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Homosexual Resident Alien Deportable as a Psychopathic Personality

its attorneys. The public policy to protect citizens from fraudulent and incompetent legal advice remains an essential consideration. It is outweighed, however, by the necessity of affording all citizens an equal opportunity to obtain expert advice concerning complex federal laws and regulations. Although the holding of the present case makes a significant inroad into the province of state regulation of all attorneys within its geographic bounds, it does not undermine the state's power to regulate the activities of attorneys in any critical fashion. Since the great majority of legal problems arising within a state will of necessity concern state, rather than federal, law, all attorneys advising in these matters will continue to be closely regulated by their state. Those crossing state lines to advise on merely federal matters will tend to be attorneys whose opinion and reputation are valued and whose advice is competent. Furthermore, the actual practice of law before federal courts remains completely subject to the judicial regulations of the particular courts, and properly so, in order to prevent any significant deterioration in the quality of the federal bar.

Homosexual Resident Alien Deportable as a Psychopathic Personality

Petitioner, a resident alien, was ordered deported on the ground that, being a homosexual at the time of his entry into the United States, he was excludable under Section 212(a)(4) of the Immigration and Naturalization Act of 1952 [1] as a "psychopathic personality." On appeal, the Court of Appeals for the Second Circuit affirmed, *holding* that the term "psychopathic personality" was a legal word of art which was clearly intended to include homosexuals, and, therefore, was not unconstitutionally vague. *Boutilier v. Immigration and Naturalization Serv.*, 363 F.2d 488 (2d Cir.), *cert. granted*, — U.S. —, 87 Sup. Ct. 285 (1966).

The power to deport is a weapon of defense and reprisal and is inherent in every sovereign state.[2] Congress, by virtue of its constitutional authority to regulate foreign commerce, has the power of deportation.[3] In order to supplement this power, Congress may also deny a person admission to the United States, or impose such reasonable restrictions on his admission as it deems proper.[4]

This power to exclude and deport has been utilized from the outset of our government, and, to date, the basic pattern of the procedure has remained essentially the same.[5] The deportation of undesirable aliens, however, became dormant after 1798, and the practice was not re-established until 1888.[6] Criteria for

[1] Immigration & Naturalization Act of 1952, § 212(a) (4), 66 Stat. 182, 8 U.S.C. § 1182(a) (4) (1964).

[2] Harisiades v. Shaughnessy, 342 U.S. 580, 587-88 (1952).

[3] Chinese Exclusion Case, 130 U.S. 581, 603-04 (1889).

[4] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

[5] *Developments in the Law—Immigration and Nationality*, 66 HARV. L. REV. 643, 644-45 (1953).

[6] *Id.* at 646.

exclusion, however, continued to develop over the years.

With regard to the exclusion of an alien, there is no requirement that he be afforded due process of law—he is not even entitled to a hearing.[7] Congress has plenary power to deny admission and to set standards for admission.[8] That due process is not required would seem to follow naturally since exclusion deals with neither citizens nor residents of this country.

Deportation presents an entirely different problem since a resident alien is living under our laws. It has been argued that because of his residence, the alien is entitled to the full protection of the Constitution in that "the Bill of Rights make no exception in favor of deportation laws or laws enacted pursuant to a 'plenary' power. . . ." [9] This view, however, has never been adopted by a majority of the Supreme Court. While it is clear that all constitutional guarantees do not apply to deportation, the decisions of the Supreme Court leave much doubt as to what safeguards do apply. Nevertheless, it was early decided that there must be a hearing in deportation cases, and that the hearing must comply with the due process requirements of notice and opportunity to be heard.[10] However, it has also been held that the principles of res judicata do not apply so as to bar a deportation hearing after the alien has been adjudged admissible at the time of his entry.[11]

Recently, however, the Court has more fully outlined the constitutional guarantees which are applicable to deportation proceedings. In *Jordan v. De George,* the Court, in determining what was meant by a crime involving moral turpitude, stated that the constitutional standard that a statute cannot be overly vague was applicable to deportation, even though it is a civil and not a criminal proceeding.[12] The following year, in *Harisiades v. Shaughnessy,*[13] the Court was faced with the deportation of a resident alien because of prior membership in the Communist Party. Such membership had, however, ended before the law making it a ground for deportation had been enacted. The Court held that an alien in a deportation proceeding is not protected by the constitutional prohibition against an ex post facto law, whatever its consequences, because deportation has always been a civil proceeding, and the ex post facto provision applies only to legislation imposing penal sanctions.[14] The Court further stated that "any policy toward aliens is . . . largely immune from judicial inquiry or interference." [15]

In 1917, the first major legislation was enacted excluding allegedly inferior persons for medical or psychological reasons. This act provided that "persons of constitutional psychopathic inferiority" were to be excluded from entry.[16] Also, resident aliens

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[7] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950).
[8] *Id.* at 542.
[9] Bridges v. Wixon, 326 U.S. 135, 161 (1945) (concurring opinion).
[10] Japanese Immigrant Case, 189 U.S. 86 (1903).
[11] Pearson v. Williams, 202 U.S. 281, 284-85 (1906).
[12] 341 U.S. 223, 230-31 (1951).
[13] 342 U.S. 580 (1952).
[14] *Id.* at 594-95.
[15] *Id.* at 588-89.
[16] Act of Feb. 5, 1917, 39 Stat. 875.

could be deported if they were found to have been excludable at the time of their entry on certain enumerated grounds, including "constitutional psychopathic inferiority." [17] There was, however, one limitation on this deportation power, *i.e.*, a resident alien could only be deported on such grounds within five years after his entry.[18] This provided an important safeguard against the deportation of aliens who had established themselves in this country over a period of time exceeding five years. In *United States* ex rel. *Powlowec v. Day*,[19] the Court of Appeals for the Second Circuit affirmed an order of deportation where conflicting medical testimony as to the alien's mental state had been introduced. The court considered the choice of differing psychiatric theories to be in the hands of the Special Inquiry Officer conducting the deportation hearing. The court thus left to the administrative officer's discretion the task of determining whether, based on the alien's acts after he was admitted to the United States, it could be said that he had the necessary condition for deportation at the time he entered the country.

[17] Act of Feb. 5, 1917, 39 Stat. 889.

[18] Act of Feb. 5, 1917, 39 Stat. 889.

[19] 33 F.2d 267, *cert. denied*, 280 U.S. 594 (1929). See Note, *Limitations On Congressional Power To Deport Resident Aliens As Psychopaths At Time Of Entry*, 68 YALE L.J. 931, 939 (1959). *Accord*, United States *ex rel.* Leon v. Murff, 250 F.2d 436 (2d Cir. 1957), *affirming* United States *ex rel.* Leon v. Shaughnessy, 143 F. Supp. 270 (S.D.N.Y. 1956). It should be noted, however, that Congress may not constitutionally delegate to administrative officials the authority to impose serious sanctions unless it provides the officials with sufficiently precise statutory guidelines. Field v. Clark, 143 U.S. 649, 692 (1892).

The great number of persons displaced by World War II caused Congress to recognize the need for modernization of the law in this area.[20] This resulted in the passage of the Immigration and Naturalization Act of 1952, which changed the grounds for exclusion from "constitutional psychopathic inferiority" to "psychopathic personality," and enumerated certain other grounds as well.[21] Furthermore, the five-year limitation on the power to deport, on the ground that the alien was excludable at the time of entry, was removed,[22] thereby allowing such a deportation proceeding to be brought at any time.

The term "psychopathic personality" was apparently intended by Congress to include homosexuals. It was believed by Congress that "the purpose of the provision against 'persons of constitutional psychopathic inferiority' will be more adequately served by changing that term to 'persons afflicted with psychopathic personality,' and that the classes of mental defectives should be enlarged to include homosexuals and other sex perverts." [23] Furthermore, the rejection of a proposed bill making specific reference to homosexuals,[24] was declared "not to be construed as modifying the intent to exclude

[20] *Supra* note 5, at 646.

[21] Immigration & Naturalization Act of 1952, § 212(a) (4), 66 Stat. 182, 8 U.S.C. § 1182(a) (4) (1964). The grounds for exclusion were psychopathic personality, epilepsy, and mental defects.

[22] Immigration & Naturalization Act of 1952, § 241(a) (1), 66 Stat. 204, 8 U.S.C. § 1251 (a) (1) (1964).

[23] S. Rep. No. 1515, 81st Cong., 2d Sess. § 345 (1950).

[24] S. 716, 82d Cong., 1st Sess. § 212(a) (1951).

all aliens who are sexual deviates." [25]

Although the legislative history is replete with references to homosexuals, it is never made certain whether all or only some homosexuals are included. However, the courts have been uniform in the determination that the term "psychopathic personality" includes at least some forms of sexual deviate behavior.[26] The leading definition of the term was stated by the Court of Appeals for the Second Circuit in *United States v. Flores-Rodriguez,* as characterizing individuals "who habitually misbehave so flagrantly that they are continually in trouble with authorities." [27] Under this definition, it would appear that, only homosexuals who are *public* nuisances would be included within the term.

In *Fleuti v. Rosenberg,*[28] the Court of Appeals for the Ninth Circuit ruled that since the great weight of evidence as to the alien's pre-entry condition was based on post-entry conduct, the statute was too vague for him to regulate his conduct accordingly, and was therefore void. The court, cognizant of defendant's two convictions on charges of sexual deviation, nevertheless held that the alien could not have regulated his post-entry conduct unless he had known that homosexuality was a ground for deportation.

While the court in *Fleuti* seems to have recognized the harshness inherent in deportation, it appears to have failed to reconcile its decision with two salient developments in this area of the law. First, the alien, through his convictions, came within the public nuisance definition of "psychopathic personality" laid down by the *Flores* court. Second, the court neglected the fact that aliens do not have the protection of the constitution's prohibition against ex post facto laws. Thus, while the "void for vagueness" doctrine has been made applicable to deportation, the doctrine would appear to be somewhat irrelevant as far as the alien's conduct is concerned since Congress may make any act grounds for deportation, even after the act has been committed. Since the alien can be made subject to ex post facto laws, it makes no difference whether he knew what conduct was proscribed.

Whatever the court's reasoning, Congress felt compelled, because of *Fleuti,* to amend the law, and in 1965 one of the other grounds for exclusion, *i.e.,* epilepsy, was deleted from the statute, and "sexual deviation" was added.[29] The purpose of

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[25] S. Rep. No. 1137, 82d Cong., 2d Sess. § 9 (1952). However, the intent of Congress as expressed in legislative reports is not necessarily controlling. The void for vagueness doctrine is premised in part on the fiction that all persons in fact know the contents of statutes. But this fiction does not extend to the point of assuming that persons in fact know the relatively inaccessible legislative history of statutes. Thus, it is held that in applying the doctrine, a federal statute must be judged on its face. United States v. Harriss, 348 U.S. 612, 617 (1954). Nevertheless, the "long and successful administration of a statute establishes patterns of social conduct to which interested parties may have become adjusted. . . . [Thus] the court may be reluctant to upset a pattern of conduct which the regulated parties have adopted and other parties have to expect." Note, *Due Process Requirements of Definiteness in Statutes,* 62 HARV. L. REV. 77, 83 (1948).

[26] Quiroz v. Neelly, 291 F.2d 906 (5th Cir. 1961); United States v. Flores-Rodriguez, 237 F.2d 405 (2d Cir. 1954).

[27] United States v. Flores-Rodriguez, *supra* note 26, at 411.

[28] 302 F.2d 652 (9th Cir. 1962), *remanded on other grounds,* 374 U.S. 449 (1963).

[29] Act of Oct. 3, 1965, § 15(b), 79 Stat. 919.

this amendment was clearly to resolve any doubt as to what persons were excludable.[30] It should be noted, however, that even under the amended statute, whether *all* sexual deviates, or only those who act in public, should be deported remains unresolved.

In the instant case,[31] petitioner, a resident of this country since 1955, had been gainfully employed since that date, and a large segment of his family resided in this country. In 1963, as part of his application for citizenship, he admitted having been arrested for sodomy in 1959, the charge subsequently having been dropped. Upon further questioning, he freely admitted having had homosexual experiences prior to his entry into this country. At a deportation hearing, he declined to be examined by Public Health Service doctors and instead submitted letters from two privately retained psychiatrists. The letters stated that he had only a psychosexual problem, that his sexual structure was fluid (he could move easily from homosexual to heterosexual conduct) and that his disorder was not in the context of a psychopathic personality in the *medical* sense. Based upon this evidence, and upon the results of a Selective Service psychiatric examination, the Special Inquiry Officer concluded that petitioner had been a homosexual *at the time of his entry* and was therefore excludable as a "psychopathic personality" in the *legal* sense.

The United States Court of Appeals, after discussing the history of the deportation act, determined that the term "psychopathic personality" was utilized by Congress "not as a medical or psychiatric formulation but as a legal term of art designed to preclude the admission of homosexual aliens into the United States." [32] The Court then went on to discuss the *Fleuti* case, and decided that the "void for vagueness" doctrine did not apply because (1) the legislative intent shows that homosexuals were included within the act, and (2) the purpose of the act was not to regulate conduct, but rather to exclude persons possessing a certain characteristic.[33] The Court also attempted to distinguish *Fleuti* on the grounds that here petitioner's sworn admission was sufficient evidence of a pre-entry condition. It rejected petitioner's other arguments that Public Health Service certification of the pre-entry condition as well as an examination by them was necessary. This requirement applies only to exclusion proceedings at the time of entry.

The dissenting opinion emphasized that constitutional safeguards apply to deportation proceedings and that lack of any medical evidence deprived the petitioner of due process.[34] Moreover, the intent of Congress to exclude *all* homosexuals was questioned in light of findings that thirty-seven per cent of the male American population, at some time, have had homosexual experience.[35] Finally, the dissent agreed with *Fleuti* that the term "psychopathic personality" was too vague, especially in view of the recent attention

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[30] S. Rep. No. 748, 89th Cong., 1st Sess. § 19 (1965).

[31] Boutilier v. Immigration and Naturalization Serv., 363 F.2d 488 (2d Cir.), *cert. granted,* — U.S. — (1966).

[32] *Id.* at 494.

[33] *Id.* at 495.

[34] *Id.* at 496 (dissenting opinion).

[35] *Id.* at 497.

focused on sexual practices.[36]

The instant case highlights the inconsistency of the law in the area of the rights of aliens when subject to deportation proceedings. The Supreme Court has, by implication, made the "void for vagueness" doctrine applicable to deportation statutes.[37] Thus, where the statute is so vague that the alien is unable to regulate his conduct accordingly, he cannot be deported for that conduct. But the Supreme Court has held that an alien is not protected from ex post facto laws since deportation is not a criminal punishment. Therefore, it appears that any discussion of whether or not a statute is too vague for an alien to know what is prohibited will be fruitless since, without ex post facto protection, Congress may pass a law prohibiting certain conduct after the conduct has been performed.

Assuming arguendo, however, that the resident alien could not be deported under a statute that is void for vagueness, it is necessary to determine whether that doctrine applies to the instant case. It has been said that if "men of common intelligence must necessarily guess at its meaning and differ as to its application"[38] the statute is too indefinite. The term "psychopathic personality" is by no means definite in any context. Even if one accepts this as a legal word of art, is the man of "common intelligence" able to guess that homosexuality is included? It seems not. In our society, with an expanding awareness of, and changing attitudes toward sex and psychological problems, its meaning is at least doubtful. There is no longer a single classification into which we can squeeze all the mentally ill. Furthermore, with the publicity surrounding new work in this area, prompting the dissent to cite the fact that thirty-seven per cent of American males have had some homosexual experiences, it can be easily seen that the average person would be confused by the term "psychopathic personality."

Another argument is that the statute is too vague for a valid adjudication of the condition, thereby depriving the alien of due process in the deportation proceeding. As previously indicated, the Special Inquiry Officer, an administrative official, has been given great power in determining the evidence and drawing conclusions. Even though the Officer is given a manual directing that homosexuals be included, it still gives him no answer to the question whether *all* homosexuals are "psychopathic personalities." This is especially true in light of the "public nuisance" theory of *Flores,* whereby only those homosexuals

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[36] *Id.* at 499.

[37] Jordan v. De George, 341 U.S. 223 (1951).

[38] Connally v. General Constr. Co., 269 U.S. 385, 391 (1926). To the extent that a statute places a penalty on completed acts, concepts of fairness require that it be sufficiently definite to give notice as to what conduct is necessary to avoid those penalties. Note, *supra* note 25, at 78. The concepts of vagueness are especially relevant in the instant case as the requirement that a statute give notice as to what conduct is proscribed applies only in those instances where the penalized person could have performed differently had he wished. Thus where sexual deviation is purely voluntary and is not due to a compulsive form of mental disease, the statute would have to give such notice. Pearson v. Probate Court, 309 U.S. 270 (1940). It must be remembered that in the instant case, the alien homosexual's conduct was purely voluntary, and could have been controlled had he desired to do so.

in constant trouble with the authorities would be deported.[39] As the due process requirements of notice and opportunity to answer the charges are required in deportation proceedings, a more concrete test is needed to give the administrative official a guide sufficiently free from vagueness.

The entire area of deportation presents a unique problem. Clearly, the alien is being penalized for a condition existing at the time of entry—a valid exercise of governmental power to exclude whomever they wish—but this condition is premised on acts committed within the country, and therefore similar to criminal punishment for some proscribed conduct. Deportation, not exclusion, is at issue and, similar to exile, can operate in some cases even more harshly than criminal penalties. In the instant case, it is evident that the penalty of deportation might never have been imposed had the alien not applied for citizenship.

It must be remembered that the alien was a resident for eight years before *any* deportation proceeding was brought against him. Most of our criminal statutes have a period of limitation yet Congress has allowed deportation to be imposed at any time to correct an error in admission. When, as in the instant case, homosexuality, which is believed to be an illness, is involved, an interesting comparison can be made to the Supreme Court decision in *Robinson v. California,* wherein it was held that the conviction of a person for the "status" crime of being a drug addict was unconstitutional as cruel and unusual punishment.[40] Presently, however, no matter how severe the sanction of deportation may be, the Supreme Court has not yet chosen to recognize that, if not *actually* a punishment, it is so closely analogous to it in substance that it deserves some of the same protections.

While the choice of whom to admit is rightfully left to Congress, there is little doubt that changes are needed in the area of deportation. If we are to deny an alien the full protection of the laws that he is living under, he should at least have the right to know what conduct is proscribed, and a time limit such as was found in the Act of 1917 should be re-established.

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[39] *Supra* note 26. In the instant case, for example, the alien was arrested but once, was never convicted and had no other dealings with the authorities.

[40] Robinson v. California, 370 U.S. 660 (1962).

DIVORCE REFORM

(Continued)

tack by the full faith and credit clause of the United States Constitution. The statute does not authorize such attack. It merely lays down a rule of evidence relative to the proof of the domicile of the procurer of a foreign divorce. Where the Constitution precludes any litigation concerning the procurer's domicile, the statute has no application.

Full faith and credit permits collateral attack on a foreign ex parte divorce so the statute is applicable in this case. Although an ex parte divorce obtained within the United States may be subjected to collateral attack, there is a constitutional presumption of its validity. It has been argued that the statute is unconstitutional because it creates a presumption of invalidity in lieu of the presumption of validity required by full faith and credit.

The constitutional presumption of validity is a rebuttable one. It is the writer's belief that the statute merely provides that, as a matter of law, proof of certain facts rebuts the presumption of validity and that this is permissible. But even were the statute unconstitutional, it would not make much difference. The cases hold that, even without such a statute as the one in question, proof of facts similar to those specified by the statute is sufficient to rebut the presumption of validity. Hence, ex parte United States divorces are as vulnerable to attack without, as with the statute.

Nor does the statute overrule the decision of *Rosenstiel v. Rosenstiel.*[2] The point of that case is that New York recognizes a bilateral Mexican divorce obtained in a proceeding at which the plaintiff was physically present *regardless of the domicile of the spouses.* Proof that the procurer of such a divorce was domiciled in New York when he commenced the divorce action is immaterial; such a divorce is valid anyway.

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[2] 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

FAMILY PLANNING

(Continued)

I have one fundamental proposal to make. The sensitive nature of the subject matter and the dangerous potentialities for control which are present suggest that careful governmental supervision is required. Administrative determination should not proliferate; private programs cannot be cut adrift. Without a central authority exercising responsible control, it becomes impossible for legitimate criticisms ever to catch up with the facts. This is true of both domestic and international programs. Hence, I suggest that, at the federal level, a special congressional subcommittee be established to supervise and oversee initial federal programs, to require and evaluate reports, and to seek continuing evidence as to the practical effects of the programs.[28]

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[28] Hanley, *Religious and Political Values in Population Policies.* Paper presented before National Conference on Family Planning; Partners for Progress, Washington, D.C., May 6, 1966.

Besides the advantage of being able to provide "a central authority exercising responsible control" over the administration of such programs, federal legislation could also advantageously provide for a more coordinated effort. As indicated by Fr. Hanley:

> I think that the matter is too important and delicate to be left to piecemeal efforts by governmental agencies, whether acting by themselves or in cooperation with private groups.[29]

In view of the present concern and trends in this country for family-planning programs, it seems likely that renewed efforts will be made in the 90th Congress to enact appropriate legislation. And, even if the suggestion of Fr. Hanley were adopted, there would still remain problems, such as the working out of administrative procedures, etc., to avoid coercion, direct or indirect, and invasions of privacy, but in the words of Mr. Ball, this "is an area [avoiding coercion] for searching discussion by lawyers" [30] and "if we are to have government birth control in any stable form in the future, now is the time to be civilizing it and lawyers must be the conscience of the movement to do so." [31]

Furthermore, as indicated above, there would be moral questions for Catholics that would have to be examined, such as the types of public family-planning programs they could support, the extent to which they could cooperate in the administration of such programs, and who the recipients may be (e.g., only the married, or also unmarried women who already have a family of illegitimate children). These are questions for renewed and careful analysis by Catholic moral theologians in light of present conditions, so that the results of their deliberations may help Catholic lay leaders in the public forum to enter into a more enlightened and fruitful dialogue with others, in trying to reach a satisfactory resolution of the present uncoordinated and piecemeal efforts.

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[29] *Ibid.*

[30] Ball, *supra* note 5, at 221.

[31] *Id.* at 267.

STATUE TO ST. THOMAS MORE

(Continued)

deemed himself, "The king's good servant, but God's servant first," we who labor in the tradition of the common law must deem it a happy duty to contribute generously to the memorial fund. Thus upon a new and lasting platform may England and all the world look up literally as well as figuratively to a permanent reminder that sanctity and eminence in the law are eternally compatible.

NATURAL LAW

(Continued)

Ford and Gerald Kelly, writing at an earlier date, proposed three criteria: the verbal formulas used in the pronouncements, the intention of the speaker, and the historical context of the document.[46] Utilizing these various criteria, which overlap to some extent, one can readily conclude that many teachings of the Church based on natural law possess strong binding force. Pope Pius XII's condemnations of therapeutic abortion, euthanasia, and artificial insemination, and Vatican II's condemnation of indiscriminate acts of war directed against entire cities or extensive areas together with their civilian populations fall into this category.[47]

As a general rule, greater stress falls on such specific moral conclusions based on natural law than on the systematic explanation of the principles from which they are derived. Certain theoretical teachings, it is true, receive repeated emphasis; for example, those on the objectivity, substantial immutability, universality, and basic knowability of natural law. The core content of these teachings, as I have said, constitutes an article of faith. Besides these rather basic assertions, another body of statements on specific moral conclusions demands "religious submission of mind and will." In my opinion, most statements about the derivation of specific natural law obligations and about the philosophical explanation of natural law are non-obligatory, for they do not professedly intend to teach the doctrine as Catholic.

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[46] FORD-KELLY, *op. cit. supra* note 26, at 28-32.

[47] See *Address to the Italian Catholic Union of Midwives* on October 29, 1951; *Address to the National Congress of the Family Front* on November 26, 1951; PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD, n.80.