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THE CAPACITY TO MARRY*

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In this paper we are speaking about the capacity to marry, not the right to marry. Pope Paul VI in his encyclical Populorum Progressio (art. 37) states emphatically that every man has the inalienable right to marry, but as we know not all men have the capacity to do so. The law of the Church states that the capacity to marry is dependent upon the ability to understand and will marriage, and the capacity to place acts per se apt for the generation of children (canon 1081). Incapacities to marry have traditionally been placed in the intellectual defect of consent or in the physical incapacity to cohabit and beget, and we are aware of the distinction relative and absolute incapacity in this regard.

There are two approaches possible in treating this subject. Canonists have still to research the psychological advances, particularly in the areas of the psychopath-sociopath, and come up with a norm or standard regarding capacity to marry. Perhaps such an investigation will never produce more than a general requirement of physical and psychic health, and such a norm has already been suggested1 in the abundant writings on this topic.2 Another approach, less complicated yet quite important,
is to reflect on the contemporary understanding of capacity to marry in the light of what legal and structural changes are necessitated by this comprehension. It is to this task that the following proposals address themselves.

The first proposal is as follows: the advances in the behavioral sciences place great emphasis on the psychological capacity to enter marriage. The Code of Canon Law on marriage accepts the two-fold division of man in regard to mental health: one, the person suffering from illness which progresses to major mental disabilities. The Code calls this “amentia.” The second category is all those of sound health. That portion of mankind which does not fall into these ready-made categories are all those who hold beliefs generally unsupported by evidence, and considered by many as irrational and fantastic, and who are an interesting interlude in the boredom of normalcy, but who are legally capable of marriage and begetting their kind. Contemporary psychiatry, however, has given us a third group in regard to mental health. These people are incapable of leading normal lives, and their behavior causes great stress in every community. Traditionally, they have not had a categorical haven in civil or canon law, and much of the tension between law and medicine has been to find a mutually acceptable response to these relatively unclassified people. The medical and legal term currently in vogue to categorize this group is psychopathic-sociopathic personality.

The Code of Canon Law understands “marital insanity (amentia)” as an intellectual defect in consent. Beginning in 1941 there was an attempt to shift the capacity to marry from a total reliance on intelligence, apprehension and comprehension as related to consent, to a consideration of the aptitude of the parties to fulfill the contract from a behavioral point of view. Although initially unsuccessful, there has been a change over the past twenty-five years from an emphasis on capacity as capacitas intelligendi et volendi to the addition of capacitas sese obligandi.

My second proposal is: these advances resist canonical formulation as factors necessary to enter a valid marriage, and diminish the clarity and certainty of Tribunal decisions in evaluating the validity of marriage. Once we commence to emphasize the capacity to oblige oneself (in the behavioral sense) to life-long commitments, and the capacity to assume the obligations

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4 Hervey Cleckley, M.D., The Mask of Sanity (St. Louis: C. V. Mosby Co., fourth edition, 1964), p. 27ff. This is the standard medical work on the psychopathic/sociopathic personality. A shorter work good for introductory information and terminology is: Vernon W. Grant, This is Mental Illness (Boston: Beacon Press, 1963).

and responsibilities of such a close interpersonal communion as marriage, then we introduce elements into marriage suitability that resist canonical formulation. What we have done in our marriage law is add the “due discretion” standard of St. Thomas. For him “discretion” is not the same as knowledge, nor is lack of discretion the same as ignorance. “Discretion” is a quality of the spiritual faculties, a vigor, maturity. Rotal decisions understood it as “debita discretio seu maturitas judicii.”

No longer do we look at capacity as solely the correct answer to the question: “does this person enjoy the capacity to enter marriage in accord with canons 1081, 1082 and 1086?” At this time we also must ask, “does this person enjoy that greater degree of discretion required to assume effectively the obligations which arise from an integral act of consent?” Once you ask this latter question . . . you introduce elements of uncertainty, you reduce the legal clarity and objectivity of the canonical norms, and we cast ourselves into the mainstream of the legal-medicine tension that has been characteristic of this century in civil society.

Thirdly, I propose that these tensions should evoke from canon lawyers the same response civil lawyers have made to identical pressures, viz., a greater emphasis on counselling procedures. While the Church has advanced from the understanding of capacity to marry as enumerated in the Code of Canon Law to the additional insights of the Rotal decisions in the past fifteen years which now recognize behavioral incapacity to oblige oneself, civil society would call this advancement, “the progress from McNaughton to Durham.”

The McNaughton Rule of 1843 required the criminal know the “nature and quality of his act . . .”, and if he did not, then he was inculpable because of insanity. Implicit in the McNaughton Rule was the two-fold understanding of man as found in the canonical marriage legislation; i.e., those who understand right from wrong, and those who do not. The inadequacy of the McNaughton standard has been advocated since the beginning of this century, and the growing acceptance of the psychiatric profession has been responsible for this.

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8 A few states have yet to change the McNaughton Rule. Cf. the lead editorial in the Boston
Lawyers have tended to look upon psychiatrists as fuzzy thinkers and apologists for criminals, while psychiatrists tend to regard lawyers as devious and cunning phrasemongers. To avoid this tension in ecclesiastical matters the Rota has been explicit on several occasions in regard to the role and competence of medical periti, and the obligation to reflect this competence in judicial decisions. The jurist holds offenders culpable; the psychiatrist maintains human behavior is largely conditioned by subconscious forces, and crucial experiences of early and dependent childhood. The jurist proclaims “toute comprendre c’est tot pardonner,” leads to permissiveness. The noise and din of the psychiatrists has at least made this much of an impression; that in most areas of society the McNaughton standard has given way to Durham... the 1954 U.S. Circuit Court of Appeals, District of Columbia, decision that stated criminals “are not responsible if the unlawful act was the product of mental disease or mental defect.” Instead of clarifying McNaughton, this decision opens up a large grey area of uncertainty in legal life. The reason for doing this is perhaps best explained in the words of Justice Holmes: “the life of the law has not been logic, it has been experience.” Modern scientific experience has returned the mystery to man, and maintains that most

9 "Decisions and Decrees—Inadequate or Psychopathic Personality," The Jurist, January 1967, pp. 102-103.
12 The Cartesian-Kantian mathematical influence established a mind-set in the 17-19th centuries that looked at man and the psyche in a highly abstract, depersonalized and scientific manner. In this framework the essentially good man was the obedient one—the man who actuated the clear and distinct ideas of thought with the moral imperative of duty. The Church

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Herald, Nov. 29, 1958 entitled, “Who Killed Jack Chester?” It is as follows:

“Jack Chester, who murdered his girl friend, hanged himself yesterday in his State prison cell.

“That’s what the news report says. But the real killer of Jack Chester was the Commonwealth of Massachusetts. Chester was merely the hangman—his own hangman. How can this be said when Governor Furcolo had already asked the Executive Council to commute Chester’s death sentence to life imprisonment and the Council was preparing to do so? It can be said because the Commonwealth of Massachusetts observes to this moment the McNaughton Rule, an archaic legal interpretation which permits a defense of insanity in murder cases only if the accused cannot distinguish between right and wrong or is driven by an irresistible compulsion.

“A jury decided that Jack Chester knew right from wrong, and that the compulsion which drove him to shoot Beatrice Fishman nine times was not irresistible. One cannot quarrel with a conscientious jury’s decision. Yet who can deny that Chester was suffering from a serious illness of the mind?

“The illness was characterized by a sense of guilt so great that Chester could accept for himself no punishment less than death—the punishment he meted out to himself yesterday. What would have happened if the jury had not had to judge Chester by the McNaughton Rule; if some more realistic rule had applied and had been found innocent by reason of substantial mental defect and confined in a mental hospital? One cannot be certain. Individuals with deep nihilistic urges seek satisfaction with terrible single-mindedness. Suicides do occur in mental institutions. But such institutions generally are more alert to prevent suicide attempts. And Jack Chester stood a better chance of having his urge alleviated in a mental institution.

“How long will Massachusetts continue to subject its deranged killers to the deadly injustice of the McNaughton Rule? The Commonwealth of Massachusetts killed Jack Chester.” Cf. Glueck, op. cit., pp. 73-74.
men need assistance in living a fully human life. The result of this tension between law and medicine resulting after Durham has had at least this positive result: a greater emphasis on psychiatric care, and a greater respect for the counselling profession as teachers in the HOW of human life and endeavor. The natural reciprocity between civil and ecclesiastical experience has made the Church sensitive to goals and achievements of the psychiatric and counselling professions. Psychiatrists of today are suggesting to the jurist that in criminal law the guilty and not guilty verdict confine itself to the facts, but in the area of premeditation, motivation, intent, etc. that there be

the possibility of an intermediate verdict between guilty and not guilty. Man is such that in this area he requires assistance in offsetting genetic, cultural, intellectual, social and political liabilities, and he may undertake adventures for which he is not fully responsible. The thought of a tertium to constat or non constat should do to the canonical profession what it has done to the legal profession in general, and that is, motivate us to offer our support and encouragement to psychiatric and counselling care. That we have such facilities already is generally not due to the fact that canon lawyers have recognized their limitations and anthropological advances, but rather due to the general pastoral concern of the Church at large. It is time that we support this trend with the professional backing of canon lawyers.

My fourth proposition is that "moral impotency" or the incapacity to marry will

in this context is the voice of God urging the correct interplay of thought and duty, and laws once made and known are the civil and ecclesiastical way of guiding man to the perfect life. These "deterministic" explanations of human nature were in keeping with the Newtonian Age and its infatuation with mathematics and science. The last fifty years have been characterized by Freud's discovery of the 'sub-conscious' which upsets the harmony and mutuality between ideas and duty, and likewise Einstein failed in his attempt to restore the unity of science. These and numerous other technological achievements have pushed man outside his own world of certainty and mathematical predictability to the cosmological and personal realms of uncertainty. Because of this, law as the warp and woof of human relationships must now be seen as the provisional instrument of society enabling men to tap the correct resources of encouragement and direction as they cope with the rapidly emerging social and cultural advances. The task then is to teach men how to carry out what is good to do in such a changing environment. How can a person in the uniqueness of his singularity and in the agency of his own person make this law a meaningful component in his own style of life? We must teach our people to internalize their Christian values, and this is radically different from telling them what to do.

15 Some have suggested as far back as 1925 that a Socio-legal Commission or Treatment Tribunal be established which would separate in personnel and technique the guilt-determining function of the Courts from the sentence-imposing and succeeding steps. The following quote from Aristotle is apt:

"The knowing what is just and what unjust, men think no great instance of wisdom, because it is not hard to understand those things of which the laws speak. They forget that these are not just acts except accidentally. To be just, they must be done and distributed in a certain manner. All this is a more difficult task than knowing what things are wholesome. For in this branch of knowledge it is an easy matter to know honey, wine, cautery, or the use of the knife; but the knowing how one should administer these with a view to health, and to whom, and at what time, amounts in fact to being a physician." Nichomachean Ethics, V, viii, 1137a; cf. Glueck, op. cit., pp. 151-152.
be more common today due to social and occupational conditions that place great stress on the making of a successful marriage. “Moral impotency” is the moral inability by reason of psychic defect to bind oneself sub gravi to the substance of the marriage contract. Perhaps “psychic impotency” would have been a better phrase, but that already has a canonized meaning in our legal tradition. So we say that one who is morally impotent cannot assume the essential obligations of marriage which normally arise from sufficient consent. In other words, some people do not have the personal wherewithal, or ego-strength, to undertake the contemporary experience of marriage. What we are saying here in this proposal is that marriage requires more of a person today than it ever did in the past. It takes more internal stamina to make a success of marriage and family life today. Marriage historically was lived in an extended family situation where the kinship group supplied all the necessary encouragement and support of the union. In addition the family was traditionally an occupational unit where wife and children were assets in helping the head of the household provide for the family weal; the family was the primary agent of socialization, caring for the sick and the aged; the family was the chief support for Christian ideals, recognition and affection; the family was the link between the individual and the larger community; the family was the main source of recreation. We need not be reminded that hardly any of these traditional elements of family life are true today.

Young couples because of the mobility of our age live in “isolated conjugal units”; the head of the household no longer works with his family finding children an occupational asset, but most likely the father works outside the home and develops roles of aggressiveness and hard-line business tactics which he is expected to repudiate when he concludes work and enters the home; the highly educated mother no longer finds the automated housekeeping chores a challenge to her life or the realization of her true potential; children within this context are a genuine parental burden because of the many years of education and effort it requires to outfit a child for responsible adulthood. Likewise, the family no longer serves an economic function, nor is it the bridge between the individual and the larger society; nor does it generally fulfill a recreation function; nor are we destitute when the family collapses. What I am saying here is that the capacity to marry today means the capacity to build a marriage largely stripped of external supports, and one that will only survive by the love and friendship of the partners themselves.

Love they say is the only ingredient that holds today’s marriage together. This is not something to lament over, but is rather

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15 “Marriage and the Division Among the Churches,” World Council of Churches Report by the Secretariat for Faith and Order and the Department of Men and Women in the Church, ido-c dossier #67/21-22 of July 2, 1967, pp. 2-5.

cause for rejoicing that married life will survive and flourish only because people are able in one way or another to grasp and hold on to that central human experience, love. It means we must educate our young to acquire the capacity to live in a "nuclear family unit," and it means also that Christian couples must feel the guidance and direction of the Church as they endeavor by their marriage to be a model of Christ's love for His Church. We must insure, insofar as it is possible, that our people are morally capable to enter and sustain marriage, but we must be realistic enough to admit that many will be "morally impotent" or incapable to undertake the contemporary marital experience.

The fifth and last proposal is this: that in an atmosphere of expanding knowledge and personal Christian maturity, the excellence of the Christian life and moral change can best be attained by counselling methods. It is clear that Christian churches must set a clear example of solicitude and living concern for family life. While this was always an anxiety of the Church it must be even more so at this time. Not only do we have the emergence of a "new morality" and new standards of Christian perfection, but we also have new social, economic and cultural situations that dramatically threaten family unity and harmony. If Christian marriage is to remain an example and leaven of society, then the Church must develop expertise and facilities to guide our people on the HOW of contemporary family living in order to equip them for this apostolate.

Counselling has long been used as an instrument for psychological change. Not so for moral change. Since Freud many psychiatrists have felt that moral issues and judgments impede the therapeutic intent of the counselling relationship. This attitude has dramatically changed in the last decade and work is now being done to adapt the stages of psychological change to the area of moral change in the quest of Christian virtue. An indication of how this approach would work in its adaptation to the realm of moral change and in the service of the integrity of Christian family life, is as follows:¹⁷

First stage is the openness to experience or availability to awareness

In a moral sense this is a trend toward a more adequate and realistic moral perspective. Persons come to see their moral behavior as not an isolated part of their personality, and that moral action is never simply a product of moral values or ethical ideals. This is not a method that would lead to an antinomian morass where all moral judgments and culpability are eliminated, but rather to a moral perspective which tends to become more adequate and realistic.

Second stage is a trend in which the individual's moral response tends to be more authentic

Counselling takes the spurious and artificial out of moral behavior. It moves one away from morality based on fixed precepts toward a morality based on one's own inner existence, on what he is at this present

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moment. Again this would not be a movement toward lawless subjectivity. It is rather a new understanding of oneself and a renewed capacity to live according to one's deep nature. One's moral response becomes more authentic as one gains an increased capacity to respond to and live out what he is in the present moment.

Third stage is the finalizing of the trend in which the individual becomes a more trustworthy locus of moral decision and evaluation in accord and in harmony with the highest Christian ideals and his present situation.

In the beginning of counseling the locus of decision is at the periphery of one's existence, either in a code of law, or in some process within his own life. He often has a divided self at this point and his decisions are not a reliable reflection of this total being. Consequently, he is not a trustworthy judge of what is genuinely fulfilling. Counseling tends to correct this situation, and to assist the individual to be a locus of moral action at the very center of his being, and in keeping with the demands of the Christian gospel.

If married couples had immediate access to sound counseling based on modern psychology and in keeping with Christian anthropology, it is felt that this service would give great assistance in preserving the Christian witness of family living. Even in instances where the marriage has been disrupted the individual must be guided along lines of solid virtue in the formation of conscience and in reconciling oneself to his life situation.

In view of the above the following conclusions are offered:

1. The "capacity to marry" is more complex than simple consent and the voluntary acceptance of rights and duties. It involves the psychological capacity and necessary ego-strength to assume the marital obligations, and to undertake a close interpersonal relationship. The absolute certification of this capacity to marry is beyond the scope of any ante-factum canonical norms.

2. The Matrimonial Tribunal system is institutionally incapable of meeting the obligations of the Church and the needs of our people involved in a broken-marriage. Our knowledge and understanding of man has been enhanced by the advances in the behavioral sciences and has resulted in the greater appreciation of the mystery of man. All this reduces the objectivity and certainty of judgments made on the Tribunal level, and demands a corresponding pastoral emphasis on informed responsible consciences. Such reduction in certitude on the Tribunal level should not cause us to disregard the "queen of the presumptions" (i.e., all acts are considered valid unless proven otherwise), but it does offer incentive for reform and inspires us to search for complementary structures to aid and comfort Christian marriage.

18 Article #172, Instruction of the Sacred Congregation of the Sacraments, August 15, 1936. Canon 1014 is built on this principle. However, criticism of this canon is not directed against the principle itself, but rather to its excessive demands of certitude. Cf. Stephen J. Kelleher, "Canon 1014 and the American Culture," The Jurist, Jan. 1968.
3. Canon lawyers as professional men must accept the limitations of their science, and should urge greater counselling and pastoral techniques for the preservation of Christian marriage and for aiding the broken-marriage.\(^{10}\)

4. All parishes should establish Centers for Family Living whose sole purpose is for the preservation and enhancement of Christian marriage and family life. This Center would assist marriage where it is needed most—in the area of common love so often eroded by social and occupational conditions. It has become increasingly clear that the continuation of the child centered parochial school system is no longer the primary concern of the American Church.\(^{20}\)

The emphasis today should be on the family, and we should initiate the foster family-centered agencies and apostolates on the parish level. If love is the only ingredient that holds the contemporary “nuclear family” together, then the Church must bolster, enhance and strengthen this love in every possible way. Feeding the poor and hungry, seeking peace, eradicating social injustice, fostering law and order, reconciling the alienated and disenchanted must be values that parents teach their children, and hence our support focuses on the primary social and educational unit of society—the family. We must teach and counsel our people on the HOW of Christian family living, and in the aftermath of *Humanae Vitae* this concern reaches new proportions.

5. All dioceses should establish a Pastoral Review Board to interview and discuss the broken-marriage (i.e., one where there is no apparent possibility of reconciliation) before it is submitted for evaluation by the Tribunal. This Board would be built on the following principles:

a. the dignity and indissolubility of the Christian conjugal union;

b. the “queen of the presumptions” would be accepted;

c. the freedom of the informed Christian conscience;

d. the *Matrimonial Tribunal* is not necessarily the final arbiter of God’s Will in regard to the validity of a certain marriage;

e. moral change and the acceptance of unusual life situations can best be achieved in our day by counseling techniques.

The members of the Pastoral Review Board would be:

canonist—(advocate),

theologian,
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psychiatrist,
expert on social and family problems,
and priest-counselor.

The agenda of the Pastoral Review Board would be to discuss the broken-marriage and the reasons for its failure with a view to forming a sound Christian conscience in its regard. No effort would be made to coerce this conscience. The entire proceedings would be conducted in a simple and sympathetic manner in keeping with its non-juridic role.

It would be the work of this Board to recommend petition for trial in the first instance if grounds were present. Some couples interviewed would have remarried civilly or in another Church. They would receive the personalized services of the Pastoral Review Board, and in some instances they could be helped by the Matrimonial Tribunal. In all cases the parties would experience the concern of the Church, and would be assisted in finding a modus vivendi in regard to their Catholic faith and their human situation.

If the Matrimonial Tribunal had the advantage of dialogue and reciprocity with the Pastoral Review Board many advantages could possibly accrue to the legal system. Its immediate effect would be to diminish the legalistic taint of the Tribunal, offer prompt pastoral assistance, personalize the services of the Matrimonial Court and make more credible its final decisions, and give aid in the delicate pastoral area of forming a correct conscience and the living of a wholesome human existence. The long range advantages are difficult to estimate, but the proximity and interaction of the Matrimonial Tribunal and the Pastoral Review Board would be beneficial to the on-going reform of Canon Law. (The establishment of the Pastoral Review Board does not indicate approval of the present Tribunal system, nor the pace and content of reform. Rather, it is a realistic expression of something that could begin immediately, meets a desperate pastoral need, and may have results beyond our present hopes and understanding.)

6. It is absolutely imperative that some institutional response be given to the problem of the broken-marriage because the contemporary emphasis on conscience, personalist values in marriage, freedom, Christian maturity and responsibility must be guided by solid values in accord with our

21 “The delay involved because of antiquated legal procedures (in the Matrimonial Tribunal) is the institutionalized Church at its unchristian worst. . . .” Theological Studies, June 1968, “News Notes on Moral Theology,” p. 299. Other critics of the Matrimonial Tribunal system are: John T. Finnegan, “When is a Marriage Indissoluble? Reflections on a contemporary understanding of a Ratified and Consummated Marriage”, The Jurist, July 1968; Stephen J. Kelleher, “The Problem of the Intolerable Marriage,” America, Sept. 14, 1968. These articles conclude that the Tribunal system is dysfunctional and irrelevant. However, it would be irresponsible to do away with the Tribunal immediately and thus create the erroneous impression that the Roman Catholic tradition now favors divorce. A better program would be to inaugurate the Pastoral Review Board and let history determine which has greater value in the service of our Christian faith. Also, cf. Herbert T. Neve, Sources for Change (Geneva: World Council of Churches, 1968). “To stick rigidly to this and other forms without questioning them, and without, if they are found wanting, seeking to replace or supplement them, is to be imprisoned in the past, unintelligible in the present, and failing to live out of the future. Indeed, without such a searching analysis, one may well be preserving heretical structures, i.e., structures that impede the missio Dei.” pp. 46-47.
tradition and the present understanding of man and his environment. A decision of the Matrimonial Court is no longer received with unquestionable obedience. With the diminishing confidence in the Matrimonial Tribunal, and the popularizing of antinomian attitudes, the reform of Canon Law and the implementation of this recommendation takes a new importance and urgency.

7. In summary each diocese would establish (or consolidate) present structures.

DIOCESAN MATRIMONIAL BUREAU AND DEPARTMENT OF FAMILY LIFE
(with the following competencies)

I. For the preservation of Christian marriage and family life—to be organized on the diocesan and parish level

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Center for Family Living
(which will offer)

1. Family Life and Counselling Services
2. Pre-Cana and Cana Conferences
3. CFM and other family-centered apostolates

II. For the pastoral care of the broken-marriage—to be organized on the diocesan level

1. Pastoral Review Board—for the counselling, education and pastoral assistance of all broken-marriages
2. The Matrimonial Tribunal—for broken-marriages offering possibility of annulment.