

CURRENT THEOLOGY

NOTES ON MORAL THEOLOGY, 1946

It is often said that the manuals of moral theology do not treat the "burning" questions of the day. To some extent this is true—and necessarily so, for these problems usually need a thorough thrashing out, verbal and printed, before really helpful conclusions can be summarized for use in the manuals. A survey of recent periodical literature (mostly 1946) shows that sincere and progressive discussion of the new problems is being carried on. In the present notes, I indicate some of these discussions and dwell rather lengthily on certain points that seem to be of special interest to moralists. The notes are not a complete coverage of recent moral theology.

Medicine is an ever-fertile field for moral problems. For instance, there is the vexing question of organic transplantation. Two years ago, Father Bert J. Cunningham, C.M., published his thesis to the effect that, with certain reservations, operations involving the transplantation of organs or of sections thereof are *per se* licit.¹ The reservations are that the operations must involve neither serious risk of life nor complete sterility for the donor.

Father Cunningham's basic arguments are the natural and supernatural unity of mankind and the law of fraternal charity. A principle that runs through his thesis is that "we may do for the neighbor that which we may do for ourselves, provided the circumstances are the same." His subsidiary arguments are drawn by *a fortiori* and *a pari* methods from the already established teachings of theologians. He reasons, for example, that since we are permitted, and even at times obliged, to expose our lives to certain danger, we ought *a fortiori* to be allowed the lesser sacrifice of a single member. And if theologians will permit blood transfusions and skin-grafting (both of which are included in Father Cunningham's definition of mutilation), why should they not *a pari* permit more serious sacrifices for proportionately graver reasons?

Within the past year, Father J. McCarthy subjected Father Cunningham's work to a lengthy critical analysis.² Father McCarthy's general reaction to the thesis is very favorable: "We confess that we are greatly attracted to Father Cunningham's conclusion—with its reservations." But there are difficulties, both in the arguments leading to the conclusion

¹ *The Morality of Organic Transplantation* (Washington: Catholic University of America Press, 1944); cf. pp. 100-104 for explanation of conclusion and reservations.

² "The Morality of Organic Transplantation," *Irish Ecclesiastical Record*, LXVII (March, 1946), 192-98.

and in the reservations; and Father McCarthy does not hesitate to indicate them. For example, must theologians admit an argument *a fortiori* from *indirect* suicide to *direct* mutilation? Or is an argument *a pari* from blood transfusions and skin-grafting valid against theologians who do not hold such things to be real mutilations and therefore would not admit the application of the principle that "magis aut minus non mutat speciem"?

In citing these difficulties, Father McCarthy does not clearly commit himself on the argument *a pari*; but he seems definitely to be on Father Cunningham's side with regard to the argument drawn from indirect suicide. He thinks that theologians are hardly justified in condemning transplantation by insisting on a parallel between *direct* suicide and *direct* mutilation and by arguing that, since direct suicide is not permitted for the good of the neighbor, direct mutilation is also unlawful for the same purpose. "But the parallel is far from perfect, because direct suicide is never lawful, whereas direct mutilation is regarded as lawful by all when it is necessary to conserve the whole body."

With regard to Father Cunningham's forceful arguments drawn from the unity of the human race and the law of charity, Father McCarthy warily observes: "But if these arguments are valid, where is one to draw the line in making sacrifices in this matter for the neighbour? Is there any logical reason why we should stop short of killing ourselves directly—if even there—provided the good of the neighbour requires it?" And in a footnote he adds: "Would these arguments, of themselves, logically demonstrate the liceity of voluntary euthanasia—say in the case of one dying from a highly contagious disease in circumstances where contact is unavoidable?"

Finally, in the reservations to the main conclusion—reservations which he himself favors—Father McCarthy finds certain difficulties. He wonders if, in keeping with the principle that one may do for one's neighbor what one may do for oneself, these reservations are logical. May not a man submit to a very dangerous operation for his own good? If so, why not for the neighbor, if this principle be really valid? As for the reservation concerning direct sterilization, Father McCarthy comments:

Yet if a directly sterilizing operation—say the removal of tubercular testicles or a double vasectomy—is necessary to save one's own life or health, it may lawfully be undergone. Here again we ask: what has become of the principle—dear to Father Cunningham—that one may lawfully do on behalf of the neighbour whatever one may do for oneself?

I shall return to this observation later in these notes. At present I am citing Father McCarthy's words merely to show that, though he agrees

with Father Cunningham that the exceptions must be made, yet he fears that the very necessity of making them renders the principle suspect.

Undoubtedly the most serious objection against Father Cunningham's thesis is not drawn from any theological manual but from these strong words of *Casti Connubii*:

Furthermore, Christian doctrine establishes, and the light of human reason makes it most clear, that private individuals have no other power over the members of their bodies than that which pertains to their natural ends; and they are not free to destroy or mutilate their members, or in any other way render themselves unfit for their natural functions, except when no other provision can be made for the good of the whole body.³

Father Cunningham cites these words in the early part of his dissertation, but in the actual defense of his thesis he does not refer to them. Father McCarthy was shrewd enough to notice this lapse, but his comment on the subject is rather weak: "How, for instance, can the conclusion be aligned with the statement from the Encyclical *Casti Connubii*, quoted earlier? Is it Father Cunningham's solution that, in the phrase 'for the good of the whole body,' the 'body' means the social, as well as the individual, body?" That is all the eminent Irish theologian has to say on this most serious objection. He then goes on to give his own conclusion, which is worth quoting here:

If we are asked regarding the liceity of a donor sacrificing the sight of one eye to provide a healthy cornea for a neighbour, we reply, with Father Cunningham, that we think that the sacrifice can be justified, provided there is a proportionate compensating cause. Which brings us to the point that, in our opinion, Father Cunningham has not sufficiently considered this element of proportionate cause in estimating the morality of organic transplants. If we may introduce here terminology, dear to us, we would say that direct mutilation is lawful, provided the subordination (the sacrifice of one entity to another) is due and provided there is a compensating cause. There is obviously due subordination when a limb is sacrificed for the necessity of the body. A part is sacrificed for the good of the whole. And one may, within limits, duly subordinate his own good to that of his neighbour—as is illustrated, for instance, by the liceity of giving blood for a transfusion. The order of charity (of goods and needs) helps to decide when subordination is due. But even when subordination is due, there must also be a proportionate compensating cause. The good must outweigh the evil. Good and evil are to be estimated in the social, as well as in the individual spheres, in the moral as well as in the physical spheres—and the degree of probability of the good and evil must also be taken into account. Thus the necessity of verifying this

³ AAS, XXII (1930), 565; cf. America Press edition, pp. 21-22.

compensating cause may help to explain the exceptions which Father Cunningham found himself forced to make.

What are we to make of all this? Obviously it would be unwise either to accept or to reject Father Cunningham's thesis without careful consideration of the pros and cons. Such consideration will hardly be given unless the subject is openly discussed. For the purpose of furthering such discussion, and not with any pretense of passing final judgment on the issues involved, I am including here my own views on the subject.

For myself, I think I could readily accept Father Cunningham's thesis as solidly probable, if it were not for the words of the encyclical. He seems to have a reasonable, if not convincing, point in his argument from indirect suicide; and though the argument from blood transfusions and skin-grafting is not valid against those theologians who do not consider these as real mutilations, yet one may wonder if their definitions are entirely satisfactory.⁴ His principle of charity no doubt needs further elucidation, and perhaps qualification, to protect it from abuse; but it clearly gives no foundation for Father McCarthy's fears concerning direct suicide, for it is limited by the phrase, "whatever one may do for oneself." Father Cunningham makes his first reservation because he considers that a direct mutilation which would very likely cause a man's death would be equivalently direct suicide. Granted this meaning, the reservation is not illogical, although the estimate itself may be questioned. And in making his second reservation he is but saying what many theologians think they must say, namely, that not everything said about the general lawfulness of direct mutilation may be applied without qualification to the mutilation of the generative organs.

The words of the encyclical are the real stumbling block to Father Cunningham's thesis. The Pope explicitly says that man's direct right over his members is limited to their natural purposes, and he apparently considers that the only natural purpose is to promote the good of the individual's own body. To interpret "body" as the "social body" borders on the fantastic. One must show that transplantation is in some way in keeping with the natural end of the member. Perhaps Father Cunningham implicitly does this in his arguments on the unity of the human race; but

⁴ I realize, of course, that there is a great difference between a blood transfusion and a permanent injury to the body. Yet is "permanence" a specific quality of a mutilation? Some theologians have justified rather serious "lacerations" for the sake of virtue; and though these lacerations may not have hampered any function, they were certainly the cause of permanent disfigurement. In general, theological treatises on mutilation are not wanting in obscurity.

"implicit" is not enough. The thesis must be explicitly harmonized with the encyclical. Father McCarthy's conclusion is vitiated by the same defect. How can he speak of "due subordination" of one's members to another when the very words of the encyclical he has just cited apparently rule out such subordination?

Is it possible to interpret the encyclical reasonably, yet in such a way as to permit organic transplantation? I hope so; for I believe that Father McCarthy is expressing a rather general reaction when he says that he is greatly attracted by Father Cunningham's thesis. I have often wondered if we might solve the problem along the following lines.

The Pope was not treating professedly of mutilation as such. He was speaking of eugenic sterilization; and, after declaring that the public authority has no power over the members of innocent citizens, he added that the individual himself has only limited rights in this matter. In outlining the individual's rights he crystallized in one brief paragraph what might be called the existing theology on the subject of self-mutilation. At that time theologians commonly recognized only one natural purpose of organs, namely, to serve the person who possesses them. But suppose that theologians today, after having carefully considered the facts concerning organic transplantation, would conclude that, since an organ or section thereof can function vitally in another body, this may also be called a natural (though secondary) purpose of such organs or sections. In this supposition, would theologians be justified in extending the principle enunciated by Pius XI in such a way as to include these secondary purposes?

If such an extended meaning is permissible, Father Cunningham's thesis can be harmonized with the encyclical; for if only a section of an organ, or only one of a pair of organs, is transplanted, this transplanted part fulfills a secondary natural purpose (helping the neighbor) without defeating the primary purpose (the good of one's own body). And Father Cunningham's reservations seem called for, too; for, if the donation involves risk of life or the entire suppression of a function, a secondary purpose is attained by a positive frustration of the primary purpose.

The foregoing is but a hesitant suggestion, a sort of "thinking out loud." Perhaps it, too (like the interpretation of "body" as meaning "social body"), is fantastic; or perhaps it is but repeating in different words what has already been said by Fathers Cunningham and McCarthy. At any rate, since they were kind enough to attempt a solution to the problem, I thought I would add my bit to the cause. I can now take my place beside them and wait for the firing squad.

Reference was made earlier in these notes to the decree of the Holy

Office concerning direct sterilization. This decree (dated February 24, 1940) stated that direct sterilization, whether temporary or perpetual, whether of man or of woman, is forbidden by the natural law.⁵ It is interesting to note that soon after the publication of the decree two of the most authoritative ecclesiastical periodicals gave widely different interpretations. According to *Periodica*, the decree refers to all direct sterilization, except punitive;⁶ according to *Jus Pontificium*, the decree does not condemn direct sterilization when this is necessary for saving one's life or for avoiding some serious disease.⁷

Apparently Father McCarthy follows the interpretation given by *Jus Pontificium*.⁸ Father Charles J. McFadden, O.S.A., seems to interpret the decree in the same manner.⁹ Merkelbach also held that direct sterilization is permissible when required for the good of the whole body.¹⁰ It is true that Merkelbach's work *De Sterilizatione* was published a few years before the decree; but I doubt if this changes the case; it is not likely that the decree was aimed at the teaching of any really great and respected theologian, as Merkelbach certainly was.

I might mention here, by way of digression, that the lengthy—and unsigned—commentary in *Periodica* contains many points of unusual interest. For instance, the commentator limits the meaning of the decree to what he calls *sterilizatio presse dicta*, which deprives man of his generative power, while at the same time leaving the sex glands (testicles, ovaries) intact. Therefore, he says, the decree does not include castration. And he conjectures that punitive sterilization is also outside the scope of the decree. His argument for this latter point is that with regard to eugenic sterilization the decree of 1940 referred to a previous decree of 1931, and this decree in turn referred to the *Casti Connubii*, and in the encyclical the Pope had indicated that he did not wish to solve the problem of punitive sterilization. The conclusion is that neither does the Holy Office wish to solve the problem in 1940.

To resume: perhaps the commentators are using different expressions to say essentially the same thing. I believe they are. Prescinding from the question of punitive sterilization, I believe that the thing condemned

⁵ AAS, XXXII (1940), 73.

⁶ *Periodica*, XXIX (1940), 149b-49h; the text of the decree and the commentary were added to this number as an appendix.

⁷ *Jus Pontificium*, XX, 156-57.

⁸ Cf. Father McCarthy's words previously quoted on p. 98.

⁹ *Medical Ethics for Nurses* (Philadelphia: F. A. Davis Co., 1946), p. 250.

¹⁰ *Quaestiones de Embryologia et de Sterilizatione* (Liège, 1937), p. 70.

by the Holy Office as direct sterilization is any operation or treatment which is directly contraceptive—or, to use an equivalent expression, any operation or treatment which is aimed primarily and directly at suppressing the generative function, as such. The test, therefore, of a direct sterilization (in the sense of the decree) should be this: does this operation or treatment produce its good effect (if any) precisely by suppressing the generative function? For example, the cutting of healthy tubes in a woman who has a heart condition that might prove fatal in childbirth does help to save her life, but it produces this good effect precisely by rendering conception impossible. On the other hand, when ovaries are treated with X-rays or excised in order to arrest the growth of cancer, this good effect is clearly produced not by rendering conception impossible, but precisely by suppressing the endocrine function.

It is usually easy to apply this test for a direct (contraceptive) sterilization, but not always. For instance, consider a problem previously discussed in this review by Father Ford: "The question has also been raised whether it would be licit to excise a uterus which is in such a weakened or abnormal state due to previous injuries in childbirth, that another pregnancy will certainly result in grave danger to the mother's life."¹¹

Father Ford considered this a contraceptive procedure and would include it under the condemnation of 1940. It is true that the actual danger to the woman's life will not arise unless she becomes pregnant; but the basic cause of the danger is already present and is in the generative system itself. The uterus is so damaged as to be useless for its prime function, gestation; and if she attempts to employ it in this function it is highly dangerous. If she has it removed, she is not defeating its natural end, because it can no longer attain this end. The operation seems to me to be essentially the removal of a seriously pathological organ. If someone insists on saying that it is a suppression of the generative faculty, then I should reply: it is not the suppression of this faculty, as such; it is, at the most, the suppression of the generative faculty *qua infecta*. It is true that the procreative function exists for the species, not for the individual; but this function does not operate in a vacuum. It is carried on by means of organs. If the organs are so damaged that they will not function safely, whence arises the obligation of retaining them?

In stating my view I am not suggesting that the uterus may be excised after some definite number of cesareans. The view rests on the supposition that competent medical men judge that this particular uterus is in the damaged condition explained above. As a matter of fact, eminent obste-

¹¹ THEOLOGICAL STUDIES, III (1942), 592-93; V (1944), 516-17.

tricians tell me that this is rarely the case;¹² but, if it should be the case, I am not convinced that the excision of the uterus is direct sterilization as condemned by the decree.

A medical question which undoubtedly has a special pertinence to our day concerns the use of a drug to get a person to talk freely. Father Francis J. Connell, C.S.S.R., clearly outlines the principles to be applied.¹³ When the use of this drug is for the alleviation of mental illness (narcotherapy), it is permissible in the same sense, and to the same extent, as hypnotism. On the other hand, the use of the drug to force a confession from a suspected criminal is morally wrong: first, because it is equivalently the use of violence; and secondly, because the information gleaned from such revelations could not be considered sufficiently reliable for a condemnation. It might well be the revelation of a crime existing entirely in the mind of the drugged suspect.

The practice of periodic continence as a means of family limitation presents no new moral problem, but it is certainly a subject rich in possibilities for discussion. In reviewing the sixth edition of Doctor Latz's book, Father J. McCarthy answers several moral and pastoral questions on the subject.¹⁴ These are mostly the ordinary questions (justifying reasons, advisability of disseminating knowledge, and so forth), and they need no further mention here. But it may be of some interest to record Father McCarthy's view of Father Griese's thesis¹⁵ that the practice of periodic continence according to the "safe period" method is *per se illicitum*, *per accidens licitum*:

This thesis is theoretically the inverse of the commonly accepted view. We would not accept the thesis. We do not know what precisely the author means by *per se illicitum*. We do not see how or in what there is any deordination *in the act of intercourse itself*, that is, in the object of the act—even though it is performed only during the sterile period. The absence of such deordination in the act itself

¹² The verbal opinions of these obstetricians are strongly confirmed by Alexander Hunter Schmitt, M.D., F.A.C.S., "Comparative Safety in Five or More Repeated Cesarean Sections," *Linacre Quarterly*, XIII (1945), 16-18. Doctor Schmitt gives sound reasons for doubting the fear that the uterus will rupture in a subsequent pregnancy. That is why I insist, in presenting my view, that the supposition be true. For an interesting exposition of an opinion somewhat like mine, see P. F. Dissez, S.S., "The Morality of the 'Porro-Operation,'" *Ecclesiastical Review*, V (1891), 342-51.

¹³ "The Morality of Narcotherapy," *Ecclesiastical Review*, CXIII (1945), 448.

¹⁴ "The Use of the 'Safe Period,'" *Irish Ecclesiastical Record*, LXVII (1946), 259-63.

¹⁵ O. Griese, *The 'Rhythm' in Marriage and Christian Morality* (Westminster, Md.: The Newman Bookshop, 1944); first published as a Catholic University dissertation (1942) under the title, *The Morality of Periodic Continence*.

(which surely is the normal meaning of *per se*) is the fundamental argument for the common view. Any deordination that is present in the concrete—and we grant that there may be, easily and often, a deordination—arises *per accidens*, comes from some factor extrinsic to the act itself, like the motive or the circumstances. It is quite true that in the concrete case, the restriction of the use of marriage to the sterile period—like total abstention from its use—will be good or bad according to the motive that inspires it, according as there is or is not in the circumstances a sufficiently justifying cause. So that in practice Dr. Griesse's thesis would lead to the same general conclusions as the common view. The exclusive use of the 'safe period' without a justifying cause will often be only venially sinful. But such use can be gravely sinful, for instance, if there is not mutual consent to the restriction or if there is serious danger of incontinence for the parties during the periods of abstinence.

This is a clear statement of what is at least the more common moral appraisal of the "safe period" method of birth control. According to this view, if husband and wife are both willing and able to confine intercourse to the sterile period, their lack of a sufficient reason for doing so would constitute only a venial sin. Granted the conditions, a more severe opinion may not be urged in practice. However, while adhering to this view as the practical norm for obligation, we may very profitably indulge in further speculation concerning the practice of periodic continence, particularly with reference to the ends of marriage.

It seems to me that Father Griesse points his thesis in the wrong direction. He emphasizes the primary end of marriage; and it is very difficult, if not impossible, to establish any *direct* obligation to try to attain the primary end of marriage. The secondary ends of marriage, on the other hand, are more tangible, refer to the concrete lives of the spouses, and can be better estimated in terms of obligation. And, after all, is it not God's plan that the primary end of marriage be attained through the secondary ends? If all married people do their full duty with regard to the secondary ends, the primary end will be amply provided for. Ordinarily, if they observe all the laws of conjugal chastity and all the duties of mutual help and love, children will be born and properly cared for. This follows from the natural subordination of the secondary to the primary ends.

In his dissertation, Father Griesse has abundant material to show that *ex ordinariis contingentibus* the attempt to limit intercourse to the "safe period" constitutes a serious danger to, if not a direct attack on, the secondary ends of marriage. Only exceptional couples can take up the practice of the "rhythm-theory" without exposing their married lives to grave dangers; and even these couples usually need the special grace of God. If this is true, and I believe it is, then the *per se illicitum*, *per*

accidens licitum is also true—though not, it seems, in the sense in which he explains it.

Discussion of the safe period leads us, perhaps by contrast, to consider the morality of artificial fecundation. During the past year a goodly amount of ink has been devoted to this topic. I have before me three excellent articles written respectively by Father Francis Hürth, S.J., of the Gregorian University;¹⁶ Père Tesson, of the Catholic Institute of Paris;¹⁷ and Father J. McCarthy.¹⁸ Father Hürth mentions three other articles that have appeared in German reviews; and the entire issue of the periodical containing Père Tesson's essay is concerned with various aspects of artificial insemination. It will do no harm to contribute another dash of ink to the cause.

Following sound moral principles, Catholic theologians universally condemn any kind of fecundation, natural or artificial, of a woman by any man other than her own husband. On the other hand, when there is question of husband and wife, they usually allow what they call artificial insemination in a wide sense. By this expression they refer to cases in which the spouses have natural intercourse, and the doctor (for example, by using a syringe) helps the semen to reach the uterus. Father Hürth dissents from the common view; he considers that such medical interference is not just an aid to intercourse, but truly artificial insemination, because it is a substitute for a natural process.

Artificial insemination in the strict sense is a substitute for intercourse. Various means have been suggested or actually employed; and most of them have been rejected as morally unsound. (I am speaking now of artificial fecundation between husband and wife.) No theologian today would approve of masturbation or interrupted coitus for this purpose; and rare indeed is the theologian who would not include condomistic intercourse in the same condemnation. Father Salsmans once allowed this last-mentioned means (intercourse with a condom) as a last resort, because he

¹⁶ F. Hürth, S.J., "La fécondation artificielle: Sa valeur morale et juridique," *Nouvelle Revue Théologique*, LXVIII (1946), 402-26.

¹⁷ R. P. Tesson, "L'Insémination artificielle et la loi morale," *Cahiers Laënnec*, June, 1946, pp. 24-43. This little magazine is, according to the editors, the only review on medical ethics in the French language. It is published quarterly; but it seems that each number is devoted entirely to one medico-moral problem and thus constitutes an independent brochure.

¹⁸ "The Morality of Artificial Fecundation," *Irish Ecclesiastical Record*, LXVII (1946), 328-33. See also LXVIII (1946), 345-46, where Father McCarthy mentions with approval that he and Father Hürth had agreed on substantials. Father McCarthy had evidently met with some opposition, for he says he had been accused of being unduly rigorous.

was not convinced that the mere use of a condom, without contraceptive intent, is intrinsically evil.¹⁹ He later withdrew this opinion; but the context indicates that he was still unconvinced.²⁰ Père Tesson cites Canon Tiberghien, professor of medical ethics at Lille, as favoring the original Salsmans' opinion. The Canon believes that condomistic intercourse, with medical transmission of the seminal fluids to the uterus immediately afterwards, may be said to preserve the essential ends of the marriage act: it is a complete self-giving act of love, and it is actually directed towards procreation.²¹ Père Tesson, who personally holds the opposite view, is sufficiently impressed by the Canon's position to conclude that he will not brand this method as certainly against the moral law unless some further pronouncement of the Holy See condemns it.

The principal point of controversy among theologians concerns the morality of artificial insemination when the husband's germ cells are obtained by some means that does not involve the use of the sex faculty—for example, by extracting semen directly from the epididymis or by massaging the seminal vesicles. Doctors consider such methods as quite unsatisfactory, if not entirely useless; but theological discussion of the issues is fruitful because it helps to clarify the principles that must be applied to these and to other more satisfactory non-stimulating methods that might be discovered.

The moralists seem to be rather evenly divided in their opinions of this particular aspect of artificial fecundation. Upon consulting thirteen standard works several years ago, I found that six pronounced it unlawful, and seven looked upon it as at least probably licit.²² Père Tesson mentions it as permissible, but as almost worthless from the medical point of view. Father Hürth condemns it, along with all other forms of artificial insemination. Almost the whole of Father McCarthy's article is concerned with this one aspect of the question. He concedes the intrinsic and extrinsic

¹⁹ Genicot-Salsmans, *Casus Conscientiae* (ed. 4^a, 1922), #1125.

²⁰ Cf. same case, in 7th edition (1938). ²¹ Cf. Tesson, *art. cit.*, pp. 37-39.

²² Cf. "The Morality of Artificial Fecundation." *Ecclesiastical Review*, CI (1939), 109-18. In this article I tried to give a complete presentation of all opinions discussed by theologians up to that time. I consulted more than thirty theological works, but only thirteen dealt with this particular aspect of artificial insemination. Those authors who would consider it illicit, and who would therefore agree with Fathers McCarthy and Hürth, are Sabetti-Barrett, Cappello, Marc-Gestermann-Rauss, DeSmet, Merkelbach, and Ubach. Those who permit it in practice as at least probably licit are Genicot-Salsmans, Iorio, Noldin-Schmitt, Payen, Piscetta-Gennaro, Vermeersch, and Wouters. Perhaps Father McCarthy would really agree with these latter authors *in practice*, for, as I mentioned, he admits the intrinsic and extrinsic probability.

probability of the opinion allowing it, but he personally champions the opposing view.

It is impossible to give here more than a sketchy outline of Father Hürth's position. Man, he says, has only the *right of use* over all that makes up his ego, and this use is limited by the natural finality of the faculties and parts. With this premise, he makes an analysis of the internal structure of the entire psychosomatic sexual mechanism, and concludes that the use of the semen itself, as well as of the sex faculty, is limited to coitus. He thus rejects all artificial methods of obtaining semen; they make a mockery of the entire complicated sex mechanism. For the same reason he rules out any right to receive the semen except through the natural object of the marriage contract, namely, coitus.

These are his biological and ethical arguments. He finds these confirmed in theology; for *Casti Connubii*, treating lengthily of marriage rights, did not mention artificial insemination; St. Paul spoke of the *debitum* as the basic marriage right; and the Holy Office condemned artificial fecundation, without qualification as to methods.²³

Father McCarthy also argues from the nature of the marriage contract, which, he says, contains all the specifically conjugal rights and obligations. Artificial insemination is outside the sphere of this contract; therefore the spouses have no right to it. He appears to agree with Father Hürth that the decree of the Holy Office included all forms of artificial insemination in the strict sense. (Father Hürth goes further, it seems, and includes even the so-called "aids" in the condemnation; for he considers these to be genuine artificial fecundation.) The silence of *Casti Connubii* is likewise pointed out by Father McCarthy.

These arguments, and others that I have not mentioned,²⁴ clearly show

²³ ASS, XXIX (1897), 704.

²⁴ Since a number of Father McCarthy's particular arguments were occasioned by my defence of the Vermeersch opinion, I think I should mention them here, with some brief comment.

He says: (1) Since I consider artificial insemination to be a lawful generative act, I should logically allow venereal pleasure to be taken in it; (2) in holding this position I am going against the traditional notion of the relationship between impotence and sterility; for impotence traditionally includes sterility; (3) it is strange that husband and wife would place a lawful generative act, yet not consummate their marriage; (4) a condition to use only artificial means of procreation would invalidate a marriage; (5) it is dangerous to draw a parallel between the sex appetite and the appetite for food and drink; and (6) he wonders if I would agree with Iorio, who allows artificial insemination to take place when the spouses have had only imperfect copula, i.e., *seminatio ad os vaginae*. (Father McCarthy thinks that this comes close to permitting artificial fecundation, *prae-habita pollutione*.)

why the opposing opinion is only probable; but they do not detract from its solid probability. The arguments, I believe, contain certain implications that are not valid. For instance, even in the supposition that all theologians admitted the lawfulness of artificial insemination under certain circumstances, is it reasonable to assume that Pius XI would have mentioned this in the encyclical? And if they insist on arguing from the Pope's silence, might not their adversaries argue *a pari* that it is not an abuse of marriage because the Pope did not mention it among the abuses? Again, when they speak of the decree of the Holy Office, are they not suggesting that theologians have no right to interpret a decree in the light of the circumstances in which it is given? Yet is not this a recognized practice of theologians? Finally, is there not an assumption in this defence of the negative position that *all* the rights of married people are contained in their marriage contract? Yet, if an individual may resort to artificial means of self-preservation even in cases where he is not obliged to do so, why may not the spouses, by mutual consent, go beyond their contract, and use an

I would briefly note concerning these points: (1) In the type of artificial insemination that I have defended as probably licit, the semen is obtained without stimulating venereal processes; hence there just is no venereal pleasure. Nor is there venereal pleasure attached to fertilization, as such; yet fertilization is certainly a generative act. In other words, nature has not attached venereal pleasure to all generative activity, but only to certain functional processes. Since these functional processes are not used in the method I defend, I fail to see why I should logically allow venereal pleasure. (2) I am not sure that the traditional notion of impotence necessarily includes sterility—for example, does relative impotence always include sterility? Yet even if it does, I see no reason why such a notion could not be progressively modified. (3 and 4) I have already conceded that artificial means of procreation do not pertain to the marriage contract, and procreation by such means could not reasonably be called a consummation of the contract. What I do not admit, until proved, is that spouses may not go beyond the contract. These objections simply show that only coitus pertains to the contract. (5) This objection is not *ad rem*. I made no comparison between appetites; my comparison was between the *right* to preserve life by artificial means and the *right* to procreate artificially.

As for (6), I would call attention to the fact that Iorio is here speaking of artificial fecundation *improprie dicta* (cf. Iorio, III, 1306, 2°, and 1304, 2°; ed. 6°, 1939). Even Father McCarthy, with most authors, allows medical "aid" to natural intercourse. The precise difference between him and Iorio would be that Iorio holds that the *seminatio ad os vaginae* may be considered as true, though imperfect, coitus, whereas Father McCarthy does not. There seems to be no particular reason for drawing me into this dispute. However, I welcome the opportunity of saying that speculatively I agree with Father McCarthy; I think that *seminatio ad os vaginae* is not true coitus, but an unnatural act. On the other hand, since the opinion allowing it to married people who can effect no more perfect union seems to be extrinsically probable, I believe Iorio is justified in allowing its use for artificial fecundation, *improprie dicta*. This opinion has no bearing on the type of artificial insemination we are discussing in the text.

artificial means of procreation, provided this means is not evil? It seems to me that the burden of proof rests with those who deny the right, and that they have not yet proved their point.

However, Fathers McCarthy and Hürth also consider the means unlawful, even if the semen is obtained by direct extraction from the epididymis. According to Father McCarthy, this is a "disordered process," because, as he states in a footnote, "it cannot be described as 'actio de se tendens ad generationem.'" According to Father Hürth, it makes a mockery of the whole sex mechanism. Their objections seem reducible to this formula: what is artificial is unnatural. *Quod est probandum!* The objections, it seems to me, fail to distinguish between what is *contra naturam* and what is merely *praeter naturam*. I wonder if Father Hürth thinks that intravenous feeding renders the alimentary mechanism absurd! His method of reasoning points that way.

Before I move on to other problems, I should like to say a final word about Father Hürth's extremely interesting article. It is by no means limited to the moral aspects of artificial insemination. In the last section ("The Juridical Aspect") he examines almost every conceivable problem: whether the paternity would be real; whether children would be legitimate; whether fecundation by violence would be rape; whether marriage would be consummated; and whether a girl would thus lose her virginity and be excluded from entering a convent requiring virginity as an indispensable condition.

Passing from the medico-moral field to other moral problems, I might mention two questions pertinent to civil legislation discussed by Father Connell. As matters of speculation, these are not new problems; but from the point of view of practical procedure they are very live issues.

Speaking of the income tax report, Father Connell says that a priest should be very exact in making this report, "since, according to the better view, it involves an obligation which binds in justice—at least legal justice."²⁵ I would certainly agree with Father Connell that a priest should be exact in this report; but I admit frankly that my reason would be based mainly on the serious harm that would come to the Church if the government discovered he was not exact. Father Connell either implies that there is an obligation to follow this "better opinion" or he suggests that it should be followed as a counsel. Regarding the obligation, the priest might well reply that he does not feel obliged to follow a more probable opinion as long as the other opinion is solidly probable. And can we say that the penal

²⁵ "A Question of Income Tax," *Ecclesiastical Review*, CXV (1946), 223-24.

law theory is not solidly probable?²⁶ Frankly, I wish we could; for I do not like it. But I do not consider myself justified in ignoring it when calculating practical obligations. Discussion of this matter with reference to concrete situations would be very helpful, it seems to me.

As for the counsel, if a priest were convinced he had no obligation in conscience to give money to the government, I doubt if he could be persuaded to do so as a matter of counsel. He might object (and very prudently, too) that he knows of much more profitable ways of disposing of his money than giving it to the government.

Another aspect of civil legislation was treated by Father Connell in answering the question, "What is to be said of the ruling of our military authorities that American soldiers in Germany are not allowed to marry German girls?"²⁷ Father Connell condemns this legislation unequivocally because "it is certainly unreasonable to forbid a man to marry simply because the girl of his choice happens to belong to another race or nation, even though her country has recently been at war with us."

If this legislation is based on anti-German prejudice (and Father Connell has very likely checked the fact and found it to be such), it is clearly unjust. But, at least for the purpose of leading to the point I wish to discuss, I can conceive of another reason for the legislation—for example, as a disciplinary measure to protect the soldiers from the hasty entering of regrettable unions.

Even if the legislation were directed against actually existing dangers,

²⁶ Cf. Martin T. Crowe, C.S.S.R., *The Moral Obligation of Paying Just Taxes* (Washington: Catholic University of America Press, 1944). After examining the penal law theory, the author rejects it as having little probability, intrinsic or extrinsic (pp. 104-13). Father Crowe's arguments are not sufficient to give me peace of mind in teaching the contrary opinion as certain. I have often wondered if Father Connell himself is satisfied that the penal law theory is bereft of solid probability. Note the way he speaks here, "the better opinion." And in his recently published book, *Morals in Politics and Professions* (Westminster, Md.: The Newman Bookshop, 1946), after saying that civil laws do bind in conscience, he adds: "It is true, some Catholic theologians believe that nowadays many (if not all) civil laws are merely penal—that is, not intended to bind in conscience but obliging the citizens only to the payment of the penalty if they are convicted of violation. However, the better view, which is more in accord with Catholic tradition, presents civil laws as binding under pain of sin—at least laws directed toward the safeguarding of morality and the common good" (pp. 16-17). I get the impression from all this (perhaps without foundation) that Father Connell feels about the same concerning tax laws as I do: namely, he would like to say that the penal law theory has no solid probability, even extrinsic, but he is not sure he is justified in saying so. Moreover, even if the penal law theory is absolutely rejected, there is still the headache of determining whether certain reductions are licit on the score that taxes are too heavy, or partly unjust, and so forth.

²⁷ "Civil Prohibition of Marriage," *Ecclesiastical Review*, CXIV (1946), 382-83.

Father Connell would say that only the Church has the power to make such laws for the baptized. This principle—of the Church's exclusive right to legislate for the baptized on all aspects of marriage except purely civil effects—is indisputable; but the practical application of it in a country like ours creates a puzzle that is not solved merely by reiterating the principle.

Certainly some restrictions on the right to marry are good. I am not referring to impediments of divine law, but to restrictions that might be made by human law. In the Church we have such impediments as crime, age, affinity, and certain degrees of consanguinity, that are of ecclesiastical origin. And it is possible that the Church might see fit to establish more impediments—although the tendency seems to be in the direction of fewer rather than more. If such restrictions are good for the baptized, they are equally good for the unbaptized. But who is to legislate for the unbaptized? Civil legislators, of course. But how are they to word their legislation? Is it reasonable to expect our legislators to frame their laws in such a way as to exempt the baptized?

It seems to me, therefore, that as long as we have no concordat with the Holy See, our legislators can hardly be expected to qualify their laws in accordance with Catholic teaching; nor can we expect them to refrain from legislation, if they judge it to be for the common good. If their legislation adds impediments to those already existing by divine and ecclesiastical law, the Church herself can officially decide whether to incorporate them into her own law, as she does in the matter of legal adoption.

The mention of race prejudice reminds me of a number of articles dealing with moral aspects of racial discrimination, especially with reference to the Negro. For example, Father John E. Coogan, S.J., makes a searching analysis of segregation as practiced by Catholics and brands it as unjust, impious, and scandalous: unjust, because it robs the Negro of his self-respect—a grand-scale insult; impious, because it gives the lie to sacred principles; and scandalous, because of the vast spiritual harm it causes the Negroes, by impeding the conversion of non-Catholic Negroes and by turning away the Catholics.²⁸

Zealots for the Negro cause are apt to argue: "If the Negro is excluded from the 'white' church in his vicinity, he is thereby excused from the obligation of hearing Mass on Sunday; and if he is excluded from the 'white' Catholic school, he is not obliged to give his children a Catholic education." Father Connell answers this emotional objection with admirable calm.²⁹

²⁸ "Christian Untouchables?", *Review for Religious*, V (1946), 107-13. See the same author's article, "Segregate the Black Christ?" in *The Priest*, Oct., 1946, pp. 28-33.

²⁹ "Rights of the Catholic Negro," *Ecclesiastical Review*, CXIV (1946), 459-62.

The fact that the Negro is unjustly excluded from the near-by church, says Father Connell, does not of itself excuse him from hearing Mass. That question must be solved on the basis of the difficulty of getting to another church. The same principle applies to the matter of Catholic education; even if the Negro's children are unjustly excluded from certain Catholic schools, he is still bound, to the best of his ability, to provide a Catholic education for his children.

Nevertheless, this discrimination in church and school cannot fail to have a harmful effect on the Negro's spirit and on his Catholicity. And this is especially so when he is excluded from, or treated as an unwelcome guest in Catholic institutions in which non-Catholics are welcomed. As Father Coogan points out:

The right religion seems less important than the right race. It is useless to tell the Negro that across town somewhere there is a Catholic church for his kind; that miles away there is a school to which he can send his children. Miles away, across railroad tracks and through traffic; miles away, out from St. Luke's parish they may go, past St. Thomas', past St. Mark's, past St. Ignatius' and St. Mary's, to find refuge at last in St. Peter Claver's or St. Benedict the Moor's.⁸⁰

These questions naturally lead to the further question: just what are the parochial rights of the Negro, with regard to church and school? "Any Catholic living within the boundaries of a parish of his rite is entitled to regard the local parish church as his church and to receive the normal pastoral services from the priests of that church." This is true, says Father Connell, even if there is a church of one's own nationality in the vicinity; and he observes, furthermore—and this is worthy of note—that the general law of the Church does not provide for separate churches along merely racial lines. There are special reasons, principally that of language, that justify national parishes; these reasons do not apply to racial differences within the same national group.

The Negro also has equal rights to attend the parochial school. Father Connell concedes, however, that special local conditions may justify ecclesiastical authorities in establishing separate schools for white and colored pupils; but this should be looked upon as a merely temporary measure, a toleration of evil, and priests should work towards abolishing it. Father Coogan also insists on the duty of breaking down all necessity of segregation. I feel like italicizing this point. In private discussions on this so-called Negro problem, many of my Jesuit colleagues have impressed upon me the fact that, even though a moral theologian may be forced at times to admit the existence of an excusing cause for not immediately stopping some practice

⁸⁰ *Review for Religious*, V (1946), 108.

of segregation, he must also point out the duty of *doing what can be done* to remedy the situation. Failure to protest against the evil or to try to change it looks very much like approval of it.

At a mass-meeting sponsored by the Catholic Interracial Council of Detroit, Bishop Francis J. Haas clearly showed one thing that Catholics can do about the segregation evil.³¹ They can, he said, keep it out of their own individual lives. As one case in which this individual effort can and should be applied he cited the industrial world and he encouraged individual workers to treat Negroes with the same fairness they would show towards white men. Although Bishop Haas did not use the technical phrase, he was really insisting that individuals live up to their obligation of showing to Negroes the *communio signa dilectionis*.

Almost twenty years have elapsed since Father Francis J. Gilligan, of the St. Paul Seminary, published a thoughtful and thought-provoking article in which he showed that the relationship of white to colored in the almost innumerable contacts of daily life should be governed by the moral principle concerning the *communio signa dilectionis*.³² White people are morally obliged to show to Negroes these *common* signs of love and courtesy. For example, a Negro fellow-worker must be treated as other fellow-workers; a Negro fellow-student is entitled to the same courtesies normally extended to other students; and so forth. (I believe the same principle applies to such things as public buying and selling and to public services offered by institutions.)

To refuse these common signs without good reason (and moralists are slow to recognize good reasons, even in the case of an enemy) is a sin against charity because it is an exclusion from the common bond of love and equivalently a sign of hatred. I think we may safely add that, in the concrete situation existing in our country, the exclusion of the Negro from these common signs is harmful to the common good and a sign of contempt.

The principle, of course, works both ways; it applies equally to the Negro in his dealings with white people. But the abuse is largely on the white side, and it is mainly with white Catholics that we must insist on the principle. If this principle were rigorously observed in the daily lives of individuals it would considerably diminish, if it did not entirely remove, the large-scale social problem.

From bruised hearts to bruised (!) pocketbooks is not such a long jump if we consider the pocketbook in terms of sin. And in the sphere of the pocketbook there is the ever-ancient, ever-new problem of estimating the absolutely grave sum for theft. Following the norm carefully worked out

³¹ "Catholics and Race Equality," *The Catholic Mind*, XLIV (1946), 748-56.

³² "The Color Line Considered Morally," *Ecclesiastical Review*, LXXXI (1929), 482-91.

by Arendt ("the weekly wage of the unskilled worker of the more favored kind"), Canon Mahoney recently placed the absolute sum in England at £4, and he was promptly attacked by a group of priests who thought it should be closer to £7.³³ Perhaps Canon Mahoney's estimate was too low for England—we can hardly judge of that; but it seems that Father Joseph Donovan's conjecture of at least one hundred dollars is shooting too high even for the United States.³⁴

Father Donovan's estimate contains a dash of information concerning the changed cost of living; then he adds significantly: "*If a month's pay or a laboring man is taken as a gauge of the absolute*, then surely it is hard to see how less than a hundred dollars could be absolutely grave, with the chances of a higher amount being probably so." The italics are mine. The clause made me wonder if Father Donovan was not thinking of Arendt's norm of *one week's pay*.³⁵

Since my "deadline" is rapidly approaching, I will bring this very inadequate survey to a close with some brief comments on an article of considerable practical import in our country. We have long needed an expert moral appraisal of the Legion of Decency classifications; and Father Francis J. Connell, C.S.S.R., is to be thanked for a carefully-planned and, on the whole, very successful attempt to make such an appraisal.³⁶

I believe that most, if not all, moralists would heartily agree with Father Connell on such points as these: that everyone is bound in conscience to assure himself of the lawfulness of attending a picture before going to see it; that everyone may safely attend A1 pictures,³⁷ unless in some exceptional

³³ Cf. *The Clergy Review*, XXVI (1946), 429-30; 559.

³⁴ *The Homiletic and Pastoral Review*, XLVI (1946), 964.

³⁵ In the text of this paragraph I have quoted Canon Mahoney's statement of the norm determined by Arendt, "the weekly wage of the unskilled worker of the more favored kind." It is doubtful if this English rendition accurately expresses Arendt's conclusion, at least in the United States; for when we think of an unskilled worker we usually think of a laboring man. Arendt was referring rather to "unskilled workers" in contradistinction to professional men or skilled technicians, and so forth. He would, therefore, rather have in mind our "white-collar" workers who get a better than average salary—at least, so it seems to me and to others with whom I have discussed the matter. It could also include small store owners. Even so, it seems that Father Donovan is aiming a bit high. Cf. Jos. Arendt, S.J., "La matière absolument grave dans le vol," *Nouvelle Revue Théologique*, LIII (Feb., 1926), 123-32.

³⁶ "How Should Priests Direct People Regarding the Movies?", *Ecclesiastical Review*, CXIV (1946), 241-53.

³⁷ For the benefit of readers in foreign countries, it may be well to interpret the classifications referred to in the text. A1 means unobjectionable for general patronage; A2, unobjectionable for adults; B, objectionable in part, either by reason of theme, or by reason of sensuous scenes; and C, condemned without qualification.

cases experience would alter this presumption, that attendance at C movies is forbidden under pain of serious sin; that children should not ordinarily be allowed to attend A2 pictures; and that as a general rule children should not be allowed to go to movies oftener than once a week.

The first of these points is but the expression of a general moral principle—the necessity of having a certain conscience before acting. There might be some disagreement with Father Connell concerning the method of attaining this assurance before attending a B picture; but there can be no disagreement as to the fact that a certain conscience must be had.

The estimate of A1 pictures needs no comment. (The author does not evaluate A2 pictures, with respect to adults; but I suppose he would in practice put them on the same plane as A1 pictures, with perhaps some slight qualification to the effect that adults who might be troubled by such pictures could not as readily be considered hypersensitive as those who find even A1 pictures a source of temptation.) In the article he does not say why he considers it seriously wrong to attend C movies; but in a later reference to these pictures he explains that “pictures in this category are gravely dangerous to practically all persons.”³⁸ This seems to be a correct estimate of such movies; for, if one may judge from the reviews and the advertising, they generally tend to accentuate the obscene. They are, therefore, common proximate occasions of serious sin; and even if some individuals can attend them without grave personal danger, their attendance would be ruled out on the score of scandal.

In my opinion, the most valuable part of the article is the section concerning children. Father Connell admits that the distinction between adults and children must be based on maturity, not on mere physical age; yet he makes the prudent approximation that boys and girls under sixteen must normally be considered children. For these, the A2 picture is likely to be dangerous by arousing temptation or undue curiosity; and frequent attendance at movies will do them physical and mental harm. This is but a sketch of material that should be very helpful to those who must direct children or help others to do so.

It is easy to appraise attendance at B pictures in terms of sound Christian asceticism;³⁹ but in terms of sheer obligation this is undoubtedly the most

³⁸ *Ecclesiastical Review*, CXV (1946), 461.

³⁹ It is sound asceticism (and sound psychology, too) to avoid all really unnecessary sources of physical sex stimulation. This rule certainly applies to movies with objectionable scenes, no matter what conclusion is reached concerning the obligation of avoiding such pictures. In the text we are discussing merely the question of obligation, particularly the degree of obligation.

baffling of all the classifications. Father Connell's factual rating of these pictures, especially those objectionable because of sensuous scenes, is very severe. According to him, they must be presumed to be a proximate occasion of serious sin to a notable proportion of average people. An individual, therefore, cannot readily conclude that he can attend such pictures without grave danger; he must have strong assurance to offset the presumption. And since the pictures are highly dangerous to so many, a good Catholic layman and, above all, a priest, could easily give serious scandal by attending such pictures publicly.

I am no expert on B pictures; but from my experience with lay adults who see these pictures I should conclude that it is rather rare that the objectionable scenes (these are the pictures that Father Connell seems to think most dangerous) create a serious temptation for them. Other priests have told me that their experience confirms mine. Hence, though I think that Father Connell's conclusions follow logically from his estimate of B pictures, I should want to have greater assurance of the facts before accepting the conclusions without some mitigation.

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NOTES ON CANON LAW

CONFIRMATION

Although the sacrament of confirmation is not required as a means necessary for salvation (canon 787), the Church has always urged her children to receive it, in order to benefit by the gifts of the Holy Ghost which it imparts, and to receive the character of a soldier of Christ.

The Council of Trent has defined that a bishop alone is the ordinary minister of confirmation (canon 782, §1); hence the Holy See has always provided that the administration of this sacrament be reserved as far as possible to the bishop as a right and an office which is proper to him. However, when the need and welfare of the faithful demanded it, the Holy See has not hesitated to substitute a simple priest as the extraordinary minister of confirmation. This faculty to confirm is given by the law itself in certain cases—to cardinals, (canon 239, §1, n. 23) without limitation as to territory, to prelates and abbots *nullius*, to vicars and prefects apostolic, who may use the faculty only within the limits of their territory and for the duration of their office (canon 782, §3). In all other cases a priest needs a special indult of the Holy See to administer the sacrament of confirmation. Such indults have been granted from time to time, for instance, to the bishops of Latin America (April 30, 1929; *AAS*, XXI, 554). However, as late as 1935, the Holy See refused to extend the privilege to European bishops, advising them rather to ask the Holy See for an auxiliary or coadjutor, or to obtain the help of a neighboring bishop for the administration of confirmation (*AAS*, XXVII [1935], 14).

At the time when the Code of Canon Law was being prepared, some of the collaborators suggested that the Holy Father be asked to extend the power to confirm to other extraordinary ministers, so that no child might die without this sacrament. Father F. X. Wernz, S.J., one of the foremost canonists of his day, proposed a canon, inserted into the first schema of the Code, which granted to pastors the faculty to confer confirmation, as extraordinary ministers, to dying persons. And he backed his proposition with the observation that the children of schismatics were more privileged in this matter than those of Catholics. The Pontifical Commission had also determined to ask the Holy Father to make this proposition a law even before the promulgation of the Code. Even though, for reasons unknown, this proposal came to nought, and Father Wernz's canon was omitted from subsequent schemata of the Code, still the idea was kept alive by canonists and moralists by proposing reasons in favor of it in their textbooks and magazine articles.

When the ravages of World War II increased the number of infants who died without confirmation, and caused many children to grow to adult age and run the risk of dying without this sacrament because there was no bishop at hand to administer it, Cardinal Jorio, Prefect of the Sacred Congregation of the Sacraments, became the champion of the cause with Pope Pius XII, proposing all the reasons suggested by prominent consultors of the same Congregation. His Holiness, after considering the importance of the matter, and wishing to provide for the spiritual welfare of a considerable portion of the faithful who in present circumstances would die without confirmation, commissioned the same Congregation to make a thorough and accurate study of the question, and, after discussing it in plenary sessions, to report to him the resolution adopted. Having done so, they handed in a report to His Holiness who, after having studied it, authorized the Congregation to draw up a decree providing for the needs of the times in this matter.

The decree appears in full in the *Acta Apostolicae Sedis*, XXXIII (1946), pp. 349-58 (n. 11), under date of October 3. We quote the most important part of the decree.

Faithfully complying with this apostolic mandate, this Sacred Congregation of the Sacraments by these present letters has decreed as follows:

1) By reason of a general indult of the Apostolic See the faculty to confer the sacrament of confirmation as extraordinary ministers (canon 782, §2) is granted only in the cases and under the conditions laid down below to the following priests, namely:

- a) to pastors enjoying a proper territory, excluding personal and family pastors, unless they also enjoy a proper territory, even though it be cumulative;
- b) to the vicars mentioned in canon 471, as well as to vicars economi;
- c) to priests to whom a certain territory has been committed exclusively and permanently, and with a determined church with the full care of souls, and with all the rights and duties of pastors.

2) The above mentioned ministers may validly and licitly confer confirmation, *per se ipsi, personaliter*, but only on the faithful who are actually present within their territory, including persons staying in places withdrawn from parochial jurisdiction; therefore seminaries, hospices, hospitals, are not excluded, or any other kind of institution even though it be [under the care of] religious no matter how exempt (cf. canon 792); provided the faithful in question are in danger of death by reason of a serious illness from which it is foreseen that they will die.

Should the ministers exceed the limits of their mandate, let them know well that they act wrongly and do not administer the sacrament, and that canon 2365 retains its full force.

- 3) They may use this faculty both within the episcopal city and outside of it,

whether the see be occupied or vacant, provided the diocesan bishop cannot be had or is legitimately impeded from conferring the sacrament personally, and that there is no other bishop in union with the Holy See at hand, even though he be only titular, who cannot act as a substitute without grave inconvenience.

4) Confirmation should be administered according to the discipline of the Code of Canon Law adapted to the circumstances, and the rite prescribed by the Roman Ritual should be used as given in detail below, and the sacrament is to be conferred *gratis vero quovis titulo*.

The decree then gives details regarding the instruction which should be given the person to be confirmed (if circumstances permit), the registration of the confirmed in the baptismal and confirmation records and in the diocesan chancery. It further informs the local ordinary that he is to instruct the extraordinary ministers in the details of the administration of this sacrament, and that he is to send an annual report to the Holy See regarding the number of persons confirmed by the extraordinary ministers and regarding the manner of carrying out this extraordinary office (nn. 5-9). The first part of the decree concludes as follows:

His Holiness, Pope Pius XII, in an audience granted to the Secretary of this Congregation on August 20, 1946, deigned to approve the above-mentioned decree and to support it with his apostolic authority, all things to the contrary notwithstanding; and he ordered that this same decree should be published in the *Acta Apostolicae Sedis*, official publication of the Holy See, to have the force of law as of January 1, 1947.

The second section of the decree gives a complete list of the canons of the Code regarding the extraordinary minister of confirmation, the matter to be used in the administration of the sacrament, the sponsors, the recording of the sacrament, and finally the penal legislation on this subject. The third section reprints in detail the rite to be used by a priest who, in virtue of an apostolic indult, confers the sacrament of confirmation. It is taken from the typical edition of the *Rituale Romanum*, for 1925.

In a lengthy article which appeared in *L'Osservatore Romano* for October 31, 1946, Monsignore Cesare Zerba, Subsecretary of the Sacred Congregation of the Sacraments, gives what he calls marginal notes for the decree: "In margine al recente Decreto della S. C. dei Sacramenti circa il conferimento della Cresima ai moribondi." Though in no sense an authentic interpretation of the decree, Monsignore Zerba's comments give us the best possible doctrinal interpretation, since by reason of his office he is thoroughly conversant with the historical background and knows the mind of the Sacred Congregation. Hence we deem it helpful to give the substance of his inter-

pretation regarding the positive provisions of the decree which we have quoted above.

The faculty to confirm as extraordinary minister is granted to all parish priests having a proper territory. It is likewise granted to the vicars mentioned in canon 471, that is, to those who have the care of souls in a parish which has been united with a moral person, such as a religious house or a capitular church. Vicars econome or administrators of parishes, as described in canon 472, also enjoy the faculty; but all other vicars, such as those mentioned in canons 474-476 do not; hence substitute vicars, coadjutor vicars, and regular assistants (*vicarii cooperatores*) do not enjoy this faculty; neither does the vicar capitular (administrator of a diocese), nor even the vicar general, unless they be bishops (or pastors), since the enumeration of the decree is absolutely exclusive. The third class of priests mentioned in the decree includes all perpetual curacies, vicariate and succursal churches whose rectors enjoy the full and independent care of souls, but lack the title of pastor. Few such will be found in the United States.

The faculty is personal: hence it cannot be delegated to anyone. Its use is limited to the territory proper to the minister: hence a pastor cannot use it in favor of a parishioner who happens to be outside the parish limits; within the parish limits, he may confer confirmation on any of the faithful who are in danger of death, whether they be adults or infants, whether they have a domicile, quasi-domicile, or residence, or simply happen to be there. Included also are all persons in institutes which have been withdrawn from the parochial jurisdiction, such as a seminary, a hospital, hospice, and the like, as well as those in an exempt religious house, even within papal cloister.

These persons must be in danger of death by reason of a grave illness; hence not from any other cause, such as imminence of battle for a soldier, or an air raid for a civilian. This danger must be such that death is foreseen. However, to avoid vain fears and scruples, a moral estimate of the danger will suffice. Practically, then, a doctor's decision that a person is in danger of death from disease, or a pastor's decision that the time has arrived to administer the last sacraments to a dying person, will allow the priest who has the faculty to administer confirmation. The words, "*gravi morbo . . . ex quo decessuri praevideantur*," are practically equivalent to those others used in the Code in analogous cases: "*urgente mortis periculo*."

In conclusion, we may note that while giving the common doctrine regarding the ordinary and the extraordinary minister of the sacrament of confirmation, the decree of the Sacred Congregation of the Sacraments very carefully refrains from any discussion of the nature of the faculty granted

to the extraordinary minister. Is it the power of orders, or the power of jurisdiction, or some third thing? Theologians have still to provide us with a satisfactory answer to this difficult problem.'

CHURCH PROPERTY

The "wealth of the Church" has ever been a target of attack on the part of "progressive" intellectuals and popular-front movements. Accustomed to think of real property as realizable in terms of ready money, the world at large confuses control of property with ownership, and, from the analogy of commercial and industrial undertakings, argues that a body which administers such imposing assets must necessarily pay fat dividends to its fortunate shareholders. From the gratuitous assumption that the Church is the clergy, the conclusion is drawn that a well-founded Church means a wealthy clergy; that *curés* and capitalists are miscreants of the same deep-dyed brand. Nothing could be further from the truth, since it is a patent fact that the enjoyment of magnificent cathedrals and other ecclesiastical buildings does not prevent the clergy in many lands from living a hand-to-mouth existence. With these thoughts as an introduction, Father Lawrence L. McReavy gives an excellent exposition of "The Ownership of Church Property" in *The Clergy Review* for February, 1946 (pp. 65-74).

The first part of the article is taken up with an exposition of the development of the doctrine of the ownership of church property. It need not detain us here. In the second half of the article, the author gives a practical exposition of the canons of the Code regarding the ownership of church property. Two points receive special emphasis and may well be pondered by all administrators of church property. The first point is the fact that the ownership of church property remains vested in the moral personality to which it belongs, even though for civil purposes it is found convenient, if not necessary, to vest church property in a diocesan board of trustees. This does not alter the canonical position; it does not make such property diocesan in ownership; but the moral person—say, the parish—retains its right to acquire, possess, and administer property of its own. Hence the members of the board which controls such property in the eyes of the civil law are merely administrators of it so far as the Church is concerned, and must consult and at times obtain the consent of the moral person who owns the property, before they may alienate such property by way of sale, mortgage, and the like.

This is a very practical thought for administrators of parochial and institutional property in the United States. It may be useful to recall here that on July 29, 1911, the Sacred Congregation of the Council issued an instruction to the archbishops and bishops of the United States to the

following effect: (1) Parish corporations (civil) are preferable to all others and should be introduced wherever the state laws allow it; (2) if the state law does not allow parishes to be incorporated, the bishops are to use their influence to have parish corporations made legal as soon as possible; (3) until such recognition can be obtained, the method commonly called "corporation sole" is allowed, but with the understanding that the bishop act with the advice and, in more important matters, with the consent of the interested parties, as well as of the diocesan consultors, this being an obligation in conscience on the bishop in person; (4) the method called "in fee simple" is to be abandoned. The instruction recommends the civil form of incorporation of parishes in use in the State of New York.¹

The second point of interest in Father McReavy's article is the ownership of particular offerings in which special regard must be paid to the donor's intentions. Even though it be clear that a donation is not made *intuitu personae* but is given to the Church, the canon law is very insistent on the necessity of respecting the will of the donor regarding the purpose for which it is to be used. "Therefore, money contributed for, let us say, a new altar, may not lawfully be devoted to a school-building, nor, for that matter, may it simply be dropped in the till for general parish purposes (including possibly the eventual erection of an altar); it must be devoted to the purpose for which it was solicited or given."

Father McReavy's article is a real contribution to the scanty literature in English on the subject of church property.

REMEDIAL SENTENCE

Canon 1971, §1, 1°, disqualifies a consort from impugning his marriage if he was the culpable cause of the impediment or of the nullity. The purpose of the law is contained in the classical maxim: "Fraus sua nemini patrocinari debet." Since this canon deprives the consort of a right granted by the law, it is to be interpreted strictly, according to canon 19. Many canonists seem to have forgotten this fundamental principle in their interpretation of canon 1971. Alarmed by the great increase in the number of cases of vitiated consent, which one of them has called a substitute for divorce, they have considered only the scandal which would follow if such a guilty consort were granted a declaration of nullity, and, as a consequence, they have extended the incapacity of the guilty consort laid down in canon 1971, §1, 1°, as widely as possible.

The Commission for the Interpretation of the Code, on the other hand,

¹ The text of the instruction as well as the form of incorporation of Roman Catholic parishes in the State of New York may be found in the *Ecclesiastical Review*, XLV (1911), 585, 696; as well as in Bouscaren, *Canon Law Digest*, II, 443-445.

has steadfastly interpreted canon 1971 in the light of canon 19. The Commission admits: that the canon applies not only to impediments strictly so-called (canons 1067–1080) but also to impediments improperly so-called (1081–1103);² and, that the guilty consort is barred from being a petitioner for annulment,³ and consequently has no right to appeal from a sentence given in favor of the marriage.⁴ However, it upholds the right of the guilty consort to notify the Ordinary or the promotor of justice of the nullity of the marriage,⁵ so that the latter under certain conditions may introduce the case; and, if he does so, he takes part in the trial by virtue of his office,⁶ not as a representative of the Sacred Congregation of the Sacraments.⁷

Furthermore, the Code Commission declared that a consort who entered upon marriage under the influence of force or fear is not debarred under canon 1971, §1, 1°,⁸ nor is a consort who placed an honest and licit impediment,⁹ but only that consort who was both the direct and malicious (*dolosa*) cause of the impediment; hence a consort who was either the indirect cause or was not the malicious (*doli expers*) cause of the impediment is not barred from petitioning for a decree of nullity.¹⁰

In its most recent decision, which we wish to discuss here, the Code Commission declares that the deprivation of the right to impugn the marriage contained in canon 1971, §1, 1°, does not cause a sentence passed to be irremediably null in conformity with canon 1892, 2°. Here is the official text of the reply: “D°. An inhabilitas coniugis ad accusandum matrimonium, a canone 1971, §1, 1° statuta, secumferat incapacitatem standi in iudicio, ita ut sententia vitio insanabilis nullitatis laboret iuxta canonem 1892, 2°? R. Negative.”¹¹

When a sentence is vitiated by irremediable nullity, the court issuing the sentence is powerless to correct or emendate the sentence in any way so as to render it valid. If it is a remediable sentence, complaint of nullity may be proposed according to the methods laid down in canons 1895 and 1896. Canon 1892, 2°, tells us that a sentence is irremediably null when it is pronounced in the cases of parties, one of whom has not the legal right to bring suit in an ecclesiastical court. According to canon 1971, §1, 1°, the consorts have such a legal right in all cases of separation and nullity, unless they themselves were the cause of the impediment. At first sight,

² AAS, XXI (1929), 171, Bouscaren, *CLD*, I, 807.

³ AAS, XXV (1933), 345 (ad II); *CLD*, I, 808.

⁴ AAS, XXXVII (1945), 149.

⁵ AAS, XXII (1930), 195; *CLD*, I, 808.

⁶ AAS, XXV (1933), 345 (ad IV); *CLD*, I, 808.

⁷ AAS, XXXII (1940), 317.

⁸ AAS, XXV (1933), 345 (ad I); *CLD*, I, 808.

⁹ AAS, XXV (1933), 345 (ad III); *CLD*, I, 808.

¹⁰ AAS, XXXIV (1942), 241; *CLD*, II, 548.

¹¹ AAS, XXXVIII (1946), 162.

one would be tempted to conclude that, if a guilty consort did bring an action for nullity, the sentence would be irremediably null. Yet the Code Commission has declared the contrary. How is the seeming discrepancy to be explained?

We have at hand the comments of three prominent canonists on this latest reply of the Code Commission. Let us see how they interpret it. In *Periodica* for June 15, 1946, (pp. 195-198) Father Cappello, after commenting on the canons involved and defining the terms used, sums up the arguments for and against the right of the guilty consort to stand in court. In favor of that right he proposes three arguments: (1) Canon 1971, §1, 1°, by no means clearly and explicitly denies the culpable consort the right to stand in court; hence the prescription of canon 1892, 2°, does not seem to apply. (2) It is not always evident whether the consort was really the culpable cause, whether he acted maliciously, whether his fault was both subjectively and objectively grave; as a consequence the consort cannot be considered debarred from his right to act unless his true and grave culpability be established in the external forum. (3) If the nullity of the sentence be admitted to be irremediable, and if later on doubts were to arise either for or against it, a number of grave inconveniences would arise regarding the validity of the process and of the judicial acts, as well as the court sentence itself, because a complaint of nullity can be proposed either by the method of exception *in perpetuum*, or by way of action within thirty years from the date of publication of the sentence (canon 1893).

Against the right of the consort to stand in judgment two arguments are proposed: (1) canon 1971, §1, 1°, collated with canons 1646 and 1648 ff., seems to deprive the guilty consort of his right to stand in court. For what do the terms "habilis" or "inhabilis," "capax" or "incapax" mean? (2) If the consort, no matter how guilty, could nevertheless stand in court and be a plaintiff, what value has canon 1971, §1, 1°, and what would be the juridical effects of the penalty established, and the privation laid down? Either none whatever or one of only slight moment. And then the learned author calmly concludes: "Hence every one will clearly see the reason for the doubt and for the answer given, as well as its importance, and the problems and questions solved by it."

Father Creusen, in *Nouvelle Revue Théologique* for May-June, 1946 (pp. 344-5), tells us that most commentators think that the legislator in depriving the guilty consort of his right to attack the validity of his marriage intended to deprive him of all capacity to act, once the procedure had been started by the promotor of justice in accord with §2 of canon 1971. Hence the court's decision would be irremediably null because of the very incapacity to be a party to the process. He then cites a minority opinion

held by Jemolo¹² and Bidagor¹³ to the effect that the privation of the right of introducing the case in the quality of plaintiff is not the same thing as the absolute incapacity of being a party to a case properly begun by the promotor of justice. Father Creusen thinks that the latest decision of the Code Commission supports this opinion, and "once again interprets the canon in its strictest sense."

Canon Mahoney, in the *Clergy Review* for December 1946 (pp. 660-664), informs us that there are Rota decisions which confirm what appears to have been up to the present the common opinion of canonists, namely, that "inhabilis" means "incapax." "Habilis" and "inhabilis" certainly have this meaning in canons 1080 and 1116, as regards the marriage contract. He then continues: "In this most recent decision favoring the culpable party, this opinion is rejected and the reason may be that the interpretation given to 'impedimenti causa' (May 3, 1945: 'causa directa et dolosa') leaves it open to dispute, until a judicial decision has been obtained, whether the party who is the cause of the impediment is actually the culpable cause of it directly and in bad faith. Accordingly, a judicial sentence, unlawfully obtained in a case of this kind is invalid, but the invalidity can be remedied as in canons 1894 and 1895."

After reading these commentators on this latest decision of the Code Commission, one point at least seems clear: there is a difference between the *inability* of the guilty party to stand in court contained in canon 1971, §2, and the *lack of right* to stand in court on the part of the plaintiff in canon 1892, 2°, which causes the sentence to be irremediably null. It is this difference upon which the Code Commission bases its decision. In what that difference consists is not too evident, in spite of Cappello's assertion to the contrary. The following explanation occurs to the writer, and he proposes it for what it is worth: The guilty consort actually had a right to come into court, but was deprived of it by reason of his being the direct and malicious cause of the impediment which made his marriage invalid; the plaintiff in canon 1892, 2°, never did have a right to stand in court.

Since the sentence of the court is remediable, according to this latest decision of the Code Commission, we may well ask with Canon Mahoney how the remedy is to be applied. It is not so clear from canons 1894 and 1895. He suggests that the promotor of justice is to intervene and perform, in the measure directed or permitted by the law, the essential acts which are lacking.

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¹² A. C. Jemolo, *Il matrimonio nel diritto canonico* (Milano, 1941), n. 195 s., 220.

¹³ Bidagor, S.J., "Circa accusationem matrimonii coniugis culpabilis," *Rassegna di Morale e di Diritto*, VI (1940), 154 ff.