

MAKING ONE'S OWN ACT ANOTHER'S*

My subject is "Church Law and the Humanization of Man." I shall address it in terms of a problem which is fundamental to law—the circumstances in which one person's act counts as another's. In this usage, the creation of law, lie opportunities for perverse debasement and for the charitable expansion of goodness. I propose to look at the ways in which the law of the Church has affected realization of these opportunities by Christians in four kinds of legal institutions—slavery, trusteeship, agency, and marriage. These instances both reflect concepts of God and become means for an understanding of God, so that the law here is penetrated by theology and interpenetrates theology in turn.

I. SLAVERY

First, as to slavery, whose legal structure as an institution perhaps needs to be emphasized. Slavery is not a relation of brute power like the act of capture or kidnapping in which it may originate. As a going system it is dependent on law in a variety of ways—to classify the slaves as distinct from free persons, to assimilate their distribution to the distribution of property, to provide general directions for their movements, to assign punishments for their breaches of public order, to regulate their sexual and educational opportunities, and to dispose of their offspring. Slavery, the use of one person so that his act counts as his master's, works only through the conceptual genius, the cataloguing power, the metaphor-making capacity of law.

In the Mediterranean world in which Christianity appeared, slavery was almost as pervasive an institution as marriage and a more pervasive institution than lending at usury. Christian law transformed marriage, it condemned usury, but it ameliorated slavery without transforming it or condemning it. Justinian, the greatest of Christian theocratic lawgivers, taught that it was "better to eman-

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cipate men than to enslave them"; but his legislation, understood by him to be the faithful execution of the will of the Most Holy Trinity, confirmed the institution of slavery which pagan Rome had adopted and earlier Christian emperors had left undisturbed.

On two points imperial Christian decrees showed sensitivity to the personhood of slaves. Prohibitions were directed at the proselytizing of slaves and at their sexual exploitation; in both cases those protected were orthodox Christians. Heretical masters were forbidden to proselytize Christian slaves. Avaricious masters were forbidden to sell them to brothels. But Christians never enacted into Roman law the legal possibility for a slave to marry. Limited evidence does indicate that the pope, against opposition by parts of the community, recognized that slaves could marry within the Church; and in the very long run—over 1000 years after the beginning—the sensitivity to the sexual rights of the slave culminated in Gratian's ringing declaration that, as there was neither slave nor free man in Christ Jesus, slaves could marry validly against the will of their masters.

It would be foolish to minimize the importance of Christian insistence on a zone of personal sexual integrity within the conditions set by slavery; it would be myopic to overlook the encouragement which Christian example and Christian Roman law gave to the emancipation of slaves "in the bosom of the Church." But the great fact cannot be disregarded that the institution of slavery was not challenged by those most qualified to attack its assumptions and its concepts, the Christian lawgivers and lawyers. Christian law did not create this dehumanizing institution, but it failed spectacularly to criticize it.

It is easy—possibly too easy—to explain the Roman Christians' attitude to slavery by the Platonic and Stoic elements in their thought, by their other-worldly outlook and belief that all would be compensated for in heaven. After all, usury was a social evil which was not accepted with resigned indifference but was vigorously combatted in patristic thought. Nor can the acceptance of slavery in the Old Testament alone account for the Christian conscience which so sharply rejected such Old Testament institutions as polygamy. Nor do St. Paul's few words—"Slaves, obey your masters"

(Eph 6:5)—and his exhortation to a fugitive slave to return (Philem 1:12) by themselves explain the lack of a Christian critique; Paul's words are more a part of the attitude to be explained than reason for it. Stoicism, Platonism, other-worldly orientation, Old Testament institutions, and Pauline texts do indeed cohere together, and in combination provide a partial theological explanation of the Christian position; but two theologically-molded beliefs seem to me of special importance in the Christian acceptance of slavery as a legal institution. The first is that it was not inconsistent with being a person to be a slave—essential personhood was not lost or violated or damaged by the condition. This belief is most vividly illustrated in the analogical application of the term "slave" to monks. The slave was propertyless, wifeless, will-less; so too was the monk, who was the slave of God. The application of the term "slave of the slaves of God" to the pope, rhetorical as the usage soon became, reflected the same conviction. Behind both applications stood the precedent of Paul; Jesus himself, in the Pauline formula, in becoming man had "taken the form of a slave" (Phil 2:7). The view of the human person here did not make it inappropriate to express the Incarnation itself in terms of becoming a slave. Slavery as a legal institution could not be attacked until a different vision of the human person had become dominant.

The other vital belief bore on the moral justification of slavery. Enslavement in battle was a moral corollary of accepting the possibility of just war. In the actual fighting it was a humane alternative to killing. But how could the enslavement of the children of captives be defended? Why was this weakest point in the institution of slavery not attacked? Why did Christian law accept without demur the axiom of classic law that status followed birth?

Here, it seems to me, theological influence was decisive. Men inherited Adam's state by birth. Original sin was fundamental to the Pauline explanation of man's fallen state. The doctrine of inherited status was essential to orthodox theology. With that view of the nature of creation, it was difficult to object to the civil law's analogous assumption that one's fate was determined by one's father. The metaphor of slavery was invoked by Paul himself in explaining man's redemption. The transmission of slavery by inheritance—vital to

the working institution of slavery, morally its weakest point—did not seem open to challenge by Paul or by the Christian legislators when they came to imperial power.

The consequences of the lack of a Christian legal critique of slavery need little enlargement. Grant, if one will, that radical transformation of the social structure of the Roman Empire was impossible even under Christian rule. Grant, if one likes, that the lot of slaves held by monasteries and bishops well into the Middle Ages was not appreciably worse than the rural villenage of free serfs. The Christian failure—the absence of a set of mind formed by law which made slavery as repugnant as polygamy, the absence of a legal doctrine that persons could not be property—came home to roost when the New World was discovered and enemy Indians in it were enslaved and when they did not suffice were supplanted by the Africans. Slavery in the Western world which lasted until little more than a century ago owed its beginnings to the men of Spain, Portugal, France, the Netherlands, and England, all nations molded by Christian thought. The occasional sharp protests of churchmen against unjust enslavement of Indians or against the brutalities of the African slave trade were no substitute for an entrenched legal critique of the very possibility of transmissible human slavery. The omissions of church law left open gulfs of dehumanization into which European civilization plunged, in which American civilization foundered.

II. TRUSTEESHIP

I turn now to consider an apparently happier relationship in which one man's act may become another's, that of the trustee or independent fiduciary. In the paradigmatic legal form the trustee acts only for the benefit of what the law calls his *cestui que* trust or beneficiary. What he makes of the trust property he does not make for himself, and his actions as trustee are never for his own account but for another's. In the same way, a lawyer must act for his client, in the performance of his function putting first not himself but him for whom he acts. Analogously, within limits less strictly defined by law, officials of a government are trustees for the people, supposed to act not for their own advantage but for that of their *cestuis que*

trust. As government is a natural necessity and as there will always be those who because of tender or advanced age or illness cannot act for themselves, so vicarial responsibility for others is required by the human condition. Parents are natural vicars. Civil law has supplemented them by guardians, church law by godparents. To find dangers in the concept of vicarage is not to suggest that it could be dispensed with, nor to overlook the exercise of altruism often present in providing for the wants of another by attributing to him an act of one's own.

Unlike the slave, the fiduciary is not smaller than the one for whom he acts, but larger. In the exercise of his trust it is his judgment that he is expected to follow. He is more qualified or more experienced or more talented than the beneficiary who reaps the fruit of his skill. There is no question of the beneficiary instructing him in the discharge of his function, no danger that he will be extinguished as a person by mechanical subordination to his *cestui que* trust. The relation, nonetheless, creates a risk to the trustee's integrity as a person. The risk arises because the one who acts vicariously for another may assume a moral position distinct from that of an individual person. If the risk is not avoided, the vicarious benefactor will dispense himself from many of the obligations of personal morality in the execution of his task. The altruism of his objective will become excuse for the amorality of his action.

Lawyers are a familiar illustration of this kind of conversion from personal to vicarial morality. It is not infrequently supposed in the profession that a lawyer owes his client every service compatible with justice, that he may virtuously do for his client acts which he would find selfish or heartless if he were to perform them on his own account. As an officer of the court he is expected to observe the requirements of justice, but in his professional role he may and perhaps must dispense with other virtues such as charity, patience, and humility. It is in that spirit in which eminent lawyers of the past such as Thomas Jefferson and Abraham Lincoln maintained by their professional work the American system of slavery while privately deploring its existence. It is in that spirit that eminent lawyers of today regard the substantive business of a corporation as no con-

cern of theirs when they are engaged in furthering its growth by their discharge of a technical task. Their professional capacity is a carapace armoring them against personal judgments of morality. Acting for another, they confine their moral responsibility to fidelity in execution of their trust.

The same phenomenon has always been apparent in the behavior of government officials. Persons who in their private relations with others are distinguished by their empathy, their forbearance, and their kindness may behave with astounding savagery in their actions undertaken for the commonweal. Winston Churchill may stand as a well-known example. Fairness, forgiveness, and charity characterized him in treating persons he knew as private individuals. As a governmental official he was capable of cruelty to individuals and to groups, culminating in the monstrous action of directing the destruction of over a hundred thousand persons living in Dresden on St. Valentine's Eve, 1945.

The history of the Church could be written in terms of the blunders, crimes, and tragedies justified by the morality of vicarious responsibility. That familiar parade of terrible examples—the Inquisition, the Crusades, the Wars of Religion—could be analyzed in terms of it. It is difficult to identify in these vast institutional aberrations malevolent men; it is not difficult to find saints who thought that what they did for another had to meet a less rigorous standard than what they did for themselves. At the heart of church law the justifying formula was put succinctly by the father of the canon law in his discussion of the use of force. Referring to the vengeful acts of Pope Silverius, Gratian said, "But by these acts he avenged not his own injury but that of the Church." The vicar was credited with a morality different from the man; he was given the armor, the carapace to shield him from the moral pain of choosing as a man.

The church officeholder was not only a fiduciary, he was God's representative; the pope, God's vicar. It was no human cause he avenged, no human cause he fought for, no human justice he enforced. The theology instilling these concepts of the special relation of the officeholder to God swelled the status of the ecclesiastical

fiduciary beyond mere human trusteeship. It magnified without essentially altering the split between the trustee as a man and the trustee as benefactor of another.

As the examples indicate, it has often been not the worst of men but the best who in fidelity to a vicarial office have put aside personal responsibility and moral sensitivity—the Jeffersons, Lincolns, and Churchills; and they have been able to find precedents and paradigms of their actions in the actions of officeholders of the Church. Their justification may be found in the classic texts of canon law. In this way, by example and by precept, by institutional law bolstered by theology, the Church fostered the view that he who acts for another may do for the other what he may not do for himself.

Vicarial responsibility of a different kind was at the same time exercised within the Church. In prayer Christians asked to be heard on behalf of others; saints became patrons and advocates. Sometimes ways of life followed ways of thought, and Christians became poor to aid the poor, sick to help the sick; the Mercederians even substituted themselves as slaves to redeem the slaves. The model of such action was the vicarious sacrifice of Jesus.

In this kind of substitution for another, more power was not claimed because of the vicarial role, but more was sacrificed of oneself. The moral demand was greater, not less. Vicarial action became, at its limit, the voluntary assumption of the shape of a slave. The vicar was preserved from dehumanizing himself by surrender of himself. The theological vision which made institutional slavery acceptable simultaneously purged vicarial action of selfishness. Can a Christian make his act another's without grave moral risk only by the sacrifice of himself as a person?

III. AGENCY

A third and general way of putting oneself in the place of another is agency. Slaves and fiduciaries too may be viewed as agents; I speak now of neither as such but of the free person who acts without great discretion at the direction of another, making his act count as the other's. How does free and limited agency of this kind relate to the personhood of man?

Suppose two lists of human acts of which one consists of Buying, Selling, and Paying; Making Contracts; Marrying; Arguing in Court; Making War; and the other consists of Eating; Sleeping; Copulating; Knowing; Loving. What is the basis of distinction between them? The first list starts on a commercial note but is expanded to include transactions which may be completely uncommercial. The second list begins with the immediately physical but is extended to include complicated spiritual processes. The difference, I suggest, is that the first kind of acts are those where it is generally accepted that one person may be an agent for another, the second those which are commonly regarded as uniquely personal, so that no agent may carry them out for his principal. You may marry by proxy, but you may not have intercourse by proxy. You may hire a soldier to fight for you, but not a slugabed to sleep for you. You may have a lawyer represent you in court but not a professor represent you in an examination. In one set of instances the act done in your name is as good or better than if you had done the act yourself in person; in the other the intervention of an intermediary seems to be absurd.

The distinction between the delegable and the undelegable is also the distinction between the legal and the nonlegal. In each case where another may act for you a legal concept has made the literally impossible metaphorically appropriate so that you, not being present in body, may make your agent's act your own. The necessity of a legal concept is particularly plain where the delegability of an act is uncertain or contested—cooking, for example, or teaching. If the hostess bakes the cake herself, it may well be looked at in a different light by herself and her guests than if she had bought it at the bakery, although in either case in serving it she may speak of it as part of "her dinner"; if the cake were the work of her cook, ascription of responsibility to her would be even more delicate and debatable. Teaching may be assigned by a professor to be conducted by section leaders in a course he is classified as teaching; it will often be felt that he has engaged in unwarranted fiction. No definite concept of agency has developed which definitively authorizes the hostess to treat her cook's act as her own or the professor that of his assistants. Only where a legal concept has been accepted as appropriate is it possible for one person to stand in for another.

As definition suggests and as these examples manifest, the legal concept of agency will be acceptable only where what is done is thought not to require any special personal quality. The introduction of agency is depersonalizing. Sometimes, no doubt, this may be counted a gain, as when lawyers were substituted for litigants in lawsuits or when trial by battle became possible by hired champions. But it is a gain in such instances only because the personal relations were hostile. In the general run of cases where persons are aiding each other, the use of an intermediary means a loss in knowledge, in love, in reciprocal recognition of humanity.

Agency, nonetheless, is a necessity of large communities. It requires but a moment's thought to imagine what commercial chaos would occur if every owner had to sell in person, how corporations would disappear without agents to act for them, how government itself could not operate without delegated functionaries. A world without agents able to act for their principals would be so remote from our experience that it would be Utopian to speculate upon its structure. The legal concepts of delegation, proxy, agency have permitted men to organize their activities, extend their power, and build their communities in multiple ways beyond the boundaries which would hold if persons had to relate to each other in person.

The Gospel itself is rich in appeals to agency: "He who hears you, hears me." "Whatever you shall bind on earth shall be bound in heaven, and whatever you shall loose on earth shall be loosed in heaven" (Mt 18:8). The texts are not only the ecclesiological ones: "Whoever receives one such child for my sake, receives me" (Mt 18:5). "As long as you did it for one of these, the least of my brethren, you did it for me" (Mt 25:40). In all of these instances persons are put in the position of Christ, acting and receiving for him.

Canon law, while it did not create these concepts, has fostered them, and their expansion and their pervasiveness in Western thought is owed to the Church's sponsorship. Distribution of authority in the hierarchical organization was largely accomplished by agency. Consistent with a theology which emphasized the descent of power from God to the Church, from the Apostles to the bishops, from Peter to the pope, delegation was a favored mode of action. Judges-delegate judged for the pope throughout the world. Bishops dispensed by

papal permission. Curates witnessed marriages by their pastor's delegation. Everywhere canon law favored the use of surrogates. It gave cathedral chapters, monasteries, universities and the Church itself the structure of a corporation.

None of this organization and extension of power was possible without a vision of human solidarity and communal responsibility. The channels which were made for cooperative human effort, the enduring shapes which were given to intellectual and religious endeavors, must be counted as the fruits of the depersonalizing of human acts by agency. Collectivity formed by legal forms has been the condition for the conduct of research, the dissemination of knowledge, and the life of the religious order.

Sacramental theology, especially as developed in scholasticism, sought to explain divine cooperation with human action in the sacraments in terms of instrumental causality. Is not the law of agency the model on which this metaphysical notion is based? When he consecrates the bread and wine, the priest acts not in his own name but Christ's. The minister of any sacrament becomes so by subordinating his intention to the Church's. The participants in the liturgy do not intend to join the celebrant in his own person; the recipients of the sacraments want to encounter Christ, not the priest in his human qualities. If the legal concept did not exist that an agent's act may be attributed to his principal without personal liability by the agent, the Church would have had to invent it; for the ministers of the sacraments act for their divine principal without personal liability for their acts. Marriage, of course, is an exception. Putting it aside, the sacramental system has depended on the depersonalization of the distributors of sacramental grace, so that through the act of any priest God could act.

The sacrament which most strikingly combines agency and personal participation is penance. On the one hand, the hearing of confession is reserved to those delegated jurisdiction by the bishop, and in pronouncing absolution these priests act not in their own name but God's. On the other hand, the personal participation of the penitent is required. The sacrament of penance has developed by analogy to a court; it is the internal forum where the priest acts as judge; but representation by counsel is forbidden. Nothing in sac-

ramental theory as such justifies this rule. Marriage, after all, may be sacramentally contracted by proxy. Vicarious reparation has been dominant in the theology of redemption. Commutation of corporeal penances to cash fines has been an established practice in the past. Why could one not confess his sins and sorrow by an attorney and do penance through a professional penitent? In the collective reception of absolution a move is made in this direction. Is it only habit that makes the introduction of attorneys for the penitent seem grotesque?

IV. MARRIAGE

Marriage, like agency, has been so often taken for granted as part of the order of things, that it requires a wrench of thought to realize to what extent it is a creation of law. No doubt without law male and female would live together, but if law did not designate particular words and actions as betokening the public commitment of a man and a woman to each other, how would marriage be distinguished from other forms of sexual association? As much as slavery, trusteeship, or agency, marriage depends upon a legal system for its definition and for recognition of its constituent elements.

Two peculiarities of marriage in the sacramental system of agency have been remarked. God's agents can delegate their functions to proxies. At the same time it matters who the agents are. If there is a mistake as to the person marrying, the marriage is invalid and the sacrament not conferred. The ministers of the sacrament do not merely bestow it; they are implicated by their action; they are personally involved by their agency. The possibility of proxy marriage is no doubt a minor anomaly, a survival from a time when marriage was more of a family treaty and less of an individual commitment, and now destined to be eliminated entirely as a fuller conception of marriage becomes dominant. But the other special features of sacramental marriage—that it depends on who the ministers are and that it makes the ministers liable for their act—seem neither trivial nor anachronistic. They demonstrate that depersonalized agency is not essential to the sacramental system. God does not have to impart grace by interchangeable ciphers.

If humanization of man means an increase in those acts which

only an individual man can do—not only eating, sleeping, and copulating, but loving and knowing, then the role of church law in humanizing man must be to increase the personal and to reduce the impersonal. How often the exception to a rule carries the true principle. Might marriage become the model of the responsibility entailed by the conferring of a sacrament? The ministers of this sacrament freely undertake to create the image of another relationship. Their union is a sign—visible only if embodied in their actions as human persons. Are they at the extremity of madness or have they reached the height of human insight, if, in the freedom of their mission, they say with Lear:

We two alone will sing like birds i' the' cage;
When thou dost ask me blessing, I'll kneel down
And ask of thee forgiveness; so we'll live
And pray, and sing, and tell old tales, and laugh
At gilded butterflies . . .
And take upon's the mystery of things
As if we were God's spies . . .

Is agency the best concept to explicate such a relation or any sacramental relation of the members of the Christian community to one another and to Christ? Marriage, if it is taken as the model, provides a different paradigm: it functions not as slavery, trusteeship, or agency, but as a meeting of two who are representative by analogy, whose actions by mutual consent become one another's.

In Genesis we are told that man is made in a likeness. In the Gospels, likeness is carried to a sublime degree: "He who sees me sees also the Father" (Jn 14:9). The concept is not one of agency. It may be that sayings such as "Whoever receives one such little child for my sake, receives me" should be understood analogously, not in terms of agency, but of likeness. Even the ecclesiological texts—"He who hears you"; "Whatever you shall bind"—may be patient of this reading. Focus then is directed to the person acting as conformed to the person of Christ. The classic phrase, *alter Christus*, captures the sense.

Slavery, trusteeship, and agency are legal constructions which make human interaction possible by substitutes treating one person as larger or smaller than another. One side of Christian thought,

accepting the inequalities and distances inherent in the relations of people, has made the best of them by such palliatives. For this thought the human encounter is possible only by such fictions, such games; the real events are extraterrestrial. The other side of Christian thought has stressed the unique character of each life on earth, and perceived each unique being here as linked to others by the bonds of love. For it, too, however, man does not stand by himself, but as an image. In the language of St. John, we are no longer addressed as slaves, but as friends. Our acts are another's not by legal fiction but by likeness.

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