CURRENT THEOLOGY

NOTES ON MORAL THEOLOGY

GENERAL MORAL

One gratifying aftermath of the Holy Office decree in condemnation of situation ethics[1] has been the constructive nature of much of the commentary on that Instruction. Of necessity a good many words have since been written in exposition of the condemned doctrine itself, in order to show precisely how situation ethics departs from orthodox teaching. But some commentators have commendably gone further, as did the Instruction itself by implication. They have re-presented traditional moral theology with proper added emphasis on those of its principles which guarantee the legitimate achievement of whatever is admissible in the purpose behind situation ethics. That is, they have dealt positively with the false presumption that our moral theology is an excessively formalistic legalism, devoid of adequate consideration for circumstances which in any true sense alter moral cases.

Both J. Fuchs, S.J.,[2] and A. Peinador, C.M.F.,[3] put primary stress on the virtue of prudence as a guiding norm in determining moral obligation or moral freedom. Prudence presupposes an objective norm of morality and an objective law obliging to its observance; both are universal, absolute, and immutable for the precise circumstances which they encompass. It is one function of prudence, however, to apply objective law to the "situation" as it exists and to determine whether a contemplated act truly represents the act which is commanded or forbidden by objective law. Thus, for example—and at the risk of oversimplification—stealing is universally forbidden. But prudence will discern that the starving man who appropriates a loaf of bread is not by his act verifying the notion of theft and consequently is not violating objective law. Without prejudice to absolute norms traditional ethics, properly understood and correctly employed, does allow for diversity in the concrete application of those unchanging principles.

EDITOR'S NOTE.—The present survey covers the period from June to December, 1956.

[1] *AAS* 48 (March 24, 1956) 144–45.

[2] "Ethique objective et éthique de situation. A propos de l'Instruction du Saint-Office du 2 février 1956," *Nouvelle revue théologique* 78 (Sept.–Oct., 1956) 798–818.

[3] "A propósito de la instrucción de la Sagrada Congregación del Santo Oficio acerca de la 'Moral de la situación,' " *Salmanticensis* 3 (1956) 195–206. For other recent observations on the Instruction, cf. K. Moore, O.Carm., "Situational Ethics," *American Ecclesiastical Review* 135 (July, 1956) 29–38; and the editorial comment, "The New Morality," *Priest* 12 (Nov., 1956) 913–16.

Fr. Peinador continues into the area of positive law and demonstrates how epikeia and clemency also contribute to a reasonable but objective morality. While clemency cannot exempt from obligation or excuse from guilt, it can and does weigh extenuating circumstances when human penalties are being exacted.

Within very recent years other attempts besides situationism have been made to justify the circumvention of natural law obligations. Most of these have been aimed at minimizing subjective guilt. Some theologians, for instance, have pushed the findings of depth psychology to the extreme of making compulsions the normal thing and thus destroying responsibility for objective sin because of lack of freedom. Others have alleged that full observance of natural law is morally impossible, and for that reason would find excuse from subjective sin. Situation ethics in the last analysis attempts to do away with the moral law itself, at least in its absolute universality, and primarily for that reason has merited formal condemnation. There is every reason for us to continue being sympathetic, understanding, and considerate of our penitents in the confessional. But that is still possible, as it always has been, within the orthodox framework of traditional moral theology.

While thus in one quarter the concept of sin is under attack, in another it is virtue that is being examined with critical eye. Gerald Vann, O.P., maintains that the unconscious motivation behind many apparently virtuous acts is sufficient to remove those acts from the category of true virtues and to reduce them, in the language of depth psychology, to pseudo-virtues.[4] Fr. Vann's basic contention is that the moralist's concept of *finis* cannot correctly be restricted to ends which emerge into consciousness, but must also include "ends which lie in the unconscious mind or at least are not wholly clear to consciousness." Of the virtues prompted by such motivation he eventually concludes that "they would not . . . be wholly without value because to the extent to which there was goodness in their motivation they would have in them the value of true virtue and the love of God."

While presenting his thesis, Fr. Vann takes issue with what he judges to be "vigorous opposition" on the part of John C. Ford, S.J.,[5] to the existence of pseudo-virtues. Fr. Ford therefore replies, primarily in order to disclaim even feeble opposition to that concept except when it is explained so as to "concede too much to the deterministic trends of psychoanalytical theory."[6] He takes the occasion, however, to express serious doubt that pseudo-virtue

[4] "Unconscious Motivation and Pseudo-Virtue," *Homiletic and Pastoral Review* 57 (Nov., 1956) 115–23.

[5] *Depth Psychology, Morality and Alcoholism* (Weston: Weston College, 1951).

[6] "Reply to Father Vann," *Homiletic and Pastoral Review* 57 (Nov., 1956) 124–27.

as explained by Fr. Vann is entirely identical with psychology's understanding of that term. Fr. Ford also questions—and shows from St. Thomas and his commentators seeming good reason for so doing—the admissibility of Fr. Vann's supposite that *finis*, understood as one of the sources of the morality of human acts, includes the unconscious motives of psychoanalytical psychology. It is certainly my own understanding of *finis*, as a font of morality, that it cannot mean anything less than *finis rationabiliter operantis*, and consequently does not include motives which are buried in the unconscious and unknown to the agent.

Whereas natural law appears to be enjoying a renascence of sorts among the jurists,[7] moralists seem to be manifesting notable interest recently in the obligations imposed by civil law. D. Diez de Triana, O.P., discusses the duty of obedience to civil authority and expresses decided preference for the opinion that all just civil law binds per se in conscience, even in cases where the legislator himself does not advert to his right to oblige under sin.[8] While admitting the competence of civil authority to legislate in the form of purely penal law, Fr. Diez would not identify a particular law as purely penal without either explicit expression of this intent from the legislator or customary interpretation at least tacitly approved by the lawmaker and admitted by the majority of prudent men.

T. Goffi, in his defense of an obligation from legal justice to pay just taxes, seems to deny the ability of civil authority to formulate purely penal laws with regard to matter which is already obligatory from natural law; and on the basis of that premise he concludes to a conscience obligation to abide by tax legislation.[9] Despite my personal preference for the theory that

[7] In mid-1956 Notre Dame Law School published the first issue of *Natural Law Forum*, containing eight scholarly contributions on the subject. Beginning as an annual, the journal is destined in the hopes of the editors to become eventually a quarterly. One item in the *Forum* statement of policy (p. 3) would perhaps benefit from further editorial clarification: "The *Forum* will not be identified with any particular school or doctrine of natural law; nor will it rule out contributions which are basically opposed to the whole conception. We are interested in promoting a serious and scholarly investigation of natural law in all its aspects, not in defending any established point of view."

The January and April issues of *Catholic Lawyer* 2 (1956) presented five papers read at the third annual Natural Law Conference of the Catholic Lawyers Guild of New York. The theme of the conference was "the practical application of Thomistic principles in respect to the virtue of Justice. . . ."

[8] "La obediencia a la autoridad civil," *Ciencia Tomista* 83 (April-Sept., 1956) 383-422.

[9] "La coscienza morale del contribuente," *Divus Thomas* (Piacenza) 59 (July-Dec., 1956) 283-93. Early in his article (p. 285) Fr. Goffi presents this argument: "Non è in potere dello Stato sopprimere un obbligo naturale dei cittadini il cui adempimento rende possibile la sua missione sociale. Per cui pagare l'imposta, ordinata eminentemente al bene commune, è per il cittadino un obbligo di coscienza imposto dalla legge naturale, che la legge divino-positiva conferma . . . ."

tax laws entail a conscience obligation, I doubt that moralists generally would sustain the validity of Fr. Goffi's argument or allow his major premise to pass without challenge. It is true that no civil power can suppress a natural law obligation. But that is not what merely penal legislation professes to do. Certainly the founders of religious institutes, for instance, when they assert that their constitutions do not of themselves bind under sin, are quite aware of the moral obligations which many of their rules express. If one concedes the possibility of merely penal laws, there seems to be no inconsistency in admitting that a civil legislator could employ them as additional sanctions on disobedience to natural law but without intending to impose the added moral obligation of obedience to himself.

Furthermore, there are affirmative precepts of natural law which require determination by positive law before they become operative. Granted, for example, that the duty to contribute to common financial needs derives ultimately from natural law, there appears to be no contradiction in conceding civil authority the right to pass merely penal legislation when it determines that this duty is to be discharged by paying taxes, and that the distribution of the tax burden should be thus and so. Without implying any partiality for the opinion that tax legislation, especially in this country, is merely penal, one may seriously doubt the validity of this argument of Fr. Goffi's in favor of an obligation in conscience.

Although N. Seelhammer is primarily concerned with the obligation to obey traffic regulations, his remarks are also applicable to civil law in general.[10] According to Fr. Seelhammer, traffic laws generally speaking oblige in conscience, since many of them are necessary specifications of a more generic natural law prohibition against risking unreasonably one's own life or the lives of others. However, the *finis legis*, and the aptitude of a given law in a particular situation to achieve that *finis*, will determine in the concrete whether a deliberate violation entails moral or only juridical guilt.

It is very doubtful that the question of obligation as imposed by traffic laws, or by civil law in general, admits of an answer any less qualified than that which Fr. Seelhammer gives. Just as it would be hazardous to maintain that all such regulations are merely penal laws,[11] so too it would appear excessively rigorous to contend that each and every deliberate violation of traffic regulations is necessarily a sin in the eyes of God. Ultimately it is

[10] "Das Verkehrsproblem in moralischer Sicht," *Trierer theologische Zeitschrift* 65 (1956) 159–73.

[11] The latest (1956) edition of *Handbook of Notes on Theology* by Andrew F. Browne, C.SS.R., still contains the statement (p. 7) that "It is solidly probable that, in the United States of America, all merely civil laws are purely penal." If a poll could be taken of all moralists in this country at the present time, the probability of such an opinion would hardly be sustained.

natural law which obliges the driver not to take unreasonable risks behind the wheel. And to a very considerable extent, traffic laws are calculated to determine more precisely what concrete precautions are ordinarily required of the average driver if he is to avoid those risks. Prudence will usually demand that those precautions be generally observed. But prudence will also admit that departure at times from the letter of the law is objectively not inconsistent with safety nor contrary to the legislator's reasonable will. In these latter circumstances it would seem rigorous to an extreme to accuse "offenders" of sin, even while conceding the justice of civil penalty if they are apprehended and found juridically guilty.[12]

Relative to this question of the legislative competence of civil authority, it is rather interesting to note from England the Report of the Roman Catholic Advisory Committee on Prostitution and Homosexual Offences and the Existing Law.[13] Appointed by the late Cardinal Griffin at the request of the Home Office, the committee "was charged with the task of presenting to the Departmental Committee a reasoned account of Catholic moral teaching upon the subject together with appropriate conclusions which might be drawn from such principles in so far as they affect the criminal law. . . ." Present law in England, currently the object of severe criticism from several quarters, regards as criminal offenses all homosexual acts committed between male persons of whatever age; the law against prostitution proscribes "soliciting and importuning to public annoyance," but is enforced in London, according to the editorial foreword prefixed to this report, merely by periodically summoning selected groups of known prostitutes in turn and imposing on each an automatic fine of forty shillings.

The report consists of three sections: (1) Catholic teaching on homosexual offenses; (2) the nature of sex inversion; and (3) a summary of conclusions and recommendations. After a brief pointed résumé of our teaching on moral responsibility as applicable to sexual deviations, the committee invokes the distinction between sin and crime and restricts to the latter area the legislative power of the state. It is the committee's opinion that legal invasion of the individual conscience always fails and frequently does positive harm. (Our own Volstead Act is cited as the best recent illustration of that prin-

[12] J. C. Ford, S.J., most sensibly rejects as unthinkable the suggestion that Church authorities should attach ecclesiastical penalties to the violation of traffic laws. As Fr. Ford points out, any such approach to even so serious a problem is both unnecessary and impractical, and misconstrues the real mission of the Church; "Excommunicate Bad Drivers?", *America* 96 (Nov. 17, 1956) 197–98.

[13] "Homosexuality, Prostitution and the Law," *Dublin Review* 230 (Summer, 1956) 57–65. The verbatim report of the committee begins on p. 60. The preceding three pages are devoted to an unsigned summary of the committee's deliberations and recommendations.

ciple.) Regarding extant criminal law on homosexual offenses, the report makes these recommendations:

I. The existing law does not effectively distinguish between sin, which is a matter of private morals, and crime, which is an offense against the State, having anti-social consequences. In matters of sex this distinction may not always be easy to draw but it is certainly ignored by Section II of the Criminal Law Amendment Act, 1885, which for the first time imposed penal sanctions in respect of acts of gross indecency done by adult consenting males in private.

II. Under the existing law criminal proceedings against adult male persons in respect of consensual homosexual acts in private . . . inevitably fall upon a small minority of offenders and often upon those least deserving of punishment.

III. The Committee recommends that the criminal law be amended so as to exclude consensual acts done in private by adult males and to retain to the full extent penal sanctions to restrain (a) offences against minors; (b) offences against public decency; (c) the exploitation of vice for the purpose of gain.

While refraining from positive recommendations as to methods of detaining those convicted under this suggested revision of law, the report submits that imprisonment—especially in institutions reserved exclusively for homosexuals—is of itself not only generally ineffectual for rehabilitation but usually deleterious. The practice of granting release to convicted homosexuals who agree to castration, the committee abhors; but it grants the lawfulness of the medical use of drugs for the suppression of (abnormal?) sexual urges when such treatment is indicated and consent of the patient is obtained.

On the question of legislation against prostitution the committee for the most part abstains, except to repeat its initial distinction between sin and crime and to insist on the state's duty "to protect women from exploitation and to preserve public order." The report does, however, advise that "the existing practice of what may be called automatic prosecution for solicitation and importuning followed by trivial fines serves no useful purpose and is indefensible on any grounds and should be discontinued."

JUSTICE

One of the most forthright statements in recent months on racial segregation was made by W. J. Kenealy, S.J., in a sermon at the Red Mass at St. Louis Cathedral in New Orleans.[14] Ever a strong advocate of natural law, Fr. Kenealy again very clearly demonstrates that it is the very essence of

[14] The Legal Profession and Segregation," *Social Order* 6 (Dec., 1956) 483–90. A somewhat abbreviated version of the same text can be found under the title "Race and Law" in *Interracial Review* 29 (Oct., 1956) 171–74.

human nature which antecedes and underlies our Constitution's guarantee of equal rights for all, and that "what man is before God, that he is before the Constitution of this country." Appealing to the loyal obedience of those privileged to serve as officers and agents of the courts in administering justice, he calls upon the legal profession to take the lead in defending the law as it applies to segregation. And in compliance with his own plea for fair and calm discussion of so controverted an issue, Fr. Kenealy reviews the popular arguments in favor of segregation and reveals again their illogic and fallacy.

Using the catechetical technique, D. Miller, C.SS.R., answers a series of more than a dozen questions pertaining to racial segregation and the practical difficulties alleged against integration in many parts of this country.[15] In general Fr. Miller's answers are conspicuous for their accuracy and unbiased restraint. Perhaps on one point a purist would be tempted to enter a demurrer. Is it adequate to say merely that segregation invariably leads to injustice without stipulating that segregation is in itself an injustice? Even if the "ideal" of separate but equal facilities were *per impossibile* realized, grounds would remain for imputing injustice to the practice of segregation. The forced separation of one people from another on an exclusively racial basis is a denial of social rights which are every man's human heritage.

One further observation, not entirely germane to a discussion of justice, concerning Fr. Miller's article. Towards the end of his catechesis he asks the question whether it would be mortally sinful for a Catholic to promote and campaign for racial segregation. After transmitting to God the question of subjective guilt, Fr. Miller expresses his conviction that objectively the practice does involve mortal sin. While there is no denying that racial discrimination admits very easily of serious matter, and that this answer is therefore correct, one may wonder whether this is the best or proper pastoral approach to moral problems. Among themselves theologians very often have to discuss the precise gravity of specific sins; confessors must be habitually aware of the theological species of sin in order to administer properly the sacrament of penance; and there are times when individuals must be reminded in no uncertain terms that they are jeopardizing their immortal souls. Perhaps that time has come with regard to this problem of segregation. But ordinarily when speaking to or writing for the general laity, I doubt that we best serve the cause of virtue by invoking too readily the "big stick" of mortal sin. Virtue is not made any more attractive by the knowledge that its contrary carries the sanction of eternal damnation. And it appears to be

[15] "Questions about Racial Segregation," *Interracial Review* 29 (Aug., 1956) 133–38. These questions had formerly been answered in various issues of the *Ligourian*, of which Fr. Miller is associate editor.

psychologically understandable that many good Catholics interpret as bullying, and consequently resent, too facile a recourse on our part to the threat of mortal sin. Without in any sense compromising our principles or diluting our doctrine, we should, it seems to me, show ourselves more reluctant than ready to make the menace of mortal sin an integral part of normal pastoral exhortation. As an example of this, and one which is pertinent to the segregation problem, H. Cooper, S.J., very effectively expresses some of these same obligations without literal reference to mortal sin.[16]

In its latter two issues of 1956, the *Catholic Lawyer* devotes a good many of its pages to the pro's and con's of Right-to-Work legislation. Five of these items are reprinted from other publications;[17] the other two, an exchange between B. H. Fitzpatrick[18] and R. Morris,[19] are presented for the first time. By the same proportion of five to two, the numerical vote is in favor of these laws.

Mr. Morris does not disagree with Mr. Fitzpatrick's defense of such legislation. In fact, he writes primarily in order to take exception to the latter's previous concession, reluctant though it was, that shop cloture can be morally justified when it is necessary to maintain wage standards. According to Mr. Morris, "shop cloture to facilitate the maintenance of monopoly standards cannot be justified morally since this is the improper use of force." If this conclusion is based, as it seems to be, on the contention that individual rights need never yield to the common good, then Mr. Fitzpatrick's subsequent challenge of this false premise is a point well taken. Certainly moralists are well aware of the middle course which must be steered between a collectivistic philosophy of member-for-society and an individualistic theory of unlimited personal rights. And if it can be established—by competent and conscientious labor-management experts, not by moralists or lawyers—that a union shop or a closed shop is essential in a given instance to the common good, then the establishment of either cannot correctly be called a violation of the individual's right to work.

A rising vote of thanks is due E. Hamel, S.J., for laying one ghost which

[16] "Questions and Answers on Segregation," *Social Order* 6 (Nov., 1956) 432–33.

[17] These are the contributions of J. F. Cronin, S.S., W. J. Kelley, O.M.I., and Rev. F. Falque, together with an anonymous review of Fr. Keller's *The Case for Right-to-Work Laws*. All are contained in *Catholic Lawyer* 2 (July, 1956) 186–206. The October, 1956, number reproduces an article by J. E. Coogan, S.J.

[18] "Morality of Right-to-Work Laws: Additional Comments," *Catholic Lawyer* 2 (Oct., 1956) 308–13. Mr. Fitzpatrick's initial article appeared *ibid.* (April, 1956) 91–107 Cf. THEOLOGICAL STUDIES 17 (Dec., 1956) 566–67 for Fr. Connery's comments.

[19] "Mr. Fitzpatrick on the Morality of Right-to-Work Laws—Comment," *Catholic Lawyer* 2 (July, 1956) 183–85.

has long haunted our tract on justice. In his doctoral dissertation, "L'erreur sur la personne dans la damnification,"[20] Fr. Hamel traces the evolution of theological teaching on the question of restitution due for unjust damnification which mistakenly victimizes someone other than the one intended. The classic example, of course, is that of Titius who, thinking he is killing Peter, actually kills Paul; or who deliberately burns down a house which he believes is owned by Peter but which de facto belongs to Paul. The benign opinion, which denies the obligation to restore, is even now granted extrinsic probability by many of the modern manualists, who invoke principally the authority of Molina, de Lugo, and Alphonsus in its defense. But since the turn of the century its intrinsic probability has been questioned with increasing frequency, chiefly on the score that it violates the principles governing obligatory restitution, offends common sense, and—in the words of Fr. Hamel—"fait ordinairement le scandale des débutants en Théologie Morale." (My own theological debutants usually go into paroxysms of derision when the opinion is explained, but there is no doubt about the essential point which Fr. Hamel is making.)

Fr. Hamel's thesis proceeds by presenting evidence that Molina was not talking about the conscience obligation to restore when he discussed this case, but rather of possible reasons for leniency in the external forum; that de Lugo, while he manifested some sympathy for the benign solution, never did make that opinion definitively his own; and that Alphonsus, out of his great reverence for de Lugo and because the latter's opinion had been misrepresented by interim authors, granted the favorable solution an extrinsic probability which it did not in fact deserve.

It is not easy, without seeming to manifest presumptuous disrespect, so to challenge the conclusions ascribed to truly great theologians. But Fr. Hamel's dissertation is beyond reproach in this regard, as he argues with seeming validity to the conclusion that the benign solution to this question cannot now be accorded either intrinsic or extrinsic probability.

For the mathematically inclined, or even for Barnum *et sequaces*, a problem proposed to F. Clavequin should prove especially fascinating.[21] The case involves a gimmick known as *chaîne de solidarité* or *boule de neige*, popular in this country some years ago. A list of five names and addresses is mailed to a number of prospective "beneficiaries," and each is directed to send 100 francs to the first person listed. Then after deleting that name, each inserts his own name in the fifth spot and mails the revised version to five friends.

[20] *Sciences ecclésiastiques* 8 (Oct., 1956) 335–84.

[21] "Chaîne de solidarité—boule de neige," *L'Ami du clergé* 66 (July 26, 1956) 477–79.

Eventually each participant could conceivably receive 300,000 francs on his original investment.

Fr. Clavequin condemns the practice as immoral on the grounds that both the motive which inspires it and the means employed are contrary to justice. He seems to base the injustice of motive on the very fact that one thereby intends to acquire something for nothing. According to Fr. Clavequin, financial profit is justified only in so far as it represents a fair return for services rendered ("c'est le service rendu à la communauté qui 'moralise' le profit"). This practice, however, aims at realizing a profit "sans service, sans peine aucune." As for the means employed, Fr. Clavequin considers the procedure to be nothing less than a swindle which exploits the naiveté of many for the enrichment of comparatively few. Against the objection "consentienti nulla fit injuria" he maintains that consent in this case is the product of ignorance and cannot be construed as rational agreement to connive in the ultimate consequences of this practice.

It is true that in financial transactions a something-for-nothing element should provoke suspicion that commutative injustice may be involved. But it is not universally true that all profit, in order to be legitimate, must represent return for services rendered. Nor does that seem to be the reason, as alleged by Fr. Clavequin, why authors are somewhat reserved in condoning lotteries and other games of chance. Aleatory contracts of their very nature do provide the eventual winner with something for nothing; but under the standard conditions stipulated by theologians, all admit that the winner acquires genuine title to his profit. The dangers against which the authors warn when treating this subject are extrinsic to the essence of the aleatory contract. However, if unjust means are employed to acquire something for nothing (and all would doubtlessly agree that the *boule de neige* takes unjust advantage of the credulous public), there is no question about the eventual conclusion that commutative justice is thereby violated.

But justice does not always so clearly favor the innocent. Does an adopted child, born out of wedlock, have a right to know the identity of his parents? Fr. Connell is inclined to the opinion that this information is a natural right which per se must be respected.[22] He submits as the essential reason favoring this conclusion that one to whom God has granted life, His greatest gift in the natural order, is per se entitled to know the instruments through whom that gift was bestowed. By way of supplementary arguments Fr. Connell refers to the filial obligation of supplying the material and spiritual needs of

[22] "The Right to Know One's Parentage," *American Ecclesiastical Review* 135 (July, 1956) 56–57.

one's parents, to the possibility of the child's eventually marrying a near relative, and to the irregularity for orders incurred by illegitimate birth. Although he admits exceptions to the general rule, Fr. Connell believes that these would be rare; and he cites as examples the individual who would abuse the information for purposes of blackmail or the one for whom the truth would cause pain and embarrassment, as would happen perhaps if one were to discover that his father had been executed for serious crime.

The problem becomes a highly complicated one if considered with an eye to the variety of circumstances which can attend its occurrence in practice. At very least one must concede a basic reasonableness in a child's curiosity as to his parents' identity. And perhaps that reasonableness is more accurately expressed in terms of a right to acquire that knowledge. But in no case would it be a prerogative which could legitimately be exercised in conflict with the antecedent rights of others; and it seems to me that it would not be a rare instance in which the child's right would have to yield. Would not an unmarried mother, who has made adequate provision for the adoption of her illegitimate child, have a superior natural right to keep her secret if she wishes, even from the child itself? (Usually that secret implies the fact of past serious sin on her part.) There seems to be nothing essentially inherent in the mother-child relationship which requires that such knowledge should be shared between them; and the extrinsic circumstances which might require it are more the exception than the rule in practice. The entire question merits far more discussion than space here allows. But if we maintain that only rarely could justification be found for keeping parental identity a secret from the adopted child, we are faced with a very practical difficulty. Our own Catholic agencies would stand accused of habitual cooperation in injustice, since agreement not to reveal the identity of parents to the parties immediately involved is common practice in adoption proceedings.

MEDICINE

Several noteworthy treatises on the broader aspects of medico-morality have appeared in the last six months. L. Loranger, O.M.I., reviews Church teaching in this regard from the patristic era to the present pontificate.[23] As would be expected, the bulk of his article is devoted to various pronouncements of Pius XII, but his preliminary matter also contains data interesting as it is valuable for theological research.

P. De Letter limits himself to the papal allocutions dating from April,

[23] "L'Eglise et la médecine," *Revue de l'Université d'Ottawa* 26 (July–Sept., 1956) 269–97. This paper was originally delivered at a medico-moral institute held in Regina, and was prepared for posthumous publication by E. Thivierge, O.M.I.

1955 to August, 1956.[24] His survey of nine pronouncements made during that period provides a most convenient supplement to the bibliography (complete to September, 1954) which Fr. Paquin includes in his excellent *Morale et médecine*.[25] One might now add Pius XII's radio message of September 11, 1956, to the Seventh International Congress of Catholic Doctors convened at The Hague,[26] together with his address last February on the legitimate use of analgesics.[27] The general theme of the September message—medical law and morality—provided the Pope with still another opportunity to insist upon the true relationship which exists between the individual and society, a relationship of superiority of part over whole in contrast with the subordination of physical part to whole as enunciated in the principle of totality. He also reminded doctors again that their professional activities cannot be divorced from the objective norm of morality as understood by sound reasoning and as explained by the Church, and that positive medical law must likewise be formulated in accord with objective moral principles.

At a more polemic level, the *New York University Law Review*[28] presents a symposium, "Morals, Medicine and the Law," based on Joseph Fletcher's *Morals and Medicine*.[29] Theology, philosophy, law, and medicine are represented in the persons of one Catholic priest and six other gentlemen of diverse religious convictions. Each was asked to express an opinion as to the competence of civil law to intervene in the practices which comprise the five basic contentions of Fletcher's book: the patient's right to diagnostic details, and the moral acceptability of contraception, artificial insemination, direct sterilization, and euthanasia. Because the *status quaestionis* of basically moral questions was thus restricted to the feasibility of civil legislation in those areas, each participant is laboring under an initial handicap of sorts. Nevertheless there is a significant amount of valuable information to be gleaned from the whole discussion, only the highlights of which can be indicated here.

J. D. Hassett, S.J., does admirably in the presentation of Catholic teaching on the points under discussion. To say that his is a thankless task is but

[24] "The Pope on Medical Questions," *Clergy Monthly* 20 (Nov., 1956) 380–86. The article is signed "P.D.L." but it is a fair assumption that Fr. De Letter, a frequent contributor to *Clergy Monthly*, is the author.

[25] Jules Paquin, S.J., *Morale et médecine* (Montreal: L'Immaculée-Conception, 1955).

[26] *AAS* 48 (Oct. 27, 1956) 677–86. An English translation of this address may be found in *The Pope Speaks* 3 (Winter, 1956–57) 261–70.

[27] At present writing the official text of this allocution is not yet available, although the NC dispatch leaves no doubt as to its importance.

[28] 31 (Nov., 1956) 1157–1245.

[29] Princeton, N.J.: Princeton University, 1954.

to express one's sympathy with the fact that the compelling force of our intrinsic ethical arguments is seldom easily apparent. And it need scarcely be said that any purely theological presentation of moral doctrine in such circumstances as these serves at best for informational purposes and will rarely be effective as an apologetic. But as an objective presentation of the Catholic position, Fr. Hassett's contribution is no mean achievement.

Writing as a Protestant theologian, P. Ramsey distinguishes himself by his apparent determination to conduct a reasoned and dispassionate discussion. Needless to say, he is not by any means in complete agreement with Catholic doctrine on these questions, nor entirely patient with our manner or tenacity in defending it. But he gives reason for one to believe that he would not be altogether out of his element in a philosophical discussion of these problems conducted in our language and on the basis of our principles. Especially in his appreciation of the distinction between ordinary and extraordinary means of preserving human life, he shows himself remarkably appreciative of ethical nuances, though it is regrettable that he was apparently unaware of Fr. G. Kelly's contribution to that distinction.[30]

The medical viewpoint is ably presented by I. P. Frohman, M.D., a general practitioner. Because Dr. Frohman for the most part conscientiously sticks to his medical last, his observations on the inadvisability of donor insemination, sterilization, and euthanasia provide strong ancillary arguments for dissuading doctors from employing these procedures. Another of his statements points up a somewhat neglected line of communication for priests who have occasion to discuss medico-morality with non-Catholic physicians: "I could not in conscience recommend contraception to a person whose religion does not permit the use of contraceptives." Very many non-Catholic doctors, who in sincere good faith differ with our moral conclusions, are open to such an appeal to professional integrity and are most willing from that motive to respect the consciences of their Catholic patients.

Of the two representatives of the legal profession, M. Ploscowe restricts himself more scrupulously to juridical issues than does H. Kalven, Jr. But both contribute a substantial amount of information which would be of value to theologians, especially by their citations of various judicial precedents relative to the points at issue.

The May, 1956 papal allocution to cornea donors[31] provided additional grounds for speculation as to the Holy See's attitude towards organic trans-

[30] THEOLOGICAL STUDIES 11 (1950) 203–20; 12 (1951) 550–56. Cf. also *Linacre Quarterly* 24 (Feb., 1957) 2–10.

[31] *AAS* 48 (June 10–16, 1956) 459–67. An English translation of this allocution is contained in *The Pope Speaks* 3 (Autumn, 1956) 198–206.

plantation *inter vivos*. Textual arguments from the address have since been advanced in favor of both sides of this current dispute. P. De Letter, S.J., submits that "the Pope's words, 'la méthode proposée, et la preuve dont l'appuie, sont erronées,' seem to reprove both the method [*inter vivos* transplants] and the argument given to justify it."[32] Somewhat more hesitantly perhaps, E. Healy, S.J., inclines to the same conclusion, though he does not specify his precise reason: "Because of the pope's words one may judge that the opinion which would permit transplants from a living donor . . . is in disfavor."[33] On the contrary, G. Kelly, S.J.,[34] R. Carpentier, S.J.,[35] F. J. Connell, C.SS.R.,[36] G. Bosio, S.J.,[37] and J. Connery, S.J.,[38] have concluded that this phase of the question was not settled on that occasion.

This latter opinion is also my own.[39] To me it would seem strange if the Pope, having begun his address by disclaiming any intention even to discuss this form of transplantation, should then have proceeded to condemn it. Is it not a more likely inference that Pius, by his express exclusion of the *inter vivos* problem, implicitly declared himself willing that discussion should continue among theologians until perhaps evidence in favor of one opinion or the other warrants a more definitive judgment? Beyond all question, the Pope did on this occasion bar one avenue of approach to a favorable solution of the *inter vivos* question, viz., any argument based on the principle of totality as extended to social relationships. But in removing that basis of solution, he did not necessarily deny that the same solution might be reached via some other premise such as the principle of charity.

How then meet the objection which Fr. De Letter perceives in the phrase "la méthode proposée et la preuve dont on l'appuie sont erronées"? In context "la méthode" appears more likely to refer not to any medical procedure whereby an organ is transferred from one living person to another, but rather to a method of argumentation, viz., the parallelism falsely alleged between the relation which corporeal member bears to the physical composite

[32] "The Pope on Medical Questions," *Clergy Monthly* 20 (Nov., 1956) 384, note 9 and corresponding text. Cf. note 24 above.

[33] *Medical Ethics* (Chicago: Loyola University, 1956) p. 141.

[34] THEOLOGICAL STUDIES 17 (Sept., 1956) 333 and 343–44.

[35] *Nouvelle revue théologique* 78 (Nov., 1956) 967.

[36] "The Pope's Teaching on Organic Transplantation," *American Ecclesiastical Review* 135 (Sept., 1956) 159–70. Cf. p. 169.

[37] "Il problema dei trapianti sotto l'aspetto morale," *Civiltà cattolica* 107 (Nov. 17, 1956) 382–94. Although Fr. Bosio denies all probability to the opinion allowing transplantation *inter vivos*, he does admit (p. 389) that the Pope has not yet settled the question.

[38] THEOLOGICAL STUDIES 17 (Dec., 1956) 560.

[39] *Linacre Quarterly* 23 (Aug., 1956) 78.

and that which social member bears to society. Not only is the parallelism itself (*la méthode*) false and dangerous according to Pius, but any attempt to substantiate the parallelism (*la preuve*) must also be rejected as equally pernicious. This interpretation would appear to be borne out by that part of the paragraph which immediately precedes the phrase cited by Fr. De Letter, as well as by what immediately follows.

In another allocution delivered within the same week and addressed to the Second World Congress of Fertility and Sterility, Pius repeated the condemnation of direct masturbation even for the purpose of obtaining seminal specimens for fertility studies.[40] It is difficult to understand how this section of his address could have occasioned the impression that the Pope had "reminded his hearers that the Church considers any method of obtaining semen, *outside marital intercourse*, as gravely sinful";[41] or that "the Holy Father stated that the direct taking of human seed *outside the circumstances of legitimate union* is to be condemned even in the light of simple, rational ethics"[42] (emphases added). It is eminently clear from this part of the allocution that the Pope was condemning any process of seminal sampling which would entail direct masturbation or, by implication, any direct excitation of the sexual faculty outside of lawful marital intercourse. But there still remains the possibility, for example, of procuring a sample by direct aspiration from the testes or epididymides—a process which may or may not be medically satisfactory, but which has been admitted as licit by many theologians and which was not included in this most recent condemnation of direct masturbation.

Discussion continues on the case of the uterus truly scarred beyond repair, e.g., by repeated cesarean sections. In his treatment of the topic, L. L. McReavy[43] summarizes the argument proposed originally by G. Kelly, S.J., in defense of the lawfulness of hysterectomy in such circumstances. Fr. McReavy's is a decidedly more accurate presentation than those which some others have attempted, but there are several items in the following quotation which seem to require qualification:

a) Even though danger [of rupture] will not actually arise independently of a pregnancy, the basic cause of danger is already present in the damaged condition

[40] *AAS* 48 (June 10–16, 1956) 467–74. Cf. *The Pope Speaks* 3 (Autumn, 1956) 191–97.

[41] A. M. Carr, O.F.M.Conv., "Roma locuta," *Homiletic and Pastoral Review* 56 (Sept., 1956) 1023.

[42] R. W. O'Brien, O.Carm., "Analecta," *American Ecclesiastical Review* 135 (Sept. 1956) 208–09.

[43] "Hysterectomy after Several Caesarean Sections," *Clergy Review* 41 (Aug., 1956) 485–89.

of the womb, which may therefore be surgically eliminated like any other dangerous pathological condition. Pregnancy is the occasion of the danger rather than the cause. [The defenders of Fr. Kelly's opinion would be willing to concede pregnancy as co-cause together with the pathological state of the uterus[44]—J.J.L.]

b) Hysterectomy does not in this case frustrate the natural purpose of the womb, because this is assumed to be no longer attainable. The object is not to suppress the generative function as such, but the generative function as irreparably damaged.[45] [The object of hysterectomy rather is to prevent future rupture of an organ whose generative function is irreparably damaged—J.J.L.]

c) The danger arises not from pregnancy alone, or from the damaged condition of the womb alone, but from the combination of both these factors, and it can be averted by the elimination of either. The operation, as it happens, eliminates both equally immediately, but, if the surgeon restricts his direct intention to the removal of the basic factor (the damaged womb), he can reasonably claim that the elimination of the other factor (pregnancy) is *praeter intentionem* and therefore permissible according to the principle of the double effect. In other words, his direct intention is not to sterilize, but to forestall the combination of pregnancy with a damaged womb by removing the womb betimes.

d) That hysterectomy does not *per se* involve sterilization is evident from the case, which sometimes occurs, of a double uterus. [Fr. Kelly and Fr. Ford had recourse to the supposition of a double uterus in order to demonstrate that removal of a damaged uterus need not be a *direct* sterilization. I doubt that they would maintain that hysterectomy is not *per se* productive of sterility, if *per se* be understood in the sense of *ex natura sua*[46]—J.J.L.]

e) If, after the final caesarean, the uterus cannot be repaired for its normal function, the surgeon cannot be morally bound to repair it, *quia nemo ad inutile tenetur*; but if he is not bound to repair it, there would seem to be no moral objection to his removing it as useless and, in its unrepaired state, dangerous.

By way of personal opinion, Fr. McReavy confesses that as yet he has not been able to decide upon the intrinsic probability of "the milder opinion," but that he is inclined to concede its extrinsic probability.

T. J. O'Donnell, S.J., after reviewing the evidence in favor of the permissive opinion,[47] concludes that the argument is solidly probable and that "when a uterus is so badly damaged that competent and conscientious obstetricians judge that it has been traumatized beyond a stage where it can

[44] THEOLOGICAL STUDIES 12 (March, 1951) 72.

[45] This statement by Fr. McReavy is doubtlessly based on one sentence written by Fr. Kelly in THEOLOGICAL STUDIES 8 (March, 1947) 103. But in the context of the paragraph in which it occurs, it seems clear that this is not the *modus loquendi* which Fr. Kelly himself prefers. Cf. THEOLOGICAL STUDIES 15 (March, 1954) 68–71.

[46] THEOLOGICAL STUDIES 15 (March, 1954) 70.

[47] *Morals in Medicine* (Westminster: Newman, 1956) pp. 108–10.

be repaired to function safely, they are not obliged to repair it but may remove it, with the consent of the patient."

Considering the relatively brief theological history of this particular problem, I consider conclusions such as these entirely consonant with sound theology. Those of us who admit the more favorable doctrine must confess that we are threading a very fine needle. But after weighing the pro's and con's to the best of my ability, it is my conviction that the intrinsic argument advanced by Fr. Kelly and Fr. Ford is adequate to establish solid probability for the opinion which they and others defend, and that it has yet to be effectively disproven. Despite the many considerable merits of Fr. Lohkamp's admirable dissertation, which denies probability to the favorable solution, he does not appear to have met this one issue squarely;[48] nor can I find in Fr. Healy's earlier article[49] disproof of the opinion as actually proposed and defended by Fr. Kelly and Fr. Ford.

The perennial supposite upon which hysterectomy is allowed in the case just discussed is the judgment of a competent and conscientious physician that a given uterus cannot be repaired so as to bear another pregnancy. This, of course, is one of the essential differences between this procedure and the routine hysterectomy for contraceptive purposes after any predetermined number of cesarean sections. Fr. Connery has already called attention to a study which tends to destroy the alleged medical basis upon which the latter practice is founded.[50] Since then, the following comment on the same article has been made by Dr. N. J. Eastman, Professor of Obstetrics at Johns Hopkins Medical School and co-editor of the journal in which he writes:

> The main theme of the paper is that uteri containing four or more cesarean section scars are less likely to rupture in subsequent pregnancies than we have hitherto supposed. This thesis is convincingly supported by the following simple fact: Rupture through one of the old scars occurred in only two of these 130 cases or in only 1.5 per cent. To set a precise figure for the incidence of rupture in uteri which have been subjected to only one or two previous sections would be hazardous, but on the basis of recent reports the figure is probably not less than 1.0 per cent, in other words, not appreciably lower than the authors' figure for these uteri containing four to ten scars. This is a new and important fact to have established

[48] Nicholas Lohkamp, O.F.M., *The Morality of Hysterectomy Operations* (Washington: Catholic University, 1956) pp. 130–42.

[49] "Quaestio hodierna de mutilatione," *Analecta Gregoriana*, Series Facultatis Theologicae 68 (1954) 437–40. Cf. also E. F. Healy, S.J., *Medical Ethics* (Chicago: Loyola University, 1956) p. 174, note 3.

[50] THEOLOGICAL STUDIES 17 (Dec., 1956) 561. The article on which Fr. Connery commented was "Patients with Four or More Cesarean Sections," *Journal of the American Medical Association* 160 (March 24, 1956) 1005–10.

—a fact, it may be noted, which pretty well annihilates any real obstetrical basis for routine sterilization after the third section. Those of us who have followed this widespread policy may not like this revelation, but the important thing is to know the truth whether we like it or not. Only fools and dead men never change their minds.[51]

It is this sort of medical challenge, issued by authorities in their own profession, which very often makes more impression upon non-Catholic doctors than does any disquisition on natural law in its application to such procedures as direct sterilization and therapeutic abortion.

Are surgeons justified in allowing residents in surgical training to operate upon private patients without the knowledge and consent of those same patients? The question is an eminently practical one, as will be recognized by anyone who is acquainted with current practice in many of our teaching hospitals. Obviously, future surgeons simply cannot be trained adequately without actual surgical experience; just as obviously the number of service patients in our hospitals is rapidly decreasing in proportion to the growing popularity of medical insurance programs. The difficulty has been and is being solved in many instances by using the private patient for training purposes. Without the patient's knowledge, a resident is permitted to perform part, or even all, of the surgery required, while the surgeon whose services have been engaged attends in a supervisory capacity. Is such a practice morally permissible?

F. J. Connell, C.SS.R., decided in the affirmative;[52] my own answer was in the negative.[53] Fr. Connell and I are in full agreement as to the principles involved, viz., that all patients must be spared any unnecessary surgical risk, and that private patients are in justice entitled to that personal service which they reasonably require of the surgeon of their choice. We likewise agree that, in selected cases, no element of additional risk need necessarily be involved if a resident, known to be competent, substitutes for the qualified surgeon and operates under his supervision. We differ, however, on the legitimacy of presuming the willingness of the average patient to submit to such substitution even under those conditions.

Precisely there, in that presumption of fact, lies the crux of the problem. My own conviction is that the average patient at the present time is not

[51] *Obstetrical & Gynecological Survey* 11 (Aug., 1956) 521.

[52] "Delegated Surgical Procedures," *American Ecclesiastical Review* 135 (Sept., 1956) 198-199.

[53] "The Resident Surgeon and the Private Patient," *Linacre Quarterly* 23 (Nov., 1956) 117-22. My own manuscript was in the editor's hands before Fr. Connell's solution came to my attention and hence did not represent "an answer to Fr. Connell."

implicitly willing to pay a qualified surgeon's fee merely for supervisory services, and far less willing to undergo surgery at the hands of a man still in surgical training. (If the truth were known to patients, they would realize that surgery just as good, or even better, can be the result of this system, but that truth is not known to the vast majority of them.) This conviction appears to be borne out by the very great reluctance of most surgeons to suggest this arrangement to their patients, and also by such typical medical opinions as this:

> Few patients, if asked, would approve of delegating to assistants the performance of *any* part of a given operation, even provided the surgeons they employ participate actively during the essential part of the operation. . . . And one suspects that most ailing surgeons, coming to the operating table as patients, would concur with most lay patients in this view. If their wives or daughters were the patients concerned, there is no doubt where they would stand.[54]

Actually, some surgeons have been able to educate their patients to willing acceptance of residents in the operating room as active participants in surgery; but until that explicit consent is obtained, presumption of willingness is hazardous.

One further point on the same subject may be of interest. In the course of my article it was established that the American College of Surgeons condemns the practice under discussion. Since then my attention has been called to an additional pronouncement, formulated by the Conference Committee on Graduate Training in Surgery and subsequently approved by the American Board of Surgery, the Board of Regents of ACS, the American Medical Association, and the Joint Commission on the Accreditation of Hospitals:

> Since the informed consent of the patient is a moral and legal prerequisite to the performance of a surgical operation, every patient about to undergo surgical operation, or his legal guardian, should have full and complete knowledge of the identity of his surgeon. . . . Private patients can be used honorably and effectively for residency training only when the patient is fully aware of the extent of the resident's responsibility for his care, and is agreeable thereto. . . .[55]

[54] L. G. Phillips, M.D., "Resident Ghosts Exorcised," *Norfolk Medical News*, Aug.–Sept., 1955, p. 4.

[55] Quoted in *Massachusetts Physician*, Jan., 1957, p. 98. Although writing apparently in a context of socialized medicine, either actual or imminent, D. Quartier makes some very pertinent observations on the fundamental right of patients to their choice of physician. Cf. "De jure libere eligendi medicum," *Collationes Brugenses et Gandavenses* 2 (1956) 352–63.

A year ago this survey noted the growing respect with which the medical profession is regarding hypnosis, both as a tool in psychotherapy and as a form of anesthetic. That trend has not abated, and from J. Madden in Australia comes a timely survey of the medical and theological history of hypnotism, together with his own favorable view as to its lawfulness when selected cases are treated with proper precautions.[56] Msgr. Madden includes the question of hypnosis as an analgesic in the delivery room, and considers its use for that purpose as per se compatible with the Pope's 1956 allocution on painless childbirth.[57] In all likelihood moralists in general would readily agree with him.

J. Fearon, O.P., while treating more briefly the generic moral aspects of hypnosis,[58] introduces the question of its use by confessors and spiritual directors who might be competent hypnotists; e.g., "in treating penitents with guilt complexes, in reinforcing advice about relying on the power of God for depressed penitents who remain untouched by ordinary exhortation, in relieving 'compulsive' tendencies, and in reducing the impact of 'compulsive' ideas." By qualifying his affirmative answer to this question and insisting on the approval of ecclesiastical superiors and the absence of unfavorable publicity, Fr. Fearon would seem to be giving equivalently a negative answer for most practical purposes—as in my opinion it should be.

With the discovery of more and apparently better tranquillizing drugs, the question of lobotomy may yet become academic, both medically and morally. But R. O'Rahilly, M.D.,[59] calls attention to some valuable medical data in this regard in his review of P. M. Tow's *Personality Changes Following Frontal Leucotomy*.[60] Based on a series of psychological tests given thirty-six patients before and after lobotomy, the book attempts to evaluate the personality changes induced in the interim. Dr. O'Rahilly sums up the author's conclusions as follows:

> . . . the greatest changes were in tests which reflect a loss of predominantly cognitive functions, needing powers of logical thinking, reasoning, perception of re-

[56] "Morality of Medical Hypnosis," *Australasian Catholic Record* 33 (Oct., 1956) 338–47.

[57] *AAS* 48 (Feb. 25, 1956) 82–93. In the February 1957 allocution on the moral aspects of anesthesia (*Osservatore Romano*, Feb. 25–26), the Pope explicitly stated that hypnosis for legitimate medical purposes is subject to the same moral principles as is the use of other anesthetics. At the same time he warned that this approbation was not to be extended to the indiscriminate use of hypnotism, for example, as a form of entertainment.

[58] "Hypnosis and Moral Theology," *American Ecclesiastical Review* 135 (Nov., 1956) 309–12.

[59] "Frontal Leucotomy—A Recent Reappraisal," *Catholic Medical Quarterly* 9 (July, 1956) 74–76.

[60] Oxford University Press.

lations and planning. That is, the basic changes were intellectual and affective, and were not emotional only.... "There is a reduction in many functions: loss of none." It "seems that the prefrontal area subserves not a few specific abilities but rather the more discriminative or more highly developed aspects of them all."

SOME PRECEPTS

May Catholics cooperate actively in Moral Re-Armament? R. Bastian, S.J., and J. Hardon, S.J., after reviewing the development and teaching of MRA, answer unhesitatingly in the negative.[61] It is their conviction that this movement is, first of all, religious in nature, especially in its dependence upon private revelation; that even apart from its religious character, it threatens to engender contempt for legitimate authority, both ecclesiastical and civil; and that finally it fosters religious indifferentism. The authors quote in conclusion a 1951 decree of the Holy Office which declared it unfitting for priests, and much more so for nuns, to participate in MRA meetings, and likewise unfitting that the faithful should accept posts of responsibility in the movement, especially membership on the so-called policy team. The decree does provide for exceptional circumstances in which, with the permission of the Congregation, learned and experienced priests might be allowed to participate in MRA. The authors also note that the movement was forbidden the faithful of England and Wales in 1946, and condemned several years later by Cardinal Schuster of Milan as dangerous to Catholics and non-Catholics alike.

In view of such strong objections as those brought by Fr. Bastian and Fr. Hardon, it comes as a distinct surprise to find the Dean of the Faculty of Catholic Theology at the University of Bonn, Werner Schöllgen, recommending Catholic participation in MRA.[62] According to Fr. Schöllgen, the movement is neither a philosophical nor a dogmatic system, but a religio-ethical way of life of a purely practical nature. It merely awakens men to ethical and religious thinking and thereby serves as a bridge to a full Christianity under the guidance of established religions. Fr. Schöllgen is inclined to "take lightly and put aside with great optimism" the charge of religious indifferentism. And he sees no threat to orthodox faith in MRA's recourse to personal inspiration, since all inner revelations and decisions

[61] "An Evaluation of Moral Rearmament," *American Ecclesiastical Review* 135 (Oct., 1956) 217–26.

[62] My information as to Fr. Schöllgen's position on this question comes from a booklet, *The Basic Problem of Education in Morals*, printed in this country but distributed from Germany. This pamphlet represents one chapter from the author's *Aktuelle Moralprobleme* (Düsseldorf: Patmos Verlag). The translators are not identified. The Imprimatur, granted for the book in September, 1955, is that of the diocese of Cologne.

"should be tested . . . by the individual's own Christian convictions which he has from his Church . . . just as in the traditional Catholic teaching on 'discretio spirituum acquisita' subjective deceptions are to be disposed of by analogous means."

From the theological standpoint, Fr. Schöllgen's endorsement of MRA is less than convincing. He seems to dismiss rather summarily several serious objections commonly lodged against Catholic cooperation in this kind of movement; and this failure to deal directly with the dangerous aspects of MRA detracts considerably from his thesis that this is a desirable apostolate for Catholics. By contrast, the 8-point declaration of MRA policy, reportedly accepted by Bishop Charrière of Lausanne-Geneva-Fribourg, amounts to a bill of limitations on Catholic cooperation within that diocese.[63] This agreement was reached at a meeting *coram episcopo* between representatives from MRA headquarters at Caux and a group of theologians appointed by Bishop Charrière. Speaking only for his own jurisdiction, the Bishop expressed his belief that, within the limitations defined by the terms of this pact, cooperation between MRA and Catholics generally might be made workable. Typical of the restrictions to be observed are these:

[M.R.] will not attempt to take the place of the Church by giving religious instruction. On the contrary, it will continue to encourage all Catholics among its members to strengthen their ties with the Church and submit to its directives.

The Church does not want to see Catholics submitted to the jurisdiction of non-Catholics in spiritual matters. The Catholic "permanent members" of M.R. should therefore never be isolated individually, but organized as groups. Wherever there are Catholics, their instruction and training should be secured through priests who are responsible to the Bishop of Fribourg. M.R. will encourage such training and instruction.

Catholics should never be used for propaganda purposes in connection with missionary activities of M.R.

The only way to avoid difficulties for M.R. in Catholic countries is for M.R. not to undertake anything without the approval of the proper bishop.

A comparison of the positions assumed on this question by various theologians, several bishops, and the Holy Office respectively, leaves little doubt as to the complexity of the moral problem posed by MRA.

[63] The NC dispatch from Zurich on which I am depending carries the by-line of Placid Jordan, O.S.B., and was printed in the Brooklyn *Tablet* sometime after early October, 1956. Unfortunately, the clipping sent me contains no further clue as to the date of publication.

Professors of moral theology would be the last to question Fr. G. Kelly's contention that the didactic approach to the problem of mutilation, as presented in the standard manuals, could be improved with revision;[64] and his suggestion that we divide and conquer strikes me as a first point well taken. Fr. Kelly proposes an initial distinction between contraceptive and non-contraceptive mutilation. The former, a species of direct sterilization, he isolates into a class by itself, preferably to be treated independently, since "the principles governing direct sterilization . . . have an absoluteness that does not apply to other mutilations." All other procedures affecting bodily integrity, including those which indirectly result in sterility, are classified as non-contraceptive mutilations, either major or minor. From this point Fr. Kelly proceeds to review the various principles and positive rules which govern non-contraceptive mutilation, and to apply them to those particular problems which are of more frequent occurrence in practice.

It is with regard to Fr. Kelly's initial distinction that I would proffer a suggestion, in acceptance of his invitation to contribute to this discussion. Some theologians have expressed regret that in the terminology of certain other moralists direct mutilation has been made synonymous with illicit mutilation. For it would seem more consonant with truth, and with the *modus loquendi* of Pius XII, to admit with Fr. Kelly that legitimate "mutilations as they commonly occur in medical practice (e.g., in surgery . . .) are evidently intended, both *ex fine operis* and *ex fine operantis*,"[65] and that recourse to double effect is not required except when a given procedure indirectly affects the generative function. My suggestion, therefore, is an effort to restrict the distinction "direct-indirect" as much as possible to sterilization, and to disassociate it from other forms of mutilation. For that reason I would propose an initial distinction between mutilation which affects the generative function and that which does not. Let the first category then be referred to as sterilization, and the necessary subdistinction of direct and indirect be applied. Most other mutilations could thereafter be treated without the encumbrance and possible confusion of reference to the principle of double effect. Under either "system" the question of sterilizing procedures presents a pedagogical problem of sorts, since contraceptive sterilization entails the additional malice of onanism, which is more properly treated in another tract. But that difficulty is not nearly as formidable as is the confusion so often engendered by current text-book presentation of mutilation.

The complicated issue of thermonuclear warfare certainly ranks as one of

[64] Gerald Kelly, S.J., "The Morality of Mutilation: Towards a Revision of the Treatise," THEOLOGICAL STUDIES 17 (Sept., 1956) 322–44.

[65] *Ibid.*, p. 329.

the most vexatious dilemmas which the modern era has brought to the moralist's doorstep. It may be the pessimist speaking, but sometimes it appears that the problem not only defies solution but actually grows more intractable with every attempt to subdue it. P. Zamayón, O.F.M.Cap., tilts valiantly with the question and concludes that no nation, even in self-defense, could make use of bombs whose extensive or intensive force is unlimited and uncontrollable.[66] Into this category he places the "C-bomb," which he distinguishes from the atom and hydrogen bombs;[67] and his ultimate decision appears to be based on the impossibility of assigning proportionate cause for even permitting destruction of such magnitude.

This last point is likewise one of several which J. C. Ford, S.J., insists upon in submitting his opinion that the H-bombing of cities is not permissible.[68] But he has recourse to this argument only after denying that the destruction of innocent life in these circumstances either would or could qualify as an indirect voluntary:

> It is my contention that the civil and military leaders who would plan and execute the dropping of a series of high megaton H-bombs on an area like Moscow or New York: (1) *would not* in practice avoid the direct intention of violence to the innocent; (2) *could not* avoid such an intention even if they would; and (3) even if they would and could avoid it, would have no *proportionate justifying* reason for permitting the evils which this type of all-out nuclear warfare would let loose.

As far as the speculative problem is concerned, it is Fr. Ford's second and third points which demand first consideration. Is it, first of all, psychologically possible to employ so devastating a weapon without directly intending the enormous loss of innocent life which admittedly would result if a typical industrial area should be H-bombed? It is no cure for insomnia to ponder Fr. Ford's contention that "there comes a point where the immediate evil effect of a given action is so overwhelmingly large in its physical extent, in its mere bulk, by comparison with the immediate good effect, that it no longer makes sense to say that it is merely incidental, not directly intended, but reluctantly permitted."

There are at least two considerations which in present context tend to distract one from a purely rational analysis of that limitation to be placed on

[66] "Moralidad de la guerra en nuestros dias y en lo porvenir," *Salmanticensis* 2 (1955) 42–79. This article is translated in digest form in *Theology Digest* 5 (Winter, 1957) 2–5.

[67] The exact nature of Fr. Zamayón's C-bomb is not clear from his description. He speaks of it as an H-bomb with a covering of highly radioactive cobalt, but claims that it differs from the H-bomb because it is an "open" bomb, i.e., one whose power can be increased indefinitely.

[68] "The Hydrogen Bombing of Cities," *Theology Digest* 5 (Winter, 1957) 6–9.

the indirect voluntary. On the one hand, one cannot prescind entirely—as one should at this point of discussion—from the realization that our obliteration bombing and our use of the A-bomb in World War II de facto included direct intent against innocent life as a means to ending the war. There is also the ugly conviction that the same intention would probably prevail if nuclear warfare should ever be declared in the future. Hence there is an instinctive reluctance among moralists to justify nuclear warfare upon a condition which will not be observed.

On the other hand, on the speculative supposition that this expressly direct intention is excluded, it is hard to be dispassionate while imagining the price which an innocent nation might have to pay if, threatened with a nuclear war of aggression, she were to limit herself to weapons of less devastating power than those employed by the enemy. Her alternative of precision bombing as a defense measure is considered by J. Connery, S.J., and found wanting:

> . . . if my enemy were in possession of nuclear bombs which I had good reason to believe he would use, it would be suicidal for me to choose the more leisurely precision bombing. His possession of such weapons would never justify a direct attack on his civilian population but it would give me the sufficient reason to knock out his war potential as quickly and as effectively as possible, even with a tremendous loss of civilian life. The only alternative to a quick and fatal blow at his war machine would be the destruction of my own population—which is certainly a sufficient reason for allowing the incidental, though perhaps staggering, losses to the enemy.[69]

It seems to me that Fr. Ford could and would admit this degree of proportion between good and evil effect and yet still be justified in doubting that the evil effect could be only indirectly intended. Furthermore, he would still subsume that "the alleged justifying cause is speculative, future, and problematical, while the evil effect is definite, enormous, certain, and immediate." More surely would he seem justified in maintaining that this kind of warfare "would mean the practical abandonment of any distinction between innocent non-combatants and guilty aggressors," and that "we would be adopting, in practice at least, the immorality of total war." Although my own position at this point is distressingly analogous to that of Buridan's hapless beast, there remains at least the satisfaction of citing these two articles of Fr. Ford and Fr. Connery as highly representative of their respective schools of thought.

[69] "Morality of Nuclear Armament," *Theology Digest* 5 (Winter, 1957) 9–12. These articles by Fr. Connery and Fr. Ford were both adapted from papers used in a discussion of the subject at John Carroll University in June, 1956.

Perhaps a partial solution to the nuclear war dilemma is contained in a most thoughtful and thought-provoking article by Thomas E. Murray of the Atomic Energy Commission.[70] It is Mr. Murray's conviction that, if we are to save ourselves from retrogression into barbarism, while at the same time providing for our security, we must choose a middle course of "rational nuclear armament." His 3-point proposal includes (1) a decision to place an upper limit to the size of H-bombs, which already, he maintains, are large enough and perhaps too large; (2) concentration on the development of smaller nuclear weapons, which, he insists, are adequate to the military necessities of the times; and (3) discontinuation of tests with weapons whose magnitude exceeds the upper limit to be determined, and acceleration of a testing program for smaller weapons. Throughout Mr. Murray's article the appeal to a nation's moral responsibility is predominant and, what is equally heartening, his suggestions provide what appears to be a positive and practical approach to a solution of the nuclear dilemma.

Warfare was again a topic of discussion by Pius XII in his annual Christmas message last December.[71] According to some of our earliest news dispatches, the Pope in the course of that address "ruled out conscientious objection" for Catholics. The text which prompted that conclusion reads as follows:

> If, therefore, a body representative of the people and a government—both having been chosen by free elections—in a moment of extreme danger decide, by legitimate instruments of internal and external policy, on defensive precautions, and carry out the plans which they consider necessary, they do not act immorally. Therefore a Catholic citizen cannot invoke his own conscience in order to refuse to serve and fulfill those duties the law imposes.

Do these words assert either expressly or by implication that conscientious objection to military service would never be justified according to Catholic doctrine?

Catholic theology has always defended the possibility of just warfare, provided that certain conditions are verified. In the paragraph immediately preceding the words quoted above, Pius had summarized that teaching. Our theology has likewise insisted always on the duty of individual citizens to comply with a legitimate government's just demands in the prosecution of such warfare. Hence it follows that, if a war is entirely just, no Catholic

[70] "Morality and Security—The Forgotten Equation," *America* 96 (Dec. 1, 1956) 258–62.

[71] *AAS* 49 (Jan. 25, 1957) 5–22. A French translation of this radio address will be found in *Documentation catholique* 54 (Jan. 6, 1957) 5–22; for the English text, cf. *The Pope Speaks* 3 (Spring, 1957).

eligible for service can in truth invoke any teaching of his Church as forbidding him to participate as a combatant. Not only is he permitted but he is per se obliged to comply with just laws of conscription. Furthermore, it is the teaching of theologians that, until the contrary be evident, presumption favors the justice of war as declared by lawful authority, and that seldom in practice would an individual be justified in deciding for himself that a particular war is so clearly unjust as to preclude active participation in it. It is in this sense that the Pope rules out conscientious objection for Catholics.

But certainly the Pope did not intend to ratify a priori the justice of any conceivable war in the future. There still remains the possibility that some government or other could declare a war which would be so patently unjust that its citizens not only legitimately could but in conscience should refuse to participate. If *per absurdum* this country, for instance, were to undertake the subjugation of the Bahamas in order to secure better beach facilities for U.S. citizens, it would be ridiculous to maintain that a Catholic draftee could not register conscientious objection.

There is also a further possibility. Being a Catholic is no guarantee against either ignorance or rash stubbornness. It could happen that a Catholic be grossly in ignorance or error regarding the Church's position on warfare; it could also happen that, despite proper instruction, he would refuse to abandon his own convictions and still maintain, sincerely but erroneously, that warfare is seriously sinful. Say what we may about his sinful rebellion against the magisterium, we still must conjure with his certain but erroneous conscience. And would we not be forced to conclude that a government would be bound in these circumstances to respect such a conscience?

From mandatory battle-dress to elective nudism is a labored transition, and furthermore it is not every day that a priest would be required to persuade a penitent to resign from a nudist colony. But the case is not as impractical as it may sound, and "Em. G's" treatment of it is well worth the reading.[72] His rather lengthy discussion is divided into two parts: the first considers in turn the alleged advantages to be derived from social nudism; the second is a model essay on the virtue of modesty. The entire article is conspicuous for its common-sense application of sound moral principles.

Advocates of communal nudism attempt to vindicate the practice on the grounds that it conduces to better physical health and, by freeing its devotees from sexual obsessions created by prudery, engenders a more wholesome outlook on sex. Both as a philosophy and as a practical mode of existence, these pretensions certainly merit the criticisms which Fr. G. levels against

[72] "Réflexions morales sur le nudisme," *L'Ami du clergé* 66 (Aug, 9, 1956) 517–19.

them. The strongest objection, of course, is the psychological fact that promiscuous nudism creates infinitely more sexual problems than it solves. Human susceptibility to sexual stimuli is due not to the fact that we wear clothes in public, but rather to the concupiscence we inherited along with our fallen nature. So small is the number of individuals who in our civilization could mingle habitually in the nude and truthfully disclaim all sexual motivation and sexual stimulation that, if such exist, they merit the dubious distinction of being termed abnormal. In common sense, therefore, we have to admit that for all but the rarest and most phenomenal individuals, membership in a nudist colony would be forbidden, because it would constitute a proximate occasion of serious sin both for self and for others.

The fact remains, however, that nudism is not intrinsically wrong in the absolute sense, but rather because of the very serious moral dangers which it all but unavoidably entails. Must one deny absolution to a penitent who might refuse to withdraw from a private nudist club on the allegation, made in sincere good faith, that for himself and for this select group of associates of both sexes nudity is utterly devoid of sexual connotation? From so precocious a Titius or Bertha, *libera nos, Domine!*

In a valuable bit of positive theology, J. Fuchs, S.J., examines the teaching of St. Thomas in order to determine what principles of his sexual ethics may be properly invoked when discussing the intrinsic morality of *amplexus reservatus*.[73] Aquinas himself did not treat the question as such. But modern authors, especially those who predicate intrinsic malice of *amplexus reservatus*, have not uncommonly appealed to his more generic doctrine in support of their thesis. It is Fr. Fuchs's purpose to test the validity of these arguments from extrinsic authority.

The author reduces to three the Thomistic principles on sexual morality which have been applied to this *amplexus*. The first looks to the *finis operis* of the sex function and asserts that "omnis usus genitalium membrorum qui non est proportionatus generationi prolis et debitae eius educationi, est secundum se inordinatus." Merely by inserting the appropriate minor premise, some have deduced that Thomas implicitly condemned *amplexus reservatus*. But Fr. Fuchs notes that whenever this principle or its equivalent occurs in the writings of St. Thomas, the author is speaking exclusively of *actus perfecti*. Since *amplexus reservatus* is by definition an imperfect or incomplete act, it cannot be included among those practices to which Aquinas intended his principle to apply.

Examination of the second principle, predicated by St. Thomas of in-

[73] "'Amplexus reservatus' secundum principia ethicae sexualis S. Thomae," *Periodica* 45 (Sept. 15, 1956) 284–302.

complete sexual acts, reveals that he himself employed it exclusively in relation to such acts as performed by the unmarried. Hence the malice which Thomas imputes to "consensus in delectationem actus peccaminosi [perfecti]" cannot on his authority be ascribed to incomplete acts in which husband and wife might indulge.

As for the final principle which judges as venially sinful the conjugal act which is performed from the sole motive of pleasure, Fr. Fuchs again notes that St. Thomas himself applies it explicitly only to *actus perfecti*. He is, however, inclined to concede that Aquinas would have defended this disputed doctrine even as applied to incomplete conjugal acts. It is Fr. Fuchs's final conclusion that these principles are not so clearly defined in Thomas' own writings that one could derive from them a teaching on *amplexus reservatus* which would certainly represent the mind of Aquinas.

SACRAMENTS

To readers of the *Irish Ecclesiastical Record* the signature "J. McCarthy" long since became a warranty of theological excellence. Over a period of some fifteen years that name has been regularly inscribed under discussions consistently conspicuous for the keenest discernment, prudent judgment, and unfailing courtesy. Now as Canon McCarthy, the former Professor of Moral Theology and Canon Law at Maynooth has published many of these answers in two volumes, *Problems in Theology*.[74] The first, dealing with the sacraments, is the only one which I have yet been able to obtain, though it is my impression that the second, which treats the precepts, is also already in publication. Moralists everywhere will agree that it was a happy inspiration which prompted this anthology of McCarthyana.

May a priest baptize a child born of Catholic parents who are living in an invalid marriage? In his answer to this question, Romaeus O'Brien, O. Carm.,[75] makes initial reference to canon 750 and apparently interprets it as requiring moral certitude as to the future Catholic education of the child to be baptized. He then applies this rule to the two possible cases encompassed by the question—a marriage which admits of validation and one which does not. In the first case, refusal of the parents to rectify their marital status is, ac-

[74] Dublin: Browne and Nolan, 1956. Another similar and equally valuable publication is W. Conway's *Problems in Canon Law* (Dublin: Browne and Nolan, 1956). This volume, too, is a selection of answers originally published in the *Irish Ecclesiastical Record* during the period 1943–56. Those familiar with Fr. Conway's writings will need no assurance of their unvarying excellence.

[75] "Baptism of Offspring from an Invalid Marriage," *American Ecclesiastical Review* 135 (Nov., 1956) 345–46.

cording to Fr. O'Brien, equivalent to denial of intention to rear the child a Catholic and hence, one would infer, is a canonical obstacle to baptizing it. In the second case, he repeats the stipulation of moral certitude of the child's being educated a Catholic, but judges that this is rather easily verified when at least one parent makes sincere promise to that effect.

It would seem that Fr. O'Brien's solution is more severe than it should be. Commentators rather frequently remark that there is no explicit canonical prohibition against baptizing the children of fallen-away Catholics who do not qualify under canon 751.[76] Canon 750 treats exclusively of the children of infidels, and the following canon applies the same rules *generatim* to the children of heretics, schismatics, and apostates. It is left to the discretion of theologians to adapt these prescriptions *mutatis mutandis* to the progeny of other non-practicing Catholics. Authors quite commonly conclude that baptism is permissible in these cases provided that there is genuine probability—as contrasted with moral certainty—that these children will be properly trained as Catholics. The right of Catholic parents to secure baptism for their child is one which prevails until it is evident that the child, not the parents, will be lost to the faith.

Two questions of a parallel nature are discussed by James Madden. The first concerns the lawfulness of admitting to First Communion children who, following the example of their negligent parents, rarely or never attend Sunday Mass.[77] Msgr. Madden begins his reply by noting that reception of First Communion is a public act of religion and that refusing it to a child is a serious matter. After reviewing canons 854–58, which specify those individuals to whom Holy Communion is to be refused, he finds no circumstance in the case as proposed which would justify denial of First Communion to these children if they desire to receive it. Especially because of home environment, it can be seriously doubted that their past neglect of Sunday Mass constituted subjective mortal sin; and it is their present disposition, under proper instruction, that should determine their eligibility for this sacrament. The Monsignor agrees that First Communion may have to be delayed somewhat for want of sufficient knowledge on the part of such candidates, but he vigorously opposes delay as a punishment for past defections. He also shrewdly adds the reminder that it is the children, not the parents, who are being prepared for First Communion.

The second case inquires about the advisability of excluding from the

[76] Cf. THEOLOGICAL STUDIES 10 (March, 1949) 102; 14 (March, 1953) 69.

[77] "First Communion of Children of Careless Parents," *Australasian Catholic Record* 33 (July, 1956) 253–56.

parochial school the children of parents who seldom fulfil their obligation of attendance at Sunday Mass.[78] The principle invoked in the query is that of preserving sacred things from desecration, and Msgr. Madden exhibits remarkable restraint in exposing the *non sequitur*. Although his concluding observations in their literalness pertain to the school question, they admit of ready adaption to the moral and pastoral theology of the sacraments:

> Admission to a Catholic school is not a reward for parental virtue; it is a helpful and sometimes necessary means to train the children to know and love God. Children of good Catholics would most likely follow their parents' instruction and example, without the aid of any school. It is with the children from careless homes that the Catholic school has an opportunity of exercising the apostolate.
>
> . . . the exclusion of children from the benefits of Catholic education because of the shortcomings of their parents is a penalty which the children have not deserved—they have committed no crime. As baptized Catholics, they have a right, *ceteris paribus*, to be treated the same as other children of the parish, and the pastor who would exclude them, merely because their parents do not attend Mass regularly, would act beyond the sphere of his competency.

Can Catholics still be inculpably ignorant of the malice of birth control? If that is possible, may a confessor ever leave his penitent's good faith undisturbed? And if so, what conditions would justify that procedure? J. Sanders, S.J., answers this series of troublesome questions with notable thoroughness and competence.[79] He considers it quite unlikely that the average Catholic nowadays could in sincerity think that contraception is permissible, although he concedes the possibility—especially for the poorly educated in India where he writes—that some may fail to recognize as onanistic certain practices which actually qualify as such. Granting then a modicum of inculpable ignorance, especially in this latter regard, Fr. Sanders proceeds to review and to reconcile five pronouncements of the Holy See as to the proper manner of treating such penitents: the four well-known *responsa* of the Sacred Penitentiary and the Congregation of the Inquisition, and the better known excerpt from *Casti connubii*. Of this last admonition Fr. Sanders states:

> I do not think that Pius XI wanted to decide in these words anything about the permissibility itself of leaving certain onanist penitents in their good faith; nor

[78] "Children of Careless Catholics," *Australasian Catholic Record* 33 (Oct., 1956) 347–49.

[79] *Clergy Monthly* 20 (July, 1956) 217–26. In the same issue (pp. 202–10) another article by Fr. Sanders, "Family Planning in India and Catholics," treats first of the prevalence of propagandized birth control in India and secondly of the pastoral means to combat its spread among Catholics.

does he say anything about the frequency of these exceptions. But he stresses the gravity of a guilty silence; he strongly condemns those confessors who safeguard good faith in such penitents when they should speak clearly, and he accuses them of betraying their sacred trust—a most grievous failure in a minister of God's sacraments.

Finally, in his application of the general principle which should govern any decision to leave a penitent in good faith, Fr. Sanders lays strong emphasis on the dangers involved in this particular matter—dangers both to the spiritual welfare of the individual penitent and to the common spiritual good. At least as far as the people of India are concerned, he judges that "rather rarely" will a confessor encounter the exceptional case in which a legitimate solution can be achieved by leaving a penitent in ignorance of the malice of a contraceptive practice.

Once beyond the stage of primary principles, universal negatives are usually treacherous as pastoral rules. For that reason especially, Fr. Sanders' refusal to universalize on this question would seem to be most wise. But if we transfer this problem to the American scene, I would be inclined to state even more strongly the rarity of instances in which onanism in good faith either could be verified or, if verified, could be allowed to continue. Certainly very few, if any, practicing Catholics in the United States can allege inculpable ignorance of the Church's position on contraception; and the vast majority of married people would at very least have a doubtful conscience concerning any practicable method of birth control. Intractable stubbornness or desperation or weakness may account for onanism among American Catholics, but placid good faith would very seldom pass the test. And even if very exceptional cases of onanists in good faith are encountered in the confessional, the dangers of leaving them in ignorance are no less formidable than Fr. Sanders represents them. All things considered, I would be inclined to "scarcely ever" as an answer to the question of leaving the onanist in good faith.

It is five years since the Code Commission issued its response confirming the applicability of canon 209 to the case of a priest who assists at a marriage without delegation.[80] In the course of that time canonists and moralists doubtlessly have indulged in no small amount of speculation as to the practical possibilities of verifying common error as envisioned in this response. L. Hofmann maintains that such situations need not be at all rare.[81]

Fr. Hofmann first has recourse to the very common opinion which defines

[80] *AAS* 44 (1952) 497.

[81] "Die Anerkennung des Error communis (c. 209 C.I.C.) in der heutigen Lehre und Rechtsprechung," *Trierer theologische Zeitschrift* 65 (1956) 266–81.

the common error of canon 209 in terms of *error de jure communis*. He then invokes the consensus of many commentators that the presence of a priest in a "public" confessional suffices as a circumstance per se apt to induce common error with regard to confessional faculties. In similar fashion, Fr. Hofmann contends, common error is also verified whenever a priest without delegation presents himself, ostensibly as official witness to a marriage, in a place where marriages are customarily held. To the objection that such an interpretation would effectively destroy the requirements of canon 1094–96, he replies (1) that this argument is no more cogent for the marriage case than it is for the confessional case; and (2) that the purpose of canons 1094–96, viz., the prevention of clandestine marriages, is in no way thwarted by his interpretation and application of *error communis*.

It is highly doubtful that Fr. Hofmann's thesis will appeal to theologians generally. Their first objection will surely be that Rotal practice is inconsistent with such an interpretation. Even before 1952 the Rota was already acting on the principle that canon 209 admitted of application to marriage cases in which a priest lacked proper delegation. One such case, decided in 1949, involved no less than an Apostolic Nuncio without matrimonial portfolio.[82] There it was ruled that common ignorance and not common error had obtained, and that consequently the Church had not supplied the Nuncio's lack of proper delegation. And as late as 1956, in another case which would certainly qualify under Fr. Hofmann's application of common error and which was pleaded on grounds of defective form, the Rota again ruled "constat de matrimonii nullitate."[83] Whether or not there is merit in Fr. Hofmann's assertion that his interpretation of common error can be applied without prejudice to canons 1094–96, the total lack of precedent in favor of such an interpretation is the strongest argument against it.[84]

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[82] *Ephemerides iuris canonici* 7 (1951) 364–65. In the fourth (1950) edition of Vlaming's *Praelectiones iuris matrimonii*, Fr. Bender, after stressing the importance of proper delegation for marriages, inserts this footnote (p. 417): "Annis elapsis in quodam loco plura matrimonia sunt declarata nulla ex defectu formae, quia celebrata coram Nuntio Apostolico, qui ipse curam de delegatione a parocho danda aliis, qui eum invitabant, reliquit, cum parochi putabant, Nuntium Apostolicum non indigere delegatione."

[83] *Monitor ecclesiasticus* 81 (1956) 416–37.

[84] For a discussion of canon 209 in its application to three cases involving respectively confirmation, marriage, and dismissal from a religious institute, cf. R. Bidagor, S.J., "Casus cum canone 209 C.I.C. connexa seu de jurisdictione ab Ecclesia suppleta," *Periodica* 45 (Sept. 15, 1956) 257–83.