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HOMOSEXUALITY AND NULLITY—DEVELOPING JURISPRUDENCE

REV. MSGR. WALTER F. KENNY*

CERTAINLY, one of the most tragic marital situations brought before the ecclesiastical Tribunal is a case in which one partner is a homosexual. The difficulty, as you well know, has been that there was not an adequate jurisprudence to deal with this emotional disorder. However, there have been recent decisions which show a developing understanding of homosexuality and provide a basis which will enable marriages involving serious homosexuals to be annulled on the basis of homosexuality alone.

There are two possible bases for annulling a marriage wherein it is alleged one party suffers from mental illness. One is that his consent is deficient because he is unable to place the acts of intellect and will, necessary for the critical judgment to bring consent to a serious on-going contract, such as marriage, into being. The result is a lack of a naturally sufficient matrimonial consent (*consensus matrimonialis naturaliter sufficiens inexistens*). The other possibility is that because of mental illness the victim is fundamentally an unfit subject to undertake, fulfill and receive marital rights and obligations. Since he cannot fulfill the contract even if he were able to have sufficient judgment to give consent to the contract, the contract would not exist, since the object cannot be brought into being by him. In this case there would be a *contractus matrimonialis inexistens*.¹

* M.A., Dunwoodie, 1954; S.T.L., Gregorian, Rome, 1956; S.T.D., Gregorian, 1957; M.S., Iona College, 1956. Defender of Bond. Pro-Synodal Judge.

¹ Cf. W.J. TOBIN, A CANONICAL EVALUATION OF THE RELATIONSHIP OF HOMOSEXUALITY TO THE VALIDITY OF MARRIAGE IN THE LIGHT OF RECENT ROMAN JURISPRUDENCE 155 (1964).

Basically, there are three kinds of clinical manifestations of emotional illness. One type of emotional illness is expressed in psychological symptoms, *i.e.*, in a thinking disorder. Schizophrenia is one such disorder in which thinking and emotion are divided. A second type of emotional illness manifests itself in physiological symptoms, *e.g.*, psychologically caused impotence. A third type of emotional disorder finds its expression primarily in maladjustment of social behavior. These are called sociopathic personality disorders.² Homosexuality *per se* belongs in this last category. It is a behavior disorder manifesting itself in compulsive, repetitive, non-gratifying, essentially unsocialized sexual conduct. Hence, it is evident that the basis of the inability to fulfill the contract is the one that fits the diagnostic category of homosexuality, rather than that of a lack of discretion. The recent Rotal decisions have lately moved in this direction and are taking into account, therefore, the reality of the homosexual disorder.

There are four Rotal decisions we wish to discuss to illustrate aspects of this growing jurisprudence. Two of these deal with sociopaths, who are not homosexuals, and two of them deal with marriages in which one party is a homosexual. The first case was brought before the Tribunal of Boston on the grounds of insanity. The man in this case was a forger of checks and a borrower of money from his friends without repayment, a liar and a megalomaniac. The marriage lasted one month, after which time the woman could no longer put

up with his financial irresponsibility. The Court of Boston denied the nullity, and the case was appealed directly to the Rota. The first *Turna* of the Rota, under Father Rogers, gave an affirmative decision. In the law section of this decision we read: "Because of the fact that someone seems to enjoy sufficient use of reason, he is not necessarily responsible for all the consequences of his actions, because it could happen by reason of some psychiatric disorder, he may not be capable of the obligations of which he has only a notional knowledge."

The Court goes on to say that many *dementes* know what marriage is and wish to become part of it, but some of them are incapable of exchanging the perpetual and exclusive right to each other's body for the purpose of performing acts suitable for the generation of children. "In these cases, we must by all means think of a lack of consent which arises not from an outside force or insufficient reflection, but from an insufficient determination of the will or incapacity of assuming obligations and responsibilities that arise from the nature of the marriage contract, so much, that these can not be absolutely separated from it." The problem is that, in practice it is very difficult to determine such incapacity. Each case of a sociopathic personality must be investigated individually. The Court annulled the marriage, stating that the defendant was unable to contract a true marriage, not because he was lacking the use of reason, but because he was incapable of determining for himself freely in assuming these responsibilities, and because of a psychopathic character.

The case was then brought to the Court

² *Cf.* NOYES & KOLB, *MODERN CLINICAL PSYCHIATRY* 546 (5th ed. 1960).

of third instance, the Rota, before Father Bejan, and a decision was reached in 1969. This *Turna* of the Court accepted what the Court of second instance said about the critical faculty necessary for marriage. However, it maintained with Van der Veldt and Odenwald, in *Psychiatry and Catholicism*, that the freedom of the will and the ability to act responsibly is not taken away in the case of a sociopath. The sociopath may not be responsible for certain types of action, which are directly connected with his mental syndrome. This *Turna*, therefore, maintains that it is not sufficient to demonstrate the existence of a sociopathic disorder, but it is necessary to prove the connection between the person's mental disorder and the marriage. Other marriages of sociopaths have been annulled because the symptoms were directly related to marriage, but in this case the Fathers of the Rota state that the records and facts do not sufficiently demonstrate that the defendant lacked the critical faculty and will of self-determination in regard to his marriage. He was financially irresponsible, but this was not directly related to his marriage. As far as marriage is concerned, the defendant seemed to be capable of a human act, in entering the contract, and not impelled toward getting married by an internal force. He had sufficient knowledge and freedom of choice. One must not conclude that a psychopathic personality is totally unable to elicit a human act about everything. In regard to marriage, he did not seem to be so afflicted.

The reports of the experts, according to this decision, presume what they are supposed to prove, *i.e.*, within the range of

matrimonial matters the defendant lacked due internal freedom. Hence, the Rota held for the validity of the marriage.

From this decision it is evident that a sociopath is able to form a naturally sufficient consent. Not all sociopaths are deficient regarding marriage.

The second case concerns a male psychopath whose case was initiated in New York. There were two grounds presented for this case, the lack of discretion and an intention *contra bonum prolis*. The courtship of this couple lasted for some five years, but was very erratic on the part of the man. The main reason why the respondent refused marriage during all that time was because he did not want children. Although his confession was not perfect, he had revealed before the marriage that he could not stand the responsibility of children. He married the girl impulsively only because he thought she was pregnant. After the marriage there were no sexual relations, since he showed an aversion, and ten days after the marriage he broke down weeping, stating that he couldn't stand marriage and didn't want children. The wife left him after one month.

The Tribunal in New York decided negatively regarding discretion, but affirmed the annulment on the grounds of the intention *contra bonum prolis*. The case was duly appealed to Philadelphia, which produced a negative decision on both counts. The case was then appealed to the Rota, *Coram Fagiolo*, and a decision given the 23rd of January, 1970.

It is obvious that the only case that the Rota could consider was the intention *contra bonum prolis*, since the lack of

discretion had two negative decisions already. The Rota found for the annulment on the grounds that the intention *contra bonum prolis* was caused by the psychopathic personality of the respondent. "The defendant could not have entered a valid marriage because of some moral impotence, as they call it today. He was not against having children because of bad will, but because he was incapable of assuming the marriage obligations."

The Rota refers to the fact that some are trying to get an impediment of moral impotence into the code. However, "[w]hatever opinion one may hold about the new code, one must not dispute the fact that whoever is incapable of assuming the marriage obligations becomes automatically incapable of entering the marriage contract."³ In fact, the code contemplates this principle, although not in the form some would suggest. In the code, marriage is effected by the consent of the parties expressed between persons who *are capable according to law*, Canon 1081, 1. This capability, in fact, does not originate only from the positive law, but primarily from the law of nature itself. Those are certainly incapable who cannot understand, accept or exchange the right to each other's body, which by nature the generation of children calls for, and which we call marriage (Canon 1081, 1082). Therefore, those that are not capable of eliciting a free consent or do not understand the nature of marriage, or are incapable of assuming the essential obliga-

³ "qui incapax est assumendi onera essentialia matrimonii, incapacem quoque esse matrimonii ineundi, ex ipsa naturali ordinatione."

tions of marriage, are not contracting a valid marriage. This incapacity, however, can originate from a few causes: *amentia*, pathological and psychological disturbances that affect sexual ability, *e.g.*, nymphomania, satyriasis, homosexuality, sadism, masochism, etc. Among the defects of consent one can duly include all kinds of incapacity to assume the essential marriage obligations. "He, who is incapable of assuming such obligations, is not capable of eliciting an act of the will whereby each party exchanges and accepts the rights and duties inherent to marriage."⁴

According to *Fagiolo*, the code does not make any mention of the incapacity of assuming the rights and essential obligations of marriage, although the code implies that anyone who suffers from such an incapacity cannot validly marry. Perhaps, says *Fagiolo*, the Code in the future should make more explicit these incapacities. However, he does not feel that moral impotence should be one of them, since it

⁴ "Ideo qui habiles non sint vel incapaces emitendi consensum liberum quo intelligitur quid secumferat sitque essentialiter coniugium vel non sint capaces assumendi essentialia matrimonii onera, valide hi non contrahunt. Haec vero incapacitas provenire potest ex pluribus causis: ex amentia, ex perturbatione pathologica quae sphaeram psychicam respicit et in sexualem quoque influit quandoque uti accidit v.gr. in casu nymphomaniae vel satyriasis, omosexualitatis, sadismi, masochismi, etc.—Omnes insuper personalitatis anomaliae, quae grave inferunt damnum intellectui vel voluntati, causam constituere possunt defectus debiti validique consensus matrimonialis. Quin igitur expectetur nova et explicita Codicis statuitio, iam ex principiis traditis et ex iurisprudencia scimus omnes morbos habituales mentis eiusque perturbationes

departs from the traditional use of the term.

In this case, in examining the proofs regarding the exclusion of children, the Rota did not consider merely the statements regarding children made by the respondent, but also the proofs alleged for the basis—the presence of mental disorder—because one set of proofs enlightens the other. “Justice demands that due consideration be given to all the arguments concerning the end purpose of the case, *i.e.*, the nullity of marriage, if it is examined and analyzed, although some of the arguments are not strictly pertinent to the cause of nullity for which this case is being discussed and adjudicated.”

The Court found for nullity in this case, but the conclusions that we can draw from this case are simply this: while, in general, lack of discretion of judgment would be incompatible with making an intention *contra bonum proles*, *i.e.*, if one is capable of such an intention against a *bona* of marriage, he should be capable of marrying and, hence, he does not lack discretion. However, the inability to assume the obligations of marriage is compatible with an

intention contrary to one of the *bona* of marriage. Some people, because of their defects, sexual or otherwise, are incapable of assuming the obligations of marriage. They cannot consent to marriage precisely because of this incapacity to the object, which has little to do with eliciting of consent at the time of the marriage, nor with their discretionary powers at that time. They rather suffer from a generalized incapacity to assume the obligations of marriage.

The third case is that of a female homosexual from Montreal. The basis of this case is her homosexuality alone. This woman suffered a difficult childhood as an adopted child. She participated in homosexual acts from her adolescence until six months after the marriage. At the time of the marriage, however, she intended the marital state, together with fidelity, permanence, and children. For a period of four years after the marriage, she successfully avoided homosexual encounters. However, the chance meeting with a lesbian reactivated her homosexual inclination. She again began to act homosexually and the marriage ended after ten years, when the husband discovered her vice. Three children, however, had been born of the marriage and the woman had always been capable of relations, and complained of her husband's lack of affection for her. The Montreal Court of first instance found that the nullity of the marriage was proven by reason of the homosexuality of the wife, which rendered her incapable of assuming both the essential obligations of marriage and the very nature of marriage, itself. The Court of second instance, *i.e.*, the Appeal Court of Montreal, found for the validity of the marriage and pointed

actuales gignere posse graves rationis usus defectus, qui referri possunt ad defectus consensus vel ad defectus discretionis iudicii. Ideo iam vi canonum 1081 et 1082 propositae quaestiones solvi possunt. Et inter defectus consensus rite includi possunt omnes species incapacitatis assumendi onera essentialia matrimonii. Qui enim incapax est huiusmodi assumendi onera vel non percipit obiectum circa quod vertitur matrimonialis consensus vel eius consensus non est personae habilis seu capacis emittendi actum voluntatis quo utraque pars tradit et acceptat iura et officia propria matrimonio.”

out that the respondent was able to live in the marriage, and that the separation occurred only because the husband discovered her vice and felt it was incurable. The case was appealed to the Rota, and a decision was given *Coram Anne* on the 25th of February, 1969. In the law section of this decision, the Court quotes, first of all, Canon 1081, and then a section from *Gaudium et Spes*, Chapter 48, of the Vatican Council: "The intimate partnership of married life and love has been established by the Creator and qualified by His laws. It is rooted in the conjugal covenant of irrevocable personal consent. Hence, by that human act whereby spouses mutually bestow and accept each other, a relationship arises which by divine will and in the eyes of society, too, is a lasting one. For the good of the spouses and their offspring as well as of society, the existence of this sacred bond no longer depends on human decisions alone."⁵

The Rota goes on to state that Canon 1081 covers all defects of marriage consent. First of all, it includes those cases where there is a defect of the quality of consent, *i.e.*, a lack of discretion of judgment of the will. Secondly, it also includes a defect of the formal object of the consent, *i.e.*, that by which the consent be-

comes marital. This defect of the formal object occurs because the contractant is unable, and incurably so, of giving and receiving the object of the marriage consent, itself. This defect of the formal object is not an exclusion of the object of the contract such as in Canon 1086, par. 2, but it is a defect of the object of the contract when the one getting married is unable to give that by which the consent becomes really marriage.⁶ No one, says the Rota, is able to contract for that which he is unable to deliver. No one can be held bound to the morally impossible. If one is such a prey to ever lively sexual desires from some morbid condition that he cannot resist these desires, it must be said that he lacks the capacity for marital consent by not being able to promise that which is not in his power.

The question is how and whether a homosexual is to be considered incapable of contracting the marriage bond so that at least in some cases the vice of homosexuality might be considered *per se caput nullitatis matrimonii*.⁷ (Marriages of homo-

⁵ "Intima communitas vitae et amoris coniugalis a Creatore condita suisque legibus instructa, foedere coniugii seu irrevocabili consensu personali instauratur. Ita actu humano, quo coniuges sese mutuo tradunt atque accipiunt, institutum ordinatione divina firmum oritur, etiam coram societate; hoc vinculum sacrum intuitu boni tum coniugum et prolis tum societatis non ex humano arbitrio pendet. Ipse vero Deus est auctor matrimonii, variis bonis ac finibus praediti"

⁶ Etenim, praeter casus in quibus nupturientis consensus irritus dicendus est sive ob exclusionem vinculi matrimonialis vel essentialis eiusdem alicuius proprietatis sive ob contrahentis defectum aut discretionis sufficientis iudicii aut liberi arbitrii, fieri potest ut consensus matrimonialis invalidus set OB DEFECTUM OBIECTI FORMALIS, quo fit ut consensus sit vere matrimonialis. Nam contingere potest ut contrahens sit inhabilis, idque insanabiliter, ad tradendum acceptandumque ipsius consensus obiectum. Tunc non adest exclusio obiecti, uti in can. 1086, par. 2, sed defectus obiecti, cum nupturiens incapax sit tradere id quo consensus fit nuptialis. ⁷ 11)—Perpensis hisce synthematis vitii homosexualitatis tali gravissima in conditione vigentis, quae, omni ambivalentia sexuali exclusa,

sexuals, of course, have been annulled on other grounds.) In order to clarify the possibility of homosexuality as *per se caput nullitatis*, the Rota here takes the most extreme form of homosexuality as an example. The most extreme form of homosexuality is a truly inverse monosexual condition that excludes all sexual ambivalence, *i.e.*, a man bound entirely to his own sex and truly adverse to the opposite sex. How can this ultimate homosexual condition truly be an autonomous *caput nullitatis*, and this because of an exclusion of the formal object of the consent to marriage? The Rota notes, first of all, that unless there is a concomitant grave neurosis or psychosis, the homosexual ordinarily cannot be said to lack either discretion or freedom. Some homosexuals, furthermore, by an extreme act of the will, and with homosexual fantasies, are capable at times of heterosexual relations, but even that ability to have relations does not mean that they are capable of giving and receiving the *ius in corpus* which by natural law is required that the consent be truly matrimonial. Hence for *Anne* the Rotal insanity *circa rem uxori* seems to be rather the incapacity of assuming the obligations and of fulfilling them, rather than the incapacity of choosing, with sufficient discretion of judgment and internal freedom, the conjugal state.

existimanda est *conditio monosexualis vere inversa*—qua homo tantum ad eundem sui sexum allectus est at que ab altero sexu vere aversus—necessario exsurgit quaestio utrum necne talis homosexualitatis conditio, quae, peritorum iudicio, insanabilis iam tempore nuptiarum exstiterit, constituat caput vere autonomum nullitatis matrimonii OB DEFECTUM OBIECTI FORMALIS consensus matrimonialis.

What is the formal object of matrimonial consent? Canon 1081, par. 2, expresses only that which is specific to marriage. It does not indicate the whole substantial formal object of marital consent. When the words, perpetual and exclusive, are used, they do not refer only to the biological and physiological aspect of marriage. The formal object of marriage is much broader. It is the intimate partnership of married life and love mentioned above in *Gaudium et Spes*. It means the common life, the perfecting of each other by the parties, the spiritual union, the two becoming one, the perfect giving of themselves to each other, the mutual perfecting of their personalities. The formal substantial object of marriage, therefore, is not only the *ius in corpus* that is perpetual and exclusive for the purpose of acts for the procreation of children, excluding every other formal element, but comprises even the *ius ad vitae consortium* or *communitatem vitae* which is properly called matrimonial with its correlative obligations or the right to the intimate union of persons and works by which they perfect one another so that they unite with God in procreating and educating new living persons (*Humanae vitae*).⁸

⁸ Obiectum, exinde, formale substantiale istius consensus est non tantum ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad proles generationem, excluso omni alio elemento formali essentiali, sed complectitur etiam ius ad vitae consortium seu communitatem vitae quae proprie dicitur matrimonialis, necnon correlativas obligationes, seu ius ad "*intimam personarum at que operum coniunctionem*," qua "se invicem perficiunt ut ad novorum viventium procreationem et educationem cum Deo operam sociant" (Enc. "*Humanae vitae*").

Now, it is difficult to explain in a juridical sense accurately and exhaustively what is essential to this community of life and what is merely a perfecting virtue of it. One must look first to the law of nature by which God established marriage for clues to the essential characteristics of the community of life and then to the realistic human civilization in which we are living. However, in reality, it is extremely difficult to reduce these positive elements in marriage to a list of essentials.

It is easier to demonstrate that this particular person is deprived of those elements without which no one could establish the community of life in the existential order. Looking at the reality of an individual case, the respondent may be so afflicted that it can be demonstrated that the formal object of marriage, this common life, could in no way be brought about by him. In its principles the common life is lacking in him.⁹

After broadening the base, the Rota then narrows the possibilities. The formal object can be said to be lacking for the above reason only in two cases: a serious perversion of the sexual instinct such as homosexuality, which truly extinguishes the natural activity of the heterosexual

instinct, or a grave personality defect or affect, such as a paranoia or the equivalent. Other conditions by which one would be inclined to think after the marriage that this respondent did not have it in him to make this community, can be known only to God, who alone reads hearts.

The homosexual truly afflicted deeply may be said to be unable to set up that community of life which we call marriage, and, therefore, his marriage is null by defect of the formal object. Despite saying all this, the Rota found that this marriage was valid because the woman was capable of living in a married life, had three children, did not deny her husband marital relations, and could have been cured with a little bit of charity on the part of her husband. At the time of the marriage, the woman definitely had the capacity for married life, as she proved the first four years of marriage, and it is not proven from the acts that she was incapable of assuming the obligations of marriage.

The fourth case appeared in the *Monitor Ecclesiasticus*,¹⁰ as a sentence given on the 2nd of December, 1967, *Coram Lefebvre*, in the Rota, in first instance. This was the case of a male homosexual physician in his forties, who married a female philosophy professor in her twenties. The man had been addicted from his youth with homosexual vice, but had a crisis of conscience between 1954 and 1957, from which he felt that he was able to overcome his problem, and so married on the 28th of December 1963. Their short-lived union was very unhappy, as the husband was unable

⁹ Longe facilius, autem est—cum in causis iudicandis iudices ponantur in campo existenti—demonstrare, in casu singulari, *ob alterutrius contrahentium conditionem penitus depravatem, in isto, iam tempore nuptiarum, plane et insanabiliter ea deficere elementa, sine quibus nemo exaedificare valeat quodcumque omnis vitae consortium quod sit matrimoniale. Tunc deficit ipsum vitae consortium IN SUIS PRINCIPIIS et hoc in casu deest ipsum obiectum consensus matrimonialis.*

¹⁰ Vol. XCIII, III, at 467 *et seq.* (1968).

to participate in relations very much, sought to be away from his wife and close to his male young friends, and to live in separate rooms. Three months after the marriage, he was arrested for sexual activity with fourteen youths under fifteen years of age, beginning in 1961, and lasting through the marriage. He was sentenced to five years in jail. The basis of the case brought to the Rota was insanity *circa rem uxoriam*. In the law, the Rota found there were two aspects of this basis of *amentia* for the annulment of this marriage; one was the defect of discretion of judgment, and the second was the incapacity of assuming conjugal obligations.¹¹

Regarding the defect of discretion, *Lefebvre* maintains that homosexuality implies various conditions that can affect the consent to marriage in different ways. Homosexuality consists of an abnormal sexual instinct, which in a sufficient depth is directly opposite to the essence and properties of marriage, opposing both procreation and faithfulness. In the Rotal jurisprudence, a critical faculty is necessary in order to marry validly *i.e.*, the ability to judge, which implies the ordination and the coordination of all the superior faculties, namely, intellect and will. It often happens that homosexuals of a sufficient grade of vice are not able to judge regarding their obligations in marriage, which are so contrary to their sexual orientation. Homosexuals are nervous and in conflict with themselves. Hence, there is a certain distortion in the faculties of a man who is

afflicted with this disorder. They are, of course, immature in their apprehension and will and do not have, therefore, sufficient discretion for the act of consent in the marriage. Psychopaths, for *Lefebvre*, even if they are not necessarily sick in a strict sense, have such an evident disturbance of their faculties, that they are unable to freely determine themselves to the object of marriage.

The testimony indicated that the respondent was nervous, suffered from emotional symptoms, such as depression, felt guilty, came from a very strange family, and always acted peculiarly. He was seen as an abnormal person because of this bizarre conduct. The experts, too, pointed out the length of his homosexuality and its depth. They thought his acting out was independent of his will and somewhat unconsciously caused. Summing up, *Lefebvre* found a lack of discretion.

The second aspect of *amentia* for annulling this marriage, according to *Lefebvre*, was the incapacity of assuming conjugal obligations. Homosexuals are so afflicted by vice that they cannot give and receive the *ius in corpus*, *i.e.*, a perpetual and exclusive *ius in corpus* for such acts suitable for the procreation of children. They are unable to give and receive these properties of this consent, namely, its permanence and exclusivity. No one is able to contract for obligations that he is incapable of fulfilling. The contract is invalid regarding an object that is morally impossible, since no one is obliged to the impossible.¹² He is

¹¹ Incapax est vir homosexualis iste propter defectum discretionis iudicii, necnon propter incapacitatem assumendi onera coniugalia.

¹² Iamvero patet neminem posse contrahere obligationes quas incapax sit dotibus ipsis suis etsi

incapable of contracting marriage, who is morally incapable of assuming the *vinculum juris* and its relative obligations of justice perpetually and exclusively. This incapacity results in the inexistence of the object of the contract for those who abhor the conjugal act so that it is impossible for them morally to carry on. Those who are not the lords of their own body cannot give this over to someone else. In the case of a homosexual, there is not the exclusion of the object of marriage as in Canon 1086, par. 2, but, rather, the defect of the object in as far as the contractant is incapable of giving and receiving the *ius in corpus* which is required by the natural law. However, this moral impotence is not required to be perpetual, since the object of the contract is not in existence at the time of the celebration of the contract.

Lefebvre then points to the facts in this case to support his claim of the nullity of this marriage. The respondent opposed conjugal relations and stated that he married for intellectual and friendly reasons, lacked interest in children, experienced difficulties in consummating the marriage, and did not have any interest in sex with his wife. He left his wife's bedroom, he said, to cure his insomnia. He claimed that he was incapable of properly educating children. Although he denied having sexual relations with youths after the marriage, the medical expert said that he had told him otherwise. Several witnesses, of course, pointed out the bad habits of the respondent, his activities before the marriage

and after, and, of course, there was the condemnation of him civilly and his being remanded to jail for five years.

The experts referred to the gravity of his homosexuality and the lack of hope of curing him, and they pointed out the circumstances of his education and the various stages of his homosexual activity through the years. In any event, the sum total of the acts points to the fact that his homosexuality was so grave that he was not able to give and receive the *ius in corpus* perpetual and exclusive which is required by law.

This case was heard in second instance by the Rota *Coram Pompedda* and a decision given on the 6th of October, 1969.¹³ Now, it is interesting to note that *Pompedda* reversed the first aspect of *amentia* of this annulment; namely, that the respondent lacked the discretion of judgment necessary for marriage, but upheld the invalidity of the marriage on the ground that the respondent lacked the capacity for assuming the obligations of marriage. There are two directions in homosexuality, namely, the inclination towards persons of the same sex, and the exclusion, or dislike, or impotency towards persons of the opposite sex. Homosexuality is against not only the biological end of marriage, but even the psychological and social ends of marriage, namely, the profound giving of the parties to one another, their mutual perfection of each other and enrichment of the union of their spirits and the completion of their new life together in chil-

acquisitis adimplere. Doctrina tenet invalidum esse contractum de obiecto relative impossibili, cum ad impossibile nemo teneatur.

¹³ *Il Diritto Ecclesiastico* Vol. LXXX, III (1969).

dren. Furthermore, marriage builds up the family and society. Homosexuality, on the other hand, is devoid of all of these biological, psychological and social functions. Some people are so afflicted with homosexuality, either by nature or habit, that they are totally inept for marriage. In these subjects, the will and the intellect so conspire toward one fixed object, persons of the same sex, and the will so impelled to fulfill feelings toward this object, that they must be said to be incapable of undertaking the obligations of marriage. We do not have to look for a kind of imbecility or intemperance of the will, but principally at the total ordination of the person. One must consider the total deordination of the person in his most hidden heart of hearts. But in each and every case, we must look and see how the homosexual vice really affects the matrimonial consent.¹⁴

In this case, even with all the facts as we have them, there is not enough proof that the respondent did not have before his mind a sufficient view of marriage, nor due deliberation in order that he might come to a free choice of marriage. He may have been irresponsible regarding his vices, but not necessarily regarding marriage in

¹⁴ Attamen et alii exstant omosexuales, qui sive ex natura sive ex habitu radicitus afficiuntur vitio pessimo nec ab eo unquam averti poterunt, quique ideo inepti omnino sunt ad matrimonium. Hisce enim in subiecti sive intellectus sive voluntas simul conspirant in unum obiectum fixum ac praevalens, adeo ut eiusmodi personae incapaces dici debeant ad matrimoniales obligationes suscipiendas. Nec igitur quapropter heic spectanda dumtaxat sunt animi imbecillitas aut intemperantia voluntatis, sed insuper ac potissimum ac principaliter personae totius deordinatio in suis abditissimis latebris pensare debet.

this case. He put it off for some time, but ultimately felt the marriage would cure him. The immaturity that homosexuality represents does not mean that a person is immature in regard to his intellectual functioning. While one may accept the fact that homosexuality is psychosocial immaturity, it does not follow that a person is immature in his intellectual functioning. The respondent did have a conscience, as he was affected by guilt throughout his life. Hence, *Pompedda* concludes that one cannot say that he lacked the knowledge and the free choice in getting married, even though he did make a mistake in judgment in going against his inclination in choosing marriage.¹⁵

Regarding the second aspect of the basis of *amentia*, *Pompedda* found that from the evidence, the respondent had, without a doubt, such a long-time and connatural, (at least at the time of the marriage), invincible inclination toward people of his own sex, and such aversion and repugnance toward women, that he was unable to undertake the obligations of marriage. The *peritus* in this case maintain that as a result of his homosexuality he was so affected and that it was a vice so consolidated by habit, that with moral certitude he could maintain the respondent, from a motive of homosexuality and from its consequent implications, was incapable of assuming the obligations of his marriage. From the evidence in

¹⁵ Utcumque dici nequit in eo defuisse debitam cognitionem et liberam electionem: eo vel maxime quia ipse nuptias voluit contra suiipsius radicatam ac veluti connaturalem inclinationem oppositam. Eo sensu conventus haberi non potest sufficienti iudicii discretionem carens in actu contrahendi matrimonium.

the case, *Pompedda* concludes that this is true, that the respondent was an incapable subject for the object of the marital consent; hence, he was incapable of undertaking the obligations of marriage.¹⁶

The results of this development of Rotal jurisprudence, in my opinion, are the following. First, the Rota appears to be getting away somewhat from legalisms. In the New York case, for example, there is a combining of two bases and the arguments for them, into one case for nullity. In the Montreal case, the *ius in corpus* as the formal object of the contract of marriage is expanded to the community of life and love of Vatican II. One who is unable to undertake that *consortium vitae* is unable to marry. This opinion opens us to a larger view of marriage, not only from the natural law viewpoint, but in the context of the civilization or culture in which we exist. Certainly, when people speak of marriage, they are not thinking of an *ius in corpus*, but, rather, of living together their common life with elements that are essential beyond what is expressed in the law. We may look toward further development of these essentials in marriage *in facto esse*.

The second over-all result of the Rotal

¹⁶ Quas conclusiones Patres accipiendas omnino esse duxerunt sive propter scientiam qua prae-
laudati periti medici pollent, sive propter earundem
congruentiam cum cunctis causae actis, sive
propter cum factis certis ac probatis ipsarum
rationem. Vir igitur conventus, quidquid est de
sua erronea aestimatione circa aptitudinem ad
nuptias, idest circa sanationem ab habitu om-
sexuali, ob suum statum incapax in contrahendo
fuit assumendi onera coniugalia, idest tradendi
alteri parti ius illud peculiarissimum quod con-
sensus matrimonialis obiectum esesentiale con-
stituit.

jurisprudence is that sexual deviation can be an autonomous *caput nullitatis*. This indicates that we no longer have need to look for a lack of discretion on the part of persons suffering personality disorder. Certainly, this view is more in keeping with common sense, as the attempt to put every *amentia* case under due discretion or lack of sufficient knowledge and judgment, seems to lead to a point where only an elite can marry validly. St. Thomas, of course, thought that ordinary business-type judgment was sufficient for marriage. Hence, there is no longer a need to stigmatize homosexuals, unhappy as they are, with a further mental disorder in order to annul their marriages, nor a need to try to prove that they are impotent in the strict sense. However, there is a limitation in these cases in the Rota, in that they deal only with the extreme homosexual, or so-called mono-sexual invert.

Thirdly, cases of sociopaths based on inability to fulfill the object of the contract should be easier to instruct, in that a history of antisocial behavior is easier to produce than a history of mental illness. The medical expert, too, can easier come to his conclusion that the respondent is incapable of marriage *in facto esse*, rather than that he lacks discretion, *i.e.*, affected in judgment. A different approach must be taken in instructing the case to prove the respondent unable to undertake obligations.

Lastly, combining this new basis and the new norms for the United States, a Tribunal should be able to handle the case of severe sexual deviation, and, perhaps, of other personality disorders, more easily.

This Rotal jurisprudence and its devel-

opment, perhaps, indicates that we have no real need for new impediments. New impediments would have to be highly qualified, as the impediment of impotence has been, and this would somewhat limit further development.

The ultimate conclusion of this whole

paper, however, is this: we now have a basis in jurisprudence for annulling the marriages of homosexuals and other deviates. It is up to us to accept the cases, to process them, and to bring them to a proper conclusion in order to help people who seek justice from the Tribunals of the Church.