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THE PHILOSOPHICAL CONCEPT OF LEGAL CAPACITY:

A RECONCEPTUALIZATION OF THE REASON/WILL RELATIONSHIP

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Thesis presented to the School of Graduate Studies
of the University of Ottawa in partial fulfillment
of the requirements for the degree of Doctor of Philosophy

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Curriculum Studiorum

Brenda Ann Wirkus was born in Cleveland, Ohio, on November 17, 1950. She was awarded the degree of Artium Baccalaureatum, summa cum laude, on May 21, 1972, by Georgetown University, Washington, D.C., with a major in philosophy. She was awarded the degree of Master of Arts in Philosophy from The Cleveland State University, Cleveland, Ohio, on June 11, 1978. Her thesis title was "Community: A Social and Metaphysical Analysis."

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Introduction

The project undertaken in the writing of this thesis is the explication and clarification of the philosophical concept of legal capacity. "Legal capacity" signifies that set of conditions which must be met for a person to be able to function as a legal agent. Capacity is ordinarily assumed to be present until claimed or proven otherwise, as in the use of the insanity defense. Part of the public's impatience with the insanity defense in recent years can be traced to a lack, within the body of the law, of a clear set of criteria for legal capacity.

In this thesis I shall construct a philosophical framework which can specify those conditions necessary for legal capacity. I shall proceed by examining a different instance of failure to meet minimum criteria for capacity. That is, I shall focus not on the secular law and the insanity defense but rather on the canon law and the conditions it sets for valid reception of the sacraments. More particularly still, in the canon law there exist procedures for determining the valid reception of the sacrament of matrimony. These procedures allow the ascertaining of the status of marriages and the invalidating or annulling of those in which there has been some failure to meet the minimum conditions for capacity.

The canon law is of special interest because it allows for many kinds of failures and, hence, many aspects of capacity. Therefore, this thesis begins with an examination of the canon law on marriage.

But neither the canon law nor the secular law provide a philosophical model to explain or account for legal capacity. And yet that is the true task to be undertaken within this thesis. What I shall do in the body of the thesis is to develop three different philosophical models of legal capacity, models derived from the recent history of philosophy and applied to the search for a set of criteria for legal capacity. These three models are the legalist/positivist, the intellectualist, and the voluntarist. The legalist/positivist model offers criteria for capacity based on the conformity of an agent's behavior to the requirements of the law. It is a model based on the work of British ordinary language philosopher J. L. Austin (1911-1960). The intellectualist model emphasizes the criterion of reason (and sanity) as being primary in any account of capacity. That model has been developed from the examination of a number of manuals of philosophy used in the late nineteenth and twentieth centuries in Roman Catholic colleges, universities, and seminaries and claiming to be based on the work of St. Thomas Aquinas dating back to the thirteenth century. The voluntarist model, not unexpectedly, insists instead upon

the role of free choice as being the ultimate criterion for capacity. That model is traced to recent philosophical positions on the Continent, specifically to Jean-Paul Sartre (1905-1980). Each of these models is applied to the particular problem at hand, the determination of the canonical validity of a marriage based upon the possession of each of the parties of appropriate capacity. And each is found to be lacking. While each model offers some valuable insights into the concept of legal capacity and while it may be said that each supplies some of the necessary conditions for any account of capacity, no one model is sufficient to perform the task I have undertaken: the explication of the concept of legal capacity.

To do that I shall have to construct yet another model, one that can include all of the conditions for capacity supplied by our previous models and yet one that can offer an integrated and unified theory of capacity. That model has been developed from two different and yet complementary philosophical systems, that of John Duns Scotus, late thirteenth-century Franciscan philosopher, and that of certain trends in nineteenth-century Anglo-American idealism, specifically those of Josiah Royce and Thomas Hill Green. What has resulted from the construction of this alternative model for legal capacity is a reconceptualization of the reason/will relationship in a way which provides for a theory of the self as agent and

which can explain in a much more comprehensive way both the necessary and the sufficient criteria for legal capacity.

I conclude by returning to the practical problem of the actual adjudication of instances of legal capacity or lack thereof, relating this model to the canon law and offering some observations about how a philosophical model can affect in a positive way the actual practice of the law. What follows from this thesis is the suggestion that it is only the sort of philosophical model which has been developed that can make any sense of the canonical problem. The actual practice of the canon lawyers indicates that, at least in recent years, their practice assumes some such sort of model. However, the determination of whether or not the other assumptions of the canon law--assumptions about the indissolubility of marriage and the logical coherence of a state of affairs initiated by choice but not dissolvable by choice--are justifiable lies outside the scope of this thesis, although I have outlined the sorts of arguments which can be advanced in support of those assumptions.

My project is of its nature dialectical. I have discovered within the canon law on marriage elements which can contribute towards the elaboration of a philosophically useful notion of legal capacity. However, I have had to construct those elements out of the canon law,

which contains them only implicitly. Thus, I have offered a theory derived from the practice of the canon lawyers which may be used, perhaps, itself to clarify and justify--or at least point to areas which need justification in--the canon law on marriage in the future. I make no claims about having performed that task within the scope of the current project, although I think that I have noted several areas which require further examination.

Chapter I. Legal Capacity: The Problem

> Whether or not the law spells it out, its statutes and its defences are constructed with reference to the premisses of the nature of the self; how the faculty of cognition is related to the self's appetitive nature, how intelligence is related to moral sense . . .
>
> --Jean Wallace
> The Insanity Defence

The concept of legal capacity lies at the heart of any theory of law and is a necessary presupposition of any legal system. Although legal systems focus almost equally on notions of property and person, inasmuch as "property" is unintelligible apart from "ownership" or, at the very least, "use," and inasmuch as none of those notions makes any sense whatsoever unless tied to "person," it would appear that the concept of personhood exercises a logical priority in any discussion of the law. And "legal capacity" is one aspect of legal personhood; indeed, it is the focal concept. To possess legal capacity, that is, to be "capable according to law" means to be a legal agent, one able to function within the framework of a legal system and able to order his life and his social relations within that framework.

This concept of legal capacity, although a foundational principle of all legal systems, is a philosophical

presupposition largely ignored while at the same time uncritically accepted by those concerned with the actual practice of law. It serves as an assumed (although often unjustified and usually unarticulated) premise in most instances of judicial decision-making. Part of the purpose of this thesis will be to render that premise more explicit by means of a detailed philosophical analysis of the relation of persons to the law and of the sense in which one can be "capable according to law." Specifically, this thesis will address the problem of defining legal capacity as it relates to the contracting of marriage. More specifically still, and for reasons which will become evident by the end of this chapter, the problem of legal capacity will be narrowed further to a discussion of the requirements of legal capacity for contracting marriage according to the provisions of the canon law.

The legal profession is not of much help in coming to any real understanding of "legal capacity." Black's Law Dictionary, citing a Georgia decision,[1] describes it as "the attribute of persons which enables them to perform civil or juristic acts." This entails "ability" and "an intelligent perception and understanding." Further, to be "capable" means to be "susceptible, competent, qualified, fitting; possessing legal power or capacity." A popular Canadian legal sourcebook[2] further defines capacity as

"the legal ability to do something or be responsible for some act, as opposed to the physical or intellectual capacity to do so (the legal competency to enter into a contract)." That work does not bother to elaborate much more on the significance of the difference between "legal" ability and those other sorts. However, in this definition there first appears the notion of responsibility. To be "capable according to law" is to be responsible for some actions or sets of actions. It may be concluded from this that legal capacity entails in some way or another the possession of a particular psychological configuration conducive to that sort of responsibility. One of the purposes of this thesis will be to clarify the relationship between various psychological elements--focusing especially on intellection and volition. This will be achieved by means of an historical exploration of various philosophical arguments about the nature of those elements. What will then be examined is the relationship between intellection, volition, social relationships and legal agency. I shall argue that any concept of legal capacity will have to include not only a concept of the self as an integrated unity of diverse elements but also a concept of a <u>social</u> self, one who develops as a legally capable person within social relationships and one whose legal capacity is intimately bound up with those relationships and the other individuals who are party to

them.

It is the additional purpose of this thesis to suggest that certain practical problems arising in the administration of the law are actually rooted in this deeper and more precisely philosophical problem--a conceptual confusion in the understanding of what constitutes "legal capacity." The only way to rid ourselves of those practical problems is to perform a task appropriate to the philosopher of law rather than to the lawyer or judge: to examine the presuppositions and models of legal capacity according to which jurists operate and to reconstruct those models in such a way as to provide persons engaged in the practice of law with an appropriate theoretical foundation for their work.

Models of legal capacity attempt to relate certain diverse concepts such as act, project, purpose, reason, will, and intention. Each of these concepts is intimately, although not always clearly, related to the concept of the self. And in any discussion of the law, this self is of necessity a social self--one which stands in relation to other selves and to the legal community. That these are philosophical issues goes without saying. That we need, then, to turn to philosophical models follows from this. But what we first need to do is examine some of the assumptions and definitions offered by the legal profession.

As indicated above, the problem of legal capacity is intimately tied to the problem of legal personhood. "The technical legal meaning of 'person' is a subject of legal rights and duties."[3] More precisely, a person is "a man considered according to the rank he holds in society, with all the rights to which the place he holds entitles him, and the duties which it imposes." (People v. R. Co., 134 N.Y. 506, 31, N.E. 873.) We shall restrict our inquiry to the problem of natural persons, i.e. human beings, and not artificial persons such as corporations which also count as legal persons. Persons are generally assumed to be "capable" in the ordinary course of affairs insofar as they are able to operate without serious difficulties in the legal community. The law provides structures and outlines for a social order within which human beings can act together, first of all, to achieve common goals and are guaranteed, secondly, the freedom to pursue their own individual goals.

> . . . legal systems represent attempts to locate principles of creative limitation. As Hegel thought, such principles are as much positive as negative for in limiting some lines of development, others are fostered and law, indeed, is the condition of freedom in so far as freedom requires order . . . The object of a legal system is thus to determine under what rules the most acceptable set of human possibilities will arise. "Most acceptable" here must mean the set which most clearly advances human society toward the social ideal. The social ideal is, by definition, the state which everyone would want were he to achieve

it.[4]

So the law exists, at least to a large measure, to allow persons the ability to pursue their possibilities both individually and collectively, to realize their goals and themselves through their activity. The whole question of legal capacity enters, again, not in the normal course of affairs where persons freely act within the framework of the law to achieve their purposes. Legal capacity is presumed in those, the majority, of instances. The real need for a clarification of the concept of legal capacity arises in situations where persons fail to achieve common goals or fail even to agree on the proper pursuit of those goals. That is, questions about legal capacity are seen most acutely in instances of conflict.

The Anglo-American law assumes a number of things about persons in their normal condition. It assumes that people are responsible for some of their states of mind, that they are responsible for their actions as well (at least for those connected with states of mind for which they are responsible), and that persons must answer to their community for their failures to abide by the laws of that community.[5] Further, it appears that the law is based upon a concept of action which is teleological, which suggests that actions are end-directed. Legal capacity in that context must entail, then, a number of things. An actor, first of all, is a causal agent. He is

somehow related to and, more precisely, identical with his intentions. His intentions can be manifested in the external world as acts which bring about a desired state of affairs. These actions are directed towards some end. They, like thoughts, have duration and continuity. And, finally, the actor retains an identity throughout a series of intentions and acts. Indeed, it is in some sense precisely this series of intentions and acts which actually constitutes the actor's identity.[6] Legal capacity requires both the continuity of mental states and of actions, and the appropriate cohesiveness and correspondence of the two.

> Our law presupposes an ordered world, it presupposes purposive behavior, a moral world and agents in it which are, above all, rational beings who act with ends in view and who act, moreover, in the light of moral codes.[7]

Our law presupposes as well as requires capacity.

The law presumes and presupposes, then, legal capacity in persons. But, as stated above,[8] it fails to define that capacity very well. Capacity has something to do with persons, actions, intentions, reason, will, ends, and the relationship among them. The practical problems generated by the misunderstandings and confusions over the interrelationships of all of these concepts are manifested in every area of the law, statutory and common. The statutory law, for the most part, is not immediately helpful in any attempt to clarify the concept of legal

capacity. The statutory law operates, it seems, from a model which may well oversimplify the relationships listed above. The philosophical model underlying that law is primarily what I shall term a legalist or positivist model. It offers only an impoverished, because incomplete, account of legal capacity which ties capacity too closely to behavior without sufficient appreciation of intentions and purposes. This position holds ultimately that the proper performance of an action alone guarantees its status as legally valid. One's frame of mind matters very little, if at all, as long as one is not insane.

The common law, of course, is not the law created by acts of the legislature but is comprised of rules of action deriving their authority from customary usage. In particular, it is that body of law and juristic theory which originated from the unwritten law of England. As such, to search out a concept of legal capacity in the common law would be to search through years and years of precedents and derive a model "from scratch." That is a possible avenue of procedure, but one which would entail a major project which would most probably best be undertaken by a legal expert working together with a philosopher. Let us assume, instead, what seems to be fairly certain. In both the United States and Canada, we find ourselves ruled by some conjunction of the statutory and the common law. That being the case, and inasmuch as the common law

is not written, it seems that to search for a model of legal capacity within the common law would be unproductive at two levels. First, we would be creating a model for which there is even less obvious evidence than we have in the case of statutory law. Secondly, if the model that we could create from the common law resembles that within the statutory law (as we would expect it might, due to their combined existence in our legal system), we would find it also to be inappropriate inasmuch as it would replicate the incomplete character of its statutory counterpart. That is, it too most probably would rely on a model tying capacity primarily to behavior. After all, that is precisely what precedent is: patterns of prior behavior and performances.

That leaves us with another option, one which seems to be more promising. I have chosen to focus on the notion of legal capacity as it appears in the canon law. Among the functions of the canon law is the prescription of norms to be followed to ensure the valid reception of sacraments. The negative corollary of that function is the judgment of failures at the level of validity. It is at this level of the adjudication of such failures that the concept of legal capacity becomes significant for, obviously, if a person lacks legal capacity, he cannot meet the requirements for valid reception of the sacraments. What makes this more fruitful than the model in

the civil law is the number of ways open, within the canon law, for failure. More specifically, failure is possible not only at the level of performance (behavior), but also and equally at the level of intention. The canon law, that is, may be more sensitive to the whole array of competing concepts which fall within the scope of "legal capacity."

Specifically, I shall examine the concept of legal capacity in the canons dealing with the reception of the sacrament of matrimony. The philosophical paradigm exhibited in the canons concerning marriage offers a far richer conceptual model than does the civil law. For example, canon 1095 on matrimonial consent states, "The following are incapable of contracting marriage: 1. those who lack sufficient use of reason, 2. those who suffer from a grave lack of discretionary judgment . . . , and 3. those who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage." There is far more to work with here than in the similar civil definition of consent as "a concurrence of wills."[9]

Finally, this issue holds far more practical interest for the canon lawyer than for the civil lawyer. As we shall see below,[10] the secular law has a number of procedures available to sever the marriage contract. These are, on the whole, formal procedures and relatively

simple. Because of the complexity of the models of legal capacity evident in the canon law, however, the breaking of the marriage bond is a much more difficult procedure. In recent years the determination of the validity of marriages has been the major preoccupation of Church tribunals. The increasing number of failed marriages has led to an increased number of requests for declarations of nullity (commonly and colloquially referred to by the laity as "annulments," a term not found in the Code of Canon Law) of those marriages, the canonical procedure by which it is declared that the union in question did not meet the requirements for the valid reception of the sacrament of matrimony. In many cases that would mean that no true marriage ever existed because of a failure of at least one of the parties to be "capable according to law." This increase in requests for declarations of nullity has led to a need to reexamine a whole range of concepts at the core of marriage legislation in order to ascertain where and how failure occurs. In short, a critical evaluation of the concept of legal capacity might shed some light on the practical issues at stake in attempting to decide on the validity of a failed marriage.

But before we can turn to our discussion of legal capacity, we must clarify one further premise that affects all that we say about the canon law on marriage. The entire problem of legal capacity as it relates to the

adjudication of marriages rests on the belief that sacramental marriages are indissoluble, i.e. permanent, as long as the parties to the marriage are baptized and the marriage is consummated. If permanent, they cannot be broken for any reason whatsoever. Divorce with a subsequent remarriage is not possible. Hence the entire "annulment" procedure within the canon law serves to ascertain which marriages were, from the beginning, valid and thus indissoluble marriages and which failed in some way to meet the necessary criteria and were therefore not truly marriages at all. "Marriages" of this second sort can be annulled and the parties to them may remarry. What will be suggested during the course of this thesis is that one of the major causes of invalidity may well be a failure of one or both parties to be legally capable.

But, again, that argument rests on the premise stated above that a marriage entered into by two baptized persons who are legally capable and who have manifested in the appropriate and prescribed manner their consent to the marriage is indissoluble. While a thorough examination of that premise falls outside the scope of this thesis and would, indeed, require a major project of its own, some general explanation of the arguments for indissolubility will be helpful as a foundation for the further argument I shall be developing. Furthermore, the question of indissolubility illustrates one other feature of marriage

significant not only to the canon lawyer but also to the theologian and philosopher. The canonical model of marriage presupposes what one might call a "metaphysical state" theory of marriage. The exchange of consent which initiates marriage also initiates a new community--a family--whose reality transcends that of the individuals within it. A new state is brought into being whose reality is more than the sum of the individual members within it because its reality continues despite their individual demise. That is, a family, represented by a family name, takes on an identity that continues into the future although the new individual family members are no longer the original ones. This does not mean, of course, that such a community could exist without its individual members, nor does it entail that the existence of the family is more important than the welfare of its individual members. The point of this theory, rather, is that the existence of the individual and the existence of the family are inextricably bound together so that individual identity is a product of that family. And that family is permanent, especially once children have been born into it. That explains, perhaps, the Church's traditional insistence upon the value of children and emphasis upon the procreative aspect of marriage. In any case, what follows from this "metaphysical state" theory of marriage is the belief that marriage is of its very

nature indissoluble.

One might divide arguments for indissolubility into three general classes: moral, theological/scriptural, and philosophical/metaphysical. While the latter will concern us most directly, the other two classes are not unimportant.

The moral argument for indissolubility is related to other sorts of moral commitments based on promises. Marriage is the promise of two persons to take one another as partners, to "love, honor, and cherish" each other in all circumstances of life ("for richer, for poorer, in sickness and in health") forever ("until death do us part"). By making this promise, two persons acquire certain moral and legal obligations to each other and they also acquire certain moral and legal advantages. Promise-making is a serious business because it is social; promises are made to others who then reorganize their lives around the expectation that promises made to them will be kept. And the promise-making of a marriage is a mutual, two-way promise. Expectations are raised on each side, and each party to a marriage has the moral right to expect that marriage to continue. Although important, this moral argument for indissolubility cannot suffice unaided as a demonstration of the indissolubility of marriage. Promises are serious, but promises can be broken for serious reasons, usually when some other value

is thought to outweigh the value of keeping the promise. That is, while we may have a general obligation to keep our promises, it is not an absolute moral obligation transcending all others. Furthermore, it may be requesting too much of human beings, especially in these days of seventy-year life expectancy, to ask them to promise anything "forever," or even until "death do us part." That may have been a less unreasonable promise when one expected that death would claim one of the partners within fifteen or twenty years of the marriage. In any event, the moral argument for indissolubility may be necessary but is not sufficient.

A second sort of argument for indissolubility is of less interest to the philosopher than it is to the canon lawyer, and that is the theological or scriptural argument. According to this argument, marriages are indissoluble because they represent the union of Christ and his Church, a union which is permanent and eternal. Christ referred to himself as the groom in Matthew 9.15. He denied the possibility of divorce and remarriage in Matthew 19.3-9 by quoting Genesis 2.24 ("That is why a man leaves his father and mother and clings to his wife, and the two of them become one body.") and adding, "Thus they are no longer two but one flesh. Therefore, let no man separate what God has joined." He concluded (Matthew 19.9) that "whoever divorces his wife and marries another

commits adultery." The same theme, in almost identical words, is echoed in Mark 10.2-12 and Luke 16.18. Finally, St. Paul in his letter to the Ephesians 5.22-33 developed this concept even further. He began by admonishing wives to be submissive to their husbands as the Church is submissive to Christ, its groom, continued by quoting Genesis 2.24, and finished by saying, "This (Genesis 2.24) is a great foreshadowing; I mean that it refers to Christ and the Church. In any case, one should love his wife as he loves himself." The canon law has developed at least in part from reflection upon these scriptural elements and commentaries of theologians; popes, and Church Fathers upon them. One cannot understand the development of the concept of indissolubility without considering Scripture, but Scripture alone does not provide a conclusive argument for the philosopher.

Thus I turn to a brief examination of the form which a philosophical or metaphysical argument for the indissolubility of marriage might take. Again, what I shall provide here is but an outline of a possible form of argumentation for indissolubility. The development and refinement of such an argument remains a future project. Nevertheless, an understanding of our particular problem of legal capacity rests upon at least a basic understanding of metaphysical reasons for the indissolubility of marriage.

St. Thomas Aquinas has probably influenced the development of Roman Catholic philosophy and theology as much as any other individual. Although his influence on the development of the canon law was not so direct, it still seems not unreasonable to begin with him in our search for a philosophical or metaphysical argument for indissolubility. He offered a number of reflections upon marriage in his Summa contra Gentiles, Book III, chapters 122 and 123.[11] St. Thomas referred to matrimony not as indissoluble but as "indivisible" and suggested that "it should endure throughout an entire life."[12] He offered a number of reasons for this indivisibility based on the very nature and natural-ness of matrimony. Furthermore, in questions 41-49 of the Supplement to the third part of the Summa Theologiae one finds a complementary account of the nature of marriage.[13]

The natural order demands, Aquinas thought, proper care for the upbringing and education of offspring. The female of the human species (like the bird, and unlike the dog)[14] cannot take care of the entire upbringing and education of her offspring alone "since the needs of human life demand many things which cannot be provided by one person alone."[15] It is natural, Aquinas thought, that the father's care for his children would extend to the end of his life. As the mother's care also lasts that long, it is natural for the two to remain together until the end of

life. Similarly, indivisible marriages guarantee for the father the certitude of his offspring.

St. Thomas also believed that divisible marriages violated equity. Women need men, he thought, for the sake of government. If a woman is taken in by a man while she is young and fecund and then turned away after she has reached an advanced age, she is permanently harmed. Similarly, if the husband is the governor, then the woman cannot divorce him because she is his subject. But if the man were permitted to divorce his wife, their association would not be one of equals but rather a sort of slavery. Finally, the greatest friendships are the longest-lasting, solid ones. Therefore, indissolubility enhances the possibility for the deepest friendship between man and woman.[16]

While interesting enough in their own right, Aquinas' arguments seem to be based upon what might now be considered some rather dubious anthropological information and some questionable views about the existence of the reasoning capacity in women. His are not the strongest philosophical arguments for the indissolubility of marriage, and they are not sufficiently metaphysically oriented for our purposes.

A more fruitful line of argumentation may be culled from the work of Francisco Suarez, sixteenth-century Spanish philosopher and <u>doctor eximius</u>. Suarez wrote

extensively (a 28-volume opera omnia) in areas both of the philosophy of law (De legibus) and metaphysics (Disputationes metaphysicae). It is from these works that we can begin to piece together an adequate explanation of the indissolubility of marriage.

Suarez, although not always in agreement with, was generally sympathetic to the work of St. Thomas Aquinas. He began his De legibus with a definition of law drawn from St. Thomas' Summa Theologiae: "Lex est quaedam regula et mensura, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur."[17] He observed that that definition was far too broad, and he spent the rest of the first book specifying and distinguishing the various conditions of law until he finally concluded that the law is a common, just and stable precept, promulgated and framed for a community. "Lex est commune praeceptum, justum ac stabile, sufficienter promulgatum."[18]

The second book contains Suarez's analysis of the eternal law and the natural law, and of the relation between the two. It is in that book that the groundwork for the indissolubility of marriage is laid in a very general fashion. In chapter seven of book two Suarez distinguished the various precepts which belong to the natural law, separating those which he considered self-evident ("one must do good and avoid evil," "one must live temperately") from those which he deduced from self-

evident propositions through rational reflection ("adultery is wrong").[19] The natural law encourages the performance of good acts, but it need not follow that the natural law requires the performance of all acts. The contracting of marriage, after all, is a good act. But so, too, are the counsels of perfection which include among them the counsel of perpetual chastity. But counsels are not precepts; "explicat autem sub jure naturali se comprehendere non tantum praecepta, sed etiam consilia."[20] While virtuous acts fall under the natural law, they are not all absolutely prescribed by it. The moral law admonishes us to do good and not to do evil, but it does not always tell us which good act to do.[21] A person may choose to marry or choose to remain celibate. Both are good acts, and what is not prohibited is permissible. "Quod si dicatur hoc jus permittere vel indifferentia quae non prohibet vel bona quae approbat licet non praecipiat, neutra est propria permissio legalis (ut sic dicam)."[22] No one is required to marry, but once one has married, things have changed in a permanent fashion. One has a choice until one makes that choice. Once made, that choice can not be made again. Once one has married, one can no longer choose the "counsel of perpetual chastity." A marriage cannot be undone because the other sort of perfection open to a person as an alternative to marriage (celibacy) becomes permanently closed

once one has married. Acting on a set of possibilities (whether to marry or not) changes forever, by narrowing, the possibilities open to one in the future. Hence the indissolubility of marriage comes from the permanence of the promise made and the changes made in the world as a result of that promise.

Now one might argue that this statement is question-begging because once a future contingent is actualized, then of course it becomes actual and its contradictory is no longer possible. That is evident in the case of ordinary promises. One is free to promise or not to promise, but once one has promised one cannot ever be as if one had not. This does not, however, hinder a promise from ceasing to bind if a more stringent moral obligation supervenes. An indissoluble marriage, then, must be something more than a promise like any other. Part of that difference stems from the analysis of marriage as generating a new metaphysical state which takes on a life of its own apart from and beyond the individuals who constitute it. A marriage is not like any other sort of promise because no other promise produces a division among ways of life. The Church only allows for two ways of organizing one's life: celibacy and marriage. The Church recommends, as I have noted above, only those two modes of life; all others are sinful. The special situation that arises with this division is that each of these promises

excludes absolutely the possibility of the other in the future. The signficance lies in the way the possibilities block each other out. Once one has married, one can never return to a virginal, celibate state not merely because of the physical virginity which cannot be recovered (although the fact of consummation has always been important, if not decisive, for canon lawyers[23]) but also because of the significance of the community of life generated by marriage whose existence remains (especially through children) even if the individuals go their separate ways. Marriage and celibacy are exclusive as possibilities and not merely as actualities. Celibacy is defined in the Catholic Encyclopedia not as virginity, but as the renunciation of marriage.[24] Only two ways of life are permitted, and one of them--marriage--closes off the very possibility of the other. One is defined negatively so as to exclude the other. And because of this, once one has chosen marriage one cannot go back to being celibate. Other promises do not produce a watershed or a divide among ways of life in the same way; other promises do not instantiate ways of being human in quite the same way.[25]

This question of the indissolubility of marriage in Suarez is linked to and follows from his metaphysics, especially as outlined in his Disputationes metaphysicae. The second disputation, de ratione essentiali seu conceptu entis, provides some interesting reflections on the nature

of being that illuminate our particular interest, as does the thirtieth (de primo ente, quatenus ratione naturali cognosci potest, quid et quale sit). In paragraphs thirty-two and thirty-three of section fifteen of the thirtieth disputation Suarez addressed the question of God's knowledge of possibilities. Suarez held that God has knowledge of possibilities, that God can have an idea of things that do not exist. God knows the future as future conditionals,[26] and God wills a whole range of possibilities which become actual when we make our choices. But possibles are a part of what is objective being; they are real states, even before they become actualized by our choice and even if they never become actual by our choice. Suarez held a "concurrence of wills" thesis such that what God wills comes into actual being if we also will it.

Objective being, for Suarez, refers to God's collection of ideas, ideas which may or may not actually exist. Objective being belongs to possibilities as well as to actual things in the world. That is what it means to say that God can have ideas of things which do not actually exist. For any individual celibacy and marriage are two possible states, either one of which might be chosen. People are truly free, and God knows these as two possible states which belong to objective being and which may become actual, dependent upon the actions of those

free people. However, as Suarez indicated in the second disputation,[27] when a choice becomes actual, objective being (which that choice already possessed when it was only possible) becomes attached to it in a permanent way such as to make it no longer changeable. It becomes an actual existent in the world and thus has attained an actuality which it did not have when it was a mere possibility. That analysis of objective being and its connection with actualized objective being relates precisely to the problem of indissolubility and the need for a canonical procedure such as the declaration of nullity of a marriage. If objective being becomes permanent when actualized by the free choices of people, then marriage becomes permanent when chosen over celibacy. Once the marriage option is acted upon, that becomes the actual objective being and the option of remaining celibate is no longer open. The only way to preserve both choices is to demonstrate that neither option had actually been exercised. The only way, that is, to "get out" of an unsatisfactory marriage is to demonstrate that one truly failed to choose the marriage in the first place. The only way to preserve the second option is to prove that no marriage ever took place. And that is exactly what the canonical procedure called a declaration of nullity does; it shows that because the marriage never really "took" in the first place, then the parties to the marriage still have open to

them the option of the celibate life or of another marriage.

As we have indicated above, this is but a sketch or outline of the kind of argument one might make for the indissolubility of marriage, but it is an argument which appears far more promising than the other alternatives which we have examined: the moral, the theological/scriptural, and the Thomist accounts. This brief exposition has, at the very least, indicated that the indissolubility of marriage is a reasonable premise and that, therefore, the problem of legal capacity is a real and important one. Let us move on to a discussion of that problem in relation to the canon law.

Chapter II. Legal Capacity and the History of Canon Law

> More, perhaps, than any secular law, the canon law has been preoccupied with the relation between the form of marriage and the personal acts constituting the events to which the legal consequences attach.
>
> --John T. Noonan
> Power to Dissolve

According to the canon law, the validity of a marriage rests on the consent of the parties to that marriage. In fact, marriage is constituted by consent, as indicated in canon 1057.1: "A marriage is brought into being by the lawfully manifested consent of persons who are legally capable. This consent cannot be supplied by any human power." [No human power, that is, other than the parties to the marriage. A valid marriage cannot be effected by anyone other than the spouses, including their parents, their kings, their bishops, or the pope himself. This canon refers to the intervention of third parties.] There appears to be a close connection here between consent and legal capacity. One type of invalid marriage is that one in which there exists some defect of consent. And, further, appropriate consent requires persons who are "legally capable." The concept of legal capacity, then, is central to an understanding of the valid reception of any of the sacraments and of matrimony in particular. It

would seem to follow that an examination of the procedures and policies used by canon lawyers and tribunal judges might indicate, at least implicitly, certain minimal conditions for legal capacity. And, conversely, the project of making those conditions for legal capacity clear and explicit might make the work of the canon lawyers and tribunal judges easier inasmuch as their practical procedures would then be grounded in formal, public philosophical theory. But before turning to actual models present in current rulings, an analysis of the canonical understanding of marriage may be helpful. And, before we can attempt that, we must examine briefly the historical development of canon law in general.

Part of the difficulty involved in understanding canonical legislation stems from the rich and diverse history of the canons. The new version of the canon law was promulgated in 1983. Those canons were based on an earlier version issued in 1917--not even seventy years ago. But the canon law has been in effect in various forms for centuries.

The term "canon law" designates the body of law constituted by legitimate ecclesiastical authority for the organization, coordination, and government of the Roman Catholic Church. Although the Church cannot be identified with its laws, its legal institutions are an essential part of its mission inasmuch as any large society needs

formal organization and public expression of the system of relations among its members. The history of canon law is the history of continuous borrowing and adaptation from other legal systems, especially from that of the Roman Empire. Thus, though the mission of the Church may be unique, its legal system incorporates much from other sources and reflects the political communities within which the Church functions. The first use of the specific term "canon" occurred during the first Council of Nicaea in 325 A.D. when reference was made to the complex of ecclesiastical regulations in disciplinary matters as the "ecclesiastical canon." But the use of the Greek term "canon" itself, a term meaning norm, rule or measure, has its source in translations of earlier New Testament passages including Galatians 6.16 (the "rule of faith" according to which Christians ought to live). Further, other New Testament gospel accounts such as Matthew 16.18-19, 18.18, 28.18 and John 21.15-17[1] suggest rudimentary bases for the organization of a community with a regulatory system. Thus, at least from the beginning of the third century the local Christian communities possessed a stable machinery for their government based on a unified faith, the notion of apostolic succession, the distinction between clergy and laity, and an awareness of ecclesiastical law governing both worship and sacramental legislation. The sources of that machinery could be traced to

the New Testament texts referred to above, to the writings of the Church Fathers and apologists of the first few centuries, letters from Rome to various other communities (the most important of which was the Prima Clementis or letter of Clement to the Corinthians in 96 A.D.), and the various letters of Barnabas (96 to 130), Ignatius of Antioch (110), and Polycarp of Smyrna (167). During the third century Tertullian and Cyprian organized the framework and vocabulary for the canon law in the west, utilizing such terms (taken from Roman law) as institutio, regula, sacramentum, ordo, and ius. During that same period there appeared a number of constitutions written primarily in Greek but soon translated and disseminated throughout the early Church to serve as a foundation for the discipline of the various Christian communities. In the East other collections of rules and regulations similarly appeared. The first canonical collection was the Synagoge Canonum by John the Scholastic in 570 A.D. That had been preceded by the compilation of decrees of various Councils in both the East and the West including those of Ancyra (314), Neocaesarea (314-325), Antioch (341), Laodicea (343-380), Nicaea I (325), Constantinople I (381). From the time of Constantine onwards, and due to his status as protector of the Church, the emperor often legislated ecclesiastical matters. In particular, the work of Justinian exercised a decisive influence on the

development of canon law through the religious legislation he included in his Corpus Iuris Civilis. This imperial legislation was appended to the various canonical collections and eventually resulted in a new sort of collection, the Nomocanon, which combined civil laws and conciliar canons on the same subject. In fact the entire Roman legal system, especially the Theodosian Code (438) and the Code (529, 534), Institutes (533), and Digest (533) of Justinian, profoundly influenced the development of canon law.

Different versions of canonical collections continued to appear throughout the pre-Carolingian era. During the fifth and sixth centuries attempts began to be made to order the constitutions of the councils and the various decretals into a single body for the purpose of unifying and coordinating legislation under the authority of the Pope to ensure its character as universally obligatory. Nevertheless, many different versions sprang up in Italy, Spain, and Africa. Moreover, Germanic law became more and more influential after the sixth century and documents also began to show up from England, Wales, Scotland, and Ireland. Conflicts developed between general collections which aimed at universality and local collections which addressed problems of the newly-emerging and quite independent national churches. Certain Carolingian (eighth- and ninth-century) reforms aimed at

the unification and restoration of more ancient collections and traditional rules, but these reforms were largely unsuccessful due to interference by secular rulers with the administration of Church law. These trials continued through the eleventh century. The authority of the Holy See had been greatly weakened in proportion to the emerging strength of both the Roman aristocracy and the Germanic emperors. The power of the Church was fragmented; its success in carrying out its mission and in legislating was dependent exclusively upon local conditions and local authorities. Therefore, progress in carrying out that mission as well as progress in legislation was uneven, neither uniform nor constant. This situation did not begin to improve until the Gregorian era (eleventh century) during which time the Pope was acclaimed the primary source of ecclesiastical law. But the most significant improvements in the unification of the laws of the Church did not happen until the time of Gratian (c. 1140) during what might be called the classical period of canon law. Gratian's Concordia discordantium canonum or Decretum appeared at that time. Furthermore, during this period for the first time in its entire history the Church promulgated official collections of universally binding laws including the Decretals of Gregory IX in 1232, the Liber Sextus in 1298, and the Clementinae in 1317. These became the only authentic and approved collections of

decretal legislation and thus became the center of the Corpus Iuris Canonici that governed the Church until the promulgation of the "new" Code of Canon Law of 1917. And for the first time within these collections was marriage legislation made clear and uniform.

Gratian's Concordia is often considered the foundation of the current canon law because it is the first comprehensive formulation of that law. The Concordia was a collection of conflicting Church authorities with Gratian's own resolution of them. Besides being based on Church authorities, rulings were often based on the civil law, including the Digest, Code, and Institutes of Justinian. Gratian applied the relatively new method of scientific theology first developed by Abelard to the great mass of existing collections of canon law. He spent considerable time working out definitions and meanings based on contextual study and interpretation of sources. He was thereby able to reconcile divergences which had previously been considered irreconcilable. And thus, for the first time in its history did the canon law begin to develop as a truly methodical and coordinated body of law. The canons were reduced to a coherent and cohesive system.

But, as indicated above, Gratian was only one of the important classical contributors to the development of the canon law. The contemporary version of canon law reflects not only the Concordia of Gratian but also a number of

decrees of the popes and the canons of the Council of Trent. In 1234 were added the Decretals of Pope Gregory IX, a summary of the case law of the previous century. These books contained excerpts from pontifical letters which were in turn taken to be actual legislation, the rule deciding each case acting as a universal rule only to be modified by other rules in the system.[2] This was the final major collection until the Council of Trent except for the Liber Sextus (sixth book; the Decretals contained five) added by Pope Boniface VIII in 1298, the Clementinae of Pope Clement V in 1317, and the Extravagantes of Pope John XXII from 1330. The canons were organized into a rather permanent statutory form during the Council of Trent (1548 to 1564). Gratian's Concordia was definitively recognized as law by Pope Gregory XIII's 1580 Cum pro munere pastorali. But, again, it had been commonly accepted long before then because of its usefulness as a teaching tool, first of all, and then later as "a source of familiar texts, decrees, and principles."[3] The canons remained pretty much in their sixteenth-century form until their revision and refinement at the hands of Cardinal Pietro Gasparri in 1910. This became, until 1983, the working form of the canon law, promulgated by Pope Benedict XV in 1917 and becoming the law of the universal Church on May 19, 1918.

Canon lawyers were neither ignorant of nor unhappy

with the secular law, however. Indeed, they used the Roman civil law wherever it could aid them in their decisions. As noted above, medieval (and earlier) canonists focused primarily on the Digest, Code, and Institutes of Justinian. These were decrees of Roman emperors, and responses to them by various Roman jurisconsults, codified and kept in Byzantium. As long as this civil law did not expressly conflict with the canon law, it was accepted as both authority and precedent.

Further, in addition to the written canon and civil law were many interpretations of those laws in such forms as glosses, summations, commentaries, and collections of cases. The glossators and commentators performed a task analogous to that of the judges. While the judges "created" the law by declaring it in their decisions (i.e. their decisions took on the authority of law), the work of the commentators had similar effects. In remarking upon their cases (whether real or hypothetical), they generated additional legal literature to which others subsequently made reference. In some instances the authority of the commentator weighed almost as heavily as did the written law itself. The official canons, however, were the final word in cases of dispute and the primary source of new decisions and commentaries. Further, commentaries lacked any guarantee of historical permanence, while the actual canonical texts were assured of lasting authority until

either officially amended or officially repealed.[4]

Case law serves as the third major component of canonical decision-making. Cases were at least equal in importance to the commentaries. Precedence was a more-than-acceptable approach to defending or promoting one's case because precedence offered additional confirmation of the correctness of both the interpretation and the application of the law. Decisions of two groups in particular have exercised special importance. The first are the decisions of the Sacred Congregation of the Council (S.C.C.), officially known as the Sacred Congregation of Cardinals for the Interpretation and Execution of the Council of Trent. This council of cardinals dates back to 1564 and was specially authorized by the Pope to execute the decrees of the Council of Trent. Its rulings had the full force of law, although its decisions initially were neither collected nor published, and therefore only could be used when mentioned in a commentary on one of its rulings.[5] Most of the real power of this group rested on the fact that its voting members were all cardinals, each at the peak of his career. As cardinals they were accountable only to God and the Pope. They gave no reasons for their decisions as the S.C.C., and their arguments could only be inferred from the Secretary's report and commentaries on their cases. Indeed, one was treading on thin ice if one decided to publish commentaries on the

rulings of the S.C.C. because such commentaries could come to be viewed as interpretations of the Council of Trent. Such interpretations needed a papal license.[6] Instead, in 1739 Cardinal Prospero Lambertini (later to become Pope Benedict XIV) began to publish reports of the S.C.C. which he had made when he was their Secretary. Finally the secrecy (and the peril of unofficial reporting) was lifted and the Catholic world at large had access to these rulings, or at least to the way those rulings appeared to whoever was the Secretary at that time. At the height of its importance (in the seventeenth century), the S.C.C. decided between 1000 and 1500 cases per year (not exclusively marriage cases, of course, but cases calling for the "execution" of the provisions of the Council of Trent--most often issues of internal ecclesiastical administration). The Council was not a regular court of appeals but it did have the power to order all other ecclesiastical tribunals (including the Sacred Roman Rota, the official court of the Church) to change and revise decisions which failed to implement the provisions of Trent correctly. By and large, the cardinals of the Council defined their own boundaries and limits. The Pope, of course, stood above them in power and authority but left them alone for the most part.

The marriage legislation of the Council began with rulings on technical questions regarding the form of

marriage prescribed by the Council of Trent, especially questions regarding banns and witnesses. Marriage cases represented only a small portion of the Council's original jurisdiction (less than 5%), but did eventually include cases based on substantive issues as well as procedural ones.

The Secretary of the Council was its executive assistant, a man who had to be capable enough to so expedite things that a committee of twenty-four cardinals could meet twice a month and yet decide 1000 cases per year. His tasks included receiving and handling all communication from the parties involved, determining the docket, assigning the case to one cardinal as his special responsibility, preparing the written report (which set out the relevant facts and law) to the committee, and finally notifying the parties concerned of the Council's decision.[7] Much of the success of the Council can be traced to excellent Secretaries, most notably to Prospero Lambertini.

The Council was not the only body responsible for case law affecting canonical decision-making. The other major body of the Roman Curia which has continued to exercise real authority in this matter is the Sacred Roman Rota. In October of 1908 Pope Pius X reorganized the Curia in such a way as to reserve jurisdiction in marriage cases to the Rota. It is the court of third instance for

decisions concerning the validity of a marriage. The Rota dates back to the late Middle Ages (twelfth century) and was not initially an independent court but rather a tribunal composed of "the hearing-officers of causes of the Sacred Apostolic Palace."[8] The auditors, or members, of the Rota are judges. The Pope has traditionally controlled the Rota by deciding where, when, and by whom a case will be tried. However, the jurisdiction of the court is universal, and the Rota tries the "more serious cases of all the Christian faithful."[9]

The Rota is composed of twenty-five men, equal and collegial. Decisions are made by a majority. The members of the Rota are appointed by the Pope, and selection is based on merit. Rotal experience often becomes a preparation for even higher positions in the Church, owing as much to increased publicity and visibility as to the experience to be gained.

The Rota, as opposed to the S.C.C., from its inception provided reports of its judgments. The judge-reporter of the group was required by the Pope to provide both parties with copies of the Rota's decision, including the laws behind the decision and the reasons for it. Diverse Decisions collected some of the cases between 1530 and 1612; a collection of more recent decisions covered more thoroughly cases from 1612 to 1650. Also, many auditors published (and sold) their own accounts of the

cases. These accounts resembled the syllabus and headnote system of modern North American law reports: cases were not identified by name only but by city of origin, date of the decision, and subject. Each contained a one-page summary of its main holding and a numbered series of propositions of law taken from the opinion. The opinion was itself numbered accordingly. The better reporters also annotated their accounts with references to the Decretals, the Roman law, other commentaries, and related cases.[10] Rotal decisions counted equally with the law, and indeed could even take precedence over the Decretals and all other official law. Practice certainly counted as much as theory.

After the time of Pope Benedict XIV (mid-1700's), however, the Rota fell into a decline. The Congregations (including, of course, the S.C.C.), composed of more prestigious cardinals, had taken over most of the interesting ecclesial controversies. Wars, revolts, and increasing nationalism in a world full of developing countries led to a diminishment of the number of secular cases the Rota was allowed to handle. The 1870 incorporation of several of the Papal States into the Kingdom of Italy signaled the end of the functions of the Rota except for judgments in cases of beatification and canonization.

But in 1908 Pope Pius X issued the constitution Sapienti consilio. This document restored to the Rota

some of its past glory and set it on a new path of even greater power in the twentieth century. The Congregations were relegated to their previous position of consultants; the Sacred Roman Rota became once again the ordinary judicial forum of the Church. The centralization of the Church and its decision-making bodies had begun in full force.

This new Rota had more stringent requirements for its auditors than had the old. By the nineteenth century, during the decline of the importance of the Rota, many auditors no longer possessed a doctorate in canon law. The new regulations required a doctorate not only in canon law but also in theology, and they similarly required that all auditors be ordained priests. All appointments were made by the free choice of the Pope, and none were made on the basis of nations or cities. Each auditor was assigned an aide also holding the doctorate in canon law and approved by both the Rota and the Pope.[11] Above all the point of these reforms was to ensure justice by ensuring impartiality.

This court was designed to embody juristic excellence. It still exists as the court of final appeal in marriage cases. That is, initial marriage decisions are rendered at the diocesan level. A tribunal comprised of one, three, or five judges decides whether a valid marriage (one in which two legally capable persons freely

consented to a "community of life and love") ever existed. To decide that a valid marriage had existed all along is to render a negative decision to the petitioner's request for a declaration of nullity of the marriage. An affirmative decision claims that the marriage was null from the start, more precisely, that a canonically valid marriage never truly existed. The Defender of the Bond, a diocesan official whose function is to defend the validity of the marriage bond in an annulment proceeding, is obligated to appeal an affirmative decision of nullity. His appeal must go to another court, out of the diocese which rendered the first affirmative decision, but generally in the same area (same province or state of the same country). The Defender also has the right to a third hearing (a second appeal) should he so desire; ordinarily he does not. But the court of the third instance is the Sacred Roman Rota. The petitioner for a declaration of nullity does need for two courts to decide in favor of nullity. If the first petition for nullity fails, then the petitioner has the right to an appeal. Even if this appeal overturns the first failure, however, a confirming verdict is still needed by a third court. That court is the Rota in Rome.

The history of marriage legislation roughly parallels the history of canon law in general. Marriages have been regulated by the canon law since the earliest days of

the Church and, as with the rest of canon law, marriage legislation is a product of a whole history of authority and tradition, a history not always characterized by perfect agreement. The canons specify procedures for contracting a valid marriage and from the time of the Council of Trent have been quite specific about detailing the form of marriage as a public event taking place within a church in the presence of an official witness for the Church as well as witnesses from the community. But the problem of this thesis--that of the nature of legal capacity, especially as it relates to marriage--transcends this rather simple concern with the procedures regulating the form of the marriage contract. What makes canonical marriage legislation so interesting is that there are several ways, other than the merely procedural by which one might fail to contract a valid marriage. That is, one might also fail at the substantive level although all the legal forms were adhered to. The nature of marriage is such that failure can occur at a deeper level. And it is the nature of the marriage bond which needs to be elaborated here to make sense of that.

Although much of the canon law is derived from its Roman counterparts, the laws concerning marriage have varied from the Roman law since their inception. Ancient Roman law viewed marriage as a contract that was dissoluble by certain legal procedures. The Roman marriage was

never indissoluble. In ancient Rome the woman was subject to her husband's authority and could not reject him, but he always possessed the legal right (by virtue of his authority over her) to repudiate and divorce her. Now this privilege was never intended to be an absolute right to be practiced in an arbitrary manner, at least not before the third century B.C. Indeed, in the interest of preserving familial stability, it was expected that such repudiation would be engendered only by some blameful action on the part of the woman. Most frequently that meant adultery. By the end of the republic, however, women had achieved some measure of equality with men in regard to marriage and could also break the marriage bond. By the time of Cicero divorce by consent of the two parties, or at least at the wish of one, had become the normal course of affairs. Divorce became epidemic. Augustus attempted to regularize the procedure for divorce but recognized that the wish of the pair was sufficient to dissolve a marriage, provided that this wish was expressed publicly in the presence of seven witnesses and announced by a message. The divorced woman could also take action to reclaim her dowry. Thus, as the literature of the time illustrates, during the first two centuries of the Empire many households were held together by financial interest and others were broken up when it seemed possible that the husband could quickly capture a new wife at least equally

well endowed.

As indicated in chapter one, the bond of matrimony was held to be an indissoluble one from the earliest days of the Church. Some of the biblical sources for indissolubility have been cited above.[12] It was further argued that marriage was indissoluble by the law of nature. Marriages were made by consent but could not be undone by withdrawal of consent. Thus, the point of philosophical interest in the discussion of the nature of marriage seems to be that two persons, by consenting to a marriage, participate in the generation of a new metaphysical state which cannot then be undone except by the death of one of the partners. A temporal event produces an eternal, and hence indissoluble, state. That the precise mechanism by which this happens is unclear goes without saying. Yet although the history of canon law is not characterized by one single set of laws unchanging and in agreement with one another, and although the canons have always been laws in process and development, there is some constancy in the canonical understanding of marriage. First of all, marriages between two baptized persons are indissoluble. Two other things also appear constant: the belief that marriage is constituted by consent (although what constitutes consent is a wholly different dilemma) and the belief, dating back at least to Pope Innocent III in the thirteenth century and reinforced by Pope Benedict XIV in

his 1741 declaration on the "Defender of Marriages" (Dei miseratione), that in all cases the bond of marriage is presumed to be valid unless proven otherwise. Everything else is open to discussion and debate, including the very nature of marriage itself, especially how a contract can generate a metaphysical state while yet remaining a set of relations in a legal system as well as a "community of life and love."[13] In the civil and common law, the answers are far simpler. Marriage is

> a contract, according to the form prescribed by law, by which a man and woman, capable of entering into such contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and wife.[14]

In the recent developments of canon law, however, marriage is not so simply a contract entered into by a single event but is rather a consent to a community of life and love which must be a consent to a continuing project, the details and shape, i.e. the conditions, of which cannot be determined or known in advance. Yet this analysis of marriage has not always been the norm. And, as we shall see in the pages to come, various historical periods gave rise to various interpretations of the nature of marriage and to the concepts of legal capacity lying behind them.

Thus, the final major way in which one might attempt to define the scope and practice of canonical decision-making lies in the understanding of the problem

alluded to above, that of the nature of marriage itself and its relationship to the legal system called canon law. In this regard, there have existed several key theological commentaries on the nature of the marriage bond and the possibility of its dissolution by one means or another. Among the theologians most often referred to is St. Thomas Aquinas on marriage in his thirteenth century Summa Theologiae and Summa contra Gentiles. Secondly, the work of Tomas Sanchez, S.J. on marital consent, De sancto matrimonii sacramento, in the late sixteenth century was one of the "first investigations by a specialist into the requirements of Christian marriage. Not merely a pioneering effort, his book was to stand as the fullest, most learned, and most acute of scholastic treatises on marriage."[15] The influence of Sanchez remained unmatched until late in the nineteenth century (1891) when Pietro Gasparri, brilliant young Italian holding the chair of canon law at the Institut catholique in Paris, published his discourse on the fourth book of the Decretals, De matrimonio. That book guaranteed Gasparri's subsequent fame, which went on to be based not only on his work on marriage but on his preparation of the formal Code of Canon Law which was to be promulgated in 1917. Unlike Sanchez's book, however, Gasparri's was not so much an original theological treatise on marriage as it was a compendium of information invaluable to the parish priest

based on a review of the old materials--Gratian, the Decretals, Pope Benedict XIV, and Sanchez--coupled with Gasparri's analysis of the 150 volumes of reports of the Secretary of the S.C.C. Gasparri used all of these as his sources for the law.[16] It was a superb essay on canonical jurisprudence, clear, lucid, simple, and candid. Gasparri re-published it in 1932 and it remains one of the monumental studies available for the aid of canonists. Finally, certain of the documents of the Second Vatican Council, most specifically Gaudium et spes (the Pastoral Constitution on the Church in the Modern World), include a new emphasis on marriage as a life-long activity rather than a one-time event or contract. This latter document amply illustrates the modifications of the notion of marriage which resulted from both historical and psychological developments in the twentieth century. It has also, by expanding the understanding of the nature of marriage, contributed to an expansion in the kinds of reasons which can be advanced for the declaration of nullity of a marriage. And it is an issue directly related to that problem which is of philosophical interest, which is indeed the focus of this thesis. That is the issue of legal capacity.

What is the problem to which the philosophical issue is tied? Simply stated, it is the following. A consummated marriage between two baptized persons is,

according to the canon law, indissoluble. It cannot be revoked by either of the parties or even by anyone in authority. A valid marriage causes a change which appears to be a metaphysical change, a change by means of which a new and permanent community is created. If that is the case, then it is clear that divorce, a formal legal dissolution of the marriage bond by appropriate authority, cannot be possible. Hence the only option open to persons desiring to terminate their union is to demonstrate before the Church tribunal that in fact no marriage ever existed, that there was some defect present from the start in one or both of the parties that prevented them from creating this indissoluble community. If, as we showed above in our reference to canon 1057.1,[17] it is consent which constitutes a marriage, then an invalid marriage will be one in which consent is defective in some way. And consent comes from persons who are "legally capable." Hence, if a person lacks legal capacity, he cannot consent to a marriage. It then becomes imperative for theologians, canon lawyers, and tribunal advocates and judges to know, understand, and be able to apply the concept of legal capacity and, most importantly, to be able to recognize its absence. But that concept has not been directly addressed by the theologians in the works cited above. Nor has it been directly defined by canon lawyers. If it has existed anywhere, it is in the actual

decisions of the Church tribunals. Even there, however, it is never explicitly cited as a reason for declaring the nullity of a marriage. Hence, it must be culled from the canon law and tribunal proceedings. The concept must be shown to be entailed by the decisions given. That is, the concept is implicitly present in the law and in the reasons given for the decisions that have been made by the Church courts. What remains is for us to construct it from those sources.

Chapter III. Legal Capacity and Contemporary Canon Law

> Cases which come before a court may be analogized to the cases which come before a physician. They are specimens of pathology. Marriages so imperfectly made or so unsuccessfully continued as to be candidates for nullification cannot stand for all the healthy marriages nurtured by the system. Yet from the pathological one may draw useful lessons about the healthful and the conditions necessary for health.
>
> --John T. Noonan
> Power to Dissolve

To understand the special insights the canon law on marriage can provide for our analysis of the concept of legal capacity, it is necessary to investigate thoroughly the requirements for marital consent. It would appear that the requirements for consent would constitute as closely as possible a listing of the requirements for legal capacity. But before turning to marriage and marital consent, let us briefly check the rest of the canonical corpus[1] for any other indications of what might constitute legal capacity.

The canons begin with an express, but very general, requirement for legal capacity. Canon 11 reads: "Merely ecclesiastical laws bind those who were baptised in the Catholic Church or received into it, and who have a sufficient use of reason and, unless the law expressly provides

otherwise, who have completed their seventh year of age." Canon 12, section 1, continues, "Universal laws are binding everywhere on all those for whom they were enacted." Thus it seems that the scope of canon law extends to all baptized Catholics who have attained the age of reason, which is approximately seven years of age. Canon 97 begins to lay out other requirements of canonical personhood: "A person who has completed the eighteenth year of age has attained majority; below this age, a person is a minor. A minor who has not completed the seventh year of age is called an infant and is considered incapable of personal responsibility; on completion of the seventh year, however, the minor is presumed to have the use of reason." Further, "whoever habitually lacks the use of reason is considered as incapable of personal responsibility and is regarded as an infant" (canon 99). However, there is no elaboration, at least in this section, of what constitutes the habitual lack of the use of reason. Yet there are indications in the section on juridical acts (canons 124-126) of other limitations on legal capacity:

> For the validity of a juridical act, it is required that it be performed by a person who is legally capable . . .
>
> An act is considered invalid if performed as a result of force imposed from outside on a person who was quite unable to resist it . . .
>
> An act is invalid when performed as a

> result of ignorance or of error which concerns the substance of the act, or which amounts to a condition sine qua non.

In Part III of Book II of the code, the section dealing with institutes of consecrated life, there are a few more indications of what is required for legal capacity, although these seem to be conditions which almost anyone might meet. Canon 597 states, "Every Catholic with a right intention and the qualities required by universal law and the institute's own law, and who is without impediment, may be admitted to an institute of consecrated life. No one may be admitted without suitable preparation." But this "suitable preparation" is left to the discretion of the particular institute, "right intention" is left undefined, and "the qualities required by universal law," apart from having attained the age of reason, are left unspecified. (The guidelines of proper law, the requisites of a given institute, are not part of the universal law.) However, although this first mention of "right intention" is left undefined, it is a not insignificant addition to the previous minimum age and possession of reason requirements. It is the first instance where something comparable to "will" appears along with reason. In the section on admission and formation of candidates to religious institutes there are a few more qualifications listed (although none which appear to be much more illuminative than those already

cited). And these qualifications appear to be more of the form of exhortations than actual requirements. Canon 642 reads,

> Superiors are to exercise a vigilant care to admit only those who, besides being of required age, are healthy, have a suitable disposition, and have sufficient maturity to undertake the life which is proper to the institute. If necessary, the health, disposition, and maturity are to be established by experts . . .

Canon 643 continues,

> The following are invalidly admitted to the novitiate:
>
> 1. one who has not yet completed the seventeenth year of age;
>
> 2. a spouse, while the marriage lasts;
>
> 3. one who is currently bound by a sacred bond to some institute of consecrated life . . .;
>
> 4. one who enters the institute through force, fear, or deceit . . .

Furthermore, temporary religious profession entails the following conditions cited in canon 656:

> The validity of temporary profession requires:
>
> 1. that the person making it has completed at least the eighteenth year of age;
>
> 2. that the novitiate has been made validly;
>
> 3. that admission has been granted, freely and in accordance with the norms of law, by the competent Superior, after a vote of his or her council;

> 4. that the profession be explicit and made without force, fear or deceit;
>
> 5. that the profession be received by the lawful Superior, personally or through another.

Canon 659 continues,

> Besides the conditions mentioned in can. 656 and others attached by the institute's own law, the validity of perpetual profession requires:
>
> 1. that the person has completed at least the twenty-first year of age;
>
> 2. that there has been previous temporary profession for at least three years . . .

As is evident, except for a repetition of the requirement of free profession (absence of force and fear), little new is added in these canons except for minimal age requirements. However, in the article concerning departure from institutes, something appears for the first time. According to canon 689,

> Even though contracted after profession, a physical or psychological infirmity which, in the judgment of experts, renders the member . . . unsuited to lead a life in the institute, constitutes a reason for not admitting the member to renewal of profession or to perpetual profession, unless the infirmity was contracted through the negligence of the institute or because of work performed in the institute.
>
> A religious who becomes insane during the period of temporary vows cannot be dismissed from the institute, even though unable to make a new profession.

Hence, the requirement of meeting the age of reason is expanded to include not being insane or having any incapa-

citating "psychological infirmity."

In the section of the canon law dealing with the sacraments we begin to see a a more detailed elaboration of a condition of capacity only mentioned in passing, as it were, in previous canons. For example, in canon 865 we see that "to be admitted to baptism, an adult must have manifested the intention to receive baptism . . ." What has been added here to the basic requirement of having reached the age of reason is the necessity of manifesting an intention. Being in the possession of and, more importantly, being able to manifest an appropriate intention certainly differs from and expands upon the simple possession of rationality. It is an expression of volition in addition to reason. Each of the other sacraments has, as, well, a similar condition of being "properly disposed,"[2] i.e. having the appropriate intention. Further, the sacrament of holy orders carries with it other conditions. Canon 1026 states, "For a person to be ordained, he must enjoy the requisite freedom. It is absolutely wrong to compel anyone . . ." This, of course, is also required for religious profession (see above). However, there are also certain impediments which can bar persons from the reception of orders. These are negative requirements, as it were, for legal capacity.

> Canon 1040. Those bound by an impediment are to be barred from the reception of orders. An impediment may be

> simple; or it may be perpetual, in which case it is called an irregularity. No impediment is contracted which is not contained in the following canons.

Among the more important irregularities is the one cited in canon 1041, section 1, which declares as irregular for the reception of orders any "one who suffers from any form of insanity, or from any other psychological infirmity, because of which he is, after experts have been consulted, judged incapable of being able to fulfil the ministry." Short of this section which does relate directly to the concept of legal capacity, the other impediments and irregularities represent merely ecclesiastical requirements most of which can be dispensed either by the Ordinary (most often a bishop) or by the Holy See. None relates directly to our inquiry.

It is only when we reach the section of the canon law on marriage that we see a thorough elaboration not only of the theology of that sacrament but of the legal conditions for consent as well. From this discussion we can begin to develop some guidelines for legal capacity, and with considerably more success than could be achieved using the rest of the canons. In canon 1055 marriage is referred to as a:

> covenant, by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children.

Furthermore, "the essential properties of marriage are unity and indissolubility" (canon 1056). And, of absolutely crucial importance,

> A marriage is brought into being by the lawfully manifested consent of persons who are legally capable . . . Matrimonial consent is an act of will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage. (canon 1057)

Here we see once again a familiar phrase, "manifested consent," now conjoined with the phrase "persons who are legally capable." Consent and legal capacity are linked together here for the first time, although "legally capable" is left unexplained. Consent, however, is further defined as "an act of will." Hence, too, "will" is conjoined to the other conditions for legal capacity which we have already encountered, including reason. The components of legal capacity are in some sense laid out here. What remains, obviously, is for us to determine precisely in <u>what</u> sense. That is, it remains for us to sort out and analyze individually the concepts referred to in the canons and then reassemble them in such a way as to make the whole coherent, consistent, and comprehensible.

Before we do that, however, a few other observations about the nature of marriage according to the canon law need to be noted. For example, "all can contract marriage who are not prohibited by law" (canon 1058), and "marriage

enjoys the favor of law. Consequently, in doubt the validity of a marriage must be upheld until the contrary is proven" (canon 1060). Legal capacity, it appears, is assumed until proven lacking. And marriage is a sacrament open to all who can meet minimum requirements.

Traditionally, there have been strong social reasons to limit the requirements of capacity. Theologians have most often considered celibacy to be a gift which few receive. Marriage is the sole lawful channel for sexual intercourse. Hence, marriage has to be an institution accessible rather democratically to all. It was thought to be unjust to restrict too many to a life of continence. Two analogies confirmed the existence of a low standard, at least in the pre-twentieth century Church. The analogies were those of religious profession and capacity for mortal (i.e. serious) sin. God might call even the simple-minded, it was thought, to serve him as religious. Almost anyone throughout the history of the church could become a monk or a nun, although the priesthood was traditionally more severely restricted. If the simple had the capacity to profess religious vows, surely they could marry. More significant, however, was the capacity to commit serious (mortal) sin. Almost everyone can sin. Once the age of reason was attained (again, prior to the twentieth century that was presumed to be around the age of seven), even a child could sin. Once capable of

reason, one was assumed capable of rational action. Gratian himself taught that the insanity which made one incapable of sin was the insanity which made one incapable of marriage.[3] The converse was assumed to be true as well: capacity to sin was capacity to marry. It was only the need for physical capacity which pushed the canonical age for marriage to fourteen for boys and twelve for girls.[4]

Contrary to this picture, however, and supported by such diverse commentators and canonists as Tomas Sanchez and Paolo Zacchia,[5] was the older Augustinian account of the purposes of marriage consisting in the procreation and education of children, the preservation of fidelity, and the maintenance of indissolubiility (the three goods of marriage). How could a person with the mentality of a seven-year-old (or a fourteen-year-old, for that matter) be capable of educating children? But no theologians appear ever to have suggested that incompetence in the raising of children was anywhere nearly as significant (or as fatal) to the capacity to marry as was the ability to perform the marriage act.

Nor does the canon law suggest such a thing. Chapters one through four of the section on marriage[6] lay out the prerequisites for the celebration of marriage, impediments to the valid celebration of marriage, and the definition and requirements for matrimonial consent.

Chapter one of this section specifies the care and preparation which ought to be given by the Christian community to those contemplating marriage. Canon 1063 begins by listing the preparation required:

> Pastors of souls are obliged to ensure that their own church community provides for Christ's faithful the assistance by which the married state is preserved in its Christian character and develops in perfection. This assistance is to be given principally:
>
> 1. by preaching, by catechetical instruction adapted to child, young people, and adults, indeed by the use ofthe means of social communication, so that Christ's faithful are instructed in the meaning of Christian marriage and in the role of Christian spouses and parents;
>
> 2. by personal preparation for entering marriage, so that the spouses are disposed to the holiness and the obligations of their new state;
>
> 3. by the fruitful celebration of the marriage liturgy . . .
>
> 4. by the help given to those who have entered marriage, so that by faithfully observing and protecting their conjugal covenant, they may day by day achieve a holier and a fuller family life.

Further, it is the responsibility of the local Ordinary to ensure this assistance (canon 1064). Canon 1066 asserts that "before a marriage takes place, it must be established that nothing stands in the way of its valid and lawful celebration." Unfortunately, the things listed as standing in the way of a valid marriage (which the canonists call "impediments") include primarily things

which can be determined by external observation and, hence, only exclude or, at best, touch only tangentially, on requirements for legal capacity. Canon 1071, for example, states that without the permission of the Ordinary, and except in cases of necessity, no one can assist at:

> 1. a marriage of vagi (persons with no permanent domicile and, hence, no home parish);
>
> 2. a marriage which cannot be recognised by the civil law or celebrated in accordance with it;
>
> 3. a marriage of a person for whom a previous union has created natural obligations towards a third party or towards children;
>
> 4. a marriage of a person who has notoriously rejected the catholic faith;
>
> 5. a marriage of a person who is under censure;
>
> 6. a marriage of a minor whose parents are either unaware of it or are reasonably opposed to it;
>
> 7. a marriage to be entered by proxy.

Canon 1072 continues, "Pastors of souls are to see to it that they dissuade young people from entering marriage before the age customarily accepted in the region." Clearly, these are requirements intended to help ensure successful marriages. But clearly, too, they do not address except indirectly the requirements for legal capacity. They are, instead, addressed to practical matters.

So too are the impediments detailed in chapters two and three of the section on marriage.

Chapter two deals with diriment impediments in general. That, indeed, is the title of chapter two. Canon 1073 states, "A diriment impediment renders a person incapable of validly contracting a marriage." Canon 1075 continues, "Only the supreme authority in the Church can authentically declare when the divine law prohibits or invalidates a marriage." And, most importantly, canon 1078 advises that "the local Ordinary can dispense his own subjects wherever they are residing . . . from all impediments of ecclesiastical law except for those whose dispensation is reserved to the Apostolic See." Thus the impediments listed in chapter two of the Code, although serious, cannot ultimately prevent the celebration of a valid marriage in the same way that a lack of legal capacity will. Those impediments can be dispensed by bishops. Chapter three, however, lists other impediments:

> Canon 1083. A man cannot validly enter marriage before the completion of his sixteenth year of age, nor a woman before the completion of her fourteenth year.
>
> Canon 1084. Antecedent and perpetual impotence to have sexual intercourse, whether on the part of the man or on that of the woman, whether absolute or relative, by its very nature invalidates marriage.
>
> If the impediment of impotence is doubtful, whether the doubt be one of law or one of fact, the marriage

is not to be prevented nor, while the doubt persists, is it to be declared null.

Without prejudice to the provisions of canon 1098, sterility neither forbids nor invalidates a marriage.

Canon 1085. A person bound by the bond of a previous marriage, even if not consummated, invalidly attempts marriage.

Even though the previous marriage is invalid or for any reason dissolved, it is not thereby lawful to contract another marriage before the nullity or the dissolution of the previous one has been established lawfully and with certainty.

These canons begin to indicate some items of interest to our inquiry into legal capacity. Here we begin to see terms like "nullity" and "dissolution." And here we also begin to see what criteria are absolutely essential for a valid marriage. For, except in the case of canon 1083, dispensations are not available. Neither the bishops nor the pope himself can dispense one from the impediment of impotence. Moreover, with the exception of "Ratum" cases, neither the bishops nor the pope can dissolve a valid marriage between two baptized persons. But the history of this latter issue is not a completely uniform one. Although the Roman law established and Gratian agreed[7] with the general position that consent, not sexual relations, made a marriage, there were in the twelfth and thirteenth centuries disputes about the ability of the pope to dissolve a valid (i.e. consensual) though uncon-

summated marriage. Although Alexander III in his decretal Commissum firmly upheld consent as the foundation of the canon law on marriage,[8] he held that

> although a marriage was lawful and valid upon the exchange of consent, it could be truly dissolved, ending all marital ties and obligations, by the religious profession of one spouse, provided that profession took place before any act of post-marital intercourse intervened.[9]

That ruling ended what had been a controversy for centuries by deciding that marriage was not in all circumstances indissoluble, even a valid marriage. The distinction made here was between a valid union and an indissoluble one. Alexander ruled that the commandment not to put asunder what God had joined could only apply to those who had consummated marriage. In any other marriage the two parties had not yet "become one flesh."[10] Thus, he distinguished between two classes of marriage, the virginal one and the norm. That distinction illustrated the problem of both canonists and theologians struggling to propound a single, unified theory of marriage. The conflict which Alexander attempted to resolve was a conflict between the Marian and the Augustinian analyses of marriage.[11] The Marian account of marriage held that marriage was constituted by consent, not by sexual relations. It was called Marian because it was the only model which allowed for the validity of the virginal marriage of Mary and Joseph, one in which sexual relations were never

present. The opposing theory dated back to St. Augustine in the fourth century. That theory held that there were three essential values which must be intended by marriage: children, indissolubility, and fidelity.[12] Lack of any of these was sufficient to invalidate the marriage, as the legislation of Gregory IX, Si conditiones, decided.[13] Refusal to participate in sexual relations, then, theoretically would render a marriage invalid from its inception. But that, again, would put in jeopardy the marriage of Mary, a move which would be theologically unpleasant at best. While the details of this theological dispute lie outside the scope of this thesis, it is important here to note that the theory of marriage, which obviously affects the legislation of marriage, was not uniform. While theologians seem never finally to have put together a uniform model of marriage which reconciled these differences, what is clear is that ecclesiastical practice has maintained a unitary model. It was thought that the virginal marriage was such a rarity that it need not be acknowledged as a separate institution or class of marriage. Even rarer is the virginal marriage in which one party eventually decides that he would like to be freed of the marriage bond in order to pursue a religious vocation. Hence, as a general rule, marriages between two baptized persons, marriages constituted by consent and consummated, are indissoluble. According to canon 1141,

"A marriage which is ratified and consummated cannot be dissolved by any human power or by any cause other than death." Marriages properly constituted (i.e. constituted by consent) but not consummated are open to dissolution by the pope. Canon 1142 provides:

> A non-consummated marriage between baptised persons or between a baptised party and an unbaptised party can be dissolved by the Roman Pontiff for a just reason, at the request of both parties or of either party, even if the other is unwilling.

What remains is what has traditionally been called the Pauline privilege because it dates back to the letters of Paul to the Corinthians, precisely 1 Corinthians 7:10-16. That amounts to the practice elaborated by Isaac, a fourth century Roman lawyer converted to Christianity from Judaism,[14] which allowed remarriage for converts to Christianity when the former spouse remained an unbeliever and cohabitation became impossible because of religious differences. This was allowed even in the case of consummated marriages. Today this is an exceptional situation and need not affect our inquiry into legal capacity except to note that it is provided for in canon 1143 which states:

> In virtue of the Pauline privilege, a marriage entered into by two unbaptised persons is dissolved in favor of the faith of the party who received baptism, by the very fact that a new marriage is contracted by that same party, provided the unbaptised party departs.

> The unbaptised party is considered to depart if he or she is unwilling to live with the baptised party, or to live peacefully without offence to the Creator, unless the baptised party has, after the reception of baptism, given the other just cause to depart.

What we can conclude even after this brief digression is that persons lawfully married cannot, according to the canon law, contract a second marriage until the former marriage is proven invalid. A marriage can be invalid in a number of different ways. The first, and easiest, way to invalidate a marriage is to demonstrate that the formal procedures for contracting a marriage, procedures first formulated by the Council of Trent and now listed in canons 1108 to 1123 (chapter five of Title VII on marriage), were not followed. That is a relatively simple legal procedure. The more difficult case is that one where the formal requirements for contracting a marriage have been met, but the marriage has still failed. In that case, the marriage can only be declared null if it can be demonstrated in a court of law (the Church tribunal) that no valid marriage ever existed because of some failure at the time the marriage was contracted. That sort of failure is a failure to meet certain conditions for legal capacity, and those conditions are tied to consent and mapped out in chapter four of the section on marriage, a chapter entitled "Matrimonial Consent."

Canon 1095 states very clearly:

The following are incapable of contracting marriage:

> 1. those who lack sufficient use of reason;
>
> 2. those who suffer from a grave lack of discretionary judgement concerning the essential matrimonial rights and obligations to be mutually given and accepted;
>
> 3. those who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage.

Within that brief canon lie all the conditions for legal capacity enumerated within the whole of the canon law on marriage. What can immediately be concluded from a quick perusal of that canon is that the very young and the very insane are eliminated by the "sufficient use of reason" criterion. People suffering from less than total mental retardation, however, may be a different case. The canon, after all, does not specify how much reason is "sufficient." The other two criteria are even less specific. The second, the "grave lack of discretionary judgement," seems to be related to the understanding, to volition and to prudence, to one's ability to appreciate, to choose and to carry out the "essential matrimonial rights and obligations." The final criterion, the psychological, entails a level of mental health higher than the mere possession of reason. It would seem to exclude persons ranging from those suffering from more mild forms of psychological impairment (emotional immaturity and instability, for

example, as well as the inability to accept personal, financial, or job-related responsibilities) to those suffering from psycho-sexual disorders as well as persons suffering from what used to be called character disorders, especially those of a sociopathic sort, which render a person unable to order his own life according to the patterns of social bonds and relationships that other people use.

Canon 1096 further specifies that consent requires a certain amount of knowledge:

> For matrimonial consent to exist, it is necessary that the contracting parties be at least not ignorant of the fact that marriage is a permanent partnership between a man and a woman, ordered to the procreation of children through some form of sexual cooperation. This ignorance is not presumed after puberty.

Canon 1097, states that "error about a person renders a marriage invalid," even though error about certain qualities of a person does not. Further, "a person contracts invalidly who enters marriage inveigled by deceit . . . which of its very nature can seriously disrupt the partnership of married life" (canon 1098). The knowledge required for consent is basically knowledge of what marriage is and a certain minimal knowledge about the person whom one is marrying, at least that he is who he claims to be and is not engaged in open deception about himself.

Canon 1101 attempts to relate external behavior to

internal intention:

> The internal consent of the mind is presumed to conform to the words or the signs used in the celebration of a marriage.
>
> If, however, either or both of the parties should by a positive act of will exclude marriage itself or any essential element of marriage or any essential property, such party contracts invalidly.

In addition, "marriage cannot be validly contracted subject to a condition concerning the future" (canon 1102). Marriage, that is, entails the unconditional acceptance of a person and of a life together with that person, regardless of whether or not that life proceeds according to one's expectations. This criterion sounds a lot like the traditional "for better or worse, in sickness and in health" section of the marriage ceremony. One cannot put conditions or stipulations on the marriage ("I will stay married only if certain things happen or work out, etc.") if that marriage is to be valid.

A final requirement for consensual validity is that one enters marriage freely. Canon 1103 states that "a marriage is invalid which was entered into by reason of force or of grave fear imposed from outside, even if not purposely, from which the person has no escape other than by choosing marriage." Consent can only be free consent. That is a criterion at the volitional level not unlike the criteria listed above in canon 1095. Consent is an

activity of the will as well as of the reason.

There are also formal requirements for the celebration of marriage which are behavioral in nature. These forms are outlined in chapter five of Title VII on marriage in the new Code of Canon Law. These norms specify other criteria which one must meet for the valid celebration of a marriage. They include such things as the celebration of the marriage in the home parish of one of the parties in the presence of two witnesses and contracted before the parish priest or bishop (or his delegate). During the ceremony the parties to the marriage must publicly manifest their consent. Also, the marriage is to be recorded in public records. Any deviation from these formal requirements must be dispensed by the bishop.

To summarize, then, marriage is constituted by the consent of persons who are legally capable. That consent is composed of several different elements, some of them behavioral (following the appropriate <u>form</u> for marriage), some of them related to reason (being old enough to possess reason and sane enough to be able to use it), some related to intellect (knowledge of what marriage is), some related to will (the free choice of the marriage and the marriage partner, free in the sense both of being uncoerced by outside forces and undetermined by inner psychological defects which would render one incapable of carrying out what one intends to do). Failure of consent

at any of these levels invalidates a marriage.

A properly performed and consummated marriage between two living Christians can only be nullified by the formal annulment process requiring a full tribunal hearing to prove that a true marriage never existed in the first place. Many grounds for declarations of nullity are extremely difficult to prove. But within the past fifteen years or so, the most usable grounds have belonged to three categories: the new psychological grounds, simulation of consent, and force and fear. Each of these grounds relates to the canons we have just explained above. And most nullity cases in the United States and Canada today make use of these three categories in one way or another.[15]

What are called "psychological grounds" above are really grounds based on defective matrimonial consent, specifically a defect in one's ability to be "capable according to law." That was the old phrasing of canon 1057 which now uses the phrase "persons who are legally capable." New interpretations of that canon, of canon 1096 (that the partners "be at least not ignorant" of the essential properties of marriage), and of the "force and fear" provision of canon 1103 have resulted in the incorporation of two distinct but related grounds for nullity which have accounted for approximately 80% of the formal declarations granted in the United States since 1970.[16]

The American interpretation of these new grounds was upheld in the promulgation of the new Code of Canon Law in 1983.

These two new grounds are grounds implied by canon 1095, which details the nature of matrimonial consent and sets out conditions which render a person incapable of contracting marriage (see above). The new grounds based on the interpretation of this canon are called "lack of due discretion" and "lack of due competence," although the Commission on the new Code of Canon Law refused to recognize the validity of the latter. Furthermore, each of these is often included in the blanket or umbrella ground called "consensual incapacity."

> Lack of due discretion means that the person did not have the ability to give valid consent at the time of the wedding and therefore the union is invalid. Lack of due competence means that the person was incapable of carrying out the obligations of the promise he or she made during the wedding ceremony.[17]

Use of these grounds was begun in the U.S. in 1969, and followed the adoption and Vatican approval of the American Procedural Norms, a series of procedures designed to expedite the process of deciding on the validity or the nullity of a marriage. The Canadian tribunals were given special privileges in 1974 similar to those incorporated in the American Procedural Norms. Those Norms (which had as their major advance a shortening of the annulment process by allowing an affirmative decision at the local

Diocesan level to suffice, thus doing away with appeals unless requested by the parties) were superseded by the promulgation of the new Code of Canon Law in 1983; the newer ground of lack of due discretion cited above, however, was not. And, indeed, even Rota decisions prior to 1970 began to show influence of an appreciation of new factors in the decision of marriage cases. By the 1950's the Rota began to decide affirmatively on the nullity of marriages of persons exhibiting different sexual orientations (i.e. homosexuals) or persons suffering from sexual disorders such as nymphomania. For the first time the Rota began to reason that persons who exhibit such orientations or disorders shortly after the marriage must have been unable to give valid consent at the time of the marriage because these are orientations that do not spring up overnight, even if their first manifestations do not pre-date the marriage itself. Furthermore, psychological testimony began to be accepted and even sought after in an attempt to understand the parties' ability to consent to a marriage. The Rota began to investigate causal links between marriage breakdown and premarital states. None of this amounted to an accommodation to the twentieth-century world replete with marriage breakdowns and divorces so much as it was a recognition that marriage is indeed a complex undertaking requiring more than a simple understanding of the relationship between sexuality and pro-

creation. It was, additionally, the recognition that many persons know what marriage is and choose it without realizing that they may well be incapable of fulfilling that which they are accepting. That, coupled with the broadening of the idea of what marriage is from that of a legal contract to that of a covenant, accounts for the great increase in requests for declarations of nullity at the diocesan tribunals.

> The result of this was that it could no longer be assumed in annulment cases that a person who could intellectually understand the concept of marriage could necessarily give valid consent to marry. The ability to both grasp and assume the real obligations of a mature, lifelong commitment are now considered a necessary prerequisite to valid matrimonial consent.[18]

This becomes a philosophical problem in the following way: Very simply, theory has not kept up with practice. The broadening and new understanding of acceptable grounds date back less than fifty years; the mushrooming of requests for declarations of nullity dates back only about fifteen. Use of the newer grounds in the rest of the world beyond North America and Great Britain is just as recent, if not more so. Many of the precedent cases for the use of the specific formulations of "lack of due discretion" come from the post-1965 period. Furthermore, more types of evidence are now allowed by the tribunals. At present the conduct of the partners in the years after

the ceremony counts as a strong indication of the consensual capacity of the partners at the time of the ceremony. In much the same way, general behavioral patterns can be used as evidence bearing on a person's capacity to assume and carry out responsibilities and obligations as promised as well as on his overall ability to exercise prudent judgment. Not only is testimony from psychologists allowed; it is encouraged by the tribunal judges as expert testimony to which strong weight is given.

But what is lacking is a philosophical explanation of legal capacity such that reason, will, intention, judgment, and ability to carry out what one promises or wishes are coordinated into a single, cohesive, and coherent theory of the self. The persons acting as "advocates" at the diocesan tribunal, of course, are interested either in promoting the case for nullity for their "clients" (if they are acting as advocates) or in insisting upon the validity of the marriage (if they are the Defenders of the Bond). Their role is to use the law to the advantage of the parties involved. Theirs is a practical activity. So, too, is the function of judge who must finally decide the outcome of the hearing. Canon lawyers study the canons, the history of them, and precedent cases in order to develop more fully an understanding of the law and its application by investigating the sorts of grounds that one might use. Theologians are concerned

with the nature of marriage and its spiritual ramifications. But any understanding of legal capacity will remain seriously lacking and incomplete if it does not include the input of philosophers whose function it is to examine the concept of self, how different aspects of the self mesh together to constitute a unified person, and how those different aspects relate to a person's projects and activities.

The remainder of this thesis will address those issues. I shall investigate, first of all, competing models of legal capacity based on thorough and complete philosophical positions. The first model I shall study is what I have called a legalist or positivist model, a model similar to one employed in the secular law on marriage according to which the fulfillment of certain prescribed sets of behavior constitutes a marriage. This model can be best described in philosophical terms by looking at the work of British philosopher J. L. Austin on performative utterances. The marriage promise is one of the first examples he uses in his own work on performatives. Such a model offers valuable insights into some of the necessary conditions of legal capacity. But, as will become evident in chapter four, the performative analysis of legal capacity fails to account for all that is needed according to canon law. That is, it sets forth necessary but not sufficient conditions for capacity.

The second paradigm which I shall examine is what I have called an intellectualist model of capacity, one according to which a person must possess reason and intellect in order to participate in a system of legal relations. This model can be traced to certain interpretations of the work of St. Thomas Aquinas and has been the foundation of a standard philosophical theory of capacity, the one most often cited by canonists in the past. Indeed, before the second half of the twentieth century, this Thomistic model was taken to be the norm even though it existed only in an implicit form in the canon law. That is, canonists and tribunal advocates and judges used the philosophical theories derived from St. Thomas Aquinas as their point of reference, but nowhere did there exist an explicit formulation of the Thomist, or intellectualist, theory of legal capacity. That will be supplied in chapter five.

Finally, legal capacity is closely connected to freedom in some very serious ways. Hence, a third possible model of capacity is one which I have called a voluntarist model, based on the premise that freedom (and hence the will) is primary in the exercise of legal capacity. A formulation based on the philosophy of Jean-Paul Sartre can best account for a concept of absolute freedom being what makes us human and, therefore, what can account for our legal capacity. We shall investigate that model

in chapter six.

What becomes evident after an examination of the philosophical models already available is that each presents a necessary component of legal capacity, but no one paradigm alone can satisfy the requirements of the canonists as set forth in canon 1095 on matrimonial consent. Therefore, in the last section of this thesis I shall try to construct a new model that gives sufficient weight to all those items included in that canon: behavior, reason, intellect, knowledge, freedom, and will. To do so I shall investigate the work of another medieval philosopher, John Duns Scotus, whose theory seems to approximate more closely than that of the version of Thomism popular in Roman Catholic institutions during the first half of the twentieth century the contemporary concerns of canonists about legal capacity and marital consent. To that I will add the work of Josiah Royce, nineteenth-century American idealist philosopher, and his British contemporary Thomas Hill Green. They shared the basic premises of Scotus about the nature of the self. Yet they also offered additional insights into the relationship of the individual to the community and into the nature of the self as a unified whole which incorporates and integrates all the above-noted facets of the human person. I shall conclude by suggesting that only a model of that sort can provide the philosophical basis for

the recent practice of Church tribunals of granting an increased number of declarations of nullity on those broader grounds explained above. Furthermore, it is hoped that the provision of a philosophical explanation and justification of this practice can lead to a more productive and, hence, more equitable practice. It is to be hoped that making the philosophical underpinnings explicit will make the tasks both of petitioning for an annulment and deciding on the actual nullity of a marriage clearer, if not easier. A philosophical model may be able to provide additional standards, or at least additional insights, into the process in order to help clarify the practice.

Chapter IV. The Legalist/Positivist Model

> In saying these words we are doing something, rather than reporting something . . .
>
> --J. L. Austin
> How to do Things with Words

One of the more straightforward models of legal capacity is a model which one might call a "legalist" or a "positivist" model. It is "legalist" in the sense that it holds to a notion of strict accountability in the law. One either adheres to the prescriptions of the law or one does not. And a person is wholly responsible for his own adherence or non-adherence. Very little counts in the way of excuses. It is "positivist" in much the same way. The law exists as a factual body of regulations against which people either measure up or they do not. Judgment (i.e. the function of the judge) is the process of applying general rules to particular cases and/or of ascertaining whether or not the provisions of the law have been met. It is not so much creative as it is comparative. It is more an activity of looking, measuring, and applying than of interpreting. Therefore, to be "legally capable" according to this model means to be capable of performing the activities specified by the legal system in order to effect certain results. The law determines what

conditions must be met to achieve a valid contract. To possess legal capacity then means merely to be able to fulfill those conditions. Once fulfilled, the act is achieved; nothing more is needed.

In the case of marriage, this model amounts to the following: Marriage, insofar as it is a contract, demands the consent of the two parties to that contract. "A marriage is brought into being by the lawfully manifest consent of persons who are legally capable" (canon 1057, section 1). Further, "the internal consent of the mind is presumed to conform to the words or the signs used in the celebration of a marriage" (canon 1101, section 1). What, then, is the condition of legal capacity according to this model? Essentially, it is the condition required for any contract: the ability to (express one's) consent. To say the proper formula is to be married. More, obviously, is required than merely saying the right words. One must, of course, know what one is saying, i.e. know what it is to which one is consenting. "For matrimonial consent to exist, it is necessary that the contracting parties be at least not ignorant of the fact that marriage is a permanent partnership between a man and a woman, ordered to the procreation of children through some form of sexual cooperation. This ignorance is not presumed after puberty" (canon 1096). Hence, each party must have attained a certain age, "the age customarily accepted in

the region" (canon 1072), and the normal intellectual awareness about marriage of any normal person of that age. In the Western world of the twentieth century, it is hard to imagine that many persons fail to achieve this level of legal capacity.

This model of marriage as the saying of the right words in front of witnesses at the appropriate moment in a legally prescribed ceremony closely resembles a philosophical model of language usage suggested by J. L. Austin in How to Do Things with Words. In that series of lectures Austin attempted to render an account of a special sort of language usage which he originally called the "performative" use of language, and to contrast it with the constative. Negatively put, performative utterances "do not 'describe' or 'report' or constate anything at all, are not 'true or false'."[1] They ordinarily have "humdrum"[2] verbs in the first person singular present indicative active tense. Finally and most importantly, the uttering of the appropriate words constitutes the doing of an action. Uttering the words of the marriage ceremony is the first example Austin provides of his performative, and "many performatives are contractual."[3]

It would appear, then, that an investigation into Austin's account of the performative utterance might be of assistance in our attempt to make sense of the "legalist" or "positivist" model of legal capacity. This

model of legal capacity (which would hold that two people were legally capable if they could pronounce the appropriate words and know what they were doing in so saying them) seems to rest on a philosophical position much like Austin's. A performative utterance is one in which, in saying certain words, we do something. The saying of the words is not an extraneous accompaniment or external manifestation of an action, nor is it a report of or statement about that action. The saying of the words effects the action. But, as we shall see in the case of marriage, the words are sufficient in one sense and yet not enough in another. Although the uttering of the words may be the primary element of the act, it is rarely the case that the utterance alone guarantees adequate performance of the act. The circumstances accompanying the utterance must be appropriate, and the speaker must be in a certain condition. "Besides the uttering of the words of the so-called performative, a good many other things have as a general rule to be right and to go right if we are to be said to have happily brought off our action."[4] We can fail; our saying of the words may be what Austin calls "unhappy" or "infelicitous." Performatives do not fail by turning out to be "false"; they are not statements or reports which correspond to external "facts." Rather, they fail in more subtle ways. Something within them goes wrong. Either the circumstances prove not to be appropriate or the

speaker does not fulfill some required characteristic.

More specifically, Austin talks about A, B, and Γ conditions. Failures at levels A and B result in the failure to achieve the act at all. Failure at level Γ, however, does not result in an aborted act. The act is achieved, but the procedure has been abused and the act is insincere or hollow, at best. In any case, the conditions which are necessary for the happy functioning of a performative are as follows:

> A.1. There must exist an accepted conventional procedure having a certain conventional effect, that procedure to include the uttering of certain words by certain persons in certain circumstances, and further,
>
> A.2. The particular person and circumstances in a given case must be appropriate for the invocation of the particular procedure involved.
>
> B.1. The procedure must be executed by all participants both correctly and
>
> B.2. completely.
>
> Γ.1. Where, as often, the procedure is designed for use by persons having certain thoughts or feelings, or for the inauguration of certain consequential conduct on the part of any participant, then a person participating in and so invoking the procedure must in fact have those thoughts or feelings, and the participants must intend so to conduct themselves, and further,
>
> Γ.2. must actually so conduct themselves subsequently.[5]

Again, it is worth noting that if conditions A and B are not met, then the act does not follow. However, if condi-

tions A and B are met but there is some failure in C conditions, the act has been accomplished, but unhappily. The performance is not void, but is plagued by "insincerities and infractions and breaches."[6]

These conditions seem to have some bearing on our discussion of the conditions necessary to contract a valid marriage and, more generally, on our discussion of the conditions of legal capacity. It would seem that a valid marriage requires an "accepted conventional procedure." Indeed, marriage consists of a conventional procedure that does include the uttering of certain words by certain persons in certain circumstances. The uttering of these words does produce a "conventional effect"; the two parties are married. The "formula," the words of the ceremony, is conventionally prescribed.

Furthermore, both the persons and the circumstances must be appropriate for the invocation of the particular procedure. The persons and the circumstances must meet certain specifiable conditions. In the case of marriage, again, these conditions are contained in the canon law: The persons must have reached a certain age (canon 1083). They cannot be impotent (canon 1084). They cannot be "bound by the bond of a previous marriage" (canon 1085). They cannot be bound by sacred orders or a public perpetual vow of chastity (canons 1087 and 1088). They cannot have killed or brought about the death of a previous

spouse (canon 1090). They cannot be related by "consanguinity in all the degrees of the direct line" (canon 1091), nor can they be legally related by adoption in the direct line (canon 1094). The woman cannot have been abducted, nor can either party have been forced into the marriage (canons 1089 and 1103). Finally, "to contract marriage validly it is necessary that the contracting parties be present together, either personally or by proxy, and the spouses are to express their matrimonial consent in words; if, however, they cannot speak, then by equivalent signs" (canon 1104).

As far as the circumstances of the marriage are concerned, marriages are ordinarily celebrated in the parish church of one of the parties (canon 1118) in the presence of the parish priest or local bishop and two other witnesses (canon 1108). Variations of these circumstances are detailed and prescribed in canons 1108-1133.

Both the parties to the marriage and its circumstances must adhere to the specified procedure in order to achieve a valid marriage and, in reference to the B conditions, the formal procedure must be executed correctly and completely. Any deviation from these norms results in an aborted act. The marriage is not achieved, i.e. there is no valid marriage because either the persons involved or the circumstances were inappropriate. No marriage can result if one fails to meet either the A or the B condi-

tions. Such an attempted marriage is invalid and can be declared null by a Church tribunal.

The Γ conditions, we recall, play a different role in the assessment of the success of a performative utterance. The Γ conditions are those concerned with procedures "designed for use by persons having certain thoughts or feelings, or for the inauguration of certain consequential conduct on the part of any participant" (Γ.1.). The parties to the performative activity must have those "thoughts or feelings," must "intend to so conduct themselves," and "must actually so conduct themselves subsequently" (Γ.2.). The rules are, again, of a different sort altogether than the A and B rules.

> Now if we sin against any one (or more) of these six rules, our performative utterance will be (in one way or another) unhappy. But, of course, there are considerable differences between these "ways" of being unhappy . . . If we offend against any of the former rules (A's or B's)--that is if we, say, utter the formula incorrectly, or if, say, we are not in a position to do the act because we are, say, married already, or it is the purser and not the captain who is conducting the ceremony, then the act in question, e.g. marrying, is not successfully performed at all, does not come off, is not achieved. Whereas in the two cases the act is achieved, although to achieve it in such circumstances, as when we are, say, insincere, is an abuse of the procedure.[7]

The Γ conditions are also a bit less specific than the A and B rules, at least insofar as they require an

examination of "thoughts, feelings," and the intent to inaugurate "certain consequential conduct." That is, they require a determination of things normally less public than one's age, previous marriages, prior vows, degrees of familial relationship and, obviously, far less public than words spoken in a church in front of a priest, witnesses, and guests. Yet, instances of these rules do also appear in the canon law. First of all, inasmuch as knowledge is, in some sense at least, the possession of certain "thoughts," it is required for matrimonial consent "that the contracting parties be at least not ignorant of the fact that marriage is a permanent partnership between a man and a woman, ordered to the procreation of children through some form of sexual cooperation" (canon 1096). As far as "feelings" or "intent" go, a person cannot be "inveigled by deceit" (canon 1098) nor can "either or both of the parties by a positive act of will exclude marriage itself or any essential property" (canon 1101, section 2). Finally, marriage cannot be contracted "subject to a condition concerning the future" (canon 1102), nor entered into by reason of "grave fear imposed from outside . . . from which the person has no escape other than by choosing marriage" (canon 1103). This last canon seems to be addressing the proverbial "shotgun wedding" situation about which Austin would say that, although an "unhappy" or "infelicitous" situation all around, it is yet

certainly the case that the marriage has been achieved. And, indeed, the canonist appears, on the one hand, to be saying the same thing about the conditions: Consent is what brings about the marriage, but consent is only ascertained inasmuch as it is publicly expressed through the words and actions of the ceremony. And, more strongly put, "The internal consent of the mind is presumed to conform to the words or the signs used in the celebration of a marriage" (canon 1101, section 1). Indeed, that canon leaves us with an analysis of marriage according to which the expression of the words of the marriage ceremony effects the marriage because of two not unreasonable assumptions: that the words express internal thoughts and that, in the absence of any reason for doubting, the words are sincerely spoken. This minimal level of trust is essential to all social interactions. Thus, Austin's understanding of the performative use of language amounts to the following. Certain activities are effected by certain specifiable behavior: the use of appropriate words in appropriate circumstances. Certain other thoughts, feelings, and intentions ordinarily accompany such behavior. If, however, those internal states should fail to accompany the external, linguistic manifestations, that in no way diminishes the successful performance of the activity in question; it merely renders it "unhappy."

The advantages of this model are evident. One can

judge whether or not a marriage counts simply by examining the critical features of legal capacity according to this model: the meeting of a minimum age requirement, a minimal level of knowledge about what marriage is, freedom from a prior marriage or binding vows, assumed ability to consummate the marriage, and, most importantly, the public expression of consent in the presence of the necessary witnesses. These features are easy to examine because they are public and external. Again, the process of judging a marriage to be valid requires the simple act of looking to see if certain visible criteria have been met.

It is interesting to note that this resembles the model of legal capacity that one finds in the statutory law. Implicit in this model is a view of marriage as a contract. "A contract is a legally recognized agreement made between two or more persons. Such agreement gives rise to obligations that may be enforced in the courts . . ."[8] This agreement appears in the consent or joining together of two minds, a "meeting of the minds," as it were.

Marriage is defined legally as a special sort of contract,

> a contract, according to the form prescribed by law, by which a man and woman, capable of entering into such contract, mutually engage with each other to live their whole lives together in the state of union which ought to exist between a husband and wife.[9]

What is required for a valid civil marriage is what is required for the execution of any other legal contract. The parties to the contract must each express their consent publicly in front of witnesses. This free and public expression not only expresses but actually constitutes an agreement between two parties at which time they each bind themselves to certain subsequent behavior which is ordinarily specified in the terms of the contract. Consent has been alternatively defined in various court cases as "an act of reason accompanied with deliberation," and "voluntary agreement by a person in the possession and exercise of sufficient mentality to make an intelligent choice to do something proposed by another."[10] Further, it "supposes a physical power to act, a moral power of acting, and a serious, determined, and free use of these powers."[11] That is, it demands that one possess legal capacity. Capacity, "the attribute of persons which enables them to perform civil or juristic acts,"[12] is that which defines the competence of parties to a contract. Competent parties are "those possessing the requisite natural or legal qualifications; legally fit. In the law of contract this excludes minors, mentally incompetent, and drunken persons."[13] Basically, then, the minimal conditions of legal capacity for any type of contract are that the parties have attained legal age, understand what it is that they are contracting, be not incapable of fulfilling

the terms of the contract, and publicly express their consent to it. What results from their consent is a binding legal relationship. At the moment of their expression of consent, the deed is done. What is irrelevant to the essence of the contract are the thoughts, feelings, and intentions of the parties to the contract. The legality and binding force of the contract do not depend upon any of those items. Failure to have the appropriate thoughts, feelings, and intentions may render the contract "unhappy" but does not diminish its legal status as a binding document. Thus, according to statutory law, a valid marriage is not a metaphysical state characterized by an appropriate frame of mind and possession of certain feelings and intentions. Rather, a legal marriage is one which has met the conditions specified by law. The civil law is not concerned with the "or "happiness" conditions of Austin as having any real bearing on the essence of a validly contracted marriage. Rather, the law is interested in ascertaining whether the A and B conditions have been met. If they have been, the marriage exists.

However, legally one is not permanently stuck with the contract if it turns out to be unhappy, i.e. if the " conditions are not fulfilled. Just as contracts are entered into by the mutual consent of the parties, so too can they be dissolved. In many states in the United

States, for example, the simplest breaking of the marriage contract is by means of a legal procedure called a "dissolution."[14] The marriage contract is dissolved (just as easily as it was created) by the mutual agreement of the two parties. Where consent is mutually withdrawn, the contract no longer exists. Other, older methods of breaking the contract are neither as simple nor as pleasant. When one party is less happy than the other, or when one party believes that the other has failed to live up to the provisions of the contract, or in jurisdictions where the simpler dissolution option is not available, then the remaining legal remedy is divorce. A divorce breaks the contract. It terminates the marriage from that point onward but does not affect the former validity of the marriage. It merely releases the parties wholly from their matrimonial obligations. Divorce is an adversary procedure which requires that one party be formally charged with the violation of the contract. One party must sue the other and grounds must be presented. However, it is also a procedure which has been diminishing in popularity since the inception of the far more recent "dissolution" or "no-fault" alternative.

But, regardless of the appropriateness of this model for the secular law's rather minimal definition of legal capacity, the question which concerns us here is whether this is a model fitting for the canon law. A closer

examination of the canons and a re-examination of Austin's six conditions for performative utterances will indicate that this model fails to characterize adequately the status of marriage and the conditions for real consent in the canon law.

In actual practice this legalist or positivist model would allow for very few marriages to be declared null, void, or never to have really existed. That kind of declaration could occur only where there was a failure to meet either the A or B conditions. In canon law these cases fall under the general categories of "defect of form" and "absence of form." They are, relatively speaking, easily declared null by a procedure which is an almost purely formal exercise. This is that simple sort of case envisioned by the positivist when he insists that the job of the judge is not to create the law but merely to determine its applicability in a certain situation. The judge simply applies the law as it stands; no creative interpretation is necessary, nor is any knowledge of the intention or the purposes of the rules required. Adjudication is a relatively easy task controlled by the common meaning of the words used in the laws. Generally, cases fall neatly under one canon or another.

For example, if one can be shown to have been under the legal age at the time of marriage, or previously (validly) married, or ordained to the priesthood, or

directly related to one's intended spouse, or kidnapped and forced into the marriage, then that marriage can be annulled with relative ease by the submission of the required petition to the appropriate tribunal authorities along with verification of the data listed above. The same would hold in the case of those who married in the presence of a justice of the peace or a Buddhist monk, in a synagogue or in a mosque, without benefit of the proper dispensation. No true marriage exists in those kinds of cases, and the contract is void ab initio. The procedure is relatively simple. Verification is achieved by mere observation and documentation of external, behavioral data. There exist few administrative problems with this model. The validity of marriages can be controlled easily by the tribunals.

Unfortunately, life at the tribunal is not ordinarily so simple. It seems somewhat unreasonable for an institution which proclaims suprema lex salus animarum to cling to such a formalistic account of sacramental theology, allowing only those marriages which have failed to meet some formal requirement to be capable of annulment. The philosophically more interesting and jurisprudentially more difficult (as well as theologically most important) cases fall into a different category altogether. The greater number of requests for annulments comes on grounds related to our conditions, grounds like emotional

immaturity, "consensual incapacity," and "lack of due discretion." These grounds obviously refer to our "thoughts, feelings, and intentions." Although Austin admitted that the line drawn between the A and B rules on the one hand and the Γ rules on the other was not as clear, neat, and distinct as he would have liked,[15] he nevertheless clung to his belief that the achievement of the performative utterance (as opposed to its "happiness") rested on the former alone. The Church does not agree.

Nor, perhaps, does statutory law, at least not entirely. In the statutory law the situation remains a bit unclear as to the status of those Γ conditions and, more precisely, the exact status of a certain invalidating element, a certain lack of legal capacity: that of mental incompetence. Insane people cannot make binding contracts. That much is certain. Nor can the mentally retarded (depending, of course, on the degree of retardation). Now, mental retardation can conceivably be construed as a failure to achieve the necessary mental age for competence. Indeed, we often speak of the retarded as being child-like. That characterization of retardation could make it subsumable under our condition A.2: The particular person must be appropriate for the invocation of the particular procedure. Mentally retarded persons are inappropriate. Drunkenness, another legally invalidating condition, could similarly be subsumed under rule

A.2. But what of insanity? Does insanity make us an inappropriate person in the sense of condition A.2.? Or is insanity rather the lack of the right kinds of thoughts and feelings and the inability to inaugurate certain consequential conduct (Γ rules)? Austin's admission that the lines are not neatly drawn is of little consolation here inasmuch as the classification of these impediments does make a critical difference--the difference between a contract which is null and void, i.e. a non-contract, and one which is binding although trouble-laden. Fortunately, that issue lies outside the scope of the present thesis. And we may take comfort from the fact that in either case there does exist a legal remedy for the unhappy (or non-) civil marriage: divorce. And, further, a legal divorce does in the statutory realm what only a declaration of nullity can do in the canonical for those marriages which are unhappy but valid and which fail to meet the requirements for dissolution: it returns the parties involved to the status of single persons, i.e. it returns to them the legal ability to marry again. The slate has been wiped clean regardless of whether the first marriage was invalid from the start or a valid marriage ended by the withdrawal of a consent which was once present. (This is not to say, of course, that there is no such thing as a <u>civil</u> annulment, but in the secular law that remedy ordinarily applies only in cases where a marriage is not physically

consummated and thus has a meaning greatly at variance with the canonical sense of the term.)

That, however, is not the case with canonically valid marriages. An unhappy but valid marriage may be dissolved by civil proceedings but that, in the eyes of the Church, in no way frees either of the parties to marry again. The only way to end a "marriage" which in principle is indissoluble is to demonstrate that a valid marriage never existed despite the performance of a ceremony and the recitation of vows. Further, "marriage enjoys the favour of law. Consequently, the validity of a marriage must be upheld until the contrary is proven" (canon 1060). It is in this regard that the concept of legal capacity becomes crucial to the project. The most successful way to prove that no marriage ever existed (if none of the "easy," formal solutions listed above applies) is to illustrate the failure of one or the other of the parties to be "legally capable," that is, a failure to meet the conditions for legal capacity. That brings us right back, again, to the central question of the thesis: In what does legal capacity consist? What conditions must be met if one is to be capable according to law?

Inasmuch as divorce, or a dissolution of the marriage bond, is not an option open to the canon lawyers and their clients, and yet inasmuch as unhappy marriages do not foster either the health or salvation of souls, the canon

law, especially in its most recent formulation, expands upon what can render a person legally incapable and, in so doing, it expands upon the grounds according to which a marriage can be declared null. These grounds seem to include items which would fall definitely into the range of Austin's conditions. Therefore, it would appear that a model based on Austin's conditions for valid performative utterances cannot account for what the canon lawyer says about legal capacity. An actual examination of the canons will help to justify these claims.

First of all marriage, according to the canon law, is not only a contractual relationship. Rather, it is a

> covenant by which a man and a woman establish between themselves a partnership of their whole life, and which of its own very nature is ordered to the well-being of the spouses and to the procreation and upbringing of children. (canon 1055)

Secondly,

> a marriage is brought into being by the lawfully manifested consent of persons who are legally capable . . . Matrimonial consent is an act of will by which a man and a woman by an irrevocable covenant mutually give and accept one another for the purpose of establishing a marriage. (canon 1057)

Furthermore, canon 1095 specifies the following as being incapable of contracting marriage:

1. those who lack sufficient use of reason;
2. those who suffer from a grave lack of discretionary judgment regarding the essential matrimonial rights and obliga-

tions to be mutually given and accepted;

3. those who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage.

It seems safe to infer that the meaning of "incapable of contracting marriage" amounts to "unable to meet some of the conditions necessary to contract a valid marriage." That would mean that anyone who falls into any of the categories cited above fails to meet certain necessary conditions for legal capacity. He cannot marry validly. His attempted marriage can be declared null.

Those items specified in canon 1095 do seem to correspond to what Austin called the Γ rules. They apply at least to the possession of certain thoughts and the ability to conduct oneself in a particular way. But, according to the canon law, the presence of those items renders a marriage not merely unhappy, as failure to meet the prescriptions of Austin's Γ rules renders his performative utterances, but actually makes a marriage null and void. So, too, do other sorts of conditions listed in the canons: (emphases mine)

Canon 1097. Error about a person renders a marriage <u>invalid</u>.

Canon 1098. A person contracts <u>invalidly</u> who enters marriage inveigled by deceit, perpetuated in order to secure consent, concerning some quality of the other party which can seriously disrupt the partnership of conjugal life.

Canon 1101. The internal consent of the mind is presumed to conform to the words or the signs used in the celebration of a marriage. If, however, either or both of the parties should by a positive act of will exclude marriage or any essential property, such party contracts invalidly.

Canon 1102. Marriage cannot be validly contracted subject to a condition concerning the future.

Canon 1103. A marriage is invalid which was entered into by reason of force or of grave fear imposed from outside, even if not purposely, from which the person has no escape other than by choosing marriage.

The canon law thus appears to blur the distinction between invalidating (A and B) conditions and unhappy-rendering (Γ) conditions, a distinction which Austin struggled to keep clear and neat. Thus the legalist model as it appears in the work of people like Austin cannot be the sole model available to the canonist because it does not allow the appropriate weight--the real invalidating force--to be given to thoughts, feelings, and intentions. The conditions for validity and, hence, for legal capacity in the canon law go beyond those suggested by Austin's analysis. While Austin presents a good case in setting out the conditions according to which we conduct ordinary legal, business and contractual relationships, including such everyday situations as promising, that case cannot be sustained when considering the conditions for the validity of a marriage according to the canon law. What is it.

about marriage that puts it somewhat beyond the scope of Austin's analysis?

One of the ways to address that question is by contrasting marriage with the other kinds of activities outlined by Austin, such as promising. Austin's understanding of performative utterances seems perfectly correct in that regard. If I promise to attend a concert with you, that promise is binding regardless of whether I meant it or not when I uttered the words. If I fail to act in the requisite manner, I am said to have broken my promise. My promise binds me regardless of my "thoughts and feelings."

The same holds true, of course, for "legal" promises, i.e. contracts. If I enter into a contract with you for the repair of the roof of your house, for example, we are bound to the terms of the contract regardless of how we "felt" at the time we initiated it. I promise to fix your roof; you promise to pay me $500 to do so. Legally, we are each bound to the performance of our respective promises. If I should say to you, "I know I agreed to fix your roof, but I didn't really mean it," your rejoinder would most likely be, "I don't care what you meant; this is what you said and here is a copy of your signed agreement." You would probably further add, "I'll see you in court." Much the same would occur if, after completion of my end of the bargain, you refused to

pay me. Ultimate legal liability would need to be adjudicated, of course, and there may be alternative legal remedies open for satisfaction of the contract (e.g. payment of a penalty in lieu of actual performance). Nevertheless, responsibility remains.

How do these situations, promising and contracting, differ from marrying? The differences are many. What needs to be determined is what are the <u>significant</u> differences from the vantage point of our study.

First of all, promises and contracts of the sort outlined above can be disposed of in ways not available to partners to a valid, canonical marriage. If I promise to attend a concert with you and a more serious moral obligation, say, the necessity of attending to a seriously ill child, intervenes, then I am bound by that more urgent obligation. Ordinarily, I would explain that to you and you would understand and release me from my promise. Difficulties might arise if there were a disagreement as to the seriousness of the reason for breaking my promise. If I said to you, "I can't attend the concert with you because I want to attend the hockey game that evening," you would be correct to remind me that attending the concert became binding at the time of the promise and that I was no longer free to arrange my affairs differently. You might still release me from my promise, but unless you did so I would remain bound by it. That illustrates a few

interesting points about promising. Promises are effected by the utterance of certain words regardless of intent at the time of uttering because those words have a common, shared meaning which allows for coherence and consistency in our social relationships. Promises may be broken in the event of a more urgent commitment. But it is difficult to imagine what might count as a "more urgent commitment" that would supersede one's marriage promise. My promise to attend the concert is a one-time promise to be performed on a specified time and date. It is conceivable that conflicts could occur at that specific time and date. It is, however, much more difficult to conceive how some more urgent commitment could interfere with the performance of one's marriage promise which extends over the entire future but which does not entail a specific performance of any one act at any one time.

It is also the case with the ordinary sorts of promises to which I have been referring that one party might release the other from the performance of the promise if he so chose. Furthermore, promises may be dissolved by mutual consent when each party has promised something to the other and no third parties are directly involved, as in the case of contracts. In none of these cases can we say that the promise <u>never</u> existed. Rather, we terminate or dissolve or cancel the promise; we cease to insist upon the performance of whatever was promised.

The analogous instance for marriages is the procedure discussed above, a dissolution.

An analysis of contractual relationships becomes helpful here in clarifying what has just been said about promising. Contracts are initiated by the mutual agreement of the parties to them. In most instances this agreement is written as well as verbal. There may be reasons which prevent the performance of a contract. In those situations what is needed, again, is a release from the person to whom the performance has been promised. That person can, however, request compensation for the non-performance of the contract and that compensation may be related to the seriousness or non-seriousness of the reasons for non-performance. If, for example, I contract with you to fix your roof and do not fulfill that contract and if I offer you no good reasons for not performing, then I would expect that you would request (and sue for) more in the way of compensation than if I had some very good reason, such as having suffered a major coronary infarction that precluded any physical labor. Even then, however, you could request performance (I could, after all, hire someone else to complete the project) and/or compensation, and you would most likely receive it if you took me to court. The crucial point here, again, is that only the parties to a contract can release one another from their contractual obligations. The courts adjudicate

when agreement about the dissolution of the contract cannot be reached. It is worth noting that this analysis can be extended to a civil marriage insofar as one is not merely able to sever the marital bond (dissolve the marriage), but one is also able to sue and collect for "non-performance," as it were, of the marital contract. That is precisely what happens in a divorce proceeding. The courts adjudicate when agreement between the parties cannot be reached.

Furthermore, promises and contracts specify, often in great detail, what it is that is promised or contracted. While it is possible that one might promise to attend a concert, some concert, at some time in the future, it is more often the case that one promises to attend a specific concert on a stated day and time. That is even more clearly the case with contracts. I contract to fix your roof according to agreed-upon and listed specifications within a certain frame of time. And you agree to pay me a specific sum, also within a limited time. The reasons for this sort of specification are at least twofold. First of all, the more information one has available, the more freely one can contract. One can perform more easily and more adequately when one knows precisely what is expected of one. Secondly, enforcement depends upon specification. Adjudication, if necessary, is easier and more effective in proportion to the clarity

and thoroughness of the list of expectations. And proof of performance (or non-performance) is similarly aided by such comprehensiveness. The less specific one is, the more difficult it will be to collect compensation. If, for example, no time frame is dictated within which the performance is to be completed, the job of the court becomes complicated to the extent that it will be necessary for the court to determine what constitutes a "reasonable" amount of time for performance. That will prolong the adjudication process and the settlement of the dispute.

Here is where we begin to see serious differences develop between other sorts of promises and contracts and marriages. The first difference to be noted is that marriages are life-long contracts which require continuous acts of will to sustain them and continuous performance. There is no time specified other than "'til death do us part." It may be objected that we can also make life-long promises. Two things, however, are worth noting about those types of promises. First of all, they are most frequently promises made to oneself, on the order of new year's resolutions. "I promise I shall lose weight and keep it off forever." "I promise never to drink again." "I promise never to wager another penny on the ponies." "I promise to quit smoking." This is not to say that these promises cannot be to another person; indeed, others

are frequently the occasion for the recitation of these kinds of promises. But they are primarily promises to oneself. Their performance is not enforceable, although we claim that they are binding even if insincere. They are promises to improve one's behavior, to rid oneself of nasty habits. And they are probably the least well-kept of any kinds of promises. That is, they are the sorts of promises which are most frequently broken. While this does not alter the fact that life-long promises can be made, it may alert one to the difficulty of keeping life-long promises. But surely anyone aware of the divorce rate understands that the marriage promise is one of the most difficult to keep. Of course, difficulty is not impossibility. Still it is not insignificant that most other life-long promises are not primarily promises to another. Marriage may be unique in that way.

What I am suggesting here is that most two-party promises, i.e. most contracts, are not life-long, open-ended arrangements but instead do have an expected completion date. If they are contracts for the continuation of services for an indefinite period of time, they at the very least specify "so long as is mutually agreeable" or "subject to review at periodic intervals." Furthermore, the terms of the contract and even the terms of promises are spelled out. We promise to quit drinking, lose weight, stop gambling, visit our mother more often. We do

not promise, ordinarily, to "be a better person." Instead we attempt to spell out what that means. Contracts are even more specific. The responsibilities of each party to the contract are listed in as complete detail as is possible. Here, again, the marriage contract varies from the norm. While there are certain general expectations on both sides, there remains a great deal of vagueness. Both parties expect a shared life; both expect a sexual relationship. But only very rarely, almost never, I would suggest, does anyone spell out what constitutes a "shared life"--whether it means doing everything together, or meeting and talking over dinner each evening, or setting aside one evening a week for the marriage. Indeed, it may mean as little as splitting the costs of a shared roof over two heads. The same holds true for the sexual aspect of a marriage. The conditions, terms, duration and frequency of that aspect is not spelled out in most instances. Surely much of the continuing adjustment that is necessary to keep a marriage going is due precisely to different expectations resulting from a lack of specification of the terms of the contract.

But more, it seems, is at stake here than a contract which fails to set time limits and specify its criteria for adequate performance. Marriage is more than an ordinary promise and more, even, than an ordinary (or even a life-long) contract. What is signficant about the

marriage relationship is that it is a joint relationship, one which involves and even changes the parties to it in a way not found in ordinary contractual relationships. In other sorts of contractual relationships the parties accept responsibility for the performance of activities the execution of which does not involve, much less alter forever, the persons who they are. Parties to these contracts remain in an external relationship to each other. They remain wholly and completely autonomous individuals, the rest of whose life remains untouched by this contract. The contract is not, nor does it become, an essential part of their identity. The marital relationship, on the other hand, does not leave the parties to it touched in such a meager way. It transforms their very existence; their very identities become wrapped up in the execution of this particular sort of contract which encompasses every aspect of their life. Further, this contract signals the birth of a new community, a family, which exists through the individuals who comprise it and which yet also exists as more than those individuals. After all, this new community will, if children are born to it, survive the death of the original members. It would appear, then, that this family, this new community which results from a marriage promise, has an ontological status independent of that of the two initial parties to it. In order to create such a community, it seems that what is

needed is more than just the recitation of the appropriate words. Insincerity or the absence of intention would do more than merely make such a community "unhappy." It would fail to bring it about at all. It would block out the possibility.

This conceptualization of marriage as having an ontological status apart from or beyond that of the individuals to it will need to be developed further in conjunction with an analysis of the idealist position on the social self and the reality of communities.[16] For now, however, it suffices to note that if in fact, as the canon law asserts, a new community results from a marriage promise that transcends even the being of the two partners, then it becomes easier to understand why theologians and canon lawyers might insist that even mutual consent to cancel such a contract cannot dissolve it. Austin's analysis of promises and contracts was not incorrect, but it was concerned only with certain types of linguistic performances, those of individuals. He was not concerned with what we might want to call social performatives. He was not offering a theory of community. His work was limited to the study of certain sorts of speech acts, those where individuals effect the performance of certain actions by means of prescribed formulae. His work cannot be extended to include marriage as it is understood within the canonical tradition.

Within that tradition the conditions for the validity of a marriage and, hence, for legal capacity have moved inward from Austin. One's acts of will and psychological states are far more difficult to discern than one's submission to conventional form and procedure. Force and fear are more difficult to determine than whether or not one said the right words in the prescribed place at the appointed hour. But this expansion of what Austin would have called invalidating circumstances to include the conditions makes it possible to understand why Austin would consider the shotgun wedding unhappy but valid, while the Church tribunal might very well conclude that no real marriage could occur at all under such conditions of duress.

Thus, the primary way in which the legalist or positivist model of legal capacity fails in its relationship to the canon law is by its inability to undo more than just a few sorts of marriages, those characterized by gross failure to meet certain formal requirements. Generally, if the words are said in the right way by the appropriate persons in the specified circumstances, one has married--forever. The thoughts, emotions, and intentions of the parties are only tangentially related to the act of marrying. They accompany the performance but in no way confirm, finalize, or validate it. In short, they are not necessary conditions.

Beneath this rather simple objection lurks a more serious problem with models of the legalist/positivist type, whether considered in relation to the canon law or the whole body of statutory law as well. As a rule these models display a lack of interest as to the intents or purposes for which the law was created. They accept the law as a fact and apply the law without regard to the purposes for which the law was designed. Adjudication becomes an almost mechanical process. According to this model the administration of the law is the unidirectional application of authority. The law itself exists as a static body of statutes created at the whim (or, more precisely, fiat) of the legislator. His reasons need not concern the judge. Law does not arise from the community; it is imposed upon it. We, as those subject to the law, stand in an external relation to it, our actions determined and then measured by what is essentially the expression of someone else's will. We either obey or we do not. We are judged accordingly. Nothing much counts as an excuse or, more importantly, as a reason for our disobeying. We know what the law is, we do what the law prescribes, and we then must live forever with the consequences.

Again, this is a model which seems, at the very least, insensitive to what is acknowledged as the central concern of the canon law and of the Church: the spiritual

welfare of its members. It is a model which ties us forever to our mistakes, our lack of judgment, our immaturity, and our simple inability to live up to what we may have, in all good faith, promised. It is totally unforgiving. As such, it cannot serve as the foundation for an acceptable theory of legal capacity.

Chapter V. The Intellectualist Model

> The intellect, in itself and absolutely, is higher and nobler than the will.
>
> --St. Thomas Aquinas
> Summa Theologiae I.82.3

A different sort of model of legal capacity is one which I have called an intellectualist model, a model which links capacity to the intellect, a model according to which the ability to reason is the sufficient condition for capacity. This is a model directly attributable to a number of nineteenth- and twentieth-century theologians and philosophers who called themselves Thomists and who compiled a number of manuals for the instruction of both prospective clergy and the faithful in Roman Catholic colleges, universities, and seminaries. They claim to base their work on the philosophy of St. Thomas Aquinas, and their intellectualist interpretation of his work does extend the concept of legal capacity considerably beyond the positivism presented in the previous chapter. In the course of this chapter I shall explain their position and outline their clearly intellectualistic interpretation of St. Thomas. The question of whether their reading of St. Thomas is accurate, i.e. the question of whether or not St. Thomas was an intellectualist, is subtle and difficult

to resolve. I shall indicate and examine thoroughly the sections of St. Thomas which serve as the foundation of this sort of interpretation. The resolution of the question of whether their reading of him is accurate falls beyond the scope of this thesis. My project is simpler and my conclusion less dramatic: the sort of Thomism developed and used in the Roman Catholic tradition was an intellectualist version. To the extent that that version was widely taught in Roman Catholic universities and seminaries through the 1950's, it exerted a considerable influence on the formation of priests and canon lawyers. Traces of that influence showed up in the subsequent decisions of those canonists regarding the validity of marriage.

The texts of these Thomistic philosophers display a remarkable similarity despite differences of nation and nationality. Included among these Thomists in the French language tradition were Abbé Arthur Robert (Lecons de Psychologie et de Théodicée, Lecons de Logique, Lecons de Morale, Histoire de la Philosophie, published in eight editions between 1914 and 1940) and Msgr. Henri Grenier (Cursus Philosophiae [1938] also published as Cours de Philosophie [1940]). Both were professors at Laval University. The English-speaking tradition included the works of George Sydney Brett (A History of Psychology, 1921), J. F. Donceel (Philosophical Psychology, 1955),

Msgr. Paul J. Glenn (Cosmology, Criteriology, Dialectics, Ethics, and Psychology, published between 1933 and 1941), George P. Klubertanz (The Philosophy of Human Nature, 1949), R. P. Philipps (Modern Thomistic Philosophy, 1934), Herman Reith (An Introduction to Philosophical Psychology, 1956), Henri Renard (The Philosophy of Man, 1956), and Bernard Wuellner (A Summary of Scholastic Principles, 1956). Furthermore, English translations of Msgr. Grenier (by Rev. J. P. E. O'Hanley in 1948) and of the earlier A Manual of Modern Scholastic Philosophy by Cardinal D. Mercier of Louvain (translated by T. L. and S. A. Parker in 1917) enjoyed immense popularity in English-speaking North America as well. The similarity among these diverse persons lay primarily in an intellectualist and Aristotelian reading of St. Thomas that led them to the following conclusions: To be human is to be a rational animal, to be a being which possesses a rational soul. The dominant principle of the soul is the intellect. The human soul has other powers, of course, including volition. There is a real distinction between the intellect and the will, and the intellect is clearly superior. From this reading of St. Thomas one can draw some conclusions about legal capacity as well: To be capable according to law one's soul must coordinate its activities in such a way that intellect dominates the passions and establishes a context within which the will

operates. One can fail to be legally capable at the level of the will if one is determined or forced by external circumstances. Those kinds of instances are fairly clear and easy to ascertain. All other kinds of failures must be failures at the level of the intellect. I shall further extrapolate this intellectualist version of legal capacity towards the end of this chapter.[1] What needs to be completed at this point is the development of the Thomistic position as it relates to the points cited above.

The arguments of these various philosophers are, again, clearly related. Consider, first, R. P. Phillips on human life and the nature of the human soul.

> The most striking difference between man and the other animals is, no doubt, the possession by the former of intellectual powers . . .[2]
>
> Our first question, then, is whether there is a substantial principle of our intellectual powers. The idea that there is not some principle which is capable of producing thoughts and retaining them, but which does not itself require to be produced or retained by any other principle--in a word, that there is not a substantial principle of intellection, would hardly occur to common sense . . . The main stream of philosophic thought has, on the other hand, always considered that common sense is, on the whole, right; and so it has recognised that psychic phenomena, such as thoughts and volitions, need some substantial subject which, owing to its capacity for supporting itself, is enabled to support them also. In the Platonic tradition this subject is called the soul. . .

> If, then, we recognise, with common sense, that there is in man a substantial principle of psychic acts, or a soul which is substantial; we shall naturally wish to discover something concerning its nature . . . If man is indeed in possession of intellect and will, as we have maintained, it follows at once that the substantial principle of these powers must also be intellectual, since they derive from it. . .
>
> The principle of life in man, which we call the soul, must necessarily be of the nature of form, that which makes a thing what it is, since it is in virtue of the soul that man is a living intellectual being; and since it is substantial, it will be his substantial form.[3]

In like manner, Henri Grenier defines man as the "intellective mobile being"[4] and continues to demonstrate that "The intellective soul is so united to the body that it is its one and only substantial form; and by it man is constituted as man, animal, living being, body, substance, and being."[5] Bernard Wuellner continues along similar lines,

> The human soul, as a subsistent substantial form in man, communicates to the body its own act of existence and is the principle by which man has every essential grade of his perfection. The soul is the noblest of forms. The intellectual soul in a certain way is all things. The intellectual soul is the form of all forms.[6]

From this beginning the Thomists move to an analysis of the structure of the human soul. The soul, for each of them, is the essential act of the human person, the principle of life. It possesses faculties or powers,

however, from which it is really distinct. These faculties or powers are potentialities, the ground or possibility for other sorts of activities. As Grenier states, "A faculty is defined: the proximate principle of operation as such. A faculty is an accident that is really distinct from the thing of which it is a property."[7] Furthermore, the intellect is one of the soul's faculties. "The human intellect is described as a cognitive faculty by which man apprehends universals, judges, and reasons."[8] And the intellect is a spiritual faculty. "A spiritual faculty is a faculty that is intrinsically and subjectively independent of matter."[9] It is a spiritual faculty because its objects, by which all faculties are specified, are spiritual objects such as wisdom, truth, relations, beings of reason, and God. Furthermore, an organic faculty cannot know universals, but the human intellect can and does. Hence, the human intellect is not an organic but is rather a spiritual faculty.[10] Grenier continues with a discussion of the will as a separate faculty or power of the soul, also spiritual but different from the intellect.

> Every form is followed by an inclination, because everything tends towards its form, or perfection, if it does not possess it; and if it does possess it, it rests in it. But the intellect, in as much as it is a knowing faculty, is constituted in act by the intelligible form by which it apprehends a thing. Therefore the intelligible form which actuates the intellect is followed by an

> inclination to the good apprehended by the intellect; and this inclination we call the will.
>
> An appetite that pursues a good presented to it by the intellect is a spiritual faculty. . . Therefore the will is a spiritual faculty.[11]

Thus, faculties and powers are really distinct from the soul because the soul is act, while faculties and powers are but potentialities. Furthermore, "the powers of a finite being are multiplied according to the completely diverse formal objects with which they deal."[12] Powers or faculties are specified, specifically distinguished, by their formal objects to which they are essentially directed. "The type of activity in turn specifies the power that performs such an act. . . Characteristic acts make the powers known to us."[13] Thus, powers or faculties are really distinct from one another because their formal objects are different. "Powers, habits, and acts are really distinguished by their diverse formal objects."[14]

From the foregoing, the conclusion of the Thomists is not surprising. They claim that there is a real distinction between the intellect and the will. Consider the following from Paul J. Glenn:

> Between the intellect and the will there is a real distinction. Both are faculties of the soul, but they are faculties for essentially different services, and so are said to be <u>really</u> distinct. They are two faculties, not two phases of one.

> Between the intellect and will, however, there is an essential real distinction. For faculties are specified--determined as essentially of this or that kind or character--by their operations and their objects. Two faculties that differ on these essential points are in no wise to be identified. Now, we have seen that the operation of intellect is a knowing operation, and the operation of will is an appetizing operation. On this score, intellect and will are seen to be two distinct faculties. Further, the object of the intellect is the true, while the object of will is the good. And truth and goodness are not achievable by a single creatural faculty, but by different faculties. The question has nothing to do with the metaphysical identification of the true and the good, but with the fact that, in the faculties which seek truth and goodness, the quest demands a real distinction of effort and approach.[15]

Abbé Robert agreed,

> Les facultés sont réellement distinctes entre elles. La volonté et l'intelligence sont certainement deux facultés distinctes puisque leur objet n'est pas le même. Cependant, l'une exerce son influence sur l'autre, et réciproquement.[16]

Once it has been established that the intellect and the will are really distinct because of their distinct objects, it follows logically that these Thomists would then examine those objects in order to ascertain whether those faculties are ordered hierarchically. Each of them concludes that the intellect is superior to the will, beginning with Grenier:

> One power can be absolutely or relatively more perfect than another. A power is

> absolutely more perfect than another, when it is such by its nature. A power is relatively more perfect than another, when it is such in regard to something accidental. Thus, in the order of beings, man is more perfect than the lion; he is more perfect in virtue of his nature; but the lion is relatively more perfect than man, from the point of view of his physical strength.
>
> Plato, St. Augustine, St. Bonaventure, and Scotus hold that the will is absolutely more noble than the intellect. This teaching is supported by Kant, Schopenhauer, Renouvier, etc. Aristotle, St. Thomas, Suarez, and Vasquez maintain that the intellect is absolutely more perfect than the will, but that the will is relatively more noble than the intellect.[17]

He provides the following arguments:

> It is absolutely more perfect to have the perfection of a thing in oneself than to be inclined to the thing as it is in itself. But the intellect knows in as much as it has in itself the perfection of the thing known; and the will desires in as much as it tends to a thing as it is in itself. Therefore the intellect is absolutely more perfect than the will.
>
> The nature of a faculty is determined by its formal object. But the formal object of the intellect is absolutely more perfect than the formal object of the will. Therefore the nature of the intellect is more perfect than the nature of the will, i.e. the intellect is absolutely more perfect than the will. The more abstract and universal an object is, the more perfect it is; abstraction results from remotion from matter or imperfection. But the object of the intellect is more abstract than the object of the will; good, which is the object of the will, includes within itself a relation of suitability to the appetite, but being, which is the object of the intellect, abstracts from this

relation of suitability.[18]

Wuellner uses slightly different expressions to convey the same message:

> Knowledge precedes appetitive activity in time and causality. An appetite is a necessary concomitant and complement of a cognitive power. Knowledge is of things in the measure in which their forms exist in the intellect. Appetite tends to things as they exist in themselves. Knowing is intentional possession; willing is tendential possession. Truth, the object of the intellect, is representatively in the intellect; good, the object of the will, is in things. Intellectual knowledge is better than acts of will in regard to goods that are inferior to, or equal to the knower's nature. . .[19]
>
> Being is prior to the true. The true is prior to the good. Knowledge precedes appetency. Knowledge excels love in objects inferior or equal to man.[20]

Paul J. Glenn adds a different dimension to the discussion:

> It is the more common doctrine among Scholastic philosophers that the intellect, considered simply in its essence, is a faculty superior to will. For, taken simply, it is more perfect to <u>know</u> than to experience an appetitive tendency. But, in reference to some special acts, the will is superior to the intellect. The will is superior inasmuch as it can move man to noble and virtuous life, and the attainment of his last end . . . Yet in the life to come when our intellect is elevated and fortified by the Light of Glory, we shall <u>see</u> God, that is, we shall <u>have</u> <u>intellectual vision</u> of God, and in this consists the essence of eternal happiness. We say therefore: The intellect is a faculty essentially superior to will, more noble than will; but <u>in</u> <u>some</u> <u>of</u> <u>its</u> <u>acts</u> <u>in</u>

> this life the will manifests itself as superior to intellect.[21]

A few of these Thomists move to a slightly different variation of the same argument, adding to it the concepts of final and efficient causality as determinants of superiority and inferiority. Herman Reith argues in the following manner:

> For the will follows the intellect not only in the choice of objects towards which it tends, but also in the manner in which it tends towards these objects. In this respect the intellect is superior to the will; the intellect moves the will because it specifies the act of the will, thus moving it as an end (a final cause). The will, on the other hand, moves the intellect, as it moves all other powers of the soul, as an agent oversees, commands, and directs the particular and proper activity of any one thing toward a common goal.[22]

Paul Glenn offers a similar line of argument:

> The intellect (in man) acts upon the will after the manner of a final cause. The intellect, so to speak, proposes the end to be achieved, the good to be attained, by the will. It "sets" the goal for the will, and so shares the attractive power, the drawing power, which goal exercises upon the will. Hence we say that the intellect moves the will after the manner of a final cause. The will moves the intellect after the manner of an efficient cause. . . The will can make the intellect turn its attention to this object or that. . . The will is not the efficient cause of the intellect's knowing, but it is the efficient cause of the intellect's deliberate attending to this, that, or the other object.[23]

Henri Renard supports the superiority of the intellect by arguing as follows:

> The question now arises as to whether this active indeterminate principle, the will, can without any knowledge from the intellect determine itself to this or to that operation. This, of course, is impossible, for the will is an appetite, not a cognoscitive faculty; as such, it can love only the known good. In order to determine itself to this or that object, to will or not to will, to do what is morally good or evil, knowledge is required. This knowledge is proffered by the intellect, and gives the form, the direction to the will-act. The intellect moves the will not in the order of efficient causality, but of specification and finality.[24]

Finally, Bernard Wuellner summarizes the situation in the following manner:

> There is a celebrated difference of opinion, especially between Thomists and Scotists, about the relative superiority of intellect and will. The Scotists take the stand of the simple superiority of the will. . . The Thomists place human beatitude formally in the intellect; the Scotists place it formally in the will. Thus, the roles of knowledge and of love in life both on earth and in heaven are differently weighted by these schools.[25]

That these arguments all resemble one another, despite differences of time and nation, can be accounted for by the belief of these philosophers that they are all presenting the teachings of St. Thomas Aquinas. None of them claims to be original; they all trace their work to the tradition begun by St. Thomas in the thirteenth century. They would each admit that St. Thomas was the master. Their own presentations reflect a number of assumptions which only a more thorough examination of the work of St.

Thomas can make clear. That can be done only if we first make some general observations about the differences between the kind of philosophizing which went on in the thirteenth century (and subsequently in the tradition of these Thomists) and the more recent history of philosophy of which Austin is one example.

At the very least, we need to point out that those of us who engage in philosophizing in the twentieth century seem to be operating from some very different conceptual models than those of our medieval predecessors. It certainly appears that more than just social, political, and economic forms of organization disappeared at the end of the Middle Ages. Whole systems of thought, whole philosophical approaches and inclinations, similarly changed. And with these changes there appeared certain new analyses of the relationship between the individual and his community, between the individual and the law. More crucially our whole understanding of the very nature of the human person and the very nature of the law altered dramatically.

Austin and his model of legal capacity derivable roughly from his analysis in <u>How to Do Things with Words</u> envisioned the relationship between the individual and the law as being a relationship between two independent entities. That is, the individual stands in a relationship to a body of law which exists independently

of him and which, ultimately, is different from him and his very nature, whatever that may be.[26] Each individual exists separately from every other individual. And the law represents the will, the fiat, of some individual or collection of individuals, namely, those who exercise power of some sort or another. We, as subjects and/or citizens, stand in an external relation to the law. Both communities and the law which organizes and regulates them are artificial constructs; communities, that is, are groups formed out of individuals who decide to create them and choose to join them. The community is not natural in the sense of co-existing dialectically with individuals. On the contrary, individuals are logically (if not historically) prior to communities. Communities are made up of individuals, created by individuals to serve their needs and desires, and are dissolvable and replaceable. Our individual, psychological self is primary.[27] Any notion we might have of a social self, of the self as a product of the community into which it is born, is secondary and derived from from this conceptualization of the individual, as is our understanding of our legal, social and political obligations.

Indeed, Austin's model reflects the basic philosophical theses of modern philosophy. He is an heir not only of Thomas Hobbes and Anglo-American philosophy but also of an interpretation of Cartesian epistemology

which resulted in the sundering of the world into two parts: that of which I am certain (my own existence) and everything else. I am more certain of my own existence than I am of any other thing. I am an irreducible center of experience, and my whole sense of identity and self-importance stems from my awareness of this fact. My experiences are individual. Only inference can take me beyond them.[28] The epistemological distinction between my own experience and my knowledge of everything else led Descartes to certain interesting ontological conclusions. "It seemed to him that where there are different epistemological routes to objects so there must be different kinds of objects."[29] And the importance of those objects would be in direct proportion, one may conclude, to the certainty with which they were known. Hence, again, the individual is primary.

Modern philosophy did not arise, obviously, out of a vacuum. On the contrary, philosophies such as those of Descartes and, even more so, those of Hobbes and Locke represent a formal break with the medieval world, a break that had begun as early as the end of the thirteenth century. As early as that time the emergent world of trade and commerce was beginning to make possible the growth of towns and, indeed, was beginning to make obsolete the feudal organization of society. Larger and looser units of political structure were needed. The

close personal relationships of feudal society (and the strict social ordering that accompanied them) were replaced by larger legal, social and political organizations with far more distance between ruler and ruled. And, although this new ordering allowed for the eventual development of democratic political theories, it simultaneously allowed for a new impersonality in social and political relations, a loss of a sense of community, and a corresponding loss of a sense of social responsibility in any other terms than as demanded by self-interest (as demonstrated by the work of Thomas Hobbes).

This shift to an individualist model of human nature and the bifurcation of reality into our internal psychological experiences (of which we are certain) and an external world which is alien to us both epistemologically (we are less certain of it than of our own existence) and ontologically (hence the development of scientific technologies to control and dominate nature rather than accommodate it) also had roots in the thirteenth century in the changing fortunes of the universals controversy. The gradual shift from moderate realism to nominalism portends more dramatic changes in our understanding of legal, social, and political relationships, as well as in our ontologies. While nominalism developed at least in part from a growing interest in the status of the will in both human nature and the divine nature, it resulted in some

instances in an almost total despair of ever being able to ascertain what our common nature is. A nominalist, one who holds that what is ultimately real are individuals and particulars, must conclude that there are no common natures but only shared "names" arrived at by convention. For him the individual, psychological self takes priority over a social self. Indeed, the social self (or, the community, or the "common good") is postulated as a mere invention of individuals for their convenience in achieving what are primarily individual and (at the end of the Middle Ages and into modern times) economic goals. The social self, the self as unintelligible apart from the community, has become a fiction which will not again be taken seriously much before the nineteenth century except in the lingering tradition of Thomism.[30]

What I am suggesting is that the model of reality, and more specifically the model of the relationship between the individual and society, the model of (even more specifically) the relationship between individuals and the law, which animated the medieval world is not the dominant model of modern times. This is not to say that that model no longer exists, or at least that vestiges of it no longer exist. What I shall attempt to do in the remainder of this chapter is to illustrate that much of the canon law currently in use reflects one interpretation of the Thomist model, a model which often seems foreign to

those of us familiar with modern individualism. That may explain, at least in part, why the canon law allows more room in its formulation for individual failures in the area of legal capacity. That may explain, that is, why one may fail to satisfy requirements for legal capacity in the canon law while at the same time meeting all requirements for legal capacity on the positivist model. However, while this Thomistic model is an improvement over the legalist one to the extent that it broadens our understanding of human acts, we shall see that even yet it remains a bit inadequate for the purposes of canon law to the extent that it cannot account for certain kinds of defects, what we might term chronic defects of the will or dispositional incapacities.

As I indicated in the opening pages of this chapter, I have chosen to call this model an intellectualist model of legal capacity because the basic premise which pervades this theory is that in the human person it is our reason, our intellectual capacity, which defines us specifically and which provides us with our legal, social, and political obligations. It is reason which we all share; reason is our common nature. This conclusion follows from Aquinas' moderate realism.

> According to him and according to Aristotle knowledge is possible because things in the real world instantiate forms and because the intellect is able to instantiate these forms. This

> doctrine has many explanations but the simplest perhaps is this: Knowledge requires a transcendence of the distinction between knower and known. So long as that distinction stands, the skeptic can ask if we really know. But the transcendence is not achieved by a literal identity. Becoming a pig is not the road to knowledge of pigs. The identity required according to Aristotle is formal. One and the same form can characterise a thing and an image or phantasm in the mind. Such forms really are in things but are not real things--forms are to be found in the entities which they inform. Hence the doctrine of moderate realism.[31]

This theory extends to our knowledge of human beings. Aquinas defines "humanity," as does Aristotle, as "rational animality." People belong to that class of animals which is gifted with reason. Reason is demonstrated by our ability to think, by our intellectual powers. The human intellect is a faculty or power and, even more strongly, is the fundamental principle of the rational soul. Reason is shared by all of us because it is the kind of thing which cannot differ among us. We can all study physics, we can all learn to read, we can all argue about universals or about baseball. Although we each may have separate, individual, and non-repeatable experiences, it is less clear and less certain that we have separate, individual, and non-repeatable thoughts. On the contrary, we know that thoughts can be repeated. Every time two different persons attempt the same problem in mathematics, they are, in effect, thinking the same

thoughts and using the same reasoning process to arrive at the same conclusion. Reason therefore appears to be a universal in the sense that it is the same in all persons.

While the above formulation is the one essentially employed by Collingwood and others,[32] St. Thomas took a rather different route to the same conclusion, to the conclusion that reason is a universal. That conclusion is based on an in-depth analysis of the nature of the human person and, more precisely, the nature of the human soul, which occupies Aquinas in questions 75 through 83 of the first part of the Summa Theologiae. An examination of those sections of the Summa will provide the necessary background for an understanding of what I have termed the intellectualist model of legal capacity. But discussions of intellect and will abound in St. Thomas and thus any examination of an intellectualist account of legal capacity might also make reference to other sections of the Summa (including, for example, ST 1.59.2 in the treatise on the angels and 1.14.1 and 1.19.1 on intellect and will in God) and to other works such as the Quaestiones disputae de veritate (especially 22.10) and the Scriptum super libros Sententiarum magistri Petri Lombardi (specifically, at 3.27.1.4 where the question of the superiority of knowledge to love is addressed). The approach taken by St. Thomas in these articles is very different. In De Veritate (DV) Thomas focused on what it meant to be an

obiectum, the object of a power. Much of that article relates this discussion to an analysis of motion and inclination; it is thus an argument derived from the concrete. The discussion in the Summa, on the other hand, is characterized by abstraction from motion and relies on the concepts of being and motion.[33] Hence those selections are of their very nature more ontological, and I shall focus primarily on insights developed from that exposition.

Furthermore, inasmuch as the concept of "person" is central to the concept of "legal capacity"; inasmuch, that is, as one's theory of legal capacity cannot but reflect one's theory of person, the philosophical anthropology and, more importantly, the philosophical psychology of St. Thomas Aquinas appears to be the place to commence any inquiry into his theory of law.

The title given to question 75 of the Summa is: "On Man Who is Composed of a Spiritual and a Corporeal Substance: and First, Concerning What Belongs to the Essence of the Soul."[34] That title indicates the Aristotelian thrust of Aquinas' argumentation as much as it reflects his Christianity. The human person is a compositum, the union of a body and a soul which stand in a matter/form relationship to the whole person or substance. Aquinas does not accept the Platonic or the Augustinian analysis of the soul:

> I answer that, The assertion, the soul is a man, can be taken in two senses. First, that man is a soul, though this particular man (Socrates, for instance) is not a soul, but composed of soul and body. I say this, because some held that the form alone belongs to the species, while matter is part of the individual, and not of the species. This cannot be true, for to the nature of the species belongs what the definition signifies, and in natural things the definition does not signify the form only, but the form and the matter. Hence, in natural things the matter is part of the species; not, indeed, signate matter, which is the principle of individuation, but common matter. For just as it belongs to the nature of this particular man to be composed of this soul, of this flesh, and of these bones, so it belongs to the nature of man to be composed of soul, flesh, and bones; for whatever belongs in common to the substance of all the individuals contained under a given species must belong also to the substance of the species.
>
> That the soul is a man may also be understood in this sense, namely, that this soul is this man. Now this could be held if it were supposed that the operation of the sensitive soul were proper to it without the body; because in that case all the operations which are attributed to man would belong only to the soul. But each thing is that which performs its own operations, and consequently that is man which performs the operations of a man. But it has been shown above that sensation is not the operation of the soul alone. Since, then, sensation is an operation of man, but not proper to the soul, it is clear that man is not only a soul, but something composed of soul and body.--Plato, through supposing that sensation was proper to the soul, could maintain man to be a soul making use of a body.[35]

Aquinas, therefore, rejected the Platonic model of the

person in favor of the Aristotelian: The human person is a substance composed of body and soul, matter and form. The human person performs a number of operations. An examination of those operations tells us what kind of thing the performer of those operations is. "Each thing is that which performs its own operations, and consequently that is man which performs the operations of a man."[36] Sensation is an operation of man. And sensation cannot be an operation of the soul alone. Sensation, that is, is not proper to the soul; it requires a body as well. Aquinas concludes from this that "man" cannot be merely a soul but must be composed of both body and soul.

This is not to diminish the role of the soul in the compositum, however. The soul stands to the person as form stands to substance: as its act. The body, matter, is pure potentiality. It is, on the other hand, the form, the substantial form, which gives a thing its substantial being: "Of one thing there is but one substantial being. But the substantial form gives substantial being. Therefore, of one thing there is but one substantial form. The soul is the substantial form of man."[37]

Aquinas further identifies the soul as "the first principle of life in those things in our world which live . . . Now life is shown principally by two activities, knowledge and movement."[38] Furthermore, this first prin-

ciple of life is "the principle of intellectual operation"[39] (emphasis mine). This intellectual principle "we call the mind or the intellect."[40] The soul, therefore, is not only the substantial form of the body. It is, in some way or another, the mind. Here lies the basis for Thomistic intellectualism. Not only is it the case that the soul is more valuable than the body for a number of reasons, not the least of which being that the soul is the act of the whole substance, that the soul is the principle of life, and that the soul is incorporeal (hence, incorruptible), and subsistent.[41] The soul, even more importantly, is somehow identified with the mind or the intellectual activity.

> According to the Philosopher in Metaphysics VIII, difference is derived from the form. But the difference which constitutes man is rational, which is said of man because of his intellectual principle. Therefore the intellectual principle is the form of man. We must assert that the intellect which is the principle of intellectual operation is the form of the human body. For that whereby primarily anything acts is a form to the thing to which the act is attributed . . . For the soul is the primary principle of our nourishment, sensation, and local movement; and likewise of our understanding. Therefore this principle by which primarily we understand, whether it be called the intellect or the intellectual soul, is the form of the body.[42]

Later in that same question[43] Aquinas further concludes, "Thus from the very operation of the intellect it is made clear that the intellectual principle is united to the

body as its form." The intellect, that is, actualizes the primary and unique operation of the human person: understanding. This is not to say that the intellect, or soul, is sufficient, however. Again, "The body is necessary for the action of the intellect, not as its organ of action, but on the part of the object; for the phantasm is to the intellect what color is to the sight."[44] Knowledge depends upon sensation, and sensation is dependent upon the body.

It is important to note that throughout this discussion Aquinas has been describing intellection as the chief "power" or "faculty" of the soul--NOT as its essence. That is, the soul cannot be defined as the intellect; intellection is its activity. The intellectual operations are merely the most significant demonstrations of the unique power of the human soul. Powers are in potentiality to their acts; they are not acts of themselves. On the other hand, "the soul by its very essence is an act."[45] It follows then that the essence of the soul is not any of its powers, intellectual or otherwise. The powers of the soul are, however, its natural properties. "The powers of the soul proceed from its essence as from their cause . . . All the powers of the soul . . . flow from the essence of the soul as from their principle."[46]

There exists, therefore, a real distinction between

the soul and its faculties or powers, the distinction between the essential act of the body, the principle of life, and potentiality, potentiality as the possibility for other kinds of activities.

In the fourth article of question 77 Aquinas defines the faculties of the soul as powers of acting which are in potentiality to their acts and which are to be distinguished according to their respective acts and objects. "A power as such is directed to an act. Therefore we must derive the nature of a power from the act to which it is directed; and consequently the nature of a power is diversified according as the nature of the act is diversified."[47] The intellect is one of these powers; indeed, it is the most perfect of them.

Aquinas' discussion turns in question 78 to a precise understanding of just what are the soul's specific powers. Some of these powers are proper to the soul alone and are not dependent upon the body. These remain in the soul even after it is separated from the body. Other powers belong to the compositum, to the unified body/soul substance, and cannot exist apart from this unity. Intellection belongs to the first category; sensation to the second. There is, therefore, a hierarchy of powers. "Now the powers of the soul are distinguished generically by their objects. For the higher a power is, the more universal is the object to which it extends."[48]

Similarly, that power whose operation so transcends the operation of the body that it is not performed by the body or any part of it at all (intellection) is higher than the operation which is indeed "performed through a corporeal organ, but not through a corporeal quality"[49] (sensation), which in turn exceeds the operation which is both performed by a corporeal organ and by the power of a corporeal quality (nutrition, growth, and reproduction). In other words, there is a triple order in the soul's operations; there are vegetative, sensitive, and rational powers. The vegetative power includes nutrition, growth, and reproduction ("the nutritive, augmentative, and generative"[50]); the sensitive faculty is comprised of the five external senses, the four interior senses, locomotion, and the sensitive appetite; finally, the rational faculty consists of the agent intellect, the passive intellect, and the will (volition, or intellectual appetition). And, as stated above, this order is also evident in any examination of the objects of each of these faculties. The object of the vegetative activity is only the body which is united to that soul. However, the sensitive faculty has a more universal object: "<u>every</u> sensible body, and not only the body to which the soul is united."[51] The sensitive power includes objects extrinsic to itself. So, too, does the rational faculty. As a matter of fact, the rational faculty has an even more

universal and comprehensive object than the sensitive--being in general, "universally all being."[52]

All of these powers or faculties proceed from the soul, but they are really distinct from one another inasmuch as they have different formal objects and different activities. However, each power or faculty has different aspects or functions which are not <u>really</u> distinct, but only formally so. Thus, within the rational faculty, for example,

> Reason and intellect in man cannot be distinct powers. For to understand is to apprehend intelligible truth absolutely, and to reason is to advance from one thing understood to another, so as to know an intelligible truth . . . But man arrives at the knowledge of intelligible truth by advancing from one thing to another; and therefore he is called <u>rational</u>. Reasoning, therefore, is compared to understanding as movement is to rest, or acquisition to possession; of which one belongs to the perfect, the other to the imperfect . . . Now it is clear that rest and movement are not to be referred to different powers, but to one and the same, even in natural things, since by the very same nature a thing is moved towards a certain place, and rests in that place. Much more, therefore, by the same power do we understand and reason. And so it is clear that in man reason and intellect are the same power.[53]

In much the same way, the higher and lower reason ("that which is intent on the contemplation and consultation of things eternal" and "that which is intent on the ordering of temporal things") are similarly distinct only in their

functions and are not separate powers. One of them, that is, is the means of knowing the other. We judge and order temporal things according to our knowledge of the laws of eternal things. Furthermore, "intelligence is not another power than the intellect" (article ten) and "the speculative and practical intellects are not distinct powers" (article eleven). Finally, neither synderesis nor conscience are powers; the former is a habit and the latter is an act (articles twelve and thirteen).

What are distinct in the rational faculty, however, are the active intellect, the passive intellect, and the will. Not only are they distinct, but there is also here a hierarchy of importance. And, clearly, it is the intellect which reigns supreme.

> The superiority of one thing over another can be considered in two ways: absolutely and relatively. Now a thing is considered to be such absolutely when it is considered such in itself; but relatively, when it is such in relation to something else. If therefore the intellect and will be considered with regard to themselves, then the intellect is the higher power. And this is clear if we compare their respective objects to one another. For the object of the intellect is more simple and more absolute than the object of the will. For the object of the intellect is the very notion of the appetible good; and the appetible good, the notion of which is in the intellect, is the object of the will. Now the more simple and the more abstract a thing is, the nobler and higher it is in itself; and therefore the object of the intellect is higher than the object of the will. Therefore, since the proper nature of a power is according

> to its order to its object, it follows that the intellect, in itself and absolutely, is higher and nobler than the will.[54]

Furthermore, the intellect actually possesses, through knowledge, the object within itself. On the other hand, the will moves towards its object as towards something external, lying outside of itself. Knowledge of objects is more perfect than volition of them because in knowledge we assimilate the forms of those objects into ourselves. In volition the objects remain forever external to us.

> The act of the intellect consists in this--that the likeness of the thing understood is in the one who understands; while the act of the will consists in this--that the will is inclined to the thing itself as existing in itself.[55]

And yet the will may be more perfect <u>relatively</u>. In the case of God, for example, our knowledge in this life is imperfect, analogical, and indirect. And yet the will moves directly towards God. "Hence, the love of God is better than the knowledge of God."[56] However, that is the case only because our knowledge of God in this life is so imperfect. In the next, in the possession of the beatific vision where the soul will actually know the essence of God immediately, there will be no question of the intrinsic superiority of the intellect to the will.

Such, then, are the texts of St. Thomas which led those I have called intellectualists to assert that the will, volition, is subordinate to the intellect, or know-

ledge. Grenier, for example, claims in the section of his Cours de Philosophie concerned with natural philosophy:

> Une faculté est plus noble qu'un autre absolument, quand elle est telle par sa nature . . . Tous les volontaristes, comme Saint Bonaventure, Scot, enseignent que la volonté est une faculté absolument supérieure à l'intelligence. S. Thomas, au contraire, affirme que l'intelligence de sa nature est supérieure à la volonté, mais que sous un certain rapport la volonté peut être supérieure à l'intelligence.
>
> Prouvons d'abord que, de soi et absolument, l'intelligence est une faculté plus noble que la volonté.
>
> La nature d'une faculté est determinée par son objet. Or l'objet de l'intelligence est de soi et absolument plus noble que celui de la volonté. Donc l'intelligence a une nature plus noble que la volonté: de soi et absolument, elle est plus noble que la volonté.
>
> La majeure est évidente.
>
> A la mineure. Plus un objet est abstrait et universel, plus il est noble et parfait. Or l'objet de l'intelligence qui est l'être, est plus abstrait et universel que l'objet de la volonté qui est le bien: car le bien comporte un rapport de convenance à l'appétit, tandis que l'etre fait abstraction de ce rapport. Donc . . . [57]

How does this version of intellectualism affect the object of our inquiry, how does it make sense of relationships within the human soul, and how does it affect relationships between people, especially those of a legal nature?

The will is the intellectual appetite. It is a passive power which is moved by something outside of

itself; it is moved, that is, by objects apprehended by the intellect. And the chief object towards which all wills move is happiness. The intrinsic nature of the will is such that it desires happiness of necessity, of a natural necessity. The will desires the good as such, the good in general, and this good is, for St. Thomas as for any other Aristotelian, happiness. The will of its very nature moves toward this good. Happiness is the natural end of the will, and the will cannot be understood apart from this end or object. Happiness, for the Christian, lies in God. In one way, then, the will always wills God because it always wills its own happiness. But, owing to that defect in knowledge stated above,[58] owing to our imperfect knowledge of God in this life, the will can mistake objects as being related to happiness when indeed they are not. We often fail to understand the connection between particular means and our ultimate end. Hence, we may will something other than, and indeed to the exclusion of, God. Further, the will can also consciously turn its attention away from the connection between God and happiness and choose something other than God. That is, we can err and we can sin.

It is therefore the case that there exists a mutual interaction between will and intellect, such that each affects the other. Ultimately, "every movement of the will must be preceded by apprehension, whereas every

apprehension is not preceded by an act of the will."[59] The intellect moves the will inasmuch as the good which is understood and known is the object of the will and moves the will as an end. St. Thomas shares with Aristotle a teleological, not a mechanical, physics. All of nature moves towards certain ends and goals; all things have their proper finis. The good, happiness, which is the object of an intellectual understanding, is the appropriate end and thus the final cause of the will's activity. It is in that sense that the intellect is superior to the will:

> The intellect may be considered in two ways: as apprehensive of universal being and truth, and as a reality and a particular power having a determinate act. In like manner also the will may be considered in two ways: according to the common nature of its object--that is to say, as appetitive of universal good--and as a determinate power of the soul having a determinate act. If, therefore, the intellect and will be compared with one another according to the universality of their respective objects, then, as we have said above, the intellect is absolutely higher and nobler than the will.[60]

As determinate powers with determinate activities, however, the will may move the intellect. "The intellect itself, its act, and its object, which is the true, each of which is some species of the good, are contained under the common notion of good. And in this way the will is higher than the intellect, and can move it."[61] These powers are interrelated; each contains the other in its

acts.

> From this we can easily understand why these powers include one another in their acts, because the intellect understands that the will wills, and the will wills the intellect to understand. In the same way, the good is contained under the true, inasmuch as it is an understood truth, and the true under the good, inasmuch as it is a desired good.[62]

Therefore, the will, considered as a "determinate power of the soul having a determinate act," can move the intellect. But ultimately, absolutely, it remains the case that the intellect exerts both a <u>logical</u> (because "every movement of the will must be preceded by apprehension, whereas every apprehension is not preceded by an act of the will") and, even more importantly, an <u>ontological</u> priority. That ontological priority stems from two sources. First, our reason, our intellect, is but an imperfect manifestation of the ultimate principle of understanding, "an intellectual principle higher than our intellect--namely, God."[63] That is, God's intellect is the model for our intellect. We share, through reason/intellect, in God's image and likeness. In God as well as in man reason, not will, exerts a primacy.

> Augustine says, <u>In God to be is the same as to be wise.</u> But to be wise is the same thing as to understand. Therefore in God to be is the same thing as to understand. But God's being is His substance, as was shown above. Therefore the act of God's intellect is His substance.

> It must be said that the act of God's intellect is His substance. For if His act of understanding were other than His substance, then something else, as the Philosopher says, would be the act and perfection of the divine substance, to which the divine substance would be related as potentiality is to act; which is altogether impossible, because the act of understanding is the perfection and act of the one understanding. Let us now consider how this is. As was laid down above, to understand is not an act passing to anything extrinsic, but it remains in the operator as his own act and perfection; as being is the perfection of the one existing: for just as being follows on the form, so in like manner to understand follows on the intelligible species. Now in God there is no form which is something other than His being, as was shown above. Hence, as His essence itself is also His intelligible species, it necessarily follows that His act of understanding must be His essence and His being.[64]

God's intellect is his essence, the perfection of his being. In us, too, then, our intellect is the closest we come to sharing in God's very essence.

Secondly, in the rational faculty the intellect is really distinct from the will. Lawrence Dewan, in his article entitled "The Real Distinction between Intellect and Will,"[65] defends this interpretation by scrutinizing the development of St. Thomas' understanding of that distinction from his third book of the Commentary on the Sentences of Peter Lombard (1255-56) to his treatise De Veritate (1258-59) and finally to his longer discussion in the Summa Theologiae 1.59.2 and 1.80.1 (1267). Dewan notes that although discussions of intellect and will

abound in St. Thomas, it is quite difficult to find much about the real distinction. In his Commentary on the Sentences cited above,[66] St. Thomas simply states that in all separate substances other than God, will and intellect "do not seem to be altogether the same thing." He offers no further argument to support what he calls a "real diversity."

Thus, references to the real distinction between intellect and will are limited to three articles, De Veritate (DV) 22.10 and Summa Theologiae (ST) 1.59.2 and 1.80.1, although the latter will be seen to be less appropriate for our purposes.

The focus of the text DV 22.10 lies in a presentation of what it means to be the object of a power. Dewan begins by affirming that

> intellect and will are not merely diverse powers, but belong to diverse genera of power. In order to make this point, St. Thomas recalls first the general principle that powers are distinguished one from another in function of their distinctive acts or operations, and that these in turn are distinguished as having diverse objects. Thus the approach to the question of the distinction between intellect and will is determined. One must consider the object of each.[67]

The objects of intellection and appetition, St. Thomas thinks, stand in a very different relation to the soul.

> . . . something is an object of the soul in two ways: in one way, inasmuch as it is naturally apt to be in the soul [esse proprium] but according to the mode of

> the soul, i.e. spiritually [*spiritualiter*]: and this is the intelligible type of the knowable inasmuch as it is knowable [*ratio cognoscibilis in quantum est cognoscibile*]. The other way for something to be an object of the soul is for the soul to be inclined and ordered towards it, inclined and ordered, that is, in accordance with the mode of the thing itself existing in itself [*inclinatur et ordinatur secundum modum ipsius rei in se ipsa existentis*]: this is the intelligible type of the appetible inasmuch as it is appetible [*ratio appetibilis in quantum est appetibile*].[68]

This analysis of the objects of cognition and appetition leads St. Thomas to the conclusion that the cognitive and the appetitive constitute not only diverse powers but even diverse genera of powers. From that he draws the further conclusion that since the intellect is cognitive and the will appetitive, then they, intellect and will, are generically diverse powers as well.

What St. Thomas does in this argument is suggest that an object--"the thing"--has a relation to the soul. This relation has one of two bases. *Either* the thing itself is in the soul in the mode of the soul and not in its own mode *or* the soul is "compared" to the thing existing in its own being, in its own way. As Dewan remarks,

> The *principle* for the conception of knowledge is the mode of being of the thing known in the knower, whereas the *principle* for the conception of appetite is the mode of being of the appetible thing itself, existing in its own proper being.[69]

What this means is that something is an object of the soul in two ways. The first way is according to the mode of the soul, i.e. spiritually, and not according to the proper being of the thing itself. The thing is knowable because of its own aptitude to be in the soul spiritually, and that is how it can be known at all.

But the second way that something is an object of the soul, the way of appetition, is significantly different. In the case of appetition the soul is inclined towards the object, "ordered towards it, ordered according to the mode of the thing itself existing in itself."[70] This presupposes that the soul already has the thing present in it spiritually (by knowledge), and this second determination is then understood as a function of the thing's own proper mode of being. Appetition is constituted by an inclination or ordering of the soul according to the mode of being of the thing and not, as in cognition, according to the mode of being of the soul itself. But appetition presupposes already the spiritual--the knowable--presence of the thing within the soul. The will is an inclination which follows upon knowledge. Thus appetition follows upon cognition; cognition exerts a primacy within the soul.

Dewan concludes his analysis of this section of <u>De Veritate</u> with the following observation.

> It seems to us, then, that the distinction between cognition and

> appetition, intellect and will, here in DV, ultimately reduces to the notions of ~~one~~ being being in a way all beings, i.e. the mode of being called "spirituality" here, and the proper being of things (as itself bringing into sight a further dimension of the very being of the soul, viz the appetitive dimension).[71]

The discussion in ST 1.59.2 takes on a different emphasis and that is seen immediately in its very question: in the angels, does the will differ from the essence or nature and then, secondly, does the will differ from the intellect? St. Thomas answers affirmatively to each, and the answer to the second follows from his answer to the first. He begins by defining the essence:

> . . . the nature or essence of any thing is wholly understood within the thing itself; therefore, whatever extends itself to that which is outside the thing is not the essence of the thing.[72]

The nature or essence of a thing inclines that thing towards its very own being. This nature can only be understood by considering only the very thing itself in which it is. This corresponds to the view of the essence as being that which the definition signifies. Thus, an inclination towards something external must be through something added to the nature or essence.

St. Thomas turns next to a consideration of the will. The will inclines to the good as such; the object of the will is the universal good. Therefore will and essence can be identical only where the good is wholly contained in the essence of the one willing, where the

object is the very being of the thing itself. That can only be true of God and cannot be true of any creature since this universal good lies outside the essence of all created things. St. Thomas concludes, therefore, that the will of the angel and, indeed, of any creature at all, cannot be identical with its essence. This view of the will emphasizes something quite different from DV 22.10. In that passage, St. Thomas focused upon the will as essentially directed outwards. In this selection from the Summa, however, the will is considered in light of its object--the good--wherever that object is found, in oneself or in others. The argument in ST 1.59.2, then, rests not on the premise of the outward direction of the will but rather on the premise that the will could only be identical with the essence where the whole of the good is contained within the essence.[73]

But how does St. Thomas move from this distinction between will and essence to the more interesting distinction, for our purposes, between will and intellect? St. Thomas begins by insisting that the argument for the distinction between will and intellect is "really similar" to that for the distinction between will and essence. As Dewan points out,

> . . . just as essence was distinguished from will inasmuch as essence was entirely or wholly understood within the thing whose essence it is (whereas, as it turned out, creaturely will had to have

> an outward-directed character), so also now intellect is contrasted with will inasmuch as intellect's typical way of encompassing the external is to render it somehow internal. I.e. knowledge is super-essence. It is built on the same model as essence, so to speak. This kinship with essence, the fact that in intellect the one being is in a way all things (or that the all are somehow one), demands that the will, which relates to the all in the proper being of the all, be still something else again. It is the very gap between the intellect's merely being in a way all things, and the real being of the "all things" which makes possible the other relationship to the all, called "will."[74]

There must be two relationships. Knowledge can only be knowledge if the thing known is in a way in the knower. But that leaves room for another relationship, that of things to the knower in the measure that they lie outside of the knower. Thus Dewan concludes, not unreasonably, that it was neither by accident nor by chance that St. Thomas first explained the essence/will distinction and then moved from that to the intellect/will distinction.

> It is this assimilation of cognition to essence which constitutes the force of St. Thomas' assertion that it is the property of diverse powers that (1) one have in oneself what is outside and (2) that one tend towards the outside thing. Intellect and will are quidditatively different, since indeed intellect is closer in nature to quiddity itself than will is.[75]

ST 1.80.1 complements both this understanding and that explained in DV 22.10. St. Thomas begins simply by asserting that one must posit an appetitive power of the soul,

leaving open whether or not this is a power distinct from the cognitive. He begins by claiming that some inclination follows from or accompanies every form. The focus of this discussion is thus on form, inclination, and their ontological relation to one another. St. Thomas claims that inclination follows upon form. It appears (although Thomas does not state explicitly) that inclination is essentially directed towards another while form pertains to the thing in itself. Our primary experience of inclination is of things as related to other things, while our primary experience of things as having form is of those things as each having its own proper being.

St. Thomas' analysis of form differentiates between form as found in things which lack the power to know and form in things which have the power to know. Form is found in a higher mode in the latter because

> In things having cognition, a thing is determined to its proper natural esse by its natural form in such a way that it nevertheless is receptive of the species or forms of other things: as sense receives the species of all sensibles, and intellect of all intelligibles. Thus, the soul of man <u>is</u> all things <u>in a way</u> according to sense and intellect. And in this respect things which know resemble God in a way, in whom all things pre-exist.[76]

Inclination, too, is better in things which have knowledge because in that case the thing is inclined to those things which it apprehends rather than merely towards those things towards which it is inclined by natural appetite.

The remainder of this article is restricted to the development of this understanding of the higher mode of appetite proportionate to a higher mode of form. St. Thomas does not argue here for the distinction between cognition and appetite or between form and inclination; he takes for granted that the reader of ST 1.80.1 has already understood and accepted the analysis in ST 1.59.2.

A final point to which attention needs to be drawn and which follows from this real distinction developed above is the observation that the object of the intellect--the notion of the appetible good--is simpler and more absolute than the object of the will, which is the appetible good. This, too, serves to demonstrates how one would argue that for St. Thomas the intellect exercises both a logical and an ontological priority in the human soul.

The primacy of the intellect and of reason is similarly evident in Aquinas' discussion of law. He begins his Treatise on Law (Summa Theologiae, first part of the second part, questions 90-108) by emphasizing that "law is something pertaining to reason":

> Law is a rule and measure of acts, whereby man is induced to act or is restrained from acting. . . Now the rule and measure of human acts is the reason, which is the first principle of human acts . . . For it belongs to the reason to direct to the end, which is the first principle in all matters of action . . . Now that which is the principle in any

> genus is the rule and measure of that genus. Consequently, it follows that law is something pertaining to reason.[77]

Furthermore, "every law is ordained to the common good."[78] Law, that is, is the rule and measure of human acts, the principle of which is reason. Practical reason directs us towards the last end which is happiness. Since each individual man is part of the community, law must concern itself properly with "the order directed to universal happiness." Universal happiness can only be achieved through the body politic. And that can only be achieved in the exercise of law for the common good. Law arises from the community as a means of achieving the ultimate happiness of that community. The law is natural in precisely the sense that it is derived from the shared reasoning of the community. It is natural as an expression of that reason which constitutes the nature of the human person. It is not so much imposed on people as it is a reflection of the order which reason makes evident to them as necessary to direct them to final happiness.

> A law, properly speaking, regards first and foremost the order to the common good. Now to order anything to the common good belongs either to the whole people, or to someone who is the vice-regent of the whole people. Hence the making of a law belongs either to the whole people or to a public personage who has care of the whole people; for in all other matters the directing of anything to the end concerns him to whom the end belongs.[79]

The law exists to promote the common good which is

discernible through reasoning and which is demonstrated in the shared experience of society. The natural law is that law based on reason and directing all men to the common good. The positive law develops within individual communities and groups. It narrows the focus of the natural law (while not violating it) to take account of special situations and circumstances pertaining to particular individuals and groups. Reason directs the positive law and is the standard against which the positive law can be measured just as much as it is the basis for the natural law. And reason is itself directed towards an understanding of universals. Hence we have returned full circle to the claim made above[80] that it is our reason, our intellectual capacity, which defines us specifically and which provides us with our legal, social, and political obligations insofar as it also defines for us the common good towards which we ought to be striving, and at which we ought to aim in our willing.

How, then, might we define an intellectualist account of legal capacity? The intellectualist holds that a person is legally capable if he is able to perform successfully the intellectual functions of the human psyche. A person can participate in the legal community and can act so as to be accountable before the law if and only if his intellect is in proper working order. In like manner, a failure at the level of the intellect and the

performance of the activities appropriate to it, those commonly defined as "reasoning," leads to a failure at the level of legal capacity. Types of failures of this sort would include mental retardation of severity sufficient to render impossible the abstracting and universalizing activities of the agent intellect, mental disease resulting in defects of the passive intellect such that it either could not receive the species impressa from the agent intellect or, once received, could not express it (transform it into a species expressa), and any cognitive and/or psychological disorders which might make it difficult or impossible for the intellect to put together the products of the abstracting process and connect or relate them by reason into arguments which could lead to an advance in knowledge. In short, any impairment of the reasoning activity from its inception through its final deductive or inductive conclusions limits legal capacity. While the will cannot fail to pursue the good as it understands it to be, the intellect may fail in its understanding of the good. And, even if it comes to an accurate apprehension of the good, it may still fail in its formulation of the practical syllogism that lays out for the will the means necessary to achieve that good.

Let us attempt to relate this account of legal capacity to a person's ability to consent to the marriage relationship. In the Thomistic analysis, it is the nature

of the will to aim at the good--happiness. In this it cannot be mistaken. Mistakes can only be the product of the finite intellect. Thus, in the former (1918) Code of Canon Law, canon 2210 specified that "those lacking the use of reason are incapable of a canonical delict." In the 1983 version of the Code, canon 99 states that "whoever habitually lacks the use of reason is considered as incapable of personal responsibility and is regarded as an infant." The intellectualist influence is present in the most basic conditions for legal capacity to be exercised not only as regards marriage but in the whole of the canon law. The severely mentally retarded cannot be capable according to law. Canon 1095 specifies those conditions which indicate a problem at the level of one's capacity to consent to a marriage:

> The following are incapable of contracting marriage:
>
> 1. those who lack sufficient use of reason;
> 2. those who suffer from a grave lack of discretionary judgment concerning the essential matrimonial rights and obligations to be mutually given and accepted;
> 3. those who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage.

All of these specifications appear to be related to an intellectualist understanding of legal capacity, at least to the extent that one cannot even begin to examine consent--an act of will--unless one has already met the

preceding requirements.

As indicated in the above canon, the Thomistic influence goes beyond cases of obvious mental retardation. It is not enough merely for the agent and passive intellects to be capable of performing their respective functions. They must perform them in such a way that the reasoning process, the process of building a body of knowledge based upon the results of abstraction and expression, can proceed and proceed correctly. However, not much knowledge is needed to be capable of contracting a valid marriage. Canon 1096 states:

> For matrimonial consent to exist, it is necessary that the contracting parties be at least not ignorant of the fact that marriage is a permanent partnership between a man and a woman, ordered to the procreation of children through some form of sexual cooperation. This ignorance is not presumed after puberty.

Very few sorts of errors can affect one's legal capacity and, hence, the validity of one's marriage. While "error about a person renders a marriage invalid (canon 1097.1),"

> Error about a quality of the person, even though it be the reason for the contract, does not render a marriage invalid unless this quality is directly and principally intended (canon 1097.2).

And, "error concerning the unity or the indissolubility or the sacramental dignity of marriage does not vitiate matrimonial consent (canon 1099)."

Now intellectualists do not claim that there are no

other sorts of failures of legal capacity. Defective consent, clearly a defect of will, has always counted against capacity and counted for an affirmative declaration of nullity. But defective consent, until very recently, was interpreted under the "force and fear" provisions and was understood to mean coerced consent. St. Thomas himself or, more accurately, the compiler of the Supplement to the Summa Theologiae addressed precisely this issue in questions 45 and 47. In ST Suppl. 45.1 is repeated the position explained in the first few chapters of this work, that consent is the efficient cause of matrimony. Furthermore, in articles one and three of question 47 compulsory consent, specifically compulsion by fear, is declared to be an impediment to marriage.

The history of canonical decisions regarding the nullity of marriages reflects the above observations.[81] Until the end of the nineteenth century there were relatively few requests for declarations of nullity and the grounds used were either coercion (which, according to any model, vitiates consent), consent conditionally given, simulated consent, or some form of insanity. But because of the paucity of true psychological grounds chances of an affirmative decision were slim unless one could demonstrate that one of the spouses was truly demented. With the advent of new psychological approaches in the twentieth century, in actual practice the "insanity" inca-

pacity was expanded to include psychoses, character disorders, and even neuroses because it was not clear that they could be subsumed under coerced or conditional consent categories. The emphasis on sanity remains an intellectualist emphasis. It seems not unreasonable to think that the intellectualist tendency taught in the colleges and seminaries through the 1950's has influenced subsequent practice.

The "discovery" of new sorts of psychological impairments in the twentieth century has corresponded very nicely to a world in which divorce has become more desirable and more acceptable. Catholics, whose percentage of divorce now approximates that of the general population, can use all of these psychological advances to procure declarations of nullity for themselves and thus divorce and yet remain in the Church. The model has expanded to accommodate changes in the practice. Or, perhaps, the change in practice coupled with advances in the development of the science of psychology have resulted in a new understanding of the model. In either event, as long as the intellectualist model still works, why reject it? Because at some point the practice begins to demand more flexibility than that model allows.

The model worked well in a world in which our understanding of psychological impairment and human psychology in general was limited. But while it never denied the

importance of the will as a component of capacity, the only defects of the will that it accepted were defects of force, fear, or conditional or simulated consent. The tendency was then to explain all other defects or failures in intellectualist terms. What resulted were somewhat forced attempts to characterize some psychological disorders which were clearly dispositional incapacities (such as homosexuality) as a species of mental illness or insanity.

Now marriages fail for many reasons and in some instances it probably is the case that individual marriages fail because of the psychological diseases of the parties to it. But to have to claim that one is disturbed in some way in order to have a marriage declared null seems to do harm in a few serious ways. First of all, it may not be true. Marriages fail, I would suggest, just as often because of unmet or unspoken expectations or because of an inability, despite one's most fervent desire, to carry out what one promises. It is not clear that these reasons represent species of psychological impairment. Nor do the more recently-accepted grounds such as emotional immaturity and lack of due discretion.

A further issue concerns the problem of remarriage. If a marriage is declared null on the basis of some psychological impairment, then it would seem that the Church would be very wary about allowing such an impaired

person to enter into (or validate) a second marriage. After all, if the impairment nullified the first marriage, how can a valid second marriage be initiated until that impairment is removed? Unfortunately, the state of the practice of psychology is such that many of these relatively minor disorders are not curable but only manageable. While it is true that the tribunal judges can attach to the record a notice that no remarriage is to be allowed until some investigation of the person's current psychological state is made, and some prohibitions on future marriages are issued, this is usually confined to instances of serious disturbance (e.g. a history of violence and aggression) or sexual dysfunction (e.g. homosexuality or nymphomania). In most cases, a person whose marriage has been annulled, even if on grounds of a psychological nature (e.g. lack of due discretion, "emotional immaturity") is free to marry again the next day. While it may be true in some cases that the original problem has been resolved, it is equally possible that it has not been, and no one can know unless psychological evaluation is required. The fact that it frequently is not indicates that perhaps these psychological impairments are used as a means to obtain an annulment because they work within the operative model of legal capacity. If that is a possibility perhaps we should be reevaluating our intellectualist model and searching for one that

better accommodates the facts of marriage failure rather than encouraging people to admit they are "crazy," disturbed, or impaired merely in order to be released from an unpleasant marital situation. In chapter six I shall do just that; I shall investigate a different model, one that rejects this form of intellectualism for a radical voluntarism based on contemporary trends in philosophy. Perhaps it is possible to develop a theory of legal capacity that can make sense of failures other than failures of the intellect and forced consent. Perhaps, that is, we can tie legal capacity to the will.

Chapter VI. The Voluntarist Model

> [Sartre] has discussed the choice of a fundamental project as a way of accounting for the fact that human beings exhibit a variety of purposes and a corresponding variety of reasons; for the fact that people's actions are, on the whole, intelligible, if not predictable in detail; for the fact that sometimes abrupt character changes occur; and for the fact that perceiving and remembering are selective and purposive.
>
> --Phyllis Sutton Morris
> Sartre's Concept of a Person

A third sort of model of legal capacity which one could derive from contemporary trends in philosophy and theology might be called a voluntarist model of legal capacity. This kind of model would reflect the role of the will in determining whether or not a person was "legally capable." In terms of this model, a person would be capable if he could choose and choose freely whether to follow the prescriptions of the law. As such, it is a model which focuses on choosing rather than on thinking. Reason and the intellect are not primary; the will is. The central belief of voluntarism is the belief that humans are radically different from all other beings in the universe by virtue of their will, the existence of which is the source of all value. Only an act of will can

have value. Humans are the only creatures which produce values; humans are the only ethical beings. This view is often tied to some sort of belief in individualism because there is no possibility of acts of will themselves being common to more than one person. My acts are my own. The value of my act of will attaches to it as mine, whereas if you had performed the same act there would not have been the same value. Tied closely to this analysis of will is a correlative analysis of intention. After all, it is the intention which determines the personal and particular quality of any act. My intention is mine; it is individual and unique. You may perform the same act, but you may not have had the same intention. Therefore, the value of your act would be different from the value of my act, despite the appearance that the acts were in fact identical. Thus, acts of will cannot be common to more than one person.

This is a type of model which may be constructed from trends evident in the evolving theology of marriage and developments in the adjudication of marriage cases in the twentieth century. St. Thomas Aquinas' philosophy (and with it the emphasis on the role of reason as the defining characteristic of the human person) never gained official approval as the philosophy of the Church until the promulgation of Pope Leo XIII's <u>Aeterni Patris</u> in 1879. His philosophy is still cited as the "official"

teaching of the Church. Yet the world of 1988 is a world considerably different from that of 1879 and even more so from that of the thirteenth century. New philosophical trends have both reflected and influenced new understandings of marriage and the relationship between the initial wedding ceremony and the eventual success of the marriage. The dispute over what constitutes a marriage and the subsequent further development of a theology of marriage rest on an attempt to come to grips with whether marriage is a contractual event or a covenant characterized by a continual re-consent.

> During the period from the beginning of the reign of Alexander III (1159-1181) through the reign of Innocent III (1198-1216) the law had established that the essence of marriage consisted in the consent to the contract, and its perfection as a contract and as a sacrament consisted in consummation by carnal intercourse.[1]

By the twentieth century this evaluation of marriage as a simple contract was fast losing ground due, again, in part to a changed world wherein divorce was becoming popular and acceptable as a legal option in most nations in the West and in part to a changed philosophical vision of marriage according to which marriage is initiated by mutual consent but is not merely a contract. Rather, by the twentieth century theologians and canon lawyers began to analyze, discuss, and write about marriage not simply as a contract upheld by an institution but as a condition

of life entered into by a contract and having an institutional character in the social order. Marriage, that is, was fast being seen as directed towards the mutual development of persons by means of mutual comfort and support. It had become, by the time of the meetings of the Second Vatican Council (1962-1965), a covenant as well as a contract, a covenant analogous to the covenant between Yahweh and Israel or between Christ and his Church.

The idea of marriage as a covenant and as a commitment to a "community of life and love" stemming from contemporary canon law decisions and theological literature (e.g. "The Pastoral Constitution on the Church in the Modern World," Gaudium et Spes, on marriage and the family) transforms the notion of marriage as act, event, or contract into the notion of marriage as "project," as a long-term commitment. It is evident that what is required for the undertaking of that sort of project differs considerably from mere consent to a contract. What is required is not simply an intellectual understanding (i.e. knowledge and reason) of the terms of the contract and what is entailed by assent to it. What is further required, and what is assumed, perhaps, but not emphasized by the intellectualist model of capacity, is the maturity of judgment necessary and sufficient not merely to understand but also to choose, undertake, and fulfill the

responsibilities of a long-range commitment to a project dependent on the will of two persons. In short, what is required is a choice of a project the terms of which (unlike a contract) cannot be known or predicted with any degree of certainty. The intellectualist model asserts that knowledge of what marriage is and the possession of reason of the "common man" (i.e. not being insane) suffice for a canonically successful marriage. But, as popular wisdom reminds us, although we all know at one level what marriage is, no one knows what he is really getting into until long after the wedding event. Furthermore, the teaching of the Church about the indissolubility of marriage seems to rest on the premise that marriage is not a simple contract of the form of other contracts inasmuch as a marriage contract cannot be rescinded by the mutual agreement of the parties to it as is the case with other contracts. Something has been created or, more precisely, begun in the initial exchange of marital consent that then transcends the parties' desires and takes on a life of its own. This suggests that the relationship begun by the exchange of consent between the parties is one that requires continual care and re-commitment. Saying the vows may initiate the marriage, but staying married is an undertaking which requires far more than the comprehension of the terms of the contract and one's agreement to those terms. It requires a re-direction of the will and the

will's projects to the sustenance of a relationship the terms and details of which cannot be known in advance.

This understanding of the marriage project became evident in many of the decisions of the Rota dating back to the 1950's and 1960's. Furthermore, this understanding seems to have taken hold in North America and England to a greater degree than in continental Europe and the rest of the world, reflecting perhaps a mentality more amiable to divorce in its legal system and seeking a way to incorporate the realities of the statutory, secular law into the lives of people affected not only by that secular law but also by canonical decisions. That is, with divorce such a relatively easy option in North America, more persons and more Catholics in particular availed themselves of it. The Church needed to be more responsive to the needs of those persons and needed as well to acknowledge the reality of the situation: that divorced Catholics would represent approximately the same percentage of the Church as divorced Americans of the general population. These were obviously persons who continued to want to remain Catholics, and the Church could hardly afford to lose them. These were souls who had suffered and needed the comfort of the Church more than ever. As a result, as indicated above,[2] the Church tribunals began to increase the use of the grounds such as "lack of due discretion" in their deliberations and decisions. This

shift in language seems to have signified a shift in emphasis from an account of marriage that emphasized cognitive and psychological elements to one that included the volitional as well. Furthermore, the number of requests for declarations of nullity as well as the number of affirmative decisions began to skyrocket. After all,

> if the contract is the sacrament by its very judicial nature and its juridical evidence, then it is relatively easy to control the validity of sacraments by marriage tribunals. If, however, the sacramental reality is the visibility of the gracious presence of Christ in the common striving of the spouses for ever greater love for each other, in the dedication to fidelity even to the point of redeeming the other from infidelity through generous forgiveness and reconciliation, and in the gracious "yes" to the mission of fatherhood and motherhood, then a very different picture emerges. The covenant aspect then comes to the foreground. The good of the persons, their capacity to love, the fostering of conditions that favor their growth in love, the experience of redemption and redeeming love, the readiness to forgive: all this will be the main interest of the Church. But then--unfortunately--it will be much more difficult to determine the validity or nonvalidity of a marriage.[3]

The perennial problem of adjudication became even more acute. Which is primary in the determination of a marriage, the internal intention of the parties to that marriage or the public expression of consent between them? How can one reconcile the supposed primacy of that internal intention with the public character of a social institution? Gradually, the trend of Rotal decisions in the

twentieth century went beyond the search for indications of insanity or of compulsion by force or fear to include the capacity of persons to be faithful for life, to educate children, and to sustain rather than merely enter an indissoluble contract. Although not expressly acknowledged in any formal way by the Rota, the grounds for declarations of nullity have expanded to include the type of "consensual incapacity" called a lack of due discretion to such an extent that a great number of annulments in North America are now granted precisely on those grounds.[4] The twentieth century has been a time of vast change.

> The roots could be found in the theory of the past, but everything was in the course of change. From a public exchange of promises interpreted by the ordinary rules of contract law, marital consent was becoming an interior acceptance to be interpreted by psychologists of the heart. Marital affection, to which lip service had for so long been given, was being more effectively acknowledged as a necessary quality of assent: Once a contract open to anyone, like any commercial bargain, canonical marriage was becoming an undertaking accessible only to persons who could be expected to be able to sustain lifelong commitments. Formerly an institution responsive to the social interests of a small governing class, in which the abstract honor given freedom to marry was combined with concrete arrangements for supporting parental choice, marriage was becoming the mutual choice of two persons in love. A type of social life which it was assumed that anyone wanting lawful sexual intercourse wanted to enter, indissoluble marriage was now becoming a form of spiritual life requiring personal perception of the values and personal dedica-

tion to their embodiment.[5]

In short, the twentieth century has signaled a transformation in our understanding and use of marriage. Prior to the twentieth century, marriage among the upper classes had often been a relationship of a primarily social and political character used to forge alliances and strengthen governments. While marriages among those groups remains a means to effect those ends, the prospective brides and grooms today are more frequently consulted concerning the choice of a spouse. More dramatic has been the change at the level of the middle and working classes. Marriages were often arranged by families, often for economic reasons and often simply because the young were thought incapable of making a prudent choice. Today, at least in Western Europe and North America, marriage is understood differently because our conceptualization of individual freedom and autonomy has changed. That is, marriage is now understood as a relationship between two individuals chosen by the individual parties for reasons of love and affection rather than arranged by their families. This changed understanding of marriage corresponds, too, to a changed understanding of sexuality by means of which sex has as its end not only the procreation of the species but also the expression of love between two persons and the forging of a bond between them by means of affection. By the time of the meetings

of the Second Vatican Council theologians had decided that the primary purpose of sex was no longer procreation. There no longer existed a "primary" purpose for sexual activity but two equally important goals, one being procreation and the other the mutual support and love of the parties to the marriage.[6]

The addition of the idea of love as somehow central to our understanding of an appropriate marriage relationship broadens in a serious way our analysis of the concept of legal capacity. First, we now are interested not merely in people capable of knowing what marriage is and able to fulfill contractual requirements. To be truly capable according to law in the required sense, those people must be able to undertake a project based not only on need for social stability but one based on love and affection. That brings the emotions into our study; furthermore that appears to bring in the irrational or at least the non-rational as well. Finally, too, there still exists the problem of the will. Sometimes at least we choose to love, and the problem of sustaining a marriage lies at least in part in our ability to choose to continue loving even when the emotions initially present have changed or even disappeared.

Recent tribunal decisions have appeared to reflect this dilemma, at least implicitly. While "falling out of love" does not count as a reason for suspecting that a

true marriage has never been and hence can be annulled, nevertheless capacity to marry in the first place entails the understanding, the appreciation, and the ability of the parties concerned to make a commitment to a relationship that must be acknowledged as capable of surviving the diminishing of affection. Further, while falling out of love may not count as a reason to end a marriage, the more important issue is whether there existed sufficient affection at the onset of the marriage to be able to say that the parties involved fully intended the marriage and were capable of that sort of commitment. Commitments of that kind transcend the bounds of mere reason. Again, most people are more willing to work to act and achieve projects to which they have an emotional attachment. Our problem then becomes the analysis of the relationship among these variables: reason, choice, emotion, will, and commitment. The expansion of the grounds for nullity evident in the twentieth century in practice, if not clearly in principle, can be traced to an expansion in the number of components seen as necessary for a successful commitment to a "community of life and love." What remains to be done is to formulate those components into a system of relations that can be analyzed in such a way as to illuminate this concept of capacity and render easier, because clearer, the work of tribunal judges.

Although it does not appear that the Church has

attempted this reformulation in any precise way because, again, the role of the tribunal is to adjudicate cases and not to write philosophy, some of the language used both in tribunal decisions and in contemporary theological literature illustrates ~~an~~ appreciation of these additional components. Besides use of the term "commitment," we find reference now made to "authenticity," "personal development," and "free choice."[7] In addition we find Catholic lay persons as well as Catholic clergy calling for an end to the tribunal procedure altogether (for example, Morris West's Scandal in the Assembly) or for at least a serious revamping of the procedure (as in Stephen J. Kelleher's Divorce and Remarriage for Catholics?) in order to expedite the process and allow more weight to the testimony of the parties involved rather than to an array of witnesses who may or may not have a true appreciation of the internal intention of the parties to the marriage. Despite their lack of recognition and standing in official circles, these critics have managed to create quite a stir among both the laity and even some clergy involved in pastoral work.

As I have stated above, the notion that the bond of marriage is assumed to be valid unless otherwise demonstrated is a presumption of canon law dating back at least to the thirteenth century and Pope Innocent III.[8] However, "some scholars have seen at the root of this

legislation another presumption of law--the presumption that the petitioner is to be suspected of dishonesty when approaching the Church for an annulment."[9] The trend in the twentieth century visible in the work of at least some of those engaged in theology and in the practical ministering to those in a failed or failing marriage, however, has been to develop more of a feeling of compassion for the human suffering that goes on while yet preserving the institutional role of administering justice. Critics such as West and Kelleher think that not enough is being done for those troubled souls, but by and large the Church is caught in a recurring dilemma. How does one protect individuals and assure the salvation of their souls while preserving the institutional role of overseeing a relationship which also has a public character, one that affects not merely the persons involved but their children and the community at large?

At least part of the concern for the protection of the individual within the troubled marriage and the insistence upon the rights of that individual in the adjudication of his marital status can be traced to certain twentieth century philosophical movements which have been applied to contemporary theology as well. Continental personalism, as an offshoot of some combination of phenomenology and Christian existentialism, has been espoused by the current pope. Existentialism is taught in the

seminaries alongside of Thomism. Existentialism and personalism are popular because of their perceived concern with the living person and his concrete emotions, especially those of anguish and despair. Existentialism and personalism each stress the primacy of the individual over the group, and the unique freedom of each individual. As such they are directly relevant to the Church's mission of ministering to and comforting troubled persons. But can existentialism serve as the philosophical foundation or model for a theory of legal capacity that can aid in the solution of the problem with which the tribunal is faced: preserving both individual well-being and institutional goals by determining in a detailed fashion their specific roles and by ascertaining the dialectics of their relationship so that the process of adjudication is made both easier and fairer. That is the special concern of the remainder of this chapter.

Existentialism originated in the writings of the philosopher Sören Kierkegaard; he reflected and articulated the anti-rationalism and individualism which became characteristic of the romanticism of the nineteenth century. Other philosophers and literary figures, including Arthur Schopenhauer and Fyodor Dostoevsky, contributed to the development of what have since come to be termed existentialist themes. But Kierkegaard especially was rejecting what he perceived to be the overly rational,

intellectualistic trends of the dominant Hegelian philosophy of the early nineteenth century whereby all of reality was defined as rational and all of philosophy was declared to be a complete system representing that reality. He countered by emphasizing instead the non-systematic, the particular, the unique individual, and the basic irrationality of the religious experience. Romanticism in the arts, in painting, sculpture, music, and literature, likewise emphasized individual experience in the face of a hostile world, encouraged individual communion with nature, and focused on individual innovation and creativity, destroying or at least severely modifying neo-classical forms and structures. The artistic search shifted from the expression of the universality of human experience to the uniquely private and personal elements within that experience. Those uniquely private and personal elements were often emotional elements. Reason, as I have stated above, is a universal; feelings and emotions, on the other hand, are private and particular, at least according to this theory. The emotion of love became a central theme of many of the artistic manifestations of romanticism, especially in the literary forms. According to that romanticism, one simply falls in love. Falling in love is something for which no reasons can be provided. Indeed, reasons seem especially inappropriate to any discussion of love. Talk of reason and love

in the same breath seems cold, callous, and even a bit vulgar. Love is unique, according to the romantic world view. It may come only once in each lifetime. It certainly cannot be rushed or forced; it just happens, striking one down like a bolt of lightning. It may be chance, or it may be fate, or it may be luck, but it is certainly not reason in any way, shape, or form. Within the context of this romanticism, it seems out of place to question why someone loves someone else. A list of reasons is totally inappropriate. When asked, according to this model, why one chose one's spouse, one would not give a list of his or her qualities because none of those qualities has any direct relation to one's love. There are only a finite number of qualities that any person can possess. It would seem possible, then, that two people might possess the same set of qualities. But it is not likely that one would love each of those persons equally. Love transcends reasons.

Much of our current culture, certainly our belief that it is inappropriate to relate love to reason, reflects that romanticism the irrationality and the individualism of which is best expressed philosophically by existentialism. People have not always married for love; in fact they have done so in great numbers only very recently and continue to do so primarily in those parts of the Western world dominated by a romantic world-view.

Furthermore, marriage for love seems to be of a logically different character from marriage for reasons of state, or family, or any of the other pre-romantic beliefs. Every rational agent knows and understands, by virtue of his existence as a rational agent, what marriage for reasons of state or family means. But it is certainly not clear that we share any common understanding of what love is because the experience of love is not a rational experience with features common to all persons. In other language, love is believed to be a part of the private world of emotional experience, while both family and state have a public dimension to them. Ultimately, according to this conceptualization, love is irrational. While a discussion of the accuracy of this analysis falls outside the scope of my current project, my claim here is that it is an analysis that has resulted from the romanticism of the nineteenth century and that it has continued to influence many aspects of contemporary life as well.

Now this existentialist model is certainly one which can provide for the preservation of individual well-being. In fact, the individual is the primary concern of this sort of theory which emphasizes freedom and the possibilities of self-creation through use of that freedom in developing for oneself a set of projects which ultimately will come to constitute one's very being. It would seem that existentialism could, then, also serve as

the basis for our voluntarist view of legal capacity, a view according to which the intellect is secondary to the will in all human activities and especially in those of ultimate human importance.

But to say even that much is to get a bit ahead of ourselves. Although a thorough examination of existentialist ontology lies outside the scope of this thesis, it is necessary to begin with a few preliminary comments about the structure of an existentialist ontology, for any concept of legal capacity that can be tied to such a model rests on the ontological assumptions thereof. The most helpful and most detailed ontological analysis of this sort is the one offered by Jean-Paul Sartre in his Being and Nothingness, the culmination of thoughts about the nature of existence begun in such works as The Psychology of the Imagination and The Transcendence of the Ego. It should be noted at the outset that Sartre certainly did not attempt, in these or any other of his works, to lay out either a theory of legal capacity or an analysis of marriage. He did not marry. He did not seem to think that marriage was a very important human project. One might even argue that he could easily, within his philosophical system, have held marriage to be a detriment to that freedom which alone constitutes the for-itself. But his philosophy is a useful means of examining what I have called a voluntarist model; any such model would resemble

his philosophy in some significant ways. While I shall conclude that the model derivable from his version of existentialism would be ultimately unacceptable to the theologians and canon lawyers in some serious ways, it nevertheless provides some important insights into human experience which any theory of legal capacity must incorporate, namely the belief that human identity is not fixed, static, or substantial but is rather a result of choices and projects that are freely initiated and are continually willed.

Part of Sartre's project in the two works mentioned above was to dispel the primacy of the Cartesian ego. He also attempted a reformulation of the concept of consciousness in a manner quite different from that of the Cartesian tradition. These works laid the groundwork for Being and Nothingness inasmuch as the latter work analyzed in far greater detail the fundamental positions introduced in the former. Again, the first of these positions was a rejection of the substantial ego of Descartes. In his cogito Descartes confused, Sartre thought, the consciousness which says "I am" with the consciousness which thinks. The first is a reflective activity, the second spontaneous. The Cartesian cogito is not one with the consciousness which doubts and thinks. It is, rather, an awareness of doubting and thinking, a reflection upon it. The original consciousness which doubted and the original

consciousness which thought were hence what Sartre would come to call "pre-reflective," and this pre-reflective consciousness became for him the primary consciousness. "Every positional consciousness of an object is at the same time a non-positional consciousness of itself."[10] And this non-positional consciousness of consciousness is, again, the pre-reflective cogito. Two other crucial points follow from this. Firstly, Sartre agreed with Husserl that consciousness is always consciousness of something. It is intentional and points to something beyond itself. It is a "positing of a transcendent object."[11] Hence he avoided idealism by stating that there does exist an object external to consciousness which consciousness is conscious of. This externally existing object of consciousness he will later name Being-in-itself. Furthermore, the pre-reflective cogito of which we spoke above is non-personal; that is, it is not an "I." An "I" or an ego or a "self" cannot come into existence until the original consciousness has been made the object of reflection. The ego, therefore, is an object of consciousness. Like other objects, it exists in the world. This means that for Sartre the ego is not a subject which somehow directs consciousness; the ego is not a subjective entity. It is, instead, a construct of consciousness. The ego is a unity of many psychic states, actions, qualities, and emotions tying together whole sets of these

psychic objects of consciousness. The ego and the world are each objects of consciousness; neither has created the other (and hence idealism is refuted). Consciousness itself is a nonsubstantial unity. It is, again, intentionality. Consciousness is prior to and transcends the "I," ego, or self. Hence it is absolutely free; nothing in the past and no personality structure can determine its future. Consciousness is nothingness. Herein lies the Hegelian influence upon Sartre. Sartre's work is a blend of a phenomenological reflection (the Husserlian influence indicated above by our comments on intentionality) and Hegelian logic. Consciousness, for Sartre, is not so much an ontological nothingness as a logical nothingness. That is, the nothingness of consciousness, what Sartre calls Being-for-itself, is the nothingness of opposition; it is an "otherness." Consciousness, Being-for-itself, is <u>not</u> Being-in-itself. And Being-in-itself <u>is</u>.

Inasmuch as Being-for-itself (consciousness) can only make sense in opposition to Being-in-itself, it would be helpful to explain just what that Being-in-itself is. Sartre's major work, <u>Being and Nothingness</u>, is sub-titled "An Essay on Phenomenological Ontology." That sub-title gives us more than a clue of Sartre's intended project. <u>Being and Nothingness</u> is a philosophical exploration into "being." And the being to be explored is divided by Sartre in his introduction to <u>Being and Nothingness</u> into

the being of phenomena and subjective being (a study, that is, of the phenomenon on the one hand and the subject on the other). The whole of Being and Nothingness is an examination of this disjunction and of the relations between the two parts thereof.[12]

Being-in-itself, the being of the phenomenon, is the simpler of the two types of being. The name "in-itself" indicates the non-relativity of this sort of being in reference to the subject.[13] The in-itself is non-referential, even to itself. It is itself. It is "filled with itself" and is thus "opaque to itself." It is "solid" (massif).[14] It is identity; it has no relation to another and thus is not temporal. Its characterization is reminiscent of the Parmenidean notion of being. It is in no way conditioned or grounded by another. It is immediate. As that which is identical, it is the opposite of Being-for-itself, being mediated by an other. The in-itself lacks the sort of identity even of not-being-an-other. Yet this in-itself is not an abstraction (as Sartre thinks Hegel construed it). Nor does Sartre accept the Hegelian position that nothingness must be implicit in this being. That is because Sartre did not accept wholly Hegel's dialectical logic, a logic of mediation where it is for the mind which is thinking that pure, immediate being passes into nothingness.[15] Sartre rejected Hegel's movement from being to determinate being in favor of a

simpler subject-object opposition. In that opposition, only the for-itself contains nothingness within its being.

The in-itself is existent being. It does not determine itself, nor can it be determined by nothingness (as in the Hegelian schema) because nothingness is not. The existence of this being does not involve an opposition to nothingness. Before being can be determined by negation, nothingness must "emerge" and be accounted for. And this, the possibility of the in-itself to acquire determination, is a product of the opposition of subject and object. "The for-itself is the nothingness of being."[16]

Thus, the for-itself stands in immediate opposition to the in-itself. The in-itself is a "plenitude"[17] which becomes determinate when negated by the for-itself. "It is determinate being 'for' a subject. Outside of this relativity, which makes it a phenomenon, it is, qua non-relative, fixed as in-itself."[18]

The for-itself is consciousness. It is that which can contact the in-itself which, as mentioned above, is plenitude and identity. We had further indicated above that consciousness is intentionality; it refers both to the in-itself and to itself. As a being-for-itself, it is not only opposed to the in-itself by virtue of its structure but it also is a counterpart of being-in-itself as being. That is, its opposition is not merely structural but is also ontological. And from that per-

spective consciousness, being-for-itself, is the opposite of being and is therefore nothingness.

But for Sartre nothingness is not merely the logical opposite of the fullness of the in-itself. The negative is a phenomenon. There are an

> infinite number of realities experienced by the human being which in their inner structure are inhabited by negation. Among these are distance, absence, change, otherness, repulsion, regret, removal, etc.,[19]

all realities which Sartre called "*négatités*." Nothingness is an "intuitive discovery. The necessary condition for our saying *not* is that non-being be a perpetual presence in us and outside of us, that nothingness haunt being."[20]

Having demonstrated that we do encounter the negative, Sartre next turned to the discovery of the negative in consciousness as that upon which negative beings depend. The negative includes such things as the *négatités* cited above, along with other activities such as asking questions, destruction, and missing someone. The negative is encountered in reality, and it is a component within the positive. Negativity and positivity are mixed in all of his examples of the negative. And this phenomenal, objective negative is the starting point for Sartre's elucidation of consciousness as the original negative. His argument, as summarized by Klaus Hartmann in *Sartre's Ontology*, runs as follows:

Nothingness is encountered in the world of objects. It cannot, however, be referred to being-in-itself since this is pure positivity. Nor can it proceed from a nothingness since this is not. It can, therefore, proceed only from a being, but a being subject to the qualification that it maintains a nothingness. Such a being has to constitute a unity with a nothingness, and such nothingness must not "befall" being because, otherwise, the problem would only be pushed back to that being which performs this feat on the former. We end in a regress because nothingness can never be shown to issue from a positive being. But even if being maintained nothingness within itself, this might be a "transcendent in the very heart of immanence." Being and nothingness have to be so unified that being is concerned for its nothingness; such being "must be its own nothingness." That is, we are not dealing once more with negation, a nihilating act, issuing from a positive being--which is impossible--but with a type of being of its own: a being which forms a unity with nothingness in such a way that it is "its own nothingness." It is thus distinguished from the phenomenon, which is also a unity of being and nothingness. Being of the type now discovered is the disjunct of being-in-itself. The opposite of being-in-itself is not simply nothingness but a unity of being and nothingness . . .

The phenomenologically negative--the negative being or <u>négatite</u>--is not indigenous to positive being. It has to be introduced from outside being as if it were a special product. The producer is consciousness as something "ontologically" negative, as a being which is its own nothingness. Viewed in this way, the connection between producer and product is the identity which consciousness as a negative shares with its product as the objective negative.

This relationship between origin and

> product is undialectical. But . . . we might say that consciousness, as the "ontologically" negative, is dialectical: it is because it is its own nothingness that it negates being.[21]

Consciousness is a nothingness. And yet it is also a revelation of being. Being is defined by Sartre as that which is. It is there, without reason or justification. It includes both being-in-itself and being-for-itself, the latter negating the former. Being is objective. It is. Being-in-itself is non-conscious being. It is the being of objects, of the world, of phenomena. It is opaque and solid. Being-for-itself, on the other hand, is conscious being. It is the negation or "nihilation of being-in-itself; consciousness conceived as a lack of being, a desire for being, a relation to being."[22] The for-itself brings nothingness into the world insofar as the for-itself as consciousness is <u>no thing</u>. The external objects of consciousness, the in-itself, stand in opposition to this consciousness. Yet that being of the in-itself cannot exist independently. Without consciousness, or the for-itself, the in-itself is an undifferentiated mass of being. Without consciousness there is no recognition possible of the ordinary things of our experience: rocks, chairs, rivers, trees. Conscious being (the for-itself) is essential to the in-itself precisely because it is a nothingness which can limit, differentiate, define, and thus give meaning to being-in-itself. Sartre appears to

have agreed with the Spinozistic dictum, omnis determinatio est negatio. And it appears, more importantly, that he holds the converse to be true as well.

The reality of the for-itself, then, lies in its negation or nihilation of a particular in-itself. Hence the in-itself is logically prior to the for-itself, and the for-itself is dependent upon the in-itself as the object of its negating activity and hence as its origin. The nothingness of the for-itself has meaning only as that which is other than being-in-itself. "Nothingness lies coiled in the heart of being--like a worm."[23] But this dependence does not stop with the origin of the for-itself. The continued existence of the for-itself likewise depends upon the in-itself. The for-itself is the (nihilating) consciousness of not being its objects.

> Consciousness perpetually negates the in-itself by realizing inwardly that it is not the in-itself; it nihilates the in-itself both as a whole and in terms of individual objects. And it is by means of knowing what it is not that consciousness makes known to itself what it is. Thus again in its daily existence the for-itself is seen to depend on the in-itself.[24]

Thus, "for consciousness there is no being except for this precise obligation to be a revealing intuition of something."[25]

The for-itself, then, is both negation and desire. "Desire is lack of being."[26] The for-itself, as a nothingness, lacks substantive being. The tendency, the

movement, of the for-itself is towards being, the drive to make itself an in-itself. But that sort of synthesis is an impossible project in that a being-for-itself would lose completely and absolutely its characteristic of consciousness if it were to become an in-itself. It would cease to be this free consciousness which brings nothingness into the world. Instead it would become merely another object in that world. And that, of course, is what Sartre means by "bad faith"--a refusal to accept the freedom of the for-itself and a desire to turn the self into an in-itself. This is a result of the anguish felt in the face of freedom. After all, the freedom of the for-itself is limitless. A consciousness not tied to or shaped by any person or self is a consciousness which can at any time choose a wholly different way of being. And yet consciousness is not general or absolute in any sense; from the very beginning consciousness is particular inasmuch as the objects of which it is conscious are particular objects and not the entire world. Each consciousness is a self-consciousness in the sense that each consciousness is consciousness of a unique and individual set of objects.[27]

This notion of lack in the for-itself brings us to a final concept in our brief attempt to lay a foundation of Sartrean ontology from which we can move to our concept of legal capacity. It is value which is what is lacked. It

is value which is what is sought and desired by the for-itself.

> The supreme value towards which consciousness at every instant surpasses itself by its very being is the absolute being of the self with its characteristics of identity, of purity, of permanence, etc., and as its own foundation. This is what enables us to conceive why value can simultaneously be and not be. It is as the meaning and the beyond of all surpassing; it is as the absent in-itself which haunts being-for-itself. But as soon as we consider value, we see that it is itself a surpassing of this being-in-itself, since value gives being to itself . . . the relation of value to the for-itself is very particular: it is the being which has to be in so far as it is the foundation of its nothingness of being . . . Value in its original upsurge is not posited by the for-itself; it is consubstantial with it--to such a degree that there is no consciousness which is not haunted by its value and that human reality in the broad sense includes both the for-itself and value.[28]

From this rather sketchy and, of necessity, incomplete overview of the Sartrean ontology, we may proceed to our specific undertaking. How might an existentialist make sense of and provide a way of determining who indeed is "legally capable"? More particularly, what insights might be supplied by an existentialist model of legal capacity to the problem confronting canon lawyers and judges about persons' ability to engage in an activity, a project, which does in some significant way define themselves and create themselves? The section of Being

and Nothingness which is most pertinent to our problem is chapter one of part four, the "Being and Doing: Freedom" section of "Having, Doing, and Being."

We have seen above that Sartre denied to the ego or individual "I" any substantiality (as in the case of the Cartesian cogito as substance). Yet there does appear an ego, or self, which exists as a unity of various acts of the same body. The for-itself recognizes a lack and therefore desires and values the formation of an ideal self by means of a choice of a fundamental project of being by which he may capture some of those "characteristics of identity, of purity, of permanence"[29] which would exist if there were a substantial ego. Reference to this ideal self as a fundamental project of being organizes and makes sense of his past. Furthermore, it provides a reference according to which he may choose present and future courses of action.

> The intelligibility of an individual's characteristic actions and ideas, as well as their unpredictability in detail, can be explained by the fact that he makes a long-term choice of the self he is trying to be, but has to invent the ways of trying to become that self from one situation to the next.[30]

This "long-term choice," which Sartre also calls an "original choice" and an "initial" or "fundamental project," is the source not only of one's identity, but also of both reason and value. Thus, it is a choice which is fundamentally irrational or, more precisely, pre-

rational. What will count as a reason, or a cause, in the future depends upon that original positing of a project.

Central to this theme, therefore, is the concept of freedom which lies at the core of the for-itself, or consciousness. The idea of self as fundamental project provides the freedom according to which an individual may make sense of his past and construct his present and future in a manner consistent with his past, but also

> This implies for consciousness the permanent possibility of effecting a rupture with its own past, of wrenching itself away from its past so as to be able to consider it in the light of a non-being and so as to be able to confer on it the meaning which it has in terms of the project of a meaning which it does not have . . .
>
> In fact as soon as one attributes to consciousness this negative power with respect to the world and itself, as soon as the nihilation forms an integral part of the positing of an end, we must recognize that the indispensable and fundamental condition of all action is the freedom of the acting being.[31]

Actions and projects are free and intentional. And Sartre seems to think that one finds the "individual person in the project which constitutes him."[32]

Certain authors have suggested that Sartre's view of a person perceived as the unity of a system of conscious relations is a version of the logical construction view of persons insofar as Sartre denies the existence of an immaterial (or material, for that matter) self as

substance.[33] That being the case, he then confronts a derivative problem. Since there is no substantial self to which we can attach experiences, how can we account for the fact that each of us has a unique set of experiences belonging to us? Philosophers going back at least as far as John Locke have provided us with memory as the central element of personal identity. Sartre thinks that memory is not irrelevant to the continuity and sense we make of our experiences as ours, but "memory is dependent on the continuity of a fundamental project which organizes the system of conscious relations."[34] Ultimately, of course, the answer Sartre would give to the question of what constitutes and unites a person as a system of experience is the nothingness to which we have referred above. "Negation is the cement which realizes this unity."[35] More precisely,

> . . . human beings can be intentionally related to nonexisting states of affairs and objects. It is by reference to a particular nonexisting state of affairs, an ideal self or fundamental project, that the body-subject organizes its thoughts and actions through time. . . The ideal self is what gives a coherent pattern to our actions; if we choose another project, that character pattern is replaced by a new one.[36]

For Sartre the distinction between individual acts and the fundamental project is an important one. Individual acts are separate from the fundamental project, of course, and make sense only in reference to it. They are

rational inasmuch as they follow from the choice of the fundamental project. That is, they are rational in the literal sense: reasons can be given for their choice and the ultimate reason always given is that they are instrumental in the implementation of the fundamental project. Phyllis Sutton Morris in her work Sartre's Concept of a Person makes the following observation:

> Sartre clearly rejects the idea that particular acts of the individual are irrational or absurd. It is not only the case that each action has some point to it, but that there is some underlying point which connects our actions with each other. This is true of our emotionally charged, as well as our calmer, acts and responses. Sartre does not treat emotions as unintelligible responses. Rather, emotions are part of that total organization of responses to a world which is structured in the light of our fundamental project.[37]

The same applies to acts of volition. What needs to be distinguished here is the relationship between ordinary acts of volition and this fundamental project. Sartre is not asserting that all acts of volition are irrational. In fact, he speaks of everyday acts of volition in ways that a Thomist would identify: actions which follow from knowledge, deliberation, and choice. But knowledge and deliberation, which occasion the ultimate choice, are "objective appreciations of the situation."[38] And these items Sartre even calls "causes."[39]

> Generally by cause we mean the reason for the act; that is, the ensemble of rational considerations which justify it.

> If the government decides on a conversion of Government bonds, it will give the causes for its act: the lessening of the national debt, the rehabilitation of the Treasury. Similarly it is by causes that historians are accustomed to explain the acts of ministers or monarchs; they will seek the causes for the declaration of war: the occasion is propitious, the attacked country is disorganized because of internal troubles; it is time to put an end to an economic conflict which is in danger of lasting interminably . . . What motivates the conversion of the bonds is the state of the national debt. Nevertheless this objective appreciation can be made only in the light of a presupposed end and within the limits of a project of the for-itself toward this end . . .
>
> To be sure, the cause is objective; it is the state of contemporary things as it is revealed to a consciousness . . . Nevertheless this state of affairs can be revealed only to a for-itself since in general the for-itself is the being by which "there is" a world. Better yet, it can be revealed only to a for-itself which chooses itself in this or that particular way--that is, to a for-itself which has made its own individuality. The for-itself must of necessity have projected itself in this or that way in order to discover the instrumental implications of instrumental things . . .
>
> Therefore the cause, far from determining the action, appears only in and through the project of an action.[40]

Even though my individual acts are free, that does not mean that they can be anything whatsoever or that they are unforeseeable. In addition, the freedom which philosophers ascribe to these acts of will is only a secondary, derivative sort of freedom. True freedom transcends any

ties to the will only; it is the basic characteristic of the for-itself in its relation to its fundamental project. And this fundamental project is precisely that; it is the foundation out of which all reasons arise and to which all subsequent acts of volition are related.

> Thus since freedom is identical with my existence, it is the foundation of ends which I shall attempt to attain either by the will or by passionate efforts. Therefore it cannot be limited to voluntary acts. Volitions, on the contrary, like passions are certain subjective attitudes by which we attempt to attain the ends posited by original freedom. By original freedom, of course, we should not understand a freedom which would be prior to the voluntary or passionate act but rather a foundation which is strictly contemporary with the will or the passion and which these manifest, each in its own way . . . In any case let us remember that the will is determined within the compass of motives and ends already posited by the for-itself in a transcendent projection of itself toward its possibles.[41]

In short, Sartre does not claim that reasons are irrelevant in the decision-making process or that reason is secondary to volition. Rather he is saying that what counts as a reason is determined by the choice of fundamental project. That initial choice precedes all other decision-making processes.

> Thus the fundamental act of freedom is discovered; and it is this which gives meaning to the particular action which I can be brought to consider. This constantly renewed act is not distinct from my being; it is a choice of myself in the world and by the same token it is a discovery of the world. . .

> We must insist on the fact that the question here is not of a deliberate choice. This is not because the choice is less conscious or less explicit than a deliberation but rather because it is the foundation of all deliberation and because as we have seen, a deliberation requires an interpretation in terms of an original choice.[42]

Deliberation concerns the justification of choices decided upon in order to implement the original project. But the real question is the justification of that entire project itself. Sartre suggests that no such justification can be given.

The freedom about which Sartre speaks, then, is neither an absolute freedom to do whatever one chooses nor an indeterminist sort of position which would hold that one's actions are "capricious, unlawful, gratuitous, and incomprehensible."[43] Rather, it appears that his view holds instead that our fundamental projects operate as final causes of a sort. Within a teleological framework one can better make sense of the relationship between individual acts and fundamental projects. The teleological structure of the project does not preclude the possibility of there being a variety of options to achieve that end, and it does make sense of and confer an order upon those choices of individual actions. That is, the final causality of the fundamental project renders particular acts intelligible even if they remain somewhat unpredictable and, always, free. Particular acts "have

meaning only inside a projected ensemble which is precisely an ensemble of non-existents."[44]

Thus, again, "the fundamental act of freedom is discovered . / . it is a choice of myself in the world and by the same token it is a discovery of the world."[45] This "choice of myself" may best be understood as the choice of a fundamental project which, in turn, amounts to a choice of an ideal self. And this ideal self

> is the ultimate end or fundamental point of all our actions, unless we choose another project; it is the relation of co-personality that unites our actions and our experiences into coherent patterns. The fundamental project is the ultimate end in terms of which we give reasons and make decisions; it is, in other words, the key to whatever rationality we exhibit.[46]

The fundamental project is the final end in light of which we make all choices and, even more significantly, provide reasons for those choices. It is the source of all of our responses, rational, volitional, and emotional. Those responses make sense only within the context of the larger project.

But this fundamental project is problematic in a few very serious ways. Many people are not aware of having made the choice of a fundamental project. Can one choose a project and yet not be aware of that choice? The need for an existential psychoanalysis appears to be based precisely on that possibility. What, then, does Sartre

mean by a "choice" of a fundamental project? What is clear is that whatever this choice may be, it is certainly not a separate psychological state or inner act or mental position prior to and separate from the actions and thoughts that construct and effect it. As Morris states, the choice of a project is "not an additional super-choice."[47] Furthermore, it is often our knowledge of the pattern formed by our actions that gives us some insight into our fundamental project. This means that it is not necessarily the case that we are unconscious of our project, but rather that we have a pre-reflective awareness of that project and our consciousness of it ~~is~~ limited to the fact that we live it through our daily actions.

> Existential psychoanalysis rejects the hypothesis of the unconscious; it makes the psychic act coextensive with consciousness. But if the fundamental project is fully experienced by the subject and hence wholly conscious, that certainly does not mean that it must by the same token be <u>known</u> by him . . . But what it grasps at each moment is not the pure project of the for-itself as it is symbolically expressed--often in several ways at once--by the concrete behavior which it apprehends. It grasps the concrete behavior itself. . . This apprehension, to be sure, is entirely constituted by a pre-ontological comprehension of the fundamental project.[48]

The value of others and hence of existential psychoanalysis lies in the fact that sometimes our project is more clearly seen by them than by us. We <u>live</u> our project in our day-to-day actions, and the total pattern of those

actions may be more evident from the outside.

Hence for Sartre there are two different kinds of choices that a person may make about his life. At the level of the fundamental project choices are made without reflection because the fundamental project is itself what makes sense of and structures reflection in the first place. The fundamental project is the source, not the result, of reasons. Once chosen, however, the fundamental project justifies a whole new range of other, particular choices. It is at that point that voluntary deliberation becomes meaningful because at this level decisions can be made (by reference to the pre-reflective choice of a fundamental project) about what can even count as a reason.

Finally, the fundamental project is not a final choice of a dominant and permanent end, forever unalterable. At times, of course, Sartre writes about it as if it were, as when he uses the phrase "my ultimate and initial project."[49] But he just as often speaks of the project as "the original integration of all my particular ensembles,"[50] and as "a projected ensemble which is precisely an ensemble of non-existents."[51] In <u>The Psychology of the Imagination</u> he refers to the self as "an harmonious integration of enterprises in the external world."[52] What this indicates is that the fundamental project is not the only end but does exercise priority in connecting and

unifying all other ends. The project may never be fully realized, but it at least offers an alternative to two other ways of conceptualizing the activity of the human person. It presents an alternative to the notion that one ought to commit himself to just one end, such as career or family. Furthermore, it is more responsive to the changing world than the more traditional view of person as substance which turns us into a permanent kind of being in the world. Sartre's theory is dynamic. And with mixed results. As Phyllis Sutton Morris reports, "The self we construct, however, is always incomplete and could be abandoned at any time."[53]

There is no limit to the number of kinds of choices which might serve as a fundamental project. Sartre enumerates at least two, being an atheist and being a thief.[54] It is worth noting that neither of these projects is exclusively a fundamental project. That is, they might also be subsequent volitional acts for which a person could give reasons. By definition, nothing that can be marked out by any philosophical principle distinguishes fundamental projects from other voluntary choices. Whether or not something is a fundamental project depends upon its relationship to the freedom of the actor and his subsequent actions. Someone might very easily decide to become an atheist (or a believer, for that matter) as a result of rational debate and evaluation. But in that

case, his choice of atheism (or belief) is not the choice of a fundamental project but is rather a choice made in light of a prior project which may or may not be identifiable to the actor. But Sartre also claims that atheism and theft could count as fundamental projects if they serve as the ultimate end connecting and uniting all other choices.

How might one incorporate this view of project to a theory of legal capacity? How, that is, might one decide whether or not a person can be adjudged "legally capable" by existentialist standards? Much weight, of course, is placed by existentialists in general and Sartre in particular on the avoidance of what he terms "bad faith." Bad faith, again, is the refusal to accept the full range of responsible freedom which is the for-itself. It may even include the attempt to objectify the for-itself, to turn it into an in-itself and thereby give it some substantial being. Any concept of legal capacity must therefore emphasize the acceptance of responsibility for those actions which one has performed. But it must at the same time leave one free to re-create himself if he is not happy with the self he has created to that point.

More specifically of interest, however, is the analysis of marriage as a type of fundamental project. Marriage seems not to differ significantly from atheism in that regard. While for some persons marriage, like

atheism, may be the result of conscious deliberation and knowledge, the romantic view to which we have alluded demonstrates that it need not always be. And, after all, "whatever operates as the ultimate point of an individual's deliberations, shaping his particular choices into a coherent pattern, deserves the title 'fundamental project'."[55] It is through the fundamental project that a person perceives his life as a unity. It is by reference to his project that he remembers selectively his past, interprets his present, and shapes his future. The fundamental project gives a coherent pattern to actions and serves as that which unifies experiences. That is why Sartre claimed that negation, nothingness, was the cement that realizes the unity of the self.[56] The self, the "I," can refer either to character as revealed by past acts or to a future self which does not yet exist. Each of these is nothing, in the sense that the past exists no longer and the future is not yet. The self is free and open. It is that against which the past makes sense and that which provides possibilities for making sense in the future. It is for that reason that Sartre identifies the ideal self with the fundamental project. It is only a self as project that can provide the framework or backdrop needed to interpret past and present; only a project is structured in the appropriate way. Only a project can be freely accepted or rejected, and only a project can shape

and organize activities. A substantial self could not do this.

Marriage can certainly serve the same purpose as the fundamental project. That is, it provides a framework within which one can make sense of one's past and around which one constructs one's future. If the person is, as Sartre seems to indicate, a pattern or ensemble of acts linked together by reference to an ideal self or fundamental project, then marriage surely can count as one sort of project. The particular acts of an individual can often be understood, and only understood, in terms of a project such as marriage. Outside of the context of such a project those actions might appear to make no sense at all.

The view of the basic irrationality of marriage which would serve as the foundation for any view that marriage can be considered a Sartrean fundamental project can be traced, again, to the romanticism of the nineteenth century according to which one simply fell in love for no reason, and then ran off and got married. Reason seems to be totally irrelevant here. And, as practical experience confirms, no amount of supplying two lovers with "reasons" works to dissuade them from running off if they so choose.

According to the romanticism which continues to influence our culture, marriage seems to be a kind of project for which it is logically inappropriate to give

reasons. Now we can give reasons for buying a cow or attending university. We may even be able to provide reasons for marrying in general. That is, we may be able to cite a list of principles according to which we might organize our life, and marriage might be one of the ways to achieve that sort of organization. But it is ridiculous to think that, having made that list, we should then set out to find someone with a similar (or even an identical) list and marry him or her. That option seems so utterly foolish and absurd because the choice of marrying someone or not cannot be decided by the intellect. An element of pure volition is involved. That volitional element shows up, again, in the popular literature and culture in talk about "chemistry" or "magic" between two people. A list of reasons, a set of principles, justification of any sort seems to be beside the point.

Indeed, it is missing the point of what marriage is not only on the level of the Sartrean fundamental project but on the canonical level as well. Marriage is an absolutely unique occasion with unique, non-interchangeable persons. It is a particular, non-repeatable occurrence. Both the "true love" of popular folklore and the canonical marriage establish a unique and irreplaceable state. But reasons can only be given in terms of universals. Justification depends upon universal principles. Universal principles and reasons, therefore, cannot be given for any

particular marriage due to the absolutely unique, non-replaceable, and non-interchangeable character of the partners. Therefore, there is no logical reason why a marriage cannot be viewed as a fundamental project in the Sartrean sense. It is precisely the kind of project for which it is logically impossible to give reasons. The act of consent to this unique, particular situation and, more importantly, to this unique and irreplaceable person, is logically independent of any lists of reasons or principles.

Another way of examining and understanding the Sartrean fundamental project is by seeing that project as something which changes an entire moral situation, which, more precisely, actually brings about a moral situation. For Sartre there are no objective values. Values arise only from our projects. No values exist and no reasons can be given until a project is chosen. Marriage is a project in that it transforms our moral situation in the requisite manner. It posits an entirely new context for us; it transforms forever and fundamentally our moral situation by providing us with reasons for rising above self-interest and taking into account obligations to another person. Thus in this sense, too, in the sense of altering dramatically one's moral situation by serving as the source of values, marriage counts as a Sartrean fundamental project. Sartre himself was not especially roman-

tic about marriage; he did not see it as a species of self-expression or assertion. Nor was he particularly concerned about the contractual aspects of marriage. But he certainly saw it as a transformation of self-interest into accounts of obligations to others. That is, he saw it as a state which could then make sense of and unite experiences into patterns of coherence and interpretation. It makes sense of the past and provides values according to which one constructs one's future.

This view of marriage as fundamental project is a view that corresponds nicely to the desire of contemporary theologians to account for a commitment to a relationship which continues over time rather than the competing view of marriage as a contract which is completed at the time of initial consent. That is, a theory of marriage as project contains the important concept of continuing consent to an on-going relationship, to a "community of life and love." And it is the will rather than the intellect which sustains this relationship; one must choose and constantly continue to choose and choose again to support that kind of relationship. The intellect is not significant in that sort of project except in determining the most suitable means to attain desired ends. Freedom, again, is central.

Thus it appears that Sartre's analysis of the fundamental project offers the requisite sense of freedom and

will needed to accommodate the canon law. It further offers a teleological model accordingly to which individual acts and experiences make sense only in light of final goals which shape their direction and provide their meaning. That, too, is an essential component of any theory of legal capacity: the end-directedness of human behavior. Capacity can only be determined by examining the ends freely chosen by a person and his ability and will to accomplish those ends. But the fruitfulness of Sartre's model as a viable (for the purposes of the canon law) account of legal capacity may be limited in two very serious ways: by the radical voluntarism and by the radical individualism of his model. The radical voluntarism of his model refers to his oft-repeated observation that the choice of the fundamental project is an absolutely free choice--one for which no reasons can be given. Reasons are important in deciding what follows upon that fundamental choice, but the choice of the project is itself basically irrational, i.e. one for which no reasons can be given. One tries out a project, as it were, sees if that project helps him shape himself into the sort of person he desires to be, and continues to accept that project for as long as he likes the results. But the project can be dropped at will just as easily as continued; again, there are no reasons either to keep the project or to reject it. There can, in principle, exist

no criteria against which one might measure that project to decide whether or not it is worth keeping. The choice of the fundamental project is pre-reflective.

Such a model will be unable to provide a foundation for an account of legal capacity as it appears in the canon law. If there are no criteria for making the choice of a fundamental project, then there are no formal criteria for legal capacity either. If a project is pre-reflective, then any adult is capable of making that choice. If one chooses a project at all, then one cannot have failed. If the project is not propitious in some way or another, it can always be abandoned. If no reasons count for the initial choice of a project, no reasons are needed to drop it either. If one chooses to marry, well and good. If one chooses not to remain married, then that too is fine. No reasons can be offered for the former act, and no reasons need be given for the latter. But then again, if there are no reasons for accepting the project in the first place, nor are there any reasons <u>not</u> to continue with it. If one is completely free, then one is always free to continue a project.

This account of legal capacity when applied to marriage as a type of fundamental project leads to some real difficulties. On the one hand, one cannot commit oneself forever to a permanent project because, by definition, there exists no such thing. The self is not a

substantial subject; its substantiality exists only in its own projects by means of which it defines itself. But if the self is not truly substantial apart from its projects, then it cannot commit itself forever to any projects. On the other hand, if the self is perfectly free, then it is perfectly free to continue with any project it has chosen. If one takes on the choice of the project of marriage, then there exist "no good reasons" (nor any reasons whatsoever) for dropping that choice. This observation may indicate some problems with the romantic conceptualization of human existence popular within the past 175 years as well. There seems to exist an asymmetry here. While people may think it rude and inappropriate to ask a man why he is marrying a certain person, it seems less unreasonable to ask why the marriage failed, should it later do so. Indeed, even in the secular law, while an "I do" or "I will" sufficed to initiate a marriage, grounds, reasons, are expected in order to terminate it, whether in cases of divorce where the grounds are explicit or even in cases of dissolution where "irretrievable breakdown" or "mutual incompatibility" is cited. If it is expected that we provide reasons to terminate a marriage, the logic of the matter would seem to require reasons to initiate it as well. What is also lacking in this model of legal capacity derived from Sartre's version of existentialism is an account that can accommodate a sense of responsibility for

one's projects. A continuing self implies continuing responsibility. But sometimes we just are not free to continue with our projects. Sometimes we simply do not have the control over situations that we would like and we end up unable to do what we intended. Sometimes our commitments conflict with one another. Sartre's view cannot explain that sort of situation. His theory offers an oversimplified view of conflicts of commitments. Because a person can drop a project at any time, he can avoid conflicts merely by eliminating--by refusing to choose any longer--one half of the conflict. If, for example, your marriage project conflicts in some serious way with your career project, then you can always drop one of those projects. Sartre appears unable to explain multiple projects and the resolution of conflicts that can result from multiple projects. And yet it is clearly and empirically the case that people do commit themselves to multiple projects.

In short, what this indicates is that Sartre's position is unable to provide grounds for excuses that may limit or eliminate altogether some of the responsibilities arising from our choice of project. Because there are no criteria for legal capacity, there are no criteria for failure either. By eliminating a continuing self and by eliminating reason from the choice of a fundamental project, we eliminate our responsibility for those projects.

But in so doing, we also eliminate the notion of a responsible self.

At the very least, that would make our relationship to any legal system--secular or canon--a problem. The law would be an artifical imposition from without on our freedom, rather than a system which creates possibilities for the exercise of our freedom. Ultimately, his account of the law could result in a positivist analysis of the law as a system constructed by any given society or government for the purpose of maintaining order. An existentialist would then view the law as a limitation of one's possibilities to exercise freedom inasmuch as the free exercise of freedom may result in incarceration if one chooses a project which the law forbids (if, for example, one chooses as one's fundamental project one of the examples Sartre himself provided in Being and Nothingness: to be a thief). The law, on this model, does not maximize possibilities for one's freedom but instead restricts them severely. A law regulating marriage and, more importantly, a law regulating the termination procedure for marriage, oppresses and limits the exercise of the freedom which alone defines the self.

The other difficulty with this model lies in its radically individualistic nature. Sartre does not address the issue of joint projects at all. It follows from his argument that all projects, because chosen individually,

are individual projects. Sartre does not address the problems arising from overlapping projects, from one project chosen by two individuals, because there is no room for such projects in his ontology. And yet that precisely is what marriage is, at least from the perspective of the canon law and Christian theology. When two persons each choose the same project, they of course retain their separate relationship to and perspective on that project. But if one of them continues to choose that project, and the other wants to reject it, then a clear conflict arises. The exercise of party number two's freedom (the rejection of a project no longer willed) would entail the limitation of party number one's freedom should that person will to continue that project. This individualist model cannot handle the difficulties that arise from the complicated world in which conflicts of commitments exist. Sartre might try to escape this dilemma by pointing out that although they have each chosen marriage to the other as their project, it is really the choice of two projects because that marriage is different from each of their perspectives. Because two persons are involved, there are actually two projects with the freedom remaining for either side to change its project. What that fails to acknowledge, obviously, is the fact that neither party can carry out his project without the cooperation of the other and the other is an essential part of the success of the

project. The project chosen is not simply marriage but is rather marriage to a particular person. It would not be enough, then, merely to say to our party number one, "Well, your choice of marriage as a fundamental project is not going to work any longer with party number two, but all that is needed is that you reassume the project with another person because your real project is marriage in general." Nor would it be accurate. Now most projects may not be like marriage. Most, that is, may be less intrinsically dependent on another person. Being a thief, or being doctor, or being prime minister of Canada are all projects dependent upon others in some way. A thief needs people from whom to steal, a doctor needs patients (or at least the disease of patients), a prime minister needs a party. But none of them requires one particular person rather than another. Any rich person, any diseased person, or any group of Liberals, Progressive Conservatives, or New Democrats might do. The marriage project differs significantly from these others inasmuch as the choice of the project at all entails the choice of the particular party attached to that project. As stated earlier, one does not choose marriage first and then look for someone--anyone--to marry. The project is "marriage to so-and-so," not merely marriage.

The nature of the marriage project as ordinarily understood, then, precludes an existentialist analysis of

it as a project and thus points out the weakness of this voluntarist model of legal capacity based loosely on a Sartrean and romanticist analysis. On the one hand, no one could commit himself forever to any project, including marriage, because to do so would be an exercise in bad faith, an attempt to substantiate one's self permanently. On the other hand, because there no standards according to which one takes on a project, there are no standards either according to which one decides that a project is no longer viable. If one is perfectly free to choose, and if no reasons enter into that choice, then once one has chosen there seem to be no reasons possible for rejecting that choice, either. One is perfectly free to continue with any project indefinitely precisely because there are no reasons not to. But, again, that does not seem to fit with our understanding of the marriage project. Sometimes one is simply not free to continue with the marriage project. At the very least, one is not free to continue with it when the other partner rejects it as a project.

It appears, in short, that the voluntarist model contributes at least two absolutely essential items to our understanding of legal capacity: an emphasis on the role of freedom in the choice of those projects by means of which one creates oneself and a view of project as something which shapes and defines one's existence and serves as the source of value and understanding of the rest of

one's life. The concept of legal capacity needs to preserve each of those elements: freedom is essential to the choice of projects by which a person creates himself. Sartre is correct in thinking that a self develops out of the choice of certain fundamental projects.

What makes this voluntarist model of legal capacity incomplete, however, is the failure to recognize that the self which is created through projects in the world is a social self dependent upon the existence and cooperation of other selves. This dependency may create certain social responsibilities such that one can never simply decide on one's own to drop a project, not, at least, if one values the freedom of others as much as one does one's own. Once that much is admitted, the need for an account of legal capacity that goes beyond the Sartrean analysis becomes evident. It becomes evident, that is, that what is needed is an account of legal capacity based on more than the ability to choose. The lines along which one might develop such an account will be explored in chapters seven and eight, along with an understanding of how we might construe this concept of a "social self." The radical freedom and voluntarism of Sartre's model must be linked to reason in some way to allow us the ability to be able to account for failures that occur even when a person wills a project. Sartre's version is simple: one either wills a project or one does not. The project ceases when

the will is withdrawn from it. Sometimes, however, a person wills something which he cannot achieve. Sometimes, that is, the will is not sufficient. On Sartre's view, it always suffices. Finally, the ultimate irrationality of the choice of a fundamental project makes it impossible to tie freedom to responsibility. We think that it is sometimes necessary to remind people of their responsibilities. The law, amidst its many other functions, does that. But the law can only accomplish that task if it can render an account of responsibility and an account of excuses as well, an account of reasons which may limit one's responsibility. Sartre's theory cannot provide us with any grounds for excuses because the project is chosen for no reasons whatsoever. That being the case, there can be no reasons given for one's failure to do all that one's project requires. Once again, Sartre's world is a bit too simple. One either chooses a project or not. Once chosen, it continues as long as one wills to continue it. One may drop it at any time. But no reasons can be given for that choice, either. Nor can any reasons (including the expectations of others affected by that choice) persuade one to continue with it. Although Sartre claims that his theory of absolute freedom entails absolute responsibility, only an empty responsibility can result from a theory which does not admit that reasons play any role whatsoever in the choice of a

project. Responsibility is not enforceable except by means of giving reasons. And failure to meet one's responsibilities cannot be excused except through the giving of reasons. Therefore, in Sartre's world one cannot fail in small ways, nor can one make sense of small failures in terms of excuses. One either accepts full and complete responsibility altogether, or one rejects the project altogether. There is no room for negotiations and accommodation, no room for compromise. And thus, perhaps, no room for marriage as a viable project.

Chapter VII. John Duns Scotus: Towards an Integration of Intellect and Will

Voluntas est motor in toto regno animae.
--John Duns Scotus
Capitalia Scoti

We have examined three distinct models of legal capacity only to find each of them lacking in some significant respect, especially in regard to our concern with the analysis of the sort of legal capacity required canonically for a valid marriage. Our legalist/positivist model met the requirements for the contractual aspect of marriage, delimiting some of the conditions necessary for the performance of any contract. But it could not account for the possibility of failure in the contracting activity. That is, it set up conditions so minimal that it is hard to imagine how one might fail to meet those conditions. And once met, one is married forever, at least in the eyes of the Church. As was noted in chapter four, the problem is not such a serious one in the civil law because contracts entered into bilaterally can be canceled in the same way: upon the consent of each party. But that will not work in the canon law because of the special status given to marriage as a new community which somehow extends

beyond and has a reality greater than the mere sum of the two individuals who are parties to it. That is, a valid marriage creates a new being which transcends the reality of the two individuals by creating a third reality. Our legalist/positivist model cannot make any sense of that, but sees marriage as a contract between two persons each of whom retains his identity absolutely. Their relationship lasts as long as the two individuals want it to last, but once they withdraw their consent from it, it exists no longer. The marriage "community" is then the sum of two individuals who enter into an artificial arrangement which can be terminated by their mutual consent. The marriage community is a relationship extrinsic to the individual partners to it; they share common interests and enter into a marriage to foster those common interests. But the individuals remain primary and essentially distinct from one another. The marriage is secondary; individuals exist as individuals both before and after the existence of the marriage. A marriage is valuable to the degree that it helps the individual members, meets their needs, makes their life easier. But the time may come when those needs, wants, and desires exist no longer. And it is precisely at that point that the marriage has outlived its usefulness. From that point on, its existence is threatened. But, as we have noted, that will not do for a theory which holds marriage to be indissoluble. Our

account of legal capacity must be able to make sense of some failure at the beginning of a marriage such that no true marriage can be said actually to exist. If that is the case, then the possibility is open for the marriage to be declared null. But annulments cannot be granted because of a simple desire on the part of either partner to be married no longer. A marriage can only be declared null if it never really existed.

The intellectualist model of the Thomistic authors of the manuals represents a philosophical attempt to understand how one might fail in the consenting activity which initiates a marriage in such a way that it could be said that a true marriage never even existed. According to this model, it was reason and the possession of understanding that constituted one's legal capacity. That is, to be capable according to law meant to be able to understand what one was doing when one consented to a legal relationship such as marriage. Failure in legal capacity meant failure at the level of the understanding and, hence, grounds for nullity focused primarily on failures at the level of reason such as insanity and other less severe forms of mental incompetence. If the reason was clouded, the will could not choose properly. If that were the case there would be no true consent, and consent was what created the marriage bond in the first place. Defective reason led to defective will. Defective will meant

defective consent. Defective consent meant no true marriage at all. Because of the assumed primacy of the intellect in all cases and the real distinction between intellect and will as components of the soul, failure was interpreted as a failure of reason, intellect, understanding, or knowledge. Theoretically that tended to limit the number of grounds for nullity to those that could fall under the scope of failures of intellect or reason. Practically that led to an explanation of marital invalidity in intellectualist language.

Developments in psychology in the nineteenth and twentieth centuries, however, have led canon lawyers and those involved in pastoral ministry to persons in troubled marriages to consider that many, perhaps most, failures of consent are not failures at the level of reason, knowledge, or intellect. Rather, many failures lie at the level of inability to commit oneself to a long-term project the terms of which may be understood in general at the commencement of the contract, but the day-to-day workings of which are beyond the understanding and beyond all possible foreknowledge. Marriage may require a capacity for long-range commitment and sustaining at the level of the will rather than the intellect. And marriage failures may be traceable not to any failures in understanding but, again, to failures at the level of the will.

If marriage is based on a free and continuing choice

of a long-running project, then it might appear that our third model of legal capacity, the voluntarist model, would best fit the bill inasmuch as this model emphasizes the individual freedom which is most often appealed to in discussions about the will. The whole notion of "project," especially projects which in some sense create the individual, can be traced to the existentialist trend in modern philosophy. Furthermore, existentialism provides a certain amount of sensitivity to individuals in anguish because of their inability to maintain or continue their projects. But, as we have noted above, this model of legal capacity also fails in a few significant ways. First of all the choice of a fundamental project is non-rational. Reasons cannot be given for the choice of the initial project; reasons only make sense in virtue of that initial choice which is, again, a choice for which there are no reasons. If there are no reasons for that initial choice (which, in our discussion, would be the choice of marriage in the first place), then no good reasons can be given either to continue in a marriage which is no longer pleasant or to quit the marriage. That is, this model denies altogether the role of reason in a way far too extreme and far too distant from the Thomistic heritage of the canon law and philosophy and theology of marriage. Furthermore, the existentialist model is extremely individualistic, as individualistic in its own way as the

legalist/positivist model. It is not clear according to the existentialist model just how two different individuals could ever share a project. Indeed, Sartre's world is so individualistic that no two persons ever could. Each person is forever trapped, as it were, in the self he has created by his own choices. That self is irremediably distinct and separate from all other selves because each individual has chosen different things and thus created a different self. Human beings have no essence, only individual existences. Two persons could then only choose the same project from their different, individual vantage points. That would mean that their projects might touch, might even intersect, but could never forge the metaphysical unity required by a theology of marriage such as the one we have here suggested. And, finally, projects can be dropped simply by the cessation of the willing activity of one of the parties. If I stop willing my fundamental project, that project ceases to exist for me. I can choose another totally different project (or person) at will. Hence, on this model marriages can dissolve simply if one person stops willing. Not even bilateral consent is required for the end of the project. Surely, then, this model can not work. According to this model of legal capacity, legal relations depend always upon the consent of each individual living within the jurisdiction of the law. Without that constant consent, force may be

the only other way to sustain those legal relations. And force will not do, of course, in any legal system which has as at least one of its goals the well-being and the eternal salvation of its participants.

And yet, certainly, each of our models has something necessary to offer to any understanding of the concept of legal capacity. From the legalist model comes the concept of performance of an action, or at least the initiation of an action, as tied to the utterance of the appropriate words under the appropriate circumstances. The marriage ceremony, the formal public uttering of consent, is what makes a marriage in one sense. It is a necessary component of the process. Necessary, too, is the possession of reason and a certain (if minimal) amount of knowledge on the part of the persons who are marrying. It is clearly true that insanity, mental retardation, or mental incompetence can limit seriously or even eliminate altogether one's capacity to engage in relations within a legal system, and especially to contract a valid marriage. But marriage requires more than the right words spoken by persons in their right mind. Marriage is the initiation of a long-term project which must be chosen not merely at the moment of the wedding ceremony but constantly throughout one's life. And it must be chosen freely. Furthermore, it is a project which shapes and perhaps even creates the very individuals who choose it.

Hence, the voluntarist model with its emphasis on free choice and will also contributes to our understanding of legal capacity.

Each of these models illuminates one aspect or another of this concept of legal capacity, and each corrects some of the weaknesses of the others. But no one alone, nor all three gathered together in some mix-and-match fashion, manages to capture the sense of legal capacity required to perform the function required by the canon law. What is required? As a practical fact what is required is a concept of legal capacity that will allow the canon lawyers and tribunal judges to adjudicate marriage cases, that is, to determine in which cases true marital consent was present and a true marriage begun and in which true capacity, and hence true consent, was lacking. What this entails is a method whereby one can judge from a person's behavior and from his stated intentions whether or not he is capable of undertaking a project like marriage. What is needed is a concept that does not make marriage so difficult to achieve that nearly everyone has grounds for nullity, but also one that does not make marriage so easy that no one can be expected to fail. One way to approach this problem is to look at how people fail and try to make sense of that, as we attempted to do in chapter three. Once the negative has been ascertained, perhaps suggestions of a positive nature about

what is entailed by legal capacity (rather than about what constitutes its lack) may be forthcoming. And yet certain positive statements about legal capacity can be made right from the outset. The sort of concept which we are seeking is one which must be teleological, one that views human activity as purposive and end-oriented in such a way that final ends act as final causes. Persons choose their short-term actions in light of long-term goals or projects. Marriage is certainly a project of that sort, an end which allows for the creation and actualization of the persons who choose it. Moreover, we need a concept which can tie this teleological understanding of marriage as a project to the contractual aspect which initiates the marriage. How do these two seemingly different interpretations of marriage combine and cohere? Further, what is required is a concept of legal capacity which can make sense of the human person and relate reason and will to person, or self, in an integrative fashion, in a manner in which the human self is a unity which is composed of formally (but perhaps not <u>really</u>) distinct faculties. Finally, some inroads must be made into the discussion of the relationship between individuals and the communities which they forge with some appreciation of the reality of the community created by marriage as well as that of the individual partners to it. That will lead us to the characterization of marriage as a metaphysical state

separate from and transcending the two persons involved in it, a community with interests of its own that may not always coincide with the individual partners to it. Indissolubility can only make sense within a model of that sort. This final discussion may well extend beyond the scope of this thesis, but it represents an issue which must be more thoroughly addressed by philosophers, theologians, and canonists if the marriage policy of the Church is to be seen as coherent and workable.

A philosophical position which appears to hold fruitful possibilities for the resolution of some of the questions raised above is a position that can be traced to another thirteenth century philosopher, the Franciscan John Duns Scotus. Scotus is often viewed in contrast to St. Thomas Aquinas as the representative of the opposing team in the debate between reason and will, as the champion, that is, of voluntarism in opposition to Thomas' intellectualism. This is quite probably an exaggeration; their difference is largely one of emphasis. The truer contrast would be between Scotus and those whom I have called "intellectualists," those writers of the Thomistic manuals popular in the late nineteenth and early twentieth centuries. A closer examination of Scotus' work indicates that he was not really just overturning the priority of reason as much as he was attempting to integrate two apparently distinct faculties into a unified human self.

And even this issue was recognized by at least one of the twentieth-century Thomists, J. F. Donceel:

> The way out of this difficulty is to remember that our intelligence does not know, nor does the will, will; but we know and will through these faculties. The difficulty arises from an exaggerated objectification of the faculties. Intellect and will are not substances but accidents. It is not really the intelligence that leads the will and the will that influences the intelligence, but I myself, as knowing, lead myself as willing; and I, as willing, influence myself as knowing. In an act of free choice it is the whole person, in his most intimate originality and spontaneity, who expresses himself.[1]

Both Scotus and Aquinas believed in the joint functioning of intellect and will. Their different emphases, however, may illuminate some issues of concern to our inquiry.

According to Scotus, the will may exercise a moral priority in our analysis of the human person, but it never operates independently of the intellect nor does it oppose the intellect. Scotus was a Franciscan; he was heir to a tradition going back before Francis to St. Augustine, a tradition which constructed a physics as well as a metaphysics according to which the universe was a manifestation of love and of affinities of natural bodies for one another. A tradition in which love or affinity is central is a tradition within which one is logically required to maintain the superiority of will over intellect. After all, will is superior to intellect in the same way that love is superior to knowledge. Scotus, of course, was

speaking from a world structured teleologically, a world in which objects have natural attractions to one another and human beings are drawn to God, who is love, as the final end and final cause. Final causality exerted a far more important role than efficient causality, and hence the will as that faculty which directs a person to his natural end was accorded a role more important than that of the intellect which illuminated the end but did little more in its attainment. But there was still more at issue here than a redirecting of the relative importance of the two faculties. What Scotus was insisting upon was that the human person was a unity within which both faculties existed, that moral worth derived from moral activity (which is essentially the activity of the will), but that the will did not operate independently of the intellect in any real way. Scotus advanced the position that intellect and will were only formally, not really, distinct faculties of the soul. St. Thomas appeared to hold the stronger position that intellect and will were really distinct, each having both its own activity and object, each of which might operate from its own power.[2] Scotus developed the concept of the formal distinction as a means of accounting for the unity of beings which were still composite in some way. This notion had special value in his discussion of the Trinity. But it had just as great an impact on his understanding of the human person as an

individual. A brief account of that understanding cannot help but clarify our question of the relationship between intellect and will.

The human person, according to Scotus and most of the rest of the medieval tradition (including St. Thomas), is an individual who participates in and shares an essence. Duns Scotus defined essence (or nature) as whatever it is which makes a thing what it is. For him essence is communicable; it can be shared by all individual persons. A person or individual, on the other hand, is in the words of Richard of St. Victor, a twelfth-century philosopher, "the incommunicable existence of an intellectual nature."[3] Each person has his own unique incommunicable existence in virtue of which he is a discrete individual. The special incommunicable existence of the shared essence is also for Scotus what defines a person. And the distinction between these two items, a person's nature and his 'thisness', his haecceity, although objective, is not a real distinction but a formal one. Scotus' adoption of the objective formal distinction was crucial to his metaphysics. Distinctions may be of three types: real, formal, and virtual (or logical). A real distinction is one which holds between two objects which are in principle physically separable. The common medieval illustration of a real distinction was always matter and form as they compose a human being. Immortal-

ity demanded that they be separable and capable of an existence independent of one another. A virtual distinction; on the other hand, is a distinction made by the mind where no objective distinction exists. A distinction between a thing and its definition would count as a virtual distinction, one made by the mind for illustrative purposes but one which has no basis in the thing under consideration. The objective formal distinction is yet a third type. An objective formal distinction applies when the mind distinguishes formalities in a thing which are objectively distinct but inseparable in reality. The distinction between essence and existence (or particular being) in a human is an objective formal distinction, one which obtains objectively between two formalities of the same person which are ultimately inseparable. Essence cannot "exist" without its particular instantiation and individuation, but particulars must similarly possess a nature from which they can be individuated. Essence, the universal formality, cannot exist apart from particular existence because "universality or not being a 'this' can only pertain to something in the mind."[4] Thus the only "existence" which an essence can have apart from its instantiation in an individual is as an act of the mind which can separate formalities in a unity. Scotus was no exaggerated realist.

Nor does the individual or particular exist in iso-

lation from its nature. The nature, or essence, is what it is that the particular is individuated from. Duns Scotus was no nominalist either, for he saw that for the nominalist there could be no foundation for universal statements. Matter was not, for Scotus, the principle of individuation. Rather, the principle of individuation was what Scotus called the haecceitas, the "thisness." The haecceitas is what makes this being this one and not that one. It is the Socrates-ness of Socrates and what makes him Socrates and not Plato, although they both share the same essence. A thing possesses this haecceity by virtue of its existence and, again, this haecceity is really inseparable from a thing's nature. It is, as emphasized previously, only an objective formal distinction.

So too is the distinction between reason and will. The remainder of this section will consider their relationship more precisely after some introductory remarks about the nature of the will in itself. What will be demonstrated is that for Scotus intellect and will are of equal importance because they exist together as two formally distinct faculties of the human soul which constitute a single unified self.

The human person can be distinguished from the animals which he surpasses in excellence because of the presence within him of two "very noble faculties," which are the intellect and the will.[5] These two faculties, or

powers, are neither identical with the soul (and hence merely logically or virtually distinct), nor are they really distinct from the soul. That they are not just logically distinct from each other and therefore identical with the soul is clear from the fact that they act differently and "different acts demand different principles of operation."[6] Nor are they really distinct, for that would destroy the unity of the soul. Intellect and will are two intrinsically distinct principles of operation; the soul is neither one of them nor something apart from them. Real distinction would imply the separability of the things really distinct from one another. Neither intellect nor will can exist apart from the other. Nor can they, either separately or jointly, exist apart from the soul. Nor the soul from them.

The intellect puts the soul in a condition to act freely inasmuch as free will and free action follow from deliberation and knowledge. There can be no will without knowledge. And yet Scotus insisted equally strongly that it is especially by means of the will that man distinguishes himself from the beast for whom life is wholly deterministic. It is by means of that faculty which makes him free that the human person controls and is accountable for his life. Hence, the will is more powerful than the intellect in that moral sense.

And yet the cognitive element remains an integral

part of the very definition Scotus gave of will as appetitus cum ratione.[7] This means that an act of the intellect is always in some way prior to the exercise of the will but, as we shall see, that in no way means that the intellect is superior to the will.

The will can be discussed in terms of itself or in relation to the actual act of free choice. In the first sense, according to Scotus, is can be called a natural appetite and, as such, it tends naturally and irresistibly towards its proper end, happiness. It is, in that sense, passive. There is thus an element of necessity in that movement towards happiness; happiness is the natural end at which the will aims. And yet it is reserved to the will to determine concretely just what is meant by happiness and what means are necessary to obtain it. And hence the will is free and something can be added to our initial definition. The will is appetitus cum ratione liber.[8]

Therefore the will possesses within itself the power to determine ends and choose the means to realize them; in short, it can command activity. This power can only be limited by the natural organic limitations of the person deliberating. Thus the will cannot overcome certain bodily forces, certain forces of nature. But the human person can always decide freely either to follow or not follow moral rules at all, or, more restrictedly, once the

former path is chosen, to choose among available and licit means to attain these moral ends. Liberty or freedom is thus a crucial component of our understanding of the will. It is the very manifestation of will. But it is not the will itself. The will, strictly speaking, is "the power to exercise knowingly and independently, without distinction and without restriction, the acts which fall under the jurisdiction of our conscious activity."[9] The will is absolutely and clearly autonomous in its sphere of activity. It is a self-determining power with complete control over its acts. "Ipsamet [voluntas] est tale activum, quod seipsam determinat in agenda. . . . Omnis voluntas est domina sui actus."[10] It does not possess, however, the power to violate, change, or modify in any way the natural inclination inherent in any other faculty. It cannot transcend or overcome, for example, the laws which control the movement of physical bodies. But that does not limit its exercise of freedom and autonomy. Thus this rational appetite makes us aware of and manifests irresistibly our ultimate good. But even if this manifestation of the end and the means to attain it were perfectly clear, that in no way would compel the free will to pursue it.

> Voluntas sic determinatur ad volendam beatitudinem, et ad nolendam miseriam, quod si eliciat aliquem actum circa ista objecta necessario determinatum elicit actum volendi respectu beatitudinis et

> nolendi respectu miseriae. Non autem absolute determinatur ad unum actum eliciendum, vel alium.[11]

Duns Scotus here reflected upon a common enough human occurrence. The human person often abuses his independence and causes himself no end of torment because he often chooses to disregard his natural ends for other short-term interests. Therefore, the will as "an energy of the soul,"[12] can act in a manner contrary even to its innate tendencies.

> Voluntas potest suspendere seipsam ab omni actu . . . Nedum potest velle et nolle, sed etiam non velle et non nolle; ergo quemadmodum libere se gerit dum actus exerit, ita cum illos, pro suae dominativae potestatis exercitio omittit.[13]

It has a dominant and absolute power over itself and all its actions.

> Potestas hoec dominativa voluntatis ita respecit velle et nolle, ut non praerequirat alios actus pro exercitio usuque illorum . . . Sicut igitur ad hoc, ut velit aliquod objectum, non est sibi opus alio actu, ita et ad hoc, ut velle omittat idem, aut aliud objectum, non postulat aliquem actum qui sit causa vel occasio ejusdem liberae omissionis; atque in hoc elucet dominium liberum voluntatis super actibus suis, quia sub omnimodam potestatem illius sic cadunt, queat illos elicere et prorsus omittere.[14]

Scotus' emphasis in these passages is clearly not an intellectualist one. First of all, St. Thomas spoke of intellect and will as distinct powers of the soul. While this does not entail the claim that intellect and will are

capable of separate existence, the language is still that of a real distinction. As has been stated previously, the precise and accurate reading of St. Thomas is a matter for further inquiry, but clearly those intellectualist interpreters cited at the beginning of chapter five read him in that way. So, too, does Lawrence Dewan.[15] St. Thomas subordinated the activity of the exercise of the will to the perception of the end of that activity, while yet according to that activity of will supremacy within its own province, the province of immanent acts against which "no external violence is possible."[16] Here, too, he is not so far from Scotus. While they both recognized that wrong actions could stem from intellectual error, that is, that the intellect does have a decisive influence upon the will and that failures in the willing activity could be traced to mistakes in the reasoning process, Scotus differed from Thomas in his continuous emphasis on the autonomy and control of the will over its own activities. While they both accepted that force or violence, for example, could restrain the activity of the will, Scotus emphasized that a forced activity was not even a truly human activity because to be human means to be one capable of moral choice. St. Thomas could certainly have admitted that without inconsistency, but the stronger insistence upon it belongs to Scotus. The will can choose or not, freely, to pursue its end. It is

not determined by its end or its object, as is the intellect. To be so determined, to fall under the intellect, would amount to reducing a person to a sub-human level, to the level that "sic homo esset unum bonum brutum!"[17] The will is the power to transcend all determinism; therefore, the intellect is inferior to it. The intellect, after all, is a natural faculty which cannot help but accept the object presented to it. The will, however, is a free power which tends freely towards its object. Nothing can force the will's consent.[18] The will is the locus of the specifically human power to intend and choose independently of all necessity, all restraint, and all force.

And yet, as noted above, the will is not isolated from the intellect but, instead, shares a close relationship with it. Together they are but aspects of a unified self; they are only formally distinct from one another. Hence, they are mutually dependent upon one another. The will is the appetite guided by reason--<u>appetitus cum ratione</u>. And an act of the intellect necessarily and logically precedes an act of will. Free choice requires prior knowledge and deliberation. The intellect clarifies; the will decides. But even to say this much is to say it incorrectly. The <u>person</u> chooses or decides after clarifying and deliberating. And the person is both intellect and will. The person, that is, is a psycho-logical unity within which intellect and will contribute

to a coordinated activity. But what is the structure of that activity? Intellect and will are mutually dependent, although the act of intellect precedes the act of will. "Volitio est effectus posterior intellectione naturaliter."[19] Scotus agreed with the Scholastic maxim, nihil volitum quin praecognitum. He was not an indeterminist. To be self-determining, as is the will, is different both from determining arbitrarily and from lacking determination altogether. For the will to be self-determining means simply that the will is free in its decisions because freedom is part of its nature. It does not mean that knowledge must thereby be excluded. On the contrary, "actus intellectus ordinatur essentialiter ad actum voluntatis."[20] The intellect may be a necessary condition for the act of the will, but it is not its moving cause. "Dico ergo ad quaestionem quod nihil aliud a voluntate est causa totalis volitionis in voluntate."[21] The object of the intellect cannot determine the will or call forth its activity. But a rational appetite cannot act blindly. Therefore, the object of the intellect performs an important function--that of informing and clarifying. Thus, while the will, insofar as it is a self-determining power, is the determining factor in all volition, the act of volition must nevertheless result from the joint cooperation of intellect and will. Will may be the principal cause, but the intellect is a neces-

sary condition. The intellect, however, is determined by its object while the will remains always free, i.e. self-determining. It is that freedom which ennobles man and is his perfection.

If this is true at the psychological level, it holds all the more at the level of the moral order. "Nulli debetur laus, nisi voluntarie agenti."[22] Without the will there is no moral order because without the will there can be no responsibility. With no responsibility we would amount to nothing more than Scotus' "good beast." Knowledge, the product of the intellect, may indeed aid us in a more responsible use of our liberty. But geniuses are not necessarily saints. Nor saints geniuses. As S. Belmond pointed out in his important work on Scotus, one need only compare a Voltaire to a Vianney to decide whether intellect or will is more important in the moral order.[23] Voltaire's brilliant intellect contributed not at all to the salvation of his soul, while a simple man like John Vianney continues to be revered as a saint not because of any intellectual accomplishments (for, indeed, there were none) but because he chose to act well, because of the exercise not of his intellect but of his will.

How might a model based upon the will as a freely active principle improve upon a more intellectualist model and the existential voluntarism of a Sartre? Scotus' model is an improvement in the first place because,

although it focuses on the will, it places great emphasis on the fact that the human psyche is truly integrated, with the distinction between intellect and will being a merely formal distinction. Thus, his model does not fall into a pure, irrational voluntarism as does Sartre's. Nor does it fall prey to the intellectualism of the Thomists, according to whom one can only fail to exhibit legal capacity if one's practical reason is so impaired that one cannot relate premises to conlusions in appropropriate syllogistic fashion or if one's consent is forced.

Scotus' model of the relationship between reason and will has the advantage of providing a picture of the human person as a unified self, as a self which moves towards ends which it chooses for itself rationally. When applied to a concept of legal capacity it allows for the end-directed behavior and the creation of the self by means of its projects--the worthwhile contributions of the Sartrean model--while not neglecting the role of reason in the choice of the projects and the self which results from them. And yet this model of legal capacity is not tied down, either, to an intellectualism which limits the ways in which one might fail to exhibit capacity. As stated above, according to the intellectualist model, failures at the level of capacity tend to be explained as failures of the practical reason, failures at the level of rationality. In order to demonstrate, then, that one lacked the

appropriate capacity for engaging in a valid marriage, one ends up turning to psychological impairments as evidence of lack of capacity.

But many marriage failures can be explained in a different and less severe way. Many marriage failures, that is, can be tied to a weakness of will or a defective will. And only a model such as Scotus' can shed light on that phenomenon.

We often speak of people as being weak-willed. Failure to achieve legal capacity according to Scotus' model, as indicated by the failure of a marriage, seems to be more often tied to weakness of will than to an inability to relate ends to means or to relate premises to conclusions in a practical syllogism. At the same time, when we speak of failed marriages we use the term "failed" precisely to indicate a less-than-desirable state of affairs, a state of affairs resulting from some deficiency in one or both of the parties. The marriage project is considered a serious one, not one to be dropped simply as an assertion of one's freedom, but rather one dropped reluctantly and only when it appears that something has gone so awry that it cannot be fixed. It will be unfixable in that sense only if some defect were present from the very beginning. An indissoluble union, again, can only be dissolved if it never truly existed indissolubly--if something were so wrong from the start that the

marriage did not stand a chance to succeed--not merely if one of the parties decides he no longer wants it.

What forms might this defect take? Again, we often speak of persons as being weak-willed. Weakness or defect of will is frequently assigned as the cause of, for example, one's inability to quit smoking. Many people who smoke would like to quit. They know that smoking is bad for their health; their intellect can put together all sorts of arguments in favor of quitting. They often recognize and even dislike intensely the side-effects of smoking such as impeded lung function, lessened resistance to colds, yellowed teeth, smoky-smelling hair and clothes. They are, most often, neither insane nor even emotionally disturbed nor immature. And yet they cannot quit. It seems that, in this case anyway, sometimes people can will the right principles and can also know what is needed to achieve it, but simply are not able to will what is appropriate to accomplish their ends. Now it might be argued that smoking is a bad example inasmuch as it is thought that smoking creates a physiological addiction which becomes more and more difficult to break as time goes by, an addiction which in effect seriously weakens the will. We might turn, instead, to another common complaint, that of gaining weight. Food is not addictive in the way that nicotine is. Many of us weigh more than we would like. We know that extra weight is unhealthy; we find it aesthe-

tically displeasing as well. Furthermore, weight gain results in poorly-fitting clothes or the financial outlay for a new wardrobe. All of these are unpleasant situations, and we know they are unpleasant. We also know how to avoid them--by not eating quite so much. But we often fail. It seems that sometimes we will an end and we know the means necessary to achieve it, but we are incapable of willing the means appropriate to it. In these instances it appears that the will might not be appropriate to the thing to be willed. The will is inappropriate to the task being set for it. The will does not possess the requisite capacity.

This analysis sheds some light and provides a new way of considering failure of capacity to consent to marriage. At least some marriages fail not because the marriage itself was not truly chosen, nor because of a failure to know what was necessary to make the marriage work, but because the willing of the end could not guarantee or determine the performance of the means to achieve that end. The action of the will is defective not in its choice of an end but in its inability to achieve that end. Unfortunately, that sort of defect only becomes evident after the fact, after the continued failure of the will. Unfortunately, too, this sort of defect cannot be predicted. It is not even ordinarily accepted--it is often denied--for a long time.

None of the grounds for nullity currently used seem to capture quite exactly the sense of defective will expressed here. "Lack of due discretion" indicates an incapacity to exercise prudence in one's judgment, a prudence that would presuppose a knowledge of the situation which one simply could not have. "Lack of due competence" is closer, to be sure, to an accurate account of the situation, but "competence" is too often tied to mental rather than volitional elements and hence is not helpful. "Consensual incapacity" may be accurate, but not without making explicit wherein the actual incapacity lies: not in the consent to the marriage but rather in the capacity to consent to what is appropriate to accomplish the marriage.

While obviously this model would need some careful study by persons concerned with the administration of the canon law, it does offer some useful suggestions towards a new formulation of the issue of legal capacity as it relates to the particular problem of failed marriages. It seems to explain better and reflect more accurately the actual experience of the persons subject to the canon law. It does, however, perhaps emphasize too strongly the reason/will distinction even though claiming it to be a merely formal distinction. It is also a model in which not too much is said about the social, communal aspects of our identity and how that relates to the reason/will

distinction. If we want to use this model to explain legal capacity, the ability of persons to act within social structures like the law to achieve their goals, then we have to deal with this communal aspect. Obviously, too, marriage is a communal activity dependent upon the intellect and will, i.e. the <u>self</u>, of two distinct persons. Therefore, it might be fruitful to supplement this medieval formulation with insights offered in the nineteenth century by persons of the idealist tradition who by and large are in agreement with Scotus but whose language and conceptual framework suggests an even more integrated theory of the self. I shall turn to them next in chapter eight.

Chapter VIII. Royce and Green: The Idealist Addition

> Will then is equally and indistinguishably desire and thought--not however mere desire or mere thought, if by that is meant desire or thought as they might exist in a being that was not self-distinguishing and self-seeking, or as they may occur to a man independently of any action of himself; but desire and thought as they are involved in the direction of a self-distinguishing and self-seeking subject to the realisation of an idea.
>
> --Thomas Hill Green
> Prolegomena to Ethics

The history of philosophy after Scotus is the history of the decline of the medieval model of the world and the beginning of the modern era with its emphasis on all sorts of new concepts such as individualism (which appeared to be a natural outgrowth of the nominalism which followed Scotus), equality, and liberty. With the beginning of the modern era also came Protestantism in its various forms, many of which rejected community and communal religious experience based on tradition in favor of the personal and, sometimes, mystical religious experience. Finally, within a few hundred years came Newtonian physics with its emphasis on efficient rather than final causality and with a mechanical structure of the world rather than one based on natural affinities. The medieval

model disappeared, remaining underground in the implicit but often unacknowledged philosophical presuppositions of the Roman Catholic version of Christianity. Most social philosophy, ethics, and epistemology in the English-speaking world reflected the new post-medieval conceptual model of reality: one based on the works of Thomas Hobbes, John Locke, David Hume, John Stuart Mill. Continental philosophy remained closer to its medieval roots but was equally caught up in an apparent rejection of much that appeared medieval. The pursuits of science and reason took hold, and philosophers began to turn from system-building to the analysis of epistemological problems concerning the very possibility of knowledge at all. The great chain of being had been broken. Democracy and the beginnings of political equality for all citizens replaced the medieval world wherein social and political relationships were structured hierarchically. Political power was severed from any divine account of its origin, and governments and the law were viewed as contractual agreements among individuals rather than the natural way persons organized their social relationships. The themes as well as the methodology of the Scholastics fell into disrepute, as attention shifted from the study of the universe and the human phenomenon as expressions of the same divine principle to the study of the concerns about the type of certainty man's reason could attain, unaided

by faith and disconnected totally from God.

This emphasis on epistemology continued through the eighteenth and into the nineteenth centuries. It is not until that latter century that we can begin to see a renewed interest in questions about the nature of reality, both physical and human. In the nineteenth century, for example, there arose an interest in the biological sciences once again and a development of evolutionary theory in biology, a theory which was teleological, based on final causality, rather than the mechanistic theory dominant in the physics of the seventeenth and eighteenth centuries which had focused instead on efficient causality. And with the advent of idealism in philosophy there developed not only that same sort of teleological analysis of the universe but also a renewed attempt to explain not only the processes of human knowledge, but how knowledge and reality are related. This sort of theory views reality as a system of interconnected particulars, as particulars which are not autonomous, isolated, and independent individuals each essentially separate from the other (as in the physics and philosophy of the Enlightenment) but rather as parts of a whole which are independent of that whole and yet derive their very existence from it. The whole, the community, is not merely the sum of its particulars. It has a life, a vitality, that transcends its individual selves if only in virtue of the fact that

its existence continues through the passage of time, during which time its members will change. Selves are born and selves die; the community outlasts those changes.

And therein lies a connection back to the Middle Ages. Selves are interrelated; they share a common quality which is their membership within the community. Now that quality may, at one time, be called being "children of God" and at another be called being different concrete determinations of the Absolute, but in each case what is expressed is far closer in meaning than the competing model of the Enlightenment. That period gave us an understanding of individuals as autonomous creatures, each forming communities by choice and primarily for reasons of self-interest (protection from the terror of a state of nature, guarantee of our natural rights, or the convenience of a centralized authority). The existence of the community according to this view is ontologically, as well as logically, secondary to the existence of individuals. On that other model, whether we return to the Middle Ages or move ahead to the nineteenth century, the community and the individual are related dialectically; each is dependent in some way upon the other. Communities, obviously, could not exist if not peopled by individuals. Individuals, however, only become individuals by a process of individuation <u>from</u> something, from the community. The community is the source of opportunities for

individuation and, hence, is the source of self-identity. This is not intended to imply that for the philosophers of the thirteenth and the nineteenth centuries the individual was less important than during those other time periods. Not at all. Josiah Royce, an American idealist philosopher of the nineteenth century, progressively emphasized the importance of the individual in his writings.[1] But he, like other idealists, appreciated that our knowledge of individuals is always secondary to that of general qualities. Only gradually, in our development from childhood to adulthood, do we learn how to distinguish and individuate. We always begin with the universal. Royce's book The Conception of God was an attempt to study historical theories about individuation. And within that book he spent considerable time discussing the position of Duns Scotus regarding individuation and determinateness. The individual is absolutely essential and indeed indispensable to logic:

> Without objects conceived as unique individuals, we can have no classes. Without classes we can, as we have seen, define no relations, without relations we can have no order. But to be reasonable is to conceive of order-systems, real or ideal. Therefore, we have an absolute logical need to conceive of individual objects as the elements of our ideal order systems.[2]

But Royce also concluded that it is never possible to know either an individual person or an individual object by trying to reach the uniqueness of him/it. While he was

sympathetic to Duns Scotus' belief that it is the unique character of each individual form, the haecceitas, that individuates persons, he thought that neither Scotus nor Aquinas had been able to define the uniqueness of the individual, "except in abstract and general terms which fail to reach the unique."[3] We can neither know nor understand isolated particulars. "Neither experience nor thought can by themselves give us a unique individual."[4] Particulars can only be known through their communities, through their families, their ethnic groups, their employment, their history. And their history is part of a communal history. Social relations may not exhaust the meaning of the individual but they are essential. Further, they are one source of self-knowledge as well:

> It is nearer the truth to say that we first learn about ourselves from and through our fellows, than that we learn about our fellows by using the analogy of ourselves.[5]

Royce continued in The Conception of God to specify a second way in which persons are individuated. Interestingly enough for our inquiry, he concluded that it was through our purposes and through our loves that we discovered ourselves as individuals. As J. Harry Cotton explains in his book on Royce,

> This world of truth and experience is determinate because the Absolute has selected it. Purpose is that which individuates and says, "There shall be no other." . . . And as the Absolute's

> preference for just this world, his purpose that is satisfied in the existing, is really a form of love, so on the human level it is love that individuates.[6]

Royce himself stated it thus:

> This practical, this passionate, this loving, this at first thoughtless dogma of love, 'There shall be no other,' is, I insist, the basis of what later becomes the individuating principle for knowledge.[7]

He granted that our loves and our purposes were often confusing and even conflicting, but he insisted that one only becomes a person to the extent that he centers his life around one comprehensive aim. This aim is my duty, a duty which no one else can do for me. Individuality is thus tied to the uniqueness of our obligations. We become who we are by means of our duties. Our loves, our purposes, our obligations, and our duties are what individuate us from one another. This idea was not fully developed until his The Philosophy of Loyalty appeared in 1908, but already in The Conception of God (1897) he seemed to be heading towards that final view according to which individuation is a product of one's choices and life projects. Thus, two apparently dissimilar time periods, the high Middle Ages and the nineteenth century, have far more in common with each other than either does with the time period in between, the beginning of "modern times," the Enlightenment.

Thomas Hill Green was a British contemporary of

Royce[8] who also echoed themes raised earlier in the history of philosophy by persons like Duns Scotus. Like Scotus, Green thought the will somehow essential to an understanding of the self. But because of developments in psychology between the thirteenth and nineteenth century and because of the idealist preoccupation with the individual, Green's exposition of the relations between self-realization, experience, knowledge, desire, will, and action in his major works[9] represented in a different way an attempt to integrate the various and diverse aspects of human experience in order to speak of a unified self which is in some sense the subject of these aspects. In that regard his work is a worthy complement to Scotus and one which also relates to the contemporary world in a way that Scotus' medieval model cannot. Green's constant point of reference was moral freedom both as it exists within the individual and in his political relationships, most especially the state. Like Scotus, he viewed the intellect and the will as each contributing to the freedom which is what makes us human.

But let us begin, as he did, by making some distinctions and providing some definitions. At the beginning of the section of the Prolegomena which opens the discussion of the will (Book II, Chapter I), Green distinguished between impressions and ideas, which characterize the world of knowledge and experience the discussion of which

he had just completed, and wants and motives, which characterize the moral sphere. Wants, he thought, are analogous in the moral realm to impressions in the epistemological. That is, wants are natural and organic. Furthermore, wants are not conscious.

> Wants . . . must be distinguished from the consciousness of wanted objects, and from the effort to give reality to the objects thus present in consciousness as wanted, no less than sensations of sight and hearing have to be distinguished from the consciousness of objects to which those sensations are conceived to be related.[10]

And so, almost immediately, we are again confronted with consciousness, which is of course related to the intellect. The self distinguishes itself from its wants by the imposition of consciousness on those wants and the transformation thereby of wants into wanted objects. And the existence of these objects, at least initially, is only in consciousness as our ideas. Further activity on our part is required to bring them into reality.

> The same thing may perhaps be otherwise stated by saying that the world of practice--the world composed of moral or distinctively human actions, with their results--is one in which the determining causes are <u>motives</u>; a <u>motive</u> again being an idea of an end, which a self-conscious subject presents to itself, and which it strives and tends to realise.[11]

Motives are not, then, natural phenomena. They are, rather, strictly human and thus the foundation for moral philosophy. Motives are superimposed upon wants. Wants,

or appetites, cannot be motives. A want can only become a motive "so far as upon the want there supervenes the presentation of the want by a self-conscious subject to himself, and with it the idea of a self-satisfaction to be attained in the filling of the want."[12] Although the language is different, it is not difficult to detect some connection between appetitus cum ratione and motive.

Now, wants do not cease to be wants when they have motives superimposed upon them. It is instead the case that wants continue at the natural level but something additional has been added at the moral level, self-consciousness. Consciousness "unites successive wants in the idea of a general need for which provision is to be made, and holds together the successive wants as the connected but distinct incidents of an inner life."[13] Nor is it the case that animal (natural) impulse is one component of motive and self-consciousness is another, and they are somehow summed together.

> If it would be untrue to say of the functions of life that they are partly chemical, because without chemical processes they could not be exercised, it is even more untrue to say of a motive, in the proper sense, that it is partly animal, because, unless an animal want occurred, it would not arise. The motive is not made up of a want and self-consciousness, any more than life of chemical processes and vital ones. It is one and indivisible; but, indivisible as it is, it results, as perception results, from the determination of an animal nature by a self-conscious subject other

> than it; so results, however, as that the animal condition does not survive in the result.
>
> The want, no doubt, may remain along with the new result--the motive, properly so called--which arises from its relation to self-consciousness, but it is not a part of it.[14]

Green was here spending a good deal of time distinguishing between instinctive (natural) actions and moral actions. An instinctive action is one not determined by any idea on the part of the agent of a good to be achieved. It proceeds without consciousness. Of course an instinctive act may not appear any different behaviorally from a moral act. Moral acts are the expression of an inner experience; self-reflection, however insufficient, is the only method we have of learning what is the inner mind which the act expresses.

> Anyone making this admission will of course endeavour to conduct his self-reflection as circumspectly as possible, and to save it as far as may be from errors which personal idiosyncracy might occasion, by constant reference to the customary expressions of moral consciousness in use among men, and to the institutions in which men have embodied their ideas or ideals of permanent good.[15]

Now the motive itself, and hence also the act of which it is the motive, is constituted, Green thought, by an act of self-consciousness. This act is "an act in which the agent presents to himself a certain idea of himself--of himself doing or himself enjoying--as an idea of which the realisation forms for the time his good."[16] Acts are

expressions of motives and, more importantly, are expressions of the self or agent. Motives are free; acts follow from the strongest motive but only insofar as that motive presents an option which accords with the agent's character, with the direction of his self:

> It is the particular human self or person that in every moral action, virtuous or vicious, presents to itself some possible state or achievement of its own as for the time its greatest good, and acts for the sake of that good.[17]

That self is a unity, "not something apart from feelings, desires, and thoughts, but that which unites them, or which they become as united, in the character of an agent who is an object to himself.[18] But the self is not a static entity; rather it is a developing person:

> Just as there is a growth of knowledge in man, though knowledge is only possible through the action in him of the eternal subject, so there is a growth of character, though the possibility of there being a character in the moral sense is similarly conditioned. It grows with the ever-new adoption of desired objects by a self-presenting and, in that sense, eternal subject as its personal good. The act of adoption is the act of a subject which has not come to be; the act itself is not in time, in the sense of being an event determined by previous events; but its product is a further step in that order of becoming which we call the formation of a character, in the growth of some habit of will.[19]

Green thus shared with Scotus a belief in the self-determination of the subject, a determination by choices of projects according to which the self develops. Motives

do not determine acts; acts are determined by the character of the self, that direction in which he has chosen to develop. And,

> What we call a strong character we also call a strong 'will.' This is not to be regarded as a particular endowment or faculty, like a retentive memory, or a lively imagination, or an even temper, or a great passion for society. A strong will means a strong man. It expresses a certain quality of the man himself, as distinguishable from all his faculties and tendencies, a quality which he has in relation to all of them alike. It means that it is the man's habit to set clearly before himself certain objects in which he seeks self-satisfaction, and that he does not allow himself to be drawn aside from these by the suggestions of chance desires. He need not therefore be a good man; for the objects upon which he concentrates himself may be morally bad . . . But, on the other hand, the weak man, taking his object at any time from the desire which happens to affect him most strongly, cannot be a good man. Concentration of will does not necessarily mean goodness, but it is a necessary condition of goodness.[20]

The will, then, is an expression of the character of the self, a self created over the course of years by the choice and attainment of various projects. The will organizes and structures the life of the self. For Green as for Scotus the act of willing is not separate from the act of thinking:

> If in all cases of willing the object willed is the realisation of an idea, the object of will is also an object of thought. It is only for a subject which thinks, and so far as thinking, that it can exist.[21]

Acts of will involve thought about the object of the act of will, for the object of that act is always an idea which the subject seeks to realize. The act of will involves

> such thought as is implied in the conception of self, of an object present to the self in idea as desired, of a world in which that object awaits realisation, of conditions under which it is to be realised.[22]

Thus Green, like Scotus 500 years earlier, did not attempt to sever reason or intellect from will, nor to declare one primary and the other secondary. Like Scotus, he envisioned the will as the self in its construction of itself by means of its projects and activities, the self as self-determiner. His language was not that of Scotus, but the affinity of their positions is quite evident. His addition to or improvement upon Scotus lay in his continual emphasis on the self as a unified subject, the self as an agent. That addition does not detract from but rather serves to reinforce the strength of the position put forward so much earlier by Scotus. His different emphasis advances our argument in the following way. His use the of term "will" goes beyond that of Scotus, beyond that of the Scholastics, and beyond that of those whom I have called intellectualists. He uses "will" to mean "entire self" or "character," not, again, "a particular endowment or faculty" on the order of "a retentive memory,

or a lively imagination, or an even temper," or, we might add, a brilliant intellect, but "a certain quality of the man himself, as distinguishable from all his faculties and tendencies, a quality which he has in relation to all of them alike."[23] The will is the self or the character. Thinking, intellection, and reasoning are incorporated into the definition of this self, as is the older definition of the will as the volitional faculty of the human soul. Those two elements become interconnected, interrelated, and inseparable aspects of a unified self who is a subject creating its character over time by the realization of its projects. There is a connection, to be sure, between this concept of "will" and goodness, and hence the moral element of the Scotist presentation. And this moral element is, Green insists in a way reminiscent of Scotus, a product both of thinking and willing in their traditional senses.

A further connection between the idealists and Scotus shows up in a far less likely place, in a series of lectures published as Understanding and Being by Bernard Lonergan. Lonergan was neither an idealist nor a Scotist in any traditional sense, and yet he shared with each of these groups an understanding of the will as the expression of the very character of the self. He explained that knowledge, the activity of the intellect, is an activity guided by absolute, objective norms. And thus, "If my

cognitional process is guided by my desires and fears, the result is not knowing but simply wishful thinking. There has to be a detachment from self in knowledge."[24] However,

> When the question arises of the free act, of willing, of the practical course of action, I reach rational self--consciousness, and what is at issue is fundamentally myself.
>
> When we say that the act of will is free, it is similar to saying that intellect understands. I understand by my intellect; I choose by my will. The ground of the free act is myself; I am the id quod operatur. What underlies an individual's choices? The ultimate reason is himself.[25]

Lonergan later adds:

> By my free acts I am making myself. The series of my choices gives me the character I have. One can say that all men have the same nature, and that it is in virtue of matter that all men are distinct individuals. But there is also a personal differentiation of one man from another, and that personal differentiation of one man from another is the cumulative product of each man's own free choices. One becomes oneself by one's choices. The ground of choice is myself as rationally self-conscious and making myself.[26]

Thus we have discovered one of our own contemporaries who also found value in that tradition going back to the Middle Ages according to which the will expressed the individual in some unique way. Lonergan's position avoids the non-rational character of the existentialist model while yet preserving its sense of project and of creating

oneself through one's choices.

Coupled with the addition of Royce--the view that knowledge of the individual comes after knowledge of the universal (and all that view entails)--the idealist tradition exemplified by Green and expanded upon by Lonergan can also shed some light on the practical aspects of our problem of legal capacity. The Roycean view of community could serve as a foundation for an inquiry into the metaphysical state generated by appropriate consent of two legally capable persons to a marriage. While that inquiry lies beyond the scope of the present thesis, it is a project which could supplement any philosophical justification for the Church's insistence upon the indissolubility of marriage. That indissolubility is tied directly to the eternal (i.e. "What God has joined together . . .") status of the valid marriage. Such a study would certainly complement the development of a metaphysical justification for indissolubility such as the one suggested in chapter one. The idealist account of community certainly is more helpful in the study of the metaphysical status of marriage than is its Anglo-American counterpart, inasmuch as that latter tradition views the community as not quite real but just a function of the joint desires or interests of individuals. That theory can only lead, as we indicated in chapter four, to a view of marriage as a contract initiated by the desire of the parties and dissolvable by

their mutual consent as well. The idealist tradition, on the other hand, provides a theory of community wherein communities have a reality which goes beyond the sum total of the reality of their members. And that theory, in turn, explicates the notion of a social self.

One of the basic tenets of such a theory of community is the realization that neither the individual nor the community can exist apart from the other, although neither one exclusively explains the other, either. They share some common essence, but each expresses that essence in its own particular fashion. The individual's interests may not always conform to those of his community, and his community's interests may not always appeal to him. Such can certainly be claimed to be true of that community generated by marriage. Individual goals sometimes conflict with "family" goals; individual interests sometimes fail to coincide with family interests (especially where children are involved). But the realization of the mutual dependence of self and other, or self and community, should result in an attempt on the part of each to get along with the other, to cooperate and assure each the freedom needed to accomplish their respective goals. While those goals are incompatible, compromise may be necessary.

Now the idealists shared with the ancient Greeks the belief that the essential end or good for a human being

was the realization and actualization of his potential. Self-realization is held to be the end of moral activity. This individual is the seat of all value, but he is not an isolated unit. He is the particular embodiment and instantiation of whatever it is that is common to all men and as such is conscious of himself not only as different from others but also as a member of the totality. The idealist also shared with the Greeks the belief that man is by nature a social being. The realization and actualization of a human being can only occur within society. And each person belongs, obviously, to a number of different societies--church, school, clubs, associations, the state--within which that actualization happens.

All individuals share at the very least a community of language and meaning. Those who marry generate their own special community. The community, again, is only made visible and can only exist through the individual. The individual as a particular "this" is the existential instantiation of that community. But the separation of the individual from the community, especially when speaking of the marriage community, is only a formal distinction, to use the language of Scotus, not a real one. The self, therefore, is social as much as individual. His individuation is an individual <u>from</u> his community; individuation is a negation and cannot occur apart

apart from a community. The idealists go on to speak of the reality of things as lying in their participation in a system of relations.[27] The very reality of the self, then, is based on its relations with other selves as well as its absolutely unique perspective on the world. And while each self has a unique perspective, each self shares in relations with other selves. Each self differs from every other self, but each self shares and establishes, in its relations with others, communities of meaning. And this shared exchange of meanings expressed through language illustrates that what we have in common is not merely external--not merely a set of shared interests--but something more intimate indeed.

The above is obviously just a sketch of the way one might begin an argument for the metaphysical status of the marriage community. It is also an explanation of the concept of the self as social which is held not exclusively by the idealists. The further elaboration of either of these themes falls outside the scope of this thesis. Nevertheless, a minimal understanding of the two is invaluable.

In that light, the value of Green's contribution to our understanding of the will lies, again, in the theory of self which represents the self as an agent or actor who creates himself through his projects and through his relations with others. There is in Green a sense of the

teleology, the end-directedness, of the agent which was so initially appealing about the Sartrean model. But Green's is an end-oriented movement which is clearly neither individualistic nor irrational. Clearly, that is, the self is rational throughout the choice and the carrying out of projects. Reasons can be given both for the fundamental as well as for the subsequent projects. Green's presentation of the self can also provide an explanation for failure of "will" in this new sense as failure of character or self as something distinct from failure of intellect and something going beyond coerced, conditional, or simulated consent. Persons, selves, either have or lack legal capacity. That lack can be evident in defects at all levels of the self and in the self as a whole. A defective "will" on Green's model would result in a self which has a picture of itself according to which it makes its choices, but sometimes fails to grasp the connection between those choices and the things that need to be done to attain them. That self may <u>know</u> what its goal is, may have an <u>idea</u>, that is, of the end to be realized. It may also <u>know</u> what means are appropriate to attain that end. But it simply may not be capable, because of its character or the self which it already is, to implement those means. And it may not be able to judge its own incapacity. That is, the "will," the character of the self, may not be proportionate to that which it wills; it may be totally

inappropriate or inadequate to the task being willed. It might will the right principles but not be able to will the practical measures to achieve those principles. It might, that is, will marriage as the kind of project which corresponds to the sort of self it wants to be, but be unable to will those things required to make the marriage work. A person might want a marriage but be unable to will those day-to-day items out of which a shared life develops: the compassion in the face of disappointment, the meeting of financial responsibilities, the care of and attention to not only a spouse but perhaps children as well. That self may just not have the strength to fulfill any of those obligations, and unfortunately may not realize that until after the marriage has occurred. This is one way to characterize a defect of "will" which affects and, indeed, can even nullify marital consent. After all, one cannot consent to what one cannot perform. Unfortunately, it is extremely difficult, perhaps even impossible, to predict such a defect.

One of the other ways in which this model improves upon the existentialist and the legalist both is in the realization that one's identity is a social identity as well as an individual one. Perhaps that is part of what makes prediction of marital success so difficult. Marriage generates a community which has a life of its own and transcends the individual realities which compose it.

The individuals within the family develop a self-identity which is shaped by that community. It is conceivable that some communities, certainly those populated by persons acting solely in their own interest, might stunt one's development or even cause harm to one's sense of identity. An evil community can make one evil; an unhappy community can make one miserable. But any community which destroys or seriously harms the individuals within it is not a true community according to the idealist definition. The community is the arena within which the individual achieves self-realization and self-identity. If any community denies or limits the possibilities for our self-realization, to that extent it is no longer a true community. No community, obviously, is perfect. But a community which harms its members harms itself; one which denies realization to its members denies realization to itself; one which destroys its members destroys itself. Now this denial of realization, this destruction, is not performed by an entity called a community but is carried out by other members of the community. Communities act through their individuals. Therefore, the community's failure is tied to a defect in at least one of the members of it. Destructive communities, be they marriages or larger groups, are intolerable and unacceptable because, again, by destroying or harming their members they are destroying their very existence as well. Just as communi-

ties which promote such kinds of harm are not true communities, individuals who carry out these harmful activities are not truly capable persons (supposing, of course, that a "true" person would be one who possesses the capacity of which we have been speaking). They may, that is, lack the capacity to work within the system of social relations in question, be it a marriage or a larger community. They may be able to will the final end of a "community of life and love," or the final end of a system of social relations within which one carries out one's projects and realizes oneself, while yet remaining incapable of willing the everyday means necessary to achieve those ends. And that is a failure at the level of legal capacity.

This analysis might begin to make sense of the issue of "consensual incapacity" as it is addressed by the canonists. For surely the implication of what Green, Royce, and the other idealists claimed was incapacity is dispositional and related to (and, I would suggest, dependent on) the sort of self or character developed to that point in time. This would be an incapacity rather than a simple failure of will such as results from force or fear, or which could be described as either conditional consent or simulated consent (which covers the exclusion of the goods of marriage).

What I am suggesting is a theoretical development

along lines already, it seems, taken in the practice of adjudication by canon lawyers and tribunal judges. I am suggesting, that is, that we use a formulation like the one presented by the idealists to make sense of and clarify this notion of consensual incapacity. According to that formulation, consent is more than the "act of will" expressed in canon 1057.2 and is actually an "act of self," an act of a unity of character, motives, and purposes. A defect of consent would then be a defect not in discrete acts of will such as a defective act of will at the exchange of consent during the marriage ceremony, but rather a dispositional incapacity, an incapacity of character, which would not limit one's ability to know what marriage was and consent freely to that, but would render one incapable of willing the means necessary to achieve that end and thereby limit one's freedom in a different sense altogether from the lack of freedom, say, in a shotgun wedding. But that would just as clearly be an invalidating incapacity.

Now to say that these incapacities are dispositional is to say that their existence becomes evident only if triggered by the right event or chain of events. Some trigger event may make the incapacity appear. The incapacity is irrelevant unless or until that trigger event occurs. It is here that our concept of a social self becomes important again. Marriage, or events within a

marriage, may serve to trigger one's incapacity not in the sense of causing it to exist, but in the sense of illustrating or manifesting its existence. Marriage to the "wrong" person can bring that incapacity out and make very evident the fact that one is unable to carry out what one has promised. Marriage to a different person may not result in the same occurrence. Now this is not quite the same as saying that one does not like one's spouse any longer, or that one does not care to stay married. Sometimes love dies. More frequently, perhaps, passion wanes and affection diminishes. These may be reasons for divorce but not for nullity. But I am speaking of something different here. There are certainly mixes of people which do not work, <u>despite</u> all good intentions, despite love, passion, and affection. And this may be traced to an incapacity on the part of one or the other, or both. Now because of the love, affection, and good intentions, this incapacity may not become evident for years. Sometimes it never becomes evident at all, perhaps because of the saintliness of the other partner. And if it never becomes evident, then it is not of concern to the canon lawyer. The law only enters when it becomes clear that incapacity is a possibility, as in the case of the irretrievable breakdown of a marriage. If a trigger event does not make the disposition evident, then there is no legal problem.

But what might be the criteria by which such an incapacity may be judged to exist? After all, that is the problem with which the canonists are engaged. Ladislas Orsy, among others, recognizes the difficulties.

> Because of its incapacity to penetrate into the internal world of human persons, and its capacity to regulate and judge external actions, the law stands partly impotent, partly competent, before the issue of consent. It stands impotent because it has no means of knowing how the human spirit works in general, or what it has done in a particular case; for such information the law must turn to other sciences. It stands competent because the manifestation of consent is an external act with far reaching social consequences. Indeed, if the law wants to bring marriages into its own orbit, as it does, it must have criteria for the recognition of an act of consent; it must also provide a procedure for judging its validity.[28]

Moreover,

> The world of law is the world of external, mainly social structures and relations. If it wants to bring a judgment over events in the internal world of the spirit, it must gather the necessary evidence from the external world, and then proceed further by way of conjectures that become legal presumptions. . . Matrimonial tribunals operate on the same rule: they cannot pronounce on the existence of a sacrament, only on the amount of the external evidence. When the external signs are such that by an prudent judgment they cannot be consistent with the required internal disposition, the tribunals pronounce that there is evidence for nullity. They cannot pronounce on the internal reality of the sacrament, known to God alone.[29]

The first bit of evidence of this incapacity is, of

course, the breakdown of the marriage. While that is a necessary condition for the marriage even to be brought to examination, it is clearly not a sufficient criterion of incapacity. I am not suggesting that this sort of defect or incapacity is the cause of all marital breakdowns. Some failures in marriage may just be due to genuine bad choices and simple bad luck. One might want to argue that the people involved in those situations also deserve a second chance at marriage. After all no one, it seems, should be condemned forever because of an honest mistake. But that would be an argument for divorce, not for nullity. Those situations fall into an altogether different class from the species of incapacity with which this thesis is concerned. The Church is not yet ready to make that move, probably because of its belief in the indissolubility of marriage. And that takes us once again beyond the scope of this thesis.

Other criteria for incapacity are not explicit, due in part to their ambiguous nature and in part to allow the judges the utmost flexibility and latitude in judgment, the better to temper justice with compassion. On the first point, the ambiguity of the criteria follows from the very nature of consent itself. As Orsy points out,

> The law's approach is mostly negative: it determines the typical cases when consent cannot exist or must not be presumed to exist. . . It is not easy for the law to handle consent. The world

> where it is given or withheld is far away from the world where the laws operate. Consent is born and exists in the internal world of the human spirit; legal norms regulate the external social relations in a visible community. The legislator can do no more than to catch a glimpse of the internal universe of the spirit and then propose some external norms by which the presence or absence of consent can be conjectured.[30]

However, there was also an intentional vagueness built into the criterion of the capacity to assume the essential duties of marriage, the third point of canon 1095 which also specifies criteria of "sufficient reason" and "discretion of judgment." Orsy relates,

> The expression, "cannot assume the duties for causes of a psychological nature," is very broad. It defies any precise definition, all the more since the psychological causes can be of an infinite variety.
>
> The history of the drafting of this canon does not leave any doubt that the legislator intended, indeed, to broaden the rule. A strict and narrow norm was proposed first: Those who cannot assume the essential obligations of marriage because of a grave psycho-sexual anomaly. Then a broader one followed: . . . because of a grave psychological anomaly, then the same wording was retained in the text submitted to the pope; finally, a new version was promulgated: because of causes of a psychological nature.[31]

Some items, however, which are counted as symptoms under this canon include extreme irresponsibility or immaturity, emotional or physical abuse, and any character disorders. It is here that the witness of experts in psychology and psychiatry becomes especially helpful.

Now these same kinds of behaviors--especially neglect and irresponsibility--may be explained in other ways. They may be the result of conscious human evil, rancor, and resentment. Or they may be the result of indifference, of not caring any longer. And those would be grounds for divorce, not nullity. The tribunal judge must ultimately decide. (A cynic might, of course, claim that those whose advocates could best present their case by means of the first explanation rather than the second would have a better chance at an affirmative decision. But the canonist would remind him that God will ultimately set things right if the procedure has been abused. The canonist would also remind him that the Christian would rather err on the side of compassion.)

A question arises, in this context, about the possibility of remarriage. Declarations of nullity are often sought after a civil divorce because one of the parties wants to marry again. Now obviously, if the incapacity were permanent a remarriage could not be allowed. And that does occur not infrequently, especially in the case of incapacities such as homosexuality and psychosis, each of which is considered permanent. But the interpretation of consensual incapacity which I am advocating need not view all incapacities as permanent. Logically this sort of incapacity would only be permanent if one adopted a view of the self that was static and

unchangeable. What I am suggesting, instead, is that view of the self or the character indicated by Green, Royce, and Lonergan: a view which claims that the self develops through time and experience. The self, or character, on this reading acquires its very identity in response to its purposes, projects, and, most importantly, other persons. We literally become who we are through our relations with others. This is a common-sense observation with serious philosophical ramifications for our project. Of course we realize that if we had been born into a different family with a different number of siblings, perhaps into a different culture or nation, we would have been different. My claim is that the self we are is similarly affected by the choice of a spouse--if not more so. Therefore, if the self one was at the time of marriage was immature (emotional immaturity is held to be invalidating as a species of lack of due discretion), that immaturity would affect not only that person but the spouse as well. Now, one sort of spouse may respond, due to his or her particular character, in such a way as to encourage and aid (although perhaps not even consciously) the original party to overcome his or her immaturity. That defect of character would disappear; it would be "cured." In that case, no marital breakdown resulted and the question of incapacity will probably never arise. One could also suppose that the original party never overcame his or her

immaturity, that he continued to take advantage of the saintly spouse. In that case, his character remained defective but the "marriage" continued and, again, the question of incapacity may never arise. But that does not mean that it does not exist. Nor, then, does it mean that the marriage is valid but just that its validity has not been called into question.

However, imagine the marriage of this same immature person A to a spouse B who genuinely cares about A but who has not the fortitude to contend with A's behavior. Suppose, that is, that a "trigger event" occurs. B divorces A, meets C, and wants to remarry. B applies for a declaration of nullity, charging that A's immaturity prevented him from consenting freely to what is entailed by a "community of life and love." It seems not unreasonable to think that a judge in this instance could decide affirmatively (for a declaration of nullity). Nor is it unreasonable to think that B deserves another chance. Should A be allowed to remarry? That question is more difficult and must be left to the judge's evaluation of the case. But it is not unlikely that a judge would prohibit remarriage for A (depending, of course, on the details of the case).

But let us consider yet another possibility. A and B marry, that is, they fulfill the prescriptions of the wedding ceremony and <u>appear</u> to marry. A is immature, goes

out with friends to the neglect of the spouse, refuses to spend time with the children, spends money irresponsibly, B truly believes in the indissolubility of marriage. B stays with A for thirty years, perhaps for the sake of the children as much as from a dedication to the indissolubility of marriage. In the meantime B has grown to dislike A and becomes resentful and bitter. A finally grows up and recognizes the unacceptability of his "self" or character for the past thirty years, as a result, perhaps, of any number of life experiences. This finally leads A to become a more mature self, one attentive to marriage and family concerns. But by now it is simply too late. After thirty years B's trust in A has been destroyed, and there are now no longer any reasons to continue what was never a true marriage (nor even a happy one) in the first place. By now the children are grown and the spouses can each support themselves. The "community of life and love" no longer exists. In fact, it never did, and no longer do any practical reasons for the continuation of what was only a mockery of a marriage. If a declaration of nullity is granted in this case, there may be no prohibition on remarriage because now both parties are sufficiently capable of the generation of a new community--just no longer with each other. Here, again, is the aspect of the self as developmental, the self as a product of its relations. And the worse its

relations, the worse the self which results.

Thus we are left with an interesting situation. Incapacities cannot be diagnosed until they are manifested. Their manifestation presumes their existence. The problem, for declaring a marriage null, is to discover when the incapacity began and, thus, one often looks for behaviors prior to the marriage that would indicate the existence of the incapacity at that time. Often those behaviors are things that prospective spouses are too blinded by love to notice or take account of. It is not the case that we are all potentially incapable. We only learn of our incapacity (unless, of course, we are particularly honest and astute and often even not then) if it is brought to light by some set of affairs such as a marriage or events within a marriage. The incapacity does not <u>depend</u> on future contingents, but its existence is only made evident by what I have called trigger events. Evidence of its existence can only occur after its existence. When the trigger event does not occur, then no one ever knows of the incapacity, probably not even the person concerned. Sometimes it does occur, but the other spouse is able to accommodate it. And sometimes not.

The point here is that incapacity means an inability to carry out projects which one understands and freely assumes. This incapacity is expressed through activities such as irresponsible behavior, neglect, and abuse. Those

activities are ambiguous, however. They might have other explanations including a free and informed choice to be unkind. That is, they may be the actions of someone who CANNOT act any differently; that would be the sense of incapacity analyzed here. They may also be the actions of someone who CAN act differently but CHOOSES FREELY not to. That is <u>not</u> the sense of incapacity under discussion. That is not an incapacity at all. Now the difference may not be easy to determine because the difference lies in the internal explanation or disposition, not in the actions. The actions, again, appear to be identical. The judges have a difficult task to perform. But the fact that the difference is difficult to determine does not mean that there is no difference at all.

So let us relate this once again to the canon law. "Matrimonial consent is an act of the will" (canon 1057.2) and is therefore the indispensable, internal, foundational element of marriage. Without consent there is no marriage because "marriage is brought into existence by the consent of the parties" (1057.1). Failure to consent means failure to marry. Canon 1057.2 defines consent as "an act of the will," but contemporary canonists seem to be developing an understanding of this "act of will" which, like the presentation of the idealist position above, takes consent beyond merely the will to the person as a whole, to the "self" of Green. Orsy, for example, claims,

> Thus to speak of an isolated act of the will (as the consent to a marriage would be) does not make much sense; an "act of the will" is really nothing else than a perceptible manifestation of the complex operations of the human psyche, of which a small portion only is open for our observation while the larger part of it remains hidden and active in influencing our decisions. Modern canon law retains the medieval approach in holding that consent is an act of the will in the Aristotelian sense. Such a position is at best alien to modern empirical psychology, and is at worst in open conflict with it. One can easily see that in a given case two tribunals could arrive at contradictory conclusions. . . Matrimonial consent is in fact much more than a mere act of the will. Everything in a human psyche contributes to it in varying degrees.[32]

Orsy also traces some of the history of the interpretation of consent. Here, too, his analysis supports the arguments provided in chapter five and elsewhere in this thesis.

> The norms of the old Code were conceived on the basis of a few philosophical assumptions, not explicitly stated in the law:
> --consent was an act of the will;
> --the will could operate, to a high degree, independently from the mind . . . The new Code retained some of the philosophical assumptions but introduced a few pragmatic rules to mitigate their harshest consequences; by doing that it opened the door to the world of empirical psychology. The result is a less cohesive system where the traditional abstract principles coexist uneasily with recent developments in the human sciences.[33]

Further,

The issue of consent occupies a central position in the canonical doctrine of marriage. There the law meets theology, philosophy, and empirical psychology . .

Philosophy provides a theory concerning the structure and operations of the human spirit . . . The theory comes from Aristotle's metaphysics; Aquinas made it his own. Eventually, in a modified but not improved form, canon law adopted it.

The gist of this theory is that in a human person the soul is the operational principle of every intelligent and responsible act. The soul, however, needs faculties to act. Those faculties must be specifically adjusted to their objects. Since there are two distinct objects for their operation, truth to be known and good to be acquired, there must be two faculties as well, one to perceive the truth and the other to reach out for the good. They are the mind and the will. For Aristotle, and especially for Aquinas, the soul, the mind and the will together were the human spirit, one and indivisible.

Whenever such philosophers spoke of a "real distinction" between the faculties, they did not mean that they could be separated and operate independently of one another, they meant only that there was a real structural complexity in the human spirit. In their language, the faculties, mind and will were not beings, entia, in the full sense but mere constitutive elements in a being, principia entis.

But such a suble approach was lost on later generations of scholastic doctors. They interpreted the real distinction as allowing the faculties to operate independently from each other. Canon lawyers, mainly in matters concerning marriage consent, have taken the theory in this later form. Once accepted, it became a logical necessity to determine the specific roles of each of the faculties, the mind and the will.[34]

Orsy seems to hold the position that input from the "empirical sciences" of psychology and psychiatry cannot help but improve canonical adjudication because that input can help to ensure "natural justice" and "more compassion."[35] Orsy is less hopeful, it seems, that philosophy can be of much help in this regard. After all, (philosophical) "theory is a hypothesis, not the description of proven facts. It cannot be anything else, since not even philosophy has direct access to the internal world of human persons."[36]

The claim presented in this thesis, however, is that despite its "speculative" nature, philosophical reflection and examination can offer some valuable insights by way of, at the very least, clarification and, optimally, by suggesting--as I have above--the study of other philosophical sources than the traditional Scholastic ones. Such has been the purpose of this thesis. (It is interesting to note, for example, that in his chapter on consent Orsy cites, as I have above, Bernard Lonergan. Now Lonergan belongs in a general sense to the "tradition." But his position has clear affinities with the idealist position outlined within this chapter.)

In the final analysis, the sort of incapacity which has been the topic of this chapter will always be difficult to detect. Our analysis of legal capacity will not ultimately make the job of the tribunal judges, the

determination of the validity of marriages based upon the capacity of the partners, much easier. The current canonical procedures seem essentially correct. Both parties answer a long series of questions about the marriage and the events leading to it. Witnesses also record their observations of the marriage. Psychological evidence is permitted, especially where one of the parties has undergone treatment. The judges then examine and reflect upon all of the available testimony, trying to ascertain the relationship between what the parties say about themselves and how they have acted. They pay special attention to harm, physical or emotional, done to other family members. They also note failures to perform ordinary obligations of a common life, especially where the parties claim to want to perform those obligations but fail nevertheless. Any of these things might be indicative of incapacity. Finally, they must judge, keeping in mind two sometimes irreconcilable goals: the social goal of preservation of respect for the indissolubility of the marriage bond, and the individual spiritual welfare of the members of the Church. It is hoped that the insights developed in the course of this thesis might have provided some additional assistance or some useful perspectives to aid in their adjudication.

Chapter IX. Some Conclusions and Some Suggestions

What the preceding pages have amply demonstrated is the need, within any theory attempting to explain legal capacity, for an integrated concept of the self, a unified self, a self which can organize its various aspects or faculties in such a way as to be able to construct projects, commit itself to projects, and carry out those projects. What is obviously also needed is a theory of the self that views one of the functions of the self as the honest evaluation of its potentials so as to determine for itself whether it can truly initiate the means necessary to attain its chosen ends. That kind of theory of the self could also present the self as created by and actualized through the projects it chooses. Thus, the ideal concept of self would be one which could incorporate a sense of the teleology of a person's projects and the final (as well as the efficient) causality of the will. What I am suggesting, of course, is the development of a metaphysics of the self, a project which lies far beyond the aims of this thesis but a project for which this thesis has, it is hoped, laid a groundwork according to which at least some of the minimal requirements of such a concept of self were clarified.

That sort of metaphysics of self must necessarily include an account of the relation of the self to the community and an investigation of the role the community plays in the creation of the self. Selves are public; they do not exist apart from a community. And certain systems within that community, e.g. the legal system, provide quite literally the means according to which the self can structure its projects and hence its life. Thus any venture into the philosophy of law, including our consideration of the concept of legal capacity, presupposes an account of the relationship of the self to the community and hence leads into those kinds of metaphysical problems. Addressing those metaphysical issues could not help but complement the work only begun in this thesis.

But the need for future projects need not detract from the accomplishments of this present one. Our inquiry into the concept of legal capacity has resulted in the putting forth of a model which tries to satisfy in a coherent way all the requirements of capacity. It has been demonstrated, first of all, that there are a few essential and necessary conditions for legal capacity, including:

1. the ability to perform appropriate behaviors at the initiation of a contract,

2. the possession of reason and intellect in the right measure. Reasoning may be defined as a power of

comprehending, inferring, and thinking in an orderly, sensible, and rational manner. It may also include the proper use of the intellective faculty in accordance with right judgment. It entails sanity. It is a distinct cognitive faculty which coordinates perception and understanding.

3. the will. That, too, must be in "proper working order." That is, the will must be free so as to be able to choose its projects. It must also be capable of achieving them. A defective will is one which chooses things it cannot attain. The free will can determine its own ends and the means to achieve them; it can also complete the project. The will is thus a final cause as much as it is an efficient one. The will initiates those projects which complete and create itself as a self in virtue of the self it wants to become.

We have examined three different models of capacity, each based on one of the above conditions for capacity. They were each in turn shown to be lacking, however, insofar as they excluded or were indifferent to the other conditions indicated above. That exclusion, in each case, resulted in each particular model's failure to be able to account for one or another aspect of the relationship between persons and the law. This failure at the theoretical level led to a failure at the practical level as well. And the practical issue is central inasmuch as

it was with a practical concern that we began our inquiry.

Simply put, the Church has a problem. On the one hand, it holds that marriages properly constituted are indissoluble. On the other hand, it is faced with a population which, at least in North America, has kept up with the general population for which almost 50% of those entering marriage will end up civilly divorced. And many of those would like to remarry. Now not all failed marriages, of course, are null marriages. But it is because marriages fail that they come to be examined by the courts to determine whether they were ever true marriages in the first place. Unless evidence exists to demonstrate that the first marriage was never truly valid, and unless the courts can make that determination, those persons cannot remarry and remain full participants in the life of the Church. The Church's procedures for declaring a marriage null are based on its understanding of the requirements for consent between persons who are "legally capable." In practical terms, it would seem that different models of capacity could lead to differences in the numbers of affirmative decisions rendered. While neither able nor desirous of granting declarations of nullity to just anyone for any reason whatsoever (and hence undermining the appearance of the indissolubility of marriage), the Church does not want to force people out of itself either. Not only is that, obviously, bad for

business but it is, more importantly, bad for the salvation and care of the souls involved. After all, that is the professed mission of the Church. Simply denying persons who have remarried access to the full life of the Church seems to be depriving them of one of the most efficacious means to their eternal happiness. Depriving them of marriage, however, similarly deprives them of one of the major areas of human happiness and one of the major ways in which people contribute to the betterment of others as well as themselves. The Church's dilemma, then, amounts to the following: How can we preserve the concept of indissolubility while yet paying proper pastoral attention to the care of the souls who have suffered because the factual situation of many marriages bears little relation to the ideal?

The only way to do that, as indicated above, is to claim that some failed marriages were never true marriages in the first place because of some deficiency of consent and capacity between the parties. The models examined above can account for failures of one sort or another. Adopting the first legalist/positivist model, however, results in very few failures at the level of capacity because the conditions presented are fairly minimal. While that model might work perfectly well in a legal system in which marriages can be dissolved (i.e. the civil law in most parts of the world), it will allow very few

declarations of nullity. And it will thereby exclude many people in the Church in North America access to that institution by which their eternal happiness is made much easier.

The second, intellectualist model increases the number of ways in which one might fail to be legally capable, but ties these other ways to one's possession of intellect and reason. Thus, the easiest way to demonstrate lack of capacity and failure of consent according to this model is to demonstrate the existence of insanity or at least severe mental illness of one sort or another. The problem with that, of course, is that most marriages which fail are not marriages in which one or both of the parties is insane. Marriages fail for many reasons; defective reason or insanity, however, would probably fall near the very bottom of the list of those reasons. In much the same way, failure of intellect could not account for many more failed marriages. While it may be true that no one completely appreciates all that marriage entails until after the fact, it is nevertheless also true that most persons have a pretty good understanding of what marriage is. Very few persons, that is, are truly ignorant of the fact that marriage is an arrangement by which two persons share a life characterized by cohabitation and a conjugal relationship which leads to the "generation of offspring" and the necessity for their

care. Thus, if one is going to cling to this model of capacity, one is going to have to present cases for nullity as cases of mental disorders or severely impaired intellect. That is, he is going to have to present the petitioners for a declaration of nullity as "crazy" in some way. And we can see practical evidence of precisely that in the 1950's and 1960's when more and more requests for those declarations began to be filed and when the Rota began seriously to address psychological impairments as defects of intellect and reason. But the problem with that model is that it has to stretch past our normal, everyday understandings of marriage and marriage failure. The intellectualist model of legal capacity, if it is going to work and allow for any significant proportion of affirmative decisions to requests for annulment, must interpret and translate marriage failures into mental illnesses or defects of reason.

Another sort of model sometimes presented is an incomplete version of the third condition we have set forth above: that of an appropriate will. The traditional kind of model that seeks to overcome the deficiencies of the first two is one in which one simply switches around the relative importance of reason and will and declares, in opposition to the second model, that will is primary and reason is always subordinate to it. That sort of model, in practical terms, would result in the

individual partners themselves deciding whether or not they wanted to continue in the marriage. Will would be the determining factor in our understanding of marriage. Marriage would be constituted by the will to marry and the will to stay married. If at any point in the marriage one of the partners withdrew his will from it, the marriage would cease to exist. To work as a viable model for the Church, one would need to maintain that marriage is not a contract constituted by consent given once and then assumed throughout the marriage but rather this model presupposes that marriage is a covenant that requires the continuous will of the parties to it to make it work. Consent, then, is not something once given but something continuously needed. In that way marriage becomes a project tied wholly to the continuing assent of the partners. While a model of this sort appeals to those who think the Church should increase the kinds of grounds open for nullity and who think that the irretrievable breakdown of a marriage must indicate some serious failure present from the start and undermining the whole life of the marriage, its position goes far beyond that. What this model entails is the primacy of will over reason. That is, it disconnects will from reason in such a way that one chooses one's fundamental projects for any (or no) <u>reasons</u> whatsoever. Will is severed from reason in the sense that choice is all that counts, choice can be explained in

terms of the desires of the person, and if those desires change, then the project can change as well. What is lacking in this model is the sense of commitment that the Church has always insisted upon, a commitment to projects undertaken in good faith. In short, this model makes it far too easy for persons to fail. And it undermines the institution's control over the marriage relationship as well inasmuch as it would allow individuals to decide for themselves whether or not they should stay married. No institutional input into that decision would be allowed. The annulment rate would then be equal to the civil divorce rate. And perhaps, as some theologians and pastors think, the Church's understanding of marriage as a permanent undertaking would be seriously undermined.

For those reasons I turned to a different sort of model, one that could be constructed from a different theory of the role of the will in the human experience. The model which we constructed in chapters seven and eight sought to reconceptualize the reason/will relationship in a more fruitful way, not merely to supplant one by the other. The advantages of that are clear. The role of the will becomes central as the teleological aspect of the self--the aspect which chooses and determines its life projects. But the will, like reason, can be defective in some ways. Specifically, according to this model there may exist a disproportion between the self's ends and the

means to attain them. It would not then simply be the case that the self chose ends but failed to understand the appropriate means to attain them (which would be a failure of reason), but rather that the self lacked the capacity or ability to carry out the end because unable to carry out the means, although it had understood and freely chosen each. It may be the case that marriage is one of those sorts of projects which one can choose in good faith and full knowledge and yet still fail. And, unfortunately, it may be the case that our capacity only becomes evident after the fact and through the failure. This sort of model would eliminate the need to characterize marriage failure as some form of serious psychological disorder or insanity. It could be traced, then, to a different sort of disability tied to immaturity, lack of judgment, and lack of the capacity to carry out those responsibilities and obligations which one had promised. That sort of theoretical framework makes more sense out of the actual practice in North American Church tribunals today and yet does not undermine the concept of an indissoluble marriage, either. Nor does it turn failure into a simple psychological disease or disorder. According to the model presented in this thesis, one does not have to be either crazy or disturbed in order to fail at marriage.

The presentation of this new model of the reason/will relationship to the self does not, however,

resolve all of the problems that need to be addressed. What the tribunal advocates and judges, as well as pastors, need to determine is the kind of evidence that would indicate this sort of failure. As we mentioned at the end of chapter eight, the tribunals today use the testimony of witnesses, and it is not unreasonable to think that that testimony would continue to be valuable even with this new model of legal capacity. Obviously, too, the testimony of psychological experts will continued to be helpful, although psychologists do not address failures of the "will" directly. They do not like to use, it seems, the language of will although they speak a good deal about desires and emotions, which are related but separate features. In any event, it is not clear how helpful psychologists would be in clarifying these sorts of defects of the self. Testimony of the parties to the marriage, of course, will continue to count as well. To the degree that we cannot specify such defects and formulate specific criteria, to that extent the law is limited. But regardless of our degree of precision, the judges are still ultimately left with the task of searching through all sorts of testimony to ascertain whether or not all the requirements for capacity have been met. The purpose of this thesis was not to solve that problem which is the critical issue of their profession. Rather, my purpose was to make some suggestions about the

kind of philosophical model that can best account for capacity at all. I have put together a philosophical examination of the conditions for capacity, something which had not been done and which certainly needed to be done. As such, it should clarify some of the problems for the tribunal judge, but it cannot do the judging itself.

A further issue should be raised as regards the failure of marriages. All marriages fail to some degree; some measure of failure is to be expected in marriage as in any other human enterprise. Marriage is more like writing poetry than it is like jumping the high jump. In a marriage there is no one point where one can finally say that one has achieved a good marriage, as one might finally reach the six foot mark. Instead, marriages have their good days (or years) and their bad ones. And even in the best of times is the awareness that one can always do more and better. No marriage, perhaps, ever succeeds completely. That being the case, the tribunal judges are confronted with the additional task of determining which defects of self are actually invalidating and which are mere examples of human imperfection which render a marriage less than perfect, but still a marriage in the canonical sense.

There remains one other concern which became evident during the preparation of this thesis. That is the necessity for the development not only of a metaphysics of

person, as indicated above, but also for an explicit statement of the metaphysical status of the marriage state. It appears from the practice of the Church tribunals that the Church holds that some sort of real, metaphysical change takes place on the occasion of a valid marriage. Appropriate consent of legally capable persons somehow brings into existence a new community which then transcends the power of anyone to dissolve it. Only death can sever the bond of marriage and destroy this new metaphysical being. But despite the volumes written on the indissolubility of the marriage bond, no one has addressed the question of the sort of metaphysical change brought about into the world on the occasion of a valid marriage in those terms. Much has been said about the institution of marriage as an earthly example and symbol of Christ's relationship with his Church. But that relationship continues despite the death of Christ and despite the continuing deaths of members of the Church. What would happen if all the Christians died? Would that terminate Christ's connection with the world? The problem is this: First of all, if marriage creates a new, indissoluble community by means of a real change of metaphysical proportions, then how can the temporal death of one of the partners destroy that community? How is it that a temporal event (the exchange of consent in a marriage ceremony) can effect an eternal change of metaphysical proportions? And then how

it is that another temporal event, a death, can put things back the way they were? The entire question of indissolubility and the creation of new metaphysical states is a serious one which needs to be addressed perhaps by philosophers along with theologians. It is a confusion which needs elucidation. In some sense the whole of the Church's practice about marriage hinges on that issue every bit as much as it does on the concept of legal capacity. I would suggest that a way to proceed to answer these problems might be to investigate a theory of community that sees communities as not completely exhausted by the summing up of their individual members, communities as having lives of their own which transcend the lives of their members. Communities of that sort, however, do outlast their members, so that sort of metaphysical theory rooted in the idealist view of the relation between the individual and the community, although it might give hints about how we could characterize marriages as indissoluble, still cannot answer the further question of why, then, an indissoluble marriage bond is broken by death unless it were to proceed along the lines of marriage as a community requiring for its existence the participation of two beings each of whom is still present in body as well as spirit.

That concern, however, takes us to a different project. What I have attempted to do within these pages

is to accept that the Church in its guise of a legal institution is going to continue its insistence upon the indissolubility of marriage. That accepted as fact, my goal was to present a philosophical understanding and elucidation of the concept of legal capacity. With that understanding, those involved in the work of the Church can base their practice of examining "marriages" and declaring some of them null on the demonstration of a lack of legal capacity in the giving of consent to the marriage, thereby failing to achieve a marriage at all. What I have done has been to provide a theoretical framework to make better sense of the practice, to make the practice intelligible and to make it possible without appeals to insanity and mental disorders. Such a framework can preserve the element of indissolubility while allowing for the exercise of compassion to those caught up in troubled marriages and troubled lives. And that, of course, is the ultimate concern to which the canons are always subordinated: suprema lex salus animarum.

Notes

Chapter I

[1]Sargent v. Burdett, 96 Ga. 111, 22 S.E. 667.

[2]J. Steven Williams, Basic Canadian Legal Terminology (Toronto, 1979), p. 44.

[3]John Chipman Gray, The Nature and Sources of the Law (Boston, 1909), p. 27.

[4]Leslie Armour, The Metaphysics of Community (Ottawa, 1978), p. 130.

[5]Jean Wallace, The Insanity Defence: A Problem of Jurisprudence and Metaphysics (Waterloo, 1968), p. 1.

[6]Ibid., p. 74.

[7]Ibid., p. 118.

[8]See pages seven, eight, and ten within this chapter.

[9]Henry Campbell Black, Black's Law Dictionary (St. Paul, 1968), p. 402.

[10]See chapter four of this thesis.

[11]See pp. 142-150 of the Vernon Bourke translation entitled On the Truth of the Catholic Faith (New York, 1956).

[12]Summa contra Gentiles 123.1

[13]Especially Summa Theologiae Suppl.41.1 and 42.1.

[14]An interestingly parallel argument appears in priest-sociologist Andrew M. Greeley, Confessions of a Parish Priest (New York, 1986), pp. 338-339. While Greeley would hardly consider himself a Thomist, he too talks about the bonding of the birds which is unlike that in other beasts.

[15]SCG 122.6

[16]SCG 123.3, 4, 5, and 6.

[17]Francisco Suarez, Tractatus De Legibus I. 1. 1. Volume 5 of his Opera Omnia (Paris, 1856), p. 1.

[18]Ibid., I.12.5 and I.6.18.

[18]Ibid., II.7.5-6.

[19]Ibid., II.7.11.

[21]Quae posterior pars clara est, tum de actibus consiliorum, tum de multis actibus bonis, qui licet non sint optimi, et ideo non sint in consilio, nec etiam sint necessarii, et ideo non sint in praecepto, nihilominus sunt honesti, et licite fieri possunt, ut actus matrimonii, etc.

[22]Suarez, op. cit., II.12.1.

[23]There was some early debate, in fact, between these competing Marian and Augustinian analyses of the importance of consummation. See chapter three, pp. 68-70.

[24]A detailed discussion of the history as well as the philosophy of celibacy may be found in The Catholic Encyclopedia, (New York, 1908), beginning at p. 481 of Volume III.

[25]See chapter four for a development of the idea of marriage as a promise and chapter eight for a more detailed explanation of what is meant by a social self.

[26]Francisco Suarez, Disputationes Metaphysicae, Vol. 26 of his Opera Omnia (Paris, 1856), Disputation 30.15.32-33, pp. 179-180.

[27]Ibid, Disputation 2.V.17 in Volume 25. Passiones illas formaliter non includere ens, neque hoc esse contra conclusionem, quia illae passiones formaliter non dicunt differentias, aut modos realiter determinantes aut afficientes ens. Si autem prior sententia vera est, consequenter asserendum est, has passiones in formali conceptu suo includere ens propter easdem rationes supra adductas, et contineri has passiones sub enumeratione facta, quia dicunt modos reales entis illi adaequatos seu convertibiles cum ipso.

Chapter II

[1]"I for my part declare to you, you are Rock and on this rock I will build my church, and the jaws of death shall not prevail against it. I will entrust to you the keys of the kingdom of heaven. Whatever you declare bound on earth shall be bound in heaven; whatever you declare loosed on earth shall be loosed in heaven." Also, "When they had eaten their meal Jesus said to Simon Peter, 'Simon, son of John, do you love me more than these?' 'Yes, Lord, you know that I love you.' At which Jesus said, 'Feed my lambs.'"

[2]John T. Noonan, Power to Dissolve (Cambridge, 1972), p. 25.

[3]Ibid.

[4]Ibid., p. 26.

[5]Ibid.

[6]Ibid, p. 121 n.

[7]Ibid., p. 109.

[8]Ibid., p. 47.

[9]Pope Pius IV, In throno iustitiae (1561), cited by John T. Noonan, Power to Dissolve (Cambridge, 1972), p. 48.

[10]Noonan, op. cit., p. 27.

[11]Ibid., p. 183.

[12]Genesis 2.24, Matthew 9.15, Matthew 19.3-9, Mark 10.2-12, Luke 16.18, Ephesians 5.22-23, 1 Corinthians 7.10-11.

[13]It is in the "Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)," in Documents of Vatican II, Walter M. Abbott, editor (New York, 1966) that reference is continually made to marriage as a community of life and love.

[14]Seuss v. Schukat, 358 Ill. 27, 192 N.E. 668, 671, 95 A. L. R. 1461, cited by Henry Campbell Black, Black's Law Dictionary (St. Paul, 1968), p. 1124.

[15]Noonan, op. cit., p. 31.

[16]Ibid., pp. 162-163.

[17]See p. 31 of this thesis.

Chapter III

[1]All references to the canons in this chapter have been taken from The Code of Canon Law, in the English translation prepared by the Canon Law Society of Great Britain and Ireland (London, 1983).

[2]See canons 851, 889, 914, 987, 1029.

[3]At least that was the opinion conveyed in the standard gloss on Gratian. See John T. Noonan, Power to Dissolve (Cambridge, 1972), p. 153.

[4]In the newly-promulgated (1983) Code of Canon Law, the age requirement has been raised from 14 and 12 to 16 and 14 respectively. See canon 1083.

[5]Noonan, op. cit.

[6]Canons 1063 through 1107.

[7]See discussion in Noonan, op. cit., pp. 80-81.

[8]Alexander III's Commissum would later be compiled by Gregory IX and become part of the Decretals.

[9]Noonan bases this interpretation on his reading of the Decretals of Gregory IX. See op. cit., p. 81.

[10]Noonan, op. cit., pp. 81-82.

[11]See ibid., pp. 83-88.

[12]St. Augustine, De bono coniugali 29.32, cited by Noonan, op. cit., p. 83.

[13]For a complete explanation of the Pauline privilege see canons 1143 through 1150 and Noonan, op. cit., pp. 342-347.

[14]Joseph Zwack, Annulment (New York, 1983), p. 39.

[15]Ibid.

[16]Ibid., p. 40.

[17]Ibid., p. 42.

Chapter IV

[1]J. L. Austin, How to do Things with Words (New York, 1965), p. 5.

[2]Ibid.

[3]Ibid., p. 7.

[4]Ibid., p. 14.

[5]Ibid., pp. 14-15.

[6]Ibid., p. 39.

[7]Ibid., pp. 15-16.

[8]John A. Yogis, Canadian Law Dictionary (Woodbury, N.Y., 1983), p. 50.

[9]Henry Campbell Black, Black's Law Dictionary (St. Paul, 1968), p. 793.

[10]Ibid., p. 402.

[11]Ibid.

[12]Ibid.

[13]J. Steven Williams, Basic Canadian Legal Terminology (Toronto, 1979), p. 44.

[14]Dissolutions, sometimes called no-fault divorces, are now available in 39 of the 50 United States in addition to the option of a contested divorce proceeding.

[15]See Austin, op. cit., pp. 14-20.

[16]See chapter eight of this thesis.

Chapter V

[1]See especially pp. 166-173.

[2]R. P. Phillips, Modern Thomistic Philosophy (Westminster, Maryland, 1959), p. 251.

[3]Ibid., pp. 296-299.

[4]Henri Grenier, Thomistic Philosophy (Charlottetown, 1950), p. 208.

[5]Ibid., pp. 280-282.

[6]Bernard Wuellner, Summary of Scholastic Principles (Chicago, 1956), p. 59.

[7]Grenier, op. cit., p. 191.

[8]Ibid., p. 211.

[9]Ibid.

[10]Ibid., p. 212.

[11]Ibid., p. 251.

[12]Wuellner, op. cit., p. 26.

[13]Ibid., p. 180.

[14]Ibid., p. 27.

[15]Paul J. Glenn, Psychology, A Class Manual (St.Louis, 1941), pp. 346-347.

[16]Abbé Arthur Robert, Leçons de Psychologie et de Théodicée (Quebec, 1921), p. 71.

[17]Grenier, op. cit., p. 253.

[18]Ibid., p. 254.

[19]Wuellner, p. 70.

[20]Ibid., pp. 125-126.

[21]Glenn, op. cit., p. 353.

[22]Herman Reith, An Introduction to Philosophical Psychology (Englewood Cliffs, 1956), p. 179.

[23]Glenn, op. cit., p. 352.

[24]Henri Renard, The Philosophy of Man (Milwaukee, 1956), p. 245.

[25]Wuellner, op. cit., p. 136.

[26]See Leslie Armour, The Metaphysics of Community (Ottawa, 1978), p. 143, for a more detailed explanation of the individual psychological self and its relation to the social self.

[27]Ibid., pp. 143-145.

[28]Ibid., p. 146.

[29]Ibid.

[30]See chapter eight of this thesis for a different development of the concept of the social self.

[31]Ibid., p. 150.

[32]Including Leslie Armour. See ibid., p. 151.

[33]See Lawrence Dewan, "The Real Distinction between Intellect and Will," Angelicum, Volume 57, 1980, pp. 557-593.

[34]St. Thomas Aquinas, Summa Theologiae I.75.

[35]ST I.75.4.

[36]Ibid.

[37]ST I.76.4.

[38]ST I.75.1.

[39]ST I.75.2.

[40]Ibid.

[41]Ibid.

[42]ST I.76.1.

[43]Ibid.

[44]Ibid.

[45]ST I.77.1.

[46]ST I.77.6.

[47]ST I.77.4.

[48]ST I.78.1.

[49]Ibid.

[50]ST I.78.2.

[51]ST I.78.1.

[52]Ibid.

[53]ST I.79.8.

[54]ST I.82.3.

[55]Ibid.

[56]Ibid.

[57]Henri Grenier, Cours de Philosophie (Québec, 1940), pp. 228-229.

[58]See p. 150 of this chapter.

[59]ST I.82.4.

[60]Ibid.

[61]Ibid.

[62]Ibid.

[63]Ibid.

[64]ST I.14.4.

[65]See Lawrence Dewan, op. cit., pp. 557-593.

[66]at Sent. I.42.1.2.ad 3.

[67]Dewan, op. cit., p. 561.

[68]Ibid., p. 563.

[69]Ibid., p. 571.

[70]Ibid., p. 577.

[71] Ibid.

[72] ST I.59.2.

[73] Dewan, op. cit., p. 580.

[74] Ibid., pp. 582-583.

[75] Ibid., pp. 585-586.

[76] Ibid., p. 589.

[77] ST I-II.90.1.

[78] ST I-II.90.2.

[79] ST I-II.90.3.

[80] See pp. 140-146 of this chapter.

[81] See John T. Noonan, Power to Dissolve, for an excellent historical analysis of the development of adjudication of marriage cases.

Chapter VI

[1] Stephen J. Kelleher, Divorce and Remarriage for Catholics? (New York, 1973), p. 59.

[2] See chapter three of this thesis.

[3] Bernard Haring, "A Theological Appraisal of Marriage Tribunals," in Divorce and Remarriage in the Catholic Church, Lawrence G. Wrenn, editor (New York, 1973), pp. 16-28.

[4] Kelleher, op. cit., p. 151.

[5] John T. Noonan, Power to Dissolve (Cambridge, 1972), p. 402.

[6] "Pastoral Constitution on the Church in the Modern World (Gaudium et Spes)," in The Documents of Vatican II, Walter Abbott, editor (New York, 1966), pp. 199-308.

[7] Ibid.

[8] See chapters two and three.

[9] Kelleher, op. cit., p. 22.

[10] Jean-Paul Sartre, Being and Nothingness, cited by Klaus Hartmann, Sartre's Ontology (Evanston, 1966), p. 22.

[11]Ibid., p. 11.

[12]Hartmann, op. cit., p. 33.

[13]Ibid.

[14]Sartre, Being and Nothingness, cited by Hartmann, op. cit., p. 34.

[15]See Hegel's Logic, part one of the Encyclopaedia of the Philosophical Sciences (1830), for an explanation of the passage from being to determinate being.

[16]Hartmann, op. cit., p. 38.

[17]Sartre, Being and Nothingness, cited by Hartmann, op. cit., p. 38.

[18]Hartmann, op. cit., p. 39.

[19]Sartre, Being and Nothingness, cited by Hartmann, op. cit., p. 47.

[20]Ibid.

[21]Hartmann, op. cit., pp. 50-51.

[22]Jean-Paul Sartre, Being and Nothingness, Hazel Barnes, translator (New York, 1956), p. 629.

[23]Ibid., p. 21.

[24]Barnes, op. cit., p. xxi.

[25]Sartre, op. cit., p. 618.

[26]Ibid., p. 88.

[27]Hazel Barnes, "Introduction" to her translation of Jean-Paul Sartre, Being and Nothingness" (New York, 1956), pp. ix to xii.

[28]Sartre,op. cit., pp. 93-94.

[29]Ibid., p. 93.

[30]Phyllis Sutton Morris, Sartre's Concept of Person: An Analytic Approach (Amherst, 1975), p. 102.

[31]Sartre, op. cit., p. 436.

[32] Ibid., p. 563.

[33] Morris, op. cit.

[34] Ibid., p. 105.

[35] Sartre, op. cit., p. 21.

[36] Morris, op. cit., p. 106.

[37] Ibid., p. 107.

[38] Jean-Paul Sartre, Being and Nothingness, Hazel Barnes, translator, of the special abridged edition (Secaucus, NJ, 1974), p. 422.

[39] Ibid.

[40] Ibid., pp. 421-424.

[41] Sartre, Being and Nothingness (New York, 1956), p. 444.

[42] Ibid., pp. 461-462.

[43] Ibid., p. 453.

[44] Ibid., p. 437.

[45] Ibid., p. 461.

[46] Morris, op. cit., pp. 111-112.

[47] Ibid., p. 113.

[48] Sartre, Being and Nothingness (New York, 1956), p. 570.

[49] Ibid., p. 463.

[50] Ibid., p. 461.

[51] Ibid., p. 437.

[52] Sartre, cited by Morris, op. cit., p. 119.

[53] Morris, op. cit., p. 120.

[54] Sartre, Being and Nothingness, special abridged edition (1974), p. 443.

[55]Morris, op. cit., p. 116.

[56]See p. 205 of this chapter.

Chapter VII

[1]J. F. Donceel, Philosophical Psychology (New York, 1955), pp. 259-260.

[2]See the references cited in chapter five of this thesis, especially Lawrence Dewan, "The Real Distinction between Intellect and Will," in Angelicum, Volume 57, 1980, pp. 557-593.

[3]Richard of St. Victor, De Trinitate IV, cited by Felix Alluntis and Allan Wolter, translators, in John Duns Scotus, God and Creatures: The Quodlibetal Questions (New Jersey, 1975), p. 536.

[4]John Duns Scotus, God and Creatures: The Quodlibetal Questions, Felix Alluntis and Allan Wolter, translators (New Jersey, 1975), p. 36.

[5]John Duns Scotus, Opus Oxoniense II d. 25, cited by S. Belmond, "Le Role de la Volonté dans la Philosophie de Duns Scot," Etudes Franciscaines, Tome 25 (mai, 1911), p. 450.

[6]B. M. Bonansea, Man and His Approach to God in John Duns Scotus (New York, 1983), p. 52.

[7]Duns Scotus, Reportata Parisiensia III d.17 q.2, n. 3, cited by Belmond, op. cit.

[8]Duns Scotus, Oxon. III d.17 n.2, cited by Belmond, op. cit., p. 451.

[9]Belmond, "Le Role de la Volonté dans la Philosophie de Duns Scot," Etudes Franciscaines Tome 25 (mai, 1911), p. 451. (La volonté est) . . . "le pouvoir d'exercer sciemment et indépdendemment, sans distinction et sans restriction, les actes qui sont du ressort de notre activité consciente."

[10]Duns Scotus, Quaestiones Quodlibetales. q.16 no.15 and Oxon. III, d.17, q.1 no.4, cited by Bonansea, op. cit., p. 56.

[11]Duns Scotus, Capitalia Scoti, tome 1, p. 384, cited by Belmond, op. cit., p. 453.

[12]Belmond, op. cit., p. 453. "La volonté est donc une énergie de l'âme."

[13]Duns Scotus, Oxon. IV d.49 q.10 n.10.

[14]Ibid.

[15]So, too, does Lawrence Dewan. See chapter five for a discussion of the use of the real distinction between intellect and will by St. Thomas.

[16]St. Thomas Aquinas, Summa Theologiae I-II.6.4. Also cited by Belmond, op. cit., p. 454.

[17]Duns Scotus, Oxon. IV. d.17 q. 4.

[18]Bonansea, op. cit., pp. 59-60.

[19]Duns Scotus, Oxon. II d.25 q.1 no.19.

[20]Duns Scotus, Capitalia Scoti t.I, p. 392, cited by Belmond, op. cit., p. 459.

[21]Duns Scotus, Oxon. II d.25 q.1 n.22

[22]Duns Scotus, Oxon. III d. 33, q.unica n.2

[23]Belmond, op. cit., p. 568.

Chapter VIII

[1]Especially in The Conception of God, The World and the Individual, and The Philosophy of Loyalty.

[2]Josiah Royce, "Principles of Logic," cited by J. Harry Cotton, Royce on the Human Self (Cambridge, 1954), p. 92.

[3]Ibid., p. 94.

[4]Ibid., p. 95.

[5]Josiah Royce, The World and the Individual, Volume II (New York, 1901), pp. 170-171.

[6]Cotton, op. cit., p. 96.

[7]Royce, The Conception of God, cited by Cotton, ibid.

[8]Green lived from 1836 to 1882, and Royce lived from 1855 to 1917.

[9]Prolegomena to Ethics and Lectures on the Principles of Political Obligation.

[10]Thomas Hill Green, Prolegomena to Ethics (New York, 1969), pp. 90-91.

[11]Ibid., pp. 92-93.

[12]Ibid., pp. 93-94.

[13]Ibid., p. 94

[14]Ibid., p. 95.

[15]Ibid., p. 98.

[16]Ibid., p. 99.

[17]Ibid., p. 102.

[18]Ibid., pp. 104-105.

[19]Ibid., p. 105.

[20]Ibid., p. 109.

[21]Ibid., p. 152.

[22]Ibid., p. 154.

[23]Ibid., p. 109.

[24]Bernard Lonergan, Understanding and Being (Toronto, 1980), p. 281.

[25]Ibid.

[26]Ibid., p. 282.

[27]See, in particular, John McTaggart Ellis McTaggart, The Nature of Existence.

[28]Ladislas Orsy, Marriage in Canon Law (Wilmington, 1986), p. 126.

[29]Ibid., p. 143.

[30]Ibid., p. 154.

[31] *Ibid.*, p. 131.

[32] *Ibid.*, pp. 62-63.

[33] *Ibid.*, p. 125.

[34] *Ibid.*, pp. 127-128.

[35] *Ibid.*, p. 129.

[36] *Ibid.*, p. 127.

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Abstract

The problem addressed in this thesis is the concept of legal capacity, a concept central to every theory of law and yet one which has often been neglected. That concept lies implicit in all legal systems; the project here undertaken is to make it explicit. This inquiry has been narrowed to the examination of the concept of legal capacity as it appears in the canon law, particularly in the canon law regulating the reception of the sacrament of matrimony. In the canon law, unlike its secular counterpart, there do exist procedures for adjudicating failures at the level of capacity, and these procedures are most frequently used to examine the validity of marriage and to annul those marriages which failed because of the lack of capacity in at least one of the partners. After an examination of both historical and contemporary trends in canonical legislation, the next step is to develop a philosophical model of capacity to explain and ground those procedures. Three different sorts of models can be developed. The first, the legalist/positivist model, has its source in the reflections of British philosopher J. L. Austin. This theory ties capacity to behavior such that one is capable according to law if one can follow specified procedures for participating in a legal system. The second, the intellectualist model derived from the work of St. Thomas Aquinas, links capacity to the intellect and the possession of reason. The third model is called a voluntarist model

because it bases capacity on the ability to exercise free choice. The work of Jean-Paul Sartre serves as a foundation for that model. Each of these models works within certain limits; each provides some conditions which must be met in any legal system for a person to be said to be legally capable. However, when these models are applied singly to specific problems of capacity within the canon law, they each fail to account for some element in the law. That is, they each present a necessary condition for the possession of legal capacity, but none of them offers a sufficient set of criteria for the determination of capacity.

It becomes necessary at that point to construct another model of capacity, one that integrates the necessary features of the models explained above and one that can account for canonical capacity. That has been accomplished by the construction of a model based upon a reconceptualization, first of all, of the reason/will relationship such that neither of those aspects holds primacy over the other. Secondly, the works of medieval philosopher John Duns Scotus and nineteenth-century idealist philosophers Josiah Royce and Thomas Hill Green form the basis for the development of a model which connects capacity with a person's ability to order his life according to choices, projects, and purposes by means of which he also realizes himself. Only a model of this final sort can make sense of our social and legal relationships and can also make sense of our failures as well.