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## Images, Spirituality, and Law

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# IMAGES, SPIRITUALITY, AND LAW

*Richard Stith \**

Let Us make man in Our image, according to Our likeness.

- *Genesis 1:26*

[T]he honor which is paid to the image passes on to that which the image represents, and he who reveres the image reveres in it the person who is represented.

- Seventh Ecumenical Council (Nicea II, 787)<sup>1</sup>

Technological consciousness and libertarian doctrine reduce the material world to an instrument—or better, to an amorphous resource existing solely for those ends which we freely choose.<sup>2</sup> We are trapped in matter without true form or meaning.

Even for the Christian, such reduction has grave consequences. God resides in a distant heaven or in a distant time. Only after years of exile in a nature bereft of divinity can we hope, perhaps, to be rewarded with bodily salvation in a different universe. In the meantime, any spirituality we hold to must be necessarily non-material—founded in a dualistic belief in the presence of the intangible Deity whispering to our own intangible selves. We are put asunder, into godless brains and disembodied souls.

Merely romantic protest against this state of affairs is not enough. We cannot wish our way out of the only world we think is real, for we know that in so doing we are only pretending, playing at believing. We cannot live in the world, say, of a Native American or of a Hindu simply because we think we might benefit from pantheistic beliefs. If we knowingly reduce truth to “what is good for us to be-

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1. Constantine Cavarnos, *Concerning the Holy Icons*, in *Orthodox Iconography* Appendix A, 54 (Institute for Byzantine and Modern Greek Studies, Belmont, Mass, 1977). I have here substituted the word “image” where Cavarnos has “icon.”

2. See Josef Pieper, *The Philosophical Act*, in *Leisure, the Basis for Culture*, translated by Alexander Dru, 69-125, especially at 81 (Pantheon-Random House, 1963); and Martin Heidegger, *The Question Concerning Technology*, in *The Question Concerning Technology and Other Essays*, translated by William Lovitt, 3-35 (Harper and Row, 1977). In a similar vein, but with explicit discussion of Christian icons (from a non-Christian point of view), see Theodore Roszak, *Where the Wasteland Ends* 109-41 (Doubleday, 1972).



lieve,"<sup>3</sup> it becomes fake and loses its power to do good for us. We need not less truth and reality, but more.

The icon (from the Greek *eikon*, meaning "image") offers us a way out, a way to reconnect the body (and matter itself) with spirit—a way actually to see God with our human eyes in this passing life. Eastern Christianity contains a nearly forgotten way to define what is real, a definition understood not as poetic pretense but as objective truth. Moreover, this ancient way of seeing seems inextricably part of Scripture and Tradition, and therefore to have the assurance of revelation behind it.

Beginning with the understanding of icons developed in the eighth and ninth centuries in the Near East, this essay will show that the iconic theory of reality permeates Eastern Christian spirituality. Finally, contemporary legal thought will be analyzed, for it is especially in law that today's great battle between image-based realism and instrumental nominalism is taking place.

## I. THE DIGNITY OF ICONS

On one point the iconoclasts (literally, "icon-breakers") of the eighth century agreed with the later-held orthodox iconodules ("icon-venerators"): a perfect image (or copy) is essentially identical to its prototype (or original).<sup>4</sup> So St. Theodore the Studite (759-826) writes in his defense of icon veneration: "If [the image is] . . . wholly similar [to the prototype] . . . the image is simply the prototype."<sup>5</sup>

This assumption, non-controversial even between these bitter opponents, may at first hearing surprise us moderns. For even a perfect copy is separated from its original by time and space; it was made after the original and stands in a location different from that of the original. Few among us would say, even of a perfect reproduction of a painting, "That is now the original" or "Neither of these can be considered only a copy" or "These two are really one and the same."

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3. Richard Rorty, *Philosophy and the Mirror of Nature* 176 (Princeton University Press, 1979).

4. This element of agreement is obscured by disagreements between opponents and supporters of icons on how to describe this state of perfect identity. See Jaroslav Pelikan, *The Spirit of Eastern Christendom (600-1700)* 109, 113 (University of Chicago, 1974). For a general critical history of the iconoclast struggles, see Hans-Georg Beck, *The Greek Church in the Epoch of Iconoclasm*, in Friedrich Kempf et al, *The Church in the Age of Feudalism*, in 3 Hubert Jedin & John Dolan eds, *Handbook of Church History* 26-53 (Herder and Herder, 1969).

5. St. Theodore the Studite, *On the Holy Icons*, translated by Catherine P. Roth, 111 (St. Vladimir's Seminary Press, 1981).



To declare that the image *is* the prototype is to think of reality as wholly a matter of form, to be oblivious to spatial and temporal separation. Yet is St. Theodore's idea foreign to our ears or only to our minds? Perhaps modern metaphysical dogmas prevent us from understanding not only the wisdom of past ages but even the phenomenological worlds in which we still live. Here, as elsewhere, pseudo-scientific doctrines may keep us from thinking clearly about that which we already know.

I recall a science fiction story read many years ago. It seems that a "copy-a-person" chemistry set had by accident come from the future to Smith's basement. Smith successfully proceeded to make a perfect, living image of himself. The copy was so exact and complete that it shared Smith's every affection and memory. Unfortunately, at that moment the chemistry set owner appeared and demanded to have all of his chemicals back. Of course, both Smiths claimed, sincerely, to be the true original, so the owner just took one Smith at random and dissolved him back into his components.

Was there not a deep truth in the claim of Smith's perfect image to be Smith? To insist upon location and timing to define him as a mere copy would seem myopic. One's identity and dignity should not depend upon accidents of space and time.

If this example is too fanciful, suppose that we could make a flawless copy of a videocassette tape. Would we not treat both tapes as identical in being?<sup>6</sup> Or suppose that a group of Americans decides to learn Israeli folk dancing or Chinese cooking. As they practice and learn, we might tend to call the results mere "imitations" of the originals. But if they achieve mastery, could we not say "This *is* Israeli folk dancing" and "This *is* Chinese cooking?" And we could state further that they know the dancing and the cooking in a far more complete way than others who might have journeyed across continents to behold the originals. Thus, at least in certain contexts, we do recognize that form may be identical to being and, therefore, that an image may equal a prototype, without regard to space-time separation. A perfect representation is a re-presentation, making the original present again.

Now a painted icon is never perfectly or essentially the same as its prototype, be that prototype Christ, the Virgin, or some saint. On

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6. Perhaps our problem with the painting above was simply that we could not conceive of a perfect copy.



this the orthodox fathers are clear.<sup>7</sup> But would it not be correct, nevertheless, to say that the icon shares some of the being, and thus some of the dignity, of the original? Yes, says St. Theodore: "[e]ven if we grant that the image does not have the same form as the prototype . . . , veneration is given to the image . . . insofar as it resembles the prototype."<sup>8</sup> For "that which is similar in some degree to another thing shares its veneration to the degree in which it is similar."<sup>9</sup> And again he explains, even though an icon of Christ is not God, "if one says that divinity is in the icon, he would not be wrong."<sup>10</sup> The nature of the icon, perhaps wood and paint, is fundamentally different from the divine and human natures of Christ, but since the icon shares His personal form to a degree, it also shares to that degree in His being and dignity.<sup>11</sup>

We moderns may wonder how an imperfect image of a person (especially one on mere paper or wood) could be said to share being with the original. Yet might we not find ourselves kissing the photograph of a distant and beloved spouse? Surely, this is done not because one loves a piece of photographic paper, but because of the beloved therein depicted. The photo contains, in some sense we cannot easily explain, a bit of "Jane-ness" or "John-ness." (So would a letter or some intimate keepsake, by the way. Relics and icons are closely related.<sup>12</sup>) It is that bit of the spouse's being which is trea-

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7. *Id.* at 31, 102. See also St. John of Damascus, *On the Divine Images* 19 (St. Vladimir's Seminary Press, 1980); and Leonide Ouspensky, *The Meaning and Language of Icons*, in Leonide Ouspensky and Vladimir Lossky, *The Meaning of Icons*, translated by G.E.H. Palmer and E. Kadloubovsky, 32, note 4 (St. Vladimir's Seminary Press, 1989).

8. St. Theodore, *Holy Icons* at 104 (cited in note 5). As far as I have been able to discover, even the most extreme iconoclasts, who had every motive for undermining all connection between copy and original, did not claim that the eighth century icons at issue bore *no* resemblance to Christ or to the saints.

9. *Id.* at 107.

10. *Id.* at 33.

11. *Id.* at 103, 107. Vladimir Lossky has reemphasized more recently that an "icon or a cross does not exist simply to direct our imagination during our prayers. It is a material centre in which there reposes an energy, a divine force, which unites itself to human art." Vladimir Lossky, *The Mystical Theology of the Eastern Church*, translated from the French, 189 (Clarke, 1957). Even between iconoclasts and iconodules, it was non-controversial "that material objects can be the seat of divine power and that this power can be secured through physical contact with a sacred object." Pelikan, *Eastern Christendom* at 93 (cited in note 4), quoting Paul J. Alexander, *The Patriarch Nicephorus of Constantinople* 5 (Oxford, 1958). Thus the form of the Cross was venerated even by the iconoclasts. Pelikan, *Eastern Christendom* at 110 (cited in note 4). Later Protestant iconoclasm seems to have been unsympathetic to, or even unaware of, such incarnational assumptions. Roszak, *Where the Wasteland Ends* at 124-31 (cited in note 2).

12. St. John of Damascus treats the holiness of saints' bodies and bones as analogous to the holiness of painted icons. St. John, *Divine Images* at 27, 42 (cited in note 7). (Ouspensky cites him approvingly on this point. Ouspensky, *The Meaning of Icons* at 44 (cited in note 7).



sured and kissed.

The last, and perhaps most striking, component of the ontology underlying icons is the *unity* of image and prototype. It is not only that copy and original share being but that they are united by that being. Put another way, the imperfect copy is an extension of the being of the original. St. Theodore argues that "prototype and image are one in hypostatic likeness, but two in nature: one entity is not split into two likenesses, so as thereafter to have no participation or relation with each other . . . ." <sup>13</sup> Because of this communion, <sup>14</sup> the Seventh Ecumenical Council (Nicea II, 787) was able to affirm that "the honor which is paid to the icon passes on to that which the icon represents, and he who reveres the icon reveres in it the person who is represented." <sup>15</sup>

Here the Council echoes the oft-cited words of St. Basil the Great:

The image of the emperor is also called the emperor, yet there are not two emperors. Power is not divided, nor is glory separated. Just as he who rules us is one power, so the homage he receives from us is united not divided, for the homage given to the image is transferred to the prototype. <sup>16</sup>

St. John Chrysostom had likewise been cited by the iconodules with regard to the participation of image and prototype in dishonor as well as honor:

Do you not know that if you insult the image of the emperor, you transfer the insult to the prototype? Do you not know that if you show contempt to his image, whether it is a wooden carving or a copper statue, you will be judged not for insulting lifeless matter, but for showing the emperor contempt? Dishonor shown to the

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Fully to describe the theory of being held by these Christian centuries would require (in my opinion) an explanation of how a person is present at least in all that is "proper" to him or her, not only in his or her image. Furthermore, in order fully to comprehend the sanctity even of icons, one should be aware of the various ways, in addition to form, in which painted icons are related to their prototypes. For example, in Eastern practice prayer is offered during the writing of an icon, and the icon is afterwards solemnly blessed. Also very important is the fact that the icon bears the proper name of the prototype. St. Theodore says that a name is "a sort of natural image of that to which it is applied." St. Theodore, *Holy Icons* at 35 (cited in note 5).

13. St. Theodore, *Holy Icons* at 108 (cited in note 5).

14. "Communion" is the word used for this relation of image to prototype by Ouspensky. Ouspensky, *The Meaning of Icons* at 36 (cited in note 7).

15. Translated in Cavarnos, *Orthodox Iconography* at 54 (cited in note 1). Daniel Sahas renders it "[T]he honour to the icon is conveyed to the prototype'. Thus, he who venerates the icon venerates the hypostasis of the person depicted on it." Daniel Sahas, *Icon and Logos: Sources in Eighth Century Iconoclasm* 179 (U Toronto Press, 1986).

16. Quoting St. John of Damascus, *Divine Images* at 36 (cited in note 7).



emperor's image is dishonor shown to the emperor himself.<sup>17</sup>

To take such assertions *realistically* (as they seem intended), rather than merely psychologically, clearly presupposes a supersensual world beyond space and time. Without temporal and spatial distance, an image and an original would indeed flow together and be no longer distinguishable. A Platonist might here invoke the world of pure Forms, of which all particulars are mere emanations and participations. A Christian could look to God and the Word *sub specie aeternitatis*, or to the medium provided by the ever-present Holy Spirit.<sup>18</sup> And there are no doubt other metaphysical formulations which could attempt to make sense of the iconic teachings we have been examining. We need not choose any one of them here.

Can this union also make phenomenological sense to modern people, obsessed as we are with subjective experience? For it is clear that the emperor does not *experience* honor or dishonor at the moment his distant image is treated with homage or contempt. Yet, when he later discovers what was done to his image, will he not feel that he gained or lost *at that earlier time* rather than at the moment of discovery? If my beloved tells me that she carried my photograph in her bosom for the entire year I was away, does not that year stand revealed now as having been already a shared, though hidden, relation of love? Perhaps our limitation is not one of being but of consciousness—a defect not present for the divinely omniscient persons represented in Christian icons.

## II. IMAGES AND SPIRITUALITY

The authoritative theory of icons we have so far examined did not spring full blown *ex nihilo*. It arose from Scripture and from Tradition, as developed especially in the great trinitarian and christological councils,<sup>19</sup> as well as from the wider spiritual consciousness within

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17. Id at 68.

18. Ouspensky states that "it is the grace of the Holy Spirit which sustains the holiness both of the represented person and of his icon . . . . The icon participates in the holiness of its prototype and, through the icon, we in turn participate in this holiness in our prayers." Leonide Ouspensky, *Theology of the Icon* 191 (St. Vladimir's Seminary Press, 1978).

19. Daniel Sahas may be incorrect in asserting that "the first Byzantine Emperor to take an official position against the icons was Leo III the Isaurian" in the eighth century. Sahas, *Icon and Logos* at 24 (cited in note 15). Prohibition of icons had already occurred in a decree of the Emperors Theodosius and Valentinian in the year 427, stating "As it is Our diligent care to guard in every way the religion of the Celestial Divinity, we specially command that no one shall be permitted to trace, carve, or paint the image of Christ the Saviour either upon the earth, upon stone, or upon marble placed in the earth, but it shall be erased wherever found . . . ." Title VIII, Book I, *The Code of Justinian*, translated by Samuel P. Scott, 3 *The Civil*



which they were embedded.<sup>20</sup> But here we shall reverse that order: the theory of icons will now be used to illuminate Scripture and spirituality.

Icon or image theory is fundamental to Eastern Christianity.<sup>21</sup> Without the help of icon doctrine, it is difficult to discern a trinitarian meaning in many passages of Scripture. For example, Colossians 1:15 states that Christ is the "image" (in Greek, "*eikon*") of the invisible God. Hebrews 1:3 refers, again, to Christ as the "exact representation" or "perfect copy" of the Father's "nature" or "being." Only if a perfect image is one in being with its prototype can one easily read these verses to indicate Christ's co-divinity, or harmonize them with His own statement that "He who has seen Me has seen the Father" (John 14:9). The distinction between the Son and the Father, namely, that the Son is begotten, is itself a confirmation of identity of being, for a son was understood to be the "natural image"<sup>22</sup> of his father, and thus to share with him an inner essence as well as the outer form shared by an artificially made image. So it is that without hesitation St. Theodore moves back and forth analogically between the nature of icons and the nature of the Trinity itself:

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*Law 74-75* (The Central Trust Company, 1932). The important word here may be "earth." The decree may be not so much anti-image as anti-matter, concerned to safeguard spiritual form from material interpolation. It is striking that this iconoclast edict occurred almost on the eve of the Council of Ephesus (431), the incarnational doctrines of which were later to play such an important role in St. Theodore's defense of icons. St. Theodore, *Holy Icons* at 85-87, 90-91 (cited in note 5). God could no longer be regarded as wholly "celestial" after that council, because His eternal Son and Mary's Child, brought forth from her womb one day in Bethlehem, were then known to be one and the same Person or Hypostasis, and so divinity could be represented by an earthly and sensible image. (However, note that the Emperor Justinian reaffirmed this iconoclast decree long after Ephesus, in the above-cited codification.).

20. See, for example, the influence of the mystery religions, described by Alexander Schmemmann, *Introduction to Liturgical Theology*, translated from the Russian by Asheleigh E. Moorhouse, 85 (The Faith Press—St. Vladimir's Seminary Press, 1966). Pelikan has emphasized the impact of the neo-platonic philosophy of the Pseudo-Dionysius. Pelikan, *Eastern Christendom* at 120 (cited in note 4). Indeed, for the Greek and the Hellenistic world in general the image is "an emanation, . . . a revelation of the being with a substantial participation . . . in the object. . . . It has a share in the reality. Indeed, it is the reality." Hermann Kleinknecht, in Gerhard Kittel ed, *2 Theological Dictionary of the New Testament*, translated by Geoffrey W. Bromiley, 389 (Eerdmans, 1964).

21. Ouspensky has written that "in the conscience of the Church the Divine dispensation is organically connected with the image. Therefore the doctrine relating to the image is not something separate, not an appendix, but follows naturally from the doctrine of salvation, of which it is an inalienable part." Ouspensky, *The Meaning of Icons* at 28 (cited in note 7). I am by no means suggesting that the same or a similar theory did not inform the New Testament authors themselves. According to Kittel, "in the NT the original is always present in the image." Kittel ed, *Theological Dictionary* at 395 (cited in note 20).

22. St. John, *Divine Images* at 74 (cited in note 7). Kittel states that "the being of Jesus as image is only another way of talking about His being as the Son." Kittel ed, *Theological Dictionary* at 389 (cited in note 20).



If the fact that the Son differs in some respect from the Father (He differs only in the property of sonship) does not prevent Him from having the same essence and veneration as the Father, then the fact that the image differs in some respect from the prototype (it differs in respect to the principle of its essence) will not prevent it from having the same likeness and veneration as its prototype. Just as Christ is distinguished from the Father by His hypostasis, so He is distinguished from His image by His essence.<sup>23</sup>

The theory of imaging we have examined is also foundational in the East for an understanding of human and Christian dignity. What is the point of the Genesis saying that man is made in the "image" of God? Is it not that man therefore has great dignity, a conclusion that makes sense only if we assume with St. Theodore that similarity in form demands similarity in veneration?<sup>24</sup>

Christians are called to a still greater imaging. By becoming like Christ, who is Himself the natural image of the Father, we become His "true images" (Romans 8:29). We even become God's "children" (I John 3:1), that is to say (unlike a wooden icon) we come to share to some degree in God's very nature.<sup>25</sup> We are "born" of God (I John 3:9, 4:7). St. Gregory of Nazianzus strongly recalls for us the genuine veneration and reverence due to the human icon:

If after baptism the persecutor and tempter of the light assail you . . . rely on the seal and say to him "I myself am the image of God; . . . I have put on Christ; I have been transformed into Christ by baptism; you must worship me!"<sup>26</sup>

Icon theory likewise sheds light on St. Matthew's depiction of the Last Judgment. When Christ says "whatsoever you did to the least of My brothers, that you did unto Me" (Matthew 25:40), He may not be speaking just metaphorically of His affection for human beings. He may be stating a real truth clear to those who know that honor and dishonor pass from image to prototype because they are one in being. His brothers share His natural image and, therefore, to do something to them is in full reality to do it also to Him.

In the East the idea of sanctification, too, is founded on imaging.

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23. St. Theodore, *Holy Icons* at 105 (cited in note 5).

24. Image theory can also explain human dignity in another way. When Christ took on human flesh, He united Himself indirectly with all other examples (images) of that flesh. "He has deified our flesh forever, and has sanctified us by surrendering His Godhead to our flesh without confusion." St. John, *Divine Images* at 29 (cited in note 7).

25. But we do so without losing our own human nature. St. John of Damascus suggests that a saint participates in divinity as a red-hot iron participates in fire. St. John, *Divine Images* at 27, 84-85 (cited in note 7).

26. *Id* at 102-03.



To be a "partaker in the divine nature" (II Peter 1:4), is to become "deified," to become like God, to take on ever more fully the Divine Likeness, and thus to share Divine Being itself. And it is *only* by becoming an icon of God that we can come to partake of His nature. St. Anthony the Great put the matter concisely: "Through likeness to God we become united with God; through unlikeness we become separated."<sup>27</sup> We cannot know Him, we cannot be in union with Him, unless we are like Him in His nature—above all in love. The teaching "[t]he one who does not love does not know God, for God is love" (I John 4:8) means that there is no other way to intimacy with God except by becoming what He is, i.e. love.

Among the other ways that Scripture gives us to image God, and thus to have God abide in us, are confession of Christ as Son of God (I John 4:15), hope in Him (I John 3:3), and especially "seeing" Him: I John 3:2 states that "we shall be like Him because we shall see Him just as He is," reflecting the age-old understanding that to see (and, even more, to know) is to image the seen in one's own being.<sup>28</sup>

For purposes of this essay, one way for humankind to image God must receive special emphasis: the fulfillment of the law. Contrary to much Protestant<sup>29</sup> and liberal thought, the Catholic and Orthodox traditions hold law to be not a necessary evil but a positive good. Sin, in fact, is defined as "lawlessness" (I John 3:4). And Christ is Himself the fulfillment of the Old Law. He who keeps Christ's commandments has Christ abiding in Him (I John 3:24), meaning that Christ's commands or laws are part of His nature. As the medieval German *Sachsenspiegel* put it: "God is Himself law, and therefore law is dear to Him."<sup>30</sup> Through God's grace, we become like Him by embodying those virtues which enable us ever more fully to comply with His law.<sup>31</sup> This idea of law as a revered reality to be reflected in our lives, and of the reflection participating in the reality, is one of the last great remnants of iconic thought to survive in the modern world (though it is hard-pressed—as we shall see below).

Fully to develop the significance of icon theory would require a

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27. Quoted by Cavarnos, *Orthodox Iconography* at 47 (cited in note 1).

28. Id. See also, for example, Pieper, *The Philosophical Act* at 88 (cited in note 2).

29. See Sheldon S. Wolin, *Politics and Vision* 141-64 (Little, Brown, 1960) on Luther's reduction of law from an end in itself to a civil and theological instrument.

30. Quoted by Harold Berman (in a 1988 presentation to the Center on Religion and Society) from Karl August Eckhardt ed, *Sachsenspiegel V: Landrecht in Hochdeutscher Übertragung* prolog (1967).

31. Cavarnos, *Orthodox Iconography* at 41 (cited in note 1).



much lengthier essay.<sup>32</sup> At the least, we would have to touch upon the Eastern Orthodox ecclesiology that is based on shared recognition of one's image in sister Churches, upon Hebrew and Greek concepts of remembrance,<sup>33</sup> upon sacramentology and *ex opere operato*, upon the use of relics and images to make holy even unseen recesses of Romanesque and Gothic churches, upon the truly marvelous ability of the Fathers and of the Middle Ages to find in numbers and in nature countless hidden images of the divine,<sup>34</sup> and especially upon the broad doctrine that natural things are images of prototypes found in the Logos, and thus can be more or less "true."<sup>35</sup> Such ideas cannot fail deeply to impress the human spirit.

Most importantly, image theory lies at the very center of the Divine Liturgy or Mass. Because of the real presence<sup>36</sup> of Christ in the consecrated Bread and Wine (the Divine Prototype being fully present in very essence or substance), the congregation is able to be "images of the cherubim," singing the thrice-holy hymn directly before Christ in His suffering and in His glory. By means of a true unity of being with past, future, and eternal events, those present for the Liturgy partake already of heavenly bliss. The liturgy, like the painted icon, transcends space and time to extend the Incarnation and Redemption through all ages of ages.<sup>37</sup> Only when Christians no longer understand the unity of image with prototype can they come to think of the Mass as a mere repetition of past saving events (and thus perhaps to question its necessity).

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32. Pelikan calls icon doctrine the very "melody of theology," citing Nicephorus. Pelikan, *Eastern Christendom* at 133 (cited in note 4).

33. On *anamnesis*, see Lossky, *Mystical Theology* (cited in note 11).

34. See here Emile Mâle's classic work, *The Gothic Image: Religious Art in France in the Thirteenth Century*, translated by Dora Nussey (Harper and Row, 1913, 1958). Mâle quotes Adam of St. Victor (who in turn was echoing St. Augustine) saying: "What is a nut if not the image of Jesus Christ? The green and fleshy sheath is His flesh, His humanity. The wood of the shell is the wood of the Cross on which that flesh suffered. But the kernel of the nut from which men gain nourishment is His hidden divinity." Id at 30. After other examples, Mâle adds: "Never was a doctrine more closely knit or more universally accepted. It dates back to the beginning of the Church, and is founded on the words of the Bible itself. In the Scriptures, indeed, as interpreted by the Fathers, the material world is a constant image of the spiritual world." Id at 31.

35. Thomas Aquinas, *Summa Theologica* I-II, Q 93, Art. 1, ob 3, asserts that a thing contains truth in so far as it resembles the divine intellect.

36. Both iconoclasts and iconodules taught the real presence of the Body and Blood of Christ. Pelikan, *Eastern Christendom* at 93-94 (cited in note 4).

37. For a beautiful exposition of the transtemporal character of the Liturgy, see Constantine Kalokyris, *The Essence of Orthodox Iconography*, translated by Peter Chamberas, 85-87 (Holy Cross Orthodox Press, 1985).



### III. IMAGES AND LAW

Rule-governed conduct is iconic. The individual actor seeks to emulate the prototypical behavior laid down in the law, and the individual application is treated as participating in the reality and dignity of the general rule. We say that to "con-form" to the law is to be "law-abiding" and "law-ful." Moreover, to fail to image the law is to "break" it. Honor or dishonor in the particular instance passes on to the general law, just as St. Basil and St. John Chrysostom pointed out the dishonor to the emperor of the slight to his image.

On another level, too, legal theory is icon theory. Once a principle exists in the law, judges tend to apply it to all factual instances which image the factual prerequisites found in statutes or prior cases. Each image acquires dignity from the principle regardless of any temporal or spatial separation between the two, and largely regardless of any consequences which the judge may find unappealing.

Sometimes analogical as well as deductive reasoning is needed in order to discover and to apply rules. Here the judge's first task is to discern the hidden prototype to be found in a mass of prior particulars, before he or she can apply it to a new case. But both types of reasoning are called "formal" (or, by their myriad detractors, "formalistic") because they find their meaning and justification in the imitation of honored forms rather than in an instrumental calculus of space-time consequences.

St. Thomas Aquinas has provided a metaphysical and theological way to understand the iconic basis of legal thought. He teaches that the eternal law is a part of the very being of God, rather than something merely willed by Him for arbitrary or contingent reasons.<sup>38</sup> Natural law is a participation in eternal law, and therefore to image the naturally right is to come closer to identity and union with God. Of course, Aquinas warns that divine value does not inhere in every legal rule. We ought not to be so rule-abiding, according to Aquinas, that we fail to bend human rules to meet emergencies that the legislator did not anticipate.<sup>39</sup> And we certainly need not obey human commands that fail to conform to the basic rules of natural law.<sup>40</sup> But Aquinas does keep and explain a large measure of principled or for-

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38. Aquinas says that the divine nature is the eternal law itself. *Summa Theologica*, I-II, Q 93, Art. 4. Because Christ is born of the Father, rather than made by God, He is also Himself the eternal law. *Id* at 2.

39. *Id* at Q 96, Art. 6.

40. *Id* at Q 96, Art. 4.



mal thinking, and so he is quite different from the radical skeptics, examined below, who attack all formal legal thought.

There is a real spirituality connected to imaging, in law as elsewhere. Participants in the Divine Liturgy realize the *eschaton* now—rather than, say, spending Sunday morning trying by some instrumental calculus to hasten the future coming of the Kingdom of God on earth. Similarly, those who comply with just laws can rightly feel that they have imaged the common good at least as well as those who work instrumentally to achieve hoped-for future benefits. By imaging the prototype, the self (and its entire nexus of relationships) becomes part of an end in itself, rather than remaining only a means thereto.<sup>41</sup>

The greatest power and ecstatic quality of this spiritual detachment from results<sup>42</sup> come when the effects of legal obedience are seemingly disastrous for the self or even for the purposes for which the law was apparently enacted. Poignant examples may be found in the famous (and true) lifeboat-cannibalism cases.<sup>43</sup> In the most commonly-cited scenario, four men are dying of hunger and thirst, lost at sea in a lifeboat.<sup>44</sup> All four will perish before help can arrive if nothing is done. But if the three stronger ones overpower the already-weakened cabin boy, eat his flesh and drink his blood, then those three will survive. Here the consequentialist or instrumentalist argument is that the sailors should violate rather than emulate the prototypical rule against killing, because the purpose of that rule is to preserve life and that purpose will now be furthered by killing.

This problem could be seen to pose the issue of whether we may do evil to achieve good, but such a formulation would beg the question—for the three sailors might argue that an act is good if it produces good results. It would be fairer to ask whether the means should image the end.

At least in a case like this that involves violently taking the life of a fellow human being (another iconic element),<sup>45</sup> the Christian tradition is clear. A good tree bears good fruit. Our duty is faithfully to

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41. This self could be the answer to Roberto Unger's call for "concrete universality," the "power to infuse a universal significance into one's finite life." See Roberto Unger, *Knowledge and Politics* 224, 234 (Macmillan—The Free Press, 1975, 1984). Unger himself reflects upon the problems of instrumentalism but does not reject it.

42. Hindu spirituality is particularly strong here, in its adherence to duty regardless of consequences. See especially the classic Bhagavad-Gita (a lengthy religious meditation at the very climax of the epic *Mahabharata*).

43. See generally A.W. Brian Simpson, *Cannibalism and the Common Law* (U Chicago Press, 1984).

44. *Regina v Dudley and Stephens*, 14 QBD 273 (1884).

45. See Richard Stith, *Toward Freedom from Value*, 38 The Jurist 48-81 (1978), where I



image the eternal good and then to trust God. God is able to produce good in this life, or in the next, from the abnegation of will and of body required in order to accept starvation and dehydration. Four deaths are simply not as great a harm as one murder—even for the three sailors. Is it not the case, psychologically as well as metaphysically, that people become that which they image? To do violence even for a good purpose is still to become a violent person. Unless there is a change of heart, will not the next killing be easier?

Image theory in the law as elsewhere is, however, vulnerable to two kinds of skepticism: doubt about the existence or dignity of the prototype, and doubt about the real link between the prototype and image. Nominalism and voluntarism are long-standing examples of such skepticism. Nominalism claims that only particulars exist, that there are no prototypes. Similar images have only a *nomen*, a name in common; and this latter is only a *flatus vocis*, a mere puff of the voice. Voluntarism asserts that prototype, image, and any alleged link between the two originate in arbitrary acts of will. There is, therefore, no material way that an actor can imitate forms that have inherent worth.

Much of modernity claims skeptically that nothing, no being and no relationship, is inherently good. Only experience and not reality exists, and only subjectively pleasurable experience is desirable—or, more accurately, is simply desired. This means that only experienced consequences, and not rules, ultimately matter. Tradition becomes mere laziness or stupidity, rather than a source of power, and the cult of originality is born. Image-based spirituality seems at best irrational, and at worst a self-indulgent distraction from technical needs, rather than humankind's best hope to incarnate God upon the earth.

A problem for such consequentialism is that it is easy to show that one consequence of abolishing rule-imitation would be the experience of great unhappiness. Even if eating the cabin boy created more total future happiness for those involved in each particular case, such cannibalism would make future lifeboat relationships much more difficult.<sup>46</sup> From the very first moment, cabin boys and others would need to defend themselves, with a good offense the best defense, de-

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argue for reverencing, rather than only valuing, human beings. Reverence prefers non-violence to preservation at all costs.

46. The nineteenth century *London Times* opined that it "would be dangerous to . . . tell seafaring men that they may freely eat others in extreme circumstances, and that the cabin boy may be consumed if provisions run out." Simpson, *Cannibalism and the Common Law* at 216 (cited in note 43).



spite the fact that full cooperation would be essential for group survival. So it would be instrumentally useful for all sailors to believe in the rule "do not kill innocent cabin boys under any circumstances." Consequentialism must admit the need for non-consequentialist rules. Yet consequentialism cannot by itself explain why these rules should be obeyed in concrete cases where it would be useful for them to be violated. Once cooperation has broken down (or no longer does any good) in the lifeboat, it becomes more useful to kill rather than to let live—perhaps still proclaiming adherence to the general principle that killing is never permitted.<sup>47</sup> Judges today are often in this predicament. They know that rules are needed. But as their rules have no inherent value, they find it irrational to adhere to them when a change or exception seems useful.

The Critical Legal Studies movement is more radical than ordinary consequentialism, claiming that all concepts, no matter how prototypical they may appear, are purely instrumental.<sup>48</sup> That is, they have whatever meaning is most politically or ideologically useful. Thus even the goal of making people experience happiness could mean only what each of us wanted it to mean. Even if concepts existed and had dignity, C.L.S. adherents argue, there would be absolutely no way to go from general to particular. The concepts found in rules are inevitably so vague and contradictory that they can always be made to yield any result. For example, our boatmen could say that by *failing* to feast on the cabin boy they would have "killed" (by omission) three people, while to eat their companion was only to "assist" in an inevitable death caused not by them but by nature. Therefore, they could argue, they did not violate the rule against killing. Whether or not such an argument would be judicially accepted would depend, in the C.L.S. view, not on reason but on the judge's (or his legal culture's) conscious or unconscious ideological choices. All moral or legal reasoning from idea to instance becomes farcical.

Yet, despite its powerful enemies, I predict that image theory will survive in law because the only alternative is simply violence, the rule of the strong. If icon theory, imaging, does not work, the alternative

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47. For an excellent survey of the difficulties which utilitarianism has with all rules, see Larry Alexander, *Pursuing the Good—Indirectly*, 95 *Ethics* 315-32 (1985).

48. Roberto Unger's early work, *Knowledge and Politics*, contains in my opinion by far the most profound critique of law by a member of the C.L.S. circle. A recent secondary source summarizing C.L.S. and comparing it to other legal philosophies is S. Prakash Sinha, *What is Law?* 201-16 (Paragon House, 1989). While C.L.S. situates itself on the political left, similar views from the right can be found, for example, in Richard A. Posner, *The Problems of Jurisprudence* (Harvard U Press, 1990).



way to realize some good is always the force of events, the chain of causation over space and time. While in other areas of human endeavor force may be cooperative, in the law it is always antagonistic. Secular law exists to resolve conflicts. The result of saying that a case cannot be decided by prototypical principles adhered to by all is simply to leave the outcome up to the play of power and interest, including the powers and interests of judges. In the case of the lifeboat, the abandonment of ideas simply means that the boy will be eaten. Cabin boys will always be formalists. Only those so powerful that they do not need protective principles can afford to be contemptuous of form.

Image theory, then, is secretly a part not only of Christian tradition but also of legal thought. We are not trapped in formless instrumentality. There are ways in our own passing days to find and exult in the incarnate good and holy. Both human experience and divine revelation tell us that there is dignity in becoming images.