESIAL LAW

by

Roger A. Kenyon

A dissertation

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Saint Paul University, Ottawa,
in partial fulfillment of the requirements
for the degree of
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There is confusion between the word "law" and the phenomenon law. This chapter examines the merits of giving a definition of "law"; it concludes by stating that, as such, a definition of "law" cannot guarantee new information. Such activity would be simply an exercise in terminology, without reference to the system in which law functions.

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According to some authors of the current theology of law project, theology serves to bring church law and mystery together, implicitly assuming a gap between them. According to the ecclesial law thesis, ecclesial law accounts for the mystery of the church because it is an aspect of the church accounting for the mystery of Christ.

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INTRODUCTION

The Second Vatican Council decreed that the teaching of canon law "should take into account the mystery of the church, as it was set forth in the Dogmatic Constitution on the Church, promulgated by this Council".¹ Such a consideration of church law has evolved into what has come to be called ecclesial law--the thrust of which is that a theory of law in the church must be in harmony with the phenomenon of church.

The Council affirmed a key equation in the process of setting forth the Constitution on the Church: the nature of the church is mystery and church law belongs to the nature of the church. It is the clarification of this equation and its systematic ramifications that the present study proposes to examine.

The problem, then, is what it means for church law to be ecclesial. Any answer, though the present study can do no more than point in the direction of one possible and speculative answer, forms a constructive concept of ecclesial law. The methodological approach taken in the discussions that follow shall be to describe a phenomenological framework according to which church law is an expression of church mystery.

Phenomenology is understood in this work in its etymological sense as a study of objects and events as they appear, as they are observed to be. The application of such a method aims to contribute an analysis of its subject-matter, ecclesial law in this case, which is accessible to public comprehension and appraisal without directly appealing to purely private

¹Vatican II, dec. "Optatam totius," 28 October 1966, no. 16, in A.A.S., 58(1966), p. 734.

experience. This is not to deny that there is more to reality than that which is observable (such as faith, freedom, and grace), but to treat of it in so far as it manifestly affects the world in which we live. Doing so the work addresses itself to three main areas: the function of law, church mystery, and the identity of ecclesial law.

Because the concept of ecclesial law is a study about church law as a whole it rather suggests an interdisciplinary effort. The first step is to describe the manner in which law functions in order to identify its operation in any given system. The second step is to evolve a model of church mystery so as to take stock of its interactive implications for church law. These two steps are the respective tasks of parts one and two. Each part consists of two chapters, reflecting an inherent tension in the form of a recurrent confusion: the one between the word "law" and the phenomenon law, the other between church mystery and church mysteriousness. Part three is kind of dialectic drawing upon the description of law as a systematic function and upon the model of church mystery in order to characterize a system of ecclesial law. One may intuitively think of parts one and two as critically selecting the tools to be used in part three, and of part three as an extended conclusion to the overall project in terms of a phenomenological account of ecclesial law. These steps are capsulized in the summary and conclusions following the last chapter.

The thesis that ecclesial law finds its identity in the mystery of the church suggests new possibilities for some of church law's most persistent issues, such as whether church law is genuinely a legal system, the role law plays in the means and ends of the church, the nature of ecclesial obligation, and how law relates to faith and freedom. These issues will be treated in the course of the overall project. To the extent of its success, this report should be

instrumental for canon law from a theoretical viewpoint in providing methods for evaluating and applying canonical legislation, for comparing legal systems, and for appreciating an ecclesial mentality. The specifics of these applications, however, lie outside the scope of the present work.

The aim of this study is descriptive, to clarify the identity of ecclesial law. It sets out with neither apologetic intention nor dogmatic predisposition since there is no place for intellectual nepotism in the interests of accuracy. One is reminded of the lament registered at the Council by Cardinal Paul-Emile Léger, Archbishop of Montreal: "Woe to the man of one book! Woe to the church of one doctor!"² In the same spirit a disclaimer is in order to the effect that this study can not and does not claim to be the only possible account of ecclesial law. Its merits must be measured by the light it sheds on the richness of the church and church law in particular.

²On the discussion of Aquinas as the authoritative doctor of the Church. Vatican II, Acta Synodalia, Vatican City, Typis Polyglottis Vaticanis, 1970-1978, vol. III, per. tertia, pars VII, p. 709.

ACKNOWLEDGEMENTS

To paraphrase a passage from the preface of H. L. A. Hart's The Concept of Law (a work we shall study in some detail), a book on legal theory should not simply report the contents of other books. I suppose there is a bit of irony in quoting a statement of that sort. Nevertheless it captures something of the intended spirit in which the following few hundred pages are written. It would only be appropriate now to inaugurate a study such as this with a word of indebtedness to those who have helped make it a reflection of experience.

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PART ONE

THE NATURE AND MANNER OF LAW

Part One presents an analysis of law with the purpose of describing the manner in which law functions in order to identify its operation in any given system. The traditional approach is to define the word "law". The relative merits of this approach are examined in the first chapter before proceeding in the next chapter to discuss the manner in which the phenomenon of law functions. The findings of this part will be applied to the findings of part two in characterizing ecclesial law as a legal system in part three.

CHAPTER ONE

THE NATURE OF "LAW"

The present chapter examines the word "law" in the interests of identifying law. It appears that historically there has been some confusion concerning the word "law" and the phenomenon law. This distinction has been brought out by Richard Wollheim in his article on "The Nature of Law".¹

Wollheim sees three distinct questions within the quest for the nature of law:

1. What is the nature of "law"? 2. What is the criterion of validity of law? 3.

What is the schema of criteria of validity? The present study will be limited to the first question, reserving the remaining questions for the next chapter where

¹"The Nature of Law", in Political Studies, 2(1954), pp. 128-142.

law resurfaces as a phenomenon. Within that first question one can distinguish various types of definitions.

The first and the simplest interpretation that can be put on the formula What is the nature, or essence, of law? is to see it as raising the question, What is the definition of 'law'? That is to say, the question might be a linguistic question: not a question about the phenomenon of law at all but a question about the word 'law'--this distinction between questions about phenomenon and questions about words being well brought out by the use of inverted commas in the formulation of the latter. Such linguistic questions can be answered by giving an explicit or equipollent definition, i.e. by giving a word or set of words that can in any sentence be substituted for any occurrence of the word to be defined so as to yield a new sentence equivalent in meaning to the old. ~~Or they can be answered by giving a definition in use, i.e. by giving a series of equivalence each consisting of one sentence in which the word to be defined occurs and one sentence in which the word does not occur and that also differs from the first sentence in some further respect. From such a series we gather the use of the original word.~~ Or finally such linguistic questions can be answered by giving an elucidation of the word, by giving a general characterization of what we mean by it.²

In other words, if the nature of "law" is satisfied by a definition of "law", then historically there have been three ways of response: explicit definitions, definitions in use, and elucidations. The first two are similar in result--though the second includes an exercise by which the definition is derived--and shall be taken together.

In so far as it is possible, no case will be made for or against the various philosophies and political theories with which the definitions are associated. Occasionally, however, it may be helpful to draw the association for a fuller appreciation of the definition.

²ibid., p. 129.

The definition of "law" begins with a survey,³ and the survey begins with the ancient Greeks, continuing historically from there.

A. Explicit and Usage Definitions

It would be helpful to have an historical survey or overview of the mixed and many definitions of law known, or at least the survivors of editing over two and a half millenia of legal thought. After this some of the major objections to definitions of "law", equipollent and usage, may be treated in a general fashion.

1. A Historical Survey

Twenty four hundred years ago the Sophists distinguished between nature (physics) and convention (nomos), putting law in the latter category, and justifying observance of the law only to the extent of personal advantage. In

³The present survey is indebted to M. P. GOLDING, "Philosophy of Law, History of", Paul EDWARDS, ed. in chief, The Encyclopedia of Philosophy, New York, MacMillan, 1972 reprint, vol. 6, pp. 254-264, albeit supplemented by the following historical overviews: Fritz BEROLZHEIMER, The World's Legal Philosophies, transl. by Rachel S. Jastrow, New York, Kelley, 1968 reprint, iv-490 pp.; Edgar BODENHEIMER, Jurisprudence, the Philosophy and Method of the Law, rev. ed., Cambridge, Mass., Harvard University Press, 1974, xii-463 pp.; Huntington CAIRNS, Legal Philosophy from Plato to Hegel, Baltimore, Johns Hopkins Press, 1949, xv-583 pp.; Thomas E. DAVITT, The Nature of Law, St. Louis, B. Herder, 1951, 274 pp.; Carl Joachim FRIEDRICH, The Philosophy of Law in Historical Perspective, 2nd ed., Chicago, University of Chicago Press, 1963, xii-297 pp.; J. Walter JONES, Historical Introduction to the theory of Law, New York, Kelley, 1969 reprint, xi-304 pp.; Sir John MacDONNELL and Edward MANSON, eds., Great Jurists of the World, New York, Kelley, 1968 reprint, xxxii-607 pp.; and Michel VILLEY, Leçons d'histoire de la philosophie du droit, 2nd ed., Paris, Dalloz, 1962, 318 pp.

the writings of Xenophon (circa 430 - circa 354)⁴ is found the concept of law as that which is enacted by the assembly as what should be done. Law is mutable, even if identified with justice.⁵

For Plato (circa 428 - 347), law is reasoned thought (logismos) embodied in the decrees of the state.⁶ But since law relates to duty and justice, seeking to be the discovery of reality,⁷ the authority of the law does not rest on the mere will of the governing power. Law and order are "second best"⁸ to the ideal polis of the Republic.

Aristotle (384 - 322) joins Plato in rejecting the conventionalism of law advanced by the Sophists. He characterizes law as "order, and good law is good order",⁹ "reason unaffected by desire",¹⁰ and "the mean".¹¹ The end of law is the common good,¹² and the common good is the standard of justice

⁴"Whatever the ruling power in a state resolves and enacts about what should be done is called law". In Memorabilia I, 1, 43.

⁵Ibid., IV, 4.

⁶Laws 644D.

⁷Minos 315a. A particularly helpful commentary on Minos is found in R. F. HATHAWAY and L. D. HOULGATE, "The Platonic Minos and the Classical Theory of Natural Law", in The American Journal of Jurisprudence, 14(1969), pp. 105-124.

⁸Laws 875D.

⁹Politica 1326a.

¹⁰Ibid., 1287a.

¹¹Ibid., 1287b.

¹²Ibid., 1280.

(equality).¹³ Justice is "that moral disposition which renders men apt to do just things".¹⁴

Cicero (106 - 43) reflects the Stoic school which, founded by Zeno (295 - 261), held that all things are governed by unvarying natural laws (koinos logos), and both man and nature partake of reason (logos).¹⁵ Cicero denied that positive law of the community, written or customary, even when universally accepted, is the standard of justice. "Justice is one; it binds all human society, and is based on one law, which is right reason applied to command and prohibition"¹⁶ Law and morality are logically connected, and only that which conforms to the law of nature is genuine law.

The Roman jurists distinguished ius naturale, ius gentium, and ius civile. Ulpian (circa 170 - 228) defined justice as "the constant wish to give each his due".¹⁷ Following Celsus (circa 67 - circa 130), he defined ius as "the art of the good and equitable".¹⁸ The doctrines of the Roman jurists were incorporated into Justinian's (483 - 565) Corpus Iuris Civilis, subject to changes of social structure and thought. While ius naturale is seen as a set of immutable divine laws by which the positive law may be morally evaluated,¹⁹ the authority of

¹³Ibid., 1283a.

¹⁴Nicomachean Ethics V, 1.

¹⁵"Law is the ruler of all things divine and human [...], directing what must be done and forbids the opposite". CHRYSIPPUS, quoted in Justinian's Digest I, 3, 2.

¹⁶De Legibus I, 15.

¹⁷Digest I, 1, 10.

¹⁸Ibid., I, 1, 1.

¹⁹Institutes I, 2, 11; III, 1, 11.

civil law was transferred to the emperor by the Roman people during some ancient period²⁰ such that "what pleases the prince has the force of law",²¹

The Church Fathers integrated Stoic and Roman legal philosophy with Christian theology. Ius divinum, referring to immutable eternal supreme reason²² which guides man in supernatural teleology,²³ acquired substantive recognition. Human law is derived from natural law,²⁴ which is derived from the eternal law.²⁵ One key consequent of this hierarchy is that "law which is unjust is not law".²⁶ Among the more influential attempts to arrive at the definition of (positive) law by the Church Fathers are:

Isidore of Seville (circa 560 - 636)

Law shall be virtuous, just, possible to nature, according to the custom of the country, suitable to place and time, necessary, useful; clearly expressed, lest by its obscurity it lead to misunderstanding; framed for no private benefit, but for the common good.²⁷

²⁰Codex I, 17, 1, 7.

²¹Digest I, 4, 1.

²²AUGUSTINE of Hippo (354 - 430), De Libero Arbitrio I, 6.

²³Thomas AQUINAS, Summa Theologica I-II, q. 93.

²⁴Ibid., q. 95, art. 2.

²⁵AUGUSTINE, loc. cit.; AQUINAS, ibid., q. 93.

²⁶AUGUSTINE, ibid., I, 5; AQUINAS, ibid., q. 95, art. 4. This attitude is neither unique nor original to Christian legal thought; PLATO, for example, held that a bad law is no law (Hippias Major 284B-E, Minos 314e, Laws 715B).

²⁷Etymologies V, 21.

THE NATURE OF "LAW"

Thomas Aquinas (1224 - 1274)

An ordinance of reason for the common good, made by him who has care of the community, and promulgated.²⁸

Francisco Suárez (1548 - 1617)

The act of a just and right will by which the superior wills to oblige the inferior this or that. [...] A common just and stable precept, which has been sufficiently promulgated.²⁹

For Suárez, lex is enacted "more by will than reason". It is not derived from natural law by logical inference but by "determinism", and hence is, in a sense, arbitrary.³⁰ He defines ius as "a certain moral power which every man has, either over his own property or with respect to what is due him".³¹

The break with the tradition of natural law was provoked by Thomas Hobbes (1588 - 1679), who could see no right reason in nature.³² While in the writings of Charles-Louis, Secondat, Baron de la Brède et de Montesquieu (1689 - 1755), law was still "necessary relations arising from the nature of things",³³ the advent of utilitarianism at the time of the industrial revolution transferred

²⁸Summa Theologica I-II, q. 90, art. 4.

²⁹De Legibus I, 12.

³⁰Ibid., II, 20.

³¹Ibid., I, 2.

³²Elements of Law II, 10, 8.

³³De l'esprit des lois I, 1.

law to an expression of the will of a sovereign in a state.³⁴ Legal positivism was influenced accordingly, especially the paradigm of legal positivism: John Austin (1790 - 1859).

According to Austin, "a law is a command which obliges a person or persons".³⁵ A command carries with it a threat of evil³⁶ and imposes duty³⁷ upon an inferior by a superior³⁸ who is sovereign.³⁹ This identifies laws improperly so-called by their lack of imperative character, sanction, or imposition of duty (such as positive morality, legislative interpretations, laws to repeal laws, etc.).

³⁴"A law may be defined as an assemblage of signs declarative of a violation conceived or adopted by the sovereign in a state, concerning the conduct to be observed in a certain case by a certain person or class of persons, who in the case in question are or are supposed to be subject to his power". Jeremy BENTHAM (1748 - 1832), The Limits of Jurisprudence Defined, Westport, Connecticut, Greenwood Press, 1970, p. 88.

³⁵The Province of Jurisprudence Determined, 2nd ed., New York, Burt Franklin, 1970, p. 15.

³⁶"If you express or intimate a wish that I shall do or forbear from some act, and if you will visit me with an evil in case I comply not with your wish, the expression or intimation of your wish is a command. [...] A command, then, is a signification of desire. But a command is distinguished from other significations of desire by this peculiarity: that the other party to whom it is directed is liable to evil from the other, in case he comply not with the desire". Ibid., pp. 5-6.

³⁷"[...] Wherever a duty lies, a command has been signified; and whenever a command is signified, a duty is imposed". Ibid., p. 6.

³⁸"[...] Whoever can oblige another to comply with his wishes, is the superior of that other, so far as the ability reaches: The party who is obnoxious to the impending evil, being, to that same extent, the inferior". Ibid., p. 16.

³⁹"Every positive law (or every law simply and strictly so called) is set, directly or circuitously, by a sovereign individual or body, to a member or members of the independent political society wherein its author is supreme". Ibid., p. 316.

A number of variations on Austin's theme have come to the fore, for example Thomas Erskine Holland (1835 - 1926) accepts the command theory in principle, but substitutes enforcement for the command of the sovereign.

A law, in the proper sense of the term, is therefore a general rule of human action, taking cognisance only of external acts, enforced by a determinate authority, which is human [...].⁴⁰

And J. W. Salmond (1862 - 1924) inserted the element of justice.

Law may be defined [...] as the body of principles recognized and applied by the state in the administration of justice. In other words, the law consists of the rules recognized and acted on by the courts of justice.⁴¹

Hans Kelsen (1881 - 1973) substituted a "basic norm" (Grundnorm)⁴² for the sovereign with the idea that a law is a norm which is authorized by a basic norm.⁴³

⁴⁰The Elements of Jurisprudence, 9th ed., New York, Oxford University Press American Branch, 1908, p. 39.

⁴¹Sir John William SALMOND, Salmond on Jurisprudence, 11th ed. by Glanville WILLIAMS, London, Sweet and Maxwell, 1957, p. 41.

⁴²"The basic norm of a legal order is the postulated ultimate rule according to which the norms of this order are established and annulled, receive and lose their validity". General Theory of Law and State, transl. by Anders WEDBERG, Cambridge, Mass., Harvard Univ. Press, 1949, p. 113. See also Hans KELSEN, "On the Basic Norm", in California Law Review, 47(1959), pp. 107-110.

⁴³"To the question why this individual norm is valid as part of a definite legal order, the answer is: because it has been created in conformity with a criminal statute. This statute, finally, receives its validity from the constitution, since it has been established by the competent organ in the way the constitution prescribes.

If we ask why the constitution is valid, perhaps we come upon an older constitution. Ultimately we reach some constitution that is the first historically and that was laid down by an individual usurper or by some kind of assembly. The validity of this first constitution is the last presupposition, the final postulate, upon which the validity of all the norms of our legal order depends. It is postulated that one ought to behave as the individual, or the

While Rudolf von Ihering (1818 - 1892) ground legal phenomena in social life, his definition of law rings of positivism.

Law is the sum of the conditions of social life in the widest sense of the term, as secured by the power of the state through means of external compulsion.⁴⁴

With the "Roaring '20s" came an iconoclasm directed against the view of law as a complete autonomous system of logically consistent elements, in lieu of which legal realism advocated attention to socially desirable consequences. For John Chipman Gray (1839 - 1915), law is "the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties".⁴⁵ Thus, all law is judge-made.⁴⁶ While Oliver Wendell Holmes, Jr. (1841 - 1935) defined law as "the prophecies of what the courts will do in

individuals, who laid down the first constitution have ordained. This is the basic norm of the legal order under consideration". General Theory of Law and State, p. 115. The basic norm is not itself a positive legal norm. "The whole function of this basic norm is to confer law-creating power on the act of the first legislator and on all other acts based on the first act". Ibid., p. 116.

⁴⁴Law as a Means to an End, transl. by Isaac HUSIC, New York, Kelley, 1968, p. 380.

⁴⁵The Nature and Sources of the Law, 2nd ed., Gloucester, Mass., Peter Smith, 1972, p. 84.

⁴⁶See Joseph W. BINGHAM, "What is the Law?", in Michigan Law Review, 11(1912), pp. 1-25, 109-121.

fact",⁴⁷ Karl Nickerson Llewellyn (1893 - 1962) extended it beyond judicial behaviour to "what officials do about disputes".⁴⁸

2. Objections

One approach in the quest for the definition of "law" is to see it as an instance of the quest for definition itself. That is, if we know what it is to define (any term), then by substitution we shall know how to define "law". First, then, what is it to define in general?

A rather lucid account of definition is given by Raziel Abelson,⁴⁹ Abelson's account provides a summary of the three main views of definition advanced, a critique of their (in)adequacy, and a synthesis into a "pragmatic-contextual approach".

All of the views of definition that have been proposed can be subsumed under three general types of positions, with, needless to say, many different varieties within each type. These three general positions will be called 'essentialist', 'prescriptive', and 'linguistic' types [...]. Writers whose accounts of definition fall largely under the [essentialist] type include Plato, Aristotle, Kant, and Husserl. Those who support [prescriptive] type views include

⁴⁷"The Path of the Law", in Harvard Law Review, 10(1896 - 1897), p. 461. Cf.: "Law is a statement of the circumstances in which the public force will be brought to bear upon men through the courts". American Banana Co. v. United Fruit Co., 213 U.S. 347-359, at p. 356.

⁴⁸The Bramble Bush, On our Law and its Study, New York, Oceana, 1951, p. 12. --"They are, however, unhappy words when not more fully developed, and they are plainly at best a very partial statement of the whole truth". Ibid., p. 9.

⁴⁹"Definition", in EDWARDS, ed. in chief, Encyclopedia of Philosophy, vol. 2, pp. 314-324. Raziel Abelson's 1957 dissertation at New York University is entitled "An Analysis of the Concept of Definition, and Critique of Three Traditional Philosophical Views Concerning its Role in Knowledge".

Pascal, Hobbes, Russell, W. V. Quine, Nelson Goodman, Rudolf Carnap, C. G. Hempel, and most contemporary logicians. Supporters of [linguistic] type views include John Stuart Mill (in part), G. E. Moore (in part), Richard Robinson, and most members of the school of linguistic analysis.

According to essentialist views, definitions convey more exact and certain information than is conveyed by descriptive statements. Such information is acquired by an infallible mode of cognition variously called 'intellectual vision', 'intuition', 'reflection', or 'conceptual analysis'. Prescriptive views agree with essentialism that definitions are incorrigible, but account for their infallibility by denying them as symbolic conventions. Although linguistic views agree with essentialism that definitions communicate information, they also agree with prescriptivism in that they reject claims that definitions communicate information that is indubitable. The linguistic position is that definitions are empirical (and therefore incorrigible) reports of linguistic behavior.⁵⁰

⁵⁰ibid., p. 314. The writers mentioned constitute a classic bibliography on the subject. Recent contributors include: Kazimierz AJDUKIEWICZ, "Three Concepts of Definition", in Logique et Analyse, 3-4(1958), pp. 115-126; Ralph BORSODI, The Definition of Definition, a new linguistic approach to the integration of knowledge, Boston, Porter Sargent, 1967, 121 pp.; John DEWEY and A. F. BENTLEY, "Definition", in Journal of Philosophy, 44(1947), pp. 281-306; John Robert CASSIDY, "Aristotle on Definitions", in Southern Journal of Philosophy, 5(1967), pp. 110-118; David E. COOPER, "Definitions and 'Clusters'", in Mind, 81(1972), pp. 495-503; Gottfried GABRIEL, Definitionen und Interessen Über die praktischen Grundlagen der Definitionslehre, Stuttgart, Frommann, 1972, 136 pp.; Abraham KAPLAN, "Definition and Specification of Meaning", in Journal of Philosophy, 43(1946), pp. 281-288; Leon KOJ, "On Defining Meaning Families", Studia Logica, 25(1969), pp. 141-149; Stephen C. PEPPER, "Definition", in University of California Publications in Philosophy, 21(1939), pp. 99-122 [vol. 1-25: reprint of original ed., New York, Johnson reprint, 1969], and "The Descriptive Definition", in Journal of Philosophy, 43(1946), pp. 29-36; George Kimball PLOCHMANN, "Array of Definitions", in Critica, 6(1972), pp. 85-98; Paul T. SAGAL, "Implicit Definition", in The Monist, 57(1973), pp. 443-450; and Fred WILSON, "Definition and Discovery", in British Journal for the Philosophy of Science, 18(1968), pp. 287-303, 19(1968), pp. 43-56.

All three theories are found wanting in terms of the knowledge they convey and adequate criteria for distinguishing good definitions from bad ones.⁵¹ Consequently, what is needed is a contextualist view.⁵²

The pragmatic-contextualist account supplies the following rules for defining:

A number of rules of thumb for evaluating definitions have become canonical in the literature on the subject despite the fact that they make no clear sense in terms of any of the traditional views. The following rules can be found in practically every textbook on logic. They were first suggested by Aristotle in his Topica and have survived without change by sheer weight of tradition.

- (1) A definition should give the essence or nature of the thing defined, rather than its accidental properties.
- (2) A definition should give the genus and differentia of the thing defined.
- (3) One should not define by synonyms.
- (4) A definition should be concise.
- (5) One should not define by metaphors.

⁵¹"All three traditional theories of definition assume, mistakenly, that if definitions convey knowledge, then the knowledge they convey is of the same type as that conveyed by ordinary statements of fact. Essentialists conclude that the knowledge conveyed by definitions is descriptive knowledge of essences, linguistic philosophers conclude that it is descriptive knowledge of language usage, while prescriptivists maintain that definitions do not convey knowledge of any kind. [...] The three views of definition distinguished above fail to provide adequate criteria for distinguishing good definitions from bad one. They assume that the criteria of a good definition can be stated independently of the specific context in which the definition is offered and the purpose it is intended to serve". Ibid., p. 321-322.

⁵²Thus, an evaluation of a definition must begin with the identification of the point or purpose of the definition, and this requires knowledge of the discursive situation in which the need for the definition arises. We use words to incite ourselves and others into action, to express and share emotions, to draw attention to things, to memorize, to make inferences, to evoke and enjoy images, to perform ceremonies, to teach, to exercise, and to show off. It is when we are unsure of the most effective use of an expression for one of these purposes, that we seek a definition. Ibid., pp. 322.

(6) One should not define by negative terms or by correlative terms (e.g., one should not define north as opposite of south, or parent as a person with one or more children).⁵³

The significance of these rules is to be understood according to the pragmatic-contextualist view.⁵⁴

The foregoing is a rough sketch of what it means to define in general, culminating in the rules for defining. Are the rules applicable to "law"? Exception may be taken to at least the first two rules.

With respect to law, the first rule either begs the question or is historically irresolvable. The purpose of setting forth a definition of "law" is, it would seem, to give the essence or nature of law. If the essence or nature of law is already given, then the definition of same is unnecessary. There is a more fundamental difficulty evidenced even by our abridged historical survey. Doctores disputant over the essence or nature of law. But an even more fundamental difficulty exists if it is denied that law has an essence.

⁵³Ibid., p. 322.

⁵⁴The first rule "makes sense only according to the essentialists theory" though it is accepted by prescriptive and linguistic definition theorists, with vacuous consequences; the second rule is worthy "only if one accepts Aristotle's extension of biological classification to metaphysics, but retains a limited value when it is reinterpreted in linguistic terms"; the third rule is an injunction against excessive brevity (e.g., a single word), but indefinite and apparently inconsistent with rule four; the fourth rule is an impediment to the consistency and precision necessitating amplified definitions in formal discourse, such as jurisprudence; the fifth rule may be preferred in informal contexts (e.g., conversation, literature, public debate) more than "formal/discursive contexts such as mathematics and natural sciences, in which figures of speech are usually out of place"; rule six, "in contrast to rule 5, holds for informal discourse and becomes senseless when applied to formal discourse [... since] a person who is unclear about the rules of the definiendum would be just as puzzled about the rules of use of a negative or correlative definiens". Ibid., pp. 322-323.

Exception has been taken to the second rule, with respect to law, concerning the genus. Bentham⁵⁵ and H. L. A. Hart⁵⁶ put a question mark to the genus of law.⁵⁷

Assuming, however, that the rules for defining somehow are applicable to "law", are they linguistically complete? The rules test for well-formed formulae. They do account for how the elements of a definition are to be arranged, but not for what such a formulation signifies nor who makes use of the definition. This incompleteness precludes pursuit beyond the lexical to the phenomenological, that is, from the word "law" to the reality of law.

We may now register a "logical demurrer", analogous to legal demurrer in equity or pleading, against the proposal that law is an instance of the quest for definition itself. That is, plea is made for dismissal of the approach on the basis that even if the rules for defining are applicable to "law", they do not establish the meaning of law because they are linguistically incomplete.

⁵⁵"The common method of defining--the method per genus et differentiam, as logicians call it, will, in many cases, not at all answer the purpose. Among abstract terms we soon come to such as have no superior genus. A definition, per genus et differentiam, when applied to these, it is manifest, can make no advance: it must either stop short, or turn back, as it were, upon itself, in a circulate or a repetend". A Fragment on Government, ch. V, sec. VI, item 7 in note, in The Works of Jeremy Bentham, published under the superintendence of his executor, Sir John BOWRING, New York, Russell and Russell, 1962 [reproduced from the BOWRING edition of 1838 - 1843], vol. 1, p. 293.

⁵⁶"It is this requirement that in the case of law renders this form of definition useless, for here there is no familiar well-understood general category of which law is a member". The Concept of Law, Oxford, Clarendon, 1961, pp. 14-15.

⁵⁷The methods substituted by Bentham and Hart are criticized by P. M. S. HACKER, "Definition in Jurisprudence", in Philosophical Quarterly, 19(1969), p. 343-347. See also: Alf ROSS, "Definition in Legal Language", in Logique et Analyse, 3-4(1958), p. 139-149; and Uberto SCARPELLI, "La définition en droit", in Logique et Analyse, 3-4(1958), pp. 127-138.

What then about the assorted meaning equations of "law" wherein law is seen as the referent of a definiens? As linguistic vehicles, abbreviative conventions, meaning equations are not without merit; but that is a matter of formal, not substantial, value. Some theorists use meaning equations as a dipsomaniac uses a lamp post--for support, not illumination. Properly understood, meaning equations establish a synonymity relationship between definiendum (that which is being defined) and definiens (that which defines it).⁵⁸ The function of meaning equations . . .

is to transfer rules of use from definiens to definiendum without articulating the rules in question, so that the rules remain implicit. The most explicit kind of definition, the kind that actually states the rules governing the use of an expression, is a very complicated matter. Outside of technical contexts, it is doubtful whether complete definitions of this kind can ever be provided. On the other hand, it is just as doubtful whether a complete articulation of all the rules of use of the definiendum need be given.⁵⁹

The attempt to arrive at a definition of law would seem to be just such a technical context requiring explicit definitions, at least as to "law" itself. Our historical survey is a compendium of implicit definitions of "law". Each definiens thereof labors to a degree under ambiguity and anachronism. Aquinas' aforementioned definition, for example, can scarcely be understood apart from an antecedent acquaintance with Stoic philosophy, Aristotelian methodology, and medieval theology. More important, the definiens proceeds from the author's experience of law, even if indirect; the definiens does not precede law. Let us rephrase the latter point in terms of an analogy with religion.

⁵⁸ABELSON, "Definition", p. 323.

⁵⁹oc. cit.

Not unlike one asking "why if there is but one God, are there so many religions", and answered "because there are so many different experiences of God by mankind", if it is asked "why if there is but (one) law, are there so many different definitions of law", should it not be answered "because there are so many different experiences of law by mankind"?

The analogy emphasizes experiential precedent, from which it may be observed that experiences differ, experiences existentially precede and form the concept of that which is experienced, and thus concepts of that which is experienced will differ.

But are not some experiences more accurate (clear, direct, etc.) than others with respect to that which is experienced? Depending on the response, affirmative or negative, the consequence is that religions and definitions of law alike enjoy either a disparity or parity of viability. Either some are more accurate than others or one is just as good as any other. Yet in either case the result is measured with respect to viability.

But what is the viability of a definition regarding law: identification of the centrality or periphery of law? Identification of the periphery is to delimit, to set boundaries. Boundaries here are linguistic perimeters set upon experiences; definitions, however, follow experiences. Within various experiences we see similar central elements which characterize these experiences as, in some sense, common. The viability of a definition regarding law then is the identification of the centrality of law. Yet that which serves to identify the centrality of law is a criterion for identifying certain experiences of law. In this way we are led not so much to a definition of "law", but to a description or method of recognition for laws--a matter to be taken up in the next chapter.

If a definition can be given, care must be taken lest it give too little or too much. A definition of "law" gives too little, so to speak, when it is based upon an arbitrarily limited ontological commitment. A legal theory need not embrace law in all the ways of God, nature, and man, but if a narrower embrace is to avoid superficiality it needs embrace the substance and not merely the form of those ways excluded. For example, the argument

Social stability requires univocal laws,

the ways of nature are ambiguous,

therefore the ways of nature are outside the ambit of law⁶⁰

results in the rejection of the various forms of natural law due not to their content, but formal precision.

The major premise is problematic. Is law such because it is univocal or because it contributes to social stability? Vis-à-vis the ways of nature, the former is arbitrary, the latter is capricious.

Consider William Blackstone's definition of "law":

Law in its most general and comprehensive sense signifies a rule of action; and is applied indiscriminately to all kinds of action whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations.⁶¹

⁶⁰Such a simplified argument could not be attributed to, but has overtones in the thought of David HUME (see A Treatise of Human Nature III, 2, 2) and Jeremy BENTHAM (see A Fragment on Government, ch. IV, sec. XIX).

⁶¹Commentary on the Laws of England, Oxford, Clarendon, 1765, I, sec. 2, [reprinted: New York, Wiley and Sons, 1966, 3 vol.; at vol. I, p. 38].

Blackstone espouses an ontological commitment in that human law is dependent⁶² upon laws of nature,⁶³ but avoids caprice by basing both on law per se.

A definition of "law" gives too much when it imports notions directed in support of a particular persuasion. Francisco Suárez, whose definition was cited earlier, furnishes a clear example of subsumption.

Since, then, the way of this salvation lies in free actions and in moral rectitude--which rectitude in turn depends to a great extent upon law as the rule of human actions--it follows thence that the study of laws becomes a large division of theology; and when the sacred science treats of law, that science surely regards no other object than God Himself as Lawgiver. [...E]ven as all paternity comes from God, so, too, does (the power of) every legislator, and that the authority of all laws must ultimately be ascribed to Him.⁶⁴

While some definitions are expository (intended to explain), others are oratorical (intended to persuade).⁶⁵

⁶²"This law of nature, being co-eval with mankind and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original". Loc. cit. [p. 41].

⁶³BLACKSTONE reiterates JUSTINIAN (Institutes I, 1, 5) in summarizing the basic principles of the law of nature to be "that we should live honestly, should hurt nobody, and should render to everyone its due". Loc. cit. [p. 40].

⁶⁴De Legibus, ac Deo Legislatore, proemium ad lib. I, in James Brown SCOTT, gen. ed., The Classics of International Law Series, Selections from Three Works of Francisco Suárez, S.J., Oxford, Clarendon, 1944, vol. I Latin texts, vol. II translations, at vol. II, pp. 13-14.

⁶⁵See Charles Leslie STEVENSON, "Persuasive Definitions", in Mind, 47(1938), pp. 331-350.

Herbert Morris has a comment germane to both ontological commitment and oratory:

This search for the 'essence' of law may have been misconceived, but it has not been without some value. Definitions connect different things. A definition of law, by connecting law with other aspects of social relations, brings out features of law that may have been overlooked or not fully appreciated. The philosopher, in his own entertaining way, resembles the poet, drawing our attention to what has, in some sense, been before us all the time. But though this can be said in favor of defining, there is also danger in this method. Our attention may be riveted rather than simply shifted. Having eyes for one or a few features, we may have eyes for no others. Something important in law will always remain outside the confines of a 'compact definition. 'It's not things, it's philosophers that are simple'.⁶⁶

B. Elucidation

Elucidations tend to be more loquacious than other types of definitions and will be treated separately. A single example should suffice, after which follows an appraisal of the definition enterprise as a whole. By way of general introduction Richard Wollheim characterizes an elucidation as follows.

[The question about the word "law"] can be answered by giving an elucidation of the word, by giving a general characterization of what we mean by it. Such elucidations can, however, be very misleading, for the fact that they are generally couched in the material mode of speech may make us forget or overlook their essentially verbal character. We

⁶⁶Review of The Concept of Law, by H. L. A. HART, in Harvard Law Review, 75(1962), p. 1452. The quotation is from MORRIS' preliminary remarks and not directed toward any theory or theorist in particular. At the end MORRIS quotes John Langshaw AUSTIN, Philosophical Papers, Oxford, Clarendon, 1961, p. 239; the reference is to AUSTIN's essay "Performative Utterances" which will be discussed in chapter four.

say 'Law is ...' rather than 'The word "law" means ...', and in saying the first may well forget that we are saying nothing that we could not say if we said the second. [...] The value of such elucidations lies not so much in revealing to us senses of words hitherto unsuspected but in separating the real meaning of a word from accretions due to association and custom.⁶⁷

1. The Example of Kantorowicz's Definition

Herman Kantorowicz's definition of "law",⁶⁸ has been selected for exposition by merit of its continuity and elegance. According to Kantorowicz, law is "a body of social rules, prescribing external conduct and considered justiciable".⁶⁹ His elucidation fares better between the Charybdis, on the one hand, of law as an instance of definition itself and meaning equations and Scylla, on the other hand, of ontological commitment and oratory. Yet it will not be necessary to re-register these hazards, for just as the elucidation surfaces a more profound definition, it raises more basic difficulties.

Kantorowicz begins by defining law as "a body of rules prescribing external conduct and considered justiciable",⁷⁰ devoting the remainder of his text to an elucidation thereof, the first element of which is "a body of rules".

⁶⁷WOLLHEIM, "The Nature of Law", pp. 129-130.

⁶⁸The Definition of Law, ed. by A. H. CAMPBELL, Cambridge, Cambridge University Press, 1958, xxiii-112 pp. The work was written in 1939, intended as the first part of the introduction to the Oxford History of Legal Science--a cooperative comprehensive project ill fated by the death of Kantorowicz and war time difficulties with research and publication.

⁶⁹Ibid., p. 79.

⁷⁰Ibid., p. 21.

Rules may be said to constitute a body when they all possess some common characteristic which renders them coherent and interdependent, e.g. that they have the same content (private law, penal law), belong to the same code or to the same State, originate from the same nation, or coincide in time and space (ancient law, European law).⁷¹

In the second chapter he disposes of the following criteria as useless. First, that only positive law is law, for such ignores natural law and its accepted theorists (such as Grotius); second, that law is a product of the "will" of the State, for such ignores societies before the formation of the State in possession of legal notions, moreover it does not account for church law and customary law; third, that the term "law" is restricted to absolutely binding rules (which is not to be confused with enforceability), for not all that is law is now in force (e.g., Roman law) and to extend the range of "binding" to include the past and future becomes too broad to prove a rule as having had or to have force; and finally, that the term "law" is a mass of real facts (for example, the behavior of judges), for laws are applied to acts (to determine legality) and to decisions (to determine justifiability), and consequently must be something other than either.

Later Kantorowicz distinguishes between "legal systems and systems of a purely factual nature", such as: (1) "the technical sciences which teach how to treat matter (inclusive of the human body) in order to produce some desired effect, e.g. engineering, agronomics, medicine"; (2) economics, for "its principles are also chiefly causal and have therefore no methodological affinity to those of any discipline of legal science"; (3) language, for "what we call 'rules of grammar' are actually mere factual habits".

⁷¹Loc. cit.

He then draws up a classification of rules in the fifth section, distinguishing commands,⁷² precepts,⁷³ and dogmas from one another⁷⁴ and cautions against reducing law to any one kind of rule exclusively.⁷⁵

From the independent surveys by Kocourek and Pound, and extracts from Hall, on "German Imperativtheorie (Thon, Bierling and others), Salmond's Jurisprudence, the Pure Theory of Law (Kelsen and the Viennese school), and above all the American analytical school (Terry, Hohfeld, Cook, Kocourek, Corbin, Gobel and Radin)", Kantorowicz draws the following conclusions:

(a) that every rule of law, permissive rules not excluded, can be expressed in the form of prescriptions; (b) that legal rights therefore can and must be described in terms of legal duties imposed on private parties or public authorities by legal prescriptions; and (c) that legal duties are created by prescriptions of the general and abstract law

⁷²"We propose to understand by commands, rules which are recognized as binding, not on the ground that their contents are right, but that they originate from the will of a recognized authority, a person whom it is a duty to obey". Ibid., p. 30.

⁷³"Precepts are rules which are recognized as binding, not on the ground that they originate from a recognized personal authority, but that their contents are recognized by conscience as being of such value that it is our duty to act in accordance with them". Ibid., p. 30.

⁷⁴"By dogmas, finally, we propose to understand rules which are recognized as binding, not because they are commands of a personal authority or precepts of conscience, but because they are logically implied by other rules the validity of which has already been recognized". Ibid., p. 31.

⁷⁵"Great schools of jurisprudence have been led astray by believing that law could be reduced to one kind of rule exclusively. The founder of the analytical school of jurisprudence and some of his followers believed law to consist wholly in commands of individual sovereigns. [...] The opposite mistake was to regard law as a body of precepts, viz. of justice or equity, as did the more radical adherents of the many schools of natural law. [...] Lastly, ordinary jurists, the schools of traditional Continental jurisprudence and the modern 'Pure Theory of Law' regard legal rules exclusively or chiefly as dogmas (though the word is rarely used)". Ibid., pp. 34-36.

being divested of their hypothetical character and individualized through their application to the concrete conduct of individuals.⁷⁶

The body of rules imposes duties in the interests of liberty, the liberty to enjoy one's rights, and in this character of law, rules are best expressed in terms of prescriptions.⁷⁷

Prescription, the second element of elucidation, takes "external conduct", the third element, as its object.⁷⁸ Law treats of external conduct, even if performed unconsciously under certain circumstances; ⁷⁹ morality treats of consciousness, even if not externally manifest.⁸⁰ Kantorowicz gives two examples: the law-abiding "homme-machine" and the selfish though law-observing money-lender. While the law approves both, ethics is indifferent

⁷⁶Ibid., p. 38

⁷⁷See Ibid., at p. 40.

⁷⁸The best-known distinction is the one first suggested by the Stoa, chiefly developed by Thomasiaus (d. 1728) and Kant and still prevailing: law is concerned with external conduct, morals with internal". See Ibid., p. 43.

⁷⁹What the law really prescribes is, therefore, nothing but external conduct, i.e. certain movements of the human body, its limbs, muscles, organs of speech, etc., or the forbearance from performing such movements. These movements must as a rule be capable of being performed consciously and voluntarily; but in certain circumstances the conduct may be mechanical and unconscious without losing its legal significance". Ibid., p. 46.

⁸⁰All systems of morals, those preached as well as those practised, whether religious or secular in origin, however different in form and substance, require some kind of motive causing, or at least some kind of consciousness accompanying, the prescribed acts, or even treat this internal conduct as sufficient without requiring any kind of external manifestation of the will". Ibid., p. 47.

to the former and disapproving of the latter.⁸¹ However law properly includes certain aspects which have traditionally been relegated to morals or ethics.⁸²

Kantorowicz introduces the concept of "quasi-morality", which includes justice. "By [quasi-morality] we mean a purely external conduct which as to its content complies with moral rules and which therefore would be moral if it were dictated by a good motive".⁸³ Law and morals are concerned with different fora, although in society law is supported by morality.⁸⁴

Such a keen dualism, even if linked by quasi-morality, has not been without its critics. In the very introduction to Kantorowicz's text, A. L. Goodhart defers in favor of objective moral rules,⁸⁵ and Graham Hughes

⁸¹Ibid., p. 47.

⁸²"Hitherto important parts of what should be counted as law and legal science have often been considered parts of morals and ethics; this limitation is anything but fruitful and results in serious practical dangers. Our distinction of law and morals would make it impossible to regard, as Austin did, the law of nations as 'positive international morality', or to admit with Gray that 'the doctrines of morality are largely . . . a most important source from which the judges draw and ought to draw the rules which make the law', or to remark with Pound that when a court seeks an interpretation which will yield a 'satisfactory' result, 'satisfactory' will almost always mean in practice morally satisfactory". Ibid., p. 48.

⁸³Ibid., p. 49.

⁸⁴"There are indeed ethical systems such as radical anarchism and certain forms of asceticism which deny value to law or to any matters secular, and therefore do not recognize the moral dignity of law at all. Should any society accept these doctrines, law would cease to function. 'Legalism' alone could not uphold it; if selfish motives, e.g. fear of the regular enforcement of the law, were the only ones to recommend its observance, there would be so many ready to take a chance of its non-enforcement that there would soon be no enforcement at all. No selfish motive can replace the 'sense of moral duty, which is the only guardian of laws not itself needing a guardian'. Ibid., p. 50.

⁸⁵"With all respect to this argument, there is something to be said for the view that objective moral rules are not concerned with motive, but that they set certain standards of conduct which the community considers all persons owe to each other. Thus, it is an objective moral law that a man must not kill

gives counter-examples to the division of law and morals by respective concern for external⁸⁶ and internal⁸⁷ conduct.

The final element in the elucidation of law according to Kantorowicz is justiciable aptitude. Enforceability by courts is rejected as a viable criterion of law since: (a) laws are such even prior to their enforcement;⁸⁸ (b) enforcement

another even though subjectively he does not see anything wrong in it. Similarly, it is an obligatory moral rule that one person must not arbitrarily seize the property of another. The distinction between these obligatory rules and the rules of State law is based on the nature of the duty owed and not on any distinction in the character of the obligation". *Ibid.*, pp. xxi-xxii.

⁸⁶"[...] we have surely come to contemplate without too strenuous a feat of imagination a system that might profess to punish the harboring of anti-social thoughts and might devise a scheme of interrogation and analysis for their uncovering. Primitive societies are known in which a sanction was imposed on the dreaming of certain dreams. The whole practice of the Inquisition may be cited as an organized attempt to prescribe internal conduct and to punish deviations. It is true that the English Heresy Acts prescribed punishment for specific overt activities, but Tuberville is quite clear that the general process against heresy was directed equally or even primarily against the simple harboring of deviationist beliefs". "The Existence of a Legal System", in *New York University Law Review*, 35(1960), p. 1004.

⁸⁷"The rules of morality may cover a wide range of referents. [...] There are in these very different forms of social control varying degrees of institutionalization, of precision in the articulation of norms and adaptability to the judgment process, that make this exclusively internal characterization of the moral rule an unhelpful simplification. [...] So, if in making moral judgments we are interested in inner attitudes, it is usually in the same way as the law is interested in inner attitudes: to characterize overt conduct, to judge it in its total setting. If we condemn unreasonable jealousy, it is not just the internal gnawing that we condemn but its manifestation in ways that gnaw at others. [...] We can only make sense of Kantorowicz's position here by supposing a fantastic sort of morality which condemns certain kinds of inner attitudes without any investigation of the background that produces them or the ways in which they manifest themselves in action. The man who indulges in sadistic daydreams should not be condemned with the man who translates them into action. And the man who is able to forbear from translating them into action only after a struggle may be more worthy of praise than the man who was never troubled by them". *Ibid.*, pp. 1006-1009.

⁸⁸"Courts have to enforce rules which are positive law, not rules which would be law if they were enforced". KANTOROWICZ, *Definition of Law*, p. 59.

needs be guaranteed by secondary rules,⁸⁹ (c) such a criterion would be circular and inverted.⁹⁰ Social pressure and physical compulsion are equally inadequate in that they also describe social customs, such as etiquette and manners.⁹¹

Instead, justiciable aptitude regards the application of principles. Indeed, the notion of application, rather than enforcement, underlies the judicial organ which enters into the concept of law.⁹² Certain elaborations are in order,⁹³ but in any event the "considered justiciable" element is introduced to "enable us to distinguish [law] from social custom".⁹⁴ This is necessary for various reasons.⁹⁵ First, social custom and legal custom are too near each other to

⁸⁹"The secondary rules, in order to guarantee enforcement, would have to be enforceable themselves if they are to be legal rules, which leads to the requirement of tertiary rules and eventually to final rules which can no more be enforceable lest they cease to be final". *Ibid.*, p. 60.

⁹⁰"The law is not what the courts enforce; the courts are one of the institutions which enforce the law". *Ibid.*, p. 61.

⁹¹See *ibid.*, at p. 62.

⁹²"Here it is proposed to understand by 'judicial organ' a definite authority concerned with a kind of 'casuistry', to wit, the application of principles to individual cases of conflict between parties". *Ibid.*, p. 69.

⁹³First, principles refer to rules in a broad sense, including mere factual uniformities (such as laws of nature) or matters where no rule of conduct is involved (such as some cases of betting). Second, "the authority must be recognized (within the group in which the rule to be applied obtains) as an organ of the group endowed with representative character of some kind and entitled to obedience or at least respect". Third, "the 'application' of the rule is not to be understood as a necessarily conscious application". Fourth, "conflict" presupposes that the aims of the parties are incompatible with each other, but they are nevertheless concerned with 'social relations', i.e. mutual impacts of conduct. This excludes theoretical differences of opinion or factual divergences of interest". And finally, the judicial organ is "a 'third' party with all that this implies in impartiality authority, and efficiency". *Ibid.*, pp. 69-73.

⁹⁴*Ibid.*, p. 76.

⁹⁵*Ibid.*, pp. 76-78.

allow for mechanical distinction. Then, too, the criterion of judicial organs assures introduction of "just those kinds of social organizations which in later stages of evolution become the object of legal dogmatics, the core of legal science". And finally justiciable aptitude tests for applicability, in contrast to enforceability, of law.

2. Objections

An elucidation is not simply an amplified characterization, but a clarification, an explanation, of the subject. It is a method of defining, and method should not be confused with result. Clarification and verification, even if they both begin with observation, combine with different techniques (classification / experimentation) in serving different applications (definition / decision). Proximately and for the most part though, both processes seek critical appraisal--relevance, comparative (dis)advantages, and contextual incorporation--of the subject matter.

If these remarks, as gratuitous as they are general, possess some degree of accuracy, then it would appear that Kantowicz offers an exemplary elucidation of "law". For all that, however, it is still seeking the referent of "law" as though law were some entity capable of capture by a linguistic label. But if law is not some such entity, then even the better mousetrap will not help hunt snark.

In his inaugural address delivered on 30 May 1953 before the University of Oxford, Herbert Lionel Adolphus Hart⁹⁶ rejected the "correspondence theory"

⁹⁶"Definition and Theory in Jurisprudence", in Law Quarterly Review, 70(1954), pp. 37-60.

with respect to law, faulting it for begetting so many illegitimate ideas about law. He opens his objections with "the suspicion that something is amiss is confirmed by certain characteristics that so many theories have. In the first place they fall disquietingly often into a familiar triad".⁹⁷

The general form of this recurrent triad may be summarily described as follows. Theories of one type tell us that a word stands for some unexpected variant of the familiar--a complex fact where we expect something unified and simple, a future fact where we expect something present, a psychological fact where we expect something external; theories of the second type tell us that a word stands for what it is in some sense a fiction; theories of the third (now unfashionable) type, tell us the word stands for something different from other things just in that we cannot touch it, hear it, see it, feel it.⁹⁸

Law, according to the triad, would be a variate, fiction, or noumenon. Without raising issue, for the moment, as to whether these positions taken individually are satisfactory or whether taken collectively they are logically exhaustive, if they are assumed at all, they commit the author to a particular perspective of the status of law. Positions of the triad are less than harmonious and different theories assuming different positions reflect this discord;⁹⁹ internal discord similarly results when a theory incorporates more than one position.¹⁰⁰

⁹⁷Ibid., p. 39.

⁹⁸Loc. cit., at footnote 2.

⁹⁹With respect to "right", HART compares American realists, Scandinavian jurists, and "the older type of theory that a right is an 'objective reality'". See ibid., pp. 39-40.

¹⁰⁰HART gives the example of "status" in AUSTIN. See ibid., p. 40.

Kantorowicz's body of rules appears to part paths with the noumenon position and the element of external conduct argues against fiction, but after all has he not opted for a variate. At the risk of doing him violence by (over-)simplification, has Kantorowicz not familiarized law as discretionary social behavior?

Adopting one of the positions of the triad is not per se noxious, but neither, it would seem, is it interesting. The matter of greater consequence rests with support for the position itself. And here issue must be raised as to whether these positions taken individually are satisfactory and whether taken collectively they are logically exhaustive. If the members of the triad are fundamentally inconsistent with one another, and it would appear they are, then they cannot all be axiomatic. Nor, however, can any one of them--or any one not mentioned--be axiomatic without begging at a primitive level the very question of the nature of law.

The second objection is a practical one; that is, concerning the practical utility of a definition of law.

Though these theories spring from the effort to define notions actually involved in the practice of a legal system they rarely throw light on the precise work they do there. They seem to the lawyer to stand apart with their head at least in the clouds; and hence it is that very often the use of such terms in a legal system is neutral between competing theories. For that use 'can be reconciled with any theory, but is authority for none'.¹⁰¹

This rather global admonition is as classic as the struggle between theoria and praxis, and it may be predicated of virtually all definitions of "law" considered

¹⁰¹Ibid., p. 40.

heretofore. While Hart was speaking about legal theories of dubious practical import redounding in a neutral or minimalist tactic taken by practitioners, caution should also be urged in making an oblique inversion of the situation; that is, fashioning a definition of "law" out of the less-disputed aspects of law. The least common denominators of law, if any, do not ensure a definition of law, nor can they contribute more to the deposit of knowledge about law than the collection from which they are taken.

An observation of the a priori orientation of definitions was implicit in the last objection,¹⁰² explicit in the present.

Hence though theory is to be welcomed, the growth of theory on the back of definition is not. Theories so grown, indeed represent valuable efforts to account for many puzzling things in law; and among these is the great anomaly of legal language--our inability to define its crucial words in terms of ordinary factual counterparts. But here I think they largely fail because their method of attack commits them all, in spite of mutual hostility, to a form of answer that can only distort the distinctive characteristics of legal language.¹⁰²

This is an inescapable property of the definitions of "law" by virtue of their being definitions.

It is as though we can define words, but describe facts. If law is a matter of facts, then the quest for a definition of "law" reduces to logomachy. Along

¹⁰²Ibid., p. 41.

these lines Hart proposes an elucidation¹⁰³ of law (not "law") in terms of four distinctive features which are here summarized.¹⁰⁴

(1) Legal language presumes, without stating, the existence of a legal system. (2) A legal statement has a special connection with a particular rule of the system, even though it might not state the relevant rule. There is an enthymemic structure about legal statements: With an unstated particular rule of the system as the implicit major premise, and an observation of pertinent fact as the minor premise, by modus ponens a statement about one's "right" or "duty" is a conclusion of law. (3) It is this structure which makes statements conclusions of law--not the person or office which utters them, though the utterer may be of consequence to the effect of the conclusion. (4) Different facts or a sequence of different states of affairs may produce identical conclusions.

In conclusion, if Hart's inaugural lecture did not pronounce the death of the definition of "law", neither did it offer a positive prognosis. Whether by explicit or usage definition or by elucidation, the identity of law is not to be

¹⁰³Heeding the method of "paraphrasis" proposed by BENTHAM, Fragment on Government, ch. V, sec. VI, item 6 in note [BOWRING edition, p. 293].

¹⁰⁴HART, "Definition and Theory in Jurisprudence", pp. 42-45. "These four general characteristics of legal language explain both why definition of words like 'right', 'duty', and 'corporation', is baffled by the absence of some counterpart to 'correspond' to these words, and also why the unobvious counterparts which have been so ingeniously contrived--the future facts, the complex facts or the psychological facts--turn out not to be something in terms of which we can define these words although to be connected with them in complex and indirect ways. The fundamental point is that the primary function of these words is not to stand for or describe anything but a distinct function; this makes it vital to attend to Bentham's warning that we should not, as does the traditional method of definition, abstract words like 'right' and 'duty', 'State', or 'corporation' from the sentences in which alone their full function can be seen, and then demand of them so abstracted their genus and differentia". Ibid., pp. 45-46.

found in the word "law". The approach to law by definitions has not been without merit, however, for in failing to capture law it has called for a reconsideration of the nature of law. If, as Hart suggests, law is a function in a system, then it would seem that the quest for law is better served by a description of the phenomenon.

It might appear that the discussion on law has so far paid little attention to ecclesial law. But recall the principle "dictum de omni: dictum de nullo" (whatever is said or denied of the whole class is said or denied of each one in the class). In so far as ecclesial law is at all law, it shares in the observations made about law. Accordingly, ecclesial law is not to be identified by a method of definitions. The suggestion is to look for it in the description of law as a function in and of a system. The description of law as a function in and of a system is the task of the next chapter. In later chapters this description of law will be applied to the church.

CHAPTER TWO

THE MANNER OF LAW

The observation that law is not so much a matter of terminology as of phenomenology raises its own set of options. A phenomenological examination looks at law in terms of identity, validity, and relevance. The present examination shall be concerned primarily with the first issue, but would do well to distinguish it from the others at the outset. While there may be yet other issues, the point is not so much to enumerate them as to focus upon legal identity. "What is the identity of law?" pursues a description of law's most important characteristics.¹ "What is a valid law?" is answered by a criterion or criteria for determining what counts as law in either a given system or minimally for all systems.² "What is a relevant law?" inquires into the

¹Cf. Joseph RAZ, "The Identity of Legal Systems", in California Law Review, 59(1971), p. 797: "The problem of identity of legal systems is the quest for a criterion or set of criteria that provides a method for determining whether any set of normative statements is, if true, a complete description of a legal system. [...] A statement is a normative statement if and only if the existence of a norm is a necessary condition for its truth. A normative statement is pure if and only if the existence of certain norms is sufficient for its truth. The set of all the pure statements referring to one legal system is called the 'total set' of that system, and every set of pure statements that is logically equivalent to the total set of a system is a complete description of that system. The problem of identity is a search for a complete description of any legal system [...]"

²Included under this issue are questions two and three mentioned by Richard WOLLHEIM; see supra, p. 1. "[...A] criterion of legal validity is necessarily relative to a legal system; each system has its own criterion, and to ask³ for a criterion without specifying the system is analogous to asking for the method of scoring without specifying the game. But, it has been felt, perhaps what we can give is, not a general criterion of validity for all systems, but a general schema for the criterion of validity of any system; a skeleton, as it were, that any criterion must satisfy if it is to fulfill its proper task--just as we might hope to give, not a general method of scoring, but a schema that any method must satisfy". "The Nature of Law", p. 132.

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justification for a judgment or invocation of the law.³ Because these are interrelated and overlapping issues, a discussion of legal identity shall to some extent touch upon validity and relevance. Moreover they are all part of the underlying question "What is a legal system?"

A. A Legal System

The concept of a legal system begins with the context of law. The context of law has a teleological sense, it refers to the proper end of human activity. Different authors see different ends, two of which are represented by H. L. A. Hart and Lon L. Fuller. According to Hart the teleological view rests upon "the tacit assumption that the proper end of human activity is survival, and this rests upon the simple contingent fact that most men most of the time wish to continue in existence".⁴ Fuller thinks the context of law to be human striving. "Law, as something deserving loyalty, must represent a human achievement".⁵ There are other opinions, of course, as to what the context of

³Ronald DWORKIN, whose writings reflect much enthusiasm over the judicial system, emphasizes the issue thus: "What, in general, is a good reason for a decision by a court of law? This is the question of jurisprudence; it has been asked in an amazing number of forms, of which the classic 'What is Law?' is only the briefest". "Wasserstrom: The Judicial Decision", in Ethics, 75(1964-1965), p. 47. DWORKIN's opinions on the issue have not been without dissent. See, e.g., Rolf SARTORIUS, "Hart's Concept of Law", in Robert S. SUMMERS, ed., More Essays in Legal Philosophy; General Assessments of Legal Philosophies, Oxford, Blackwell, 1971, p. 134.

⁴The Concept of Law, p. 187.

⁵Lon L. FULLER, "Positivism and Fidelity to Law--A Reply to Professor Hart", in Harvard Law Review, 71(1958), p. 632.

law is or should be. To see how context relates to other components of a legal system, however, it would seem permissible to take one formulation as a paradigm and check it against another. This leaves aside, momentarily anyway, the acceptance or rejection of any dogma about the end of human activity.

Admittedly Professors Hart and Fuller have not been randomly selected. They are contemporary representatives of the classic debate over the (dis)association of law and morality.⁶ By allowing their dogmatic differences to cancel each other out what remains is an underlying commonality to the speculative framework of the authors which makes their divergence in one sense trivial. Their divergence is neither insignificant nor uninteresting, but equally valued departures along an overall path. It is this overall path that pertains to legal systems.

Law is conceived with respect to society, arising with a social system as a function thereof.⁷ As the social system begins to take shape certain functions become more evident. From a teleological view the human aggregate seeks to survive.⁸ Man, in his natural condition, finds himself physically vulnerable, mentally and physically approximately equal, somewhere between the extremes

⁶Their debate took shape piecemeal in: HART, "Positivism and the Separation of Law and Morals", in Harvard Law Review, 71(1958), pp. 593-629 [excerpt reprinted in Ronald M. DWORKIN, ed., The Philosophy of Law, Oxford, Oxford Univ. Press, 1977, pp. 17-37]; FULLER, "Positivism and Fidelity to Law--A Reply to Professor Hart", pp. 630-672; HART, The Concept of Law, chs. VIII and IX [pp. 151-207]; FULLER, The Morality of Law, rev. ed., New Haven, Yale Univ. Press, 1969, chs. II and III [pp. 33-151]; HART, Review of The Morality of Law, by Lon L. Fuller, in Harvard Law Review, 78(1965), pp. 1281-1296; FULLER, The Morality of Law, rev. ed., ch. V ["A Reply to Critics", pp. 187-242].

⁷Cf. HART, "Definition and Theory in Jurisprudence", pp. 45-46.

⁸See HART, The Concept of Law, pp. 187-195.

of altruism and selfishness, in need of basic supplies (food, clothes, shelter), and at times tempted to prefer immediate personal interests. So for the sake of survival there needs be provisions at least for physical safety, mutual forbearance and compromise, toleration, property, and sanctions. Particular provisions along these lines draw from several sources: folkways, customs, morals, mores, norms, etc. Somewhere along the path of social evolution a binding minimum of behavior is expressed in a somewhat amorphous fashion. These expressions are thought to possess certain features or properties in common; they are recognizable as belonging to a special class by their possession of the properties.

The foregoing sociological rendition is not so naive as it is simplified and presents a rather liberal amplification of Hart's theory in part. It is possible to discern, however, that the context of law (survival), under the human condition (physical vulnerability, approximate equality, limitations of altruism, of resources, and of understanding and will), determines by natural necessity a certain minimum content of law (provisions for preservation, coexistence, forbearance, property, and protection).

By starting with human achievement as the context of law and law as representing this end,⁹ Fuller sees the necessity of order. Order, thus understood, is the minimum content of law. Fuller regards order as morally necessary for law (which probably says more about how Fuller views law in

⁹"The respect we owe to human laws must surely be something different from the respect we accord to the law of gravitation. If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark". "Positivism and Fidelity to Law--A Reply to Professor Hart", p. 632.

relation to human achievement than how he views order). So that there may be laws at all, there must be order. Now "order itself will do us no good unless it is good for something",¹⁰ namely "the ordinary, extralegal ends of human life".¹¹ Order dictates certain properties of laws, such as being general, publicized, prospective, understandable, consistent, within the capacity of those affected to obey, stable, and congruently administered.¹² These Fuller considers to be an "inner morality of law".¹³ They are morally valued in that in their absence there could be no laws. "Law, considered merely as order, contains, then, its own implicit morality".¹⁴

As with Hart, there is certainly much more to Fuller's speculation than is or needs be presented here. But even from what has been said it appears that for a legal system the context of law, whatever it may be, determines what by necessity shall be at least the minimum content of law in that system. The strength of this observation could be tested against the theory of another

¹⁰*Ibid.* p. 657.

¹¹*Ibid.*, p. 656.

¹²See FULLER, The Morality of Law, rev. ed., p. 39.

¹³Against which it has been objected that "they may be viewed as 'maxims of legal efficacy' and maxims of this nature are not, as such, conceptually connected with morality. If a person assembles a machine inefficiently, the result is inefficiency, not immorality". Robert S. SUMMERS, "Professor Fuller on Morality and Law", in SUMMERS, ed., More Essays in Legal Philosophy, p. 129. Similar criticisms are registered by: Ronald DWORKIN, "The Elusive Morality of Law", in Villanova Law Review, 10(1965), p. 634; Marshall COHEN, "Law, Morality and Purpose", in Villanova Law Review, 10(1965), p. 651; and H. L. A. HART, Review of The Morality of Law, pp. 1285-1286. FULLER replies in The Morality of Law, rev. ed., at pp. 200-224, by distinguishing what implications his eight principles of legality have for a system of managerial direction as compared with their implications for a legal order.

¹⁴FULLER, "Positivism and Fidelity to Law--A Reply to Professor Hart", p. 645.

author, one with whom neither Hart nor Fuller dogmatically agree: Lord Patrick Devlin's second Maccabean Lecture in Jurisprudence of the British Academy.¹⁵ Devlin's underlying theme is that law exists for the protection of society, and this it discharges in part by protection of the moral order which is necessary for the preservation of society.¹⁶ Social preservation and morality function in Devlin's speculation as the context and content of law. Whether one happens to agree or not with the dogmas which Hart, Fuller, Devlin, or someone else assigns to context and content of law is irrelevant to the framework of a legal system.

Perhaps only among the more elementary and ephemeral social organisms are there unified or singular contexts of law. That is, a system whose context of law is simply survival, or simply advancement, or simply something else. While it is a matter for sociological verification, the more familiar social systems such as the church and state appear sophisticated by their possession of dogmatically diversified or pluralistic law contexts. For most systems survival alone is not enough; some degree of happiness among its members enters into its context of law. Fuller fashions the matter thus:

¹⁵Delivered 18 March 1959. In Proceedings of the British Academy, 45(1959), pp. 130-151 [reprinted in The Enforcement of Morals, London, Oxford Univ. Press, 1965, xiv-139 pp., as ch. I (pp. 1-25); excerpt reprinted in DWORKIN, ed., The Philosophy of Law, pp. 66-82]. H. L. A. HART responded with Law, Liberty, and Morality, Stanford, Stanford Univ. Press, 1963, 88 pp. The debate was also taken up by Eugene Victor ROSTOW, "The Enforcement of Morals", in Cambridge Law Journal, 18(1960), pp. 174-198 [reprinted in The Sovereign Prerogative, New Haven, Yale Univ. Press, 1962, pp. 45-80] and Glanville WILLIAMS, "Authoritarian Morals and the Criminal Law", in Criminal Law Review, 1966, pp. 132-147.

¹⁶Two critical reviews of which can be found in Richard WOLLHEIM, "Crime, Sin, and Mr. Justice Devlin", in Encounter, 13(Nov. 1959), pp. 34-40 and Ronald DWORKIN, "Lord Devlin and the Enforcement of Morals", in Yale Law Journal, 75(1966), pp. 986-1005.

As Thomas Aquinas remarked long ago, if the highest aim of a captain were to preserve his ship, he would keep it in port forever. As for the proposition that the overwhelming majority of men wish to survive even at the cost of hideous misery, this seems to me of doubtful truth.¹⁷

To say that human survival and achievement are the conjunctive benchmarks of a sophisticated social system, if in fact they are, is to report on the empirical status of their law contexts. These are not the only dogmatic options available. An autocratic system might include obedience, even at the expense of survival or achievement. Commonality is another possible dogma, one which would make all members equal shareholders in responsibility, property, defense, etc. Spiritual growth and the pursuit of knowledge are yet other dogmatic possibilities. In any event it is of no logical interest to the framework of a social system which dogmas its law context empirically subscribes to, nor whether its context is unified or diversified (having one or several dogmas). Whatever dogma a system possesses has the value of being advantageous (advancing or protecting) or at least not disadvantageous (retarding or endangering) to the well-being of the system. The meaning of well-being is set by the dogma; the experience of well-being under obedience to a dictator may be different from well-being under achievement of majority happiness, but these are logically equivalent. In the next section it will be seen that the dogma of a law context gives rise to obligations within the system, but first there is the matter of the content of law.

¹⁷The Morality of Law, rev. ed., p. 185. FULLER footnotes AQUINAS from AQUINAS' question on man's happiness. "Hence a captain does not intend as a last end, the preservation of the ship entrusted to him, since a ship is ordained to something else as its end, viz., to navigation". Summa Theologica I-II, q. 2, art. 5.

The content of law, minimally determined by the context of law, in turn determines the properties of law. Without specifying the legal context and content of a particular system it would not be possible to accurately describe the properties of law in that system. It has been held, however, that for all legal systems there are certain necessary law properties. What are they and why are they necessary? Joseph Raz introduces his Concept of a Legal System¹⁸ on the assumption that

The three most general and important features of the law are that it is normative, institutionalized, and coercive. It is normative in that it serves, and is meant to serve, as a guide for human behaviour. It is institutionalized in that its application and modification are to a large extent performed or regulated by institutions. And it is coercive in that obedience to it, and its application, are internally guaranteed, ultimately by the use of force.

Naturally, every theory of legal system must be compatible with an explanation of these features. Because of their importance we shall, moreover, expect that every theory of legal system will take account of these features, and will, at least partly, explain their importance for the law.¹⁹

These are possible properties within a particular system, sure enough. But what does it mean to say that they, or others for that matter, are necessary properties within all legal systems? The question revolves around the meaning of "necessity". One distinction is between logical (formal) and empirical (material) necessity. In so far as the generative sequence from context to content to properties is true of all legal systems, the logical necessity of a property or set of properties assumes some universal context and content of

¹⁸The Concept of a Legal System; An Introduction to the Theory of Legal System, Oxford, Oxford Univ. Press, 1970, ix-212 pp.

¹⁹Ibid., p. 3.

laws. Raz refers to enforcement (coercion, sanctions) and so does Hart, however Hart sees it as "a natural necessity".²⁰ It is necessary given the nature of mankind in order to facilitate the proper end of human activity. The same could be said about institutions for the creation and interpretation of laws: they are practical considerations, under the human condition, for the realization of law. It is possible to imagine a society in which the requirements for effecting the proper end of human activity were always observed. Such a utopia would have no need of an institution for enforcement.²¹ Were this society to have an unambiguous language or otherwise enjoy infallible clarity of communication, it would employ no institution for interpretation. And were there a common discovery of the ways according to which the inhabitants should conduct themselves, there would be no need for the creation of same. Thus these institutions are contingent upon the state of society.

Another distinction surrounding necessary law properties can be made with regard to legal validity. Necessary law properties, whether logically or empirically so, need not be sufficient for the requirements of legal validity in a particular system. There may be simple social systems in which the criterion of legal validity consists of no more than a statement of the necessary properties of law, but social systems do not have to be so limited and the familiar ones are not. Suppose being normative is a necessary property of law. In the State system, for instance, that alone does not constitute law. Customs and rules of etiquette are normative in that they are guides for behavior, but they are not laws.

²⁰The Concept of Law, p. 195.

²¹To argue that the law was "enforced" by personal conviction of the inhabitants is simply to force "enforcement" where it does not belong, rendering the term vacuous.

An alternative to the quest for necessary properties of law is to view them within a system as a disjunctive aggregate. The search is then for a criterion for the inclusion or exclusion of marginal instances from paradigmatic instances. For example, suppose that within some system the properties of law consist of being normative, authoritative, efficacious, and sanctioned, and that a standard or paradigm law would possess all of these. An expression lacking only sanction would be a marginal instance of law, but an instance nonetheless, unless the criterion specified otherwise. Hart's approach along these lines, revealed in the following passage, has been likened²² to a cluster concept.²³

[...] I am not sure that in the case of concepts so complex as that of a legal system we can pick out any characteristics, save the most obvious and uninteresting ones, and say they are necessary. Much of the tiresome logomachy over whether or not international law or primitive law is really law has sprung from the effort to find a considerable set of necessary criteria for the application

²²By Rolf SARTORIUS, "Hart's Concept of Law", pp. 142-144.

²³Hilary PUTNAM explains the idea of a cluster concept in terms of man. "Suppose one makes a list of the attributes $P_1, P_2 \dots$ that go to make up a normal man. One can raise successively the questions 'Could there be a man without P_1 ?' 'Could there be a man without P_2 ?' and so on. The answer in each case might be 'Yes,' and yet it seems absurd that the word 'man' has no meaning at all. In order to resolve this sort of difficulty, philosophers have introduced the idea of what may be called a cluster concept. (Wittgenstein uses instead of the metaphor of a 'cluster,' the metaphor of a rope with a great many strands, no one of which runs the length of the rope.) That is, we say that the meaning in such a case is given by a cluster of properties. To abandon a large number of these properties, or what is tantamount to the same thing, to radically change the extension of the term 'man,' would be felt as an arbitrary change in its meaning. On the other hand, if most of the properties in the cluster are present in any single case, then under suitable circumstances we should be inclined to say that what we had to deal with was a man". "The Analytic and the Synthetic", in Herbert FEIGL and Grover MAXWELL, eds., Minnesota Studies in the Philosophy of Science, vol. III, Scientific Explanation, Space, and Time, Minneapolis, Univ. of Minnesota Press, 1962, p. 378. Quoted in SARTORIUS, "Hart's Concept of Law", at p. 142.

of the expression 'legal system'. Whereas I think that all that can be found are a set of criteria of which a few are obviously necessary (e.g., there must be rules) but the rest form a sub-set of criteria of which everything called a legal system satisfies some but only standard or normal cases satisfy all.

[...I]n the case of a concept so complex as a legal system we can do no more than identify the conditions present in the standard or paradigm case and consider under what circumstances the removal of any one of these conditions would render the whole pointless or absurd.²⁴

In The Concept of Law Hart points out that a skeleton account of the salient features of law "does little more than assert that in the standard, normal case laws of various sorts go together", yet "the deep perplexity which has kept alive the question ['What is Law?'], is not ignorance or forgetfulness or inability to recognize the phenomena to which the word 'law' commonly refers".²⁵ Consequently the manner of law should be approached by describing a way out of the perplexity about law rather than by defining a criterion for the correct application of "law" (that is, for including or excluding an expression as law within a system on the grounds that it does or does not possess certain specified properties). The perplexity surrounding law typically refers in one form or

²⁴"Theory and Definition in Jurisprudence", in Proceedings of the Aristotelian Society, suppl. 29(1955), pp. 251-252 and 253. Cf. H. L. A. HART, "Philosophy of Law, Problems of", in EDWARDS, ed. in chief, Encyclopedia of Philosophy, vol. 6, p. 264: "[...W]hat is needed is not a characterization or elucidation of usage but a reasoned case for the inclusion in or exclusion from the scope of the expressions 'law' and 'legal system' of various deviations from routine and undisputed examples. These deviant cases include not only international law and primitive law but also certain elements found in developed municipal legal systems, such as rules to which the usual sanctions are not attached and rules which run counter to fundamental principles of morality and justice".

²⁵The Concept of Law, p. 5.

another to the nature of obligation.²⁶ Obligation, then, is the chief concern of legal identity.

B. Legal Identity

Both of the approaches to legal identity presented in this section attempt to account for obligation within a legal system. The first approach, property of Professor Hart, starts from the position that obligation presupposes rules²⁷ and proceeds along a description of law as the union of primary and secondary rules. Objections against limiting law to rules and the primary/secondary rules distinction raises doubt as to whether Hart has found his hoped for "key to the science of jurisprudence"²⁸ and rather suggests another starting point. If that starting point is the origin of a legal system itself, namely the context of law,

²⁶In the form of "three recurrent issues" in *The Concept of Law*: "How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from, and how is it related to moral obligations? What are rules and to what extent is law an affair of rules?" Pp. 6-17, at p. 13. HART holds that these "underlying issues are different from each other and too fundamental to be capable of" permitting a satisfactory definition of law. *Ibid.*, p. 16.

²⁷It will be recalled that the theory of law as coercive orders, notwithstanding its errors, started from the perfectly correct application of the fact that where there is law, there human conduct is made in some sense non-optional or obligatory. In choosing this starting-point the theory was well inspired, and in building up a new account of law in terms of the interplay of primary and secondary rules we too shall start from the same idea". *Ibid.*, pp. 79-80. HART otherwise criticizes the theory that law is coercive orders in chapters two through four.

²⁸*Ibid.*, p. 79.

then law is the articulation and realization of legal obligation within a system.²⁹ In other words, laws presuppose obligation.

1. Obligation Presupposes Rules

While an obligation presupposes the existence of a rule, it is not the case that the existence of a rule always results in an obligation.³⁰ Rules of etiquette and grammar, for example, are not properly said to carry obligations. An obligation differs from being physically compelled and being obliged.³¹ Physical compulsion is a material fact about a superior power bodily subduing an inferior power. "[T]he statement that a person was obliged to obey someone is, in the main, a psychological one referring to the beliefs and motives with which an action was done".³² A robber may physically overwhelm his victim or he may oblige his victim to surrender his property through threats of harm. In this sense being obliged is akin to psychological compulsion. Being obliged is a

²⁹Cf. PLATO's idea of law seeking to be the discovery of reality, p. 4, supra.

³⁰"The statement that someone has or is under an obligation does indeed imply the existence of a rule; yet it is not always the case that where rules exist the standard of behaviour required by them is conceived of in terms of obligation". HART, The Concept of Law, p. 83.

³¹"If we have an obligation to do something there is some sense in which we are bound to do it, and where we are bound there is some sense in which we are or may be compelled to do it. To probe these notions it is important to distinguish three things: (1) being physically compelled to do something, (2) being obliged to do something, (3) having an obligation to do something". H. L. A. HART, "Legal and Moral Obligation", in Abraham Irving MELDEN, ed., Essays in Moral Philosophy, Seattle, Univ. of Washington Press, 1958, p. 95. HART is arguing against the theory exemplified by John AUSTIN (see supra, p. 8) that obligations are imposed by coercive orders.

³²HART, The Concept of Law, p. 81.

product of the potential victim's attitude toward the situation; if he does not regard the threat as sincere or the harm sufficient or the assailant able to inflict the threatened harm, he will not feel obliged to turn over his possessions.³³

If one does not think or feel himself obliged, he is not, yet he may retain an obligation.³⁴ Rules are considered to impose obligations when subject to a critical reflective attitude;³⁵ that is, criticism justified by deviation from conformity.³⁶

³³See ibid., pp. 80-81. The fearless and foolish likewise do not feel obliged.

³⁴"To feel obliged and to have an obligation are different though frequently concomitant things". Ibid., p. 86. See also p. 56.

³⁵"Rules are conceived and spoken of as imposing obligations when the general demand for conformity is insistent and the social pressure brought to bear upon those who deviate or threaten to deviate is great. [...] What is important is that the insistence on importance or seriousness of social pressure behind the rules is the primary factor determining whether they are thought of as giving rise to obligations". Ibid., p. 84. There is an important difference, not entirely clear in this passage, between the fact of an obligation and testing for the presence of an obligation. If the critical reflective attitude is a test such that if there is a critical reflective attitude, then there is a breach of obligation giving rise to it (something like if there is a symptom, then there is an illness giving rise to it), then HART has yet to explain the origin and meaning of obligation. If the critical reflective attitude is the fact of an obligation, then obligations are as arbitrary as the standards of conformity and degree of criticism in the wake of their violation; in other words, obligations are social behaviour. That, however, is not in keeping with HART's inclination toward objective obligations. See p. 81.

³⁶"What is necessary is that there should be a critical reflective attitude to certain patterns of behaviour as a common standard, and that this should display itself in criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified, all of which find their characteristic expression in the normative terminology of 'ought,' 'must,' and 'should,' 'right,' and 'wrong'." Ibid., p. 56.

Two other characteristics of obligation go naturally together with this primary one. The rules supported by this serious pressure are thought important because they are believed to be necessary to the maintenance of social life or some highly prized feature of it. [...] Secondly, it is generally recognized that the conduct required by these rules may, while benefiting others, conflict with what the person who owes the duty may wish to do.³⁷

Since resistance to robbery would in no wise meet with a critical reflective attitude, a victim is under no obligation to tender his valuables, even if physically compelled or obliged to do so.

When a certain pattern of behavior is regarded as standard subject to a critical reflective attitude (meaning deviation from the standard will justifiably be criticized), this behavior is held by those "internal" to the system to constitute a rule, the observance of which is obligatory. This contrasts with the "external" or observer's perspective, according to which the behavior of those internal to the system is guided not by rules and the rule-dependent notion of obligation, but by "observable regularities of conduct, predictions, probabilities, and signs".³⁸ From an internal perspective there is a normative connection between a rule of behavior and an act of behavior (e.g., one ought to stop at a red traffic light). From an external perspective there is only an empirically contingent connection between one event and another (e.g., when the light is red, traffic stops).

It is worthwhile to ask, en passant, if one ought to stop at a red traffic light because there is a rule to this effect, why should the rule be observed: because there is an obligation to do so or because failure to do so will meet with

³⁷Ibid., p. 85.

³⁸Ibid., p. 87. This distinction can be traced in HART's speculation to "Theory and Definition in Jurisprudence", pp. 247-250.

criticism? It cannot be the former for if there is an obligation to observe the rule that one ought to stop at a red traffic light and an obligation presupposes a rule, then there must be a second rule to observe the first rule. The second rule suggests another obligation which presupposes a third rule, and so on in infinite regress.

The way out of the regress is to begin with a fact (since, unlike an obligation, a fact is self-evident) and either derive an obligation from a fact or construe an obligation as a matter of a fact. Now the fallacy of trying to derive "ought" from "is" having been pointed out in Hume's celebrated dictum,³⁹ there is little alternative⁴⁰ to construing obligation in terms of fact. In Hart's

³⁹] cannot forbear adding to these reasonings an observation, which may, perhaps, be found of some importance. In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary way of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, is, and is not, I meet with no proposition that is not connected with an ought, or an ought not. This change is imperceptible; but is, however, of the last consequence. For as this ought, or ought not, expresses some new relation or affirmation, 'tis necessary that it should be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it. But as authors do not commonly use this precaution, I shall presume to recommend it to the readers; and am persuaded, that this small attention would subvert all the vulgar systems of morality, and let us see, that the distinction of vice and virtue is not founded merely on the relations of objects, nor is perceiv'd by reason". A Treatise of Human Nature, bk. III, pt. I, sec. I, reprinted from the original edition and ed. by L. A. SELBY-BIGGE, Oxford, Clarendon, 1967, at pp. 469-470. See also the twenty-two related essays in William Donald HUDSON, ed., The Is-Ought Question: A Collection of Papers on the Central Problem in Moral Philosophy, London, Macmillan, 1969, 271 pp.

⁴⁰There have been recent attempts to bridge the gap between "ought" and "is" along the now familiar lines of performative utterance, viz. to say someone ought to or should do something is to say that for certain reasons he is being advised to do it. See Max BLACK, "The Gap between 'Is' and 'Should'", in Philosophical Review, 73(1964), pp. 165-181 [reprinted in Margins of Precision: Essays in Logic and Language, Ithaca, New York, Cornell Univ. Press, 1970, pp. 23-40; also reprinted in HUDSON, ed., The Is-Ought Question, pp. 99-113], and

theory the obligation to stop at a red traffic light means failure to do so will meet with criticism. Obligation, then, is an elliptical expression of fact regarding the prevention or avoidance of criticism.⁴¹

It has already been noted that while an obligation presupposes a rule, not every rule imposes an obligation. In this vein Hart introduces the distinction between primary and secondary rules: "Rules of the first type impose duties; rules of the second type confer powers, public or private".⁴² The human condition being what it is (physically vulnerable, approximately equal, etc.), a

John R. SEARLE, "How to derive 'Ought from 'Is'", in Philosophical Review, 73(1964), pp. 43-58 [reprinted with revisions in Speech Acts; An Essay in the Philosophy of Language, Cambridge, Univ. Press, 1969, pp. 175-198; also reprinted, in HUDSON, ed., The Is-Ought Question; pp. 120-134]. This however, appears to construe obligation as a matter of a fact (viz. advising), rather than derive an obligation from a fact.

⁴¹Cf. D. Neil MacCORMICK, "Legal Obligation and the Imperative Fallacy", in A. W. B. SIMPSON, ed., Oxford Essays in Jurisprudence, 2nd series, Oxford, Clarendon, 1973, p. 128: "Herein lies the key to the binding character of law. I as a citizen may or may not be disposed to accept each and every law in itself and for itself. I may deeply disapprove of the content of particular laws, but insofar as the majority of citizens continue to accept that the law can only be made or changed by settled procedures, and in so far as the officials who administer it continue in fact to acknowledge and honor a duty to apply it scrupulously, the law binds me whether I like it or not. [...T]he citizen is bound by the law, in that he must like it or lump it". This train of thought would seem conducive to the "bad man theory of law", according to which law is observed only to prevent or avoid punishment. See HOLMES, "The Path of Law", pp. 457-478; criticized by William TWINING, "The Bad Man Revisited", in Cornell Law Review, 58(1972-1973), pp. 275-303. But if behavior is guided by the desire to avoid official censure, as MacCORMICK has it, or criticism, as HART puts it, then at bottom just how far is such a notion of obligation from what HART calls being obliged?

⁴²HART, The Concept of Law, p. 79. On p. 92, however, he says secondary rules "are all about" and modify primary rules: "[...W]hile primary rules are concerned with the actions that individuals must or must not do, these secondary rules are all concerned with the primary rules themselves. They specify the ways in which the primary rules may be conclusively ascertained, introduced, eliminated, varied, and the fact of their violation conclusively determined". SARTORIUS critically compares the two descriptions in "Hart's Concept of Law", pp. 135-138.

small closely-knit community could function in a stable environment with just primary rules as long as these rules are accepted by the majority and include restrictions on violence, theft, and deception. Were the community large or pluralistic or the environment volatile, the exclusive use of primary rules would likely lead to (1) uncertainty about what the rules are since they do not form a unified system, (2) a static or slow process of change in adding to or subtracting from the deposit of rules as a result of their customary nature, and (3) inefficiency in maintaining the rules due to the lack of authoritative bodies for the discernment of an infraction and execution of a remedy. These three main defects are met by supplementing the primary rules of obligation with secondary power-conferring or enabling rules.

The remedy for uncertainty is a "rule of recognition"⁴³ which specifies features which a primary rule⁴⁴ must possess to be a rule of the group.⁴⁵ This

⁴³Peter Michael Stephan HACKER argues that there may be "numerous distinct rules of recognition, addressed to different judicial organs, having distinct content although similar form" and that "there need be no rule of recognition in a system which specifies all the criteria of validity of the system". "Hart's Philosophy of Law", in P. M. S. HACKER and Joseph RAZ, eds., Law, Morality and Society: Essays in Honour of H. L. A. Hart, Oxford, Clarendon, 1977, p. 24.

⁴⁴The rule of recognition shall also have to range over the secondary rules of change and adjudication lest they be excluded from the system or deemed invalid. On p. 102 of The Concept of Law HART says that the rule of recognition assesses "the validity of other rules of the system" without specifying which other rules. Interpreting this ambiguity so as to include other secondary rules preserves the integrity of HART's intended meaning or function of the rule of recognition (namely, unification of the system and discernment of legal validity) at the expense of his explicitly intended scope of the rule of recognition (which, on pp. 92 and 97, is limited to primary rules).

⁴⁵Primary rules may be identified, among other ways, by reference to an authoritative list or text or to some general characteristic (e.g., enacted by a specific body, or long standing customary practice, or relation to judicial decisions) or hierarchy of characteristics. See *ibid.*, pp. 92-93. "For the most part the rule of recognition is not stated, but its existence is shown in the way

introduces unification and legal validity into the system. A rule is legally valid when it satisfies all the criteria provided by the rule of recognition.⁴⁶ Since the rule of recognition is not subject to evaluation of itself by itself, thus being ultimate,⁴⁷ it is neither valid nor invalid.⁴⁸ Its existence is a matter of fact.⁴⁹ The remedy for the static quality is "rules of change" which empower the creation of new and elimination of old primary rules. This introduces the ideas of legislative enactment and repeal. The remedy for inefficiency is "rules of adjudication" which empower individuals to authoritatively determine

in which particular rules are identified, either by courts or other officials or private persons or their advisers". P. 98:

⁴⁶HART repeatedly claims (see ibid., pp. 89, 226 and 229) that a rule of recognition is not necessary for the existence of a legal system. Simpler forms of society may function by primary rules alone, while even in advanced social systems a rule of recognition "is not a necessity, but a luxury", albeit a typical one. If so, then SARTORIUS rightly objects that "it cannot be a necessary condition for the existence of a valid law". "Hart's Concept of Law", pp. 150-151.

⁴⁷Joseph RAZ considers the situation in which "the legal system concerned contains two types of ultimate laws: laws of one type directing the courts which laws to apply, those of the other type guiding their discretion in deciding (partly) unregulated disputes. Laws of the first type are laws of recognition, laws of the second type are ultimate laws of discretion, and both impose duties on the courts". "The Identity of Legal Systems", pp. 810-811.

⁴⁸In this sense it compares to Hans KELSEN's basic norm (see p. 9, supra) or Georg Henrik von WRIGHT's sovereign norm: "A norm which cannot be traced back to any other norm cannot, by definition, be valid relatively to any other norm. It will be either invalid relatively to some norm of next higher degree or it will be neither valid nor invalid, i.e. sovereign". Norm and Action; A Logical Enquiry, London, Routledge and Kegan Paul, 1963, p. 199.

⁴⁹The assertion that it exists can only be an external statement of fact. For whereas a subordinate rule of a system may be valid in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact". HART, The Concept of Law, p. 107.

whether a primary rule has been broken on a particular occasion. This introduces the concepts of judge, jurisdiction, and judgement.

Hart's concept of a legal system⁵⁰ formally⁵¹ revolves around the interplay of primary and secondary rules. He has attempted to show "that most of the features of law which have proved most perplexing and have both provoked and eluded the search for definition can best be rendered clear, if these two types of rule and the interplay between them are understood".⁵²

Perhaps the most perplexing feature of law is obligation,⁵³ a feature which, in Hart's speculation owes its existence to rules. The nature of obligation is not rendered clear, however, by the interplay of primary and

⁵⁰"So long as the laws which are valid by the system's tests of validity are obeyed by the bulk of the population this surely is all the evidence we need in order to establish that a given legal system exists. [...] There are therefore two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials". *Ibid.*, pp. 111 and 113.

⁵¹Referring to the aforementioned passages from The Concept of Law, SARTORIUS writes that "they constitute nothing more than purely formal criteria for the existence of a legal system. As such, they could be satisfied by the rules, officials, and players of the National Football League, as well as many other rule governed social organizations": "Hart's Concept of Law", p. 139.

⁵²HART, The Concept of Law, p. 79.

⁵³"The situation in which an individual has a legal duty to do or to abstain from some action is the commonest and most fundamental of all legal phenomenon; the reference to duty or its absence is involved in the definition of such other legal concepts as those of a right, a power, a legal transaction, or a legal personality". HART, "Philosophy of Law, Problems of", p. 266.

secondary rules if it is the case, as it has been suggested,⁵⁴ that the distinction between primary and secondary rules is neither necessary nor sufficient. Setting aside the distinction what remains is the position that obligation is nonetheless the product of rules. Then again it has been objected that a legal system does not live by rules alone, but also by principles, policies, and customs.⁵⁵

⁵⁴To the thesis that secondary rules are power-conferring and all about duty-imposing primary rules it can first be objected that not all secondary rules confer powers. A rule of recognition does not confer powers, it sets up criteria. It determines sources of law, but does not empower someone to make them, like the rules of change. See L. Jonathan COHEN, Review of The Concept of Law, by H. L. A. Hart, in Mind, 71(1962), pp. 408-409. On the other hand, not all primary rules impose obligations. Enabling rules such as those which define the way marriages are made do not impose duties or obligations (and are thus examples of what HART considers secondary rules; see The Concept of Law, p. 27), yet they appear in almost every system governed by primary rules alone. See ibid., pp. 409-410. Instead obligations can be imposed by secondary rules and the rule of recognition is again an example. It imposes a duty upon officials in the system to exercise their powers by applying laws satisfying certain criteria. See RAZ, The Concept of a Legal System, pp. 197-200. Even to say secondary rules are about primary rules is subject to qualification. "Secondary rules can be about secondary rules as well as primary ones, and they are no more about rules than about behaviour, for they guide behaviour no less than do primary rules. Moreover primary rules too may be about, i.e. include reference to, other rules, e.g. if the operative facts for the performance of the acts they guide involve reference to the existence and scope of other rules, or to the fact of violation of or compliance with other rules". HACKER, "Hart's Philosophy of Law", p. 20. Given the ambiguity and inconsistency inherent in the attempt to find a substantial difference between primary and secondary rules, it would seem that the distinction is fundamentally a matter of formal classification. In this vein HACKER is led to suggest "that Hart's distinction between primary and secondary rules is a distinction by enumeration. Secondary rules are rules of recognition, change, and adjudication, primary rules are not". Loc. cit.

⁵⁵Ronald DWORKIN argues that legal principles, such as no man may profit from his own wrongdoing, are elements of law that are not rules nor identified by a rule of recognition. In a lacuna of rules a judge cannot create a new rule to be applied ex post facto for the gap is filled within the perimeters of law by legal principles. See DWORKIN, "The Model of Rules", in University of Chicago Law Review, 35(1967), pp. 14-46 [reprinted as "Is Law a System of Rules", in Robert S. SUMMERS, ed., Essays in Legal Philosophy, Oxford, Blackwell, 1968, pp. 25-60; also reprinted in DWORKIN, ed., The Philosophy of

If these were subject to a rule of recognition⁵⁶ and consequently were legally valid, then should it not be said that they too impose obligations? With this the Hartian notion of obligation has been formally expanded, but not substantially changed. It is still an expression of fact regarding the prevention or avoidance of criticism.

A substantial change results all around when obligations existentially precede rather than succeed rules, principles, and policies. The change is made in order to tie obligations more directly to the context of law and is legitimated

Law, pp. 38-65]; "Social Rules and Legal Theory", in Yale Law Journal, 81(1972), pp. 855-890; "Hard Cases", in Harvard Law Review, 88(1975), pp. 1057-1109; these three articles are respectively reprinted in DWORKIN's Taking Rights Seriously, Cambridge, Massachusetts, Harvard Univ. Press, 1977, as chs. 2 [pp. 14-45], 3 [pp. 46-80], and 4 [pp. 81-130]; and "No Right Answer?", in HACKER and RAZ, eds., Law, Morality and Society, pp. 58-84. HART had said, though without much elaboration, that in the so-called hard cases where there is neither statute nor other formal source of law, the judge may use (even exclusively) "permissive legal sources". See The Concept of Law, p. 200 and note on pp. 246-247. But if the judge may do so, says SARTORIUS who would concur with DWORKIN, he bypasses the rule of recognition and thus renders it insufficient. See "Hart's Concept of Law", pp. 152-153 and Rolf SARTORIUS, "Social Policy and Judicial Legislation", in American Philosophical Quarterly, 8(1971), pp. 151-160.

⁵⁶Unlike DWORKIN, Rolf E. SARTORIUS holds that those principles which count "can be identified by something quite like Hart's ultimate rule of recognition". This is accomplished "by loosening up a bit Hart's concept of a rule of recognition, which must include the rule of stare decisis, so as to take account of the fact that the doctrine of precedent gives authoritative status directly only to particular decisions, rather than to general results. As so modified, it will identify constitutional provision, legislative enactment, and judicial decision as authoritative sources of law". Individual Conduct and Social Norms; A Utilitarian Account of Social Union and the Rule of Law, Encino, California, Dickenson, 1975, p. 192.

in so far as it is better able to account for diverse types of obligations⁵⁷ and for a wide range of phenomena within each type of obligation.⁵⁸

2. Laws Presuppose Obligation

Starting from a context, a goal or end of social activity within a system, an obligation is a valuation to the effect that something is conducive to a context. This would seem to be true of all normative systems in so far as it concerns the notions of obligation and context in general. Particular normative systems share this framework but are individuated by the dogma assigned to their contexts. That is, a norm of whatever type (legal, social, moral, religious, etc.), call it "x-type", consists in the articulation and realization of an x-type obligation. An x-type obligation is an obligation arising out of an x-type context. An x-type context is a context possessing some particular dogmatic value ("value" is used here in the sense of "meaning"). If, as it was said earlier, the dogma possessed by a system, whatever its content, has the value of being advantageous (advancing or protecting) or at least not disadvantageous (retarding or endangering) to the well-being of the system, the meaning of well-being being set by the dogma, then there is a obligation to do those things

⁵⁷Such as legal, social, moral, and religious obligations. That is, the move preserves isomorphic symmetry over the spectrum of obligations in general. It gives a teleological orientation to obligation in a legal system, conforming with the place of obligation in other systems. As a result a unified theory of obligation is possible with legal obligation being an instance thereof.

⁵⁸In this vein see Max BLACK quoted *infra*, p. 140. Among the phenomena which the concept of legal obligation might countenance are validity, rights, power, justice, criticism of laws, and obeying laws.

which advantage the well-being of the community and refrain from those things which disadvantage it.

Obligations are not merely mode d'emploi or recipes, however. The latter are examples of what von Wright calls "directives or technical norms". They are, approximately speaking, concerned with the means to be used for the sake of attaining a certain end".⁵⁹ It is characteristic of technical norms that the end be desired.⁶⁰ Were no desire associated with the end, either for or against it, von Wright would call the statement anankastic; that is, "a statement to the effect that something is (or is not) a necessary condition of something else". A technical norm logically presupposes an anankastic proposition.⁶¹ An obligation is not a technical norm for it does not owe its existence to the desirability or any other affective appraisal of its end (viz., its context). It is not a product of volition, but of what is in fact instrumental to the context. Consequently even the unanimous assent of the populus could not alter the obligations existing in a system. Obligations go with the context. They are discovered, but neither created nor destroyed as long as the context is stable.

An anankastic proposition is passive in that it merely declares what it describes as necessary for something else to obtain. As a value⁶² an obligation

⁵⁹Georg Henrik von WRIGHT, Norm and Action, p. 9.

⁶⁰It shall regard as the standard formulation of technical norms, conditional sentences, in whose antecedent there is mention of some wanted thing, and in whose consequent there is mention of something that must (has to, ought to) or must not be done. An example would be 'If you want to make the hut habitable, you ought to heat it'. Ibid., p. 10.

⁶¹It would be a mistake, I think, to identify technical norms with anankastic propositions. There is, however, an essential (logical) connexion between the two. In giving the directive 'If you want to make the hut habitable, you ought to heat it', it is (logically) presupposed that if the hut is not being heated it will not become habitable". Von WRIGHT, loc. cit.

is active in that it not only declares but decrees what it describes as necessary or useful in pursuit of the context. This is the deontic sense of "ought" and the sense in which an obligation will be spoken of as a valuation. Having an obligation to do something is not merely a reason, but a justification for doing it.

Sometimes the language of obligation is spoken where a technical norm or anankastic proposition is intended. The resulting confusion could be attenuated by reserving "ought" for a (deontic) obligation, "should" for a technical norm, and "must" for an anankastic proposition.⁶³

Obligation is the only logically necessary deontic operator in a system, for prohibition is equivalent to the obligation ~~to~~ forbear and permission is equivalent to the absence of prohibition. Forbearance roughly refers to not doing what one in fact can do. Using prohibition and permission as conventional abbreviations, a right is definable in the following way. If someone is permitted to do or have something while everyone else is prohibited from hindering or preventing his doing or having it, then he has a right, relative to the others,

⁶²To equate a value with personal or collective preference is to make it subjective or arbitrary; to equate it with a fact is to assign it no more than a formal role, such as material causality or expediency. A value as it will be understood here in subsumption to obligation is reducible to neither preference nor bare fact. It is instrumental. Its worth is not merely a measure of efficiency and effectivity, but propriety as well, since it is subject to suitability or appropriateness.

⁶³Cf. Von WRIGHT, Norm and Action, p. 101.

to do or have it.⁶⁴ Other formal relationships and inferences involving obligation are proper to a study of deontic logic.⁶⁵

⁶⁴See *ibid.*, p. 89. Cf. right as correlative to duty in Wesley Newcomb HOHFELD, Fundamental Legal Conceptions as Applied in Judicial Reasoning, ed. by Walter Wheeler COOK, New Haven, Yale Univ. Press, 1964, p. 50. BENTHAM correlated duty and right around the notion of sanctioned legal liability. "1. That may be said to be my duty to do (understand political duty) which you (or some other person or persons) have a right to have me made to do. I have, then, a DUTY towards you: you have a RIGHT as against me. 2. What you have a right to have me made to do (understand a political right) is that which I am liable, according to law, upon a requisition made on your behalf, to be punished for not doing. 3. I say punished: for without the notion of punishment (that is, of pain annexed to an act, and accruing on a certain account, and from a certain source) no notion can we have of either right or duty". A Fragment on Government, ch. V, sec. VI, items 1-3 in note [BOWRING edition, pp. 292-293]. For an elucidation of a legal right from the view that obligation presupposes rules see HART, "Definition and Theory in Jurisprudence", p. 49.

⁶⁵"Deontic logic, or the logic of obligation, is that area of thought in which we formulate and systematize such principles as that nothing can be obligatory and forbidden at once and that whatever we are committed to by doing what is obligatory is itself obligatory. It differs from ethics in that it does not pronounce upon questions concerning what is in fact obligatory (the view that our only obligation is to maximize pleasure and minimize pain would be an ethical position rather than one in deontic logic) and from pure formal logic in that it formulates principles that are specific to the concept of obligation and allied problems (the principle, for example, that whatever is obligatory is obligatory can be established outside deontic logic, being merely a special case of the ordinary logical principal that everything is what it is)". A. N. PRIOR, "Logic, Deontic", in EDWARDS, ed. in chief, Encyclopedia of Philosophy, vol. 4, p. 509. If quantity is any indication, deontic logic has received considerable attention. Approximately 250 works appear in the bibliography of Georg Henrik von WRIGHT, An Essay in Deontic Logic and the General Theory of Action, Amsterdam, North-Holland Pub. Co., 1972, 110 pp. Just as many works are listed for the neighbouring field of juristic logic by Amedeo G. CONTE, "Bibliografia di logica giuridica, 1936 - 1960", in Rivista internazionale di filosofia del diritto, 38(1961), pp. 120-144. Good introductions (with extensive bibliographies) to deontic and juristic logics can be found in Georges [Jerzy] KALINOWSKI, Introduction à la logique juridique; éléments de sémiotique juridique, logique des normes et logique juridique, Paris, R. Pichon & R. Durand-Auzias, 1965, vi-188 pp., and La logique des normes, Paris, Presses universitaires de France, 1972, 218 pp.

Compare the following instances of obligation. One ought not to⁶⁶ tease the baby, torture the baby, kick the cat, eat with one's hands, say "I be", take his automobile, escape from prison, shoot the piano player, move the Queen's Bishop. Hart would likely discount those matters of etiquette, grammar, and game playing as not properly obligations. Yet each of these is an obligation in so far as each has the value of being conducive to some context or other. It is just that they do not belong to the same context. If chess is thought of as a system, the context (object or goal in the case of games) of which is to checkmate one's opponent, then from the internal perspective one has an obligation to move so as to mate before being mated. Obligations are not usually spoken of in connection with chess, reflecting the rarity of a perspective wholly or preponderantly internal to the game. But from a purely internal chess perspective there would be no obligation, for example, to forbear torturing babies.

Assuming the preposterous to make a point, the point that obligations exist independent of any internal / external perspective distinction, suppose Boris assures Bobby, his chess partner, that he will torture Bobby's baby if Bobby checkmates him. Perhaps it would be said that they are no longer playing a game, the game along with its obligations having come to an end. This is first to confuse the use of "game" as a system with "game" as a diversion (not to be taken "seriously" or having no effects outside itself). Moreover the principle that in a conflict of obligations one or other of the alternatives ceases to be

⁶⁶Which is positively stated by the equivalent expression "ought to forbear". "An agent, on a given occasion, forbears the doing of a certain thing if, and only if, he can do this thing, but does in fact not do it". G. H. von WRIGHT, Norm and Action, p. 45.

obligatory has neither rational support (since the existence of an obligation depends upon its context, not other obligations) nor empirical universality (as the various conflicts of moral and legal duties attest).

Bobby, being such a chess devotee, resolves to pursue mate. Now two third-parties to the scenario, call them Intra and Juxta, happen to have witnessed the exchange. Intra expresses astonishment at what she calls Bobby's absurd behavior, berating him for it. Juxta is more reserved, saying only that Bobby has an obligation to stalemate since that will maximize his chess obligation under the constraint of his moral obligation to prevent needless suffering.

Bobby's perspective is wholly or preponderantly internal to the game. He might not explicitly reflect upon his chess obligations, but nonetheless operates in accord with them. From his vantage he is in no way obliged to save the child. Intra's perspective is internal to a system the context of which she regards as giving rise to obligations which override Bobby's quest for checkmate (overriding Bobby's action but not his obligation; not having a perspective internal to the game, Intra does not regard Bobby obliged to seek checkmate). This is so because she considers Bobby subject to the same system to which she is subject.

Juxta merely recites deontic hypotheticals: as a game player Bobby has a chess obligation to checkmate Boris; as a member of society Bobby has a moral obligation to prevent his baby from needlessly suffering; if Bobby checkmates Boris, Bobby's baby will suffer needlessly; the prevention of needless suffering is, in some way, greater than, equal to, or lesser than checkmating one's opponent; in a situation such as this the most effective decision strategy is to

minimize the maximum loss and, if possible, maximize the minimum gain.⁶⁷ Whence Juxta makes her observation (even without further resolving the fourth of these propositions).

Juxta's perspective is neither internal nor external to either of the systems mentioned in the sense that Hart would use "internal" and "external". Juxta is an observer of these systems yet she sees obligations within them. Her observations are formal; that is, if X is conducive to context Y of system Z, then a member of Z who could do X is obliged to do so.⁶⁸ So much is true from

⁶⁷The situation corresponds to a zero-sum state: one party's gains are equal to another's losses. The strategies are John von NEUMANN's minimax and maximin principles of decision theory. See John von NEUMANN, "Zur Theorie der Gesellschaftsspiele", in Mathematische Annalen, 100(1928), pp. 295-300 [transl. by Sonya Bargmann as "On the Theory of Games of Strategy", in Albert William TUCKER and Harold William KUHN, eds., Contributions to the Theory of Games, Princeton, Princeton Univ. Press, 1959, vol. 4, pp. 13-42], and also John von NEUMANN and Oskar MORGENSTERN, Theory of Games and Economic Behavior, 3rd ed., Princeton, Princeton Univ. Press, 1953, x-641 pp.

⁶⁸For example, if keeping personal promises is in the interests of the community and one member has promised something to another member, then the first member ought to keep his promise. "Ought" (having an obligation) does not appear as a free variable in the conclusion for in this example it is equivalent to being in the community's interest. Alexandre Passerin D'ENTRÉVES questions whether HART has "really succeeded in bridging the gap between fact and value, between the is and the ought" because it is "not difficult--and Hart admits it himself--to see the value judgment implicit in what is at first presented as a simple observation of fact, namely in the proposition that the aim of all human association is survival". He maintains that HART, like HOBBS, "interposes a value judgment between the observation and the prescription". See "'Un noyau de bon sens' (à propos de la théorie du droit naturel chez H. Hart)", in Revue internationale de Philosophie, 17(1963), pp. 312-334, at pp. 322-323 [transl. in Philosophy Today, 9(1965), pp. 120-133, at p. 126; also reprinted in D'ENTRÉVES, Natural Law; An Introduction to Legal Philosophy, 2nd rev. ed., London, Hutchinson University Library, 1970, pp. 185-203, at pp. 193-194] HART must answer for himself, but D'ENTRÉVES' point is of general consequence. D'ENTRÉVES would rewrite the above schema as "if X is conducive to context Y of system Z and Y is a value (ought to be pursued), then a member of Z who could do X is obliged to do so" as though if the context were not a value, there would be no obligation to do those things conducive to it. D'ENTRÉVES, however, is either back with the camp of infinite regress (whence the value or obligation attached to the context?) or

the nature of obligation regardless of what X, Y, and Z refer to. Such observations are, so to speak, neither inside nor outside, but beside systems.

Going back to Intra, suppose she also held a perspective internal to the chess game when she reacted to Bobby's behavior with a critical reflective attitude. Would it not be that she saw the two obligations, one overriding the other? That is, if so, one context predominates over the other. There is nothing within the nature of system contexts, and thus nothing within the nature of obligations, to resolve which contexts are to take priority over others or otherwise establish an equality among them. But yet in a given system if one action is, according to some reckoning, more conducive to the context than another action, then the obligation to do the first action in this way takes priority over the obligation to do the other action. Similarly, if two systems are "contained" in a third and perfection of the first is more conducive than perfection of the second to perfection of the third, then the first context takes priority over the second relative to the third; likewise relative to the third system the first and second are either non-valued or equal.⁶⁹

The foregoing sketch, however rough and rudimentary, illuminates at least enough of the more salient aspects of a unified theory of obligation to describe

understands value as preference. An alternative is to see value not as a property of the context, but as a function of that which is conducive to the context.

⁶⁹For example, although grossly simplified and in need of refinement the idea is not far from the variously-held view that law should follow morality in so far as morals are more apt toward the all-encompassing divine plan. If that were true, then in such a case a legal obligation yields to a moral obligation, whether or not it (the yield) is observed in practice. Whether the foregoing hierarchy of systems is ontologically accurate is, of course, moot. But whatever configuration is accurate, it is so regardless of personal desire or enforceability one way or the other.

legal obligation as an instance thereof. That is, if the context of law regards the system itself or all members of the system,⁷⁰ then law subsists in the articulation and realization of a valuation that something is conducive to a goal or end of human activity within a system regarding the system itself or all its members.⁷¹ In other words, a legal norm (a law) is a description of a legal obligation. A law is prescriptive in so far as a prescription is a deontic description. Statutes, principles, and the like are manifestations of laws.

Thus far the discussion has approached legal identity by attempting to account for obligation within a legal system. Accordingly the key question is "which comes first: norm or obligation?" Professor Hart, noted for his lucidity and insight, has represented the position favoring the former. His concept of law as an interplay of primary and secondary rules has not, however, rendered clear the nature of obligation. If a more adequate defense of the "norm first" position is possible, it does not appear imminent. In any event the alternative, context-dependent obligation, is recommended by the elegance of symmetry it lends to a unified theory of obligation, making possible a formal description of legal obligation as an instance thereof. But still "the life of the law has not been logic: it has been experience", to adopt Holmes' phrase.⁷² The position that laws presuppose obligation is substantiated by the extent to which it

⁷⁰Although assumed here only in order to illustrate the mechanics of law as a function, it has been classically argued that law is always directed to the common good. See, e.g., AQUINAS, Summa Theologica I-II, q. 90, art. 2.

⁷¹Trivially then, law would not exist in a perfect society; that is, in a social system so developed that nothing more could be to the advantage of its well-being nor could anything damage its well-being.

⁷²The Common Law, Boston, Little, Brown, 1881, p. 1.

quadrates with familiar experiences or phenomena associated with law, such as justice and obedience.

Different senses have been attached to "justice", signifying approbation, impartiality, and retribution. Consequently justice may mean that something is fitting ("his just deserts"), fair ("a just decision"), or equitable ("justice was done"). "It would be generally agreed", however, "that doing justice means treating equals equally and unequals according to their relevant inequalities".⁷³ This is the kernel of commutative and distributive justice⁷⁴ which goes back to Aristotle.⁷⁵ The question is, how should relevant inequalities be determined?

Hart hints that "sometimes a consideration of the object which the law in question is admittedly designed to realize may make clear the resemblances and differences which a just law should recognize and they may then be scarcely open to dispute".⁷⁶ That is, generalizing and in terms of systems, relevant inequalities can be determined from the context of law. Inequalities are

⁷³Stanley I. BENN, "Justice", in EDWARDS, ed. in chief, Encyclopedia of Philosophy, vol. 4, p. 301.

⁷⁴Commutative justice is that which should govern contracts. It consists in rendering to every man the exact measure of his dues, without regard to his personal worth or merits, i.e., placing all men on an equality. Distributive justice is that which should govern the distribution of rewards and punishments. It assigns to each the rewards which his personal merit or services deserve, or the proper punishment for his crime. It does not consider all men as equally deserving or equally blameworthy, but discriminates between them, observing a just proportion and comparison". "Justice", in Henry Campbell BLACK, Black's Law Dictionary, 4th rev. ed., St. Paul, Minn., West, 1968, p. 1002.

⁷⁵Nicomachean Ethics V, esp. 6 and 7.

⁷⁶The Concept of Law, pp. 158-159.

relevant to the extent that they affect or are affected by the legal context.⁷⁷ Because they pertain to the context of law, inequalities on the basis of need or merit (Hart, in the place just cited, refers to capacity) ought to be favored. There is a legal obligation to favor them. The obligation is legal because the context is legal. Were the dogma of the legal context not unlike the dogma of another context, say a moral context, for the same membership, then favoring some inequality pertaining to the shared dogma or similar dogmas would be not only legal but moral (or whatever other according to the type of context). In default of pertinent inequalities, equal treatment is held to be most conducive to the context of law and accordingly enjoys priority obligation. In other words,

⁷⁷Read in this light, John RAWLS' theory of justice concludes with little more than it at least implicitly assumes. RAWLS argues that a hypothetical society which chooses its principles of justice in a rational and disinterested manner would choose two principles: "the first requires equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society". A Theory of Justice, Cambridge, Massachusetts, Harvard Univ. Press (Belknap), 1971, pp. 14-15. Inequalities are justified in so far as they are "to the greatest benefit of the least advantaged". See ibid., p. 302. This has the effect of continually "bringing up the rear", the goal or context of which would seem to be a state in which all were equally advantaged. From the perspective of the society members the end state is no different from the initial state, viz. a parity of members. To say that the initial state was one of apparent parity while the end state is actual parity is to adopt a perspective external to the system since RAWLS constructed the situation such that the members saw themselves as similarly situated, "behind a veil of ignorance" as to the distribution of their social circumstances. See ibid., p. 12. Against RAWLS' theory it has been argued that justice is a pluralistic concept consisting of disparate principles which vary from one form of society to another and are not always the product of rational choice. See Brian M. BARRY, The Liberal Theory of Justice; A Critical Examination of the Principal Doctrines in "A Theory of Justice" by John Rawls, Oxford, Clarendon, 1973, x-168 pp., and David MILLER, Social Justice, Oxford, Clarendon, 1976, pp. 253-344.

Where no good ground can be shown for treating people differently, they clearly ought to be treated alike. This is the procedural presupposition of justice. The words, principle 'one man, one vote' asserts that there are no differences between persons that would justify a differential franchise. This is not the case with the progressive taxation, where capacity to pay is taken as a ground for discrimination.⁷⁸

Suppose, however, a putative description of a legal obligation differs from what is in fact an obligation in a legal system. That is, either no such legal obligation exists or the description is not accurate, adequate, complete, consistent, or otherwise "true" of it. Now if a law, most simply put, is a description of a legal obligation, it ought to be observed. The obligation to obey the law comes from the legal obligation, not from its description. Plainly then in the criticism of laws the question is not whether some law or other ought to be obeyed (for all ought to be), but whether some putative law is actually a law. If, in the interests of safety and fuel economy, a statute specifies a maximum speed limit of 90 kmh on all highways while 100 kmh would actually be an equally safe yet more economical speed, then the statute does not correctly represent the legal obligation it purports to represent. An individual driver who takes it upon himself to travel accordingly might not win a sympathetic ear in traffic court, but then the enforceability of the letter of the law is irrelevant to the truth of its spirit. To the extent that a description, viz.

⁷⁸BENN, "Justice", loc. cit. A clear statement of equality before the law is exemplified by article three of the 1949 Basic Law for the Federal Republic of Germany: "(1) All persons shall be equal before the law, (2) Men and women shall have equal rights. (3) No one may be prejudiced or favored because of his sex, his parentage, his language, his homeland and origin, his faith, or his religious or political opinions". Transl. in Albert P. BLAUSTEIN and Gisbert H. FLANZ, eds., Constitution of the Countries of the World, Dobbs Ferry, New York, Oceana, 1971, vol. V, Federal Republic of Germany, suppl. issued Dec. 1974, p. 6.

a statute or principle, disagrees with a legal obligation, which ought the members of the system observe? The question contains the key to its answer: one ought to observe one's obligations. "It is certain that he transgresses the law, who, while observing its letter, goes against its spirit".⁷⁹

Criticism of laws is not, however, merely a lesser degree of disobedience. Criticism involves a disagreement between description and obligation; disobedience involves a conflict between obligations. The former can be resolved within the system by diligent discernment. The latter is resolved ipso facto with respect to a third context for relativization of the first two.⁸⁰ A passage from Thomas Aquinas illustrates the matter succinctly.

Man is bound to obey secular princes in so far as this is required by the order of justice. Wherefore if the prince's authority is not just but usurped, or if he commands what is unjust, his subjects are not bound to obey him, except perhaps accidentally, in order to avoid scandal or danger.⁸¹

In this way he resolves conflicts between religious and secular obligations by appealing to the order of justice. His method is rational though the outcome is dogmatic. Were another dogmatic meaning given to the order of justice or a different third context appealed to, the outcome might have gone another way. A passage from Thomas Hobbes illustrates this matter, also succinctly.

⁷⁹"Certum est, quod is comittit in legem, qui, legis verba complectens, contra legis nititur voluntatem". BONIFACE VIII, De Regulis Iuris, R. 1. 88 in VI^o, in Emil Albert FRIEDBERG and Aemilius Ludwig RICHTER, eds., Corpus Iuris Canonici, 2nd ed., Lipsiae, Ex Officina B. Tauchnitz, 1879-1881, vol. II, col. 1124. See also AQUINAS, Summa Theologica I-II, q. 96, art. 6.

⁸⁰This was discussed in connection with Intra and the Bobby vs. Boris chess game. See supra, p. 63.

⁸¹Summa Theologica II-II, q. 104, art. 6, ad. 3.

[...N]o law can be unjust. The law is made by the sovereign power, and all that is done by such power, is warranted, and owned by every one of the people; and that which every man will have so, no man can say is unjust. It is in the laws of a commonwealth, as in the laws of gaming: whatsoever the gamesters all agree on, is injustice to none of them.⁸²

Whereas Aquinas thought laws just when ordained to the common good, made within the power of the lawgiver, and imposing burdens proportionately,⁸³ Hobbes thought laws just when issued by the sovereign on behalf of the commonwealth. In any event, if there is an objective order of contexts, then all conflicts of obligations are only apparent. Whatever the dominant context--preservation of the State,⁸⁴ happiness in the body politic,⁸⁵ maximum pleasure,⁸⁶ etc.--the obligation to obey the law depends upon the extent to which the law is conducive to this context, regardless of what one might personally prefer or others might insist upon.

To what extent, then, ought disobedience to laws be tolerated? This is the question of civil disobedience. John Rawls defines "civil disobedience as a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the

⁸²Leviathan; OAKESHOTT edition, p. 227.

⁸³See Summa Theologica I-II, q. 96, art. 4.

⁸⁴Which SOCRATES argued even at his own peril. See PLATO, Crito 50a-53e.

⁸⁵See ARISTOTLE, Nicomachean Ethics V, 3.

⁸⁶See BENTHAM, A Fragment on Government, ch. I, sec. XXXIX-XLVIII.

government".⁸⁷ He argues against the justification of dissent if violent.⁸⁸ Though Mark R. MacGuigan defines "civil disobedience as a public, nonviolent act of illegality, performed for a moral purpose, with a willingness to accept the legal penalty attached to the breach of the law", he holds that "even violence may be a proportionate response to some injustices".⁸⁹ Ronald Dworkin goes even further, contending the subject of rights has no duty to accept punishment for breaking a wrongful law.⁹⁰

Within the framework of a legal system the question of disobedience would rather seem to reflect a quest for the discernment of legal obligation. In effect the question is an epistemological one. Toleration should vary in inverse

⁸⁷A Theory of Justice, p. 364. Sections 55-59 reprinted as RAWLS, "A Theory of Civil Disobedience", in DWORKIN, ed., The Philosophy of Law, pp. 89-111.

⁸⁸See ibid., pp. 366-367. A Theory of Justice, p. 364. Sections 55-59 reprinted as RAWLS, "A Theory of Civil Disobedience", in DWORKIN, ed., The Philosophy of Law, pp. 89-111.

⁸⁹"Obligation and Obedience", in J. Roland PENNOCK and John W. CHAPMAN, eds., Political and Legal Obligation, [Normos XII], New York, Atherton, 1970, pp. 50 and 51.

⁹⁰"Taking Rights Seriously", in New York Review of Books, 15(17 Dec. 1970), no. 11, pp. 23-31 [reprinted in: Eugene Victor ROSTOW, Is Law Dead?, New York, Simon and Schuster, 1971, pp. 168-194; SIMPSON, ed., Oxford Essays in Jurisprudence, 2nd series, pp. 202-227; and DWORKIN, Taking Rights Seriously, pp. 184-205]. John FINNIS objects that DWORKIN's premises and assumptions warrant the conclusion that while it would be inappropriate for the government to punish the breaker of a wrongful law, it is not the case that the government has no right to do so. If the government has the right to do so, then the offender has the duty to accept punishment. See "Some Professional Fallacies about Rights", in The Adelaide Law Review, 4(1971-1972), pp. 377-388. (FINNIS' article contains a helpful clarification of HOFELD's legal relations which FINNIS applies to the Second Vatican Council's declaration on religious liberty ["Dignitatis humanae", 7 Dec. 1965, in A.A.S., 58(1966), pp. 929-946] as an example of a right declared but not after all granted.) A general appraisal of DWORKIN's theory is found in Joseph RAZ, "Professor Dworkin's Theory of Rights", in Political Studies, 26(1978), pp. 123-137.

proportion to the extent to which legal obligations are known. It isn't so much a matter of knowing what we don't know, but knowing that we don't know. Absolute certitude as to what are in fact the obligations within a legal system is surely more than can be expected within the more familiar and complex social organisms, such as the church and state. But a lesser degree of certitude necessitates, practically anyway, a greater degree of toleration. Toleration in the superlative is indistinguishable from anarchy and it is the natural offspring of the failure to ascertain legal obligation.

Ascertaining legal obligation is an intricate and often delicate operation which requires an understanding of the system and function of law. The previous and present chapters, proceed through an appreciation of law. The next part of this study is devoted to, an understanding of the church. What remains for part three shall be to formulate the principles according to which ecclesial law operates. To this end the present chapter contributes a description of the manner in which law functions, the first constructive step towards describing a concept of ecclesial law. That is, the identity of law is revealed in a legal system by the correlation of obligation to the system's context (proper end).

PART TWO

MODELS AND MODES OF THE CHURCH

Part Two treats of the church with the purpose of evolving a model of church mystery so as to take stock of its interactive implications for church law. The modeling method has been applied to the church in recent years as a speculative tool for descriptive analysis. The merits of this method are examined in chapter three before proceeding to a specific model of mystery in the next chapter. The findings of this part will be applied to the findings of part one in characterizing ecclesial law as a function of church mystery in part three.

CHAPTER THREE

MODELS OF THE CHURCH

This chapter initiates a consideration of the church and church law with a survey of relevant writings over the last half-century. These writings reveal certain themes focusing upon the relationship of church law to the church in terms of vision, means and ends. The modeling method is then introduced and followed by a critique of modeling the church.

A. Recent Canonical Speculation

Prior to Vatican II canon law was, for the most part, occupied with legalism in theory and techniques of practice. Such a generalization is not

without evidence in the writings of the pre-conciliar period. Pio Fedele¹ has traced the general theory of canon law according to the literature of the decade before the Council and in the process pointed out the emphasis upon juridical structures. It is noteworthy that his own Discorso generale sull'ordinamento canonico² was among the first works of the "code age" to embrace canon law theory. More theological in overtone was La nature du droit canonique³ by Germain Lesage, but dated only a few years after its appearance by the doctrine developed at the Council. The practical counterpart of legalistic theory is a preponderance of technique. One survey⁴ of canon law in America from the Code to the Council makes it clear that at least locally the questions of canon law were inclined more toward "who, how, when, where" than "what or why".

Neither the church nor its law came into being with the Second Vatican Council, of course, but surely it is no exaggeration to say the Council has had an impact upon canon law and canonist alike.⁵ Interest has been generated in the

¹La Teoria Generale del Diritto Canonico nella Letteratura dell'ultimo Decennio", in Ephemerides Iuris canonici, 19(1963), pp. 9-85.

²Padua, CEDAM, 1941, 170 pp.

³Ottawa, Éditions de l'Université d'Ottawa, 1960, 224 pp.

⁴John A. ABBO, "Canon Law in the U.S.A., 1917-1963", in American Ecclesiastical Review, 150(1964), pp. 55-83.

⁵See: Mario PETRONCELLI, Il Diritto Canonico dopo il Concilio Vaticano II, Napoli, Libreria scientifica editrice, 1969, 478 pp. [reviewed by Fiorenzo ROMITA in Monitor Ecclesiasticus, 95(1970), pp. 118-155]; Gaston VENNES,

philosophical⁶ and theological⁷ or, more specifically, ecclesiological⁸ areas of church law. Even the more traditional explanations of law in the church have had to re-present their credentials.⁹ Examining the literature in the wake of

"Une conversion dans le droit canonique", in Studia Canonica, 7(1973), pp. 191-214; and William J. WAMBOLDT, The Role of Law in the Church, according to North American Authors since the Second Vatican Council, Roma, Pontificia Universitas Gregoriana, 1977, xiv-237 pp.

⁶Though still primarily Thomistic. See: Antonio ROUCO VARELA, "Filosofía o Teología del derecho? Ensayo de una respuesta desde el Derecho Canónico", in Leo SCHEFFCZYK, Werner DETTLOFF, and Richard HEINZMANN, eds., Wahrheit und Verkündigung; Michael Schmaus zum 70. Geburtstag, München, Ferdinand Schöningh, 1967, vol. 2, pp. 1697-1741; Willy ONCLIN, "La noción de ley canónica", in Ius Canonicum, 7(1967), pp. 25-40; Pedro Juan VILADRICH, Teoría de los derechos fundamentales del fiel; presupuestos críticos, Pamplona, Ediciones Universidad de Navarra, 1969, xxvii-404 pp. Richard POTZ proposes a critical-hermeneutic approach in his Die Geltung Kirchenrechtlicher Normen: Prolegomena zu einer kritisch-hermeneutischen Theorie des Kirchenrechts, Wien, Herder, 1978, 296 pp.

⁷See: Gottlieb SÖHNGEN, Grundfragen einer Rechts-theologie, München, A. Pustet, 1962, 168 pp.; Marian ZUROWSKI, "Introductio in Theologiam Iuris Canonici", in Prawo Kanoniczne, 10(1967), pp. 3-32.

⁸See: Manuel USEROS CARRETERO, "Statuta Ecclesiae" y "Sacramenta Ecclesiae" en la ecclesiología de St. Tomas de Aquino; reflexión tomista sobre el Derecho de la Iglesia en paralelismo a la actual temática ecclesiológico-canónica, Roma, Libreria editrice dell'Università Gregoriana, 1962, xxxviii-359 pp. [Analecta Gregoriana, vol. 119]; P. Franciscus Xaverius De URRUTIA, "De natura legis ecclesiasticae", in Monitor Ecclesiasticus, 100(1975), pp. 400-419.

⁹See: Javier HERVADA, El ordenamiento canónico, Pamplona, Universidad de Navarra, 1966, 292 pp.; James E. BIECHLER, ed., Law for Liberty; The Role of Law in the Church Today, Baltimore, Helicon, 1967, 221 pp. ["Statement of Consensus" in BIECHLER, at pp. 185-202, reprinted as "The Role of Law in the Church", in The Jurist, 27(1967), pp. 163-181]; Juan CALVO, Teoría general del Derecho público eclesiástico, Santiago de Compostella, Porto, 1968, 228 pp. [reviewed by Antonio ROUCO VARELA in Revista Española de Derecho Canónico, 26(1970), pp. 453-456]; Derecho canónico, Pamplona, EUNSA, 1974, vol. 1 [Pedro VILADRICH, "El Derecho canónico", pp. 29-73; Pedro LOMBARDÍA, "Estructura del ordenamiento canónico", pp. 161-216; and Javier

this wave might give certain clues as to its vector. From that it may be possible to trace backward to the basic premise of ecclesial law. Such an examination is conceptually simplified by identifying main themes.¹⁰

The first theme has to do with church law being the juridical aspect of the institutional church. The church, by its very nature, possesses a visible and juridical aspect.¹¹ Even after Vatican II the church is described as a hierarchical institution.¹² Since man has need for society and society has need for law, as a (supernatural) society the church has need for law according to its nature.¹³ A canonical norm flows from three aspects of the church: as a unique human society, as the historical instrument continuing Christ's work on earth, and as a realization of the communion of saints teaching.¹⁴ While modern

HERVADA, "La constitucion de la Iglesia", pp. 217-234]; and Paul HINDER, Grundrechte in der Kirche; eine Untersuchung zur Begründung der Grundrechte in der Kirche, Freiburg, Schweiz, Universitätsverlag, 1977, xiii-301 pp. [Studia Friburgensia, no. 54].

¹⁰Marshalling the thoughts of others into categories, however rough, inevitably raises suspicion of a Procrustean Bed both as to the classification and categories. Procrustes, recall, was the giant of Attica in Greek mythology who tied travelers to a bedstead and either stretched them or cut off their legs to make them fit. This seems to be a healthy suspicion in that it cautions against oversimplifying in areas rich with diverse and occasionally inconsistent speculation. But the thematic synthesis which follows serves a loose and in any event temporary purpose.

¹¹Klaus MÖRS DORF, "Wort und Sakrament als Bauelemente der Kirchenverfassung", in Archiv für katholisches Kirchenrechts, 134(1965), pp. 72-79.

¹²Gotthold HASENHÜTTL, "Church and Institution", in Concilium, 10(1974), 1, pp. 11-21. He maintains that as a human product the institutional side of the church is changeable but designed to last.

¹³D. J. VELLA, "Canon Law and the Mystical Body", in The Jurist, 22(1962), pp. 412-432.

¹⁴Orio GIACCHI, "La norma nel diritto canonico", in Ius Canonicum, 16(1976), 32, pp. 23-36. His position is that a juridical norm is part of the mystery of revelation and of the church as well as an abiding dimension of human life.

ecclesiology centers on the church as a sacrament, any sacrament has a formally juridical structure and matter capable of regulation by positive legislation and so the externals of the church-sacrament, the institution or structured community of persons, are essentially juridical.¹⁵

The four year period following the Council's closure saw a number of institutional alterations: implementation of the Synod of Bishops;¹⁶ new faculties and dispensing regulations;¹⁷ reorganization of the Roman Curia;¹⁸ new norms governing the Apostolic Signatura¹⁹ and Sacred Roman Rota;²⁰ and the division of a Sacred Congregation.²¹ One can speculate that this activity temporarily captured the attention of canonical literature. If so, the eclipse of the Council's emphasis upon non-judicial matters soon abated. Though the Council created new law, not everything it said has the same legally binding

¹⁵Luis VELA, "El derecho canónico como disciplina teológica", in Gregorianum, 50(1969), pp. 719-756. VELA raises two related points: the study of the church requires an understanding of law and church law must be coordinated in theory and practice with dogmatic and moral theology.

¹⁶PAUL VI, m.p. "Apostolica sollicitudo", 5 Sept. 1965, in A.A.S., 57(1965), pp. 775-780. Also see changes by S. C. Pub. Eccl. Neg., rescript, 24 June 1969, in A.A.S., 61(1969), pp. 525-539; rescript, 20 Aug. 1971, in A.A.S., 63(1971), pp. 702-704.

¹⁷PAUL VI, m.p. "Pastorale munus", 30 Nov. 1963, in A.A.S., 56(1964), pp. 5-12; m.p. "De Episcoporum muneribus", 15 June 1966, in A.A.S., 58(1966), pp. 467-472; dec. "Religionum laicalium", 31 May 1966, in A.A.S., 59(1967), pp. 362-364; Sec. State, rescript, "Cum adnotae", 6 Nov. 1964, in A.A.S., 59(1967), pp. 374-378.

¹⁸PAUL VI, apost. const. "Regimini Ecclesiae universae", 15 Aug. 1967, in A.A.S., 59(1967), pp. 885-928.

¹⁹Sig. Apost., norms, 25 March 1968, in Canon Law Digest, 7, pp. 246-272.

²⁰S. R. Rota, norms, 1969 [no specific date], in Canon Law Digest, 8, pp. 1055-1078.

²¹S. C. Rites divided into S. C. Divine Worship and S. C. Cause of Saints. PAUL VI, apost. const. "Sacra Rituum Congregatio", 8 May 1969, in A.A.S., 61(1969), pp. 297-305.

force.²² And juridical institutions were more clearly recognized as united by source and goal with charisms in the Holy Spirit.²³

The second theme emphasizes the supernatural character of canon law and its basis in divine law. Since the church is the sacrament of salvation, canon law is at the same time a divine and human instrument of salvation.²⁴ Canon law pursues the same goal as divine law, the salus animarum, and so the common good of the church and of the individual are inseparable.²⁵ Canon law differs from all other types of law not merely in its matter (the supernatural) and purpose (eternal beatitude), but in its very substance.²⁶ Its basic order [Grundordnung] is not so much to be found in a constitution, which is irrelevant to the Church, or statement of fundamental law, which is a formulation of legal framework, but in divine law, canonical principles, and tradition.²⁷ Again, canon law is a compenetration of supernatural character (promoting salvation of

²²Pietro GISMONDI, "I principi Conciliari e il Diritto Canonico", in Il Diritto Ecclesiastico, 79(1968), pp. 3-21.

²³Wilhelmus BERTRAMS, "De constitutione Ecclesiae simul charismatica et institutional", in Periodica, 57(1968), pp. 281-330.

²⁴Marcelino CABREROS DE ANITA, "Valor teológico del Derecho canónico", in Revista Española de Derecho Canónico, 27(1971), pp. 89-105. Says the author, among the divine elements in canon law are its sources, foundations, subjects, objects and purpose. See also F. Javier URRUTIA, "Elementa mutabilia et immutabilia in structuris Ecclesiae", in Periodica, 69(1980), pp. 59-83, and in the same issue R. SEBOTT, "De Ecclesia ut societate perfecta et de differentia inter ius civile et ius canonicum", at pp. 107-126.

²⁵Pio FEDELE, "Utrum definiri possit lex ecclesiastica ex ordinatione 'ad bonum commune'", in Ephemerides Iuris Canonici, 33(1977), pp. 23-31.

²⁶Gérard FRANSEN, "Variations sur le thème de la loi canonique", in Revue théologique de Louvain, 9(1978), pp. 424-435.

²⁷Hans HEIMERL, "Grundordnung und Normengefüge im katholischen Kirchenrecht", in Oesterreichisches Archiv für Kirchenrecht, 25(1974), pp. 195-237.

the individual soul while safeguarding the common good), equity, and tradition.²⁸ The divine law is decisive in understanding the binding force of canonical norms.²⁹

There are a number of variations on the third theme which locates church law in the external dimension of the church. Each variation plays upon a dichotomy: visible society / spiritual community;³⁰ inner order of grace and morality / outer order of ecclesial activity;³¹ interpersonal, external relationships among men / internal relationships with God;³² the community in

²⁸Ramón BIDAGOR, "El espíritu del Derecho Canónico", in Revista Española de Derecho Canónico, 13(1958), pp. 5-30.

²⁹Pedro LOMBARDÍA, "Norma y ordenamiento jurídico en el momento actual de la vida de la Iglesia", in Ius Canonicum, 16(1976), 32, pp. 61-80. Readers familiar with LOMBARDÍA's leading articles on rights in the church ["Lay People in Church Law", in The Irish Ecclesiastical Record, 109(1968), pp. 281-312; "The Fundamental Rights of the Faithful", in Concilium, 5(1969), 8, pp. 42-46; and "Rights of the Layman in the Church", in Concilium, 7(1971), 8, pp. 115-123] may initially find his present argument more restrictive. The apparent inconsistency resolves in the underlying principle that only within a framework are there options. His position here is that the best guarantee for the common good is for the faithful to act in accordance with a right conscience directed by commands in keeping with the divine design.

³⁰Vatican II, const. "Lumen gentium", 21 Nov. 1964, no. 8, in A.A.S., 57(1965), pp. 11-12. The Council emphasizes, however, that "they form one complex reality which comes together from a human and a divine element". The mentioned dichotomy is introduced by the Council early on in its initial document: "Sacrosanctum Concilium", 4 December 1963, no. 2, in A.A.S., 56(1964), p. 97. It is reiterated by Vatican II, const. "Gaudium et spes", 7 Dec. 1965, no. 40, in A.A.S., 58(1966), p. 1058. It lies at the basis of understanding the function and purpose of canon law, according to S. C. Catholic Education, letter (on teaching canon law in seminaries and scholasticates), 2 April 1975, sec. I, in Canon Law Digest, 8, pp. 955-963. The society / community part of this dichotomy is developed by William H. ONCLIN, "Church and Church Law", in Theological Studies, 28(1967), pp. 733-748.

³¹Lamberto De ECHEVERRÍA, "The Theology of Canon Law", in Concilium, 3 (1967), 8, pp. 5-9.

³²Valentin RAMALLO, El derecho y el ministerio de la Iglesia, Roma, Università Gregoriana Editrice, 1972, xv-473 pp. [Analecta Gregoriana, vol. 190] [reviewed by Robert E. MORAN in The Jurist, 35(1975), pp. 365-366].

Word and Sacrament / the community in worship;³³ etc. In any case the external dimension is directed toward the internal. Law exists to promote conditions for the possibility of the common good in the external order.

The next theme is almost exclusively the property of the last decade: ³⁴ canon law at the service of church life. Canon law acts as a means, not an end in itself.³⁵ Its generic purpose is the salus animarum and its specific purpose is the promotion of justice³⁶ and the common good.³⁷ In the final analysis the salvation of souls must be a finality common to all theories of church law.³⁸ Canon law can and should serve, but not substitute for spiritual renewal.³⁹

³³Remigiusz SOBAŃSKI, "Słowo i Sakrament jako czynniki kształtujące prawo kościelne", in Prawo Kanoniczne, 16(1973), pp. 3-15.

³⁴For a late pre-Conciliar view see Joaquín SALAVERRI DE LA TORRE, "El Derecho en el ministerio de la Iglesia", in Semana de Derecho canónico, Salamanca, 1954, Investigación y elaboración del Derecho canónico, Barcelona, Juan Flors, 1956, pp. 1-54.

³⁵Francis G. MORRISSEY, "The Role of Canon Law Today", in Chicago Studies, 15(1976), pp. 236-253.

³⁶Francis G. MORRISSEY, "The Spirit of Canon Law / Teachings of Pope Paul VI", in Origins, 8(1978), pp. 33, 35-40. MORRISSEY surveys over forty statements by PAUL VI on the role of canon law in the life of the church. Law at the service of justice has been a dominant and repeated teaching of the Holy Father.

³⁷Dario COMPOSTA, "Teologia e Legge Canonica", in Apollinaris, 45(1972), pp. 403-453.

³⁸Dario COMPOSTA, "Finalità del diritto nella Chiesa", in Apollinaris, 48(1975), pp. 376-401. He maintains that church law can be studied in terms of its Christological origin, ecclesial formality, or redemptive finality. Theories as to the purpose of law in the church tend to relate to four aspects: canonical legalism, charitable morality, sacramentalism, and the sanctification and salvation of souls. Cf. Dario COMPOSTA, La Chiesa visibile: lezioni di teologia del diritto, Roma, Pontificia Università Urbaniana, Città Nuova Editrice, 1976, 116 pp.

³⁹Clarence GALLAGHER, "Canon Law and the Christian Community", in Heythrop Journal, 12(1971), pp. 281-296, 401-424.

Church law establishes a network of juridical relationships which coordinate social activity (Christian life and ministry) for the common good (union with Christ); this in turn determines the social structure and law of the Church.⁴⁰ To do this effectively the church's legal order must emphasize the reasonableness and relevance of law⁴¹ at the service of the faith community.⁴²

The service of canon law is also treated with some nuance in terms of its pastoral spirit. To serve the people of God implies a pastoral spirit which must imbue the formation and application of ecclesiastical law.⁴³ The "pastorality" of canon law is shown in its hierarchical, missionary, and creative services.⁴⁴ Canon law, in as much as it safeguards the identity, unity, and social order of the church, is a necessary presupposition and basis of pastoral activity.⁴⁵

⁴⁰Remigiusz SOBANSKI, Wprowadzenie do zagadnienia Roli prawa w Kościelne", in Prawo Kanoniczne, 18(1975), pp. 3-24.

⁴¹Denis F. O'CALLAGHAN, "The Reasonableness of Law: An Historical Perspective", in Irish Theological Quarterly, 44(1977), pp. 263-278.

⁴²Eugenio CORECCO, "'Ordinatio Rationis' o 'Ordinatio Fidei'? Appunti sulla definizione della legge canonica", estratto da Strumento internazionale per un lavoro teologico comunio, numero 36, nov.-dec. 1977, nuova serie, 22 pp., Jaca Book, Finito di stampare nel mese di dicembre 1977 dalla tipografia G. Bianchi di R. & A. Dogheria - Sesto S. Giovanni [reprinted in Communio (French edition), 3(1978), pp. 22-39].

⁴³Pericle FELICI, "Norma giuridica e 'Pastorale'", in Ius Canonicum, 16(1976), 32, pp. 15-22.

⁴⁴Fernando RETAMAL, "Derecho y pastoral en la Iglesia", in Ius Canonicum, 15(1975), 36, pp. 43-78. See also Fiorenzo ROMITA, "Pastorale e diritto canonico: Consiglio pastorale e consiglio presbiterale", in Monitor Ecclesiasticus, 92(1967), 3, pp. 438-509.

⁴⁵Pedro Juan VILADRICH, "Derecho y pastoral. La Iusticia y la función del Derecho canónico en la edificación de la Iglesia", in Ius Canonicum, 13(1973), 26, pp. 171-258. His premise is that to be an action which builds up the church, pastoral action must first be a just action since the church must realize justice.

The fifth theme concerns the response of canon law to the dynamic situation of the church. Changes in the church's situation have been accelerated by (a) the influence of mass media, with its instant environment and cross-pollination of ideas and events, (b) a socio-cultural transformation emphasizing the dignity and values of the human person, and (c) a post-Conciliar ecclesiological orientation toward recognizing the autonomy of the temporal order, Christian optimism (personal and human development), primacy of the people of God, positive role of the magisterium, and ecumenical sympathies.⁴⁶ Since the church's juridical order grew out of various social presuppositions, church law relevant to one historical situation may be not only antiquated but even detrimental in another.⁴⁷ Supplying for antiquated laws by a system of innumerable exceptions, dispensations, doctrines of common error, doubt, "supplied" jurisdiction, and so forth further fosters the legalism of irrelevant legislation.⁴⁸ Legalism is a distortion of law through misunderstanding and misuse, one which fails to see that church law is subordinate to the ends of the church.⁴⁹ Socially irrelevant norms, contestation and dissent in the church, and

⁴⁶ Germain LESAGE, "Un nouveau style de droit ecclésial", in Studia Canonica, 6(1972), pp. 301-314.

⁴⁷ Johannes NEUMANN, "The Social Nature of the Church and Its Consequences for Canon Law", in Concilium, 5(1969), 8, pp. 7-13.

⁴⁸ Louis De NAUROIS, "Le juridisme et le Droit", in Nouvelle Revue Théologique, 90(1968), pp. 1064-1082.

⁴⁹ John C. BARRY, "Law in the Post-Conciliar Church", in Studia Canonica, 5(1971), pp. 259-278.

internal church tension lead to the rejection of law.⁵⁰ The result is a crisis in canon law, a widening gap between legislation and its application.⁵¹

Laws should be subject to quality evaluation.⁵² Such qualities ought to include collegial, doctrinal, ecclesial, pastoral, practical, proportional (priority of values), responsible, scriptural, and theological features.⁵³

Tensions in the church and church law exist between: catholicity of the church / Romano-German foundations of canon law; the Conciliar concept of an active ecclesial community / juridical individualism; institutionalized / non-institutionalized charisms.⁵⁴ These can be contained and may be resolved through the equitable distribution and protection of rights.⁵⁵

⁵⁰Francis G. MORRISEY, "Preparing Ourselves for the New Law: 'Law Alone will not Hold the Church Together'", in Studia Canonica, 7(1973), pp. 113-128.

⁵¹Louis De NAUROIS, "Crise du droit canonique?", in Nouvelle Revue Théologique, 97(1975), pp. 501-524.

⁵²Ladislav M. ORSY, "Quantity and Quality of Laws after Vatican II", in The Jurist, 27(1967), pp. 385-412. He adds that to speak about the qualities that make good law is to implicitly describe the qualities of a good legislator..

⁵³This adjectival composite, arranged alphabetically for purposes of neutrality, draws upon the recommendations of all the preceding articles under this theme as well as two by Eugenio CORECCO: "Il rinnovo metodologico del diritto canonico", in La Scuola Cattolica, 94(1966), pp. 3-35; "Diritto Canonico", in Leandro ROSSI, ed., Dizionario Enciclopedico di Teologia Morale, Roma, Edizioni Paoline, 1973, pp. 215-232.

⁵⁴G. THILS, "La révision du droit canonique et les problèmes ecclésiologiques qu'elle rencontre", in Revue théologique de Louvain, 9(1978), pp. 328-341.

⁵⁵José SÉTIEN, "Tensions in the Church", in Concilium, 5(1969), 8, pp. 35-41.

The remaining themes have to do with relationships between the sacred sciences. First, though canon law is intimately related to theology⁵⁶ and the pastorate, it is unique. In light of Vatican II, future church law will remain juridical though replete with theology.⁵⁷ However canon law is not a theological discipline using juridical instruments; it differs in aim and scope from dogmatic and moral theology and it possesses a truly juridical method and structure.⁵⁸ Canon law receives generic theological data concerning the basic social structure of the church, but the social order has its own autonomy, its own rules, concepts, and expressions which form its own legal system oriented to the implementation of particular matters.⁵⁹ Law plays a pastoral role with respect to the dignity of the person, harmony of the community, and efficiency of the church's mission.⁶⁰ The juridical and pastoral aspects of the church are united just as the church is united though visible and invisible.⁶¹

⁵⁶Benito GANGOITI is a study apart. See his "Introductio in theologiam juris canonici", in Angelicum, 4(1970), pp. 456-502. Though he calls it a theology of canon law, GANGOITI proposes what might be better called a canon law of theology. Its scope would be to determine which juridical elements have theological content, sort them into categories of divine, natural, and positive law, and study their relationships so as to ensure that they work in harmony.

⁵⁷Gabriele MOLTENI, "Lo studio del diritto canonico dopo il Vaticano II", in Apollinaris, 40(1967), pp. 129-175.

⁵⁸Pietro Agostino d'AVACK, "Legittimità contenuto e metodologia del diritto canonico", in Il Diritto Ecclesiastico, 89(1978), pp. 3-41.

⁵⁹Teodoro JIMÉNEZ URRESTI, "Canon Law and Theology: Two Different Sciences", in Concilium, 3(1967), 8, pp. 11-14.

⁶⁰Pericle FELICI, "Orientations pastorales de la législation canonique", in Studia Canonica, 9(1975), pp. 201-213.

⁶¹Sebastiano BAGGIO, "La naturaleza pastoral de la norma canonica", in Ius Canonicum, 16(1976), 32, pp. 49-59.

An alternative approach to the sacred sciences and their roles is to begin with theology and stress the theological foundations of law. The existence and formulation of ecclesiastical legislation is conditioned by the legislator's understanding of the church. Currently the trend is toward an emphasis on the theological character and proper nature of canon law from an ecclesiological point of view.⁶² As a result, future church law would have to be based upon a theological understanding of the church and its mission, one which does not draw a distinction between the spiritual and institutional church.⁶³ A theological understanding of the church's nature and purpose is in fact the ontological and epistemological basis of church law.⁶⁴ A theology of canon law should rest upon the fundamental proposition that the end of all law in the church is to share in the work of the Holy Spirit.⁶⁵ Its task is to critically

⁶²Ladislav ORSY, "Toward a Theological Conception of Canon Law", in The Jurist, 24(1964), pp. 383-392. Claudianus KEMMEREN, "Recent Trends in the Science of Canon Law toward a Theology of Law", in The Jurist, 25(1964), pp. 24-45.

⁶³Giuseppe BALDANZA, "Natura e Fine del Diritto Canonico dopo il Concilio Vaticano II", in Monitor Ecclesiasticus, 94(1969), pp. 201-215. Ladislav ORSY, "Theology and Canon Law", in The Furrow, 16(1965), pp. 149-153 [cf. "Theology and Canon Law", in Clergy Monthly, 6(1965), pp. 205-210]. ORSY maintains that the fundamental object of both theology and canon law is "the life of the mystical Christ on earth, and this life cannot be divided into a mere legal one that would be the object of canon law, and into a (let us say) mystical one that would be the object of theology. They are aspects of the same life that is one and indivisible" (p. 148).

⁶⁴Antonio M. ROUCO VARELA, "Allgemeine Rechtslehre oder Theologie des Kanonischen Rechts?", in Archiv für katholisches Kirchenrechts, 138(1969), pp. 95-113, and "Le Statut ontologique et épistémologique du droit canonique. Notes pour une théologie du droit canonique", in Revue des Sciences Philosophiques et Théologiques, 57(1973), pp. 203-227.

⁶⁵Ladislav M. ORSY, "The Life of the Church and Renewal of Canon Law", in The Jurist, 25(1965), pp. 46-65 [cf. "The Reform of Canon Law", in Clergy Review, 48(1963), pp. 750-767], and "Vatican II and the Revision of Canon Law", in Clergy Review, 53(1968), pp. 83-100.

consider the juridical elements of society and ask how they work toward the salvation of souls.⁶⁶

A theology of law is the result of progressive cooperation and mutual understanding, on both material and formal grounds, between theology and canon law since the XVI century.⁶⁷ Among other things, continued progress calls for an integration or reconciliation of the German historical-philosophical school with the Italian dogmatic-juridical school⁶⁸ and a rethinking of Ius Publicum based on the progress of ecclesiology and magisterial teaching about the church.⁶⁹

Theology presents canon law with pre-juridical grounds for action (information about that which is immutable in the church) and its meta-juridical goal (the salus animarum); practical canonical activities challenge theology for ongoing relevance.⁷⁰ Still a theology of law will have to take account of divine,

⁶⁶Dario COMPOSTA, "Prospettive per una teologia del diritto", in Salesianum, 29(1967), pp. 28-69. He says that in this it pursues three ends: logical (verbal correctness of the law), ontological (social justice in the church and state), and deontological (soteriological aspects of juridical structures).

⁶⁷Dario COMPOSTA, "Indicazioni e incidenze storiche per una teologia del diritto", in Salesianum, 32(1970), pp. 239-282. COMPOSTA presents something of an historical dialectic. Until the XII century theology covered the whole of Christian life; during the next half-millennium canon law attained a higher degree of acknowledgment in the church and became a science, partly theological and partly practical.

⁶⁸Alberto De la HERA, Introducción a la Ciencia del Derecho Canónico, Madrid, Editorial Tecnos, 1967, 333 pp.

⁶⁹Alberto De la HERA, "A la recherche d'un fondement théologique du droit canonique", in L'Année Canonique, 12(1968), pp. 49-58.

⁷⁰Neophytos EDELBY, Teodoro JIMÉNEZ URRESTI, and Petrus HUIZING, "Preface" [concerning canon law and theology], in Concilium, 1(1965), 8, pp. 3-4.

natural, and positive law⁷¹ and not canonize a particular type of ecclesiology.⁷² A number of aspirations are predicted for the theology of law enterprise, among them: canon law's participation in the relevance of the Gospel;⁷³ an aid to understanding ecclesiological and other theological problems;⁷⁴ and possible resolution of the tensions between lawfulness and unlawfulness,⁷⁵ authority and freedom, grace and law, charism and institution,⁷⁶ juridical order and mysterium.⁷⁷

The theological approach to church law may prove to be a useful ecumenical method in that theology seeks to clarify areas of commonality.⁷⁸

⁷¹Antonio M. ROUCO VARELA, "Was ist 'Katholische' Rechtstheologie?", in Archiv für katholisches Kirchenrecht, 135(1966), pp. 530-543.

⁷²Gerard SHEEHY, "Reflections on the Current State of Law in the Church", in Studia Canonica, 12(1978), pp. 199-210. He explains that while there are differences of emphasis within the one common ecclesiology, there cannot be ecclesiologies substantially in contradiction with one another without disturbing the essential unity of faith.

⁷³Gérard FRANSEN, "Derecho canónico y teología", in Revista Española de Derecho Canónico, 20(1965), pp. 37-46.

⁷⁴Dario COMPOSTA, "La Teologia del diritto e i suoi problemi essenziali", in Apollinaris, 51(1978), pp. 54-80.

⁷⁵Eugenia CORECCO, "Valore dell'atto 'contra legem'", in Ius Canonicum, 15(1975), 30, pp. 237-257.

⁷⁶Jose B. TINOKO, "Juridicity in the Church; A Critical Study of the Different Methodological Approaches to the Question of the Existence of the Juridical Factor in the Church", in Philippiniana Sacra, 11(1976), pp. 497-544.

⁷⁷Antonio M. ROUCO VARELA, "Die katholische Rechtstheologie heute", in Archiv für katholisches Kirchenrechts, 145(1976), pp. 3-21.

⁷⁸Antonio M. ROUCO VARELA, "Teología Protestante Contemporanea del Derecho Eclesial", in Revista Española de Derecho Canónico, 26(1970), pp. 117-143. René METZ, "Pour une théologie du droit de l'Eglise: Quelques essais protestantes", in L'Année Canonique, 17(1973), pp. 647-666. Hans DOMBOIS, "The Basic Structure of Church Law", in Concilium, 5(1969), 8, pp. 23-27. DOMBOIS, for example, is a Lutheran who exhorts the church to conduct itself

Such discussions developed from a theological foundation may lead to new solutions for some of the central problems facing the church.⁷⁹

Likely it would not be possible to reconcile these themes into any common sentiment. Neither, however, will it be necessary; a brief inventory will do. These seem to be the chief characteristics of church law which can be gleaned from the aforementioned themes: juridical, supernatural, external, serving, dynamic, relevant, and ecclesial. Setting "ecclesial" aside for a moment, the remainder address two primary aspects: being and doing. The first three characteristics speak more to "how canon law is"; the last three speak more to "what it does": Always they are related to the church. The primary themes, then are two: the vision of church law depends upon the vision of the church; and church law participates in the means and ends of the church.

In that they consider the church to be church law's primitive point of reference⁸⁰ both as to being and doing, these primary themes presuppose something more simple and subtle: church law is ecclesial. That is, church law

in juridical concepts appropriate to its characterization by Vatican II as a people of God.

⁷⁹Víctor De REINA, "Eclesiología y Derecho Canónico; notas metodológicas", in Revista Española de Derecho Canónico, 19(1964), pp. 341-366. Wilhelm STEINMÜLLER, Evangelische Rechtstheologie; zweireichelehre - Christokratie - Gnadenrecht, Köhn, Graz, Böhlau Verlag, 1968, 2 vol. (xiii-945 pp.). Wilhelm STEINMÜLLER, "Divine Law and its Dynamism in Protestant Theology of Law", in Concilium, 5(1969), 8, pp. 14-22. Joseph HOFFMANN, "Droit canonique et théologique du droit. Réflexions à propos d'un livre récent: W. Steinmüller, Evangelische Rechtstheologie", in Revue de Droit Canonique, 20(1970), pp. 289-307, and 24(1974), pp. 3-27. Peter KRÄMER, Theologische Grundlegung des kirchlichen Rechts; Die rechtstheologische Auseinandersetzung zwischen Hans Barion und Joseph Klein im Licht des II. Vatikanischen Konzils, Trier, Paulinus Verlag, 1977, xxix-162 pp.

⁸⁰Certain particulars are prior to others in that the latter depend upon the former for their identification. E.g., "the house that Jack built". See Peter Frederick STRAWSON, Individuals; An Essay in Descriptive Metaphysics, Garden City, New York, Doubleday (Anchor), 1959, ch. I [pp. 2-49].

is not something of (possessed by) the church, but about the church (constituting it in part). If so, then the justification of church law is its unification with the church as to vision, means and ends.

B. The Modeling Method

It is still necessary to point out the distinction between mystery and mysteriousness when speaking about the church. That is mysterious which is not now known but is considered capable at least in principle of being known through reason. Mystery is applied to that which is knowable not by any extension of reason but through divine faith.⁸¹ More must be said about mystery, but first the church's mysteriousness deserves attention.

Mysterious things, and the church as such, are often "descriptively rich"; that is, much can and remains to be said about them because their multivalent natures are not exhaustively known. As an aid to grasping the mysteriousness inherent in various disciplines one conceptual tool, the model, has paid high dividends. A model is a "situation with which we are all familiar, and which can be used for reaching another situation with which we are not so familiar; one which, without the model, we should not recognize so easily".⁸² In doing so the modeling method has spread from the "hard" to the "soft" sciences: from

⁸¹See Vatican I, const. "Dei Filius", 24 April 1870, in Giovanni Domenico MANSI, ed., Sacrorum Conciliorum Nova et Amplissima Collectio; Parisisis, H. Welter, 1901-1927, vol. 51, col. 429-437; Acta Sanctae Sedis, 5(1869), pp. 462-471.

⁸²Ian T. RAMSEY, Religious Language; An Empirical Placing of Theological Phrases, London, SCM Press, 1967, p. 61.

mathematics, natural and social sciences⁸³ to language and philosophy.⁸⁴ But even this, the employment of models as an explanatory substitution for some complex phenomenon, is the weakest use of models. Their merit goes beyond clarification to creative insight. Such insight may shed some light on mystery and its centrality to ecclesial law.

Modeling as a tool invites the "invention" of a couple clichés for caveat purposes. First, if a worker has only a hammer, he will see every problem as a nail. This is the "upper limit" reservation about modeling. Surely at most a model may show how, but not say how the church is what it is. Not everything about the church can be modeled; not every model can be applied to the church. Second, a poor worker always finds fault with his tools. This is the "lower limit" caution. Models are powerful but passive instruments. To effectively model the church assumes some familiarity with modeling theory and applications. This is where to begin; and modeling begins with metaphors.

I. Metaphors

While modeling theories differ, it is safe if simplified to say that at the foundation of every model rests at least one metaphor. Metaphor boasts an impressive bibliography. One work alone cites some three thousand

⁸³See Mary B. HESSE, Models and Analogies in Science, London, Sheed and Ward, 1963, 150 pp.

⁸⁴Such as Paul RICOEUR, The Rule of Metaphor; Multi-disciplinary Studies in the Creation of Meaning in Language, transl. by Robert CZERNY with Kathleen McLAUGHLIN and John COSTELLO, Toronto, University of Toronto Press, 1977, viii-384 pp.

references.⁸⁵ Metaphor has also undergone a recent and rapid departure from literary decoration to speculative innovation. Here the authors are fewer, but the notion of metaphor is more powerful (effective or creative). The departure began in 1936 with a series of lectures by Ivor Armstrong Richards.⁸⁶ Richards suggested that two thoughts (the "tenor and vehicle") interact and in doing so are mutually affected. To better appreciate the significance of the interaction view of metaphor it may be briefly contrasted with the more traditional view.

If there may be said to be a classical view of metaphor, judging by prevalence among rhetoricians it would likely be the substitution view. Such is the position that a metaphorical expression replaces and can be reduced to some literal expression(s). As such the utility of metaphor rests with its ability to either supply for a lacuna in the lexicon (e.g., the "love" attraction between sub-atomic particles) or to add stylistic decoration. Substitution metaphors are useful or convenient, but not regarded as necessary or contributing to the deposit of knowledge. What seasoned canonist, for example, could not quickly translate "love's eyes may be myopic" into something like "emotional attraction may inhibit an awareness of or avoid dealing with (inter-)personal obstacles"?

A special case of the substitution theory may be traced to Aristotle, who suggested that "the simile also is a metaphor, the difference is but slight."⁸⁷

⁸⁵Warren A. SHIBLES, Metaphor: An Annotated Bibliography and History, Whitewater, Wisconsin, Language Press, 1971, xiv-414 pp. Add to this the ongoing lists of articles found in the weighty volumes of The Philosopher's Index; An International Index to Philosophical Periodicals, Bowling Green, Ohio, Bowling Green Univ., 1967 to date.

⁸⁶The Philosophy of Rhetoric, Oxford, Oxford Univ. Press, 1936, lecture V, "Metaphor", pp. 89-138.

⁸⁷Rhetoric III, iv, 1¹-3; cf. x.

That is, a metaphor is an elliptical simile, a comparison based upon analogy or similarity from which "like" or "as" has been omitted. This has the form, "X is [like] Y [in some sense Z]". "All the world is [like] a stage [all the men and women merely players]".⁸⁸ However, the basis of analogy or similarity cannot always be said to pre-exist the metaphor⁸⁹ and in any case there are few objective criteria for testing its applicability.⁹⁰

Simply stated, an interaction metaphor works by associating certain implications (properties, characteristics, habits, etc.) of one thing with another such that the hearer grasps an isomorphism⁹¹ between the two things and thereby envisions both in a novel manner.⁹² Max Black's often-repeated

⁸⁸William SHAKESPEARE, As You Like It, act II, scene 7, line 139.

⁸⁹"It would be more illuminating in some of these cases to say that the metaphor creates the similarity than to say that it formulates some similarity antecedently existing". Max BLACK, Models and Metaphors; Studies in Language and Philosophy, Ithaca, New York, Cornell Univ. Press, 1966, p. 37.

⁹⁰See Monroe C. BEARDSLEY, "Metaphor", in EDWARDS, ed. in chief, Encyclopedia of Philosophy, vol. 5, p. 285.

⁹¹A correspondence among two or more systems of things based upon the similar way in which aspects or elements of each perform or are related in their respective systems. For example, one tenet of the ecclesial law thesis to be detailed later concerns the isomorphism between law as a function in any social system and law as a function of the church. Says Douglas R. HOFSTADTER, who possesses the talent to synthesize interdisciplinary inquiry for mass consumption: "The word 'isomorphism' applies when two complex structures can be mapped onto each other, in such a way that to each part of one structure there is a corresponding part in the other structure, where 'corresponding' means that the two parts play similar roles in their respective structures". Gödel, Escher, Bach: An Eternal Golden Braid, New York, Basic Books, 1979, p. 49.

⁹²"In the context of a particular metaphorical statement, the two subjects 'interact' in the following ways: (i) the presence of the primary subject incites the hearer to select some of the secondary subject's properties; and (ii) invites him to construct a parallel 'implicative complex' that can fit the primary subject; and (iii) reciprocally induces parallel changes in the secondary subject". Max BLACK, "More about Metaphor", in Dialectica, 31(1977), p. 442.

example, "man is a wolf", lucidly displays the workings of an interaction metaphor.

The effect, then, of (metaphorically) calling a man a 'wolf' is to evoke the wolf-system of related commonplaces. If the man is a wolf, he preys upon other animals, is fierce, hungry, engaged in constant struggle, a scavenger, and so on. Each of these implied assertions has now to be made to fit the principal subject (the man) either in normal or in abnormal senses. If the metaphor is at all appropriate, this can be done--up to a point at least. A suitable hearer will be led by the wolf-system of implications to construct a corresponding system of implications about the principle subject. But these implications will not be those comprised in the commonplaces normally implied by literal uses of 'man'. The new implications must be determined by the pattern of implications associated with literal uses of the word 'wolf'. Any human traits that can without undue strain be talked about in 'wolf-language' will be rendered prominent, and any that cannot will be pushed into the background. The wolf-metaphor suppresses some details, emphasizes others--in short, organizes our view of man.⁹³

Unlike substitution metaphors, interaction metaphors cannot be reduced to literal language since they impart new information in the process of resolving "a semantic dissonance",⁹⁴ "redescribing" both members of the metaphor.⁹⁵

⁹³BLACK, Models and Metaphors, p. 41.

⁹⁴"In a theory of tension, which I am here opposing to a theory of substitution, a new signification emerges which deals with the whole statement. In this respect, metaphor is an instantaneous creation, a semantic innovation which has no status in established language and which exists only in the attribution of unusual predicates. In this way metaphor is closer to the active resolution of an enigma than to simple association by resemblance. It is the resolution of a semantic dissonance". Paul RICOEUR, "The Metaphorical Process", in Semeia, 4(1975), p. 78. RICOEUR's "tension theory" has received considerable comment of late. For example, see Philosophy Today, 21(1977), entire issue. For present concerns the tension theory complements an interaction view.

⁹⁵"The metaphor works by transferring the associated ideas and implications of the secondary to the primary system. These select, emphasize, or suppress features of the primary; new slants on the primary are illuminated;

Thus they are not only affective (stimulating feeling), but cognitive (illuminating understanding).⁹⁶ In the interpretation or reconciliation of initially inconsistent terms, the hearer is brought to a new perception. To say "man is a wolf" is to say more than something about man and something about a wolf.

The value of metaphor in ontological inquiry has not been without its advocates and detractors. For example, Stephen C. Pepper theorizes that there are four basic ontological systems, each derived from "a basic analogy or root metaphor".⁹⁷ But for Thomas Hobbes one of the seven reasons why "there can be nothing so absurd, but may be found in the books of philosophers" is "the use of metaphors, tropes and other rhetorical figures, instead of words proper".⁹⁸

the primary is 'seen through' the frame of the secondary. In accordance with the doctrine that even literal expressions are understood partly in terms of the set of associated ideas carried by the system they describe, it follows that the associated ideas of the primary are changed to some extent by the use of the metaphor, and that therefore even its original literal description is shifted in meaning. The same applies to the secondary system, for its associations come to be affected by assimilation to the primary; the two systems are seen as more like each other; they seem to interact and adapt to one another, even to the point of invalidating their original literal descriptions if these are understood in the new, post-metaphoric sense. Men are seen to be more like wolves after the wolf-metaphor is used, and wolves seem to be more human". Mary B. HESSE, "The Explanatory Function of Metaphor", in Yehoshua BAR-HILLEL, ed., Logic, Methodology and Philosophy of Science, Amsterdam, North Holland Publishing Co., 1965, p. 252.

⁹⁶Since they can affect attitudes, caution must be exercised lest they be self-fulfilling. See Frederick FERRE, "Metaphors, Models, and Religion", in Soundings; A Journal of Interdisciplinary Science, 51(1968), pp. 330-332.

⁹⁷World Hypothesis, A Study in Evidence, Berkeley, Univ. of California Press, 1966, p. 91; see esp. ch. V.

⁹⁸Leviathan, or the Matter, Forme and Power of a Commonwealth, Ecclesiastical and Civil, ed. by Michael OAKESHOTT, Oxford, Blackwell, 1957, pp. 27-28

It is not that metaphors do not denote or reveal things as they are, rather they can do more. Like a painting, a metaphor represents by organizing perception⁹⁹ and contributes so much the more of for it.¹⁰⁰

2. Models

Aquinas thought it fitting that spiritual things be metaphorically likened to material things since man attains knowledge through sensation of the latter and in this way "even the simple who are unable by themselves to grasp intellectual things may be able to understand it".¹⁰¹ Such use of metaphor, to open avenues of knowledge, is not far from the thrust of models. A metaphor establishes a conceptual link between things, opening the possibility of seeing one in terms of the other. But when the one is actually interpreted in terms of the other, when predictions are made as to what it systematically means for one thing to be another, there obtains a model. A model is more than a sustained metaphor. It systematically represents or describes via some (even implicit)

⁹⁹A similar position is argued by Nelson GOODMAN, Languages of Art; An Approach to a Theory of Symbols, 2nd ed., Indianapolis, Hackett, 1976, xiii-277 pp., see esp. pp. 68-95.

¹⁰⁰Such recognition of what might be called the representational aspect of a strong metaphor can be accommodated by recalling other familiar devices for representing 'how things are' that cannot be assimilated to 'statements of fact'. Charts and maps, graphs and pictorial diagrams, photographs and 'realistic' paintings, and above all models, are familiar cognitive devices for showing 'how things are', devices that need not be perceived as mere substitutes for bundles of statements of fact. In such cases we speak of correctness and incorrectness, without needing to rely upon those overworked epithets, 'true' and 'false'. BLACK, "More about Metaphor", p. 456.

¹⁰¹Summa Theologica I, q. 1, art. 9.

metaphor so as to contribute new information about the original entity (be the original an object or process, a system or state of affairs).

Three aspects merit elaboration: how the type of metaphor (substitution, interaction) affects the model; how the model represents or describes; and how it contributes new information. It should be seen that these points are sequentially significant; the first determines the second, the second determines the third. To respond better to the first, it will be taken last--in fact, in the context of modeling the church.

Models represent or describe by being different from the original.¹⁰² Max Black identifies three areas of difference and categorizes models accordingly.¹⁰³ These areas of difference are the result of changes in spatio-temporal proportion, medium, or conceptual perception; models are respectively labeled scale, analogue, or theoretical.

Scale models are perhaps the most familiar but least interesting. Their's is a magnification or reduction in size (e.g., a class-room replica of the DNA molecule or a minature of Saint Peter's Basilica), an acceleration or deceleration in speed (e.g., time-lapse photography of, say, cloud formation or a slow-motion representation of nuclear fission), or any combination of

¹⁰²"To think that A is B is one thing, to think of A as B is another [...]. In some ways, indeed, the two things seem to be mutually exclusive. There is no room, e.g., to think of a cylinder of gas as a box full of fast-moving billiard balls, unless one knows very well that it is not in fact such a box. One cannot use the model of a box full of fast-moving billiard balls to explain the behaviour of a box full of fast-moving billiard balls: a model can only be used to explain the behaviour of things which are in fact distinct from it". Stephen Edelston TOULMIN, The Philosophy of Science; An Introduction, London, Hutchinson University Library, 1953, p. 163.

¹⁰³See Models and Metaphors, esp. at pp. 220-233.

dimensional alterations. They resemble the specimen by "embodying the features of interest in the original."¹⁰⁴ Scale models bring entities of other sizes and speeds under control, among other reasons to maximize perceptual effect at minimal physical effort.¹⁰⁵ In this way their contribution of information is chiefly how the original may be contextually understood or rearranged; how the original goes outside itself or relates to other things. They can not add to an understanding of content; indeed only less depending upon precision of the model's detail.

Analogue models involve a change of medium: electronic circuitry to represent the nervous system, a hydraulic pump to illustrate economic supply and demand, family relationships to tell about Trinitarian nature, etc. They conserve identity by reproducing "as faithfully as possible in some new medium the structure or web of relationships in an original".¹⁰⁶ Analogue models and originals are isomorphic in that the former embody the same pattern of relationships as the latter, though expressed through different media. A diagram is a simple example.¹⁰⁷ In this way analogue models contribute

¹⁰⁴ibid., p. 221

¹⁰⁵E.g., to see how the house will "look" when the furniture is arranged thus and so before applying elbow grease. To avoid thinking of scale models in just physical terms a similar example could be constructed for, say, a model budget.

¹⁰⁶BLACK, Models and Metaphors, p. 222

¹⁰⁷Question may be raised as to "mixed models". Are the blue prints for a house a scale or an analogue model? One cannot answer by the way a model "looks", not only because appearances may be deceptive but because the contrast is not necessarily exclusive. That is, analogue models can (though they need not) include scale models, but the converse is not the case. Generalizing, if theoretical, analogue, and scale models are said to be arranged in a descending hierarchy, a model at one level can (but need not) include a lower level model, yet it cannot include a higher level model.

information about relationships internal to the original, how its elements are interrelated.

Theoretical models consist in constructing¹⁰⁸ or conjuring an imaginary entity accessible to description and transposing its properties onto a more complex domain. Whether that domain is a theory about reality or reality itself makes for two sorts of theoretical models: a model of a theory or a theory developed in terms of a model. First, what is a theory?

Theories, as traditionally contrasted with experimental laws, contain some terms which cannot be empirically verified.¹⁰⁹ They are chiefly viewed as either: (reductionism) oblique statements reducible to "statements about

¹⁰⁸BLACK emphasizes that while "scale models and analogue models must be actually put together [...], theoretical models (whether real or fictitious) are not literally constructed. [...] The theoretical model need not be built; it is enough that it be described". Models and Metaphors, p. 229. If that means theoretical models are not constructed in some space-time-medium, it does no more than reiterate the fact that theoretical models are not scale or analogue models (at worst it begs the question). BLACK does not say what else it may mean, so in his silence one may assert the seemingly obvious: theoretical models are at least mental constructs, imaginary fabric. It is this that is "described".

¹⁰⁹"Apparently the most fundamental distinction between laws and theories is that experimental laws contain only terms that refer to observables or are operationally definable (such terms as 'pressure', 'velocity of fall', 'sulfuric acid', or 'proportion of tall sweet pea plants in the sample'), whereas the statements of theories contain at least some terms that do not refer to observables and are not operationally definable. In other words, it is held that experimental laws are immediately intelligible, independent of theories, in terms of the generally understood experimental procedures of science, and that their truth or falsity is epistemologically prior to that of theories since they can be confirmed or falsified directly by carrying out the experimental operations implicitly or explicitly specified in the meanings of their component terms. In the case of theoretical terms, on the other hand, it seems that there are no overt procedures for identifying their referents; 'electron', 'space curvature', 'electromagnetic wave' cannot be pointed to, and hence it is suggested that theoretical statements cannot be directly tested by observation and experiment". Mary B. HESSE, "Laws and Theories", in EDWARDS, ed. in chief, Encyclopedia of Philosophy, vol. 4, pp. 404-405.

sense-data or physical objects; (instrumentalism) useful devices for organizing knowledge and making predictions, whether or not the devices refer to reality; or (realism) a set of true or false statements referring to things that really exist. Setting aside the reductionist view,¹¹⁰ theories, models, and metaphors alike may be seen as either heuristic fictions or speculative descriptions.¹¹¹

In the case of a model of a theory, the model is invoked as something familiar and intelligible to render more manageable the relatively more obscure phenomena. The model is independent of and epistemologically posterior to some knowledge about the original. For example, given the Cartesian and Newtonian theories of matter and motion (the details of which need not be repeated here), the corpuscular-kinetic model¹¹² contributes an intuitive grasp,

¹¹⁰The view that there could be a definition of every theoretical term in terms of observables was subjected to damaging criticism and has been universally abandoned. It broke down for two main reasons. First, it can be shown that in many existing theories such translations cannot be carried out, and yet no reputable theorist wishes to abandon otherwise satisfactory theories on this ground alone. Second, and more fundamental, it has been demonstrated in detailed artificial examples by Frank Ramsey and Braithwaite and argued in general terms by many other writers that if explicit definitions of all theoretical terms by means of observables could be carried out, theories would be incapable of growth and therefore useless. Theories are required to be general and predictive and therefore capable of assimilating an indefinite number of new observations without themselves radically changing in meaning. Explicit definitions could not leave room for this and could not exhaust the potentially infinite and largely unknown range of observables to which the theory might be relevant". *Ibid.*, pp. 406-407.

Note the parallel between the reductionist view of theories and simple substitution view of metaphors.

¹¹¹Heuristic fictions are "passive" in the same sense that speculative descriptions are "active". Both are intended to represent or describe, but the one "declares" what is known while the other furthermore "decrees" where else to look for new information.

¹¹²A summary of which is found in Milic CAPEK, Philosophical Impact of Contemporary Physics, Toronto, Van Nostrand, 1961, p. 79: "1. Matter, which is discontinuous in its structure, that is, made of absolutely rigid and compact units, moves through space according to the strict laws of mechanics. 2. All

even if abstract, from which inferences can be drawn.¹¹³ Such as: light consists of certain corpuscles traveling in linear propagation and reflection. This example points to an important observation: the value of a model is independent of a theory's validity or acceptability. It is also the chief tenet of instrumentalism, as just mentioned.

Realism takes the tact "that when a theory is developed in terms of a model, the model is the description of the way the world is conceived by that theory. That is, gases are really made up of molecules, light is really transmitted by wave motion in the ether, and so on".¹¹⁴ The model arises with and as (part of) the theory; it is identified with the theory having reference to reality.

In either case the theoretical model is in some ways like and in other ways unlike the original (be the original a theory or area of reality). More important,

apparently qualitative differences in nature are due to the differences in configuration or motion of these basic units or their aggregates. 3. All apparently qualitative changes are merely surface effects of the displacement of the elementary units or their aggregates. 4. All interaction between the basic corpuscles is due exclusively to their direct impact. Action at a distance is a mere figure of speech. 5. Qualitative variety as well as qualitative transformation are psychic additions of the perceiving human mind; they do not belong to the nature of things". See also Mary B. HESSE, Forces and Fields; The Concept of Action at a Distance in the History of Physics, London, Thomas Nelson, 1962 reprint, ch. V, "The Corpuscular Philosophy", pp. 98-125.

¹¹³"To make good use of a model, we usually need intuitive grasp ('Gestalt knowledge') of its capacities, but so long as we can freely draw inferences from the model, its picturability is of no importance. [...] A promising model is one with implications rich enough to suggest novel hypotheses and speculations in the primary field of investigation. 'Intuitive grasp' of the model means a ready control of such implications, a capacity to pass freely from one aspect of the model to another, and has very little to do with whether the model can literally be seen or imagined". BLACK, Models and Metaphors, pp. 232-233.

¹¹⁴Mary B. HESSE, "Models and Analogy in Science", in EDWARDS, ed. in chief, Encyclopedia of Philosophy, vol. 5, p. 358.

there are yet other ways in which the (dis)similarity is unknown. When the original is conceptually perceived by way of the model, what is known about the model "supplies" for what is not known about the original.¹¹⁵ While this has potential for error it may also prompt further refinements or insights into the original.¹¹⁶ Theoretical models thus possess cognitive content.¹¹⁷ Empirical or speculative testing can reduce the margin for error,¹¹⁸ but with its elimination goes the margin for further refinement or insight. The two margins are not identical, of course, but they both derive from the dynamic middle of unknown (dis)similarity between model and original. To borrow Nelson Goodman's phrase:

¹¹⁵FERRÉ captures this spirit in negative terms: "Just as in the case of literary metaphor, a scientific model with no more to offer than a foreshortened simile is hardly worth the effort it costs. Indeed, clarity and economy would dictate, especially in the sciences, that models whose only function is to issue in a list of literal comparisons be eliminated as one extra bit of baggage that seekers of knowledge may justly jettison". "Metaphors, Models, and Religion", p. 335.

¹¹⁶See HESSE, "Models and Analogy in Science", p. 356.

¹¹⁷"Models not only suggest literal comparisons, they not only afford heuristic aids to further investigation and discovery: models themselves offer directly an indispensable ingredient to the human quest for understanding. [...] Thus a model is doing its most important task when it helps those who are thinking 'through' it to find new connections among previously discovered laws, or to appreciate an otherwise baffling phenomenon as a special case of what is already familiar, or to see parallelism among a number of otherwise disparate theories, or to see analogies between new data and what is already known, or to gain an intuitive 'grasp' of the subject matter through a fresh encounter with the familiar". FERRÉ, "Metaphors, Models, and Religion", p. 336.

¹¹⁸"When a billiard ball model of gases is proposed, it is not intended that every feature of billiard balls--for example, their size and color--should be ascribed to gases. There is always a negative analogy that is implicitly recognized and ignored". HESSE, "Models and Analogies in Science", p. 356.

"In one sense, of course, any completed program is trivial--in just the sense that the goal of any program is to trivialize itself".¹¹⁹

The contribution of information or utility of models, then, has to do with illuminating relationships. Scale models reflect external relationships and show the way something can be understood in its setting or rearranged. Analogue models, being isomorphic with originals, reflect internal relationships and show how an entity's elements are interrelated. And theoretical models enable one to see new connections between theory and reality,¹²⁰ the unknown and the known.

C. Analogue Church Models

Most models of the church are analogue models. This section traces the theological and ecclesiological bases for analogue church models according to the representative frameworks of two rather well-known theorists.

I. Ramsey's Theological Framework

With his, the eighth series of Whidden Lectures the Reverend Ian T. Ramsey introduced Max Black's reflections on models and metaphors to

¹¹⁹"A World of Individuals", in I. M. BOCHENSKI, Alanzo CHURCH, and Nelson GOODMAN, The Problem of Universals; A Symposium, Notre Dame, Indiana, Univ. of Notre Dame Press, 1956, p. 27.

¹²⁰"If the model is invoked after the work of abstract formulation had already been accomplished, it would be at best a convenience of exposition. But the memorable models of science are 'speculative instruments', to borrow I. A. Richard's happy title". BLACK, Models and Metaphors, p. 237.

theological methodology.¹²¹ He mentions but makes little use of metaphors, except to say that they, "like models, are rooted in disclosures and born in insight".¹²² If, however, models and metaphors are parallel structures (even isomorphic) and so perform redundant functions, then either the model or the metaphor is unnecessary. Furthermore, he discounts the value of scale models ("picturing models" as he proposes to call them) in theology for two reasons. First, such models may be incompatible.¹²³ This is a relatively weak objection because it could be raised against any type of models and a set of occasionally inconsistent models may reflect more the complexity of the entity modeled than the capability of scale modeling. Second, scale or picturing models are unable to disclose or convey insights¹²⁴ as analogue models can (the latter being re-baptized "disclosure models"). But if the objection is conceded, as it must be, should not speculative theology move beyond analogue models toward the all the more thoroughgoing theoretical models, especially those based on interaction metaphor? An affirmative answer frames the point of departure for the following chapter. The remainder of the present chapter probes the potential for analogue church models.

¹²¹BLACK's Models and Metaphors originally appeared in 1962. RAMSEY's lectures were delivered at McMaster University, Hamilton, Canada, in January 1963.

¹²²Jan T. RAMSEY, Models and Mystery, London, Oxford Univ. Press, 1964, p. 50; see pp. 47-60.

¹²³"Judge, king, and father might perhaps be supposed in the end to interlock consistently, but what of their links with strong towers and houses of defense?" Ibid., p. 7.

¹²⁴"A picture theology which is too taped and too cut and dried is self-condemned--leaving no place for the mystery and transcendence of God, leaving no place for wonder and worship". Loc. cit.

Analogue models facilitate "reliable theological understanding" when they (a) are isomorphic with the original, leading to a disclosure or moment of insight,¹²⁵ and (b) illustrate some set of events as interrelated instances of a comprehensive scheme.¹²⁶ The events may be highlights in human history, transition points for a people, meaningful experiences in one's life, etc. Though they need not be limited to extremes--the best of times, the worst of times--these are perhaps easiest to identify. A model's applicability varies in direct proportion to the set of events it covers: the greater / lesser the quantity or quality (significance) of events, the greater / lesser the model's applicability. Ramsey favors the phrase "empirical fit". "The theological model works more like the fitting of a boot or shoe than like the 'yes' or 'no' of a roll call".¹²⁷ This contrasts with the empirical verifiability of scientific models. Events exemplify or fit in with the comprehensive scheme, rather than being "true" of it.

¹²⁵"In other words, there are on the one hand certain situations in which we find ourselves, certain situations of a cosmic character, which in virtue of some feature or other echo, chime in with, are isomorphous with other situations in which we speak, for example, of strong towers, of kingship, of fathers and sons, and the two together, because of the common feature, generate insight". *Ibid.*, p. 16.

¹²⁶"A model in theology does not stand or fall with, a theological model is not judged for its success or failure by reference to, the possibility of verifiable deductions. It is rather judged by its stability over the widest possible range of phenomena, by its ability to incorporate the most diverse phenomena not inconsistently. [...] As a model in theology is developed, it rather stands or falls according to its success (or otherwise) in harmonizing whatever events are to hand". *Ibid.*, pp. 16-17.

"The role of theological models with respect to understanding, unlike that of scientific models, is to help construct a completely comprehensive conceptual scheme in which every possible event can be interpreted as exemplifying it". FERRÉ, "Metaphors, Models, and Religion", p. 341.

¹²⁷RAMSEY, Models and Mystery, p. 17; cf. pp. 38-40.

Ultimately Ramsey labors a noble but ill-fated task: one which he believes goes beyond Max Black's position to "the objective reference of all disclosures".¹²⁸ The task is ill-fated not by its nature, but by the suggested methodology. Namely: (1) divine truths are so descriptively rich as to require a host of variegated models; (2) each model yields a disclosure; (3) to ground a disclosure in the divine referent it is qualified by such phrases as "infinite", "perfect", "all", etc.; (4) a model, then, discloses mystery.

In theology the model must occur in a phrase which incorporates also a qualifier which in its simplest form will be a word or a suffix designed to make sure that here the main point of the model is seen to be its fulfillment in a disclosure. At every stage in theological reasoning the route from a model to a mystery must be indicated.¹²⁹

If that is at all a fair summary of the salient issues, then the first problem with Ramsey's schema has to do with equivocation. Descriptive richness has to do with mysteriousness; somewhere along the way it has been identified with mystery. Models may disclose mysteriousness, but it remains to be seen whether they can do the same for mystery.

The second problem is more subtle, and pervasive for it. It appears as though qualifiers are imported to clarify the link which already exists between models and mystery. In fact they are imported to create the link; to "elevate" disclosure models to models disclosing mystery. But qualifiers cannot add cognitive content to models simply by virtue of their juxtaposition, much less demonstrate a link with mystery. So the "error of a priori" is two-fold: the

¹²⁸ibid., p. 58.

¹²⁹ibid., p. 61.

meaning of qualifying phrases as they pertain to mystery (e.g., the "cosmic" sense of "perfect") is presumed; so too it is presumed that such qualifiers are predicable of mystery. Thus, that such qualifiers link the disclosure of analogue models with mystery is an assumption, not a conclusion.

Ramsey rests with the exhortation that any attempt to model the Church shall have to (a) employ a multitude of models since "there is no single inward track to mystery", and (b) study them comparatively in order to "explore the possibility of making consistent connections between the different language routes, the possibility of creating a more coherent pattern in the Christian doctrine of the Church".¹³⁰ Be that as a prolegomenon to Avery Dulles' Models of the Church,¹³¹ which meets both criteria.

2. Dulles' Ecclesiological Framework

Dulles' methodology lends itself to the imagery of constructing and plotting along a Cartesian coordinate graph: church metaphors¹³² are calibrated in some manner or other along the vertical axis; testing parameters¹³³ are set out along the horizontal axis; and the consequences of

¹³⁰Ibid., pp. 65-66

¹³¹Garden City, New York, Doubleday (Image), 1978, 239 pp.

¹³²He opts for five: the church is an institution, mystical communion, sacrament, herald, servant.

¹³³Of which he has selected six: bonds of union, beneficiaries, goal, status in the eschaton, vision of ministry, and role in revelation.

each metaphor with respect to each parameter¹³⁴ are plotted at the intersection of abscissa and ordinate.

Dulles critiques the applied models individually and to some extent comparatively. He also suggests certain ecumenical ramifications of the models presented. But these considerations are subordinate to the theory of modeling the church and certain objections shall have to be met at this level before models can be meaningfully applied to the church. In the first and last chapters the author anticipates a few limitations. These are chiefly three and need only be outlined. Firstly, a model taken individually is incomplete. There may be an imbalance, failure to account for certain essential aspects of the original modeled. There may be distortion, overemphasizing some aspects of the original. The model is dependent upon and limited by the imagery. Secondly, the models taken collectively are inconsistent. There may be conflicts in imagery or in the meaning of images. And clearly models are disparate, not all of equal value, merit, or utility. Finally, models taken at all are inadequate. They are artificial; that is, constructs proposed to picture the

¹³⁴Respectively: [Institution] visible signs, members, save souls by making members, none, juridical power, guardian or conserver; [Mystical communion] reconciling grace and gifts of the Spirit, members animated by faith and charity, develop communion with the divine, achieves consummation, fostering fellowship, mediator or transmitter; [Sacrament] all social and visible signs of grace, those better able to express their faith because of church contact, purify and intensify man's response to grace, continues only in so far as visible embodiments are needed for communication, visible symbolization, sacred mediation; [Herald] faith in response to the gospel, those who hear the word of God and have faith in Jesus as Lord and Savior, evangelization, perdures until the Kingdom comes, proclamation, herald or mediator; [Servant] sense of mutual brotherhood in Christian service to the world, those aided, Christian help and hope, unclear--likely due to its stress on the world becoming rather than ending, social activity, facilitator of communion.

Terse and cumbersome to match as they may be, these "coordinates" are presented here only to illustrate the basic idea of applied church models. The discussion, however, focuses upon the theory of modeling the church.

church in certain ways (explanatory instruments or useful fictions). And they are transitory, subject to modification or replacement relative to contemporary milieu. One man's model may be another's anachronism.

Nevertheless, nothing succeeds like success. Church models "can have great value in helping people get beyond the limitations of their own particular outlook, and to enter into fruitful conversation with others having a fundamentally different mentality".¹³⁵ But can they go beyond comparative perceptions of the church to insights into the nature of the church? Likely those discussed cannot or not very far for two reasons: the use of substitution metaphors and analogue models.

Substitution metaphor, once again, replaces and can be reduced to literal language. It either "plugs the gaps in the literal vocabulary" or, when that "cannot be invoked, the reasons for substituting an indirect, metaphorical, expression are taken to be stylistic".¹³⁶ Stylistic usage aside, "plugging the gaps" is not a disparaging thing in theology. Matters known but ineffable would have to be passed over in silence were it not for substitution metaphor. So too in ecclesiology. But while substitution metaphors say what perhaps cannot otherwise be said, their contribution is only linguistic. They add not to knowledge, but to vocabulary.

The mystical communion image, for example, is brought one step closer to literal language as "a communion of men, primarily interior but also expressed by external bonds of creed, worship, and ecclesiastical fellowship";¹³⁷

¹³⁵DULLES, Models of the Church, p. 16

¹³⁶BLACK, Models and Metaphors, pp. 32-34.

¹³⁷DULLES, Models of the Church, p. 59.

successive reformulations may come closer yet. To attempt to determine whether all known images of the church are the substitution sort would be a laborious task indeed. One compilation¹³⁸ reports some eight dozen images and there is little reason to regard the list as exhaustive. But were an attempt made, the failure to arrive at a literal reformulation for any given image would show only that it has not yet been done, not that it cannot be done.

One wonders just how metaphorically active some church images are.¹³⁹ Two images--one ancient, one recent--provide examples. Has not "church institution" passed into platitute with repeated usage? And could not "church servant" be understood as an abbreviation for, say, a community convoked and commissioned by God to render service? Similar expressions, such as "Red Cross cares", are unproblematic and realized as referring to particular people and activities.

Finally, church metaphors of the elliptical simile sort expose no more than their bases of analogy or similarity.¹⁴⁰ E.g., the church is [like] a sacrament [visibly manifesting invisible reality], the church is [as] a herald [proclaiming that which is to come]. Against the elliptical-simile metaphor it might be

¹³⁸Paul Sevier MINEAR, Images of the Church in the New Testament, Philadelphia, Westminster Press, 1960, 294 pp. Referred to in DULLES, Models of the Church, at p. 23.

¹³⁹Some images no longer can or never could give rise to metaphor. A literal church metaphor is no church metaphor; it is a contradiction. "This is no more helpful than, say, treating a corpse as a special case of a person: a so-called 'dead metaphor' is not a metaphor at all, but merely an expression that no longer has a familiar metaphorical use". BLACK, "More about Metaphor", p. 439.

¹⁴⁰If, as BLACK warns, some elliptical-simile metaphors create rather than formulate their bases of analogy or similarity, then their use by theologians is not unlike the child who, having lost a coin on one street, looks for it on another where the light is better. Discovery supposes pre-existence.

argued that "church sacrament", for example, is primordial or calls for a rethinking of sacrament which is only afterward applied to the church and seven specific rituals.¹⁴¹ Should the argument subscribe more to real reference than personal preference,¹⁴² then the metaphor should be studied for its interaction value.

What are the limits of analogue church models? First, what can they do? Analogue church models, as either useful fictions or speculative descriptions, disclose relationships that make up the church. The institutional model, for example, reveals connections along the lines of visible, hierarchical authority. Now theological models, of which analogue church models are a species, bring events into a whole, show their collective meaning. Analogue church models, then, conceptually integrate Christian activity so as to display a significant pattern, namely the presence of church.

Taking the servant model as an example, the scenario runs thus. Modern man has come to realize that he must discover for himself, by rational and empirical means, the principles of cause and effect constitutive of the world. Such an epistemology alone, however, may fail to include other dimensions of reality, viz. those known through faith, hope, and charity. So the church finds its place in the world,¹⁴³ serving to supplement and guide the advancement of

¹⁴¹Cf. DULLES, Models of the Church, pp. 67-75.

¹⁴²"If one stands committed to a given model it is relatively easy to establish criteria by which that model is to be preferred to others. Each theologian's criteria therefore tend to buttress his own preferred models". Ibid., p. 197.

¹⁴³Here DULLES makes poignant use of a quotation from John A. T. ROBINSON: "The house of God is not the Church but the world. The Church is the servant, and the first characteristic of a servant is that he lives in someone else's house, not his own". The New Reformation?, Philadelphia, Westminster Press, 1965, p. 92; quoted in DULLES, Models of the Church, p. 102.

the world. This scenario harmonizes various forms of Christian activity (such as social justice, ministry to the needy, health and education programs, etc.) as indicative of the church, convoked and commissioned.

What cannot analogue church models do? Most important for present concerns, they cannot refer to mystery. This was the tragic flaw in Ramsey's theological models and, consequently, is the limitation to Dulles' ecclesiological models. Upon an analogue foundation Dulles built his Church models¹⁴⁴ and the gates of mystery shall prevail against them.

The discussion thus far has led to the following observations. The vision of church law depends upon the vision of the church. The church is a complex reality: mysteriousness surrounding mystery. This reality may be better understood by using models. Church models rest upon church-image metaphors. Analogue models competently disclose mysteriousness, such as how the church is composed. But reference to church mystery is necessary since, it seems, therein lies the key to ecclesial law's identity. So the second constructive step toward a descriptive concept of ecclesial law calls for at least one church model, one with theoretical foundation, which reflects mystery.

¹⁴⁴As already stated, the models used in theology are not scale reproductions. They are what Max Black calls 'analogue models' or what Ian Ramsey calls 'disclosure models'. DULLES, Models of the Church, p. 32.

CHAPTER FOUR

MODES OF THE CHURCH

A specific model of church mystery is considered in the present chapter. Since an image is at the root of a metaphor and a metaphor is at the root of a model, these three elements will be considered in the sections that follow.

A. The Word-event Image

At the outset it needs be understood just what it is about mystery that is being modeled and what sort of image this suggests. The image proposed and explained in this section is that of word-event.

If ecclesial law calls for a church model which reflects mystery, could church mystery itself be such a model?¹ Perhaps it could were "model" understood as a type, design, or exemplar.² But a typological "model" is no

¹Remigiusz SOBAŃSKI has chosen church-mysterium as the model for a theory of church law. See "Modell des Kirche-Mysteriums als Grundlage der Theorie des Kirchenrechts", in Archiv für katholisches Kirchenrechts, 145(1976), pp. 22-44. See also: "De Constitutione Ecclesiae et natura iuris in Mysterio Divino intelligendis", in Monitor Ecclesiasticus, 100(1975), pp. 269-294; "El lugar y las funciones de la canonística en la vida de la Iglesia", in Ius Canonicum, 16(1976), 32, pp. 293-305; "I problemi sostanziali e metodologici dell'insegnamento dei fondamenti del diritto canonico", in Apollinaris, 51(1978), pp. 81-113; and "Die methodologische Lage des katholischen Kirchenrechts", in Archiv für katholisches Kirchenrechts, 147(1978), pp. 345-376 [reprinted as "Sytuacja metodologiczna prawa kościelnego", in Prawo Kanoniczne, 22(1979), pp. 5-24].

²Cf. BLACK, Models and Metaphors, p. 219: "We also use the word 'model' to stand for a type of design (the dress designer's 'spring models', the 1959 model Ford)--or to mean some exemplar (a model husband, a model solution to an equation). The senses in which a model is a type of design--or, on the other hand, something worthy of imitation--can usually be ignored in what follows".

more than a symbolic ideal. In contrast, the models of interest to the speculative sciences systematically represent or describe by way of some metaphor so as to contribute new information. These are non-reflexive, they differ from the originals they represent or describe. As such it would make no sense to say mystery models itself. So church mystery cannot be the church model for ecclesial law. The same applies to "church sacrament" in so far as sacramentum is understood in etymological relation to mysterion.³

If, then, church mystery is not the model, but the original to be modeled, what is the meaning of church mystery? Only with, say, the Second Vatican Council has the magisterium clearly addressed that question.⁴ The first chapter to the dogmatic constitution on the church treats of "the mystery of the church", building to a crescendo with the eighth article. There it is taught that the church is a visible community "through which [Christ] communicates truth and grace to all men".⁵ Whatever else may be said about ecclesial mystery, it

³Note that "mysterion" has historically been used in a number of different ways--in as many as eight different senses by the Greek Fathers alone. See Avery DULLES, "Mystery (in Theology)", in William J. McDONALD, ed. in chief, New Catholic Encyclopedia, New York, McGraw-Hill, 1967, vol. 10, p. 151. Scriptural usage is no less inconsistent. See Günther BORNKAMM's article on mysterion in Gerhard KITTEL and Gerhard FRIEDRICH, eds., Theological Dictionary of the New Testament, transl. and ed. by Geoffrey W. BROMILEY, Grand Rapids, Michigan, Eerdmans, 1967, vol. 4, pp. 802-828.

⁴"It is only in our time that the Church has offered a definitive interpretation of herself (after an only partially successful beginning at the First Vatican Council!). This late development may perhaps be accounted for, if not justified by the fact that like most human societies the Church began to take stock of itself only to the extent that its operation is impeded". Michael SCHMAUS, Dogma 4: The Church; Its Origin and Structure, transl. by Mary LEDDERER, New York, Sheed and Ward, 1972, p. 7.

⁵Vatican II, const. "Lumen gentium", 21 Nov. 1964, no. 8, in A.A.S., 57(1965), p. 11: "Unicus Mediator Christus Ecclesiam suam sanctam, fidei, spei et caritatis communitatem his in terris ut compaginem visibilem constituit et indesinenter sustentat, qua veritatem et gratiam ad omnes diffundit".

shall have to be filtered through this kernel. The key image is Christ's communication, to which there are two aspects: the medium (form, vehicle), that through which there is communication, viz. a visible community of faith, hope, and charity; and the message (content, subject-matter), that which is communicated, viz. truth and grace to all men.

The message aspect of mystery, which has to do with God's salvific plan for mankind, is a notoriously vast field of study--not all of which directly pertains to discussions concerning ecclesial law. Two topics thereof, however, do have direct bearing upon ecclesial law: missiology and eschatology (roughly, the role of law in the means and ends of church life). So that these areas may be more precisely studied in relation to church law, they will be delayed until a theoretical church model conducive to mystery has been developed in the remainder of the present chapter.

The medium aspect of mystery, which has to do with the church's self-transcendence, is occasionally confused with mysteriousness. Mysteriousness is like a problem yet unsolved, a puzzle awaiting more effective methods for solution. I.e., "The Church, like Christ, is a riddle to be solved".⁶ It seems that the confusion lies at what Karl Rahner calls "the epistemological basis for the theological conception of mystery".⁷ Though mystery is received through faith rather than reason, surely it is no less intelligible. Mysteriousness seeks a puzzle-solution, its method consists in the acquisition of additional data, piecing bits of information into some array. Mystery seeks self-

⁶René LATOURELLE, Christ and the Church, transl. by Sr. Dominic PARKER, New York, Alba House, 1972, p. 132.

⁷"Mystery", in Karl RAHNER, ed., Encyclopedia of Theology, The Concise Sacramentum Mundi, New York, Seabury (Crossroads), 1975, p. 1002.

transcendence, its method consists in the acquisition of a new perspective, one which operates on information but arranges it so as to impart meaning at a "higher" level.⁸ As a simple illustration, suppose one were to try to "read" a novel one letter at a time, even one word at a time. However diligent the effort, it could not lead to an understanding of the plot, let alone the theme. Understanding occurs on another level: beyond syntax to semantics. A reader transcends the letter- or word-tokens on a page (in this sense he does not even "see" them), developing thoughts out of whole phrases, sentences, paragraphs, etc. The example is one of literal transcendence, even though a simple, everyday sort.

1. Evolving an Image of Mystery Medium

Now then, to model the church in terms of communication it would seem sufficient to show that the church is a (not exclusively the) vehicle for divine / human dialogue. At the same time, however, the church is an historical and living community of people convoked and commissioned by God. Thus it shall be necessary to show how this active body doubles as an instrument of dialogue. The point may be reduced to asking whether communication can be performative. It can be, at least in ordinary language, as "performative utterances". It may be helpful to have an idea of performative communication before reflecting on its possibilities for a church model.

⁸"This orientation towards mystery is not a mere residue of what for the moment is not yet known, nor is it something which is found side by side with what is clearly known and with what can be clearly investigated. It is the innermost essence of transcendence in cognition and freedom, because it is the condition of the very possibility of cognition and freedom as such". RAHNER, loc. cit.

The contemporary philosophical study of language acts was inaugurated in 1950 by Peter Frederick Strawson.⁹ By distinguishing the use of an expression from the utterance of an expression (e.g., two people may utter the same sentence, but use it in different ways), Strawson emphasized the fact that speaking is doing. John Langshaw Austin¹⁰ attempted to distinguish just what words can do. To begin with the most obvious, an utterance¹¹ occupies some medium. These are communication tokens: movement of air waves, ink markings on a page, bodily gestures, etc. Some utterances are used to describe or report states of affairs; these are either true or false accordingly. Other utterances are used to perform or purport something; these either succeed or fail.¹²

One party expresses something by verbal, literary, or other means to another party. The parties need not be physically present to one another at the moment of expression, nor need the expression specifically name those to whom it is addressed, provided there is some generic identification (e.g., a public notice to the effect that "all able-bodied men are hereby ordered to report for duty"). The expression performs what it states. This endeavor is subject to the

⁹"On Referring", in Mind, 59(1950), pp. 320-344.

¹⁰"Other Minds", in Proceedings of the Aristotelian Society, suppl. 20(1946), pp. 169-175 [reprinted in Philosophical Papers, pp. 44-84]; "Performative Utterances", in Philosophical Papers, pp. 220-239; and How to do things with Words, Oxford, Clarendon, 1962, 166 pp.

¹¹Though AUSTIN and others have focused upon speech acts, performative utterances shall be taken more generally to include all communication media, whether literary, pictorial, or other equivalents.

¹²AUSTIN speaks of the "felicity" or "infelicity" rather than "success" or "failure" of a performative utterance, but the difference is terminological.

context of its usage,¹³ but as yet lacks any firm rules for success.¹⁴ For example, "I suggest that you reread this paragraph" does in fact make a suggestion. However, "the author suggests that the reader reread this paragraph" report what the author has done. As a report it is either true or false, true in this case. Other performative expressions have to do with adopting, betting, consenting, guaranteeing, guessing, naming, promising, vowing, warning, and so forth. In any case, "if a person makes an utterance of this sort we should say he is doing something rather than merely saying something".¹⁵ E.g., "I apologize . . .", "we confer upon you the degree . . .".

¹³The exchange of marital vows provides a familiar example of why an "I do [hereby marry you]" may fail to be performative. If the ability of either party is impeded, or if some essential element of consent is lacking, or if the requisite formalities are not observed, then no vow obtains, the utterance, is "impotent". "Now at this point one might protest, perhaps even with some alarm, that I seem to be suggesting that marrying is simply saying a few words, that just saying a few words is marrying. Well, that certainly is not the case. The words have to be said in the appropriate circumstances, and this is a matter that will come up again later. But the one thing we must not suppose is that what is needed in addition to the saying of the words in such cases is the performance of some internal spiritual act, of which the words then are to be the report. It's very easy to slip into this view at least in difficult, portentous cases, though perhaps not so easy in simple cases like apologizing". AUSTIN, "Performative Utterances", p. 223. Were AUSTIN speaking to a canonist he would say something like: consent is part of the performative expression. Marriage is effected by the expression of consent; if consent is lacking, the attempted expression thereof is vacuous.

¹⁴See L. Jonathan COHEN, "Do Illocutionary Forces Exist", in Philosophical Quarterly, 14(1964), pp. 118-137; P. F. STRAWSON, "Intention and Convention in Speech Acts", in The Philosophical Review, 73(1964), pp. 439-460; and John R. SEARLE, "What is a Speech Act", in Max BLACK, ed., Philosophy in America, Essays, London, George Allen and Unwin Ltd., 1965, pp. 221-239. See also the symposium on performatives in Theoria, 29(1963): Ingemar HEDENIUS, "Performatives", pp. 115-136; Justus HARTNACK, "The Performatory Use of Sentences", pp. 137-146. In the issue just before, Georg Henrik von WRIGHT takes a close-up look at one type of performative utterance, "On Promises", in Theoria, 28(1962), pp. 276-297.

¹⁵AUSTIN, "Performative Utterances", p. 222.

Performative utterances can be seen in the studies of truth,¹⁶ rights and responsibility.¹⁷ However many or few other disciplines they occur in, performative utterances do in fact occur. To respond to an earlier question, communication can be performative for indeed it is (logicians would say the actual entails the possible). Whether this applies in the study of church is a further question, of course. But there is a more specific image¹⁸ than "performative communication" which better captures the contours of mystery medium: word-event. Its principal advantage is its ability to account for a communication medium which is not artificial, abstract convention as is the

¹⁶p. F. STRAWSON maintains that "true" is used primarily as a performative expression. To say a statement "is true" is not to make a statement about a statement, but to perform an act of accepting, agreeing with, or endorsing the statement. See Gertrude EZORSKY, "Performative Theory of Truth", in EDWARDS, ed. in chief, Encyclopedia of Philosophy, vol. 6, pp. 88-90.

¹⁷See H. L. A. HART, "The Ascription of Responsibility and Rights", in Proceedings of the Aristotelian Society, 49(1948-1949), pp. 179-194 [reprinted in Antony G. N. FLEW, ed., Logic and Language, Oxford, Blackwell, 1951, pp. 145-166]. According to HART, a phrase such as "this is now yours" really ascribes something, it is the very act of transferring a right. For a critique see Peter T. GEACH, "Ascriptivism", in Philosophical Review, 69(1960), pp. 221-225, and George PITCHER, "Hart on Action and Responsibility", in the same issue, pp. 226-235. HART makes a brief general concession to these criticisms in the preface to his Punishment and Responsibility; Essays in the Philosophy of Law, Oxford, Clarendon, 1978 reprint with revisions, p.v.

¹⁸It may be suggested that the function of language in Sprachereignis falls under the heading of what J. L. Austin has called performative discourse". Robert W. FUNK, Language, Hermeneutic, and Word of God; The Problem of Language in the New Testament and Contemporary Theology, New York, Harper and Row, 1966, p. 26. "Sprachereignis", language-event, is the virtual equivalent of "Wortgeschehen", word-event, the image about to be proposed. The close similarity between these terms and the theories underlying them will be indicated presently. Whichever term is used for the image, the point being made is that the image may be seen as a species of performative communication since it bears the characteristic of performing (creating, effecting) what it states and it is this more specific image that will be applied to the church.

case with ordinary human language, but connatural, significant activity as is the case with divine language. If an adequate church model can be fashioned out of this image, one which reflects church mystery, then its interpretation should designate the role of ecclesial law, law in the life of the church. Such is the task to which the following discussion is devoted. Once the word-event image has been set up, it can be linked with the church in terms of metaphor and model.

2. Ebeling's Theory of Word-event

The notion of word-event can be adopted as an image with some adaptation from Gerhard Ebeling's Wortgeschehen, which is not unlike Ernest Fuchs' Sprachereignis. Both Ebeling and Fuchs were students of Rudolf Bultmann at Marburg and all three were influenced by the philosophy of Martin Heidegger on the phenomenological nature and functions of man and language. Though a balanced appreciation of Ebeling's work would necessitate some study of Fuchs, Bultmann, and Heidegger, for the most part the present discussion will dispense with this since it is the mechanics of word-event and not Ebeling's general theological framework that is of immediate interest.¹⁹ One premise out of which Ebeling and others work, however, is the primacy of language: God and man are revealed as such through language.²⁰ A key consequence of this is

¹⁹Adequate introductions to the related thought of these individuals can be found in: James M. ROBINSON and John B. COBB, Jr., eds., The New Hermeneutic, New York, Harper and Row, 1964, xii-243 pp.; FUNK, Language, Hermeneutic, and Word of God, esp. chs. 1-3, pp. 1-71; and Paul J. ACHTEMEIER, An Introduction to the New Hermeneutic, Philadelphia, Westminster, 1969, 190 pp.

²⁰"Let us first recall the fundamental fact that it is the capacity for using words which constitutes man and reveals him as man". Michael SCHMAUS,

the commonality of language, God and man speaking to and with one another. Ebeling leads up to this in the following way.

Man finds himself in a passive position with respect to the world about him: he is created, not creator; subject, not sovereign of time, place and circumstances.²¹ Recognizing this situation takes the form of radical questioning: "the question of meaning, the question of guilt, the question of communication, etc".²² These questions arise out of the living situation of passivity, not out of an abstract notion of finitude (which asks after the prime mover, etc.). Most radically, the questioning concerns God: "God is experienced as a question".²³ And since "God gives himself to be

Dogmas I: God in Revelation, New York, Sheed and Ward, 1968, p. 96. "Speech therefore is no mere epiphenomenon of man but an integral part of his very being". Hans Urs Von BALTHASAR, Word and Revelation, transl. by A. V. LITTLEDALE with the cooperation of Alexander DRU, Montreal, Palm, 1964, p. 103. "Indeed, one must go further. Not only does man exist only in his speech, but also it is only in speech that reality presents itself to him. Language is itself the fabric of experience, since no matter how immediate and direct one's own experience may be, it is always mediated through the linguistic context in which he has his being. This means, then, that both the world and God come to expression only in the form of word". William R. BARR, "Word of God and Word of Man in Word-Event", in Lexington Theological Quarterly, 4(1969), p. 125. "[...] God himself is thus intrinsically word and not something which, in itself wordless, must first be placed by external means in the field of language in order to become an object of word". Gerhard EBELING, God and Word, transl. by James W. LEITCH, Philadelphia, Fortress, 1967, p. 28.

²¹Cf. Paul TILLICH, Systematic Theology, I-II, I c.

²²Gerhard EBELING, "Rudimentary Reflexions on Speaking Responsibly of God", in Word and Faith, transl. by James W. LEITCH, Philadelphia, Fortress, 1967, p. 349. Word and Faith is a collection of EBELING's previously-published essays.

²³ibid., p. 347. "It is not a case of just any questions that are answered sooner or later by reality that encounters me. Rather, it is a case of radical questionableness, and that means: a questionableness to which reality itself does not contain the answer. It cannot be answered by some element which is admittedly not yet known, but is to be discovered after all in the end, in the reality itself that concerns me. [...] Of course we must not stop at merely

known",²⁴ knowledge of God is no less passive; no more can be known about God in the living situation than he reveals.

How does God reveal himself in the living situation? By his intimate relation to reality: in and through the world,²⁵ but not simply as the world.²⁶ Consequently "all talk of God is worldly talk of God".²⁷ In other words, God is to be spoken of in the same way he speaks: concretely, clearly, actively.²⁸

penultimate and provisional lack of understanding and consequently assign God some sort of place among the gaps in our knowledge, so that as these gaps in our knowledge close, there is so to speak less room for God and his reality is pushed ever further afield with the bounds of our knowledge, and God thus finds himself on the retreat [...]" Ibid., p. 348.

²⁴"Knowledge of God is essentially determined by the fact that God gives himself to be known, and so gives man to know himself as the creature already known by God. The knowledge of God has therefore nothing of the character of spontaneous investigation and discovery on man's part". Ibid., p. 350.

²⁵"A God distinguished from the world is, if he is a God really conceived and objectified, in fact a piece of the world after all--even if it is called the reality above and beyond the world. If, however, he is radically separated from all conceivable reality, then he himself has consequently to be denied reality". Gerhard EBELING, "Worldly Talk of God", in Word and Faith, p. 357. See also Gerhard EBELING, "Word of God and Hermeneutic", in Word and Faith, pp. 324-325 [reprinted in ROBINSON and COBB, The New Hermeneutic, pp. 101-102].

²⁶"[...] Real knowledge of God is knowledge of the reality of God. The reality of God, however, is on no account to be thought of like the reality of the world and consequently as a piece of the world's reality; nevertheless the reality of God can be expressed solely in view of the reality of the world". EBELING, "Reflexions on Speaking Responsibly of God", p. 345

²⁷EBELING continues: "We cannot speak of God without the world being also included one way or another--nor indeed in the sense of an unfortunate necessity, but because our talk of God is addressed to the world; indeed, if we speak rightly of God, because God himself addresses himself to the world in such a way that he is its absolute concern and to that extent belongs absolutely to the world. If we thus cannot speak of God without the world being also included, then everything now depends entirely on how the world is included, on the sense in which our talk of God is worldly, on what is false and what is true worldly talk of God". "Worldly Talk of God", p. 359

²⁸See ibid., pp. 360-361

Such speech from man and from God, each to the other, comes together through the events of their common ground: the world.²⁹

The nature of word-event is itself rather straightforward. If performative utterance is characterized as an utterance which accomplishes (does, effects, performs) what it articulates (says, signifies, proclaims), then word-event is an event which articulates what it accomplishes. They differ in a couple of respects, the first of which is media: the one being linguistic convention; the other, connatural activity. The second difference has to do with what may be called logical or conceptual sequence. The one is an articulation which accomplishes; the other, an accomplishment which articulates. But regardless of which aspect conceptually comes first, articulation or accomplishment, it is essential to the workings of performative utterance and word-event that the two aspects pertain to some same thing. The performative-utterance "I bet five dollars", for example, does what it says. Performative utterance and word-event differ in this regard from all other forms of signification. And it is this economy which will play a central role when applied to the transcendental operation of mystery.

The sort of word-event with which the following discussions are concerned is self-revealing. Word-events are events which reveal the true nature of a person, relationship, or situation. Now not every act of embezzlement, for instance, indicates a selfish interest. There may be mitigating circumstances of poverty, illness, urgency, or ignorance. But apart from these circumstances such an act discloses something about the thief, or about his relationship to the

²⁹See Gerhard EBELING, "Theology and Reality", in Word and Faith, pp. 191-200.

victim. So too in the more savory example of manna on the Exodus, these provisions were interpreted as revealing Yahweh as provider. Le style c'est l'homme.

Complications set in when criteria for identifying and interpreting word-event, especially God's word-event, are called for. Religions throughout history have not been nonplused when it comes to suggesting, often claiming, criteria for discerning God's word. Word-event is at least not inflationary, however, in that its method of discernment is patterned after the aforementioned method of mystery (namely, the acquisition of a new perspective, one which operates on information but arranges it so as to impart meaning at a higher level). In terms of word-event this means the perception of significant events: events which signify what they effect.³⁰ Signification refers to some aspect of the relationship between God and man. The effects are manifest in and through worldly events. And the perception thereof operates out of a faith perspective. The clarification of these elements could be more specifically set in terms of the church word-event metaphor, to which the discussion is now directed. By way of transition, question could be raised as to the basis of word-event as an image.

As an image, word-event is something of a novelty. Part of what is meant by the fact of word-event, God speaking in and through-worldly activity, is as old as, well, God speaking. The formal recognition of word-event, however, is a product of the latter twentieth century and all the more innovative when

³⁰It is in the event of perceiving significant events that communication is achieved. "The basic model for this event is not a statement, irrespective of the situation of speaking. It would be better to describe the event of the word as a communication". Gerhard EBELING, The Nature of Faith, trans. by Ronald Gregor SMITH, London, Collins, 1961, p. 186.

applied to the church. But then images are not things that were in the beginning, are now, and forever shall be; they are used as long as they are useful.

The manufacturing of supplementary images goes on whenever the faith is vital. Today we experience some difficulty, however, since our experience of the world has become, in so many respects, secular and utilitarian. Our day-to-day life provides very few objects having numinous overtones that would make them obvious sources of new religious imagery--though there are some brilliant suggestions for new imagery in the writings of theologians such as Paul Tillich, Teilhard de Chardin, and Dietrich Bonhoeffer.³¹

Taking up that last example, Bonhoeffer's notorious image of the world "come of age"³² straightforwardly fails to meet the first two of Dulles' seven criteria for evaluating models: basis in scripture, basis in Christian tradition.³³

Since models are based upon metaphors and an image is linked to the church to yield a church metaphor, one would rather expect any criteria proposed to evaluate models to have bearing upon the evaluation of images. If so, the sheer weight (theological impact, acceptance, and utility) of Bonhoeffer's image is enough to offset the two mentioned criteria. Dulles would not likely disagree, for as he explains "nearly all Christians feel more comfortable if they can find a secure biblical basis for a doctrine they wish to defend--the clearer and more

³¹DULLES, Models of the Church, p. 26.

³²Most notably pronounced in his 30 April, 8 June, and especially 16 July 1944 letters from Tegel prison, Berlin.

³³See DULLES, Models of the Church, p. 198.

explicit the better". Something similar is said of tradition.³⁴ In other words, these criteria are more for the affective than cognitive evaluation of models (thus images). The remainder of Dulles' criteria will be dealt with later, but for now, by the precedent of Bonhoeffer's image, Ebeling's adapted image will not be subjected to any exegetical contrivance. The image shall have to prove itself useful for what it can be, not for what it might have been.³⁵

B. Church Word-event Metaphor

"One cannot couple any two nouns at random and be sure to produce an effective metaphor".³⁶ Yet the same flexibility of language which permits metaphors denies clear rules for their recognition. Monroe C. Beardsley³⁷ suggests the criterion that a metaphor taken literally yields logical absurdity or patent falsehood. Max Black objects "that this test, so far as it fits, will apply equally to such other tropes as oxymoron or hyperbole, so that it would at

³⁴"Not all Christians set the same value on tradition, but nearly all would agree that the testimony of Christian believers in the past in favor of a given doctrine is evidence in its favor. The more universal and constant the tradition the more convincing it is". Loc. cit.

³⁵To a certain extent it is incumbent upon the responsibility of speculative theology to take a creative role in representing the church through images and thus through metaphors and models. To place all images at the mercy of scripture and tradition is to pronounce their number fixed, perhaps to regard their interpretation immutable, and quite possibly to seal off all discussion with an ever-changing world.

³⁶BLACK, "More about Metaphor", p. 436.

³⁷"The Metaphorical Twist", in Philosophy and Phenomenological Research, 22(1962), pp. 293-307

best certify the presence of some figurative statement, but not necessarily a metaphor".³⁸ In other words, Beardsley's contrast is lost. Literal falsehood, if necessary, is not sufficient; otherwise all false statements would be metaphors. Instead, "our recognition of a metaphorical statement depends essentially upon two things: knowledge of what is to be a metaphorical statement, and our judgment that a metaphorical reading of a given statement is preferable to a literal one".³⁹ If so, then the statement "the church is word-event" ought to be pursued along two lines. First, what it is for the statement to be metaphorical, specifically to be an interaction metaphor, and second the preferability of a metaphorical reading.

I. Nature of the Metaphor

It requires no exotic or rigorous understanding of "literal" to realize that the church is not literally word-event. That much is obvious, but it is not so immediately evident that "the church is word-event" could not be reduced to some literal expression(s). If it could, then the metaphor belongs to the substitution sort. And that entails a rather modest contribution from the metaphor to the understanding of the church, not much more than decorative description or quaint predication. If, however, the metaphor imparts new information in the reconciliation of its terms, then the metaphor is of the interaction variety; where the whole (total information content) is greater

³⁸BLACK, "More about Metaphor", pp. 449-450.

³⁹Ibid., p. 450. Cf. Ina LOEWENBERG, "Identifying Metaphors", in Foundations of Language, 12(1975), pp. 315-338.

than the sum of its parts, it cannot be reduced to same.⁴⁰ Consequently, by demonstrating that "the church is word-event" is an interaction metaphor, it follows that it is not a substitution metaphor since the two types of metaphor are exclusive.⁴¹

How then does "the church is word-event" operate as an interaction metaphor? Its mechanics may be seen in a series of claims à la Max Black.⁴² The metaphor results from a statement having what can be distinguished as two subjects:⁴³ one primary, "the church"; the other secondary, "word-event".

⁴⁰See Felicity HAYNES, "Metaphor as Interaction", in Educational Theory, 25(1975), pp. 272-277.

⁴¹For students of logic, a clear case of "modus ponendo tollens". An inference of the form 'Either A or B; A; therefore not-B'. This type of inference is valid only if 'or' is interpreted as exclusive disjunction". Boruch A. BRODY, "Logical Terms, Glossary of", in EDWARDS, ed. in chief, Encyclopedia of Philosophy, vol. 5, p. 69

⁴²Cf. BLACK, Models and Metaphors, pp. 44-45; "More about Metaphor", pp. 441-443.

⁴³BLACK says simply "a metaphorical statement has two distinct subjects". It would be more accurate to say that the metaphor results from or arises out of such a statement in the reconciliation of these subjects than to identify metaphor with the statement. This is more in line with Paul RICOEUR's "tension theory" when he says: "Metaphor depends upon a semantics of the sentence before it concerns a semantics of the word. Metaphor is only meaningful in a statement; it is phenomenon of predication. [...] Metaphor proceeds from the tension between all the terms in a metaphor statement". "The Metaphorical Process", p. 77. But if BLACK does not go far enough, RICOEUR seems to go too far when he adds that the tension which gives rise to metaphor "is not something which occurs between two terms of the statement, but between two complete interpretations". He is referring to literal and absurd interpretations. "The strategy of discourse by which the metaphorical statement obtains its meaning is absurdity. This absurdity is revealed as an absurdity for a literal interpretation". Ibid., pp. 77-78. That presupposes the existence of independent literal and absurd interpretations, in the resolution of which metaphor is to obtain. But is not such a presupposition self-defeating? Were there a literal interpretation or an interpretation reducible to the literal, then the substitution view of metaphor comes into play. And the idea of an absurd interpretation is itself absurd or at least self-contradictory.

Word-event is regarded as an interrelated system, a field of identifiable events, perceptions, meaningful or significant effects, etc., with their various properties and characteristics. These aspects of word-event are transferred to or "projected upon" the church. As one recognizes an isomorphism between the church and word-event certain points which they strongly have in common are emphasized (the chief one of which, for present concerns, is self-transcendence, but also a dynamic medium--a spiritual community in the one case, worldly events or activity in the other; etc.), weaker or dissimilar points are passed over in silence or suppressed (e.g., institutionalism in the one case, naturalism in the other). The church and word-event are each seen in terms of the other. As a result, a new perspective of the church and of word-event is gained by viewing each more like the other.

The Church and word-event are not seen simply "like" or "as" each other, for they are partially isomorphic; certain aspects of each are identical, at least functionally so. E.g., the stronger points of commonality mentioned. Yet they are not wholly isomorphic, as evidenced by the nature of their dissimilarities. Were they entirely correspondent, the association would be more literal than metaphoric.⁴⁴

⁴⁴"Implication is not the same as covert identity: looking at a scene through blue spectacles is different from comparing that scene with something else. [...] To suppose that the metaphorical statement is an abstract or précis of a literal point-by-point comparison, in which the primary and secondary subjects are juxtaposed for the sake of noting dissimilarities as well as similarities, is to misconstrue the function of a metaphor". BLACK, "More about Metaphor", p. 445. Dissimilarities between the church and word-event are not merely trivial variations, such as different colors of skin on an apple and an orange. Such dissimilarities still correspond, namely in that they have colored skins. Church and word-event differ in non-corresponding ways, the most obvious being that the nature of one is a social reality, the other a linguistic phenomenon. It will not do to object that they too correspond by having natures, for all things do and the objection thereby voids the very contrast (between metaphorical and literal) it wishes to press.

2. Preferability of the Metaphor

Word-event, as we have said elsewhere,⁴⁵ is predicated upon God's word being self-revelatory, creative, and inseparable from the world. The events of the world through which God reveals himself and his will are creative events in the world:⁴⁶ be they individual acts such as a manna on the Exodus, or living examples such as the lives of the saints; celebrations, persecutions, convocations, conquests, commissions; through natural events (feasts, famines, floods) or human events (as Isaiah says: "O Lord, you mete out peace to us, for it is you who have accomplished all we have done" ISAIAH 26.12). In any event,

God speaks in and through the world. Merely that such and such obtains in the world, that some spatio-temporal state of affairs is the case, is not in itself word of God. Man is needed to complete the communication of God. The one who is to be the recipient of his word in direct encounter must see the divine word through the ways of the world. The world is the vehicle of God's word, for it obtains in the ways of the world—but is not to be left at that to be identified with the world. The communication of God finds completion in man's recognition of what it is. To receive the word of God is to 'get behind' what is spoken and to get to the speaker. Thus the word of God maintains

⁴⁵Roger A. KENYON, Existential Structures; An Analytic Enquiry, New York, Philosophical Library, 1976, pp. 50-57.

⁴⁶"God's word has effect. [...] The active character of the word can be illustrated by the Hebrew expression 'dabar', which signified both 'word' and 'deed' (see, e.g., Gén. 15,1)". SCHMAUS, God in Revelation, p. 115. What does this make of scripture? As a literary text, nothing. As an instrument through which recorded events of God's word are transmitted anew (therein lies the activity), scripture is word-event. This is similarly true of tradition. See Vatican II, const. "Dei Verbum", 18 Nov. 1965, no. 7-26, in A.A.S., 58(1966), pp. 820-830.

divine status though it be expressed in the world and through the world to man. No identity exists with the word of God and the world, yet the former is inseparable from the latter.⁴⁷

This raises the question of verification: how does one know that worldly event is word-event? Well, what more is word-event than worldly event: divine communication and human reception. As to the former, the Second Vatican Council opened its constitution on divine revelation by restating what believers believe God's ongoing word to be.

It pleased God, in his goodness and wisdom, to reveal himself and to make known the mystery of his will (cf. Eph. 1.9). His will was that men should have access to the Father, through Christ, the Word made flesh, in the Holy Spirit, and thus become sharers in the divine nature (cf. Eph. 2.18; 2 Pet. 1.4). By this revelation, then, the invisible God (cf. Col. 1.15; 1 Tim. 1.17), from the fullness of his love, addresses men as his friends (cf. Ex. 33.11; Jn. 15.14-15), and moves among them (cf. Bar. 3.38), in order to invite and receive them into his own company.⁴⁸

Events which effectively signify this word pertain to word-event. As to human reception, the Council further points to the necessity of a faith perspective.⁴⁹ While the particular nature of faith is best reserved for a subsequent discussion, suffice it to say that faith opens a man's heart and mind to accept what is

⁴⁷KENYON, Existential Structures, p. 56.

⁴⁸Vatican II, "Dei Verbum", no. 2, p. 818. The passage continues: "This economy of Revelation is realized by deeds and words, which are intrinsically bound up with each other. As a result, the works performed, by God in the history of salvation show forth and bear out the doctrine and realities signified by the words; the words, for their part, proclaim the works, and bring to light the mystery they contain. The most intimate truth which this revelation gives us about God and the salvation of man shines forth in Christ, who is himself both the mediator and the sum total of Revelation".

⁴⁹Ibid., no. 5, p. 819.

beyond him in the depths of reality.⁵⁰ An individual who is merely an observer of worldly events and is not himself open to revelation will describe events which those who are open to revelation say are transcendental as at best coincidental with their beliefs.⁵¹ Ebeling takes the tact of saying a certain word is God's word in that it raises the context to ultimate concern.⁵²

To say "the church is word-event" is to substitute "churchly" for "worldly". Or rather, to limit the medium through which God speaks to that of the life and times of the church. The limitation is one of focus. It is not to say that God cannot or does not speak via non-church world events, but rather to direct attention to the church as one way through which he communicates. And to say God speaks in and through the church is not thereby either to affirm or deny that in some sense he inhabits the church.

Those events in the history of church life which signify God's ongoing word are properly "churchly" word-events, church-word-event. However only if one is prepared to defend the thesis that all events in church history present God's word can it be said that church history is the history of church-word-event. Such a sweeping claim, if possible, is not necessary. It suffices for purposes of

⁵⁰Cf. Vatican I, "Dei Filius", ch. 3, in MANSI, ed., Sacrorum Conciliorum, vol. 51, col. 432-433. But both revelation and reason precede faith. See the articles subscribed by Louis BAUTAIN and Augustin BONNETTY, referred to in note 19 of chapter five, infra.

⁵¹Note the parallel to the internal / external perspective of rules described by H. L. A. HART in chapter two, supra.

⁵²"God's word is itself verification. It verifies itself by verifying man. [...] God's word is in essence not that which merely supplements the context into which it enters. On the contrary, it renders a decision concerning it. And accordingly the hidden factor which is announced into the context by the word of God does not concern some aspect or other of the context, but rather the whole context itself. It renders a life and death decision". EBELING, God and Word, pp. 40, 42.

the metaphor "the church is word-event" to show that church-word-event can occur. That it can occur is perhaps most concretely demonstrated by showing that it has occurred. Is it too soon to cite the aggiornamento of John XXIII as an example? Convocation of the Second Vatican Council; the Conciliar call for renewal and reaffirmation of pastoral activity, religious life, education, ecumenism, ministry, mission, etc.; continuing implementation of this vision. Such a church-word-event is closer to a process, like the Reformation, than an individual act, like parting the waters. (How would one classify the conversion of Augustine, as an act or process? Clearly the classification of an event is not relevant to whether or not it is word-event.) In so far as God's salvific will for man is conveyed, even mediately or indirectly, through this church event, it is word-event.

"The church is word-event" metaphor redescribes the two subjects, "the church" and "word-event", such that each is seen to be more like the other. The dynamic medium of word-event is accentuated by its association with human activity, events in the lives of people who constitute the church. Word-event, specifically church-word-event, is thus seen to be more a living thing. It is instilled with a sense of theme by association with divine revelation. The transcendental nature of the church is brought out by its association with performative communication, actions indicating what they effect. It is instilled with a sense of plot by association with human activity. Therein lies the thrust and chief contribution of the metaphor to understanding the medium aspect of church mystery. As discussed earlier, church mystery possesses two aspects: medium and message. The medium is visible community faith, hope, and charity; the message is truth and grace to all men. The new perspective gained from the metaphor "the church is word-event" reconciles these aspects in terms

of church-word-event. That is, a faith perception of church events which manifest God's love, church action which goes beyond human deeds to doing while saying the will of God.

C. The Church-word-event Model

Up to this point the meaning of the term "church" has not been developed at length. Only what was of particular importance for the discussion has been mentioned. Now the question is one of describing and interpreting the church in terms of word-event and word-event in terms of the church; that is, modeling the church as church-word-event. A model, once again, systematically represents or describes by way of some metaphor, in this case the interaction metaphor, "the church is word-event", so as to contribute new information about the original entity, viz. the church. As a description and interpretation of the church is made by unfolding church-word-event, the role of church law should unfold with it. This is a methodological consequence of the thesis that ecclesial law finds its identity primarily in the church and secondarily in law. In other words, church law is a study of the church, not the other way around as it has sometimes, intentionally or otherwise, been assumed. What remains then are a few reflections on the church-word-event model drawn from the study of ecclesial identity thus far.

I. Nature of the Model

If models represent or describe by being different from originals, how does word-event differ from the church? If simply as the result of change in spatio-temporal proportion, the model belongs to the scalar family. Scale

models detail originals, but add nothing to understanding them. They are useful for depicting the placement of originals among other things, but convey no insights into the nature of what they picture. Weighing the pros and cons of scale models as if anticipating a purchase is, however, a luxury word-event cannot afford, for it does not really differ from the church on the basis of dimensional alteration. Church-word-event is a spatio-temporal subset, so to speak, of the church. When and where there is word-event that is church-word-event, there is church.⁵³ That is rather a tautology.

Similarly church-word-event is no analogue model of the church in that it does not play upon a change of medium. Use of the term "medium" can be a bit confusing since it has not consistently come up in the discussion in the same sense. The discussion has resolved itself to the following method. The first step toward a descriptive concept of ecclesial law calls for at least one church model which reflects mystery. To facilitate matters a model is being constructed along the lines of church mystery medium, viz. events of the living community. This was the first use of "medium", with accent upon "event". Events are word-events in that God speaks in and through them to man,⁵⁴ but first they are events in the world. Since worldly events are the medium of word-event and church-word-event is a species of word-event, the church

⁵³As mentioned in the last section, it is not necessarily the case that church history extends only as far as the history of church-word-event. That is, there is no reason to suppose that the church is exhaustively described by church-word-event. There are church words and events which are not word-events. Yet where there is church-word-event necessarily there is church, for church-word-event is categorically, even if not exclusively, an occurrence of church.

⁵⁴The other side of the story is that man too speaks in and through events to God. Both God's word-event and man's word-event are contained in the notion of church-word-event.

modeled as church-word-event shares the same medium as word-event, namely certain events of the world.⁵⁵

On the other hand, there is another sense of "medium" in which the church and word-event differ. The church is a social reality whereas word-event is a linguistic phenomenon. But does the fact alone qualify church-word-event as an analogue model of the church? And if it is so qualified, wherein lies its merit, just how informative is it? Well, to say that a model is an analogue model is to categorize it according to some identifying (even if only formal) characteristic, viz. a change of medium. So under the second sense of "medium" church-word-event cannot be excluded from the analogue model category. But then neither could, say, a model based upon the metaphor "the church is a quadratic equation", were that a metaphorical statement. What "the church is word-event" has that "the church is a quadratic equation" has not is an isomorphism between the model and original. If word-event, unlike a quadratic equation, embodies the same pattern of relationships as the church, then church-word-event should be included as an analogue model.

That an isomorphism exists between church and word-event was seen, under the interaction metaphor "the church is word-event", as their stronger points of commonality. Now then, "one of the prime purposes of this kind of model is to make possible a completely comprehensive interpretive framework for all possible happenings [...]"⁵⁶ That is, in terms of the present model, to

⁵⁵The point stands even when the common denominator, word-event, is subtracted: the church is worldly in that it is real and exists on earth (which is not to deny that it is also ethereal). The church--its people, their work--does not exist apart from the world; on the contrary, it constitutes the world in part.

⁵⁶FERRÉ, "Metaphors, Models, and Religion", p. 341.

illustrate a set of church events as interrelated instances of divine / human dialogue. As an analogue model church-word-event brings events in the history of God's people⁵⁷ into a whole so as to show their collective meaning, namely that they are constitutive of the church which is thus a dynamic social reality.

As interesting as it is, that seems to be about as far as church-word-event can go under the auspices of an analogue model. As such it fares no better than any other analogue model when it comes to reflecting mystery. Nevertheless, from what was said about "the church is word-event" as an interaction metaphor there does appear to be an isomorphism between the transcendental operation of word-event and mystery medium of the church. It is just that an analogue model, which competently reflects the interrelationship of church events, cannot go far enough. It cannot make the connection between the theory of word-event and ecclesial reality, much less sustain a systematic interpretation of church-word-event. The reason, one may hazard to hypothesize, is that the connection has to do with neither internal nor external church relationships, but with the conceptual perception of the church as a whole. A difference of conceptual perception is a difference that launches a theoretical model.

A theoretical model introduces a new way of looking at and speaking about an original. It is to envision the church as word-event. But that can mean either the church as if or as being word-event. The former is what Max Black calls a "heuristic fiction", a convenient description "reminiscent of simile and argument from analogy".⁵⁸ If so, then the metaphor which underlies the

⁵⁷Strictly speaking the order between events and history is the other way around. History is constituted by events.

⁵⁸BLACK, Models and Metaphors, p. 228.

model would seem to be the elliptical simile sort discussed earlier, a special case of substitution metaphor. The theory itself would subscribe to the instrumentalist view. That is, to say church-word-event is a useful device for organizing knowledge and accordingly making predictions about the church, whether or not church-word-event^o really refers to the church as it is.

But it has already been seen that "church" and "word-event" interact metaphorically so as to contribute new information by their association with one another. And since interaction and substitution metaphors are mutually exclusive, the theoretical model is one of the church as being word-event. The theory itself partakes of the realist view, which is to say a description of church-word-event consists of true or false statements referring to the reality of the church. Thus, when a theory of the church is developed in terms of word-event, church-word-event is how the church is understood to be. Church-word-event is identified with the way the church is.

2. Interpretation of Church in Terms of Word-event

The mechanics by which word-event gives meaning to the church builds upon the operation of "the church is word-event" as an interaction metaphor.⁵⁹ Fundamentally it is an operation to organize certain information so that it can be interpreted. The corpus of information about the church consists of such established facts and regularities as: the church is made up of people; these people are commonly associated by a creed; they profess and attempt to live out what they mean by faith, hope, and charity; it is held that by their common

⁵⁹See ibid., pp. 230-231; cf. the discussion surrounding note 43, supra.

association the people communicate with God in a special way; their common association typically gives rise to supporting structures and specializations, etc. The nature of word-event is taken as a pattern for organizing what is known about the church. Word-event is a blend of word and event. As such it brings together the semiotic properties of word and dynamic properties of event so as to be a special case of performative communication. More will be said about these properties with respect to their consequences for an interpretation of church. The correlation between word-event and church is determined by use of the interactive metaphor "the church is word-event". That gives rise to an interpretation of church-word-event, a presentation of the church as being word-event. The resulting conceptual perception of the church is two fold: a new way of seeing what is known about the church and a way of seeing something new about the church--explication and prediction.

One of the new ways of seeing what is known about the church goes back to the properties which word brings to word-event and are interactively projected onto the church. To begin with, "by 'word' we do not mean the single word. This word, as a unit of language, is an abstraction over against the original conception of word as containing an encounter. By 'word', then, we mean something with a totality of meaning".⁶⁰ In this sense a word is a unit of communication--which is to describe it by its utility or purpose in the vein that "language is what language does".⁶¹ Looking at the unit itself, an account may be made of how its elements are arranged, what it signifies or means, and who

⁶⁰EBELING, The Nature of Faith, pp. 185-186.

⁶¹To borrow a phrase from H. Jackson FORSTMAN, "Language and God; Gerhard Ebeling's Analysis of Theology", in Interpretation, 22(1968), p. 191.

makes use of it when, where, and how. These are the three traditional branches of semiotics: syntax, semantics, and pragmatics. For example, the parts of some unit of communication, in order that the unit be conventionally recognized and consequently succeed in communicating, must exhibit what is regarded as proper form. That is, the unit has to be grammatical. But that does not mean the church must be grammatical, which does not seem to make sense, for it is the properties of word-event and not simply word (in the sense of artificial, human convention) that are projected onto the church by the interaction metaphor "the church is word-event".

The semiotics of word are tempered by the dynamics of event. Events are immanent and immediate. The result is that a "semiotic" of word-event has to do with communication through connatural, significant activity. Consequently it would be better to speak of the perception, signification, and efficacy of word-event. It is this "semiotic" property that is transferred to the church. It is interactively transferred: as the church and word-event are each progressively seen to be more like the other, their properties each "go over" to the other by illuminating isomorphic equivalents in the other. Intuitively one may say the isomorphic equivalents of perception, signification, and efficacy in terms of a living community convoked and commissioned by God are identity, direction, and purpose. These terms will be allowed to stand without elaboration for now since only their presence and the fact that they constitute the church is relevant to an interpretation of the church as being word-event. They will be given particular consideration in conjunction with the origin and orientations of ecclesial law.

Still taking word as a unit of communication but now looking at the communication act itself, an account may be made of the communicator's

attitude toward the subject matter of the communication: whether it is regarded as a fact, as a matter of supposition, desire, or possibility, or as a command, admonition, or entreaty. These are the three traditional aspects of mood: indicative, subjunctive, and imperative. In man-made languages (artificial, human convention) mood is shown by an inflection of the verb, as in Latin or Greek, or by auxiliaries, as English "may", "should", "could", or by both. Again, that does not mean the church has verbs that inflect or take auxiliaries any more than word-event has them. The event dimension of word-event displays the communicator's attitude.⁶² The church, as an expression, may be said to convey God's attitude or its own attitude on behalf of God in the approach it takes to the very thing it does. Some things the church contemplates, others it legislates; sometimes it preaches, sometimes it practices; etc. Under the model of church-word-event these things are the church: being and doing communication between God and man. Since the communicator's attitude is constitutive of the expression in word-event, rather than merely represented in it as is the case with word, it would be helpful to distinguish what type of attitude is meant by referring to that relating to word-event as, say, mode and that relating to word as mood. One may continue to speak of the indicative, subjunctive, and imperative when speaking of word-event as long as it is kept in mind that their meaning derives from an interaction metaphor. Thus it may be said that church-word-event possesses indicative, subjunctive, and imperative modes. Given the residual

⁶²Note that with word-event, since there does not seem to be firm rules governing its formulation, there may be greater room for ambiguity over the communicator's attitude. The communicator's attitude need not coincide with what a recipient takes the communicator's attitude to be.

connotations of these terms, however, it would probably be best to select something more neutral, such as "actuality, possibility, and necessity".

Further interpretations of church-word-event are possible by following the preceding method. That is, taking some aspect of a unit of communication as it occurs in word-event and interactively associating it with the church. But at any rate the interpretations already made sufficiently anticipate church law.

First, however, something should be said about the validity of the church-word-event model. According to Max Black,

We can determine the validity of a given model by checking the extent of its isomorphism with its intended application. In appraising models as good or bad, we need not reply on the sheerly pragmatic test of fruitfulness in discovery; we can, in principle, at least, determine the 'goodness' of their 'fit'.⁶³

Black's position is basically that a model is validated by "the putative isomorphism between model and field of application". An inconsistent or incomplete "fit" would count against a model. Consequently church-word-event shall have to rationally correspond to familiar experiences or phenomena of the

⁶³BLACK, Models and Metaphors, p. 238. DULLES has a handful of pragmatic tests in case they are needed: capacity to give church members a sense of their corporate identity and mission; tendency to foster the virtues and values generally admired by Christians; correspondence with the religious experience of men today; theological fruitfulness (ability to solve problems that proved intractable by appeal to the older models, or to synthesize doctrines that previously appeared to be unrelated); and fruitfulness in enabling church members to relate successfully to those outside their own group. Models of the Church, pp. 198-199. DULLES' tests are as broad as they are important, sufficiently so as to warrant weaving them into the more specific context of ecclesial law. This would be more appropriate than standing them up to the model for an appraisal vis-à-vis the church in general, for the model itself is more specifically that of church mystery and church law's account thereof. It is worthy of note that BLACK is treating of theoretical models while DULLES has been considering analogue models.

church. The key match at hand is between the canonical, theological, and pastoral phenomena and church-word-event modes. A "fit" here would, for the most part, validate the model.

If the process by which church law unfolds has been understood, church law will be seen as an interpretation of the church and unfolded along with theology and the pastorate.⁶⁴ According to the model of church-word-event the church is a nexus of events (from an individual's one-time action to a people's ongoing process) possessing such identity, direction, and purpose as to be by doing (proclaim by performing) communication between God and man. At the same time the communicator's (apparent) attitude is part of the communication, making the message a matter of actuality, possibility, or necessity.⁶⁵

To consider the church on the basis of its modes is to treat each mode as a substantive (that is, concentrate on its unique properties) and evolve principles governing its operation. At this level of abstraction the actuality, possibility, and necessity modes are a study of the church pastoral, theological, and canonical. Having reached that level of interpretation of the church as being

⁶⁴The caution is against a preconceived notion of church law that seeks to fit church-word-event as best it can into the categories of that notion. Ironically such a notion is itself another model of the church or church law and the forced-fit is a category mistake of assuming that models have interchangeable parts.

⁶⁵It should be reiterated that the communication is performative; it exists only in dynamic context and can no more be isolated from worldly ("churchly") events than "flowingness" can be isolated from a river. Certain acts of protection and provision (e.g., events during the Exodus) are held to say by doing. "I am your God and you are my people". Other word-events have more to do with possibility (e.g., those acts which say "that you may be saved, have faith" or "if you love us, help us") or necessity (e.g., acts which effect as they signify "you are to worship no other", "let my people go", etc.).

word-event at which the sought after and apparently familiar term "canonical" appears, it is possible to reverse the process, to look back at whence it came and in doing so piece together a description of ecclesial law. Simply put, ecclesial law is a mode of the church being word-event. Underneath, however, lies a way of seeing something new about the church, something reflected in saying "the church canonical, theological, and pastoral" rather than "canon law, theology, pastorate of the church". Namely, the canonical, theological, and pastoral aspects are the church; they arise together as the church. Each is not a discrete dimension apart from the others. Each is not relegated to a certain part of church life where it sits sovereign. The traditional categories are opened up, or rather described along different lines such that church law, for example, could and should be speculative as well as directive, descriptive as well as prescriptive. As such church law is not restricted to a set of statutes but exists in the activities of the church where the community lives out such requirements as are relevant to God's ongoing word. More will be said about the particular characteristics of ecclesial law in the final analysis; for now let us draw up the discussion of the church.

Church-word-event was set up as a theoretical model to reflect the medium aspect of mystery. It captures this by a method of self-transcendence, viz. the perception of events which signify what they effect. The theoretical model makes for a new way of seeing what is known about the church by interactively associating it with the operations of word-event. As a result the church is seen as being performative communication. It also makes for a way of seeing something new about the church by what is known about the model "supplying" for what is not known or not as well understood about the church. And as a result the church is seen to be canonical, theological, and pastoral in

an open-ended, dynamic sense. This returns to the thesis that ecclesial law finds its identity primarily in the church and secondarily in law.

So that the principles according to which ecclesial law operates may be well founded, the discussion of these two chapters has focused upon an understanding of the church and the discussion of chapters one and two focused upon an appreciation of law. This sets the stage for the final discussion to describe a system of ecclesial law.

PART THREE

THE ORIGIN AND ORIENTATIONS OF ECCLESIAL LAW

Part Three focuses on ecclesial law with the purpose of describing a phenomenological framework according to which church law is an expression of church mystery. Drawing upon the findings of parts one and two, these final chapters attempt in particular to sketch a system of ecclesial law. The context of such a system is discussed in chapter five; its content, in chapter six. Attention is given to the relativity of various factors involved so that, in the process, it may be seen how the concept of ecclesial law considered here relates to other concepts of law and of church.

CHAPTER FIVE

THE ORIGIN OF ECCLESIAL LAW

According to an adage, no doubt ancient, there is more than one way to tell the truth. Why it is told the way it is and just what it tells may well be just as important as the truth itself. The wisdom of the adage is its openness to the possibility of more than one way of seeing things in the pursuit of truth. The possibility of seeing things in different ways lies in the fact that while the world is inevitably experienced as something or other, what it is experienced as on any given occasion might not be the only or ultimate word on the subject. Church law is a case in point. For example, several themes on the nature of church law were outlined earlier, ranging from the juridical aspect of the

institutional church to the interrelationship of the sacred sciences. All of these are attempts to "tell the truth" about church law and each makes its own contribution. But why was any one of them told the way it was? Because that is how the authors saw the church which, in turn, was a reflection of their perception of God and of what was pleasing to him.¹

What, then, is really being described: a perception of the human situation, of God, of church, or of church law? All of them actually, in a related manner. A world outlook dominated by feudalism, for instance, would reasonably regard God as Almighty King. To the mind of medieval Europe the social, economic, and political order was a matter of kingdoms and castes, of serfs and vassals, revolving around the feud or land held in return for services. The heavenly Kingdom was the earthly kingdom writ large. The Lord of the Universe was the land lord raised to a greater power and vested with the superlatives of all that was regarded as good in man. Thus man makes God over in his own image. It really could not be otherwise in so far as God is experienced in and through the world. Of course "an image does not an idol make". An idol is an artifact or human creation. An image is not a man-made god, but a man-made description of God in terms of things familiar to men of a particular time and place. A different view of the world would suggest a different view of God.

¹"Books have been written about the models that influenced, in various ways throughout the course of history, our understanding of the Church and the ways the life of the Christian community was organized. The study could be carried further and the question raised as to why a given model was followed by the community. The answer would be, of course, because either the community as a whole, or those in charge of it, perceived God as someone particularly pleased with the model. Therefore, the real history of development is not so much in the succession or reconciliation of various models, useful as they can be for our understanding, but in the evolving understanding of who our God is, what it is that pleases him, what it is that is an acceptable offering to him". Ladislav M. ORSY, The Evolving Church and the Sacrament of Penance, Denville, New Jersey, Dimension Books, 1978, p. 64

Whatever the view of God, the view of church varies according to it. To continue the feudal-view example, the Christian church of the Middle Ages saw itself as an earthly reflection of the heavenly Kingdom (the heavenly Kingdom was itself an image reflecting the feudal system). It was thus an institutional organization, but a holy one in contrast to the secular powers. A holy government or hierarchy would no less have need of regulations to preserve and perpetuate its realm. These came in the concrete form of canons as an ecclesiastical juridical system developed in keeping with the institutional image of the church.

The foregoing feudal-view rendition would likely be amplified by an historian without substantial alteration. In any event it recounts the concept of church law more from a philosophical than historical angle. That is, it is more concerned with the epistemological evolution of the concept than the sociological development of its setting. In essence its epistemological evolution is like so many concentric circles at the center of which stands a conscious being. The outermost circle is the perimeter of one's *Weltanschauung* or world view. Within it lies an image of God within which, in turn, is a concept of church and, as a subset thereof, church law. This is only a spatial analogy, of course, intended to illustrate the progressive influences which bear upon a concept of church law.²

²As such it should not be subjected to the physical characteristics of the circles. Another analogy or two might be helpful. Church law does not relate to the church as a puzzle piece to a jig-saw puzzle. It is not discrete from (even if interlocking with) other pieces, nor indeed is it a piece, part, property or otherwise substantive *res*. Rather church law is more like one of the life-functions of an organism, e.g. metabolism. It could be pointed out but not directly pointed to.

The concept of ecclesial law is likewise the product of an epistemological evolution. Its description is triggered by the image of church mystery which, in turn, is caught up in the mystery of God or, more specifically, communion with Christ. Pressing the evolution further one would have to go back to the mind-set or world view out of which this particular series of progressive influences arises in order to trace the origin of ecclesial law. To do so is to search for ourselves since the mystical picture of church law is somewhat a self-portrait of the church in the modern world. In other words, today's church sees itself in terms of mystery. More specifically, the fathers of the Second Vatican Council placed their understanding of mystery at the foundation of their statement on the church's constitution. Their statement, the dogmatic constitution "Lumen gentium", identifies church mystery with Christ's universal communion. This is to say that in Jesus as Christ God offers to be in common with mankind (individually and collectively), to share himself and what he has. Much more must be said about what this means, the particulars of its occurrence. But for the moment it bespeaks an immanent experience of God as one who comes into common with man so as to decisively reveal man's right relationships with God, nature, his fellow man, and himself. More must also be said about this experience but it too is indicative of something more immediate. And that something is the very way through which we view the world today. In brief it is a personalized, relativized view stratified by personal perspectives. This, then, is where to begin: with a study of consciousness so as to sketch why we view the world in the way we do.

A. Consciousness: Why We See the World the Way We Do

The point is that we can speak more clearly about God, church, and church law once we better understand just how much of our speech is about ourselves. It is not that we are always the subject-matter of our own discourse, as though all talk about God were veiled talk about man. Rather such is the nature of discourse and the nature of human prehension itself that a subject (that aspect of a person which prehends others) is the unseen organizer of that which is seen. Imagine, for example, and this is another spatial analogy, a painting, printing, or some other pictorial representation. The analogy is between two senses of perspective: the one having to do with picturing, the other with consciousness. Implicit in the representation is the artist's perspective. The artist's perspective is not portrayed in the work itself, rather it is the way through which he portrays the work.

The twentieth century Dutch artist Maurits Cornelis Escher has made the most of playing upon this phenomenon. His intriguing use of pictorial perspective to create illusions makes for an apposite analogy with the perspectives of consciousness. This it does by emphasizing the fact that the means through which one prehends (perspective) organizes the manner in which something is seen (perception).

Two of his 1947 works, a wood-engraving entitled "Another World" and the lithograph "Above and Below",³ are illusions that at first seem to be one angle

³There are, of course, numerous collections of ESCHER's works. All of those mentioned here are reproduced passim in HOFSTADTER's previously mentioned Gödel, Escher, Bach.

on more than one scene but, because of the shared contours, are actually one scene from more than one angle. They are provocative in that he has attempted to capture perspective within the print so as to compete with the viewer's own perspective, forcing the viewer to be conscious of his perspective by sorting it out from those of the print.

Another series of his works⁴ create the illusion of a finite number of steps going infinitely higher (or lower, depending upon the "direction") by using distance within the two dimensions of a picture to implicitly portray the depth of a three-dimensional object. Owing to an ambiguity of perspectives, these objects, which would be impossible in three-dimensional space, appear to make sense in two.

One last work which should be mentioned here has to do with recursion. Recursion, simply put, is the recurrence of something with the same content but in a different form. Not too much stress should be laid upon the terms "content" and "form". A set of two sets of two, for instance, is a recursion of a single set of four. They have the same quantitative value though different levels of grouping or expression. Escher's self-portrait, a 1935 lithograph entitled "Hand with Reflecting Globe", is recursive while Norman Rockwell's, for example, is not. The Rockwell work finds the artist at his easel peering into a mirror; the viewer sees the artist seeing himself. The viewer's perspective is

⁴Most notably the woodcut "Tower of Babel" (1928) and three later lithographs: "Relativity" (1953), "Ascending and Descending" (1960), and "Waterfall" (1961).

⁵ESCHER's 1948 lithograph "Drawing Hands" is in this genre. One hand is rising from the page in the picture to draw a second hand also rising to draw the first. ROCKWELL's "Triple Self-Portrait" appeared on the 13 February 1960 cover of The Saturday Evening Post.

not called into question as it is with the Escher work. Therein the artist is seen only in reflection with the effect that the artist's perspective is identified with the viewer's perspective (rather than the other way around).

The purpose of appealing to Escher's artistry is to focus attention by way of analogy with pictorial representations upon the fact that consciousness occurs in perspectives. This is a fact so characteristic of consciousness as to be taken for granted, like a pair of eyeglasses once put on. Like eyeglasses, personal perspectives affect one's experience of the world; unlike eyeglasses they cannot be taken off. At this point the analogies drawn from artistry and optometry have exhausted their utility. Personal perspectives do not have to do with representations of spatial relativity and proportion nor with sight or any other bodily sensation. They have to do with consciousness and are its stratification.

The stratification or layers of consciousness are the ordering of experience into binary, subject-centered relationships. That is, prehension always involves two and only two parties, the prehendor (subject) and prehended (object),⁶ relative to the prehendor as either interpersonal ("I-You"),⁷ impersonal ("I-It"), or transpersonal ("I-God").

⁶Cf. our earlier discussion of the matter in Existential Structures, p. 13 and pp. 24-37.

⁷The structures of language hinder more than help these subtleties. That is, the familiar first-, second-, and third-person in the conjugation of a finite verb permits both too much and too little. It permits too much in betraying the fact that the subject ("I") does not exist as such in isolation, but only in relation or contra-distinction to an other. Cf. John MACMURRAY, Interpreting the Universe, London, Faber and Faber, 1936, pp. 136-141. It allows for too little by not portraying the possibility of a reflexive relational existence as is the case with the transpersonal perspective (in the sense that the interpersonal and impersonal perspectives are symmetrical and transitive respectively).

The transpersonal relationship is actually an infusional experience: "I unto Us" or "I within Us". It is the experience of an object with and within which one participates; not between persons, but mediated through them. Marriage, membership in the human race, being part of the world, and other forms of commonality proximate the transpersonal experience but are nevertheless impersonal in that their objects are not persons. Divine communion is apparently the only instance of immanent, personal experience. Consequently the transpersonal relationship may be characterized as "I-God".

Be that as a brief introduction to the way through which we view the world, the view of the world which we have today is increasingly defined with an awareness of these structures, sensitive to the strata of consciousness. Martin Buber's Ich und Du⁸ is an obvious example. Now mankind did not wake up one morning with a personalized, relativized view. It has been with him as a conscious being all along. His awareness of it has, however, taken a leap in the last century. This is especially so in the disciplinary form of existentialism, affecting the study of man from art and literature to politics and psychoanalysis.⁹

"Strata of consciousness" is, of course, a figure of speech and an awkward one at that. In more familiar terms the strata are the social, natural, and

⁸Originally published in 1922 and translated into English as I and Thou; new transl. by Walter KAUFMAN, New York, Scribner's, 1970, 185 pp.

⁹See Alasdair MacINTYRE, "Existentialism", in EDWARDS, ed., Encyclopedia of Philosophy, vol. 3, pp. 147-154 for an overview of existentialism's impact upon the social sciences. His article is followed by Jacob NEEDLEMAN's on "Existential Psychoanalysis", pp. 154-156. Existentialism is one of those vague terms with so many brands that it can scarcely be understood apart from asking "whose?" Ironically then it is the victim of its own doctrine.

supernatural orders.¹⁰ These orders designate the totality of conscious experience. Whatever experience of God man may have, he has it only in terms of his social, natural, and supernatural experience.¹¹ To experience God in this way is to experience him in an immanent, personal manner by means of faith. This, then, is the second stage in the epistemological evolution of the concept of ecclesial law: a study of faith so as to say how we know what we know about God.

¹⁰This terminology represents a metaperspective and is more familiar in that we are more accustomed to speaking at such a level. Perspectives of a higher level (which is another way of saying perspectives of perspectives or metaperspectives) are nevertheless perspectives and as such are binary and subject-centered. Moreover, perspectives can only be perceived impersonally since they are not persons. Thus the social order, for instance, is the extension set of the impersonal relationship "I to It", where "It" is the interpersonal relationship "I with You". An extension set is the denotation or totality of objects to which a term refers. The set of all men, for example, is the extension set of "man". In the case of the natural and supernatural orders "It" is the impersonal relationship "I to It" and transpersonal relationship "I within God" respectively. On another point of terminology, the supernatural is unfortunately all too often confused with superstition and bears a black eye for it. Still it seems to be the best word for present purposes. A particularly helpful rational construction of the idea of the supernatural may be found in John Wood OMAN, The Natural and the Supernatural, Cambridge, University Press, 1931, xiii-506 pp., esp. pp. 69-73. John HICK, who we will meet up with shortly, supplies a short summary of the work in his article on "Oman, John Wood", in EDWARDS, ed., Encyclopedia of Philosophy, vol. 5, pp. 537-538.

¹¹Whatever experience of God man may have in some "other worldly" fashion, such as a beatific vision, it is not ours within this world of present worldly life.

B. Faith: How We Know What We Know About God

Martin Buber begins his study of faith with the position that there are two types of faith¹² which, commenting upon Buber's distinction, John Hick labels fides and fiducia.¹³ The one is a matter of cognition, the other is a matter of confidence or trust. The latter presupposes the former.¹⁴ How we know what we know about God is an epistemological issue necessitating an analysis of faith in its cognitive rather than affective sense.

Hick makes his own distinction, dividing cognitive faith into propositional belief and interpretive experience. The one is linguistic, the other is

¹²"There are two, and in the end only two, types of faith. To be sure there are very many contents of faith, but we only know faith itself in two basic forms. Both can be understood from the simple data of our life: the one from the fact that I trust someone, without being able to offer sufficient reasons for my trust in him; the other from the fact that, likewise without being able to give a sufficient reason, I acknowledge a thing to be true. In both cases my not being able to give a sufficient reason is not a matter of a defectiveness in my ability to think, but of a real peculiarity in my relationship to the one whom I trust or to that which I acknowledge to be true". Two Types of Faith, transl. by Norman P. GOLDHAWK, New York, Harper and Row, 1961, p. 7.

¹³"Faith' is employed both as an epistemological and as a nonepistemological term. The words fides and fiducia provide conveniently self-explanatory labels for the two uses. We speak, on the one hand, of faith (fides) that there is a God and that such and such propositions about him are true. Here 'faith' is used cognitively, referring to a state, act, or procedure which may be compared with standard instances of knowing and believing. On the other hand, we speak of faith (fiducia) as a trust, maintained sometimes despite contrary indications, that the divine purpose toward us is wholly good and loving. This is a religious trust which may be compared with trust or confidence in another human person". Faith and Knowledge, 2nd ed., Ithaca, New York, Cornell Univ. Press, 1966, p. 3.

¹⁴"It is only when the religious believer comes to reflect upon his religion, in the capacity of philosopher or theologian, that he is obliged to concern himself with the noetic status of his faith. When he does so concern himself, it emerges that faith as trust (fiducia) presupposes faith (fides) as cognition of the object of that trust. For in order to worship God and commit ourselves to his providence we must first have faith that he exists". Ibid., p. 4.

existential. Faith as propositional belief has the general form of belief justified by the credibility of another party. For example, I take it on faith that my physician has made a proper diagnosis of my ailment (the object of faith is the diagnosis, not the physician--though I may have confidence or affective faith in him). While I am not competent in matters of human anatomy and medicine, my medical doctor has repeatedly demonstrated himself to be. Though not specifically theological, this definition is consistent with certain scriptural¹⁵ and doctrinal¹⁶ uses of the term. And it is faith as it applies to religious knowledge that is of immediate concern.

1. Propositional Belief

According to Hick, Aquinas is the paradigm proponent of propositional faith. According to Aquinas¹⁷ faith consists in assenting to propositions about matters which cannot be verified nor completely comprehended but which are revealed by God. As such it "presupposes a knowledge both that God exists and

¹⁵E.g., HEBREWS 11.1: "Faith is confident assurance concerning what we hope for, and conviction about things we do not see".

¹⁶For example, faith is "a supernatural virtue whereby, inspired and assisted by the grace of God, we believe that which he has revealed to be true, not because of the intrinsic truth of things perceived by the light of natural reason, but because of the authority of God who reveals them, who can neither be deceived nor deceive". Vatican I, "Dei Filius", ch. 3, in MANSI, ed., *Sacrorum Conciliorum*, vol. 51, col. 432. Some contemporary commentaries likewise maintain that "faith is essentially sharing the knowledge and consciousness of another person". Juan ALFARO, "Faith", in RAHNER, ed., *Encyclopedia of Theology*, p. 503. Again, faith "bases itself in the competence and trustworthiness of the one who is believed, and it is based on his insight and knowledge". Heinrich FRIES, "Faith and Knowledge", in *ibid.*, p. 521.

¹⁷Summa Theo. II-II, q. 1-7

that he has revealed the propositions in question".¹⁸ Knowledge that God exists is established by theistic proofs,¹⁹ such as Aquinas' own five ways of proving divine existence.²⁰ Knowledge that God has revealed the propositions in question is established by sacred scripture and apostolic tradition. The credibility of scripture and tradition comes from a variety of visible signs, most notably miracles and fulfillments of prophecy.²¹ Belief in these visible

¹⁸John HICK, "Faith", in EDWARDS, ed., Encyclopedia of Philosophy, vol. 3, p. 165. The following description of propositional faith is from HICK's summary on pp. 165-166. What HICK does not mention is that propositional faith also presupposes that God is credible. According to the First Vatican Council, quoted a couple of notes back, God "can neither be deceived nor deceive". Whose testimony is it that God is credible: is it a statement by man (various men) or by God? It is not conclusive if it is by God for it is possible to lie when testifying to one's own honesty. Neither, however, is it conclusive if by man. For one party to know that another party is telling the truth the first party must otherwise know that what the second party is telling is true. But by definition the articles of faith cannot be known by man except in so far as they are revealed by God. If the definition of the articles of faith were relaxed so as to be accessible by human knowledge, then they would be articles of reason, not faith. Consequently it appears that God's credibility cannot be concluded. He may in fact always be telling the truth but we cannot be certain. In other words, according to the presuppositions of propositional faith God's veracity is not beyond question. His credibility is simply supposed with no possible proof.

¹⁹"Reason can prove with certitude the existence of God and the infinity of his perfections". Louis Eugene BAUTAIN, theses against fideism, 8 Sept. 1840, no. 1, in Heinrich DENZINGER, ed., Enchiridion Symbolorum, Definitionum et Declarationum de Rebus Fidei et Morum, rev. by Adolf SCHÖNMETZER, 35th ed., Barcelona, Herder, 1973, no. 2751 (1622); Augustin BONNETTY, theses against traditionalism, 11 June 1855, no. 2, in Acta Sanctae Sedis, 3 (1867), p. 224; Vatican I, "Dei Filius", ch. 2 and 4 and the first canon on revelation, in MANSI, ed., Sacrorum Conciliorum, vol. 51, col. 431, 433 and 435.

²⁰Summa Theo. I, q. 2, art. 3.

²¹See Vatican I, "Dei Filius", ch. 3 and canons 3-4 on faith, in MANSI, ed., Sacrorum Conciliorum, vol. 51, col. 432, 435; also PIUS X, m.p. "Sacrorum antistitum", 1 Sept. 1940, second article of the oath against modernism, in A.A.S., 2 (1910), pp. 669-670.

signs comes not from faith, which they set about to establish, but from reason. In other words "the use of reason precedes faith and must lead us to it".²²

The propositional versions of both faith and reason²³ subscribe to the general format: evidence justifies premises from which conclusions are deduced. In the case of reason the evidence consists of self-evident states or sensations; the premises are thoughts, ideas, and other mental states gained by reflection upon the sensations; and the conclusions express in any form that which is inferred. In the case of faith the evidence consists of perceptible signs of such a peculiar nature as to justify a set of beliefs which are reduced to word and deed in the form of scripture and tradition. That is the "first half" of faith. Notice its isomorphism with reason. The isomorphism reappears in faith's "second half". Scripture and tradition, which are readily construed as so many propositions about the relationship between God and man, are themselves secondary evidence which in turn justify the belief that God has revealed certain otherwise unknowable articles. Faith then is not unreasonable, but "beyond" reason. Even so its progression beyond reason is rational in that it follows the general format already mentioned.

²²BAUTAIN, theses against fideism, no. 5, in DENZINGER, ed., Enchiridion Symbolorum, no. 2755 (1626); also BONNETTY, theses against traditionalism, no. 3, loc. cit.

²³Clear examples of which may be found in John LOCKE's Essay Concerning Human Understanding, which first appeared in late 1689, "Reason, therefore, here as contradistinguished to faith, I take to be the discovery of the certainty or probability of such propositions or truths, which the mind arrives at by deduction made from such ideas, which it has got by the use of its natural faculties; viz. by sensation or reflection. Faith, on the other side, is the assent to any proposition, not thus made out by the deductions of reason, but upon the credit of the proposer, as coming from God, in some extraordinary way of communication. This way of discovering truths to men, we call revelation". An Essay Concerning Human Understanding, book IV, ch. XVIII, sec. 2, collated and annotated with prolegomena, biographical, critical, and historical by Alexander Campbell FRASER, New York, Dover, 1959, vol. II, p. 416

Propositional faith and propositional reason both lead to knowledge in so far as they are justified true belief.²⁴ Where they chiefly differ is over the evidence that justifies them. It is here that propositional faith meets with its strongest objections when it is applied to religious knowledge. (Recall that not all propositional faith is theological in nature; e.g., faith in a physician's diagnosis, attorney's advice, or even a meteorologist's report.)

One such objection goes back several centuries to David Hume's Enquiry Concerning Human Understanding. Section ten of his Enquiry contains an argument to the effect that, owing to the apparent nature of special visible signs, there is a higher probability that a putative miracle²⁵ is a deception than

²⁴According to the most widely accepted definition, knowledge is justified true belief. [...] It is obvious and generally admitted that we can have knowledge only of what is true". Anthony QUINTON, "Knowledge and Belief", in EDWARDS, ed., Encyclopedia of Philosophy, vol. 4, p. 345. Cf. Roderick M. CHISHOLM, Theory of Knowledge, Englewood Cliffs, New Jersey, Prentice-Hall, 1966, x-117 pp., and Jaakko HINTIKKA, Knowledge and Belief, An Introduction to the Logic of the Two Notions, Ithaca, New York, Cornell Univ. Press, 1964, x-179 pp. An interesting counter-example to the definition just given is supplied by Edmund L. GETTIER, "Is Justified True Belief Knowledge?", in Analysis, 25(1963), pp. 121-123. In essence, though not example, it goes like this. Suppose Socrates, looking in the direction of a distant knoll upon which stands a large redwood tree, squints at an animal figure lying this side of the redwood and says "there is a sheep on the knoll". Suppose further that the animal this side of the tree is in fact a dog while a sheep is grazing on the other side of the knoll out of immediate view. Socrates believes that the fuzzy four-legged figure he sees is a sheep for it roughly looks like one to him and he has known sheep to graze upon the knoll under similar circumstances in the past. Furthermore it is true that there is a sheep on the knoll, though blocked from view. Does the situation warrant the conclusion that Socrates knows a sheep is on the knoll?

²⁵He includes prophecy as a kind of miracle. HUME follows the Augustinian-Thomistic line in defining miracle as surpassing the laws of nature. The biblical notion does not, however, conceive of miracle in terms of the violation of natural law. See Raymond E. BROWN, et al., eds., The Jerome Biblical Commentary, 78:111-114, Englewood Cliffs, New Jersey, Prentice-Hall, 1968, vol. II, p. 785. Nor is such a conception favored among contemporary theological circles. See Johann Baptist METZ, "Miracle", in RAHNER, ed., Encyclopedia of Theology, pp. 962-964

that it is authentic. The apparent nature of miracle follows from the stability of the laws of nature on the one hand and the capriciousness and vulnerability of human testimony on the other. Miracles, Hume observes, are not well documented, are likely the product of religious zeal or personal interests, appeal to emotional pleasure in surprise and wonder, flourish in direct proportion to gullibility and primitivism (they "are observed chiefly to abound among ignorant and barbarous nations"), and conflict with one another. In short, though they are logically possible, miracles are highly improbable and proof of them is even less likely. "[T]herefore we may establish it as a maxim, that no human testimony can have such force as to prove a miracle, and make it a just foundation for any such system of religion".²⁶

If in the end Hume has not exploded the foundation of religious propositional faith, he has at least demonstrated the severity of its limitations. In the process, however, he has inadvertently sown the germ of an alternative conception of religious faith, one which is more in keeping with the previously outlined contemporary view of the world. Concluding that faith and reason are not different ways of knowing the world,²⁷ Hume has unwittingly opened the

²⁶HUME, An Enquiry Concerning Human Understanding, ed. by L. A. SELBY-BIGGE, 3rd rev. by P. H. NIDDITCH, Oxford, Clarendon, 1975, p. 127. His reservations about miracles join those of HOBBS, Leviathan, ch. 37. (HUME's mentioned Enquiry dates to 1740; Leviathan was first published in April of 1651.)

²⁷Like LOCKE before him, HUME held that faith yields to reason. See LOCKE, An Essay Concerning Human Understanding, book IV, ch. XVIII, and HUME, An Enquiry Concerning Human Understanding, sec. X, part II, and sec. XII, part III [SELBY-BIGGE edition, items 101 and 132]. The underlying idea is that reason doesn't displace faith, it replaces it. The image associated with this idea is not of two noetic opponents, faith vs. reason. Rather there is only the one proponent of knowledge about the world of familiar experience: reason. Faith is the name given to the gap reason has yet to occupy. Faith may be figuratively likened to a zero, an epistemological zero: a place-holder in the

door to the suggestion that they are different ways in which the world is known. In other words, faith and reason operate on the same evidence but from different perspectives (rather than the same perspective upon different evidence).

2. Interpretive Experience

John Hick calls this alternative conception of faith the interpretive element within religious experience.²⁸

That we 'know God by faith' means that we interpret, not only this or that item of our experience, but our experience as a whole, in theistic terms; we find that in and through the entire field of our experience we are having to do with God and he with us. Our knowledge of him is thus, like all our knowledge of environment, an apprehension reached by an act of interpretation, although it differs from the rest of our knowledge in that in this case the interpretation is uniquely total in its scope.²⁹

enumeration of knowledge having no explanatory value of its own. Seen this way there is no more conflict between faith and reason than between a doughnut hole and the doughnut. In other words, propositional faith doesn't compete with reason for knowledge about the knowable world, it contrasts with it.

²⁸Though mentioned in many of his works, his theory, to which the following discussion is indebted, is developed chiefly in Faith and Knowledge, esp. part II [ch. 5-6, pp. 95-148], and "Religious Faith as Experiencing-as", in Godfrey Norman Agmondisham VESEY, ed., Talk of God; Royal Institute of Philosophy Lectures, 1967-1968, London, Macmillan, 1969, pp. 20-35 [reprinted in HICK, God and the Universe of Faiths; Essays in the Philosophy of Religion, New York, St. Martin's Press, 1973, pp. 37-52]. For a useful commentary see Terence PENELHUM, Problems of Religious Knowledge, London, Macmillan, 1971, ix-186 pp.

²⁹HICK, Faith and Knowledge, p. 121.

His two main points are that (1) religious faith is an interpretation of the entirety of experience as indicative of the divine and (2) a faith interpretation has the same cognitive structure as certain other kinds of interpretations. The first point is the product of transpersonal experience. It is, once again, the case of being with God, within God.³⁰ This will become clearer after an examination of the second point, which begins with a study of interpretation.

An interpretation set, let us say, consists of more than one interpretation such that (a) each interpretation is a complete and consistent explanation of events with respect to their importance for (effect upon) the interpreter, (b) the events are past or present facts or states of affairs, and (c) all interpretations pertain to the same basic information (evidence) about the events. An explanation is a description or examination of things by the connections or relationships among them. Thus a chemist's explanation of fire, for instance, is as a rapid combination of oxygen with other materials, producing heat; flames being the resultant gases which reach incandescence upon release, providing illumination. A physicist, on the other hand, would likely speak in terms of ionic valence, molecular acceleration, etc., instead of oxidation and the like. But in both cases fire holds the same significance for the two scientists. It is latently the same whether or not it is patently different. That is, they would use fire for similar purposes and handle it in like manners. Though their descriptions differ terminologically, representing different "levels" of analysis, their attitudes, approaches, and responses to the phenomenon are the same after all. It would be quite another matter were one of them to worship the

³⁰In terms of personal consciousness I am within the world; my body and deeds are in the world; the world is in God; through the world I am with God. I am worldly in God, but personally with him; thus I encounter Us.

blaze, for then fire would have another meaning or importance. So too reference to nocturnal lights shifting over a marsh as miasma, ignis fatuus, will-o'-the-wisp, and jack-o'-lantern would not constitute an interpretation set. This is not so much because they are different names or labels for the same phenomenon, but because they do not call for different responses. "[...T]he significance of a given object or situation for a given individual consists in the practical difference which the existence of that object makes to that individual".³¹

In any interpretation set the event in question can be interpreted as this, that, or the other since the interpretations are disjunctive. Disjunction is either exclusive or inclusive, depending on whether only one or more than one option can be true.³² To give an example of an exclusively disjunct interpretation set, suppose a certain husband believes that his wife loves him. While it is a rather common supposition it is also an interpretation of behavior. Against suspicions of simulation on his wife's part he could list the various things she does for him as evidence of her love. It may be a very long list indeed. Yet he would not say

³¹HICK, Faith and Knowledge, p. 100.

³²"When two statements are combined disjunctively by inserting the word 'or' between them, the resulting compound statement is a disjunction (or alternation), and the two statements so combined are called disjuncts (or alternatives). The word 'or' has two different senses, one of which is clearly intended in the statement 'Premiums will be waived in the event of sickness or unemployment.' The intention here is obviously that premiums are waived not only for sick persons and for unemployed persons, but also for persons who are both sick and unemployed. This sense of the word 'or' is called weak or inclusive. A different sense of 'or' is intended when a restaurant lists 'tea or coffee' on its table d'hôte menu, meaning that for the stated price of the meal the customer can have one or the other, but not both. This second sense of 'or' is called strong or exclusive. A disjunction which uses the inclusive 'or' asserts that at least one disjunct is true, while one which uses the exclusive 'or' asserts that at least one disjunct is true and at least one disjunct is false". Irving M. COPI, Symbolic Logic, 3rd ed., New York, Macmillan, 1967, pp. 11-12.

that her actions are identical to her love for him, rather they are indicative of it. Consequently it may still be objected that the man's spouse is practiced at the art of deception and, unbeknown to him, has been plotting his demise all along so as to secure the inheritance. These are two mutually exclusive interpretations of her deeds: the one as amorous, the other as vicious. In so far as it is not possible for a wife to love and hate her husband at the same time, only one of them can be true. (Which of them is true is irrelevant to the structure of the interpretation set.)

Now consider the case of the laborer who believes he deserves the industrial accident that has befallen him for stealing from the company. That is his interpretation of events. One might say that the laborer evaluated his action as wrong and liable to punishment, perhaps he felt guilt or remorse for doing it, and was disposed to consider his injury as some sort of de facto punishment. There was no material connection between the two events, though there may have been a mental one. Perhaps his troubled conscience led to anxiety and physical fatigue and the accident was brought on by carelessness. What we have here is another interpretation, a complete and consistent explanation of events having no recourse to crime, punishment, or any other meanings that may be attached to certain empirical situations. Both interpretations presuppose that something has happened and they pertain to the same basic information about its occurrence. Neither interpretation, however, excludes the possibility of the other and consequently another observer is free to choose among them. The point of this example is to illustrate the mutual compatibility of interpretations in an inclusively disjunct set. That is, it is possible for more than one reading of the same thing to be "true" or "correct". "Reading" is an appropriate word for it, at least for the laborer's interpretation.

Reading is simply the recognition of signs, the grasp of things as significant. Accustomed as we are to think of reading as a literary venture, as having to do with conventional ink markings on paper or other printed matter, it is nevertheless no esoteric sense of reading that extends to events in and of the world. A sailor reads the stars, a farmer reads the weather. Body language, animal behavior, and the signs of the times are all quite properly read. Word-events, no less than words, are read.

Imagine then two amateur archaeologists who happen to come across a particular rock formation. One attributes it to wind and water erosion while his companion takes it to be the work of an ancient primitive civilization. To the one the formation has no real meaning, it is simply the result of natural forces wearing away at the rock. It is not "readable". To the other it is readable. There is some message, be it scientific or artistic, intentionally put there and if only he "knew the language" he could read it. A third interpretation would be introduced were the first character to attempt a compromise: "Well, maybe it's nature's way of reminding us that all things must pass or that even the mighty are moved gradually". This is quite a departure from his original position. He now attributes intention to nature (which need not be personified to be anthropomorphized), sees the formation as significant, and proffers a reading.

Let us put these three perspectives in intuitive order with the case of three ladies listening to an afternoon radio broadcast who disagree over a modulation in the transmission. One says they have picked up static, another claims it is a code, while the third thinks it is atonal music and briefly explains the composition. According to their various interpretations the same sound waves are respectively attributed no meaning (unreadable), unknown meaning (readable), and known meaning (read). Substituting the world itself for rock

formations and sound waves does not alter the structure of the interpretation set. It does, however, reveal the role of faith as an interpretation according to which the "world-event" is word-event.

As we see it the world consists of three orders (natural, social, and supernatural) corresponding to the three types of personal relationships (impersonal, interpersonal, and transpersonal). All of these have to do with different perspectives on the same or very similar information about the one world. An explanation of the world necessarily proceeds from one or other of these perspectives and thus in effect it is an interpretation, a cosmological interpretation.

Instead of listening to the radio, let us ask the three ladies of the last example to look at the world. The first says that the world is an aggregate of events variously affecting one's physical well-being. The second sees certain events as having value beyond the question of (material) survival. These have to do with rendering due regard for the worth of others as equal to that of oneself. The third contends that the world itself, as a singular event, conveys meaning and, accordingly, those worldly events recognized as having reference to this theme are themselves word-events.

Faith is a species of the third lady's approach. Thus the chief tenets of faith understood as interpretive experience may be philosophically formulated as follows. (1) The world is the totality of one's environment considered as a whole, apart from an inventory of individual events, and considered as an event, a resulting occurrence. (2) World-event is word-event: it conveys a message, it is indicative of something. (3) Worldly events, individual events in the world, are word-events in so far as they are recognized as signifying the meaning of world-word-event. A theological reformulation would not amplify these tenets.

It would specify them with respect to a source, being, or force which in some sense is ultimate in regard to them, viz. God. One might say, for instance, that the world is the result of divine invention (whether instantaneous or evolutionary is of no consequence to the point at hand). So too world-word-event is indicative of the divine.

What then is the meaning of world-word-event? At the level of world-word-event medium and message merge. It is the communication of being: communion. Theologically speaking, world-word-event is at once the indication and actualization of sharing existence with and in God.³³ Thus faith is not concerned with proof, but with participation. In faith one recognizes that always and everywhere in and through the world one must come to terms with God. The recognition of divine presence calls for a dispositional response accordingly. "Entering into conscious relation with God consists in large part in adopting a particular style and manner of acting towards our natural and social environment".³⁴

Just what is this style and manner of acting towards our natural and social environment? For Christian faith the answer touches upon the message aspect of mystery. In the previous chapter the message of mystery was said to relate to Christ's communication of truth and grace to all men. It can now be said

³³To repeat a previous caveat, "other worldly" participation with the divine, such as the beatific vision, is topic for another study.

³⁴HICK, Faith and Knowledge, p. 115. "[...E]ven when the sense of the presence of God has dawned upon us in solitude it is still normally true that it leads us back to our neighbours and often deepens the ethical significance of our relations with them. Thus the dispositional response which is part of the awareness of God is a response in terms of our involvement with our neighbours within our common environment. Even the awareness of God through nature and mystical contemplation leads eventually back to the service of God in the world". HICK, "Religious Faith as Experiencing-as", p. 31.

that the style and manner of acting towards our environment is part of Christ's communication of truth and grace. How so?

Well, for Christians the life, death, resurrection, and anticipated return of Jesus as Christ are all part of a message about the magnitude of God's love.³⁵

The Jesus-event, then, is word-event for it reveals something about God. How and what it reveals, characteristic of word-event, are the very same. The Jesus-event is indicative and at the same time demonstrative of God's attitude toward the world. It is an indication-demonstration of love and forgiveness even when faced with rejection. That is Christ's communication of grace. In Jesus God offers to be in common with mankind, to share himself and what he has. To share his being is the communication of being; it is, simply put, communion.

The obverse of grace is truth, which Christ communicates by clarifying man's right relationships by the thematic example³⁶ of his life. "Right" relationships is an awkward phrase but in its favor it carries less a connotation of absolute or objective than "authentic", "actual", or "true". In passing these others over is it implied that the Jesus-event does not impart absolute or objective meaning to man's relationships? There is an important sense being developed here in which one must be bold enough, if bold it is, to answer in the affirmative. That sense is apparent when it is understood

³⁵As expressed, for example, in JOHN 3.16: "God so loved the world that he gave his only son, that whosoever believes in him should not perish, but have everlasting life".

³⁶Theme, not plot: the point of action, not a particular plan of action. By his words and deeds Jesus taught others to love and forgive one another. He did not draw up a list of specific things to do. The specific things that need be done in pursuit of love and forgiveness vary with time, place, and circumstances. The ongoing truths have more to do with "why" than "how".

that the Jesus-event is itself a faith interpretation of reality. The event of Christ provides an interpretive appraisal of our right relationships with God, nature, each other, and ourselves but it is itself part of an interpretation, viz. the Christian way of seeing the world.³⁷ Just what this interpretive appraisal consists of is the task of the whole of the Christian response to divine presence. Philosophy of church law has a narrower competence, but one which must be attentive to the thrust of the Christian interpretation since church law, like the church itself, is part of that response.

In brief, that which is known about God is known by faith. Faith is an interpretation of the world according to which worldly events are word-events in so far as they proclaim-perform communion. According to Christian faith Christ is the center of communion³⁸ and this is the mystery with which the Church is identified.³⁹ The church is identified with Jesus Christ in terms of

³⁷Christian faith is a version of faith. Faith is a species of transpersonal experience (the "third lady's approach"). Impersonal and interpersonal experiences make for other interpretations of the world. Nevertheless no one interpretation excludes the possibility of the others and consequently no one interpretation is compulsory. While this divests faith interpretation of any absolute or objective status it preserves the freedom associated with faith. See HICK, Faith and Knowledge, pp. 120-148. In other words the interpretation set which the three cosmological interpretations constitute is inclusively disjunct, the interpretations are mutually compatible.

³⁸A phrase reminiscent of Dietrich BONHOEFFER's lectures on Christology, according to which Christ is the center of human existence, history, and nature. See his "Christologie", in Eberhard BETHGE, ed., Dietrich Bonhoeffer, Gesammelte Schriften, Munich, Chr. Kaiser Verlag, 1960, vol. 3, pp. 166-242, esp. pp. 194-200.

³⁹It is the connection "between our understanding of human existence, of God, and of Jesus Christ, on the one hand, and our understanding of the Church on the other. Or more immediately, our understanding of the nature and mission of the Church depends upon our understanding of the meaning and value of Jesus Christ, who reveals to us at one and the same time who God is and who we are". Richard P. McBRIEN, Catholicism, Minneapolis, Winston Press, 1980, [vol. II] p. 569.

word-event. What follows from this is an analysis of ecclesial mystery so as to describe what it means for the church to be a means of communion.

C. Mystery: What it Means for the Church to be a Means of Communion

The supreme good, argues Aristotle in the opening chapters to the first book of Nicomachean Ethics, is eudaimonia, loosely translated as happiness. It is that which is sought by all things for its own sake and for the sake of which everything else is sought. If the pursuit of happiness is the primary motive for human endeavor, then the definition of what constitutes happiness is chief among the factors affecting the way men endeavor together. Predictably the three ways of viewing the world, the three cosmological interpretations, place the accent of happiness on different areas of experience. Their versions of man's right relationships vary accordingly. So as to see how the church enters into the picture as a means and what communion has to do with happiness let us consider the consequence of each interpretation in turn.

Thomas Hobbes' treatise "Of the Natural Condition of Mankind as Concerning their Felicity and Misery", the thirteenth chapter of Leviathan, well illustrates the first or natural interpretation. There it is seen that whenever happiness is measured in terms of material possessions, sensual pleasures, or personal recognition, in so far as these are finite there will be competition over them. Or at least that is a lemma to the argument that mutual distrust arises from the approximate mental and physical equality which naturally exists among men. One man's security varies in inverse proportion to that of others. But because men are approximately equal, no one being able to definitively subdue the rest, there can be no lasting security. Instead every man is against

every man in an ongoing struggle which Hobbes calls war. War inhibits all progress and renders "the life of man, solitary, poor, nasty, brutish, and short".⁴⁰

What Hobbes had to say about the natural condition of mankind was echoed by Hart some three centuries later. It will not be necessary to rehearse Hart's schema, having devoted much of chapter two to it. Still there is a striking parallel between the two which is of immediate interest, particularly as to the context of law within their common interpretation.

The passions that incline men to peace, are fear of death; desire of such things as are necessary to commodious living; and a hope by their industry to obtain them. And reason suggesteth convenient articles of peace, upon which men may be drawn to agreement.⁴¹

That is, men desire to live and to live well. To do so in light of man's natural condition necessitates a certain degree of cooperation. Since cooperation is a creature of reason, not natural desire, it must be sanctioned by the possible loss of that which is naturally desirable, namely life and living well. With Hobbes, as with Hart after him, the context of law is the preservation and progress of life.

Adding an interpersonal dimension makes for quite an other interpretation, one which emphasizes the value of the happiness of others as intrinsically equal to one's own. Here happiness is measured in terms of virtue. The remainder of Aristotle's Nicomachean Ethics might be invoked as an example. Aristotle's idea of virtue is an action conforming to reason which

⁴⁰OAKESHOTT edition, p. 100.

⁴¹Ibid., p. 102

aims at a mean state between the extremes of excess and deficiency. Righteousness, for instance, is the mean between envy and malice. Other authorities have other ideas of virtue. But in any event if there is any competition to speak of it is not so much between persons for personal gain at the expense of others as between one's own actual (present) and potential (possible) development of dignity. The role of law understood accordingly has to do with the protection and promotion of values associated with human dignity, such as freedom and respect.

Note that the transition from one interpretation to another does not entail a new goal or a new need for an old goal. The goal all along is human happiness. Each interpretation envisions this same pursuit but in terms determined by its particular perspective. If impersonally I am emphasized in relation to all others, then happiness is the extent to which others afford me pleasure. There is nothing cynical about it. But if interpersonally I am not the only one possessing special status in relation to the remaining things of the world, then possessions, pleasure, and recognition at the expense of others may be seen as so much greed, lust, and pride. The interpersonal perspective does not deny me a special status, rather it recognizes that others are equally entitled to the same. So too the transpersonal perspective adds a depth perception of its own without doing violence to the considerations of other perspectives. Faith is just such a perspective and Christian faith takes account of divine presence as presented by the Jesus-event. What has the Jesus-event to say about human happiness?

The Jesus-event is a two-fold presentation. It is word-event about God and at the same time word-event about man. That is, Jesus reveals God to be personal and loving by himself being personal and loving and indicates to men

the kind of life they will lead in response by the example of his own response. "Forgiveness, mercy, love are right attitudes between men because they are already God's attitude toward men".⁴² Happiness is attained by participation with God in an intimate, family-like manner. It is to see God as Father and ourselves as his children.

The role of the church in all of this may be summed up in the apostolic commission found at the end of the gospel according to Matthew:

Full authority has been given to me both in heaven and on earth; go, therefore, and make disciples of all the nations. Baptize them in the name 'of the Father and of the Son, and of the Holy Spirit.' Teach them to carry out everything I have commanded you. And know that I am with you always, until the end of the world.⁴³

Even if these were not ipsissima verba of Jesus it would be evident from the Jesus-event as a whole that the role of the church is one of proclamation and performance. Linked together the church is word-event. Its activities are significant. They signify the inbreaking of communion through Christ. At the same time they are realizations of his communion, programs and projects of worship which foster the commonality of men as brothers.

To be a means of communion means to be an event recognizably having reference to Christ's universal communication of truth and grace. This the church is in an ongoing way; such is its transcendental nature and mystery.

⁴²HICK, Faith and Knowledge, p. 224; see also chapters 10-11, passim.

⁴³MATTHEW 28.18-20. "The word 'command' does not affirm the establishment of a new Law, but of a new way of life, just as the Law of Moses established a new way of life". John L. MCKENZIE, "The Gospel according to Matthew", in BROWN, et al., eds., The Jerome Biblical Commentary, 43:206, vol. II, p. 114.

In so far as the church is a mystery and law is a function, church law is a function of mystery. That is quite a simplification, really an over-simplification if divorced from the discussions of parts one and two. Nevertheless it is essentially a restatement of the thesis that ecclesial law finds its identity primarily in church and secondarily in law. A distillation of church and law has come up with mystery and function. On the one hand the medium of church mystery may be modeled as word-event and its message interpreted accordingly from a faith perspective. On the other hand law is a function in and of a system. It is the articulation and realization of a value; that is, of that which is conducive to a goal or end of human activity.⁴⁴ Now if the goal or end of human activity is happiness and faith finds the fulfillment of happiness in communion, then from this perspective the context of ecclesial law is not other than the articulation and realization of communion.

Here we have touched upon the starting point for a system of ecclesial law. The point of the present chapter is that the starting point or origin of an ecclesial law system is the product of its epistemological evolution and cannot be appreciated apart from an analysis of it. Were it otherwise one would fail to come to terms with ecclesial mystery; ecclesial law would be either irrelevant

⁴⁴Such is the position that a value has to do with the formal function of being conducive to ends, independent of personal judgments regarding the means. It is represented by Lon L. FULLER, further defended by Joseph P. WITHERSPOON, and critiqued by Ernest NAGEL in their debate which appeared in Natural Law Forum: FULLER, "Human Purpose and Natural Law", 3(1958), pp. 68-76; NAGEL, "On the Fusion of Fact and Value: A Reply to Professor Fuller", 3(1958), pp. 77-82; FULLER, "A Rejoinder to Professor NAGEL", 3(1958), pp. 83-104; WITHERSPOON, "The Relation of Philosophy to Jurisprudence", 3(1958), pp. 105-134; and NAGEL, "Fact, Value, and Human Purpose", 4(1959), pp. 26-43. In reiterating the distinction between a value and a value judgment WITHERSPOON summarizes what FULLER means by a value as "the capacity or aptness of a given human means, however correct or erroneous the value judgment about it, to achieve a given end". P. 119.

or relegated to issues of ethics. To see how this is so let us conclude by looking at the context of ecclesial law from the three perspectives of consciousness and the interpretations they make of reality. Since the meaning of mystery makes sense only in the third, within transpersonal experience, ecclesial law would be expected to do likewise. An elaboration of this third approach to the context of ecclesial law doubles as a springboard for the following chapter on the orientations of ecclesial law; that is, the remainder of an ecclesial law system.

D. Communion: The Context within which Ecclesial Law is a
Function of Mystery

Think of the three perspectives of consciousness, or personal perspectives as we have also called them, as windows on the world. Any spatial analogy imposes certain artificial limitations upon its non-spatial counterpart. Even so it is innocuous to the extent that the limitations are obvious and sufferable for the sake of simplicity. Though the windows look out onto the same tract they peer at it from different angles. The angles are equivalent to perspectives. As might be expected a report on the lay of the land will vary from window to window because of the various angles. In other words perception is a function of perspective. Consequently a detailed description of one's horizon, taking into account the angle of the window, is much the same as an interpretation.

In keeping with the inclusive configuration of consciousness the windows are appropriately arranged one behind the other rather than side-by-side. That is, the view from the pane nearest the scenery becomes part of the picture from the pane behind it. The latter in turn is included within the vista from the furthest pane. As a result the distinctive characteristic of each window is

carried over and combines with that of the window behind it when one peers through both. The distinctive characteristic of each window in our analogy is its angle, the analogue of perspective. The point, in short, is that perspectives are cumulative.

To make the point more clearly let us make the windows less clear. That is, instead of representing perspectives by angles imagine that each of the windows from the nearest to furthest is tinted with one of the primary colors red, yellow, and blue, respectively. As every school child whose water colors have run together soon discovers, the mixture of red and yellow colorants produces orange. So too one who peers through a yellow stained pane placed behind one that is red will have a cumulatively colored world, orange in this instance.⁴⁵ Adding the pane stained blue, one sees through the three glasses darkly. Though the red, yellow, and blue panes respectively correspond to the impersonal, interpersonal, and transpersonal perspectives, red, orange, and gray are the analogues of impersonal, interpersonal, and transpersonal experience.

To experience the world impersonally is to experience it empirically, as so many facts about cause and effect wherein the goal is simply to stay alive. If we do this we live; if we do that we die or at least suffer damage. Survival then is the natural context of law. To experience the church impersonally is to experience it as an institution: an organization set up for the promotion of programs intended to serve the needs of those with whom it comes into

⁴⁵The same thing obtains when some other feature, such as curvature, is substituted for coloration as the distinctive characteristic analogous to perspectives. A convex window, for example, shows the environment to be elongated along its axis and foreshortened away from it. A concave window has the converse effect. (This is the principle behind those amusement park mirrors which reflect a short-stout or tall-thin illusion.) Put the two together, however, and if their curvatures are opposite but equal they will produce a neutral effect.

contact. But since the picture is limited to temporal welfare so also is the scope of the church and church programs. In this light the church is as secular as the state. Religious activities having no empirical produce to show for their efforts would quite naturally be considered optional or irrelevant. Indeed, norms of a religious or otherwise non-secular nature not directed toward survival would not be laws. Church law would be not unlike the regulations of a social agency.

The axiology imported by the interpersonal perspective does not deny the empiricism of the impersonal perspective. An axiology is a theory or doctrine about value. The root of "axiology" derives from the Greek word for "worthy". Some things are spoken of as being worthy in themselves, as having intrinsic value. Other things are instrumentally worthy, they possess extrinsic value. Survival and that which is conducive to survival are thus said to have intrinsic and extrinsic values respectively. So the world of impersonal or empirical experience is not without its own set of values. The interpersonal approach adds to the deposit of that which is intrinsically valued. It adds the happiness of others as equal to one's own. Consequently the context of law is cumulative. Dignity, which is the social context of law, is inclusive of survival, the natural context of law.

Personalism gives a new hue to the foregoing description of church. Interpersonally the church is experienced as a society: a group of people whose members feel a sense of personal identity. Still there is the element of service to members and others. The scope of service, however, extends also to values associated with persons, persons being something more than merely living organisms. Ethics and aesthetics enter into the picture where the pursuit is not only life but living well. Religious activities of a moral or artistic orientation

are relevant since they are directed toward dignity but they do not appear to possess any meaning beyond this. Church law as a result amounts to a corpus of axioms for defining and determining proper behavior.

Ultimately there is the transcendentalism of the transpersonal perspective. When it is seen that the world itself has meaning it emerges that the object of strife is the communication of being. The communication of being by any other name is communion. Consequently communion is the supernatural context of law. Like the gray of our windows-on-the-world analogy, communion is a cumulative context. It includes the natural and social contexts of survival and dignity. John Hick speaks to this very point (allowing for terminological variations).

The significance for us of the physical world, nature, is that of an objective environment whose character and 'laws' we must learn, and toward which we have continually to relate ourselves aright if we are to survive. The significance for us of the human world, man, is that of a realm of relationships in which we are responsible agents, subject to moral obligation. This world of moral significance is, so to speak, superimposed upon the natural world, so that relating ourselves to the moral world is not distinct from the business of relating ourselves to the natural world but is rather a particular manner of so doing. And likewise the more ultimately fateful and momentous matter of relating ourselves to the divine, to God, is not distinct from the task of directing ourselves within the natural and ethical spheres; on the contrary, it entails (without being reducible to) a way of so directing ourselves.

In the case of each of these three realms, the natural, the human, and the divine, a basic act of interpretation is required which discloses to us the existence of the sphere in question, thus providing the ground for our multifarious detailed interpretations within that sphere.⁴⁶

⁴⁶HICK, Faith and Knowledge, pp. 107-108.

Faith is an interpretation from the transpersonal perspective and according to Christian faith the church is a means of communion. Modeling the church as being word-event, church law is seen to be a mode thereof. It follows that the context of ecclesial law is communion. Ecclesial law is fully accredited as law by transpersonal experience since ecclesial law, most simply, is a function of mystery and mystery is recognized transpersonally.

CHAPTER SIX

ORIENTATIONS OF ECCLESIAL LAW

In establishing ecclesial law as a fully accredited system of law, each of the system's principal elements contributes to a collective expression of church mystery. The first of these elements, context, treats of the origin of ecclesial law and was considered in the previous chapter. The remaining two elements, content and obligation, are indicative of the orientations of ecclesial law. It is therefore in the content of ecclesial law and the correlation of obligation to communion that the concept of ecclesial law comes to term.

A. Minimum Content of Law

Because ecclesial law is a type of law in the supernatural order and orders are cumulative, the content of ecclesial law is best understood by looking at minimum content in the cumulative sequence of orders. The quest for the content of law is inaugurated with a simple statement of fact. It is a contingent fact of mankind that each of the three ends of human endeavor is optional and vulnerable to certain adverse circumstances of the human condition.

No one has to go on living, no one has to be dignified, and no one has to commune with God. Certainly there are those who choose to opt out. Nevertheless, the majority of us tend to desire life, dignity, and communion. More accurately, we desire those ends which we perceive. Desire does not make them ends, however.

Such is the human condition that provisions have to be made to attain and maintain the ends of endeavor. This is what is meant by saying that the ends of human endeavor are vulnerable. The human condition is a combination of congenital and behavioral circumstances. Not every aspect of the human condition is called into question, of course. Only those circumstances that bear upon the end of human activity are at issue. Arrangements have to be made to overcome certain innate deficiencies and offset certain acquired excesses for the sake of attaining and maintaining the designated end. Nowhere is this more evident than in the natural order, for here a failure to address man's material needs may have fatal consequences.

1. In the Natural and Social Orders

Mankind has a natural need for food, clothing, and shelter. These are finite goods and those that exist are distributed according to the contingencies of the environment. Enter the human propensity toward personal interests and the competition that ensues soon redounds in the "law of the jungle". Or at least that is what would happen in the absence of constraint. The evolution of constraint into a binding minimum of behavior both as to performance and forbearance constitutes the core of law in the natural order. Law is figuratively said to contain measures oriented toward providing for deficient supplies while protecting against excessive demands. Such measures are the collective content of law. Hobbes identifies nineteen of them; Hart, half a dozen.¹

¹See HOBBS, ch. 14-15 of Leviathan, pp. 103-124 in the OAKESHOTT edition. HART, The Concept of Law, pp. 189-195. HOBBS has his mind on

When it comes to the content of law, neither Hobbes nor Hart espouse a strictly impersonal approach. The first of Hobbes' articles of peace, or laws of nature as he also calls them, is the pursuit of peace and right of defense. The second is like unto it and involves mutually limiting the exercise of personal rights in the interests of peace and defense. Hobbes is assuming that "he that renounceth, or passeth away his right, giveth not to any other man a right which he had not before; because there is nothing to which every man had not right by nature".² More briefly, everyone has a natural right to everything. But if the scope of rights is universal, the distribution is equal: if everything to everyone, then equally to all. The question is, what is the basis for such an equality? The same question could be raised with regard to any position, Hart's included, having to do with the distribution of goods.

To say that an equal distribution is based upon an equality of persons is to suppose something intrinsic to the nature of persons which justifies such a distribution. The intrinsic worth of persons is characteristic of the social order. It is important to bear in mind that one order does not differ from another in terms of time and space, but in terms of perception. It is still

peace, something more than mere survival. The remainder of his articles of peace call for the keeping of covenants, gratitude, complaisance, pardon, rehabilitation, respect, humility, modesty, equity, equitable distribution, safe conduct, arbitration, and impartiality. He repeatedly acknowledges that they are summed up in the "golden rule" of the gospels: do unto others as you would have them do unto you. In so far as they are concerned with qualitatively more than meeting biological needs there is a stronger resemblance between the speculations of HOBBS and FULLER than between HOBBS and HART. Lon FULLER, recall, had human achievement in mind when he associated order with the minimum content of law. Yet neither HOBBS nor FULLER go so far as to explicitly ground the content of law in the dignity of the person. For HOBBS the "golden rule" is the means to peace; for FULLER order is the means to human achievement.

²Ibid., p. 104.

necessary in the social order, if indeed there is to be a social order, for men to survive. The need for food, clothing, and shelter obviously remains when people are seen to be ends in themselves. But because they are ends in themselves the distribution of basic supplies is not arbitrary.

Whether they are regarded impersonally or interpersonally, individuals have a natural need for certain materials. The minimum would seem to be nourishment, including air and water of course, and protection from the elements. That hardly spells a life of luxury but it is biologically enough on which to get by. At any rate, we are now looking for the sine qua non of survival and not everything that is desirable is necessary. Nourishment and protection from the elements are all anyone would minimally require in isolation. Yet, as anthropologists tell us, isolation is not a natural tendency in man. We are gregarious creatures. We are also barbarous, even if not as crudely so as our primitive ancestors were. The tendency to live together and the tendency to take what we want inevitably lead to conflicts over taking things from one another. But why should it matter whether we plunder the things of the world or plunder the goods of one another? Why should there evolve, as it historically has, a norm of behavior which distinguishes between the two? The answer is obvious in retrospect: because people are not equated with things.

That might not have been the answer our ancient ancestors would have given were they able to do more than grunt. Our fore-fathers from the paleolithic period, for instance, were no doubt conditioned by applied resistance to distinguish between edibles in the wild free for the taking and those in the custody of their Neanderthal neighbour. When emphasis is placed upon immediate personal needs and desires, then regard for others extends only as far

as does their ability to resist. But as long as regard for others is meted out by the measure of their clubs, then respect is not for persons but for the weapons they wield. Civilization has since devised more effective merchants of maiming. To their dubious credit they are even greater monuments to the equation of people with things.

On the other hand, advancements in the production and distribution of goods have reduced the necessity of force and fraud for survival--reduced but not eliminated. The occasional unavailability of certain staples keeps the spirit of the ancients alive among us. In any event is equitable distribution the policy of avoiding force and fraud or of realizing equal worth? Is the regard for others as equals a fiction, a luxury afforded by abundance? The answer is indicative of the difference between impersonal and interpersonal attitudes.

Individuals, whether perceived impersonally or interpersonally, need the minimum materials for survival. Interpersonally, however, there are other factors to consider under the heading of dignity which redefine these needs in terms of overall priority. It would not be possible to determine whether intrinsic worth is real or fictional unless it could be put into practice. In order to exercise one's intrinsic equality there must be the social opportunity for doing so. But if the tendency toward favoritism were allowed to go unchecked, then intrinsic worth might just as well be fictional for that is what it would be in effect. An allegory of same is the writing on the wall in the tenth chapter of George Orwell's Animal Farm: "All animals are equal, but some animals are more equal than others".

Favoritism is to the social order as personal interest is to the natural order. The individualism of personal interest draws a distinction between oneself and everything else. Favoritism operates within a group and draws the

distinction between those who are of one's own kind and those who are not. But while personal interest pursues direct benefit to oneself, the benefit sought by favoritism is indirect: whatever happens to my kindred (directly) happens to me (indirectly). One's kindred need not be limited to consanguine or connubial ties. Indeed the kinds that have historically been at issue have to do with such innate features as race, sex, and origin.

Favoritism becomes a point of contention when the treatment of others is intentionally zero-sum, meaning that by design the gains of some are equal to the losses of others. In this way favoritism toward those of one's kind entails discrimination against those not of one's kind. The entailment is bidirectional and now always in arithmetical proportion.

A partiality or prejudice in the treatment of others due to a distinction of innate features amounts to an "us versus them" attitude. Extreme forms of such an attitude equate "them" with worldly things as though they were not even persons. Even less extreme forms may add a caste system to intrinsic worth. The result is that all persons are equally worthy within their caste, unequal outside it. It would be inaccurate, however, to attribute either form entirely to malice. Certain kinds of favoritism and accompanying discrimination have been engrained in the collective conscience of certain cultures and social settings for reasons other than ill will. Thomas Jefferson, for example, third President of the United States and a strong advocate of democracy, inherited his father's slaves along with land and other "property".

This is not the place to delve into the reasons for prejudice, though an attempt to draft particular legislation without it could do no more than treat symptoms. The tendency toward favoritism in its various forms is presented as a fact of human behavior. Given dignity as the goal, those forms of favoritism

are at issue which, while admitting the intrinsic worth of all persons, stop short of or arbitrarily qualify equality. Equality in this sense refers back to dignity and is a product thereof.

Equality of dignity differs from equality of ability in that the former is innate, the latter is acquired. Innate does not only mean inborn. Personal features over which one has no control may also be said to be innate. Whether or not the aged or handicapped, for example, are able to perform on par with able-bodied youths is irrelevant to the respect due them by virtue of their personhood. Typical is the slogan "equal wages for equal work" which objects against salary discrimination on the basis of sex or some other innate state instead of job-related performance. Fair housing is another area of contemporary concern and we are still in the throes of acquiescing to interracial marriages.

It is not an offense against dignity when a person fails to be hired because of a lack of physical or intellectual skills, but it is when the reason has to do with arbitrary discrimination against innate features. On the other hand am I as a left-händer to be denied employment at the local machine shop because most of the equipment is for right-handed operators? Reason would find in favor of the shop owner in so far as my dexterity poses a safety hazard or hinders productivity. The prospective job in question includes the equipment in question. A similar example could be constructed for the use of a language native to the individual but foreign to occupational needs.

Now compare the reasons for which survival and dignity are vulnerable. We have a natural need for nourishment and defense against the elements since the human anatomy neither synthesizes sustenance nor is adequately shielded from the outside. We are also inclined to infringe upon the possessions of others

out of personal interests. We have a social need for equal opportunity and freedom of choice since people are born with innate differences, such as sex and race. We are also inclined to treat others unequally out of favoritism toward our kind. Note the two-fold aspects of the human condition with behavioral circumstances capitalizing upon those congenital.

It is a contingent fact that survival and dignity are vulnerable because the human condition in either case could conceivably have been otherwise. Were we capable of photosynthesis, born with impenetrable exoskeletons, functional hermaphrodites, and anthropologically identical, etc., it is questionable whether we would be inclined to infringe upon the possessions of others or to treat other unequally. But it is another question, more fundamental and therefore independent, as to whether or not we would draw the distinction between impersonal and interpersonal relationships.

The human condition could logically have been otherwise, but, given what it is the end of human activity in each order is vulnerable. In order to counteract the vulnerability of each end, supply and demand have to be brought into balance. Measures to this effect make up the collective content of law. (It follows as a lemma that the content of law is contingent. Were the human condition such that the ends of human activity were not vulnerable, then there would be no raison d'être for the content of law as we have described it.)

In brief the minimum content of law in the natural order amounts to measures oriented toward providing for deficient supplies of food, clothing, and shelter while protecting against the excessive demands of personal interests. The minimum content of law in the social order is similar³ to the foregoing. It

³Isomorphic actually. The same function of counteracting the vulnerability of the context of law appears in both orders, though the specific means and ends of one order perceptually differ from those of another.

amounts to measures oriented toward providing for equal opportunity and freedom of choice while protecting against arbitrary favoritism and discrimination.

Survival does not mean the same thing in the social order that it does in the natural order. The natural order is an interpretation or ordering of the world in impersonal terms. Except for oneself there are no persons in the natural order. Sure there are other homo sapiens, but they, like wolves, weeds, and the weather, are seen as so many things with which one has to contend in the process of staying alive. The interpersonal order refers, of course, to the same world. Those same homo sapiens are there right along with the wolves, weeds, and everything else. They have not changed but one's perception of them has. There is something about humans which sets them apart. It is the same thing that sets oneself apart, namely personhood. They still have to be contended with, but as equals. That places a different priority upon the distribution of goods and all that goes with attaining and maintaining it. Survival becomes a means in relation to the notion of dignity.

Personhood obviously is not quantitative. A man minus a limb is no less a person than if he had it. Personhood is a quality that shows up in others (whether it is revealed or ascribed is impossible to prove existentially) as one comes to a consciousness of others as "You" rather than "It". Personhood is not a universal quality. It does not typically show up in such objects as land, air, and water, nor in plants and animals. Part of the reason why persons are persons is that they are set apart.⁴ Quality is a distinction "added on". It is in this same sense, in fact because of it, that orders are said to be cumulative.

⁴A universal quality would be impossible to detect existentially. For example, how could one show the inhabitants of an imaginary world in which utterly everything is blue that it is blue?

Language makes it difficult to speak of cumulation without appealing to quantitative imagery. Even verb phrases in English are geared to report spatio-temporal changes. Yet the cumulative phenomenon is not a spatio-temporal change. Phrases such as "set apart", "added on", "included in", "arises out of", etc., make little literal sense unless understood to report quantitative change. That is why repeated warnings have been issued when dealing with comparative illustrations which involve extension or duration, such as the windows-on-the-world analogy toward the end of the previous chapter. Because the use of quantitative imagery is linguistically ineluctable one runs the risk of confusing cumulation with accumulation.⁵ This can have misleading and perhaps plainly erroneous consequences when translated into terms of law. But let us return to the meaning of survival in the social order.

When the operating premise is that all relationships are "I-It", meaning ~~nothing~~ else is on an equal footing with oneself, then it matters not whether one preys upon bipeds or quadrupeds as long as doing so serves one's own personal needs. But when the premise is that there are "I-It" relationships and "I-You" relationships then even the manner of dealing with impersonal objects is determined by the extent to which it affects others. One can not deal indiscriminately with the environment and not have it bear upon one's neighbour. Of course not every action equally affects human dignity and measures must be fashioned accordingly. Yet the well-being of one's neighbour

⁵If the windows in our example near the end of the last chapter were all the same color, then peering through any combination of them would have an accumulative effect: a darker shade of the same hue. But because they are different hues to begin with, different qualities, the net is cumulatively yet another hue. So too dignity is not the simple addition of its own concerns with those of survival.

and the common good of the community enter into the determination of how to provide for deficient supplies and protect against excessive demands.

Note that there are both impersonal and interpersonal relationships in the social order. Personhood, to repeat, is not a universal quality. It is just that there are those whom one would relate to impersonally in the natural order as homo sapiens and interpersonally in the social order as fellow persons. Ordering the world this way or that affects the way one approaches and responds to the world but it does not directly alter the world any more than thinking of a certain series of sounds as symphony changes the number of notes. The contents of the world remain the same whether the world is thought of as a natural order or as a social order. The content of law, on the other hand, is a product of perception and varies accordingly.

2. In the Supernatural Order

Since it makes methodological sense to work from genus to species when possible and since ecclesial law is a species, so to speak, of law in the supernatural order, the question of content ought therefore to be taken up initially in terms of the supernatural order. Let us first review the nature of orders and the manner in which they are related.

The natural, social, and supernatural orders comprise an inclusively disjunct interpretation set. Each order is a complete and consistent explanation of events with respect to their bearing upon the interpreter. All interpretations refer to the same field of data, namely the world. And no one ordering of the world excludes the possibility of looking at the world another way. An explanation, we have said, is a description or examination of things by the

connections or relationships among them. An order describes the fundamental way in which a conscious subject relates to objects about him. One may draw a keen distinction between oneself and everything else. That does not change the world but it does determine how the individual will interact with the world. Behavior is a function of perception. He will interact as it best suits himself; to do otherwise would be unreasonable. The object of his interaction is survival and we have already translated this into terms of law as the context and, subject to the human condition, content of law in the natural order.

Another way in which one may relate to those about him involves the preceding distinction between oneself and others, but not all others. Some are seen to be persons like oneself, others are not. Those who are persons typically belong to the same species as oneself, in other words they are human. But what sets them apart from everything else as far as interaction is concerned is one's regard for them as equals. The respect due them in virtue of their dignity places emphasis upon the whole person and people as a whole. This too we have translated into terms of law, law in the social order.

Finally, one may relate to those about himself in a manner which sees everyone and everything as parts of a whole. Translating this into terms of law is the task of the present section. It is proposed to begin with a philosophical formulation from which the content of law in general can be discerned before reformulating the matter theologically and translating it into the content of ecclesial law.

The supernatural order evolves as one comes to a consciousness of being part of a whole. We are speaking of a logical and not necessarily chronological evolution. This sort of evolution is a phenomenon which we have already encountered, albeit in slightly different forms and under different names. Most

recently it was met in the nuance of cumulation. Another name for it is transcendence, a term which unfortunately but understandably causes uneasiness and confusion among the uninitiated.

It is human behavior to fear the unknown. Certain philosophers, Kant and Hegel among them, and certain theologians, particularly the mystics such as Meister Eckhart and John of the Cross, have placed the transcendent beyond experience and in some cases beyond knowledge. We can agree with them only in the sense that though the transcendent is beyond one realm of experience it is in another realm which is within the overall possibilities of human experience. The same goes for knowledge.

Transcendence in this sense does not imply distance of separation. It is a transparency or recognition of "more" in the midst of that which is. A simple example was given early in the fourth chapter. One cannot derive any meaning from a novel "read" one letter at a time. But when letter-tokens on a page are grasped together one can comprehend their significance. Note the transition from quantity to quality, from ink markings to meaning, reflected by the phrases "grasped together" and "comprehend" even though the two are etymologically equivalent.

One could speak of orders as sequentially transcendent in lieu of using the adjective "cumulative" were it not for the noted connotation attached to "transcendence". On the other hand, "cumulation" has the added advantage of reminding us that the three orders are related in some sort of logical succession. John Hick favors the phrases "superimposition" and "interpenetration" for what amounts to the same phenomenon.⁶ "The ethical is

⁶HICK, Faith and Knowledge, p. 103, ch. 5-6, passim; see also the quotation on p. 176 supra.

experienced", for instance, "as an order of significance which supervenes upon, interpenetrates and is mediated through the physical significance which it presupposes".⁷ So too

it is always true of the religious mode of 'experiencing as' that the data in question are in themselves ambiguous and capable of being responded to either religiously or naturalistically. ~~More~~ strictly, the two types of interpretation are not alternatives on the same level but are different orders of significance found in the same field of data. The religious significance of events includes and transcends their natural significance. Those events which the prophets saw as acts of God can also be seen as having proximate natural and human causes; and the person of Christ, seen by Christian faith as divine, is depicted in the New Testament as being at the same time genuinely human.⁸

Different orders of significances can be found in the same field of data because different qualities can be successively "superimposed" upon the same quantities.⁹ Just as linguistic meaning is superimposed upon an arrangement of ink markings, sound waves, images, Braille bumps, a phenomenological ordering is superimposed upon the world. The comparison is particularly apt as far as the supernatural order is concerned since it is an ordering of the world as being a meaningful whole.

⁷HICK, "Religious Faith as Experiencing-as", p. 30. Emphasis added.

⁸HICK, "Faith", p. 168.

⁹This is a subtle phenomenon but simple to understand once it is recognized that the relationship between quality and quantity is not a quantitative tertium quid. It is an aspect of the quality itself. That is why at the risk of sounding repetitive it must be emphasized that one order is not "added on", "included in", or otherwise a spatial or temporal addition to another order or to the world.

Coming to a consciousness of being part of a meaningful whole is something done in retrospect since the whole phenomenologically precedes its parts. The identification of a part depends upon a prior awareness of the whole.¹⁰ It is possible to refer to a chicken without referring to its egg, but it is not possible to refer to a chicken egg without referring to a chicken. As far as phenomenological reference goes, the chicken came first. To regard the world as a whole is to derive the identity of any part, oneself included, after the fact from the whole. Said another way, the personal identity of a conscious subject is secondary to the world as a whole.

In the natural and social orders, on the other hand, the personal identity of a conscious subject is primary, others are secondary, and the whole is understood quantitatively. Whether all relationships are "I-It" or some are "I-It" and others are "I-You", "You" and "It" are regarded as such only in counter-distinction to "I".

When speaking of any order, the whole refers to the world. In the case of the natural and social orders the whole is equated with the totality of impersonal or interpersonal relationships. In the case of the supernatural order the whole is understood as other than the sum of its parts. In this sense the natural and social orders are reductionistic and the supernatural order is holistic. Reductionism equates the whole with the sum of its parts. Holism regards the whole as greater than the totality of its parts. The world is greater than all its parts in a qualitative way. The world could not be reduced to any set of relationships for it precedes them and it transcends them. The world transcends its parts in a particularly significant manner: it has meaning. One

¹⁰Cf. STRAWSON, Individuals, referred to in note 80 of chapter three, supra.

does not have to know what it means in order to know that it has meaning (as is also the case with foreign languages).

The sense of "meaning" which the world is said to possess is that of purpose. It is used to ask "what is the meaning of life?" but not "what is the meaning of your behavior?" The latter looks backward, so to speak, for reasons while the former is directed ahead. Meaning may also indicate, among other things, personal intention or resolve, results or ramifications, synonymity, casual or conventional connection. Examples:

He only meant to help.
His election means the end of all our worries.
'Cavil' means to quibble.
Red litmus means an excess of acid.
A red light means stop.

None of these are applicable to an ongoing integral event, which is how the world is understood when envisioned as a qualitative whole.

Already we have the rudiment of a philosophical formulation or, more specifically, a supernatural cosmology. The world is an ongoing integral event. It is, in other words, a process. It is a process which bears purpose, or at least that is the sense of its meaning. Since the world is all that is the case, the process bears its purpose per se and in se. That is, because the perimeters of the world extend to the limits of possible experience, the meaning or purpose of the world is "contained" within it. The identification of process and purpose with one another and with respect to the world as a qualitative whole amounts to world-word-event which we have elsewhere characterized as the maximum merger of medium and message. Both characterizations come to the same thing and both cite the same sort of perspective as to why the world is interpreted this way. Earlier we have seen and later we shall return to see that faith, understood as interpretive experience, is a certain brand of this perspective.

For now we can only outline the path which a translation into terms of law would take. A complete translation is not possible without a more specific idea of the world's meaning since that is what the context of law would be in the supernatural order. The communication of being or communion, which is the way the meaning of world-word-event was characterized earlier, rather clearly conveys an experience of shared existence.

An experience of shared existence is not the "bare beingness" which ontologists talk about. Orders are orderings or interpretations of the world and interpretations are phenomenological, not ontological devices. That is, they have to do with the way the world appears (to someone) rather than how it is in itself. The way the world appears has a decisive effect upon an individual's interaction with it for he will "live his truth", he will act so as to achieve what he regards as the proper end of human endeavor.

In so far as the world appears to be a whole which conceptually (not chronologically) pervades and precedes any interaction of individuals, then the interaction of individuals has a transcendental effect upon all. That is why the supernatural order is characterized as "I-Us". Even though one relates to others as people and things, they are all part of "Us". One relates to them and through them to "Us". This is the core of communion and like the other ends of human endeavor it is optional and vulnerable, but because of its pervasive scope it is vulnerable because it is optional.

Each of the three primary interpretations or orderings of the world which we have described is predicated upon the possibility of superimposing different qualities upon the same quantities: different orders of significance upon the same field of data. The field of data at issue cosmologically is the world. Thus there is a qualitative ambiguity about the world. From within any given

interpretation, however, there is no ambiguity. Each order is a complete and consistent explanation; an organization of the world according to the perspective of a conscious subject.

Since there are certain similarities among orders in organizing the world they are said, subject to qualification, to be cumulative. Even so, a radical diversity exists among orders because they are founded upon unique perspectives. The relationship "I-It" appears in all orders but not with the same significance. "I-You" appears in the social and supernatural orders, not with the same significance, and not at all in the natural order. "I-Us" appears only in the supernatural order. This sort of succession precludes the possibility of the same conscious subject holding different cosmological interpretations simultaneously.¹¹ Consequently a supernatural ordering is averted when either of the other orders is opted for.

One opts for either of the other orders out of, to use the language employed earlier, innate deficiency (congenital circumstance) or acquired excess (behavioral circumstance). In this case the former refers to nescience, the latter to contentment with the status quo. There is an inability or unwillingness to interpret experience in holistic terms.

Opting for either of the other orders has the appeal of placing oneself, alone or with others, at the center. They are, in other words, egocentric or anthropocentric. In either case the world is secondary and consequently quantitative. The world is quantitative as a consequence of man's finitude. That is, if man is his own standard of measurement with which to define the

¹¹It is possible for different subjects to have different interpretations of the world at the same time, though, and in this manner the cosmological interpretation set is inclusively disjunct.

environment, then substance, activity, and values are all units and multiples of units affecting man. To cite an extreme, the infinite is not other-than-finite, it is an unspecified multiplicity of finite units. "According to this view, the divine is simply the human raised to the power of 'x'".¹²

Such a view succeeds in isolating those at the center, seeing them as the only genuinely independent beings. All things else are relativized by the center and as a result interaction with the periphery takes some form of utilitarianism. Apart from this the autonomous center regards the periphery with apathy, anarchy, and atheism for that which is not of service is not of interest. None of this is necessarily vicious. But even while persons may render respect for the dignity of other persons they conserve the primacy of the center in the process.

The supernatural order, on the other hand, is an interpretation of all experience in holistic terms. It is to regard people, plants, planets, and all things else as fundamentally related by their common conceptual union. From this notion of an underlying unity flows an unqualified cooperation among all things according to their contingent natures. It is not a shift from the selfish "my will be done" to the sacrificial "your will be done", but a coming to terms with the communal "our will be done".

Such is the nature of ordering the world that the conscious subject is always at the center. But in the case of the supernatural order no qualitative gap exists between the center and periphery. Here the center is centripetal; that is, secondary to the whole, having been defined by it. This sort of

¹²John Arthur Thomas ROBINSON, Honest to God, London, SCM, 1963, p. 68.

phenomenological passivity affects the identity and interactions of man. He is most fully himself, so to speak, when freely disposed to the service of others. To be open to and to act upon an openness to others without qualification is to realize that we are rightly related to one another as parts of a whole. It is realized transcendence: the meaning of being is identified with doing. To be part is to participate with others in the purposive process of the whole. Doing so gives meaning to our lives because it participates in the meaning of life.

Bringing about a spirit of unity and the harmony or unqualified cooperation which accompanies it clearly cannot be legislated by some sort of coercive action. Force in any form is self-defeating to the voluntary disposition of oneself. What is needed is a program oriented toward awareness, acknowledgement, and actualization of our commonality in everyday life. Those who choose to separate themselves by a qualitative chasm pronounce their own penalties in the process. These are the sanctions of isolation and dissatisfaction stemming from the inability of finite man to transcend per se, to reap any lasting meaning from his life.

The mentioned program amounts to the content of law in the supernatural order. It is chiefly a pedagogical program and would as such have to be tailored to the circumstances of each locale. Uniformity is not necessarily the road to unity. Thus the norms for behavior vis-à-vis unity have a passive bent about them, creating an environment within which each individual can come to consciousness of his right relationships and set about living them out. By setting up an atmosphere of common understanding and empathy, for instance, agreement and sympathy are allowed to flow freely and responsibly.

Survival and dignity make their case in the supernatural order because of the contingent nature of mankind but they do so as a means in relation to the

notion of commonality. One still has to contend with men and wolves, weeds and weather, whether they are benign or hostile and whether or not they are able and willing to return one's compassion.

Communion does not mean the end of needs but it does dispel greed. Note that there is no greed in the ecosystem until one comes to man. Greed is a desire for superabundance peculiar to mankind. Only man has demonstrated the ability to equivocate a superabundance of goods with a superiority of self. Doing so he loses his identity to that of his dominion. Communion does not locate man's identity in possessions, talents, intelligence, state in life, or any other situational contingency. It is what he makes of them in bringing about an unqualified cooperation which is telling of his possessing himself.

Until now we have not had to formalize the concept of person but in making the transition from a philosophical to a theological formulation of the supernatural order the personal dimension of transpersonalism is more pronounced. Let us begin by reviewing what we said about persons. Our concern is phenomenological and so emphasizes how man sees himself and others as persons.

Only one person "exists" in the natural order: the conscious subject. Likely he would not reflect upon his being a person, but because of the way he distinguishes himself from everything else he practices the first feature of personhood, viz. qualitative distinction. He is the one to whom other things are significant. In the social order a person is conscious of others as persons. Why? Because they are qualitatively distinct like oneself. That is an important point. Others are regarded as persons in so far as one sees them on par with oneself. The point is also very open-ended in that it does not limit other persons to the same biology as oneself. Said then of the whole, the whole is a

qualitatively distinct conscious subject like oneself. In brief, the whole is personal. But since one's next door neighbour and the qualitative whole are obviously not biologically the same, one should not expect to communicate with them in quite the same way.

Arbitrarily let us say that those who are personally but not biologically the same as oneself are "personal" and reserve the word "person" to those who are both. The question of personification depends upon whether certain beings or phenomena are regarded as if or as being personal. It is a relative question, relative to the one doing the regarding.

The personal whole is not as readily apparent as one's next door neighbour, ironically because of its pervasive scope. Yet on the same account it is transparent in a secondary manner through its parts. Worldly events which are indicative of or otherwise signify the personal whole are word-events of that whole. My neighbour and I are persons in the personal being of the whole. Note the operation of faith in perceiving the whole through its parts and therefore the special relationship between parts because of their common relationship to the whole. Note also that neither faith nor communion are exclusive to homo religiosus.

The personal whole is known in numerous ways under numerous names, among them Yahweh, Allah, Viṣṇu and Śiva, and the Holy Trinity. Whatever else may be said by way of drawing religious distinctions, each of these names is applied to an experience of the personal whole¹³ which various men call God.

¹³They are to be distinguished, however from the so-called suprapersonal whole or Absolute represented in the East by ŚANKARA and in the West by Francis Herbert BRADLEY. The eighth century Hindu theologian ŚANKARA took the teaching tat tvam asi, "that you are", of the Chāṇḍogya Upanisad (VI, viii, 7) to assert strict numerical identity of ātman (self) with Brahman

"Personal whole" is no more an exhaustive description of God than "qualitatively distinct conscious subject such as oneself" is a complete description of person. But both say something minimally true about God and persons however else they are known. Men of different times and places, of different cultures, social, political, and economic settings, demographic and geographic considerations, and so forth are inevitably influenced by these factors in the specific images they have of God. One's view of God varies with one's view of the world in so far as God is experienced in and through the world. Agrarian and nomadic societies, for instance, would and historically have tailored their images of God out of the materials most immediate and important to themselves. The fact that various images do not completely quadrate with one another says more about man than about God. In any event it is not ours to argue that all religions ultimately lay claim to the same God. What we are arguing for is a transition from knowledge about God and to knowledge of God; from the philosophical to the theological. And the latter is based upon an image of God. The image of God of chief concern to the Christian church, and thereby to church law, is centered upon Jesus of Nazareth as the Christ, the anointed one of God.

To say with Christian faith that this Jesus is the center of communion is to cite him as the key to bringing about communion in practical life.¹⁴ Jesus

(Absolute). Any distinction at all including finitude, change, and plurality, are maya, illusions. BRADLEY, an English philosopher at the turn of the twentieth century, taught much the same doctrine in book two of his Appearance and Reality; A Metaphysical Essay, 2nd ed., 9th impression (corrected), Oxford, Clarendon, 1962, xx-570 pp., esp. pp. 119-142: The work first appeared in 1893.

¹⁴We are not concerned here about raising the christological issue about the "natures" of Jesus as Christ. This kind of question belongs to another conceptual framework, particularly one marked by a priori categories. It is

appears to have exhibited communion in an exemplary manner. By freely disposing himself to the service of others even when unrequited he showed himself to be more than just a good man. By his teaching and behavior he showed mankind what it means to be fully human. He cut across all manner of class and categories and stunned a history of humanity, not just the Hebrews of ancient Palestine, but generations before and after bred upon the principle that only the strong survive. The message he delivered was uncomfortably personal: love one another as your heavenly Father loves you; forgive one another as he forgives you. In short, do for others as God does for you.

So much is contained in so short a message. It is a statement about how God is and thereby how man rightly is to be. But to be himself does not mean man must deny his fundamental desires for peace, security, and affection. Quite the contrary. What he has to renounce are paths that deceptively direct toward discord under the pretense of fulfillment.

These paths are constructed out of the static categories by human architects and can only lead to a man-made image of "ideal man". "Ideal man" is autonomous, so the image runs, because of his categorial dominance: authority, wealth, strength, intelligence, etc. But the method is self-defeating on a global scale. Wherever there are categories over finitude there is opposition, and where there is opposition there cannot be collective fulfillment. For some to be strong, some must be weak; for some to be affluent others have to suffer poverty; and so on. Hobbes has already outlined the inescapable

enough at present to adopt the descriptive axiom of active identity that something is as it does. "Our knowledge of God's nature is derived from our knowledge of his deeds; we know what he is in so far as we know what he had done". HICK, God and the Universe of Faiths, pp. 151-152.

consequences of such a competition, namely a never-ending struggle as the houses of have and have-not periodically exchange occupants.

By the message of his life Jesus taught three things about Yahweh's hesed: that it is perfect, processive, and transparent. These are things which apply to man in order to realize the identity which he possesses (in contrast to being something other than himself as the ideal and therefore unobtainable image of man would have it).

God's love is perfect; that is, it is thorough-going. Because it is neither reserved nor qualified there is no cause for separating oneself from others by a ratio of relative placement according to categories. Categories, be they male / female, rich / poor, black / white, or whatever, are artificial. They are not part of humanity by nature. Sure there are males and there are females and so on, but that is not what makes them human. Even the sense of equality which treats two or more individuals as having the same categorial rank is amiss for it preserves a ranking system.

God's love is processive; that is, it is fulfilled in via. We could say it is fulfilled in vita. Peace, security, and affection do not stand at the end of the road which one travels only then to partake of them. They are realized, made actual, in the process of doing for others. Self-pursuit is erroneous if not contradictory.

God's love is transparent; that is, it is experienced clearly but mediately. The mediation of God's love in and through the world around us leaves the room for the freedom of each individual to recognize or not a vivacity or spirit that lends meaning to life. Meaning is something associated with the whole, and in retrospect its parts, which themselves are conceptually secondary, are said to be meaningful. Because a sentence has meaning its words and letters are

meaningful; because life has meaning our lives are meaningful. The meaning of life according to the Christian interpretation is living in common with God. Life is lived with God through the world, not lost in it but neither apart from the world.¹⁵

So Jesus' message is do for others as God does for you, and here is what God does for you: his love is perfect, processive, and transparent. Here then is what you are to do to be fully human: be compassionate toward all others in so doing you will discover yourself and commune with God. Jesus proclaimed his message by performing it, by living a supernatural life. The church, likewise, is a living community which proclaims by performing Jesus' message. That is, church-word-event derives from Jesus-word-event. Thus the church is both active and passive in the process of bringing man to know who he is and what it means to be who he is. It is servant, but also served; sacrament and recipient; herald, yet hearer; teacher though pupil.

Church law is a mode of the church modeled as word-event. It is a mode of communion, both creative and reflective. Creatively, ecclesial law is that function of the church aimed at the articulation and realization of communion by a pedagogical program oriented toward awareness, acknowledgement, and actualization of commonality in everyday life. The Second Vatican Council opened its first document on much the same theme.

¹⁵Such was the teaching of JOHN XXIII. "No one should make the mistake of supposing that his own spiritual perfection is inconsistent with the tasks of this present life. The two are perfectly consistent. Let no one imagine that he must necessarily withdraw from the activities of temporal life in order to strive for Christian perfection, or that it is impossible to engage in such activities without jeopardizing one's human and Christian dignity". Encycl. "Mater et magistra", 15 May 1961, no. 255, in A.A.S., 53(1961), p. 460.

The sacred Council has set out to impart an ever-increasing vigor to the Christian life of the faithful; to adapt more closely to the needs of our age those institutions which are subject to change; to foster whatever can promote union among all who believe in Christ; to strengthen whatever can help to call all mankind into the Church's fold.¹⁶

First on its agenda was the reform and promotion of liturgy for "it is through the liturgy, especially, that the faithful are enabled to express in their lives and to manifest to others the mystery of Christ and the real nature of the true Church".¹⁷

The reason why the Council gave priority consideration to liturgy is telling of its basic understanding of the church. --Because liturgy especially exemplifies the proclamation and performance by the faithful ("express in their lives and manifest to others") of the mystery of Christ and the nature of the church. These three elements, living testimony, Christian mystery, and the nature of church coalesce as church-word-event. By bringing them together, the interrelated functions of the church, one of which is ecclesial law, are seen to be creatively oriented. Thus understood the Council had much to say about the creative end of ecclesial law, from communication to ecumenism to education and human enterprise.

Reflectively ecclesial law is a discernment of communion. It is an evaluation of the extent to which various forms of behavior, relationships, projects, programs, and other activities are in keeping with communion. The use of statutes or canons as evaluation standards is, of course, typically part of

¹⁶Vatican II, const. "Sacrosanctum Concilium", no. 1.

¹⁷Ibid., no. 2.

church law's reflective methodology.¹⁸ Canons are tools of church law in that reflective ecclesial law is concerned with whether something is conducive to communion rather than whether it exactly conforms to the written statute. The difference in orientation is crucial to the interplay between creative and reflective ecclesial law. An exaggeration of the reflective task can confuse or otherwise reduce church law to a code of canons and occlude the creative role of law in living experience. Put positively, the essence of ecclesial law can best be seen by looking at the chief concern of legal identity, namely obligation.

B. The Identity of Ecclesial Law

Legal identity is the apex of our study. Finis est primus in intentione, ultimus in executione. So it is with the concept of ecclesial law. Methodologically speaking, the description of ecclesial law is not unlike playing bridge: if played well, it's all in the bidding. If described well, the concept of ecclesial law is all in its preliminary concepts. The preliminary concepts of ecclesial law are obvious enough: church and law. What is not so obvious to traditional descriptions of church law is that these concepts do not ultimately refer to different phenomena. The failure to appreciate that law is a function of a system--arising with and as part of the system--destines even the most otherwise accelerated understandings of church law to telling less than they

¹⁸Other standards, to mention only a couple, are customary practice and the so-called common estimation of man principle whereby "conflicts between the official opinion of judges and the reasonable public opinion of well educated people should be avoided and reconciled". PIUS XII, alloc. to S. R. Rota, 1 Oct. 1942, no. 4, in A.A.S., 34(1942), p. 343.

might have.¹⁹ But because the system of which ecclesial law is a function, namely the church, has the nature of mystery, the manner of church law is also mystery.

The link between law and mystery is the key concept of ecclesial law. Ours has been a descriptive account of this concept because the link between law and mystery is discovered, not created. It is discovered in the process of understanding the church and appreciating law.

In order to understand better the mystery of the church we have distinguished it from mysteriousness by making models of both. The upshot has been that mystery and mysteriousness take different models. Modeled as being word-event, church mystery is seen to be self-transcendent; it is a medium with a message. Meanwhile church law is a mode thereof.

Seeing the church in this way is part of a broader phenomenon of perception, namely the faith perspective. Mystery is knowable through faith and faith is an interpretive element within religious experience. From such a perspective the world as a whole has meaning because it is the medium through which a person communicates with the personal whole. This is the essence of transpersonal experience.

According to Christian faith, communion is the point at which medium and message merge; the meaning of life is living in light of God. To live like Christ

¹⁹An American seminar held only a year after the closure of Vatican II, for instance, included scholars in scripture, theology, philosophy, history, sociology, and canon law. Their statement of consensus opens with an analysis of the church but, because it does not come to terms with the manner of law, its concluding recommendations do not appear to have a distinct flavor of ecclesial creativity. Instead they keep with a canonical methodology, substituting certain elements drawn from American civil experience (such as a separation of governmental powers) for known deficiencies in the canonical method. See BEICHLER, ed., Law for Liberty, pp. 185-202.

is to live a supernatural life. That is, it is to be fully human by being for others as God is for us and in doing so to experience shared existence. The church is a means to communion in that it is an ongoing word-event having reference to Christ's universal communication of truth and grace.

To appreciate law one again has to begin by way of drawing a distinction. Because law is a phenomenon and a functional one at that it has to be described rather than defined. In general, law amounts to measures for bringing about the proper end of human activity under the limitations of the human condition. A specific notion of the proper end of human activity depends upon a particular perception of the world. One such perception is transpersonal and according to it our proper end is unity and harmony. Christian faith is more specific. It calls for communion with God, who is known and experienced in a special way in and through the Jesus-event. The church shares in bringing this about by a program oriented toward awareness, acknowledgement, and actualization of our commonality. In this way ecclesial law accounts for the mystery of the church because it is part of the church accounting for the mystery of Christ. Thus the link between law and mystery.

The conclusion to the discussions on law in part one was that the identity of law is revealed in a legal system by the correlation of obligation to the system's context. If that is so, then the identity of ecclesial law is revealed in a system of church law by the correlation of obligation to divine communion. It follows that an ecclesial norm consists in the articulation and realization of a valuation that something is conducive to communion.

Since the Second Vatican Council has stressed the importance of liturgy, let us look at the dynamics of an ecclesial norm by taking participation in liturgical celebration as an example. According to the Council, Christians have

a right and an obligation by reason of the baptism to full, conscious, and active participation in liturgical celebrations.²⁰ Setting aside the matter of baptism for the moment, the Council has declared under the solemnity of a constitution that each Christian faithful is, on the one hand, permitted to participate in liturgical functions while all others are prohibited from preventing his or her doing so and while, on the other hand, being bound to participate by reason of supernatural advantage. It would seem that the immediate reason for the right and obligation has to do with coming to communion rather than from baptism, but without an analysis of baptism one can do no better than conjecture. In any event the Council has declared that liturgical participation is conducive to communion. In other words it has given utterance to the connection between liturgical involvement and the communication of being.

Utterance is only the tip of the articulation iceberg if one takes into account the history of experience and reflection that goes into a discernment of this sort. Even so the Council did not and could not have created the connection between liturgical participation and communion. Nor could it be brought about by whatever is necessary for its realization. The connection must be valid even before its articulation in order to qualify as an ecclesial norm. Were it otherwise then the specific content, liturgical participation in this case, would not have the value of being conducive to the general context, communion, and neither right nor obligation would exist in fact. (They may, however, exist in force; that is, be promulgated, regulated, and sanctioned.)

²⁰Vatican II, "Sacrosanctum Concilium", no. 14. Elsewhere the Council reiterates the right of the laity "to receive in abundance the help of the spiritual goods of the Church, especially that of the word of God and the sacraments from pastors". Const. "Lumen gentium", no. 37.

The existence of an ecclesial norm depends, as a value,²¹ upon its instrumentality in relation to communion. Were it a value judgment it would depend upon desire—personal or collective, for or against. This places the ecclesiastical legislator in a passive position of giving voice to that which is the case, namely the existence of supernatural obligations. It is at the same time a scientific position of proceeding by a discovery process to describe these obligations. Descriptions have to be updated as exceptions appear and more apt measures become available, but still they are descriptions and not prescriptions. The principle that water solidifies at 0°C does not dictate what water ought to do when exposed to freezing temperatures; it describes what water regularly does. The statement that Christians have an obligation to participate in liturgical celebrations declares that there is an obligation to do so but it is the obligation itself which decrees liturgical participation. Obligation, once again, is the value of being conducive to the proper end of the system. An ecclesial norm is prescriptive in so far as it is a description of a supernatural obligation.

An ecclesial norm ought to be observed because of its value, not because of its promulgation, regulation, or enforceability. Discrepancies can occur, of course, between descriptions and obligations. Measures which once were effective means for fostering communion may be ineffective or even counterproductive at another time or place. At its extreme, an individual may come under official censure for advocating what is after all in the best interests of communion (e.g., Matteo Ricci). In such a case it is the authorities

²¹See the FULLER-NAGEL debate referred to in note 44 of the previous chapter.

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themselves who suffer or are suffering from a loss of communion. It is, after all, love and not legislation that is the fullness of the law, at least from a Christian faith perspective.²²

Descriptions and obligations can be at variance for any of a number of reasons, most of which have to do with the human factor. Descriptions are, of course, artificial. They are man made. Obligations are not made by men in any usual or direct sense.²³ One has an obligation to do that which, under the human condition is conducive to the end of human endeavor in a system. The human condition is influenced by such factors as technology, demography, traditions, and terrain. As the effects of these factors differ and develop historically and geographically so does the human condition. Obligations change as the human condition changes. Thus those descriptions that do not keep up should not be kept, for if enforced they may do more harm than good. Even apart from changes in the human condition the discovery of legitimate exceptions or the discernment of more effective or more efficient means of achieving ends may date descriptions which were once thought to be accurate, adequate, and complete.

From what we know about orders, can obligations themselves be at odds? Phenomenologically it seems they cannot. But if not, then why does there occasionally appear to be a conflict between, say, social, moral, legal, and / or

²²Cf. ROMANS 13.8, 10; GALATIANS 5.14.

²³They do follow from the end of human endeavor in a system, which is part of an ordering of the world. An order, in turn, is a cosmological interpretation at the conceptual center of which stands a conscious subject. So to a certain extent man does have an indirect role to play in the formation of obligations.

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religious obligations? The immediate answer is that these are conflicts of categories, not obligations, but the reason goes deeper than terminology.

Suppose that in a certain somewhat futuristic society a ban has been imposed by the political authorities on liturgical participation because the country officially regards such activity as detracting from the autonomy of the state and humanistic dignity of its members.²⁴ Assuming also that this is a sincere situation and not the fiat of a malevolent few, then credit must be given where it is due. Gentle but firm efforts to educate the masses in the official state doctrine that man is ultimately alone, that he is responsible to himself for himself, and that only the collective organ is eternal have repeatedly met with minority resistance from a Christian counterculture which claims, among other things, the right to conduct public acts of worship. These displays have had little measurable effect to date but because of a fear that the people may trade their trust in science for superstition to the detriment of all, our imaginary legislators have, with heavy hearts, passed a bill banning public liturgical practice. --But public practice alone, leaving all forms of private worship to the individual conscience.

Notwithstanding, certain clusters of Christians have continued their public practices on the premise that they cannot commune with God in any meaningful way without manifesting it in a liturgical community. Political pressure on the Chief Executive has eventually resulted in the indictment of one such

²⁴The inspiration for this example comes from Lon L. FULLER, "The Case of the Speluncean Explorers", in Harvard Law Review, 62(1949), pp. 616-645, and "The Problem of the Grudge Informer", appendix to The Morality of Law, rev. ed., pp. 245-253. Both are well reasoned and well written as evidenced by the inclusion of the former in Ephraim LONDON, ed., The Law as Literature, New York, Simon and Schuster (Touchstone), 1960, pp. 635-663.

community. Before deciding in favor of a trial, the grand jury entertained arguments invoking the ancient Constitution of the United States, particularly its first amendment, as well as the Second Vatican Council's documents regarding religious liberty and related ecclesial legislation. It was also argued that the so-called Bill of Rights was replaced ages ago after the formation of the NorAm nation by the Articles of Responsibility. These Articles, in fact, capitalized upon the Conciliar declaration that "civil society has the right to protect itself against abuses committed in the name of religious freedom".²⁵

However the defense may object that the state has misread the Council's intentions, the argument is lost even if the point is won. The state is not concerned to read or misread the mind of the Council for it does not regard itself bound by ecclesial norms. To see what it does regard itself bound by, let us look at the nature of obligations.

The formal structure of an obligation is that if X is conducive to context Y of system Z, then member of Z who could do X is obliged to do so. Unless the system is internally inconsistent there cannot be both an obligation to do something and an obligation to forbear from it. If the system is consistent and one of the options is obligatory, then either the other option is not obligatory or it is obligatory in some other system. This seems to be the case with public liturgical participation in our hypothetical example. Therein the state is one system and the church or Christian community is another. Collectively speaking, the state operates on an interpersonal level. It considers its members bound by those norms which embody obligations related to its understanding of

²⁵Vatican II, decl. "Dignitatis humanae", no. 7. See the related discussion in FINNIS, "Some Professional Fallacies about Rights", mentioned in note 90 of chapter two, supra.

human dignity. Thus it is a valid law in the social order which forbids public liturgical participation. On the other hand the church operates on a transpersonal level. It considers its members bound by those norms which embody obligations related to its understanding of communion. Thus there could be no law in the supernatural order which forbids liturgical involvement. The question is, what ought a member of both systems to do? To which norm is a Christian citizen of NorAm bound? It is fine to say one is an obligation in one ordering of the world and its opposite is an obligation in another ordering, but it is the same spatio-temporal world in which they are to be executed and this is where the conflict appears.

We know that at least theoretically the conflict between two (or more) systems can be resolved relative to a third and in some sense controlling system provided there exists an objective priority among them.²⁶ But knowing now what we do about interpretation, that a set may be mutually inclusive and have conflicting values, we should have to add another stipulation to the preceding method: that all systems at issue belong to the same order. Thus the method does not apply to a conflict between orders in the cosmological interpretation set. There are only the three basic orders: natural, social, and supernatural. Even if there were another to which to appeal, a conflict between it and the others would require yet another order and so on ad infinitum. And in any event there appears to be no way of establishing an objective priority among them. Consequently the conflict seems to be ontologically irresolvable.

²⁶See pp. 63 and 68-69 of chapter two, supra.

Phenomenologically, however, there is no conflict to resolve. Since no one can straddle cosmological interpretations²⁷ and from within any given interpretation of the world there is a unique proper end of human endeavor, it follows that from within any interpretation the values which one is obliged to observe appear without ambiguity. The Christian is obliged to participate in public liturgical celebrations in so far as they are conducive to communion. The secular authorities of NorAm are obliged to prevent such activities in so far as they are detrimental to human dignity. Each sees the situation from his own interpretation of the world.

Christians are not likely to regard their liturgical practices as contrary to human dignity because communion is inclusive of dignity in the sense that contexts are cumulative. Consequently Christians would, while distinguishing between supernatural and social obligations, recognize a harmony among them which does not admit of conflict.²⁸ Any apparent conflict is the product of inaccurate or incomplete descriptions. From the perspective of Christian faith the bill passed by the NorAm authorities cannot be law for it does not describe an obligation. If the context of law is ultimately communion and public liturgical participation is conducive to it, then there exists an obligation to participate and the conflict is only apparent.

Could not the state validly run an argument to the contrary? It could. Then has not the phenomenological quest for the identity of ecclesial law shipwrecked on the reef of relativity? Not at all. In fact ecclesial law is a legal system as legitimate as any other because legal systems are relative to

²⁷See p. 195, supra.

²⁸The Second Vatican Council spoke to this point in its dogmatic constitution "Lumen gentium", no. 36, par. 4

interpretations of the world. Were there but one ordering of the world then faith could not be free, there would be no room for mystery, and ecclesial law would possess no distinct identity. Ecclesial law has a transcendental identity and the transcendent is a matter for phenomenological inquiry. Because ecclesial law is a species of law in the supernatural order and it is in this order that the church, modeled as word-event, has meaning, church law is meaningful from a faith perspective.

Put positively, the identity of ecclesial law begins with the fact that church-word-event is a living expression whose meaning is the proclamation by performance of gospel values. Interactively then ecclesial law is a mode of church-word-event. It is the normative function of creatively and reflectively articulating and realizing that which is conducive to communion. Whatever else may be said in or about church law, its account of mystery derives from its transcendental identity. It is the workings of that identity which we have attempted to describe phenomenologically.

C. A Prospective Conclusion by Way of Comparative Overview

As far as the working premises of canonical practice are concerned, the thesis that a certain identity exists between law and mystery is a methodological prolegomenon. It takes its place alongside the theology of law project outlined early in the third chapter. There is a decisive difference between the two, however, and although ours is not a comparative study of canonical methodology it serves the purpose of a prospective conclusion to critically comment on the difference between them.

During the last five years or so a certain theology of law project has emerged from an affective reaction against canonical irrelevance to a cognitive and concrete enterprise of putting law back on the track of faith. The ecclesial law thesis shares in this practical aspiration but takes exception to the premise that theology is a catalyst or other instrument which can be invoked ex machina in order to bring church and law into tangential proximity.

Although opinion is rather widespread within the collective theology of law project over the precise role of theology, it appears to most of the project's advocates that in one way or another, theology plays the part of a mediator. Klaus Morsdorf is representative of this school. He invokes theology to bridge the gap between law and church on the assumption that without a theological character canon law would amount to little more than a secular juridical system, even if attributed a pastoral function.²⁹ It is as though there was a linear progression from law in the abstract, all forms of which are secular, through theology to theological canon law. How this is so and just what it means remain to be seen. It also remains that the imagery is quantitative: one of bringing law closer to the church by narrowing the gap which separates them. As long as there is any gap, however, church law does not possess the character of the church, viz. mystery, and therefore does not transcend.

²⁹Klaus MÖRSDORF, "Kanonische Recht als theologische Disziplin", in Archiv für katholisches Kirchenrechts, 145(1976), pp. 45-58. An interesting variation with law playing the mediating role between theology and church is considered in Robert E. RODES, Jr., "The Canon Law as a Legal System--Function, Obligation, and Sanction", in Natural Law Forum, 9(1964), pp. 45-94. "The canon law may be characterized as Christian theology structured by Roman law, and brought to bear on the institutional necessities of the Church". At p. 46.

Two theorists, and with some qualification a third, have written on the identity between law and mystery. By beginning with an analysis of the church as a salvific community out of which its juridical structures evolve, both Remigiusz Sobański³⁰ and Francesco Coccopalmerio³¹ go on to describe ecclesial law as a dynamic part of the church which plays a normative role in the salvific pursuit of the community. Though their analysis labors somewhat, chiefly under certain interactive implications of using a sacramental model of the church,³² it marks a dramatic departure from the proximity thesis (that theology brings law and church together) to the identity thesis (that ecclesial law is a functional expression of church mystery).

The third theorist is more difficult to classify; a surprising occurrence in light of the fundamental differences between the two theses. Ladislav Orsy has been one of the pioneers in the theology of law project since its modern inception just prior to the Second Vatican Council. Of late, however, his writings reflect so close a proximity between law and church that at times they draw conclusions indicative of the ecclesial law thesis. For comparative purposes, then, his recent work is particularly illuminating.

Starting points, reflected Lon Fuller in a reply to his rather formidable critics, bear a decisive influence upon debate "--not on what the disputants said;

³⁰For bibliographical references see note one of chapter four.

³¹Especially in "De Conceptu et natura iuris Ecclesiae animadversiones quaedam", in Periodica, 66(1977), pp. 447-474.

³²Such as occasionally institutionalistic overtones, an other-worldly orientation, lack of differentiation between the model and object modeled, residual scholastic presumptions about law, retention of the internal / external dichotomy, insensitivity to the ontological / phenomenological distinction, and consequent difficulties in describing the transcendental operation of law.

but on what they considered it unnecessary to say, not on articulated principles but on tacit assumptions".³³ Orsy's lengthy article applying Bernard Lonergan's cognitional theory to foundational issues in canon law argues an epistemological evolution of church law.³⁴ He reasons that an understanding of law is embedded in a philosophy of community and that knowledge of this community is embedded in a cognitional theory. But what he does not say and what comes into play as he develops ecclesial-law-like conclusions³⁵ is that Lonergan's theory presumes an objective order of values and an objective order of being.

Recall that phenomenologically the view of the world from within any given cosmological interpretation appears as if it were objective, e.g. there being an unambiguous proper end of human activity. Whether it is after all, whether any one ordering is ultimately and independently "true" raises an ontological question. So Orsy's theory operates, as any cosmological interpretation must, out of a particular phenomenological view as though it were ontologically resolved.

Predictably his speculation will reach conclusions akin to ecclesial law's identity thesis in that his argument implicitly adopts certain presumptions operant within a supernatural ordering of the world. Section ten is especially revealing. Transcendence, it says, is achieved by acknowledging the objective

³³The Morality of Law, rev. ed., p. 189

³⁴Ladislav ORSY, "Lonergan's Cognitional Theory and Foundational Issues in Canon Law; Method, Philosophy and Law, Theology and Canon Law", in Studia Canonica, 13(1979), pp. 177-243.

³⁵For example, "a human person is not fully alive in the community unless he appropriates the value upheld by the law, and wants to reach for it out of his own personal decision taken responsibly". Ibid., p. 235. See also "The Interpreter and His Art", in The Jurist, 40(1980), p. 44. Responsible acceptance complements the pedagogical orientation of ecclesial law's content.

order of values. "Values for man are whatever is good for him. [...W]hat is supremely good for man is to reach union with God [...]"³⁶. Law participates in this process to the extent that laws critically establish judgments about the community's needs, the values it should pursue, and its capacity to achieve them.

Just when it seems Orsy has every reason to link law with mystery and affirm the identity thesis he writes that "the world of law is incapable of describing the Church in mystical terms because the invisible is beyond its grasp".³⁶ He subsequently and repeatedly remarks on the distinct worlds of theology and canon law. What has happened, as Professor Fuller might muse, is that one unsaid starting point has caught up with and cancelled out or at least crippled another. The latter starting point amounts to a supernatural ordering of the world and leaves room for the role of law. The former starting point is a tacit assumption that law is something that has certain functions. (It contrasts with the description to which ecclesial law subscribes: that law is a function.³⁷) As something having certain functions, Orsy's concept of law fits within Raz's schema.³⁸ But in so far as that certain something possesses a substantive nature it competes or even conflicts with the church's substantive nature, namely mystery. Theology may bring them intimately close, but closeness cannot account for the mystery of the church.

³⁶ORSY, "Lonergan's Cognitional Theory", p. 218, note 32.

³⁷Over half a century ago Walter W. COOK suggested a study of law along this line. See his "Scientific Method and the Law", in American Bar Association Journal, 13(1927), pp. 303-309.

³⁸Joseph RAZ, "On the Functions of Law", in A. W. B. SIMPSON, ed., Oxford Essays in Jurisprudence, 2nd series, pp. 278-304.

Reflecting briefly upon the concept of ecclesial law considered in these half-dozen chapters, one can see that the ecclesial law thesis suggests new possibilities for some of church law's most persistent issues. Accordingly, for example, church law is a genuinely legal system, law plays an authentic and animated role in the means and ends of the church, ecclesial obligation is teleological rather than authoritarian in nature, and law is interdependent upon faith and freedom. These are the findings of a phenomenological analysis and must be understood within such a framework. Nevertheless they address the spirit of church law as a whole.

Further aspirations for this field of study, though outside the scope of the present work, have to do with applying the aforementioned findings in evaluating and applying canonical legislation, dialogue on comparative legal systems, and the teaching of an ecclesial mentality. This particular and eminently practical task is better left to the skills of legislators, practitioners, and professors.

SUMMARY AND CONCLUSIONS

(1) This study of the concept of ecclesial law is concerned with church law as a legal system. The identity of ecclesial law is revealed in a system of church law by the correlation of obligation to the system's context.

(2) The principal elements of a legal system are what can be called its "context", "content", and "obligations". The context of law refers to the proper end of human activity. The content of law amounts to measures, subject to the human condition, which are oriented toward the context of law. The human condition referred to here is a mutable combination of circumstances which can be unfavorable to the proper end of human activity in terms of either deficient supplies or excessive demands. An obligation is a valuation to the effect that something is conducive to the context of law in a given system.

(3) Law subsists in the articulation and realization of obligations with respect to a particular system. An obligation, as a value, is prescriptive; a legal norm is a description of an obligation.

(4) A descriptive expression (such as a statute, custom, or policy) lacks binding force to the extent that it diverges from the obligation it purports to articulate. The fact that a divergent expression is promulgated, regulated, or even enforced by authorities cannot give it prescriptive value.

(5) The proper end of human activity is phenomenological for it depends upon one's cosmological interpretation. A cosmological interpretation is an ordering of the world according to a particular personal perspective. Each perspective organizes experience in terms of binary, subject-centered relationships. There are three types of these basic relationships: impersonal, interpersonal, and transpersonal. To these relationships correspond three orders: the natural, the social, and the supernatural.

(6) While each cosmological interpretation is distinct, no one interpretation excludes the possibility of the other interpretations. Cosmological interpretations are cumulative in so far as the basic relationship of one interpretation appears in its successor(s), although it would be subject to the priorities established by the basic relationship in the latter interpretation. It follows, then, that there is only one proper end of human endeavor for each order, although the end of a preceding order may be a means or subordinate aspect of a subsequent or "higher" order (as survival is to dignity and both are to communion). It seems that no one can consistently maintain more than one cosmological interpretation at any one time.

(7) An impersonal relationship establishes a keen distinction between oneself and everything else. Accordingly, the proper end of human activity and, therefore, the context of law in the natural order is survival. The two main aspects of the human condition which hinder survival are organic needs and personal intrusion. Counteracting these is the minimum content of law in the natural order: measures oriented toward providing for deficient supplies of food, clothing, and shelter, while protecting against the excessive demands of personal interests.

(8) An interpersonal relationship recognizes the personhood of certain others; that is, their equality with oneself. As such, dignity is the proper end of human activity and, by the same token, the context of law in the social order. However, since there are innate differences among human beings and there is a tendency to favor those of one's kind, to the detriment of dignity, the minimum content of law in the social order is oriented toward providing for equal opportunity and freedom of choice, while protecting against arbitrary favoritism and discrimination.

(9) A transpersonal relationship envisages the world as a personal whole with and within which the conscious subject participates. One relates to others and through them to the whole. There are various ways of phrasing the proper end of human endeavor in this light, among them: the experience of shared existence; a spirit of unity and the harmony of unqualified cooperation which accompanies it; communion, the communication of being. All come to the same thing though the third more readily lends itself to a theological formulation. Because this end depends upon a personal quality being predicated of the whole, anything less impedes its progress. The natural and social orders limit the scope of personhood to oneself or oneself and certain others equal to oneself. Opting for either of them has an occlusive effect upon holistic experience. Since one opts for either of the other orders by not knowing or not desiring to do otherwise, the minimum content of law in the supernatural order is oriented toward awareness, acknowledgement, and actualization of commonality in everyday life.

(10) Faith, as a form of interpretive experience, consists in perceiving the world transpersonally. Christian faith, understood in this light, gives rise to a supernatural ordering of the world. The proper end of this order is communion; that is, God and man sharing themselves with one another. The Jesus-event is instrumental to this endeavor by showing that the way of God is the way of man for man to be fully himself. The way of God is grace; love and forgiveness breaking down the barriers of isolation. This, according to the Christian interpretation, establishes love and forgiveness as the right relationship between man and all things else, including himself.

(11) The church, modeled as being word-event, is seen to share in the aforementioned Jesus-event. A word-event is a type of performative

utterance; a performative utterance both does and says some same thing. Word-event, as its name more specifically suggests, is an event which signifies what it effects, disclosing the nature of a person, relationship, or situation. The transcendental operation of word-event is isomorphic with that of church mystery; that is, they play similar roles in their respective systems. Consequently that which is known about the operations of word-event may be interactively associated with that which is less well understood about church mystery. By associating the constitutive functions of word-event with those of the church, church law is seen to be a mode of church-word-event.

(12) Jesus proclaimed his message in the same act of performing it. So too the church, modeled as being word-event, is a living community which proclaims supernatural life by living it. In other words, the church has meaning in the supernatural order as a means to communion. Consequently, the goal or context of church law, as a mode of church-word-event, is communion. From a faith perspective, therefore, church law is a function of mystery since it is an aspect of the church accounting for the mystery of Christ. This constitutional link between law and mystery is characteristic of ecclesial law. Ecclesial law is the normative function of creatively and reflectively articulating and realizing that which is conducive to communion.

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