

ON VALIDITY AND INVALIDITY OF SACRAMENTS

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THIS ARTICLE had its genesis, more or less, in an after-dinner conversation with a theologian who remarked, as we were talking about sacraments and priesthood, that the notion of "validity" belonged in my discipline of law rather than his discipline of theology. His doctrine is very much concerned with sacraments as celebrations, and so he is less apt to ask whether they are valid than how well they come off. On his understanding, talk about validity or invalidity of a sacrament is no more useful than talk about validity or invalidity of a birthday party.

His impatience with traditional notions of validity is shared by many ecumenical-minded people who see invalidity as a pejorative term and are unwilling to apply it to the ministrations of those Protestant bodies that lack priests ordained in the traditional fashion but seem to be living in Christ's presence at least as fully as a typical group of Catholics or Orthodox.

These problems with the notion of validity of sacraments are, in fact, very similar to some of the problems we have with the notion of validity of legal transactions. If it seems unacceptable to consign a child to hell (or even limbo) because the priest used the wrong formula in baptizing him, it seems analogously unacceptable to put a family out of their home because their title deed is not sealed in the proper way.

My friend's dismissal of validity as a mere legal concept is, of course, not to be taken seriously. Many legal concepts, including this one, have gained a secure place in theology. But if a legal concept is to be used in theology, perhaps our experience of it as a legal concept can shed some light on its theological function. It is with this possibility in mind that I shall try here to see what contribution legal analysis can make to a theological understanding of the validity of sacraments.

I am encouraged in the attempt by the fact that the sacraments seem to resemble legal transactions in a number of ways. Just as the sacraments pick up and sanctify events out of everyday life (e.g., the Eucharist as a common meal), or events out of salvation history (e.g., baptism as a passing through the Red Sea), so they pick up and sanctify common juridical forms. Baptism and confirmation correspond to forms such as naturalization by which people are received into a community. Ordination is like inauguration or swearing in, the entry into an office or a position. Marriage is like the secular or pagan transaction of the same form. The correspondence between the sacrament of penance and a judicial trial

and sentence has often been noted. It is possible, though perhaps more fanciful, to see the anointing of the sick as an authoritative liberation like habeas corpus or the medieval gaol delivery. Even the Eucharist has a juridical counterpart (though its other symbolic elements are much more important) in the crowns, masks, stools, maces, and other physical objects used to embody the official presence of kings and chiefs in the assemblies of their people.¹

More important for our present purposes than these specific analogies is a certain general similarity of function between the sacraments and the kind of legal transactions that we characterize as valid or invalid. Legal transactions such as the probate of wills, the execution of deeds or commissions, the sale of goods or the adoption of children have a kind of positioning function. They give you a social context. They show where you stand in the ongoing life of the community under the law. Similarly, the sacraments give you a spiritual and ecclesiastical context. They show where you stand in the ongoing life of the Christian people under God.

THE MEANING OF VALIDITY

The sacraments, like the legal transactions just referred to, are effected by means of "performative utterances." The concept of a performative utterance ("performative" for short) was developed by Oxford Professor J. L. Austin (1911-60) to describe a class of linguistic usage that does not seem to impart information, express emotion, or do any of the other things linguistic philosophers generally expect language to do.² Utterances of this class seem not so much to describe a state of affairs as to create one. For instance, when the bridegroom at a wedding says "I, George, take thee, Martha, etc.," he is not describing a marriage ceremony or enumerating the obligations of the married state; he is getting married.

Austin gives a number of examples of social performatives—"I bet," "I promise," "I apologize"—but legal examples are of more concern to us. In addition to marriages, wills, deeds, appointments, powers of attorney, contracts, and many other legal transactions take this form. They affect people's status, their rights and duties, their ownership of lands and goods. That is, they serve the positioning function just referred to.

Both socially and legally, as Austin is quick to point out, the effect of the performative is not achieved merely by saying the right words, but

¹ See, e.g., the article "Mace," in N. Wilding and P. Laundy, *An Encyclopedia of Parliament* (4th ed., London, 1971) 451-57. This aspect of the Eucharist is brought out more fully in services such as Benediction than in the Mass.

² Austin's most complete statement is in *How to Do Things with Words* (Urmson ed., Oxford, 1965). Karl Olivecrona put Austin's work to legal use in "Legal Language and Reality," in *Essays in Honor of Roscoe Pound* 151 (Newman ed., 1962), and later in *Law as Fact* (1971).

by saying them under the right circumstances. He gives the example of the wife of the president of a shipping company, who is about to break a bottle of champagne over the bow of a ship and name it the Queen Elizabeth. When she has done so, everyone will call it by that name. But if someone rushes up at the last minute, grabs the bottle out of her hand, and breaks it against the ship, shouting "I name this ship Generalissimo Stalin," it will not carry that name. The performative, in Austin's terminology, will misfire. According to Austin, if the performative is to have its effect, it must be part of "an accepted conventional procedure," the persons and circumstances must be appropriate for invoking that procedure, and the procedure must be executed correctly and completely by all those involved.

I would add one more condition: the participants must intend to invoke the procedure. Austin does not deal with intention except under the head of insincerity, which he says makes the performative "hollow" but does not keep it from taking effect. But to my mind, invoking the procedure without intending to is different from invoking it insincerely. Take the difference between signing a note not intending to pay it and signing a note thinking it is a receipt. Or supposing the bottle slips out of the president's wife's hand at the launching and breaks over the ship while she says "Dammit." Both in social relations and in law, a performative is generally regarded as not taking effect if it is uttered without the intent to invoke the procedure of which it forms a part. The comparable principle in sacramental theology is that the sacramental performative must be uttered with the intent to do what the Church does.

Lawyers deal constantly with the concept of validity and, as is their custom with familiar concepts, they define it to suit the occasion or not at all. Their definitions, when they offer definitions, tend to cluster in two categories: one that dwells on legal effect (a valid will is one that will pass the testator's property in accordance with its terms) and one that dwells on conditions that must be met (a valid will is one that is signed by a mentally competent testator in the presence of two witnesses who also sign in the presence of the testator and of each other). The two types of definition are, of course, not inconsistent, since it is obvious that if all the necessary conditions are met, the transaction will have whatever effect the meeting of the necessary conditions gives it. On the other hand, the definition in terms of effects is not fully accurate, since something besides invalidity may prevent a transaction from having the effect expected of it. A will may not pass the testator's property because his creditors may get it all. A contract may not be enforceable according to its terms because of a supervening impossibility of performance. A married couple may have no right to live together because one of them

may be in jail. In all these cases, we do not say that the transaction is invalid, we say that even though it is valid it fails of its customary effect. The transaction is still valid because the prescribed conditions have been met. The definition of validity in terms of these conditions is the one that covers every case.

So the validity of a legal transaction turns out to involve the fulfilment of conditions quite like the conditions for a performative utterance taking effect: that the transaction be carried out by the right people under the right circumstances. For convenience, I shall refer to a performative as being "in order" if the conditions are met for its taking effect. Thus it will be possible to speak of the validity of a legal transaction as follows: *A legal transaction effectuated by a performative utterance is "valid" if and only if the performative by which it is effectuated is in order.*

The validity of a sacrament raises a problem of definition quite similar to that raised by the validity of a legal transaction. We could say that a sacrament is valid if it achieves the spiritual effects it is supposed to achieve,³ or we could say that it is valid if the performatives by which it is effectuated are in order. Here, too, there are objections to defining validity in terms of effects, because other things besides invalidity may keep a sacrament from having its proper effect. Thus, a baptism may fail to confer grace because the recipient was not sorry for his sins, or it may fail to confer grace because the minister poured on cleaning fluid instead of water, but only in the latter case would we speak of the baptism as invalid.⁴ Conversely, where the minister pours cleaning fluid, the rite may confer grace because of the dispositions of the parties, but it will still not be a valid baptism.

Expressing this understanding of validity in the terminology adopted here, we arrive at the following: *A sacrament is valid if and only if the performative by which it is effectuated is in order.* All the traditional theological categories—matter, form, intention, subject, minister—can be subsumed under the reference to the performative being in order.⁵

Note that with validity understood in this way, we are not questioning the reality of anyone's spiritual experience when we question the validity of his sacraments. I want to stress this point because I feel that some authors have created unnecessary problems by disregarding it. They

³ See, e.g., the statement by K. Knutson concerning a Lutheran approach to validity, *Lutherans and Catholics in Dialogue 4: Eucharist and Ministry* (1970) 43–44.

⁴ In the former case theologians would speak of it as "unfruitful."

⁵ As I have defined the term, the performative will be "in order" if the conditions for validity are fulfilled, even if the conditions for liceity are not—e.g., where leavened bread is used for the Eucharist. It is not easy to find a comparable case of a valid but illicit legal transaction. The only one I have been able to think of is that of a conveyance lacking the necessary revenue stamp.

seem to feel that validity is a matter of spiritual effect, so that invalidity cannot properly be attributed to any ministrations that seem to be seriously undertaken and that seem to bring people closer to Christ. I find no basis either in Catholic tradition or in secular law for defining the term in any way that would require this sensitivity in its use. Granted, many Catholic apologists of the old school, although there was nothing wrong with their *definition* of invalidity, were overbroad to the point of arrogance in drawing the *consequences* of invalidity. To determine the exact nature of these consequences requires a fairly sophisticated inquiry.

THE VALID LEGAL TRANSACTION

At this point let us look at what happens when there is a valid legal transaction—say I sell you my house, executing and delivering the deed with all the formalities prescribed by law. For one thing, there is a moral aspect to the transaction. Having duly sold you the house, I ought to move out and let you move in: it is right for me to do so, wrong for me not to. There is also a kind of abstract legal aspect. There are rules in our legal system which assign rights and duties to the owner of a house. Before the sale those rules applied to me; now they apply to you. Furthermore, there are public officials who will “enforce” these rules: somewhere there is a sheriff or policeman who would formerly have put you out of the house at my request; now he will put me out at yours. Finally, there is a whole series of attitudes that prevail in the community concerning the owner of a house. Our fellow citizens, on learning of this transaction, will transfer those attitudes from me to you.

The various schools of legal theorists have given different emphases to these different consequences.⁶ For my part, I see them as complementary. They are all parts of an ongoing dialogue in which the government, the community, and individual citizens develop and voice expectations of one another. In selling you my house, I have created an expectation on your part that I will move out and let you move in. It is morally right for me to live up to that expectation. The rules of law are expressions by the community or by the legislative agencies of the government of what they expect of the owner of a house and what they expect on his behalf. The sale transfers these expectations from me to you. Statements about

⁶ Emphasis on the moral effect of the transaction, the duty to move out and the right to move in, is typical of traditional scholastic legal theory. Emphasis on rules is characteristic of the analytical positivists, whose major modern statement is H. L. A. Hart's *The Concept of Law* (Oxford, 1961). Emphasis on enforcement by public officials is characteristic of American legal realism; Holmes, “The Path of the Law,” *Harv. L. Rev.* 10 (1897) 457 is generally regarded as the founding document of this school. For emphasis on community attitudes, see Olivecrona, n. 2 above. My own views are further developed in *The Legal Enterprise* (Port Washington, N.Y., 1976) chap. 1.

enforcement are statements about what we expect of the sheriff, or about what the sheriff will expect of us when he intervenes in the situation. Statements about community attitudes are statements about what people expect of you as the buyer, of me as the seller, of the sheriff if he is needed, and of one another.

To put the matter more generally, I think that law can best be seen as a kind of dialogue between a community and its government. Within that dialogue, particular rules and dispositions express how the government expects the ongoing life of the community to be ordered, and how the community expects the government to intervene in that ongoing life. Legal transactions like the sale of a house affect the manner in which these mutual expectations apply to particular persons. They help set the terms of a particular person's participation in the dialogue between community and government. As I put it earlier, they show where he stands in the ongoing life of the community under the law.

There remains the question whether a transaction of this kind affects the ostensible subject matter of the transaction itself. Does the sale of a house, for instance, in addition to affecting people's expectations, actually affect the house? At one time legal performatives were probably conceived of in magical terms, so that my transfer of the house to you was regarded as actually altering the supernatural condition of the house. Modern theorists have, of course, been unwilling to accept such magical notions. On the other hand, we are not altogether comfortable when the theorists go on to insist that the person who says that such-and-such house belongs to so-and-so is conveying information about the sheriff, the community, or the legal system, but is telling us nothing whatever about the house.

I think we will have to admit that a statement that the house belongs to so-and-so is not descriptive in the way that a statement that it is made out of bricks and painted white is descriptive. Still, I do not think it is correct that such a statement is not descriptive at all, or that it is descriptive of community attitudes but not of the house. To the extent that the house is more than bricks and paint, to the extent that it plays a part in the ongoing life of the community, it plays that part with the character of belonging to one person and not to another, so that belonging to one person rather than another is one of its qualities.

Let me illustrate with the analogy of a game. Suppose I hold three kings and two aces in my hand. The statement that I have a full house will be true if I am playing poker, false or meaningless if I am playing bridge. But within the context of an ongoing poker game, the statement that I have a full house is not a description of the mental condition of the players, it is a description of the cards I hold in my hand. By the same

token, within the context of the ongoing life of a particular community governed by a particular legal system, the statement that this is your house is a statement about the house.

THE VALID SACRAMENT

In Catholic doctrine a valid sacrament confers various graces on a properly disposed recipient. Some of these graces are general, common to all sacraments. Others are specific to particular sacraments: the graces conferred by marriage, ordination, and confirmation to live up to the state of life undertaken, and the creation, restoration, and maintenance of the supernatural life ("state of grace") in baptism, penance, and the Eucharist. Besides these graces, Catholic doctrine assigns to certain sacraments effects that seem to fall into a different category. These effects include the "character" imparted by baptism, confirmation, and ordination, the state of being "one flesh" in sacramental marriage, and the transformation of bread and wine into the body and blood of Christ in the Eucharist. Unlike the graces, these effects depend on no interior disposition except the intent to invoke the sacramental performative. Also, unlike the graces, they are irreversible. Finally, again unlike the graces, they seem to answer definitively the question of who or what someone or something is.

I shall refer to this second category of effect as "ontological," meaning by the term *pertaining to the place of a person or thing within the whole order of being, as distinguished from any contingent or ephemeral order*. I realize that this definition is narrower than the customary use of the term in scholastic philosophy. On the other hand, it seems fairly consonant with the purposes for which it was first coined.⁷ I have not found any authoritative definition that precludes my using it in this way (or any other way for that matter); nor have I found another word that would serve my purpose as well. That purpose is to show that sacraments have one kind of effect that is analogous to the effect of a legal transaction on people's expectations, and another kind of effect that is analogous to the effect of a legal transaction on the subject matter of the transaction. These are, respectively, the graces and the effects I have called ontological.

The manner in which the sacraments confer grace has long been a theological puzzle. Orthodox Catholic doctrine insists on a genuine causality linking the sacrament with the grace conferred. At the same time,

⁷ See Gilbert Ryle's article "Ontology" in *Encyc. Brit.* 16 (1967) 974: "It was intended to denote a particular branch of philosophy; namely, that branch which deals with the theory of being, for example the theory of what really exists in contrast with what only seems to exist, of what permanently exists in contrast with what only temporarily exists, and of what exists independently and unconditionally in contrast with what exists dependently and conditionally."

we are taught that grace is a free gift of God. How, then, can God's free gift have a cause extrinsic to God? There have been two major theories, that of "instrumental causality" and that of "moral causality." By the first theory, the sacrament is an instrument that God chooses to use in conferring grace; hence the grace can be attributed both to God and to the sacrament in the same way that the driving of a nail can be attributed both to the carpenter and to the hammer. By the second theory, the sacrament elicits from God the conferring of the grace: through the sacrament the Church calls on God to bestow the grace on the recipient. Hence the grace can be attributed both to God and to the sacrament in the same way that a pardon issued by a king at the request of a courtier can be attributed both to the king and to the courtier.

I find the verbal metaphor in the second of these theories more attractive than the technological metaphor in the first. On the other hand, I find it more persuasive to have the sacrament operate on the recipient, as it does in the first theory, than to have it operate on God, as it does in the second. If I had to choose between the two theories, I would be hard put to do so. Actually, though, I do not think we have to accept either one.

It seems to me that grace is not a commodity that God dispenses, as both theories seem to suppose it is; rather, it is a living presence of God in people's lives. When we ask how the sacraments confer grace, we are asking not how God uses them to dispense a commodity but how He uses them to become more fully present. That question is a little easier to answer.

If grace is an active presence, then the grace of a sacrament cannot be exhausted at the moment the sacrament is received. I expect the Eucharist to be a source of growth and sustenance to me as long as I continue to receive it. I expect from baptism and marriage the day-to-day support I need to live as a Christian and a married man for the rest of my life. In each case the sacrament initiates a continuing presence in my life ("habitual grace"), and with it the expectation of regular and renewed creative interventions for my support ("actual grace"). In the same way, your purchase of my house initiates a habitual recognition on the part of the public authorities that the house is yours, and with it the expectation that the sheriff will intervene in support of your ownership when you need him.

The question of how the sacrament produces these effects is quite like the question of how the sale of the house makes you the owner. In both cases the performative, simply by being a performative and being in order, accomplishes what it says. It accomplishes it not as a tool accomplishes a task, and not as a motive accomplishes an act, but intrinsically and without mediation. If the law can establish performatives effective

within the community it governs, so much the more can God, who created the whole universe through His Word, establish performatives with universal effect.

Grace, the expectation of God's intervention in my life,⁸ is not the only expectation created by the sacramental performative. God expects me to live in accordance with the sacraments I receive; so do my fellow Christians. I, for my part, expect to be supported not only by God but by the Christian community as well. When a person is baptized, God expects him to live as a Christian, his fellow Christians expect him to participate in their common life, and he himself expects the support of his fellow Christians in living as one of them. These expectations also are analogous to those that arise from a legal transaction. When I sell you my house, the government expects me to surrender possession and you to pay the taxes. The neighbors expect you to see to the removal of the trash and the mowing of the lawn. You expect them to call the police if they see a burglar breaking in.

This brings us to the ontological effects. Affirmations about the ontological effect of sacraments do not fit comfortably into modern philosophical categories. Hence there has been a tendency to restate such effects in nonontological terms (as by attributing Christ's presence in the Eucharist to the faith of the recipient) or to deny them altogether (as by insisting that a man and a woman cannot still be sacramentally married when they have lived apart for ten years and still hate each other). This tendency is analogous to the tendency of legal theorists, also concerned with modern philosophical categories, to say that a legal transaction does not directly affect its subject matter—to say that the statement that you have bought my house confers no information about the house.

I suggested in response to the theorists that a statement about who owns a house is a statement about the house itself in that it tells us what part the house plays in the ongoing life of the community under the law. In the same way, a statement that bread and wine at the Eucharist become the body and blood of Christ is a statement about the bread and wine in that it tells us what part they play in the ongoing life of the Christian community under God. Or the statement that two people are man and wife is a statement about those two people in that it tells us what part they play in the same ongoing life.

⁸ In calling grace an "expectation," I am not adopting the view, condemned by the Council of Trent, that it is merely a favorable disposition on God's part toward the person in question. The term "expectation" denotes a claim (I expect my students to read this material before the next class) as well as a prediction (I expect it to rain tomorrow). See *The Legal Enterprise* (n. 6 above) 22-23. Note that Karl Rahner uses two metaphors for grace, a pledge and a kernel, both of which denote expectation; see *Foundations of Christian Faith* (New York, 1978) 124.

Of course, even if the quality of belonging to you or me is a quality of a house, it is not an ontological quality in my sense of the term. There are two reasons why it is not. First, within the legal system the quality of belonging to a particular person is ephemeral. The same law that assigns one owner to a house will under many different circumstances (e.g., a tax sale, an eminent-domain proceeding) assign a different owner in his stead. Second, the legal system itself is ephemeral. It operates only within the borders of a particular territory, and even within those borders a legislative innovation could give the house a different owner, or a revolution could abolish private property altogether.

Other qualities attached to persons and things by legal transactions are ephemeral in the same two ways. A public official may be deposed by appropriate legislative or judicial proceedings. Or he may revert, at least temporarily, to the status of a private person by crossing a state line. If he is constitutionally irremovable—like the czar in Russia—he may be turned into a refugee by the displacement of the constitution itself. A painting or a truckload of furniture that was legally confiscated from its owner (say from a Jewish owner by the German government in 1938) may be restored to him if it finds its way to a different country, or even in the same country after a political change. Even marriage, insofar as it is a civil legal transaction and not a sacrament, may be effective only in certain countries, and only for certain times.

Qualities imparted by sacramental transactions, on the other hand, are not ephemeral in either of these ways. Within the sacramental system there is no way in which the effect of a sacramental performative can be undone; nor is there any time or place in which the sacramental system does not apply. But not being ephemeral in these ways does not exhaust the ontological significance of the sacramental performatives and their effects. As a legal performative may determine the part played by a person or thing in the ongoing life of a community under the law, so a sacramental performative may determine the part played by a person or thing in the ongoing life of the Christian community under God. But that ongoing life is a participation in the interior life of God, who is Being itself. To determine the part played in that ongoing life is to set the terms of participation in Being; this is the fundamental basis for calling the effect of the sacrament ontological.

THE INVALID LEGAL TRANSACTION

We can speak of an invalid legal transaction where a performative is attempted but is not in order—where, in Austin's terminology, it misfires. Or we can speak of an invalid transaction where a result that is normally brought about through a performative is brought about with no perfor-

mative at all. An example of the first kind would be a case where a will had not enough witnesses; one of the second kind would be a case where the family of the deceased took over his possessions without any will.

In neither of these cases does the law necessarily treat the invalid transaction the same as no transaction at all. Such transactions give rise to a variety of expectations which the law may have occasion to take into account. To show how it does this, let us look at a few specific cases and then see what general conclusions can be drawn from them.

1) A group of business associates or investors can obtain through certain performatives the status of a "corporation." When they have this status, they enjoy, among other benefits, "limited liability," that is, none of them can be held responsible for the debts of the enterprise beyond the amount he himself has invested or agreed to invest. This is an important benefit, because it enables people to embark on innovative, and therefore risky, ventures without placing their entire fortunes in jeopardy.

a) If we attempt in good faith to form a corporation in the way the law provides, but inadvertently omit or misperform a step in the process, we will usually end up with a *de facto* corporation. This will lack some of the qualities of a *de jure* corporation; notably, the state can make it stop doing business in a corporate name. But the investors will have the benefit of limited liability.

b) If we start doing business as a corporation without making any attempt to form one as the law provides, we will probably not be able to claim limited liability or any other benefit of being a corporation. Even here, though, some courts hold that an investor who buys stock in what he supposes in good faith to be a corporation should not lose his whole fortune to a creditor who also supposed it to be a corporation when he extended credit. The law can protect the expectation of the investor without disappointing any expectation of the creditor; there is no reason why it should not do so.

2) The performatives for the conveyance of real property have differed considerably in different periods of history, but they have always been fairly elaborate. Generally, today, the seller must execute a formal document ("deed") describing the transaction in traditional terminology, and the buyer must then have this document recorded in a public register.

a) If I, as seller, embark on this procedure or agree in writing to do so (the requirement of a writing is to provide evidence of my undertaking), you, as buyer, can require me to go through the whole procedure or supply any steps I may have left out. Any steps you have left out you can supply whenever you choose. But until the missing elements are supplied, I can sell the property to a third person who is unaware of the sale to you, and you will be out of luck.

b) Even without written evidence of my undertaking to sell you the property, you may be able to hold me to it if you have entered into possession and made improvements. But you are still not protected against a third person who buys the property from me without knowing about your claim.

3) Marriage (again considered as a civil relationship only) is accomplished by a performative that generally involves some kind of license from a public official, followed by a ceremony before either a public official or a minister of religion and the making of a public record.

a) If the performative misfires through inadvertence (say the license was improperly issued) or an unsuspected ineligibility of one of the parties (say a defect in Harry's Mexican divorce), the result will be a "putative marriage." The parties will have all the rights and obligations of the marriage relation as long as they stay together. Their children will be legitimate. Each may have to share with the other the property he or she acquires while they are together. On the other hand, they are free to break up. Either may leave the other and marry someone else. Once they have broken up, neither can gain further rights from the relationship.

b) If the parties live together without a marriage ceremony, some states will treat their relationship as a "common-law marriage" if there is adequate evidence that they intended to be man and wife. But even if the relation is one of mere concubinage, to the extent it is stable and enduring, it may impose obligations. For instance, the man may have to pay the grocery bill the woman runs up for their common meals. And if they split up, they may have to share the property and money that they have gained by their joint efforts or put aside for their joint support.

4) Adoption, another relationship established through performatives, creates as nearly as possible the full range of rights and duties that exist between parent and child.

a) If the performative misfires, most of the same rights and duties will exist until one party or the other abandons the relation. For instance, if the relation continues until the death of the adopting parent, the child will participate with other children in the parent's estate. On the other hand, if the relation has been abandoned, the child will have no share in the estate. If the adopting performative had been in order, the relationship could not have been abandoned, and the child would have had the same rights as a natural child regardless of anything either he or the parent did.

b) Where there is no attempt to enter into an adoption, the person who raises a child may still stand *in loco parentis*. Whether he does or not will depend on his intentions toward the child. If he is *in loco parentis*, he will have all the rights and duties of a parent as long as the relationship continues. That is, he may punish the child without being

liable for assault, he may put the child to work without having to pay him, and he must provide the child with food, clothing, and medical attention. But he can break off the relation and abandon the child (as long as he does not leave the child wholly unprovided for—the usual case is one where a man abandons his wife and the child they were both raising, and is held not to be liable for child support payments).

This handful of examples will, of course, not exhaust the subject of invalid legal transactions, but it will serve to illustrate some of the common threads running through the ways the law treats such transactions. The following principles appear to be generally applicable:

1) *The invalid transaction takes its meaning from the valid transaction.* That is, the question with which the law has to deal is how far the one shall be equated to the other. To what extent will the defectively formed corporation give the same advantages as a real corporation? Which of the rights of a true landowner will we extend to an occupant whose title is defective? What rights and responsibilities of married people attach to people who cohabit without being married? When can a person *in loco parentis* treat a child in the same way as an adoptive parent could?

2) *The performative serves to resolve the ambiguity that would otherwise be present in the transaction.* If the parties fail to go through the prescribed performative, it cannot be known for certain whether they wished to bring about the state of affairs the law envisages in supporting the valid transaction. Without the performative we cannot be sure that the business associates expected to adopt a corporate form and put a specified amount of capital at risk; that when I put you in possession of my house, we expected you to become the owner in my stead; that a man and woman who share an apartment have made a serious commitment to each other; that a person who takes a child into his home expects to raise the child and be a parent to him. Where the law endeavors to give effect to expectations of this kind, it cannot do so in full confidence without the performative.

3) *As the invalid transaction approaches unambiguity, it tends to become the moral equivalent of the valid transaction.* To the extent that those who invested in a business expected to have limited liability, that the person who moved into a house expected to be the owner, that a couple expected to be man and wife, that an adult expected to take responsibility for raising a child, their expectations were the same as the ones which enter into valid incorporations, sales, marriages, or adoptions. We will feel that these people ought to have what they expected, and the law will tend to give it to them. Much of the law's reluctance to give effect to expectations of this kind is a result of difficulties of proof, and will be overcome to the extent that the expectations are clearly shown.

This is why a transaction in which the performative misfires will have more nearly the effect of the valid transaction than will a transaction in which no performative is attempted.

4) *The invalid transaction never becomes the real equivalent of the valid transaction.* I use the word "real" here to mean pertaining to the *res* or subject matter of the transaction. The real effect of the valid transaction, that is, its effect on its subject matter, is one that the invalid transaction cannot have. The people who inadvertently fail to form their corporation may escape the burden of unlimited liability, but they are not "really" a corporation, and they cannot go on doing business as a corporation after they discover their mistake. If I inadvertently fail to give you a good title to my house, you may be protected against me, but since you are not "really" the owner you will not be protected against a good-faith purchaser who buys from me and gets a proper conveyance. An invalid marriage or an invalid adoption will create rights and duties only as long as the personal relationship envisaged by it persists, whereas a "real" marriage or adoption may continue to create rights and duties even after the personal relationship is broken up.

The difference between moral and real equivalency, as invoked by the last two points, needs more discussion. For the purpose, let us look at the case of *Ritchie v. Katy Coal Co.*, decided by the Court of Appeals of Kentucky in 1950.⁹ Everett Ritchie married one Bertha in 1932 and deserted her in 1937. She languished for a while, but by 1942 had taken up with another man, although there was no divorce. In 1946 Everett went through a marriage ceremony with one Sallie, whom he deserted within a few months. In 1947 he went through another ceremony with one Lonnie, with whom he was still living when he was killed in a mining accident in 1949. It appears that neither Sallie nor Lonnie realized he was not free to marry.

The workmen's compensation benefits for Everett's death were split between Bertha and Lonnie. Bertha got a share because she was Everett's wife. Lonnie got a share because she was in fact dependent on him. Sallie got nothing because she was neither.

The moral basis of Lonnie's claim is obvious. She expected Everett to go on supporting her, and as far as anyone knows he would have done so if he had lived. The fact that she supposed herself to be married to him removes a moral obstacle to implementing her expectation (an obstacle that has impressed some courts and legislatures more than others) and also makes more definite what the expectation was (Principle 1). But even without the ceremony the expectation could have been discerned from the couple's copying of the domestic arrangements of their married

⁹ 313 Ky. 310, 231 S. W. 2d 57 (1950).

neighbors (Principle 2). In some jurisdictions it would still have been given effect.

We may suppose that by the time Everett died neither Bertha nor Sallie expected anything at all from him. We know that Bertha had made other arrangements. So evidently had Sallie, since she had had no more than \$65 from Everett in the two years preceding his death. It would seem, therefore, that neither Bertha nor Sallie had a moral claim of the kind Lonnie had, and that even if Bertha had had a claim of this kind it would have been no better than Sallie's. So it must be a different kind of claim that we recognize when we give a share in the benefits to Bertha but not to Sallie.

That claim, of course, is the one Bertha has as Everett's "real" wife. The marriage performative gave her this status, and only another performative from a divorce court could have divested her of it. It makes no difference that she did not need or did not deserve to be Everett's wife, just as it would make no difference if I did not need or did not deserve to own my house. Lack of need or lack of merit might be a reason for taking my house away from me—which would be a new transaction effected by a new performative—but not for treating the house as already not mine. Similarly, no such reason would justify ignoring a marriage where there has been no divorce.

The real effect of a legal transaction, as we have seen, is one of positioning the subject matter of the transaction within the ongoing life of the community. It is neither possible nor desirable to maintain that positioning in a constant correspondence with everyone's needs and deserts. Not possible because needs and deserts fluctuate. I need and deserve my house more on some days than others, but we could not maintain a legal system if I owned it more on some days than others. Not desirable because one of the results of the positioning brought about by legal transactions is to give people things to live up to. My status as a married man and a homeowner imparts direction as well as position to my life in the community. They point the way to moral development for me. If I lose any position I fail to live up to, my moral life in the community will be totally adrift. So the fact that Everett and Bertha made a bad job of their marriage does not mean that they were not "really" married.

Sallie's position while she and Everett were living together was like Lonnie's position at the time Everett died. It was the moral equivalent of a valid marriage (Principle 3). But when Everett left her and she provided for herself in some other way, the moral equivalency disappeared. The equivalency depended on the moral context created by the invalid transaction, and the moral context depended on the expectations to which the invalid transaction gave rise. Once this context was gone, Sallie had no

claim because she was not the real wife. The invalid marriage could not be the real equivalent of a valid marriage (Principle 4).

THE INVALID SACRAMENT

Traditional Catholic apologetics has had some difficulty reconciling the theological necessity of the sacraments with the obvious fact that many Protestants, who receive some sacraments invalidly, are better Christians than many Catholics, and many Jews, Moslems, pagans, or agnostics, who receive no sacraments at all, are better people and probably more pleasing to God than many Christians. Three lines of analysis have been used to resolve the problem, but none of them works very well.

First, there is the "baptism of desire" doctrine. This begins with the principle, evidently accepted from patristic times, that if a catechumen, one who has already committed himself to becoming a Christian, should die before he can complete his instructions and be baptized, his wish will be taken for the deed and he will be received into Christ's presence as a full-fledged Christian. His status is reconciled with the doctrine that only the baptized can be saved by saying that he has "baptism of desire." If his death came about by martyrdom, he is said instead to have "baptism of blood."

As applied to catechumens and other would-be Christians, this doctrine seems both sound and adequate. But its extension to cover all the unbaptized people that we are unwilling to consign to hell seems forced. The idea is that since it is the will of God that everyone should be baptized, anyone who desires to do the will of God desires, at least by implication, to be baptized and can therefore be said to have baptism of desire. As for an atheist, if he desires to do right, he desires, at least by implication, to do the will of God, so we can put him in the same case as the unbaptized theist.

This reasoning seems to obliterate the distinction between being baptized and not being baptized to the point of making the sacrament meaningless. At the same time, it seems to belie the respect we feel for the good lives of our neighbors, because it makes them the equal of baptized Christians only after death. Baptism of desire may serve a dead person as well as baptism of water, but it does nothing for a living person. Finally, this reasoning does not really solve the problem to which it is addressed. There is no historical support for applying it to any sacrament but baptism. If the Eucharist is also "necessary to salvation," this doctrine will not help.

A second approach to the problem is that of "invincible ignorance." If someone fails to receive valid sacraments, or even fails to receive any sacraments, because he does not know any better, God will let him off. This approach was originally developed to save people who had never

heard the gospel, or Christians who had never been taught the Catholic faith. But it is easy to extend it to cases where the gospel or the Catholic faith is presented so ineptly or so unpleasantly as to repel rather than attract the hearers.

This doctrine, too, seems seriously lacking in respect. It supposes that people of other denominations will be saved because they erroneously believe themselves to be serving God or following Christ, whereas we will be saved because we are actually doing so. Our experience is quite different. Our experience is that they are often *really* serving God or following Christ better and more faithfully than we are, and that at the Last Judgment we may well be the ones who will have to plead that we did not know any better.

A final approach to the problem is the "uncovenanted mercies" doctrine. God has promised us that if we receive the sacraments, we will be given the graces necessary to our salvation, but He has not promised us that He will withhold those graces from other people. It is likely, indeed is to be expected, that God will bestow His grace on other people as freely as He does on us. Only, He has not promised to do so.

The trouble with this is that it overlooks some of God's promises. If grace is God's presence in people's lives, there is good warrant for saying that He has promised to bestow it on anyone who asks. It is not clear that any mercies are uncovenanted.

It appears, then, that conventional apologetics does not offer an account of invalid sacraments or of nonsacramental transactions between God and man that can reconcile a sound ecumenical outlook with traditional Catholic teaching as to the necessity of the sacraments. My attempt here is to construct such an account on the analogy of the above treatment of invalid legal transactions. The four principles I developed there yield the following analogous principles:

1) *The invalid sacrament or nonsacramental transaction takes its meaning from the valid sacrament.* The things effectuated by sacramental performatives are essential to the Christian life even if the performatives themselves are not. One who does not receive baptism or the Eucharist must find some other way of initiating and maintaining a personal appropriation of Christ's redemptive work. To the extent that he is successful in doing so, we will say that his initial appropriation is the equivalent of baptism (hence the concept of "baptism of desire"), and his maintaining of that appropriation is the equivalent of the Eucharist (cf. so-called "spiritual" Communion). Similarly, we may say of a minister that his work of bringing Christ to others is equivalent in this or that way to the sacramental priesthood, or we may say of a sinner that he has repented and been forgiven just as he would have been through the sacrament of penance. To the extent that people are redeemed through

transactions with God that are not sacraments, those transactions can be described by reference to the sacraments which they replace.

2) *The sacramental performative serves to resolve the ambiguity that would otherwise be present in the transaction.* If the transaction is conceived as one between the person and the Christian community, this point is fairly clear. The performative has the same function as it has in secular legal transactions. But if the transaction is conceived as one between the person and God, it is a little harder to see how it can suffer from ambiguities, or how if it did they could be resolved by a performative. Even if I do not fully understand the nature and scope of my dealings with God or His dealings with me, He understands them well enough. How can He need a performative to make clear either what I mean or what He himself means? This appeal to God's omniscience fails to take seriously Austin's point that a performative does not merely describe a state of affairs, it brings one about. It is not that if I neglected to receive the sacraments, no one would know how fully and unambiguously I am committed to the following of Christ. Rather, it is my reception of the sacraments that *constitutes* whatever full and unambiguous commitment I have been able to make. It is my hope, indeed it is my expectation, that the rest of my life, as yet only tenuously and ambiguously committed to Christ, will grow into conformity with the sacraments I receive and the divine presence they call into my life. As for God's dealings with me, no doubt He will give me all I ask for and more, regardless of whether or not I receive the sacraments. But it is only in receiving the sacraments that I clearly call down His presence in my life: otherwise my asking is as ambiguous as my commitment.

A certain ambiguity of intention inheres in the human condition. That ambiguity will be more, not less, apparent to God, who sees hearts, than it will be to men, who see faces. As long as a transaction remains internal, it will necessarily partake in some measure of that ambiguity. The performative, being unambiguous in its effect, and requiring no intention beyond the intention to utter it, provides the internal ambiguity with an external resolution.

3) *As the invalid sacrament or nonsacramental transaction approaches unambiguously, it tends to become the moral equivalent of the valid sacrament.* Salvation is the free gift of God; it has only to be accepted. God will not refuse the benefit of Christ's redemptive work to anyone who makes a clear appropriation of it, whatever form the appropriation takes. The act of appropriation creates an expectation that God will make the appropriation good, and a moral claim that God will live up to the expectation. Baptism gives rise to the same expectation and the same claim; hence the act of appropriation, to the extent that it is unambiguously that, is the moral equivalent of baptism. Similarly, an

unequivocal dedication to the ministry of the gospel will be the moral equivalent of ordination—that is, it will entitle a person to proclaim God's Word authoritatively with confidence in his mission and to receive the respect due to Christ's representative. Again similarly, a man and a woman who unequivocally commit their lives to one another and live together in that commitment are entitled to God's blessing and the community's support for their union; their commitment is the moral equivalent of marriage.¹⁰ Or if a person unequivocally repents and renounces his sins and calls on God to forgive him, he has a claim to be forgiven, and his repentance is the moral equivalent of penance.

In all these cases there is theoretically no need for a performative to give rise to the moral equivalency. But, as we have seen, a performative may be necessary to keep the transaction from being ambiguous. There is a level of asceticism at which one's dealings with God are free from ambiguity, but not many achieve that level. For most of us, where there is no performative, the transaction is more or less ambiguous, and the moral equivalency is correspondingly more or less flawed.

4) *The invalid sacrament or nonsacramental transaction cannot become the ontological equivalent of the valid sacrament.* The moral equivalency just discussed is dependent on the expectations of those involved in the transactions in question. But the ontological effect of the sacraments constitutes a positioning within God's overall creation. It may give rise to moral claims that transcend the expectations of those involved. It may mean that God expects things of people beyond what they expect of Him. It may give people something to live up to as well as something to expect.

In other words, where the moral equivalency depends on the moral context, the ontological effect may create a moral context of its own. For example, the mutual commitment of a man and a woman, even if it is complete enough to furnish a moral ground for their living together without being validly married, will not impose on either of them a moral obligation to effect a reconciliation after they have split up, whereas a sacramental marriage may impose just such an obligation on both of them. To put it yet another way, the moral equivalency lasts no longer than the circumstances that gave rise to it, whereas the ontological effect is permanent. In developing these points, I am simply drawing out the analogy of my discussion of the *Ritchie* case against the background of my discussion of the ontological effect of sacraments.

A corollary of this principle is that the invalid sacrament will serve only so long as its invalidity is not perceived, the nonsacramental transaction only as long as the need for the sacrament is not felt. A person may lose nothing of God's mercy for being inadvertently baptized with

¹⁰ Cf. my "Natural Law and the Marriages of Christians," *Jurist* 35 (1975) 409.

cleaning fluid, but when he discovers the mistake he will be expected to have himself baptized over again with water. A member of a church that does not administer the sacrament of penance may have his sins, however heinous, forgiven by merely repenting them, but if he becomes a Catholic, he will be expected to mention them in confession.

This account of invalid sacraments seems to accord with Catholic teaching about the necessity of valid ones. It recognizes the valid sacrament, effectuated by prescribed performatives, as the model for God's redemptive work in the life of each person (Principles 1 and 2). It recognizes the system of valid sacraments as the ontological foundation for God's ultimate redemption of the world (Principle 4). At the same time it recognizes, again in accordance with Catholic teaching, that people who receive valid sacraments cannot claim any kind of moral superiority over people who receive invalid sacraments or no sacraments at all (Principle 4).

It remains to say a little more about the person, all too common, who receives the sacraments validly but fails to lead an adequate Christian life—fails, in traditional terminology, to correspond to the graces he receives. It is firm teaching that his moral state is, if anything, worse than that of a person who receives no sacraments at all. Still, the ontological transformations have taken place and cannot be undone. What this means, it seems to me, is that through the performative God assigns such a person a place in Christ's kingdom and chooses a mode of entering into his life. The place will be there when the person is ready to occupy it, and God will be present under the chosen mode when the person is ready to receive Him. Meanwhile the performative will give the person no claim on God, although it will set the direction of God's claim on him.

CONCLUSION

One need look no further than the documents of the Second Vatican Council to see how much the teaching and the ecumenical stance of Roman Catholicism are affected by questions of the validity of sacraments. The Council's new overtures toward Protestant churches rest in considerable part on the fact that most of those churches baptize validly. Its much broader overtures toward the Eastern Orthodox churches rest similarly on the fact that those churches administer all the sacraments validly. Catholics find in the actual or supposed lack of a valid priesthood, and hence of a valid Eucharist, their most formidable obstacle to closer relations with Protestants,¹¹ as they find in the possession of these

¹¹ Recent Catholic scholarship seems to have become more receptive to the validity of nonepiscopal ministries; see G. Tavard, "Roman Catholic Theology and 'Recognition of Ministry,'" in *Lutherans and Catholics* (n. 3 above) 301, and the statement of the Roman Catholic participants, *ibid.* 31-32. On Anglican attitudes toward the same question, see N. Sykes, *Old Priest and New Presbyter* (Cambridge, 1957).

sacraments their most important source of common ground with the Orthodox. As for their relations with Anglicans, anyone who has concerned himself with those relations can testify to how profoundly they have been affected by the papal judgment of 1896 on the insufficiency of the performative used by early Anglicans in conferring the sacrament of order.

I would not like to say that this concern with validity, this concern with accurate performatives, is misplaced, but I do think there may be more room than we have supposed for taking other considerations also into account. The Church's one foundation is Jesus Christ, her Lord; on this foundation are being built many mansions in varying stages of completion. It is not apparent why someone whose ontological transformation through the sacraments is incomplete should be less a part of the process than someone whose moral formation is still rudimentary, or someone whose doctrinal orthodoxy leaves much to be desired. My hope is that the foregoing account of valid and invalid sacraments may offer a basis for relating these different categories of incomplete Christian formation, and so point the way to a more sophisticated ecumenical understanding of who or what constitutes the Church.¹²

¹² My conclusion should be compared with those of J. Gurrieri, "Sacramental Validity: The Origins and Use of a Vocabulary," *Jurist* 41 (1981) 21.