

Invalidity of Marriage by Reason of Sexual Anomalies

Charles J. Ritty, J.C.L.

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#), and the [Sexuality and the Law Commons](#)

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

INVALIDITY OF MARRIAGE BY REASON OF SEXUAL ANOMALIES[†]

CHARLES J. RITTY, J.C.L.*

THE convocation of the Second Vatican Council was an invitation to an examination of conscience. There has been in the past forty years or more new thinking in the fields of scripture, liturgy, theology and the teaching of the Church (catechetics). Canon Law, on the contrary, has made little revision of jurisprudence in order to keep the law in harmony with the needs of our times, as evidenced through cases. This presents a challenge to us in the field of law. It is obvious that there must be new thinking and research in the studies of Canon Law and the jurisprudence of the Church. Since the law is a living science, it should fall under the new dimensions of thought and the circumstances of our times.

The problem of sexual anomalies is becoming more vexing each day with the number of cases presented to ecclesiastical tribunals. Cultural patterns have changed and the Victorian attitudes which once suppressed discussion of sexual anomalies have been submerged by healthier interpretations and understanding of these physical and psychical aberrations by advances in genetics, psychology, and psychiatry. With the more positive approach to the study of sexual anomalies, *e.g.*, homosexuality, emerging, we have all noticed an increase in cases which are undoubtedly presented on the premise that Canon Law has progressed at the same rate as the behavior sciences.

In treating of the nullity of marriage the tribunals always seek some norms of jurisprudence to arrive at decisions. As is evident, the judges are often left without the proper tools to resolve such difficulties. The Code of Canon Law does not treat of such personality problems, and the jurisprudence of the Rota, which is usually a rule of law and a necessary tool for jurists, has not given much light on the subject. In fact, at times, when related subjects such as the sexual anomalies, homosexuality, psychopathic personalities, constitutional immorality, moral degeneracy, etc., are presented to the Rota, there has been even a negative attitude.

[†] Paper given at the annual meeting of the Canon Law Society of America. New York, September 17, 1963.

* Chancellor, Diocese of Cleveland.

It is impossible within the scope of this paper to discuss all types of moral delinquents, sexual perverts, psychotics, psychopaths, neurotics, sociopaths, etc. We shall confine our remarks to some thoughts concerning sexual anomalies in general, with special emphasis on nymphomaniacs and homosexuals. The recent thinking of psychologists and psychiatrists will help to shed light upon the subject, together with some indications of the *praxis* of the Sacred Roman Rota.

No one will deny that those afflicted with sexual anomalies or psychopathic defects such as we are considering should not enter marriage. The problem arises because such persons do enter marriage and then are unable or unwilling to accept the responsibilities of such a stable union, and eventually abandon their spouses, terminating the marriage. The question is this: is there any canonical relief for those who enter marriage with one afflicted with sexual anomalies, *e.g.*, a homosexual, a nymphomaniac?

It would be an oversimplification to state that such cases of abnormal sexuality cannot be handled as such in ecclesiastical tribunals — or to say that the only solution is to seek a declaration of nullity under the *caput nullitatis* (reason for the decree of nullity) of impotency, insanity, or otherwise to seek a dissolution of the marriage as *ratum et non consummatum*. We shall try to establish that the sexual anomalies (moral degeneracy, constitutional immorality, social degeneracy, homosexuality, nymphomania, etc.) may be valid grounds for the nullity of marriage.

We admit the serious difficulties involved in this subject:

1. The difficulty and vagueness in defining the sexual pervert, the sexual psycho-

path, the moral degenerate, the compulsive sexual offender, the violent sexual offender, etc.

2. The difficulty in securing valid evidence to categorize such individuals.

3. The difficulty in establishing that such a person is incapable of contracting marriage, a stable union of two persons of different sex for the purpose of having children.

4. The difficulty of reconciling modern psychology and psychiatry with the established jurisprudence of the Church.

5. The difficulty of defining the precise *caput nullitatis* (reason for the decree of nullity) of such cases.

6. The difficulty of establishing exact juridical criteria for the declaration of nullity.

The approach to the problem may be from two sides: (1) based on the personal incapacity of the person to enter a true marriage — the approach of the modern psychologists and psychiatrists; (2) based on the defects of intellect and will which prevent the person from giving true consent. The latter approach is the traditional one followed in the jurisprudence of the Rota.

I. Sexual Anomalies in General

This is the most difficult section to discuss in this paper, because of the number of perversions or anomalies of sex and the difficulty of determining what constitutes the moral degenerate or one constitutionally immoral, or the sexual psychopath.

Dr. John R. Cavanagh, a noted Catholic psychiatrist, clearly defines and describes the types of sexual perversions which he prefers to label as sexual anomalies.¹ Among

¹ John R. Cavanagh, M.D., "Sexual Anomalies and the Law," *The Catholic Lawyer*, IX (1963), 4-31.

the anomalies listed by Cavanagh, the following are pertinent: voyeurism, exhibitionism, transvestism, fetishism, sadism, masochism, necrophilia, incest, rape, troilism (trolism), prostitution, sodomy, bestiality, pedophilia, nymphomania, and homosexuality.

Certainly one who is afflicted psychopathically with one of these anomalies would be classified as a moral degenerate, or one constitutionally immoral, or a sexual psychopath. "Psychiatrically, those sexual offences which are significant are those which follow a *repetitive obsessional fantasy*, lead to *compulsive acts* of forced sexual assaults either on adults or children. These may be of a nature of an unresisted urge (irresistible impulse) . . . a surface symptom of a more profound psychic disturbance." Cavanagh defines sexual perversions (deviations or psychosexual abnormalities) as being methods of sex gratification, mainly or exclusively, without penile-vaginal intercourse."² Many of these anomalies become abnormal only when they take an extreme, fixed, or compulsive form. Concerning the responsibility of the sexual offender, Cavanagh feels that in many cases sex offenders should be considered responsible, because the offense represents lack of control over normal temptations and normal sexual desire.³ He rejects the concept of the sexual psychopath as a person normal in all areas of conduct except the sexual, *i.e.*, not insane except sexually.⁴

Obsession is "an overpowering, persist-

ent, and irrational idea accompanied by feelings of tension and fear";⁵ *compulsion* is "an overpowering, unreasonable urge to perform certain actions and is associated with the development of tension and anxiety if the act is not performed."⁶ In evaluating the responsibility, these factors of repetitive, obsessional, compulsive, and forced actions must be taken into consideration. The question of an irresistible impulse will arise. Each case must be considered on its own merits: "An *unresisted urge* is one which, because of mental illness, so far causes the individual to lose his power of choice in regard to particular acts that in spite of the fact that he may reconcile an act as wrong, he feels so impelled to act that he is unable to adhere to what he considers right."⁷ The sexual offender will in many cases be legally responsible. His responsibility will depend upon his basic disorder, not his sexual offense, and also depend on the degree of compulsiveness involved in the condition.⁸

The question here is whether a person afflicted with a compulsive obsession to one of the sexual anomalies (mentioned above) can enter a valid marriage. Many persons with such anomalies are rational, not insane, and responsible. Unless a person has one of the sexual anomalies as a symptom of a much deeper mental disorder, we must consider this person as mentally capable and responsible, able to understand and to will to enter a valid marriage. Cavanagh points out that a person should not be judged on

² Cavanagh, *art. cit.*, p. 7. "The sexual psychopath is usually defined in terms of his inability to control his own sexual acts or perversions."—Frank T. Lindman and Donald M. McIntyre, Jr., *The Mentally Disabled and the Law* (University of Chicago Press, 1961), p. 299.

³ *Ibid.*, p. 28.

⁴ Cf. Lindman and McIntyre, *op. cit.*, p. 318.

⁵ John R. Cavanagh, M.D., and John R. McGoldrick, M.D., *Fundamental Psychiatry* (Milwaukee: Bruce, 1958), p. 264.

⁶ *Ibid.*, p. 265.

⁷ Cavanagh, "A Psychiatrist Looks at the Durham Decision," *The Catholic University Law Review*, V (1955), 26.

⁸ Cavanagh, "Sexual Anomalies and the Law," *The Catholic Lawyer*, IX (1963), 30.

the basis of symptoms. The responsibility can be clarified by the statement that, psychiatrically, those offenses which are significant are those which, following a repetitive obsessional fantasy, lead to compulsive acts of sexual assault either on adults or children.⁹

Put in philosophical terms: an unresisted urge is one which has developed so excessively at the expense of the other psychic powers that in comparison to this urge, the other powers exert negligible influence upon reason when it is called upon to make a judgment. This urge occupies the focal point of consciousness . . . it becomes the basis upon which the intellect represents an object or some course of activity as desirable to the will. . . . This occurs not as an isolated temporary mental illness, but as part of a continuing illness which both antedates and succeeds this particular act.¹⁰

Following these definitions by a psychiatrist, we therefore can envision the possibility of a person who has been afflicted with a sexual anomaly connected with repeated perverted acts which are the result of an obsessional fantasy and which lead to compulsive acts which are considered abnormal as being a person who is constitutionally immoral, or as a moral degenerate in regard to sex.

Does such a one have a personal incapacity to marry? The law does not directly answer the question. Moral or personal incapacity to marry, like insanity, is not mentioned among the diriment impediments of Chapter IV (can. 1067-1080) of the marriage law in the Code of Canon Law, or among the defects of consent of Chapter V (can. 1081-1093). The Code does not legislate and there is no history of jurisprudence for such an impediment or reason for nullity. As in the case of insanity, the norms of the

natural law must determine the validity of marriage which is contracted by one who is morally incapable of giving full marital consent.

Since there is no specific legislation for such an impediment or defect of consent as envisioned by one morally incapable of a contract, ecclesiastical judges are presented with a problem of adjudication, especially since incapacity is not specified in the natural law.¹¹

The question often proposed to tribunals is whether or not a person was *able* to give valid consent. In the case of one who is considered morally incapable (*e.g.*, for our purposes, those afflicted with a compulsive, irresistible obsession to a sexual anomaly), the question more precisely is whether or not the person fundamentally was unfit for the *state* of matrimony.

The Rota has traditionally declared marriages invalid by the defect of consent based on the psychic inability to give sufficient consent at the time of the marriage. Because of recent studies in psychiatry and psychology, new light has been brought to bear on the capacity of persons to elicit human acts, and the Rota has begun to speak of the case in which "*usus rationis non sufficit.*"¹²

The law states that all may contract marriage who are not prohibited by law (can. 1035). Keating recently wrote an excellent article concerning the psychically incom-

⁹ *Ibid.*, p. 29.

¹⁰ *Loc. cit.*

¹¹ *Sacrae Romanae Rotae Decisiones*: Dec. XXXIII, dec. XLIV (1941), p. 489, n. 2, *coram Heard*, 16 octobris 1942: "Matrimonium quod spectat, nullum positive statuit Ecclesia impedimentum pro eis qui sanae mentis non sunt, sed rem reliquit iuris naturae principiis." ("The Church has not positively established any impediment with regard to marriage for the insane, but has rather left the matter to the principles of natural law.")

¹² *S.R.R. Dec.* XXVI, dec. LXXXIII (1934), p. 709.

petent.¹³ He states that the *caput nullitatis* (reason for the decree of nullity) would be grounded on a defect of *personal capacity*, sanctioned by a *lex inhabilitans* (anomaly) of the natural law.¹⁴ The Code also requires that the contractants must be *iure habiles* (legally competent).¹⁵

The personal capacity or incapacity of the person with a sexual anomaly is important to consider here. Writing of the *discretio iudicii in ordine ad matrimonio* (capacity of understanding requisite for marriage), D'Avack states that the legislator considered it superfluous to sanction with a specific norm the nullity of a bond contracted by one who is found to lack sufficient capacity to intend the act which he effects and the life and duties which emanate from it.¹⁶ It is an unquestionable presumption that the intrinsic incapability of the contractant to intend and to will the marriage renders the bond *ipso iure* (by the law itself) null, specifically because it places him in the impossibility of emitting a conscious and deliberate consent. But D'Avack finds it more correct to consider the case as one of *personal incapacity*—rather than lack of consent. The *defectus discretionis iudicii* (failure in the ability to understand) is precisely a defect of the natural capabilities of the person, and only in its effect does it resolve itself to a *defectus consensus* (defective agreement).

¹³ John R. Keating, "The *Caput Nullitatis* in Insanity Cases," *THE JURIST*, XXII (1962), 391 ss.

¹⁴ *Ibid.*, p. 396.

¹⁵ Can. 1081: "Matrimonium facit partium consensus inter personas iure habiles legitime manifestatus . . ." ("Marriage is effected by the consent of the parties lawfully expressed between persons who are capable according to law. . . .")

¹⁶ Petrus D'Avack, "Sul *defectus discretionis iudicii* nel Diritto Matrimoniale canonico," *Archivio di Diritto Ecclesiastico*, II (1940), 157-178.

The Code does not speak specifically of the *defectus animi* (defective intent) among the diriment impediments (in which there is also included the requirement of personal capacity) or among the defects of consent, but considers it as a lack of natural capacity.

The Code, however, does speak of the *discretio iudicii* (discretion of judgment) either as one of the fundamental prerequisites of a general personal capacity, when in Book II it states: "Infanti assimilantur quot-quot usu rationis sunt habitu destituti" ("All persons who are habitually without the use of reason are judicially in the same class as infants"), (can. 88, § 3); or as one of the juridical capacities of the procedural law when in Book IV, canon 1648, states: "Pro minoribus et iis qui rationis usu destituti sunt, etc." ("In favor of children and those persons who are bereft of reason.") Finally, concerning penal responsibility and imputability, Book V, canon 2201, rules: "Delicti sunt incapaces qui actu carent usu rationis." ("Persons who actually lack the use of reason are incapable of crime.")

When the Code treats of matrimonial consent and its defects, it always refers to the contractants who are already *iure habiles ad contrahendum* (legally fit for marriage), *i.e.*, contractants who are *pleno usu praediti sive cognitionis intellectivae sive deliberationis volitivae* (endowed with either the full use of intellectual cognition or volitive deliberation), and who are constitutionally and juridically capable of giving valid matrimonial consent.

Just as in all other human acts, so in matrimony there is required in the contractant "sufficiens discretio iudicii ad actum intelligendum et eligendum." ("Having sufficient understanding to know and to elect to perform an act.") The general dispositions of the positive law are found in canon 1035:

“Omnes possunt matrimonium contrahere, qui iure non prohibentur.” (“All persons who are not prohibited by law can contract marriage.”) Canon 1081 determines the consent “inter personas iure habiles legitime manifestatus.” (“Lawfully expressed between persons who are capable according to law.”) These canons refer primarily to the fundamental requirement of personal capacity of the contractants. It is the natural law which inhibits the celebration of marriage by one who would not have full and perfect consciousness or free capacity of self-determination with relation to the bond which he intends to bring into being and to the very serious rights and duties inherent in the bond, which he must assume. *Sufficiens discretio iudicii* (Sufficient ability to understand) is indispensable in canonical marriage, considering its juridical nature — a consent of the parties alone (“Qui nulla humana potestate suppleri valeat”).¹⁷ (“Which [consent] no human power can supply”).

Granted that the defect of the personal capacity is intrinsically bound up with the consent, still every alteration or every lack of intellectual knowledge or every defect in the election and deliberation of the will resolves itself into a true defect of consent. The defect of personal natural capacity is referred to and is the consequence of the manifestation of the consent of the parties.¹⁸

Only the knowing and willing man can be held accountable to his proper actions according to St. Thomas¹⁹ and the doctrine

¹⁷ Can. 1081, § 1.

¹⁸ D’Avack, *art. cit.*

¹⁹ St. Thomas, *Summa Theol.*, I-IIae, q. 21, a. 3: (The “reference should read thus: St. Thomas, *Summa Theol.*, I-IIae, q. 21, a. 2 (not 3).”) “Tunc actus imputatur agenti, quando est in potestate ipsius, ita quod habeat dominium sui actus.” (“An action is imputed to an agent, when it is in his power, so that he has dominion over it.”)

and practice of the Rota.²⁰ Also according to St. Thomas, an act proceeds from the will with knowledge of its end.²¹ Consequently, just as in the *prudens electio voluntatis* (a judicious willed choice [to act]), so without the consciousness of the act either in itself or in its consequences, the latter is no longer voluntary, because, as St. Thomas explains, “nihil volitum nisi praecognitum” (“nothing is willed which is not first conceived”). Hence, every manifestation of consent presupposes and demands a “*iudicium quoddam de eo in quod consentitur*” (“power to judge measured by that to which consent is given”).²² Canonists and theologians agree that the act must be “positus cum plena mentis advertentia et perfecto voluntatis consensu” (“arranged with complete mental perception and perfect volitional accord”).

Plena mentis advertentia (complete mental acumen) requires that the author have not merely an instinctive perception or a purely material understanding of an act (an advertence proper in some extent to animals), but rather a true logical foresight and full consequential knowledge of the act itself and its motives, in its essence, its importance, and its effects.

Perfectus voluntatis consensus (perfect voluntary accord) requires that the author,

²⁰ *S.R.R. Dec. XXII*, dec. XII (1930), p. 127: “Actus autem humanus tunc tantum habetur, si procedat ab homine qua tali seu ab eius deliberata voluntate, idest si actio ponitur a sciente et volente.” (“A human act is had only if it proceeds from man as such, from his deliberate will; that is, if the action is posited by a knowing and willing man.”)

²¹ *Summa Theol.*, I-IIae, q. 6, a. 1: “Actus procedens a principio intrinseco seu a voluntate cum cognitione finis.” (“An act proceeding from an intrinsic principle, that is, from the will with knowledge of its end.”)

²² St. Thomas, *Summa Theol.*, I-IIae, q. 74, a. 7.

having full consequential consciousness of the act, freely determine himself to put it into being, *i.e.*, an act not merely the result of automation, or from an external force, but by his own actual intrinsic volitive deliberation. It is the rational appetite which brings this about: "apprehenso fine, aliquis potest, deliberans de fine et de his quae sunt ad finem, moveri in finem vel non moveri" ("After a goal to be achieved has been determined, anyone who thinks about it and considers those things attainable by reaching the goal, will be either moved toward its attainment or not.")²³

It follows from scholastic teaching that whatever is lacking in the contractual consent, *i.e.*, if one were deprived of the *plena mentis advertentia*, or the *perfectus voluntatis consensus in ordine ad matrimonium* (complete mental perception or the complete volitional integrity proper for the married state), there would be lacking true consent. The grave inversion of the sexual anomalies, or the serious lack of personal capacity, could affect both the intellect and the will in the contract of marriage. The sexual anomalies can impede the action of the intellect and the will²⁴ especially in the sensi-

tive appetite.²⁵

It is conceivable, therefore, that a person with a sexual anomaly which has reached the state of an obsessive, irresistible, compulsive urge would have a personal incapacity so that he would not be able to elicit a free and deliberate act which is required in matrimonial consent. It is possible for a man to have a right understanding of marriage, but because of some defect to be incapable of right action of the will to elicit the act of

"Unde causae quae diminuunt iudicium rationis, sicut ignorantia; vel quae diminuunt liberum motum voluntatis, sicut infirmitas vel violentia aut metus aut aliquid huiusmodi, diminuunt peccatum, sicut et diminuunt voluntarium; in tantum quod si actus sit omnino involuntarius non habet rationem peccati." ("Wherefore those causes which weaken the judgment of reason (*e.g.* ignorance), or which weaken the free movement of the will (*e.g.* weakness, violence, fear, or the like), diminish the gravity of sin, even as they diminish its voluntariness; and so much so, that if the act be altogether involuntary, it is no longer sinful.")

²⁵ St. Thomas, *Summa Theol.*, I-II, q. 77, a. 1: "necesse est quod quando una potentia intenditur in suo actu, altera in suo actu remittatur, vel etiam totaliter in suo actu impediatur. . . quando motus appetitus sensitivi fortificatur secundum quamcumque passionem, necesse est quod remittatur vel totaliter impediatur motus proprius appetitus rationalis, qui est voluntas. Alio modo ex parte obiecti voluntatis, quod est bonum ratione apprehensum. Impeditur enim iudicium et apprehensio rationis propter vehementem et inordinatam apprehensionem imaginationis et iudicium virtutis aestimativae, ut patet in amentibus." ("it follows of necessity that, when one power is intent in its act, another power becomes remiss, or is even altogether impeded, in its act. . . when the movement of the sensitive appetite is enforced in respect of any passion whatever, the proper movement of the rational appetite, or the will must, of necessity, become remiss or altogether impeded. Secondly, this may happen on the part of the will's object, which is good apprehended by reason. Because the judgment and apprehension of reason is impeded on account of a vehement and inordinate apprehension of the imagination and judgment of the estimative power, as appears in those who are out of their mind.")

²³ St. Thomas, *Summa Theol.*, I-IIae, q. 6, ad 2. The natural intrinsic capability to be responsible or accountable juridically for an act is that which the canonists and the theologians call the *sufficiens discretio iudicii actui proportionata*, *i.e.*, two elements distinct but concurrent and interdependent:

(1) *Intellective*—the capability to know the act both in itself and its immediate and mediate consequences, in such a way as to consciously put it into effect, *i.e.*, true capability for logical and consequential understanding of the act, so as to be able to discern and differentiate the motives, to measure its religious, ethical, social, juridical value, its mediate and immediate consequences.

(2) *Maturitas libertatis* is volitive capability freely to *self-determine* oneself to the performance or non-performance of the act.

²⁴ St. Thomas, *Summa Theol.*, I-IIae, q. 73, a. 6:

marriage.²⁶

The attitude of the Rota concerning this point can be illustrated by two cases. Both treated of the personal incapacity of the contractants.

1. The first case, *coram Wynen* (1941),²⁷

²⁶ St. Thomas, *Summa Theol.*, I-IIae, q. 77, a. 2: "Ad recte agendum homo dirigatur duplici scientia, scilicet universali et particulari, utriusque defectus sufficit ad hoc quod impediatur rectitudo voluntatis et operis. . . . Et iterum considerandum est quod nihil prohibet aliquid sciri in haitu, quoad tamen actu non consideratur. Potest igitur contingere quod aliquis etiam rectam scientiam habeat in singulari, et non solum in universali, sed tamen in actu non consideret . . . quod autem homo non consideret in particulari id quod habitualiter scit, quandoque quidem contingit ex solo defectu intentionis; . . . quandoque autem homo non considerat id quod habet in habitu, propter aliquod impedimentum superveniens, . . . vel propter aliquam infirmitatem corporalem; et hoc modo ille qui est in passione constitutus, non considerat in particulari id quod scit in universali, inquantum passio impedit talem considerationem. Impedit autem tripliciter: . . . tertio per quamdam *immutationem corporalem*, ex qua ratio quodammodo ligatur, ne libere in actum exeat." ("Since man is directed to right action by a twofold knowledge, viz., universal and particular, a defect in either of them suffices to hinder the rectitude of the will and of the deed. . . . Again, it must be observed that nothing prevents a thing which is known habitually from not being considered actually: so that it is possible for a man to have correct knowledge not only in general but also in particular, and yet not to consider his knowledge actually. . . . Now, that a man sometimes fails to consider in particular what he knows habitually, may happen through mere lack of attention; . . . Sometimes man fails to consider actually what he knows habitually, on account of some hindrance supervening, . . . or some bodily infirmity; and, in this way, a man who is in a state of passion, fails to consider in particular what he knows in general, in so far as the passions hinder him from considering it. Now it hinders him in three ways . . . thirdly, by way of *bodily transmutation*, the result of which is that the reason is somehow fettered so as not to exercise its act freely.")

²⁷ *S.R.R. Dec.* XXXIII, dec. XV (1941), pp. 144 ff. It received a favorable decision in 1933, negative in 1935 — ex capite defectus consensus ex

is that of a man addicted to narcotics and guilty of further criminal acts, etc. It deals with the constitutional immorality of the man. Some observations of the Rota concerning this case are worthy of note.

The Rota appraises the concept of the new opinions of the psychologists and the psychiatrists, who require not only the use of reason and the formal act of the will, but a "third element," appreciation (*seu aestimationem*) of the object, which would contain an element both cognoscitive and appetitive as a function of the reason and the will. The Rota mentions that this theory is neglected in moral theology and canon law. The theory is that the cognoscitive function has two elements: one, representative or conceptual; the other, ponderative or estimative — and that these are concerned with the *agibilia* or the practical judgment. The cognoscitive concerns the object (*quid sit*), the estimative cognition considers the social, ethical, juridical value of the object (*e.g.*, marriage). The Rota states that this actually refers to the object from two different aspects. According to the modern psychologists, the act can be impugned by reason of the defect of the required appreciation.²⁸

If a man cannot estimate even substantially the thing to be done, he is impeded in his natural appetitive faculty, either from an impediment which is only transitory (*e.g.*, drunkenness, delirium, violent fever) or from a habitual defect as found in many mental cases, and *psychic anomalies*, which are recently called "constitutional immorality."²⁹

parte viri. (It received a favorable decision in 1933, negative in 1935 — by reason of a defect of consent on the part of the man.)

²⁸ *Ibid.*, no. 9, p. 151. Concerning this same subject cf. also Dec. XXXV, dec. LVII (1943), pp. 596-600.

²⁹ *Loc. cit.*

Modern psychologists demand, besides the intellectual conception and consequent act of the will, a "third element" to elicit valid matrimonial consent; and they assert that the man in this case, because of his constitutional immorality or by a defect of the ethical element, could not know the value and weight (*momentum*) of marriage and, therefore, did not elicit valid marriage consent. The Rota explains that this is more accurately a description of the foreknowledge by which the act of the will is constituted and can be called human — really the *praecognitum* (premeditation).

The Rota admits that, notwithstanding the new terminology, the theory substantially agrees with the scholastic philosophy. According to St. Thomas and ecclesiastical jurisprudence, the mere use of reason or the previous knowledge of the nature of marriage as described in canon 1082 is in no way sufficient, but there is also required a *discretio* (capacity to discern) and a *maturitas iudicii* (mature understanding) which is properly proportioned to enter the marriage contract.³⁰ It is much more important in the contracting of marriage, which imposes a grave and perpetual obligation.

It is to be noted that constitutional immorality must be understood in the psychological sense, namely as the psychological incapacity of a person rightly to consider the ethical value and, according to this right estimation, to direct his mode of acting. It is not to be taken in the theological sense, as the conceptual incapacity to understand a wrong or to elicit an act which is a sin. Both senses are intimately connected, because it can be rightly asked whether one

can validly contract a theological fault when he cannot estimate its ethical value.³¹

The Rota continues: "It can no longer be sustained that constitutional immorality is nothing more than a species of mental illness." If these men are considered such that crimes can be imputed to them, by what law are they judged to give valid consent? We reply that such men cannot sufficiently estimate the value and the weight of marriage and all the obligations connected with it. But how can we know that such a defect is so grave that they cannot estimate the *substantial* value of marriage? (Tanzi, the psychiatrist, points out the great difficulty in establishing the certain boundaries between normal and abnormal.)³²

The Rota concludes that if there is sufficient estimative knowledge of the substantial value of marriage, there is not, however, required an exact reasoning or understanding of each and every obligation connected with marriage. Much less is it required that one have a firm *propositum* to fulfill the obligations of marriage, or is there needed a reflex estimative knowledge. So little is required for valid consent in a man who has sufficient conceptual knowledge of the nature of marriage (can. 1081, § 1) and is endowed with free will.³³

³⁰ St. Thomas, Dist. 27, q. 2, ad 2 ad II; S.R.R., *dec. cit.*, n. 11.

³¹ S.R.R., *dec. cit.*, n. 15.

³² *Ibid.*, n. 16.

³³ *Ibid.*, n. 28: "Ad valide contrahendum non sufficit mera cognitio *quid sit* matrimonium, quae cognitio etiam in puero haberi potest, sed insuper requiritur maturitas iudicii, quae contractui matrimoniali ineundo proportionata sit . . . sicuti alicui peccatori habituali nequit ideo, quia habitualiter pravos actus committit, abiudicari liberum arbitrium, ita ei adiudicari nequit facultas cognoscendi valorem substantialem rei agenda, est agatur de re magni ponderis qualis est matrimonium." ("In order to contract validly, mere knowledge of *what* marriage is does not suffice, which knowledge can be had even in a youth; but moreover there is required maturity of judgment proportioned to the matrimonial contract to be entered

The Rota further warns that we must be careful in using this modern doctrine in judging the nullity of marriage because of a defect which lacks even an appropriate name (ambiguous terms: constitutional immorality, moral insanity) and about whose essence even the authors are divided. Extreme caution must be used in adjudicating nullity because of the uncertainty of juridical criteria and such equivocal terms which may cause confusion.³⁴

2. The second case of the Rota pertinent to this subject is one of nymphomania, *coram Heard* (1942).³⁵ The Rota considers in this case the fact that the intellect may remain intact, but because of a defect of the equilibrium of the organs and the co-ordination of the powers, the will is rendered inefficacious, and there is had either abulia or inertia, or an *irresistible impulse* which the person cannot resist.³⁶

into . . . just as it cannot be denied that an habitual sinner possesses free will, because he habitually commits depraved acts, so also it cannot be denied that he possesses the faculty of knowing the substantial value of the matter to be done, although there is question of a matter of great importance, such as marriage.”)

³⁴ *Ibid.*, n. 13 and 14. The Rota gave a negative decision to this case, not because of the personal incapacity, but because of the lack of evidence, and because three years before the marriage the man had apparently been cured of his narcotic addiction.

³⁵ *S.R.R. Dec. XXXIII, dec. XLIV* (1941), pp. 488 ss.

³⁶ St. Thomas, *Suppl.*, q. LI, art. 1: “Quidquid impedit causam de sui natura impedit et effectum similiter. . . . Consensus autem voluntatis est actus, qui praesupponit actum intellectus.” *S.R.R., dec. cit.*, p. 489: “Intellectus autem et voluntas sunt facultates animae ideoque penitus spirituales . . . nec ulli morbo physico subiaceri possunt. . . . Extrinsece tamen, seu in suo operatione, impediti possunt ob defectus sive in sensibus externis et internis, quibus utitur intellectus ad conceptus formandos et deinde iudicium, sive in potentiis executivis, quae imperio voluntatis subserviunt . . .

Those who lack the use of reason are to be prevented from marriage and not only those who lack use of reason, such as idiots, but also those who are like them in some way, who cannot form a right judgment of the nature of the contract, such as infants, or those equal to infants. Supposing sufficient knowledge in the agent, there is also required for consent sufficient deliberation of the will, which clearly is lacking where the intellect is absent, and also when disturbances either of the intellect or will, through abnormal phantasies or disordered nerves, remove the possibility of making a true election of the will. A person, therefore, can be such that, although master of himself, he commits acts which he reproves, because he is dominated by an interior invincible force. The intellect remains sufficiently sane, and the delirium exists only in the acts.³⁷

It is not necessary for a valid contract that the person have before his eyes the sanctity of matrimony (can. 1082). The case of the nymphomaniac, rather than arising from a defect of the necessary knowledge, is in fact based on the *personal incapacity* of the woman to give valid consent on account of

sic digestio impedit contemplationem, haec vero digestionem retardat, tristitia generat morbum, laesio organorum amentiam causat.” (“Whatever impedes a cause, by its very nature likewise impedes the effect. . . . Consent of the will is an act, which presupposes an act of the intellect.” *S.R.R., dec. cit.*, p. 489: “The intellect and the will are faculties of the soul and are therefore completely spiritual . . . nor can they undergo physical sickness. . . . Extrinsically, however, in their operation, they can be impeded because of defects either in the external and internal senses, which the intellect uses to form concepts and finally the judgment, or in the executive powers, which obey the command of the will. . . . Thus digestion impedes contemplation, this latter hinders digestion, sadness gives rise to sickness, organic injury causes insanity.”)

³⁷ *S.R.R., dec. cit.*, n. 2, p. 489.

the impossibility of deliberation. The sexual instinct completely dominates her personality — a sexual degeneration which renders her pathologically irresponsible. She is not *amens* (foolish) but *demens* (insane), a monomaniac concerning libidinous acts. We are concerned here not about her simulated consent but rather that she gave consent impelled by a force of an irresistible instinct. The force of the irresistible instinct cannot effect the election of the means even indirectly. Neither is the degree of deliberation required for marriage to be exaggerated — “sufficit quae ad peccatum mortale requiritur” (“all that is required is that degree of intent necessary for mortal sin.”)³⁸

If the consent of the woman does not directly make the marriage invalid by reason of the irresistible instinct, indirectly it makes the marriage invalid — “ex ipsa intrinseca et necessaria incapacitate contrahentis” (“from the very internal and compulsive incapacity to perform the marital act”) to preserve the *bonum fidei*.

The Rota compares this defect to the diriment impediment of impotence. Impotence is not a diriment impediment to marriage unless it is incurable. If one is curably impotent, he is master of his body and can transfer the *ius* (right) to his body, not at once but in the future exercise, which is sufficient for valid consent. If the woman was truly suffering an invincible sexual instinct so that she would indiscriminately give herself to any man, at the time of the marriage she was not master of her body and thus could not transfer the *ius* to her body. And it is not necessary to consider whether it can be cured.³⁹

³⁸ *Ibid.*, n. 6.

³⁹ *Ibid.*, p. 495. It is to be noted that the Rota rendered a *non constare* decision because there was not sufficient evidence for the invincible instinct.

As is evident from the two cases which have been quoted from the Rota decisions, such cases of one who is afflicted with a sexual anomaly or one who is constitutionally immoral are not impossible, notwithstanding the warnings given by the Rota about the difficulties inherent in such cases, particularly because of the lack of specific juridical criteria.

In adjudicating such cases, therefore, it would be necessary to evaluate the circumstances of each case, to seek the counsel of experienced psychologists and psychiatrists (*periti*) (experts), and to weigh carefully the influence of the obsessive compulsion on the action of the intellect and the will. The Rota itself has taken into consideration (*e.g.*, in the case of the nymphomaniac) the personal incapacity of the subject to contract valid marriage, not only by reason of the invincible instinct, but also by reason of the intrinsic and necessary incapacity to contract marriage and to preserve the *bona matrimonii* (integrity of marriage). Here there is no question of a diriment impediment, there is no question of insanity; but there is a basic incapacity of the subject to give full and free consent to the substance of the contract of marriage. Is it not conceivable, therefore, that one who is afflicted with one of the sexual anomalies, by reason of an obsessive compulsion to perform unnatural and perverted acts, could also be considered in the same category as the nymphomaniac, who has an invincible sexual instinct contrary to the substance of marriage?

II. Nymphomania and Homosexuality

We come now to a study of two specific anomalies, homosexuality and nymphomania. We treat these because of the frequency of such cases brought before ecclesiastical tribunals in recent years.

A. *Nymphomania*

Nymphomania is an excessive sexual desire in the female, usually psychogenic in origin, which often leads to extramarital relations or masturbation, and finally to chronic compulsive promiscuity.⁴⁰

Besides the Rotal case of nymphomania mentioned previously, there is another case, *coram Sabattini* (1957).⁴¹ In this latter case the court declared that the mental defect of the true nymphomaniac is not so much a case of inability to elicit integral consent; rather it has the juridical figure of a diriment impediment and is quite similar to the impediment of impotence.⁴²

This case, like the one in 1942 *coram Heard*, deals with the personal incapacity of the subject to assume the obligation of marital fidelity. It frequently happens that the nymphomaniac, unless she sees marriage only as a means of satisfying her stimulus which is irresistible—in which case she would necessarily lack liberty—*quoad matrimonium in fieri* (as far as the marriage ceremony) can posit the element of cognition and of the will necessary for the contract, because she can understand the substance of marriage and the *bonum* of fidelity. The difficulty arises *quoad matrimonium in facto* (as far as an existing marriage) — or rather *circa usum conjugii* (with respect to marital practice).

In comparing this anomaly with impotence, we know that impotence is an impediment, a juridical concept, not a psychological species. Impotence is no more than that the *usus corporis* (corporal connection) between spouses cannot be had. However, the

⁴⁰ Cavanagh, "Sexual Anomalies and the Law," *The Catholic Lawyer*, IX (1963), 13. This subject has already been treated by Keating, *art. cit.*

⁴¹ Fasc. n. 132. Reported in part in *Il Diritto Ecclesiastico*, LXXI (1960), 314-322.

⁴² Keating, "The *Caput Nullitatis* in Insanity Cases," *THE JURIST*, XXII (1962), 399.

nymphomaniac cannot have the *usus exclusivus corporis* (exclusive exercise of her body) — a quality which is always necessary to the *usus matrimonialis* (marital experience). And this, because of the degree of her anomaly, gives her a personal incapacity. In this case (*coram Sabattani*—1957), it is decreed that grave and incurable nymphomania certainly invalidates marriage; the invalidating force does not come from a defect of consent, but rather as a diriment impediment, since the anomaly of the nymphomaniac seems to approach the diriment impediment of impotence.

The comparison of the two cases (1942 and 1957) reveals a slightly different approach. The first case (1942 — *coram Heard*) deals with marriage *in fieri* — and considers the subject as giving consent, but forced by an invincible sexual instinct, the sexual degeneration which renders her pathologically irresponsible. The second case (1957 — *coram Sabattani*) approaches the nullity after the manner of a diriment impediment and considers the marriage *in facto*. The marriage is rendered invalid indirectly, based on the woman's intrinsic and necessary personal incapacity to preserve the *bonum fidei*. Because of her psychological defect (nymphomania) she is like a person who is impotent. She is, therefore, impeded and not able to give in marriage the *usus exclusivus corporis*.

Regardless of the manner of approach to these two cases, it is apparent that it is possible to declare null and void a marriage which is contracted by one who is afflicted with a serious sexual anomaly.⁴³

⁴³ St. Thomas, Suppl., q. LI, art. 1. "The mind and the will can be impeded in their operation by reason of an extrinsic cause, either in the senses by which the intellect forms its concepts, or in the executive powers which are subservient to the rule of the will."

B. Homosexuality

Perhaps the most vexing problem brought before ecclesiastical tribunals in recent years has been the problem of homosexuality in relation to the nullity of marriage. Coburn has already treated this subject in a paper read at the regional meeting of the Canon Law Society of America in New York City.⁴⁴

In homosexuality there is a deviation of the sex feelings away from their proper heterosexual object to a sexual object of the same sex. Dr. Cavanagh defines homosexuality as "a state in which the sexual object is a person of the same sex, and in which there is a concomitant aversion or abhorrence to the sexual relations with members of the opposite sex."⁴⁵

Homosexuals are also called perverts. But this is not a truly defined description. There

is a clear distinction.⁴⁶ A homosexual may be a pervert but he is not necessarily so. A pervert is an individual, homosexual or heterosexual, who finds complete sexual satisfaction in a manner which frustrates the primary purpose of the sexual act. A homosexual, or invert, therefore, is not a pervert unless he performs perverse acts. The sexual inversion is a way of thinking and feeling, not merely a way of acting. The performance of homosexual acts is not in itself evidence of inversion. "Homosexuality . . . is not an entity in itself but is merely a symptom of some underlying disorder, probably neurosis. . . . A definition in terms of behavior is preferable since homosexuality is a symptom of underlying personality distortion and not of a single integrated psychiatric syndrome."⁴⁷

It is important, therefore, to make a clear distinction between the state of being a homosexual and the way of acting as a homosexual. There are some homosexuals who are inverts as a way of thinking and feeling, but who have never indulged in overt homosexual acts.⁴⁸

Following the definition of Cavanagh we have a restricted concept of homosexuality

⁴⁴ Vincent Coburn, "Homosexuality and the Invalidation of Marriage," *THE JURIST*, XX (1960), 441-459.

St. Thomas uses the term sodomy in referring to homosexuality, *Summa Theol.*, II-II, q. 154, art. 12: Whenever there occurs a special kind of deformity whereby the venereal act is rendered unbecoming, there is a determinate species of lust. This may occur in two ways: First, through being contrary to right reason, and this is common to all lustful vices; secondly, because, in addition, it is contrary to the natural order of the venereal act as becoming to the human race: and this is called the unnatural vice. This may happen in several ways. First, by procuring pollution, without any copulation, for the sake of venereal pleasure. This pertains to the sin of uncleanness which some call effeminacy. Secondly, by copulation with a thing of undue species, and this is called bestiality. Thirdly, by copulation with any undue sex, male with male, or female with female, as the Apostle states: and this is called the vice of sodomy. Fourthly, by not observing the natural manner of copulation, either as to undue means, or as to the other monstrous and bestial manners of copulation.

⁴⁵ Cavanagh, *art. cit.*, p. 24.

⁴⁶ *Loc. cit.*

⁴⁷ Leon Salzman, M.D., "The Concept of Latent Homosexuality," *The American Journal of Psychoanalysis*, XVII (1957), 167.

⁴⁸ John F. Oliven, M.D., *Sexual Hygiene and Pathology: A Manual for the Physician* (Philadelphia, 1955), p. 430: "This is a chronic usually lifelong disorder of the total personality, although in a number of cases its only apparent manifestation is the abnormal direction of the sex drive. Homosexuality is basically a medical (probably chiefly psychiatric) problem. But because of its relative incurability, the fairly frequent tendency of these patients to seduce others, and because of the almost instinctive animosity the homosexual inspires in many normal people, in practice it has remained more a social than a strictly medical problem."

(for our purposes). It will not be necessary to evaluate the moral responsibility of the homosexual or the theories as to the cause of the anomaly (organogenic or psychogenic). We note, however, that there is no agreement among psychiatrists that homosexuality is inborn.⁴⁹

Various divisions are given for homosexuality.⁵⁰

We shall follow Oesterle who divides homosexuality into primary and secondary homosexuality: *primary* is always founded in the character of the person, possibly innate, of indigenous causes; *secondary* is found when the person acquires the anomaly during life, often by seduction. There is a further division between facultative and obligatory homosexuality: *facultative* refers to the bisexual attraction; *obligatory* is such that in relation to persons of the opposite

⁴⁹ James H. Van der Veldt and Robert P. Odenwald, *Psychiatry and Catholicism* (New York, 1952), p. 380.

⁵⁰ Cavanagh divides the homosexual into three types:

1. *True homosexuality* — also called psycho-sexual homosexuality — is the condition described above. The homosexual has no interest in the persons of the opposite sex. This condition is usually considered to be acquired in early life and to be psychogenic in nature.

2. *Pseudo homosexuality* — or erroneously called bisexuality — a condition in which the individual is sexually interested in both sexes. Not true homosexuality.

3. *Constitutional homosexuality* — a term used by those who felt that the condition is inborn and, therefore, unchangeable. "There is no scientific proof of this theory." (*Art. cit.*, p. 25.)

True or genuine homosexuality is also divided into essential and acquired:

Essential, which is genetically determined or caused by very early environmental factors or influences, sometimes beyond consciousness.

Acquired, that is, predominantly determined by new factors arising in later life — late childhood, adolescence, or manhood. Cf. Michael J. Buckley, *Morality and the Homosexual* (Westminster, Md., 1959), pp. 16-17.

sex the person is absolutely impotent.⁵¹

If we follow the definition of Oesterle regarding the obligatory homosexual, and if proof can be had that the person never had any inclination toward the other sex, the nullity of the marriage because of impotence might be relatively easy to establish. When we consider the facultative or the bisexual homosexual, the marriage can be consummated and thus it becomes indissoluble. In the latter case, according to present jurisprudence and legislation, there can be only the solution of the problem by a separation *a mensa et toro* (from bed and board). The homosexual can, in many instances, consummate the marriage by normal sexual intercourse, at least with great psychic effort, sometimes with repugnance and abhorrence, sometimes with the representation in fantasy that husband or wife is the homosexual partner.

Homosexuality always presents a danger to marriage, and often leads to the complete breakup of the union; the marriage itself becomes victimized. Precisely because the homosexual is not always *a priori* prevented from the consummation of the marriage by reason of the aversion to the other sex, still, as frequently happens, there is danger that the marriage will not be consummated. The canonist may ask the question: Can the nullity of a marriage be explained on the basis of homosexuality? The question is pertinent because not every homosexual man or woman is impotent.

One must determine whether the case is one of obligatory or facultative homosexuality. If the homosexuality is so fixed that it becomes obligatory, or if it is obligatory from childhood, and if this has progressed

⁵¹ Gerard Oesterle, "De Relatione Homosexualitatis ad Matrimonium," *Revista Española de Derecho Canonico*, X (1955), no. 28, p. 23.

in successive degrees, and this can be established, then we are confronted with a practical case of impotence *absoluta et insanabilis* (absolute and incurable).⁵²

What makes the judgment of homosexuality so difficult is the fact that some of those persons who are active homosexuals are only facultative homosexuals, *i.e.*, they are bisexual. In such cases a judge cannot be careful enough in giving a judgment or opinion, before accepting as proved with moral certitude that impotence is present in the canonical sense. It happens, and with tragedy to the spouse, that a homosexual desires marriage only as a coverup for his perverse activity.

The Rota on February 16, 1940, in an interesting case of functional impotence with regard to a man who had the sexual anomaly of practicing sodomy,⁵³ gave some practical directives for examining such cases, with these observations: It is the opinion of certain people that such inversion is nothing more than the effect of an innate instinct or a physical impulse, *i.e.*, a sickness, which is unconquerable and, therefore, perpetual. *In foro externo* (in the open forum) it is necessary that we abstain from all kinds of general judgments with regard to impotence which embraces perversion or inversion of the sexual appetite. Each case should be carefully weighed. Even if there is aversion or frigidity towards the other sex, it does not necessarily follow that it brings with it or causes full and perpetual incapacity of performing copulation or of bearing children.

⁵² Oesterle, "Welchen Einfluss hat die Homosexualität auf die Ehen," *Oesterreichisches Archiv für Kirchenrecht*, XII (1961), 325.

⁵³ *S.R.R. Dec. XXXII* (1940), dec. XV, pp. 141-154.

The Rota suggests questions which should be asked in such cases: whether the person in question suffered a sickness or a pathological condition, either congenital or acquired; at what age the vice was begun, and from what cause, *e.g.*, from morbid dispositions, from defect of discipline of parents, from a seducer, or from excesses in adolescence. The jurisprudence of the Rota at that time held the opinion that perpetual functional impotence cannot be readily said to exist if it has had its source from these previous vices.

It may be important for our study to evaluate the argumentation of Father Oesterle. Oesterle has written extensively regarding homosexuality and the invalidity of marriage.⁵⁴ The writer, after serious research of Rotal jurisprudence as far back as 1877, was unable to find any marriage case which was based on the juridical cause of homosexuality.⁵⁵

Oesterle argues that a marriage with a homosexual can be annulled on three grounds: (1) *exclusio matrimonii ipsius*

⁵⁴ "Animadversiones in Sententiam S.R.R., die 23 feb., 1951, coram Staffa," *Il Diritto Ecclesiastico*, LXII (1951), 730-750; "De Relatione Homosexualitatis ad Matrimonium" cited in note 51 *supra*; "Voluntas se obligandi et voluntas non adimplendi ad tempus vel in perpetuum in ordine ad proles generationem," *Perfice Munus*, XXXIV (1960), 45; "Von der psychischen Impotenz," *Ephemerides Iuris Canonici* (1955); "Welchen Einfluss hat die Homosexualität auf die Ehen," *Oesterreichisches Archiv für Kirchenrecht*, XII (1961), 305-337.

⁵⁵ Cf. *Causa Jurinen. seu Viennen. before S. C. Council* — 28 iulii 1877; 15 dec. 1877; 23 martii 1878 (*Thesaurus S.C.C.*, Vol. 136, pp. 406-409; p. 601; Vol. 137, pp. 124-131); *Causa Colonien.*, 18 aug. 1906 (*Thesaurus*, Vol. 165, pp. 994-1009); *Causa Mechlinien.*, 17 feb. 1906 (*Thesaurus*, Vol. 165, pp. 476 ss.). The Congregation of the Council always treated cases of impotence almost exclusively from the standpoint of the non-consummation of the marriage.

(prevention of the marriage itself): there is no intention of entering a real marriage; (2) *exclusio fidelitatis* (infidelity); (3) *exclusio iuris ad coniugalem actum* (the prevention of the right to the marital act).⁵⁶ He attempts to prove the invalidity of marriage on homosexual grounds⁵⁷ by stating that homosexuality is in its essence incompatible with marriage: Even though the homosexuals may have the wish to break off their prior relationships, they often are unable to do so, because they lack the will to make such a break, or they are unable energetically to fight against their inclinations and, consequently, at the time of the marriage they are lacking in good faith.

The arguments that homosexuality is incompatible with marriage may be summed up as follows:

1. According to canons 1081 and 1086, the homosexual could not have the will to enter a true marriage; under the outward appearance of marriage he desires to continue his homosexual relationships.

2. On the basis of canons 1081 and 1086, the person before the marriage proposes to sin against matrimonial fidelity, and this can sometimes be established by evidence before and after the marriage.

3. On the basis of canon 1081, matrimonial consent is not had in the sense that the man and woman reciprocally hand over and receive forever the exclusive right (*ius in corpus*) (the right over the body).

For these reasons the marriage is invalid: (1) because the homosexual is incapable, as a result of the homosexual relation, even if he had the intention of giving true matrimonial consent, of restraining himself from the homosexual relationship (often there results a true impossibility of normal inter-

course with the spouse); (2) because the homosexual not only does not permit the exclusive right to marital intercourse, but often excludes it entirely. The conclusion is that homosexuality is incompatible with the essence of marriage.

According to canon 1086, anyone who externally manifests consent but inwardly does not awaken the corresponding act of the will simulates consent. The contract of marriage requires four elements: (1) the intention to conclude a true contract, (2) the intention to bind oneself to the contract, (3) the physical and moral capacity to bind oneself, and (4) the intention to fulfill the duties that are undertaken.⁵⁸ How far is the homosexual physically and, at least, morally able to bind himself to the marriage contract? No one can enter a valid contract who cannot dispose freely of the object of the contract. It must be an object which is possible both physically and morally. No one is held to the impossible, nor is he able to oblige himself to it.⁵⁹ This doctrine holds even if the object is only relatively impossible.

We have already treated of the case of nymphomania (*coram Heard—supra*), where this doctrine is strengthened by a favorable decision. We feel that an argument can be drawn *a pari* (equally) for homosexuals in the same classification as the nymphomaniac. Homosexuals are irresistibly drawn to actions against their nature. They are no longer masters of their own actions in regard to a correct union as husband and wife. This is a sickness of the will. A sick person can have full consciousness

⁵⁸ *Ibid.*, p. 329.

⁵⁹ A. Vermeersch, *Theologiae Moralis*, Vol. II (Romae, Brugis, Parisiis, 1924), n. 411, p. 352; cf. G. Heinzl, *Summa Theologiae Moralis*, Vol. I (ed. 30, Innsbruck, 1952), n. 63, p. 65; n. 70, pp. 70 ss.

⁵⁶ Oesterle, "Welchen Einfluss . . .," p. 305.

⁵⁷ *Ibid.*, p. 328.

of the situation. But he feels he is no longer master of himself and is dominated by an interior force, invincibly compelled to commit those acts which he reproves. The intellect remains sufficiently sane; the delirium exists only in the actions.⁶⁰ The homosexual is incapable for the duration of his life to bind himself to a natural use of marriage. This thinking is certainly in accord with the definitions of the modern psychologists of a sexual anomaly, *i.e.*, a sexual anomaly which follows a repetitive obsessional fantasy, which leads to compulsive acts — an unresisted urge.

To this we might add the fact that the personal incapacity of the homosexual to marry can be drawn not only from his lack of intellectual and volitional activity⁶¹ but also from a direct inversion of nature, which never, or only with great difficulty, can be cured. Such a person cannot hand over the right of his body to his partner, or receive it, if the contract is for life and exclusive, with ultimate reference to the procreation of children.⁶² He is radically unfit for marriage; he freely makes a contract which he cannot fulfill.

We shall not consider the arguments of Oesterle concerning the *bonum prolis* and *bonum fidei* (for the good of the offspring and for the good of the faith).⁶³ He treats at great length the *dubium* (uncertainty) created by the Rota in some recent decisions,⁶⁴ whether or not there is the division of the flesh by sexual acts *contra naturam*

(against nature).

It has been considered as commonly held that the constant canonical jurisprudence concerning the *bonum fidei* is not vitiated by acts contrary to nature, but only by acts *per se apti ad prolis generationem* (which because of their very nature are appropriate in begetting children). But the Rota has also held the contrary opinion (according to Oesterle):⁶⁵

Communis sententia est adulterio aequipari sodomiam, in ordine ad ius tributum parti innocenti divertendi, a parte quae est in culpa. Cuius sententia ea adducitur ratio quod, *etiam per sodomiam*, coniux carnem suam cum alio dividens perfecte frangat fidem coniugii, quod eo tendit ut coniuges fiant una caro. (The common opinion is that sodomy is equal to adultery, relative to the right given to the innocent party to separate from the party who is at fault. The reason given for this opinion is that *even through sodomy* the spouse who shares his flesh with another perfectly breaks the faith of marriage, which strives to make the spouses one flesh.)

Sodomy is therefore equal to adultery; the Rota apparently has not always held the same opinion.⁶⁶

The arguments of Oesterle for invalidity are not without merit, especially in the light of modern psychiatry. The conclusion is again that the personal incapacity of the homosexual, like that of the nymphomaniac, can create an inability to contract a valid marriage. We may envision, therefore, cases of homosexuals who in regard to *matrimonium in fieri* have a personal incapacity to

⁶⁰ Oesterle, *art. cit.*, p. 332.

⁶¹ E.g., S.R.R. Dec. of 25 feb. 1941, Dec. XXXIII, dec. XV (1941), p. 145; 16 iulii 1943, S.R.R. Dec. XXXV, dec. LVII (1943), 596-600.

⁶² Oesterle, *art. cit.*, p. 334.

⁶³ Cf. Oesterle, *art. cit.*, pp. 326 ss.; "De Relatione Homosexualitatis ad Matrimonium," *Revista Española de Derecho Canonico*, X (1955), 41 ss.

⁶⁴ S.R.R. Dec. XXVII, dec. XLII (1935), 358; and *coram Mattioli*, n. 6141, Dec. 11, 1958.

⁶⁵ S.R.R. Dec XXVII (1935) *coram Massimi*, 29 maii 1935, dec. XLII, p. 358, n. 3.

⁶⁶ Oesterle lists many authors on both sides of the argument. Those who held that sodomy or homosexuality does not create the division of the flesh base their argument upon the opinion of St. Alphonsus. Oesterle even calls into question the source of this opinion, and the basis of the quotation. Cf. "De Relatione . . .," pp. 54 ss., esp. p. 58.

contract a true marriage; and in the case of *matrimonium in facto* often have, in addition, a physical incapacity.

Conclusion

It must be admitted that this study of sexual anomalies in relation to the nullity of marriage does not solve these complex problems. However, cases of this nature have been more readily accepted in tribunals in recent years. A study of recent Rotal jurisprudence and of the commentaries of the canonists reveals a growing perfection and refinement as the research of modern psychiatry and psychology becomes surer and more appreciated. Cases of persons with these disorders should be investigated in detail to determine the personal incapacity of the subjects to enter a true marriage. If found to be personally incapable, they should be judged radically unfit for marriage.

Depending on the merits and the circumstances of the cases, the judges at present may follow not only the traditional Rotal treatment of such cases based upon defects of intellect and will, but also the recent approach based upon the personal incapacity of the subjects to make a contract which they cannot fulfill.

Since the Code and the jurisprudence of the Church for the past forty-five years have not provided adequate tools to solve these modern problems, we must look to other sources. The advances in thought and systems of modern psychology and psychiatry and the other related sciences should challenge us to reconsider cases from the aggregate total of our expert past experience together with a judicious application of the present research findings of these sciences.

It is obvious that further studies are necessary to assist the judges to: (1) examine

new thinking in psychology and psychiatry; (2) define the homosexual, the sociopath, the constitutionally immoral, etc.; (3) study the concept of error and fraud related to sexual anomalies and marriage; (4) define the concept of the constitutionally immoral, the sexual psychopath, etc., and their inability to fulfill the obligations of marriage; (5) determine that heterosexuality is a condition of valid marriage; and (6) establish homosexuality and other sexual anomalies as diriment impediments of marriage.⁶⁷

⁶⁷ Recalls the words of Pope Pius XII — to the Fourth International Convention of Catholic Doctors — in which he encourages the sciences of physiology and psychology and the studies of the mutual actions and reactions of physics and morality, and in which he states that one may not reject a teaching because it is new. — September 29, 1949: *AAS*, XLI (1949), 559 ss.; *The Catholic Mind*, XLIII (1950), 250 ss.

Along these lines Father Joseph Goodwine has made the following suggestions as revisions for canons 1081 and 1083:

Canon 1081, § 3: *Inhabiles ad validum consensum praestandum, praeter quos expresse iure impeditos, sunt:*

n. 1. *Qui carent usu rationis aut exercitio liberae voluntatis;*

n. 2. *Qui tam deminuto vel tam immaturo usu rationis inficiuntur, ut rectam aestimationem matrimonii eiusque iurium et onerum efformare nequeant;*

n. 3. *Qui immoralitati, perversioni sexuali, aut pravis moribus tam addicti, ut nequeant onera ex finibus proprietatibusque matrimonii profluentia aut assumere aut adimplere.*

Canon 1083, § 2: n. 2. *Si persona iure habilis bona fide contrahat cum persona immoralitati, aut perversioni sexuali, aut pravis moribus tam addicta ut onera contractus fideliter adimplere nequeat. (Canon 1081, §3: Besides those expressly impeded by law, they are unqualified to give valid consent:*

n. 1. *who lack the use of reason or the exercise of free will;*

n. 2. *who are afflicted by so diminished or so immature use of reason, that they cannot form a correct appreciation of marriage and of its rights and duties;*

It is hoped that the new codification of law, now under consideration, will give serious thought to problems of this nature. It is suggested that the new revision might establish a permanent or temporary impediment for such persons as those who have a personal incapacity to marry — a temporary impediment, for example, dependent upon diagnosis and upon psychiatric therapy, before such a person would be allowed to contract marriage.

On the other hand, it is hoped that the new code of law will clearly define the norms of actions, based on juridical concepts which will give the jurist a basis to adjudicate the validity or invalidity of such marriages, *e.g.*, the circumstances before and after the marriage which would prove

that the person not only should have been prevented from entering marriage, but that once the contract was made there would be a basis in law and nature to declare such a contract null and void.

These problems are beginning to represent a pressure and a challenge to us to examine and clarify what is essential in the law. We must also search out what is dependent on the circumstances of our times. With reverence we must preserve the law and the principles of the law of the past. At the same time, we must advance the cause of jurisprudence in our day and for the future, evaluating with prudence what is new, treating with charity what seems an innovation.

The task of jurisprudence and the work of ecclesiastical tribunals are certainly in accord with, and necessary in, the field of pastoral work. Even the law must have a pastoral outlook.

Canonical jurisprudence is a living science and it must not only hold sacred what is the past, but also keep abreast of the new dimensions of thought. We must face the difficulties and the exigencies of our times.

n. 3. who are so addicted to immorality, sexual perversion, or depraved morals, that they cannot either assume or fulfill the duties flowing from the ends and properties of marriage.

Canon 1083, § 2, n. 2. If a legitimately qualified person contracts in good faith with a person so addicted to immorality, sexual perversion, or depraved morals that he cannot fulfill faithfully the duties of the contract.)

