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CANON 1084 AND PSYCHIC IMPOTENCE

by

Richard C. Bauhoff

A dissertation submitted to the Faculty
of Canon Law, Saint Paul University,
Ottawa, Canada, in partial fulfillment
of the requirements for the Degree of
Doctor of Canon Law

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BIOGRAPHICAL NOTE

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ABBREVIATIONS

<u>A.A.S.</u>	Acta Apostolicae Sedis
<u>C.L.D.</u>	Canon Law Digest
<u>C.L.S.A. Proceedings</u>	Canon Law Society of America, Proceedings
<u>C.L.S.N.</u>	Canon Law Society of Great Britain and Ireland Newsletter
<u>E.I.C.</u>	Ephemerides iuris canonici
<u>I.D.E.</u>	Il diritto ecclesiastico
<u>M.E.</u>	Monitor ecclesiasticus
<u>Periodica</u>	Periodica de re morali, canonica, liturgica
<u>PL</u>	J.P. Migne, Patrologiae cursus completus [... Series latina]
<u>R.D.C.</u>	Revue de droit canonique
<u>S.C.D.F.</u>	Sacra Congregatio pro Doctrina Fidei
<u>S.C.S.O.</u>	Sacra Congregatio Sancti Officii
<u>S.R.R. Dec.</u>	Sacrae Romanae Rotae decisiones seu sententiae

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INTRODUCTION

In the 1917 Code of Canon Law, marriage was juridically defined as a bilateral contract with the exchange of the ius in corpus apt for the generation of children as its formal object. There is no doubt that this was a purely contractual and biological view of marriage which was subsequently challenged by some canonists and theologians.

The Pastoral Constitution on the Church in the Modern World, Gaudium et spes,¹ of Vatican II described marriage as "an intimate community of conjugal life and love" ordered to the good of the spouses and the procreation and education of children. The Council Fathers made it clear that the concepts and the language of Gaudium et spes were predominantly pastoral and theological.² In accord with the directive of John Paul II that the new Code should translate conciliar teaching into canonical terms,³ the Church's matrimonial legislation in the 1983 Code is based upon this

¹SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, Gaudium et spes, in A.A.S., 58(1966), pp. 1025-1120.

²The footnote 1 attached to the very title of the document expressly states that the Constitution contains doctrinal principles applicable to modern times. Therefore, it is to be interpreted according to the general norms of theological interpretation. Since Canon Law is to be based on theology, the doctrinal principles of Gaudium et spes could provide the foundational concepts for canonical legislation.

³JOHN PAUL II, "Sacrae disciplinae leges", in A.A.S., 75-II(1983), pp. vii-xiv (at p. xi).

constitution. Accordingly, marriage is now canonically defined as a "partnership of the whole of life" which is "by its nature ordered toward the good of the spouses and the procreation and education of offspring."⁴ This description of marriage provides the canonical cornerstone with regard to the juridical structuring of the marital relationship. All rights and duties which constitute the essence of conjugal partnership are to be determined in light of this notion of marriage.

The right to sexual intercourse is still regarded as one of several essential elements of marriage. Therefore, can. 1084, 1, of the 1983 Code declares a person inept to contract marriage who is incapable of realizing the promised right to conjugal intercourse. In other words, according to can. 1084, 1, antecedent and perpetual impotence invalidates marriage. The law itself neither speaks of the different kinds of impotence nor does it distinguish the different causes underlying the incapacity for intercourse.

Canonical jurisprudence has traditionally distinguished between organic and functional impotence. Organic impotence

⁴Can. 1055, 1: "Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos euectum est." Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, Vatican City, Libreria Editrice Vaticana, 1983.

is so called because of its origin in physical or anatomical defects in the sexual organs. Functional impotence is generally distinguished between physiological or neurological and psychic. The distinction is based on the nature of the causes underlying the impotent condition. Thus, the former type results from physiological or neurological abnormalities, while the latter is caused by defective psychological processes. This is called psychic impotence, the direct object of our study.

In the past, psychic impotence has been dealt with in Rotal jurisprudence in several matrimonial cases. However, until the classic sentence of October 9, 1964 by Cardinal Sabattani there was strong resistance on the part of Rotal judges to pronounce affirmative decisions on marriage cases alleged to be invalid on the basis of psychic impotence.⁵ The primary reasons for such a rigid stance were: first, the difficulty in proving the requirement of perpetuity, and

⁵See S.R.R. Dec., c. SABATTANI, October 9, 1964, in S.R.R. Dec., 56(1964), pp. 682-708. In this sentence, Sabattani brings together the current research both in medical and canonical sciences on vaginismus. On p. 684, Sabattani says that until 1964, there had not been a single marriage case declared null on the basis of vaginismus because its incurability could not be proven. For a detailed study of this point, see G.E. CERAFOGLI, "De periti interventu iudicisque decisione in vaginismi casibus", in Studi di diritto canonico in onore di Marcello Magliocchetti, Vol. 1, P. Fedele (ed.), Roma, Officium Libri Catholici, 1974, pp. 279-295 (at p. 290).

second, the uncertain conclusions of medical science on the causes and curability of the underlying condition.

In the last twenty years, scientific advances in medical and psychological sciences have increased our understanding of the human sexual response which is essentially governed by a person's psychosexual constitution. Since several factors influence a person's sexual response, the sexual capacity and functioning are determined by those factors. But there is no uniform opinion concerning the exact nature of the multiple causal factors nor concerning the so-called "cures" of the sexual dysfunctions. These difficulties, no doubt, have reinforced the rigid jurisprudential approach to psychic impotence. Nevertheless, several Rotal judges have, in recent years, taken the lead in incorporating into their juridical reasoning the valid and dependable conclusions or insights provided by more recent scientific studies in psychiatry and psychology and thereby have offered to jurisprudence a new way of looking at cases involving psychic impotence.⁶

The purpose of this study is to illustrate the hypothesis that under certain circumstances, the psychically

⁶This approach reflects the advice of Pope Pius XII to Rotal Officials given in his allocution of October 3, 1941, in which he clearly stated that ecclesiastical jurisprudence cannot and must not neglect the genuine progress of sciences which affects moral and juridical matters. See A.A.S., 33(1941), p. 423.

impotent person is, in fact, juridically incapable of contracting marriage. This can be true either on the grounds of impotence or on the grounds of incapacity to assume the essential obligations of marriage. In other words, a psychically impotent person is incapable of establishing the consortium totius vitae as defined in the new Code. In the process of proving this hypothesis, we will endeavor to answer some important questions concerning: the canonical notion of impotence from a historical standpoint; its understanding in light of the teaching of Vatican II and the new Code on marriage; the most recent scientific findings on psychic impotence; and the more recent jurisprudential approaches to marriage cases involving psychic impotence.

Several canonical studies have investigated the diriment impediment of impotence and related topics including the following: the nature and impediment of impotence,⁷ the requirement of perpetuity,⁸ the juridical understanding of consummation,⁹ the impediment of impotence as it relates

⁷P.V. HARRINGTON, "The Impediment of Impotency and the Notion of Male Impotency", in The Jurist, 19(1959), pp. 29-66; 187-211; 309-351; 465-497.

⁸K.E. BOCCAFOLA, The Requirement of Perpetuity for the Impediment of Impotence, Roma, Università Gregoriana Editrice, 1975.

⁹J.E. HUDSON, Marital Consummation according to Ecclesiastical Legislation, (Doctoral Dissertation), Saint Paul University, Ottawa, Canada, 1977.

to vaginismus and paraplegia,¹⁰ and the juridical nature of an artificial vagina.¹¹ These studies have generally dealt with specific aspects of impotence. To date, there is no in-depth research done on psychic impotence in light of the more recent trends in canonical developments and the progress in medical and psychological sciences. The aim of our research is to show the validity of the proposed hypothesis on the basis of scientific (canonical and medical) advances.

In the first chapter, we will summarily review the historical foundations of impotence with specific reference to the similarity in description of maleficium and psychic impotence along with the difficulties in applying to impotence the principles of antecedence and perpetuity. The second chapter will provide a canonical commentary on the principles governing the diriment impediment of impotence as defined in canon 1084, 1 of the new Code and their applicability to psychic impotence. The third chapter will contain an analysis and synthesis of recent advances in psychiatry,

¹⁰P.L. FRATTIN, The Matrimonial Impediment of Impotence: Occlusion of Spermatic Ducts and Vaginismus, A Historical Synopsis and a Commentary, Washington, D.C., The Catholic University of America Press, 1958. J.J. BRENKLE, The Impediment of Male Impotence with Special Application to Paraplegia, Washington, D.C., The Catholic University of America Press, 1963.

¹¹M. THÉRIAULT, "Néo-vagin et impuissance", in Studia Canonica, 2(1968), pp. 25-76.

psychology, and sexology with regard to psychic impotence and its effects on the marital relationship. Finally, the fourth chapter will deal with jurisprudence of the Roman Rota in some of the more recent decisions (of the past twenty years) on cases involving psychic impotence and the incapacity to assume the essential obligations of marriage which might result from the same causes underlying psychic impotence.

CHAPTER I

THE HISTORICAL DEVELOPMENT OF THE IMPEDIMENT OF IMPOTENCE

Canon 1084, the approved and promulgated revision of canon 1068 of the 1917 Code, is a legal description of the essential characteristics of the diriment impediment of impotence. The text of the canon reads:

Can. 1084, 1. Antecedent and perpetual impotence to have intercourse, whether on the part of the man or of the woman, which is either absolute or relative, of its very nature invalidates marriage.

2. If the impediment of impotence is doubtful, either by reason of a doubt of law or a doubt of fact, a marriage is neither to be impeded nor is it to be declared null as long as the doubt exists.

3. Sterility neither prohibits nor invalidates marriage, with due regard for the prescription of can. 1098.¹

¹Can. 1084, 1. "Impotentia coeundi antecedens et perpetua, sive ex parte viri sive ex parte mulieris, sive absoluta sive relativa, matrimonium ex ipsa eius natura dirimit.

2. "Si impedimentum impotentiae dubium sit, sive dubio iuris sive dubio facti, matrimonium non est impediendum, nec stante dubio, nullum declarandum.

3. "Sterilitas matrimonium nec prohibet nec dirimit, firmo praescripto can. 1098." Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, Vatican City, Libreria Editrice Vaticana, 1983. The English translation is from the Code of Canon Law, Latin-English Edition, translation prepared under the auspices of the Canon Law Society of America, Washington, D.C., Canon Law Society of America, 1983.

While this canon contains a concise presentation of the requisite aspects of impotence and confirms the historical distinctions regarding the nature and invalidating effect of impotence, an historical survey reveals divergent practices about the invalidating effect of impotence upon marriage. For example, in the seventh and eighth centuries, while local Councils and Penitentials appeared to view antecedent impotence as a diriment impediment to marriage, theologians and canonists considered impotence as grounds for dissolution of a marriage. The apparent confusion evolved from a lack of agreement concerning the nature of marriage, its efficient cause, and finally, the object of consent which established the marital relationship.²

This chapter will review the historical development of the impediment of impotence. Since the diverse opinions on the invalidating effect of impotence were debated simultaneously with the controversy over the nature and the efficient

²Several authors discuss the reasons for the divergent opinions of the French and Italian schools of thought concerning the invalidating effects of impotence: G. H. JOYCE, Christian Marriage: An Historical and Doctrinal Study, London, Sheed and Ward, 1933, pp. 427-436 (hereafter cited: JOYCE, Marriage); P. V. HARRINGTON, "The Impediment of Impotency and the Notion of Male Impotency", in The Jurist, 19(1959), p. 30 (hereafter cited: HARRINGTON, "Impotency"); G. LESAGE, "Psychic Impotence: A Defect of Consent", in Studia Canonica, 4(1970), p. 62 (hereafter cited: LESAGE, "Psychic Impotence"); J. MC CARTHY, "The Traditional Concept of the Impediment of Impotence", in The Irish Theological Quarterly, 19(1952), pp. 225-226 (hereafter cited: MC CARTHY, "The Traditional Concept").

cause of marriage, a brief review of the Roman Law influences on the canonical nature and formation of marriage will precede a summary presentation of the consensual and copula theories eventually reconciled by Alexander III in the twelfth century. The evolving notions and causes of impotence during the Medieval Ages will be summarily discussed. The chapter will conclude with references to the foundational texts for the essential qualities of impotence, that is, its antecedence and perpetuity.

A) The Nature of Marriage

Neither the Scriptures nor the Fathers of the Church defined the nature or the constitutive elements of marriage. Christians married according to the customs and practices of Roman Law which were in harmony with the Church's theology of marriage. With the recognition of the Church as a legal person by the Edict of Milan in 313 A.D., and the subsequent adoption of Christianity as the religion of the Empire in 370 A.D., the Church had recourse to the Roman Law for those matters not covered by the existing ecclesiastical law.

a) Roman Law Influences

The traditional descriptions of marriage in Roman Law are those of Modestinus and Ulpianus. Both jurists described marriage as a union, a "coniunctio", but differed with regard to its descriptive qualities. Modestinus

described marriage as a community of the whole of life, a "consortium omnis vitae", resulting in a participation in both divine and human law whereas Ulpianus presented the marital union as an undivided sharing of life, a "individuum consuetudinem vitae".³ Both descriptions portray marriage as a way of life rather than a contract.⁴

While the Church considered its earlier theological and canonical collections adequate descriptions of marriage,⁵ it

³The definition of Modestinus implied the permanency of the marital union and further indicated the couple's sharing in civil and religious aspects of society. Ulpianus stressed the individual sharing of life in marriage which included the wife's sharing in the family worship of her husband. See Digesta 23,2,1, and Institutiones 1,9,1. The definition attributed to Ulpianus is not identified as such in the Institutes.

⁴Several authors discuss the relevance of the traditional Roman Law citations and the consequent effect on the Church's formulation of its doctrine on marriage. See the discussions in D.E. FELLHAUER, "The Consortium omnis vitae as a Juridical Element of Marriage", in Studia Canonica, 13(1979), pp. 10-17 (hereafter cited: FELLHAUER, "The Consortium"); W.M. LAWSON, "Roman Law: A Source of Canonical Marriage Legislation", in Resonance, 4(1967), pp. 6-9 (hereafter cited: LAWSON, "Roman Law"); T. MACKIN, What Is Marriage?, New York, Paulist Press, 1982, pp. 73-76 (hereafter cited: MACKIN, Marriage); R. NAZ, "Droit romain", in Dictionnaire de droit canonique, R. Naz (ed.), Vol. 4, Paris, Librairie Letouzey et Ané, 1949, col. 1505; J.N. PERRY, "The Canonical Concept of Marital Consent: Roman Law Influences", in The Catholic Lawyer, 25(1980), pp. 228-236 (hereafter cited: PERRY, "Marital Consent").

⁵Several authors suggest that the commentaries by the Fathers of the Church which emphasized the procreative aspect of marriage are better viewed as moral defenses of the use of sex in marriage for procreative purposes and a safeguarding of the virginal marriage of Mary and Joseph rather than sacramental treatises on the nature and theology

adopted the Roman Law descriptions of marriage and supplemented this with the Church's theological and canonical teaching on the indissolubility of marriage.⁶

B) The Cause of Marriage

The Romans were concerned with distinguishing marriage from cohabitation. Therefore, a couple living together with marital affection were legally considered to be married.

5 (cont'd) of marriage. For example, Augustine (354-430) used a defensive approach to combat the Gnostic and Manichean tendencies in addition to defending the virginal marriage of Mary and Joseph. For a more detailed discussion on the defensive approach used by the Fathers of the Church, see FELLHAUER, "The Consortium", pp. 18-19; L. ÖRSY, Marriage in Canon Law, Wilmington, Delaware, Michael Glazier, 1986, pp. 21-24 (hereafter cited: ÖRSY, Marriage); J.A. BRUNDAGE, "The Problem of Impotence", in Sexual Practices and the Medieval Church, V.L. Bullough - J.A. Brundage (eds.), Buffalo, New York, Prometheus Books, 1982, p. 135 (hereafter cited: BRUNDAGE, "The Problem of Impotence").

⁶The Roman definitions resurfaced in the eleventh and twelfth centuries and were notably visible in the collections of Ivo of Chartres (1040-1116), the Decretum of Gratian (c. 1140), and the Decretals of Gregory IX (1227-1241). Ivo's descriptions are recorded in Panormia, Liber Sextus, Cap. I, in J.P. Migne, PL, 161, 1244. For Gratian, see the Introductory dictum, C. XXVII, q. 2. Gregory's description is recorded in c. 11, X, II, 23. The adoption of the Roman definitions into canonical and theological usage is discussed by FELLHAUER, "The Consortium", pp. 37-42 who reports (at p. 39): "It was [...] the definition of the Institutes which was the more commonly accepted. The reason lies in the fact that the Institutes were known to the Middle Ages before the Digest, and the medievals had a marked tendency to traditionalism."

a) Roman Law Influences

Prior to the contractual definition of marriage during the reign of Justinian (527-565)⁷, marriage was treated under the ius personae which included family, property, contracts, and wills. Consent was the constitutive element for these legal institutes.⁸ The direct influence of Roman Law has been noted by Joyce:

The Roman jurists had laid it down as a principle that the essential element in marriage was the consent of the parties. The consent of the

⁷See the brief comment of LAWSON, "Roman Law", who states (at p. 8): "It was not until the time of Justinian, when marriage was entered and considered valid only by the consent of the parties, that the marriage agreement was elevated to that of a contract. From this notion and that of a Roman contract in general, we receive our canonical theory of marriage." Similar statements are offered by MC CARTHY, "The Traditional Concept", pp. 225-226; A.C. MC NEVIN, "The Indissolubility of Marriage as Effected by Consummation", in Resonance, 4(1967), p. 17 (hereafter cited: MC NEVIN, "Indissolubility").

⁸There were no legal prescriptions legislating a specific ceremony nor was the presence or participation of a civil magistrate required. The consent given by the pater familias, or the reverencing of the husband's household gods by the wife, or the deductio in domum by which the wife was established in her husband's home constituted the necessary proof for marriage. For further reading on these rites, see B. NICHOLAS, An Introduction to Roman Law, Oxford, The Clarendon Press, 1962, pp. 76-83; PERRY, "Marital Consent", pp. 230-231. Also see H.F. JOLOWICZ - B. NICHOLAS, Historical Introduction to the Study of Roman Law, 3rd Edition, Cambridge, England, Cambridge University Press, 1972, p. 114 where the authors state: "Marriage was to the Romans, [...] a de facto rather than a de iure matter, in the sense that two people were held to be married, not because they had gone through any particular ceremony, but because they in fact lived together as man and wife."

persons under whose potestas they were, should there be such, was also necessary. Though marriage is not termed a contract in Roman Law, its contractual aspect is extremely prominent in the treatment accorded to it. Just as with contracts, it is constituted by the consent of those who are concerned. If the consent had been duly given, the marriage was legally complete even though the customary ceremonies were omitted. The most important of these ceremonies was the home-coming of the bride - the deductio in domum. Yet even this was only essential in the exceptional case of a marriage celebrated in the absence of the bridegroom. [...]

But the Church could readily accept the rule which declared that marriage was effected by consent, and that consummation was not essentially requisite. This was not merely in accordance with reason, but harmonized with Christian teaching. The Church had always held that, though the union of the Blessed Virgin Mary and St. Joseph was one of perpetual continence, it was nevertheless true marriage.

This theory of consensus as the constitutive element of marriage was readily accepted by the Church and became the foundation of the consensual theory in canon law.

b) Additional Secular Influences

The Germanic custom and law of the fifth century held that marriage was constituted in two distinct stages: the engagement, customarily arranged by the fathers of the

⁹JOYCE, Marriage, pp. 42-43. The following authors also discuss consent as the efficient cause of marriage in Roman Law: W.J. LA DUE, "The Sacramentality of Marriage", in C.L.S.A. Proceedings, 1974, p. 26; MC CARTHY, "The Traditional Concept", pp. 225-226; MC NEVIN, "Indissolubility", p. 17.

respective spouses, and the handing over of the bride to her husband for consummation of the marriage.¹⁰ The Germanic legal system added the necessity of consummation along with consent for the completion of the marital bond.¹¹

The Church's understanding of marriage was greatly influenced by the current legal systems. However, the Church enriched the secular influences adding the theological symbolism of the union of Christ with the Church to explain the marital relationship. The stage was set for a debate concerning the constitutive elements of Christian marriage -- Was consent alone sufficient? Or, was consummation a necessary ingredient for Christian marriage? Theologians and canonists who argued that consent alone was sufficient espoused the consensual theory while those who argued that consent with consequent consummation formulated the copula theory.

¹⁰The Germanic customs are discussed by J.E. HUDSON, Marital Consummation according to Ecclesiastical Legislation, (Doctoral Dissertation), St. Paul University, Ottawa, 1977, pp. 25-26 (hereafter cited: HUDSON, Marital Consummation). Also see JOYCE, Marriage, pp. 51-52; MC CARTHY, "The Traditional Concept", pp. 225-226.

¹¹These secular influences would directly influence the canonical and theological formulations particularly in the eleventh and twelfth centuries when the Church began to reflect on its doctrine of marriage. The School of Paris espoused the Roman theory that consent was the efficient cause of marriage. The School of Bologna adopted the Germanic teaching which held that consent and subsequent consummation was necessary for the formation of a valid, indissoluble bond of marriage.

c) The Consensual Theory

The early Church favored the consensual theory because it permitted the union of Mary and Joseph to be viewed as a valid marriage without the necessity of consummation thereby preserving the virginity of Mary.

Early proponents of the consensual theory include Ambrose (340-397), Augustine (354-430), and Nicholas I (858-867).¹² The consensual theory was fully developed by Peter Lombard (1100-1160) who taught that consent was the efficient cause of marriage. Sexual intercourse, resulting

¹²For Ambrose, marriage was created by consent which he described as the union of wills. See AMBROSE, De institutione virginis, cap. 6, 41, in Collectio selecta SS. Ecclesiae Patrum, A.B. Caillau (ed.), Parisiis, Apud Mequignon-Howard, 1829-1840, v. 60, p. 572. Augustine, a disciple of Ambrose, emphasized the necessity of consent when describing the marital union of Mary and Joseph. See AUGUSTINE, De nuptiis et concupiscentia, lib. I, c. 12, in A.B. Caillau, op. cit., v. 141, pp. 202-203. In response to select questions raised by some Bulgarians, Nicholas I taught that consent, not intercourse, was essential in the formation of the marriage bond. See NICHOLAS I, Responsa Nicolai ad consulta Bulgariaeorum, III, in J.P. Migne, PL, 119, 980. HUDSON, Marital Consummation, pp. 8-16 discusses Nicholas I's response and comments (at pp. 14-16) that this response cannot be taken as the definitive doctrine of the Church because a contemporary, Hincmar of Rheims (806-882), was preparing a commentary in which he concluded that sexual intercourse was a constitutive element in the formation of marriage. The teachings of Ambrose, Augustine, and Nicholas I are discussed in greater detail in FELLHAUER, "The Consortium", pp. 18-25; J.T. FINNEGAN, "When Is a Marriage Indissoluble? Reflections on a Contemporary Understanding of a Ratified and Consummated Marriage", in The Jurist, 28(1968), pp. 315-316 (hereafter cited: FINNEGAN, "Consummated Marriage"); JOYCE, Marriage, pp. 43-45; MC NEVIN, "Indissolubility", pp. 13-19.

in the consummation of the marriage, did not pertain to the essence of marriage.¹³

The consensual theory was countered by other authors who, following the lead of Hincmar of Rheims (806-882), argued that this theory was inadequate and formulated the copula theory.

d) The Copula Theory

One of the earliest and most frequently quoted proponents of the copula theory was Hincmar of Rheims who taught that sexual intercourse was equally necessary and essential along with consent for the formation of the marital bond.¹⁴

¹³"Efficiens autem causa Matrimonii est consensus, non quilibet, sed per verba expressus, nec de futuro, sed de praesenti." P. LOMBARD, Sententiarum Libri Quatuor, Lib. IV, D. XXVII, c. 3, in J.P. Migne, PL, 192, 910. A summary commentary on Lombard's teaching is presented in greater detail in FINNEGAN, "Consummated Marriage", p. 316; HUDSON, Marital Consummation, pp. 22-25; E. SCHILLEBEECKX, Marriage: Secular Reality and Saving Mystery, London, Sheed and Ward, 1965, p. 82.

¹⁴See HINCMAR of Rheims, De nuptiis Stephani et filiae Regimundi comitis, in J.P. Migne, PL, 126, 137, and 145. Hincmar's commentary was in response to Stephen's contention that his marriage to the daughter of Regimund was invalid on the ground of affinity. Hincmar stated that without consummation, the union of partners could not be called a marriage. For an informative discussion of Hincmar's teaching, see HUDSON, Marital Consummation, pp. 27-34; JOYCE, Marriage, pp. 53-55; MACKIN, Marriage, pp. 150-151. MC NEVIN, "Indissolubility", comments (at pp. 23-24): "Hincmar's significance lies in the fact that he seems to have been the first to incorporate sexual intercourse into the very constitution of marriage. Accordingly, he has profoundly set the stage for late medieval developments."

Gratian (c. 1140) supported the copula theory and attempted to reconcile the two theories in the Decretum. Since canonists and theologians felt constrained to define marriage to preserve the legitimate matrimonial character of the union of Mary and Joseph, Gratian could scarcely teach that sexual intercourse was fundamental to the formation of a valid marital bond. At the same time, he accepted the Augustinian model of marriage which distinguished the primary and secondary ends of marriage. Gratian's compromise was that a valid marriage was created by the exchange of consent which was later ratified through sexual intercourse. Consent initiated marriage but consummation perfected the union making it indissoluble. By not denying the role of consent and at the same time adding the necessity of consummation, Gratian attempted a reconciliation between the Schools of Paris and Bologna.¹⁵

14 (cont'd) ÖRSY, Marriage, explains (at p. 25) the importance of Hincmar's teaching differently: "he was the first to state firmly that once a marriage was consummated, it obtained a new status; it represented the union of Christ to the Church. Therefore, it could not be dissolved. Thus, Hincmar established the principle that indissolubility is intimately linked to consummation, a position that modern canon law continues to hold. Whether or not he was of the opinion that marriage comes into existence by consent alone remains uncertain."

¹⁵See C. XXVII, q. II for Gratian's teaching. His position is discussed in more detail by W.W. BASSETT, "The Marriage of Christians - Valid Contract, Valid Sacrament", in The Bond of Marriage; An Ecumenical and Interdisciplinary Study, W.W. Bassett (ed.), Notre Dame, Indiana, University

A compromise between the consensual and copula theories was effected by Pope Alexander III (1159-1181) who taught that the consent of the parties was sufficient to establish a valid marriage which was indissoluble in principle. Consummation made the marriage indissoluble in fact.¹⁶

Therefore, consummation of the marriage accomplished by completion of the physical act of intercourse conferred indissolubility upon the marital union. Furthermore, the physical consummation was thought to symbolize the scriptural explanation of marriage by which the two partners become one. With the reconciliation of the copula and consensual theories, canonists and theologians would begin to question the juridical effect of impotence, the inability to perform the marriage act in conjunction with the act of consent by which marriage was created.

15 (cont'd) of Notre Dame Press, 1968, p. 136; BRUNDAGE, "The Problem of Impotence", p. 135; HARRINGTON, "Impotency", pp. 31-33; HUDSON, Marital Consummation, pp. 38-44.

¹⁶Pope Alexander III was the former Bandinelli, a professor of Canon Law at the School of Bologna. For a discussion of the reconciliation rendered by Alexander III, see HUDSON, Marital Consummation, p. 94. ÖRSY, Marriage, comments (at p. 26) on Alexander III's teaching: "The bond was firm to the point that the parties themselves could not dissolve it anymore (this has been known as 'intrinsic indissolubility'). After the marriage had been consummated, it could not be dissolved at all ('extrinsic indissolubility') - to be understood, by any human power. [...] Innocent III (pope 1185-1216) confirmed the same doctrine, and so did Gregory IX (pope 1227-1241) by including the relevant documents into his official collection of decretal letters."

C) The Notion of Impotence

Early citations of the condition of impotence are reported in the Penitential of Theodore (c. 690) and in a rescript of Pope Gregory II to St. Boniface in 726. In both cases, it was stated that the marriages could not be consummated because of an impotent condition. While the references describe impotent conditions, the Church, apparently following the practice of Roman Law, granted dissolutions of the marriages rather than declaring impotence an impediment to marriage.¹⁷ This practice conformed with the copula theory which taught that marriage was established in successive

¹⁷The Penitential of Theodore reports a condition of male impotence while the rescript of Pope Gregory II refers to female impotence. These early citations are reported in A. DE SMET, Tractatus theologico-canonicus de sponsalibus et matrimonio, 4th Edition, Brugis, Car. Beyaert, 1927, pp. 494-495; MC CARTHY, "The Traditional Concept", p. 225. The ecclesiastical practice of dissolving unconsummated marriages apparently followed the Roman Law practice which admitted impotence as grounds for dissolution of a marriage rather than an impediment to marriage. For brief commentaries on the influence of Roman Law upon the Church's practice of dissolving marriages when impotence was alleged, see K.E. BOCCAFOLA, The Requirement of Perpetuity for the Impediment of Impotence, Roma, Università Gregoriana Editrice, 1975, p. 17 (hereafter cited: BOCCAFOLA, Perpetuity); P.L. FRATTIN, The Matrimonial Impediment of Impotence: Occlusion of Spermatic Ducts and Vaginismus, A Historical Synopsis and a Commentary, Washington, D.C., The Catholic University of America Press, 1958 (hereafter cited: FRATTIN, Impotence), pp. 1-3 who comments (at p. 2): "The only exception concerned the specific case of spadones castrati, to whom, as to those who had not reached puberty, marriage was absolutely forbidden." Also see LAWSON, "Roman Law", pp. 10-11.

moments beginning with the coniugium initiatum (marital consent) and the coniugium ratum (fully existing marriage).

a) Gratian and the Decretum

Gratian described impotence as the inability to have sexual intercourse; the inability of the impotent party to perform the marital act; or the inability of a couple to be united carnally.¹⁸ For Gratian, the impotent person was capable of entering a matrimonium initiatum. Since the marriage could not be consummated, it was open to the possibility of a dissolution.¹⁹ Inasmuch as Gratian espoused the

¹⁸"Queritur, an propter impossibilitatem coeundi, a viro suo aliqua sit separanda?" Dictum, C. XXXIII, q. 1. "Quod autem interrogasti de his, qui matrimonio iuncti sunt, et nubere non possunt, si ille aliam, vel illa alium ducere possit? De quibus scriptum est: 'Vir et mulier, si se coniunxerint, et dixerit postea mulier de viro, quod non possit coire cum ea, si potest probare, quod verum sit, per iustum iudicium, accipiat alium'. Si autem ille aliam acceperit, separentur." c. 1, C. XXXIII, q. 1. "De his requisisti, qui ob causam frigidae naturae dicunt se invicem non posse operam carni dantes commisceri." c. 2, C. XXXIII, q. 1.

¹⁹"Ecce, impossibilitas coeundi, si post carnalem copulam inventa fuerit in aliquo, non solvit coniugium. Si vero ante carnalem copulam deprehensa fuerit, liberum facit mulieri alium virum accipere." Dictum, c. 29, C. XXVII, q. 2. J.J. BRENKLE, The Nature and Impediment of Impotency: A Historical Synopsis, (J.C.L. Dissertation), Washington, D.C., The Catholic University of America, 1961, (hereafter cited: BRENKLE, The Nature of Impotency), states (at p. 39): "From this text, even though the notion of antecedent and consequent impotence is the object of discussion, still the effects of impotence upon marriage are quite clear." Gratian's description and interpretation of impotence are discussed by J.A. ALESANDRO, Gratian's Notion of Marital

copula theory, impotence was grounds for dissolving an unconsummated marriage rather than an impediment to marriage.

b) The Decretals

Similar descriptive phrases are used in the Decretals of Gregory IX (1227-1241) to refer to the condition of impotence. Impotence was described as the incapacity to render the marriage debt or the impossibility of being joined through the marriage act.²⁰ In addition, the impotent person was considered analogous to the prepubescent youth who lacked the physical capacity for the physical consummation of marriage.²¹ By comparing the sexual incapacity of the

19 (cont'd) Consummation, Roma, Officium Libri Catholici, 1971, pp. 83-84; FRATTIN, Impotence, pp. 4-5; HARRINGTON, "Impotency", pp. 33-35.

²⁰"Ex literis tuis accepimus, quod quidam sedecim annorum vel eo amplius quandam annorum tredecim duxit in uxorem, qui quum debitum reddere deberet, et non posset, mulier tam gravem infirmitatem contraxit, ut omnino viro sit facta inutilis, et instrumentum eius sit impeditum ita, quod vir ei commisceri non potest." c. 3, X, IV, 15. Also see c. 6, X, IV, 15. See BRENKLE, The Nature of Impotency, who briefly mentions (at p. 36) the various descriptive terms. Furthermore, impotentia coeundi is used in title 15, Book IV of the Decretals to describe an impotent condition: "Titulus XV. De frigidis et maleficiatis, et impotentia coeundi."

²¹The Church accepted the practice of Roman Law legislated by Justinian which set the age of puberty at fourteen for males and twelve for females. Justinian's legislation abolished the previous method of bodily inspection to determine when puberty was attained. See the commentary of LAWSON, "Roman Law", pp. 9-10.

impotent person with that of a minor, Gregory likened and declared both the impotent person and a youth not only incapable of physical consummation but also lacking consensual capacity necessary for contracting marriage.²²

The nomenclature of the Medieval Ages lacked legal and medical precision. Terms were used indiscriminately to describe the condition of the person incapable of performing the physical act of intercourse. Most of the problems discussed during this period would today be called impotence.²³

c) Select Commentators and the Notion of Impotence

Commentators on the Decretals upheld the previous distinction of the bonum prolis and the bonum coniugum. Consequently, Raymond of Pennafort (1175-1275) and Hostiensis (1200-1271) taught that impotence prevented the completion or fulfillment of either end of marriage.²⁴ Since neither

²²"Sicut enim puer, qui non potest reddere debitum, non est aptus coniugio: sic quoque qui impotentes sunt minime apti ad contrahenda matrimonia reputantur." c. 2, X, IV, 15.

²³Several authors comment on the lack of a precise juridical and medical vocabulary: BRENKLE, The Nature of Impotency, pp. 36-37; BRUNDAGE, "The Problem of Impotence", p. 135; P.V. HARRINGTON - C.J. KICKHAM, "The Impediment of Impotency and the Condition of Male Impotence: A Canonical-Medical Study", in The Linacre Quarterly, 25(1958), pp. 101-102.

²⁴Raymond of Pennafort describes the juridical effect of impotence in this way: "Cum enim omne matrimonium aut causa suscipiendae prolis, aut causa incontinentiae fiat,

end of marriage could be attained, the natural conclusion was that the impotent party was incapable of giving valid consent because the very object of consent was absent ab initio. Therefore, the marriage was considered to be null ab initio.

Thomas Aquinas (1225-1274) clarified the relationship between marriage and the capacity for intercourse: consent, not intercourse, was the efficient cause of marriage. However, marital consent included the exchange of the right over the body of the other for the purpose of performing the marital act. If this right was not present, or was lacking in one or both of the contracting parties, the consent was invalid because the impotent party attempted to contract obligations incapable of fulfillment. Therefore, consent posited by an impotent person was ineffectual because the

24 (cont'd) impossibilitas coeundi utramque causam removet." RAYMUNDUS DE PENNAFORT, Summa de matrimonio, (dans sa Summa [de poenitential]), Avenione, 1715, p. 558 (hereafter cited: RAYMOND, Summa). Also see RAYMUNDUS DE PENNAFORT, Summa de matrimonio, X. Ochoa - A. Diez (eds.), Vol. 1, Tomus C, Roma, Commentarium pro Religiosis, 1978, col. 965 (hereafter cited: RAYMOND, Summa de matrimonio). Hostiensis provides this description of impotence: "Et videtur quod haec [impedimenta supra dicta] impediunt et dirimant, cum duo bona matrimonii deficient et causae principales et finales, propter quas matrimonium contrahitur, scilicet fides, et evitatio fornicationis, et susceptio prolis, [...]." HOSTIENSIS (Henricus de Segusio), Summa aurea, Lib. IV, De frigidis et maleficiatis, Lugduni, 1588 (hereafter cited: HOSTIENSIS, Summa aurea).

actual capacity for intercourse was lacking in the incapacitated person.²⁵

Since there was general agreement that marriage demanded the capacity for sexual intercourse, a gradual evolution occurred in which impotence, the physical incapacity for performing the marriage act, formerly a ground for the dissolution of a non-consummated marriage, was now recognized as an impediment to marriage.²⁶ Moreover, impotence was distinguished from sterility (the incapacity for generation) which was not considered an impediment to marriage.²⁷ When the physical consummation was impeded because of an impotent condition, the marriage was no longer dissolved on the basis of non-consummation, but was now considered null from its

²⁵"[...] dicendum quod, quamvis actus carnalis copulae non sit de essentia matrimonii, tamen potentia ad hoc est de eius essentia: quia per matrimonium datur utrique coniugum potestas in corpore alterius respectu carnalis copulae." Summa Theol. III, Suppl., q. 58, a. 1, ad 1.

²⁶See the comment of LESAGE, "Psychic Impotence", where he states (at p. 65): "It is through the Decretals of Gregory IX, promulgated in 1234, that the diriment impediment of impotence became the common law of the Church." A similar view was expressed in HARRINGTON, "Impotency", pp. 42-46.

²⁷A divergent opinion was held by Panormitanus (1386-1453) in which he taught that the power of generation was essential for the formation of a valid bond of marriage. See PANORMITANUS (Nicolaus de Tudeschis), Commentaria in Quinque Libros Decretalium, Lib. IV, tit. 15, c. 2, n. 5, Venetiis, 1578 (hereafter cited: PANORMITANUS, Commentaria). The teaching of Panormitanus is discussed in more detail by BRENKLE, The Nature of Impotency, pp. 40-41.

inception because the impotent party attempted to bind himself to the perpetual obligation to give the right to the body. Since the impotent person was incapable of performing the promised right, the consent exchanged was vitiated. Further investigation was necessary into the invalidating nature of impotence -- did impotence of itself invalidate marriage? Or was its invalidating effect dependent upon specific conditions? The necessary qualifiers of impotence, that it be antecedent and perpetual, were discussed in conjunction with the developing understanding of the causes of impotence.

D) The Causes of Impotence

Medieval commentators distinguished natural and accidental causes of impotence. The natural causes existed from birth and were considered intrinsic to the person. The accidental causes induced through magic or witchcraft (maleficium), or through surgical or accidental removal of the male genitalia, were viewed as extrinsic to the person.

a) Natural Impotence

Natural impotence was discussed according to three categories: impotence in minors (pueri), female impotence (arctatio), and male impotence (frigidity).

i) Impotence in Minors

When discussing the nature of impotence, Gregory IX compared the innate impotent condition of minors (pueri) who lacked the understanding and the physical capacity to enter marriage to natural impotence in adults.²⁸ Commenting on this comparison, Raymond of Pennafort explained that impotence in minors ceased at puberty and therefore constituted a temporary impediment whereas the impotent condition in adults could be temporary or permanent.²⁹ Thomas Aquinas elaborated on this interpretation and described this condition as impotence of the mind and body. With reference to ecclesiastical law founded on the majority of cases, Thomas taught that marriage could not be validly contracted before the age of discretion (fourteen for males and twelve for females). However, if the minimum physical and psychological requirements whereby nature and reason were sufficiently developed emerged prior to the age of discretion, the par-

²⁸"Impotens ad copulam est impotens ad contrahendum matrimonium, sive sit impedimentum aetatis sive naturae." c. 2, X, IV, 15. As previously noted, the pueri were minors who had not reached puberty which was fixed at the ages of fourteen for males and twelve for females.

²⁹"Naturalis, et temporalis impotentia, quae est in puero, impedit matrimonium, quod quandiu inest ei, non potest contrahere. [...] Naturalis impotentia in frigido, quae est perpetua, impedit matrimonium contrahendum, et dirimit iam contractum." RAYMOND, Summa, p. 558. Also see RAYMOND, Summa de matrimonio, col. 966.

ties could validly contract marriage.³⁰

Despite the Medieval practice of parents betrothing minor children, such unions were not recognized as valid because the children lacked the physical and psychological capacity to contract marriage. The natural, innate impotence in minors constituted a temporary impediment to marriage which ceased at the onset of puberty.

ii) Arctatio

In the Medieval Ages, arctatio was used to describe the natural condition of female impotence in which the vagina was too narrow to permit penetration by the penis.

The Decretals contain three references to female impotence.³¹ The first described an inability for penetration

³⁰See Summa Theol. Suppl. III, q. 58, a. 5. Also see JOYCE, Marriage, who reports (at pp. 94-95) the Medieval practice of parents betrothing their minor children in marriage. With the exception of the Lombardic custom which recognized the ceremony as an exchange of valid consent, the ceremony was considered to be a promise of future marriage.

³¹Prior to the Decretals, female impotence was described in more general terms. For example, Gratian described female impotence as the woman's inability to render the debitum, or the mulier infirmitate correpta: "Quod posuisti, si mulier infirmitate correpta non valuerit viro debitum reddere, quid eius faciat iugalis: bonum esset, si sic permaneret, ut abstinentiae vacaret." c. 18, C. XXXII, q. 7. Canonists who interpret the mulier infirmitate correpta to constitute a condition of antecedent and perpetual impotence include F.X. WERNZ - P. VIDAL, Ius canonicum, Vol. 5, Ius matrimoniale, 3rd Edition, Romae,

resulting from a disease caused by an obstruction in the vagina. In this case, if the affliction could not be remedied by the known medical skills, the husband was permitted to remarry. In the second situation, a similar doctrine is reiterated concerning the woman's impotent condition which could be remedied only by means which presented a danger to the life of the incapacitated person. As such, the inability for penetration rendered the woman an inept candidate for marriage. The third reference which described a permanent blockage of the vagina preventing penetration was compared to arctatio, but it differed in that this condition was not only permanent but also absolute.³²

iii) Frigiditas

Frigiditas was used to designate a congenital condition of male impotence which rendered the man incapable of sexual relations with all women.

31 (cont'd) Apud Aedes Universitatis Gregoriana, 1946, p. 266: "[...] canon vero in textu allegatus congrua interpretatione de impotentia perpetua et antecedente mulieris est intelligendus, neque ad alias interpretationes plus minusve contortas et difficiles est confugiendum."; F.M. CAPPELLO, Tractatus canonico-moralis de sacramentis, Vol. 5, De matrimonio, Romae, Marietti, 1950, p. 387. For a dissenting opinion, see JOYCE, Marriage, where the author reports (at pp. 329-330) the probability that the woman was afflicted prior to the consummation of the marriage which permitted a separation.

³²See c. 3, X, IV, 15; c. 6, X, IV, 15; c. 4, X, IV, 15.

Gratian used the term frigiditas without providing a specific description of the condition. He simply stated that frigiditas nullified the marriage and permission was to be granted to the wife to remarry.³³

The reference in the Decretals specifies that this condition resulted in the inability of the afflicted male to have sexual relations with his present spouse and all women. If the marriage was dissolved on the grounds of frigidity, and the incapacitated male attempted a second marriage and was capable of performing the marriage act, the first marriage was to be reestablished.³⁴ Therefore, in order to invalidate marriage, frigiditas had to be of an absolute and permanent nature.

Since it was assumed that the male had the primary role in the act of intercourse, Thomas Aquinas and Hostiensis maintained that frigidity was proper to males. Furthermore,

³³See c. 2, C. XXXIII, q. 1.

³⁴"Accepisti mulierem et, per aliquod tempus habuisti, per mensem aut per tres, aut postremo per annum, et nunc primum dixisti, te esse frigidae naturae ita, ut non potuisses coire cum illa, nec cum aliqua alia; et si illa, quae uxor tua esse debuit, eadem affirmat, quae tu dicis, et si probari potest per verum iudicium, ita esse ut dicitis, separari potestis, ea tamen ratione, ut, si tu post aliam acceperis, reus periurii diiudicaris, et iterum post peractam poenitentiam priora connubia reparare debebis." c. 1, X, IV, 15. "[...] masculus iurabit se naturaliter frigidum, id est, se non posse cognoscere aliquam mulierem, nec moveri ad voluntatem coeundi. Nam si aliquoties moveretur et non possit perficere, non esset naturaliter frigidus." HOSTIENSIS, Summa aurea, n. 10.

this condition was considered to be permanent and absolute because it prevented sexual intercourse with all members of the opposite sex. Therefore, the frigidi were thus prohibited from contracting marriage.³⁵

b) Accidental Impotence

Two general categories of accidental impotence were distinguished in the Medieval Ages: impotence induced by magic or witchcraft (maleficium) and impotence resulting from surgery or violence (secti).

i) Maleficium

The earliest canonical evidence admitting maleficium as a cause of impotence was a letter of Hincmar of Rheims which underscored the necessity of an investigation to determine the cause of the impotence. If it was determined that the impotence was attributed to the machinations of the devil, Hincmar prescribed a remedy of confession, penance, and exorcism to alleviate the impotent condition. If a cure was not achieved, the parties were free to separate and enter

³⁵ See HOSTIENSIS, Summa aurea, n. 2. For the reference to Aquinas, see Summa Theol., III, Suppl., q. 58, a. 1, ad 6 where he admits that while frigidity can exist in women, it does not constitute an impediment to marriage because the primary role in the marital act was ascribed to the male. Hence, as an impediment to marriage, frigidity was proper to males.

another marriage.³⁶

Gratian reproduced Hincmar's letter in the Decretum.³⁷ Upon acceptance of Hincmar's prescribed remedies, Gratian commented that if the parties were capable of performing intercourse following the granting of a separation, the reestablishment of the former union was not juridically required because maleficium prevented sexual relations with certain individuals only. Maleficium was therefore recognized as a relative condition.³⁸

Yet it remained questionable whether maleficium satisfied the juridic requirement of perpetuity. While some thought that maleficium could be cured through spiritual remedies, others believed that the condition could be per-

³⁶See HINCMAR, De nuptiis Stephani, et filiae Regimundi comitus, in J.P. Migne, PL, 126, 151. The implications of Hincmar's letter are discussed by LESAGE, "Psychic Impotence", p. 67.

³⁷See c. 4, C. XXXIII, q. 1. LESAGE, "Psychic Impotence", states (at p. 67) that the inclusion of Hincmar's letter into the Decretum "introduced into ecclesiastical law the idea of impotence resulting from an evil spell."

³⁸See BRENKLE, The Nature of Impotency, who explains (at pp. 61-62) Gregory II's prescription (c. 2, C. XXXIII, q. 1) for the reestablishment of the prior union as a reference to an intrinsic cause of impotence (frigidity) rather than the extrinsic cause of maleficium. Also see FRATTIN, Impotence, who reports (at p. 8) that the separation was granted only after it was established that the wife was not responsible for the magic resulting in the incapacity for sexual intercourse. From this distinction, the notion of relative impotence evolved.

petual if the person who cast the spell died, or when the spell could not be broken after following the prescribed remedies, or when the instruments used to induce impotence were lost.³⁹ Prior to the acceptance of maleficium as a cause of impotence, impotence was thought to be a natural condition which rendered the person absolutely impotent. As such, medieval canonists interpreted the word "perpetual" as an "abbreviation" for absolute, biologically determined impotence. When investigating the perpetuity of maleficium with this understanding, the condition did not fulfill the biological, absolute condition as did the natural forms of impotence.⁴⁰

Innocent IV (1243-1254) implied that maleficium did

³⁹See the comments of LESAGE, "Psychic Impotence", pp. 69-70. Similar statements are reported from a medical viewpoint by M.B. BROOKS - S.W. BROOKS, Lifelong Sexual Vigor: How to Avoid and Overcome Impotence, Garden City, New York, 1981, p. 8. G. WAGNER - R. GREEN, Impotence: Physiological, Psychological, Surgical Diagnosis and Treatment, New York, Plenum Press, 1981, describe (at pp. 73-74) the condition of ligature, i.e., erectile failure attributed to sorcery in which it was thought that the impotent condition was induced by a witch's tying knots in a leather strap and hiding the cord. The impotent condition was thought to persist until the cord was discovered and the knots untied.

⁴⁰See BOCCAFOLA, Perpetuity, where he states (at p. 55) the controversy over the perpetuity of maleficium "was merely a symptom of the deeper struggle over the true meaning of the impediment of impotence. [...] The most disputed point in the controversy over maleficium was whether or not it could be perpetual."

not constitute an impediment and consequently marriages were not to be declared null on this basis.⁴¹ But a gradual evolution occurred which admitted the possibility of relative impotence induced by maleficium thus departing from Innocent IV's commentary. For example, Hostiensis admitted maleficium constituted the impediment of impotence even though the condition was not necessarily absolute or biologically induced.⁴² Aquinas followed Hostiensis' theory admitting maleficium as a relative impediment.⁴³ Panormitanus also admitted maleficium as a perpetual form of impotence provided the spell was contained in the food consumed by the afflicted party. Under these circumstances, the disposing cause could be interpreted to be a natural one.⁴⁴ Gradually, maleficium was accepted as a cause of impotence because

⁴¹"Nos dicimus, quod propter maleficium, numquam separatur matrimonium [...]." INNOCENTIUS IV (Sinibaldus Fliscus), Commentaria apparatus in V Libros Decretalium, lib. IV, tit. 15, c. 5, Frankfurt/Main, Minerva, 1968.

⁴²"Item aliquando maleficiatur homo adeo, quod non potest cognoscere uxorem suam: sed bene cognoscit omnes alias [...]." HOSTIENSIS, Summa aurea, nn. 8-9.

⁴³"[...] maleficium quandoque potest praestare ad omnes impedimentum, quandoque ad unam tantum: quia diabolus voluntaria causa est, non ex necessitate naturae agens." Summa Theol. III, Suppl., q. 58, a. 2, ad 4.

⁴⁴"[...] nam saepe ista impedimenta (maleficia) sunt perpetua, unde quum mortuus est ille, qui fecit, vel maleficium est perditum, vel si fuit datum in potu, vel cibo." PANORMITANUS, Commentaria, c. II, n. 15.

it prevented the attainment of the primary and secondary ends of marriage.

During the Medieval Ages, the controversy continued whether maleficium was a form of the impediment of impotence if it persisted, and if so, whether it satisfied the requirement of perpetuity. Only in the seventeenth century was maleficium accepted as a relative form of impotence satisfying the same conditions as natural impotence.⁴⁵

ii) The Secti

The second category of extrinsic causes were those which resulted from violence, injury to, or excision of the male genitalia. Medieval authors used additional terms to designate this second type of impotence which included castrati, spadones or eunuchi.⁴⁶

The secti are briefly mentioned by Gratian who maintained that once marriage was contracted, no type of consequent impotence could be recognized as a cause for

⁴⁵See LESAGE, "Psychic Impotence", who states (at pp. 71-72): "With the development of psychological sciences, functional impotence, which was once attributed to evil spells, is now considered as the effect of mental diseases." A similar comment is offered by BOCCAFOLA, Perpetuity, p. 61.

⁴⁶"Castrati autem, eunuchi et spadones idem revera sunt; nempe, qui testiculis carent." D. SOTO, In Quartum Sententiarum Commentarii, II, dist. 34, q. 1, a. 2, Ex typographia P. Borremans, 1613, p. 265.

separation.⁴⁷ Hostiensis and Panormitanus both taught that the male deprived of both testicles and the ability to produce semen could marry as long as he was capable of erection and penetration.⁴⁸ Whether or not semen was an essential requirement was open to debate.⁴⁹

Despite the fact that the secti could not produce and emit semen which was potentially generative, they were not always excluded from marriage. Marriage was prohibited or nullified only when the condition antedated the exchange of consent.

⁴⁷See c. 25, C. XXXII, q. 7.

⁴⁸The common teaching in the Medieval Ages was that the capacity for intercourse sufficed for the establishment of marriage. Therefore, Hostiensis states: "[...] si saltem unum testiculum quis haberet: quia talis contrahere posset [...]." HOSTIENSIS, Summa aurea, n. 7. Also see PANORMITANUS, Commentaria, lib. IV, tit. 15, c. II, n. 5. BRENKLE, The Nature of Impotency, states (at p. 65): "The term sperma [...] obviously refers to [the] total ejaculate or semen and not merely the spermatozoa."

⁴⁹The question of the nature of semen to be deposited in the vagina was debated subsequent to Cum frequenter of Sixtus V (1585-1590) in which it was stated that eunuchs and spaded men were prohibited from contracting marriage because of their frigid nature. From this response a debate arose in the twentieth century in which the semen required for consummation was described as that which was elaborated in the testicles. While Sixtus V did not legislate this definition, it appeared in P. GASPARRI, Tractatus canonicus de matrimonio, Vol. I, 9th Edition, Roma, Typis Polyglottis Vaticanis, 1932, p. 302: "Virile semen, ut dictum est, conficitur in testiculis. Unde spadones et eunuchos, utroque testiculo carentes, certum et manifestum est verum semen emittere non posse, ut expresse docet Sixtus V [...]."

E) The Essential Characteristics of Impotence

The essential characteristics that impotence be antecedent and perpetual, whether absolute or relative, evolved in conjunction with the descriptions and causes of impotence suggested by medieval canonists and theologians. In addition to the requirements of antecedence and perpetuity, medieval canonists studied the juridic effect of knowledge or lack thereof concerning an impotent condition.

a) Antecedence

Gratian indirectly distinguished antecedent impotence from consequent impotence when he described impotence as the inability of a person to consummate the marriage on the first attempt at intercourse following the exchange of consent.⁵⁰ However, when commenting on the §acti, Gratian stated that if the condition was subsequent to the exchange of marital consent, it did not affect the validity of the marital bond.⁵¹ Hostiensis implied that consequent impotence resulting from the accidental loss of the genitals did not affect the validity of the Bond. Only that male whose

⁵⁰Gratian's distinction is similar to the present law with the exception that the impotent condition must exist at the time consent is exchanged, not afterwards. The current interpretation of antecedence will be presented more fully in Chapter II.

⁵¹See c. 25, C. XXXII, q. 7.

loss of the genitalia antedated the marriage was incapable of marrying validly.⁵²

When the antecedence of the impotent condition was doubtful, a presumption favoring antecedence was established when a petition for separation was received early in the marriage.⁵³ But Panormitanus opposed this interpretation arguing that the presumption should be for subsequent impotence.⁵⁴

There was unanimous agreement in the Medieval Ages that once marriage had been contracted, no consequent condition of impotence invalidated the union. In order to invalidate marriage, the impotence must antecede the exchange of marital consent.⁵⁵

b) Perpetuity

The natural causes of impotence were considered to be perpetual because they existed from birth. As such, they

⁵²See HOSTIENSIS, Summa aurea, n. 7.

⁵³See Ibid.

⁵⁴See PANORMITANUS, Commentaria, n. 9. BRUNDAGE, "The Problem of Impotence", reports (at p. 136) that in such cases, a petition for separation had to be timely, that is, submitted within two months of the celebration of the marriage.

⁵⁵Brief commentaries on the unanimous agreement that consequent impotence did not constitute an impediment to marriage are reported by BRENKLE, The Nature of Impotency, pp. 70-71; HARRINGTON, "Impotency", p. 47.

were judged absolute because they prevented the possibility of sexual intercourse with all members of the opposite sex.

The Decretal letter of Innocent III (1198-1210) to the Bishop of Auxerre appears to be the foundational text for the juridic requirement of perpetuity. The situation presented to Innocent III concerned the validity of a dissolution granted by the Bishop on the grounds of arctatio. Following the dissolution, the woman remarried and was found capable of intercourse. The Bishop therefore inquired about the validity of the new marriage because the woman was allegedly impotent. Innocent III responded that the previously granted dissolution was erroneous since the impediment was not perpetual. The first marriage was therefore valid and was to be restored.⁵⁶

As previously discussed, the proponents of the copula theory described the effects of impotence as preventing the formation of the marriage bond. Temporary or permanent

⁵⁶"[...] nos tamen, perspicaciter attendentes, quod impedimentum illud non erat perpetuum, quod praeter divinum miraculum per opus humanum absque corporali periculo potuit removeri, sententiam divortii per errorem, licet probabilem, novimus esse prolatam [...] et ideo inter ipsam mulierem et primum virum dicimus matrimonium exstitisse." c. 6, X, IV, 15. For a detailed interpretation and commentary on Innocent III's letter, see BOCCAFOLA, Perpetuity, pp. 39-50 who comments (at pp. 40-41): "Innocent III can, then, justly be regarded as the originator of the requirement of the perpetuity of impotence in ecclesiastical positive law because of this explicit legal precedent which he here recognizes as a paradigm for the solution of similar cases."

impotence at the first attempt of consummation following the exchange of marital consent was in fact actual impotence preventing the completion of the marriage process and the subsequent establishment of an indissoluble bond. Therefore, the necessary qualifiers of antecedence and perpetuity were not pertinent to this theory. However, with the adoption of the consensual theory, a gradual evolution occurred in which impotence was no longer a ground for the dissolution of the marriage, but was an impediment at the time of marital consent preventing the attainment of either end of marriage.

The constitutive prerequisite of perpetuity was indirectly implied in the Decretum and the Decretals with reference to the condition of frigidity in which it was stated that should a second marriage be attempted and in fact consummated by a frigidus, the first marriage was to be reestablished. The presumption was that the male perjured himself for the purpose of obtaining the annulment. It can therefore be concluded that frigidity must be of a permanent nature in order to invalidate a marriage.⁵⁷

The issue of perpetuity was further discussed by Raymond of Pennafort when he equated the natural impotence of minors with the physical incapacity of the adult and noted

⁵⁷See c. 2, C. XXXIII, qq. 1-2 and c. 1, X, IV, 15.

that the natural impotence of minors was temporary while in adults, the condition could be permanent or temporary.⁵⁸ Thomas Aquinas also commented on the perpetuity of impotence when discussing maleficium. This extrinsic cause could be temporary or permanent depending on the results attained by the triennial test. A permanent condition of maleficium can be admitted even when sexual relations were impossible with just one person.⁵⁹ If, however, after the completion of the trial period the marriage remained unconsummated, the condition was presumed to be permanent.⁶⁰ Nevertheless, if the person was capable of performing the marital act following the granting of an annulment, the juridic requirement of

⁵⁸"Naturalis, et temporalis impotentia, quae est in puero, impedit matrimonium, quod quamdiu inest ei, non potest contrahere." RAYMOND, Summa, p. 558. Also see RAYMOND, Summa de matrimonio, col. 966.

⁵⁹"Et ideo distinguendum est. Quia impotentia coeundi ex maleficio aut est perpetua: et tunc matrimonium dirimit. Aut non est perpetua et tunc non dirimit. Et ad hoc experiendum eodem modo Ecclesia tempus praefixit, triennium scilicet, sicut et de frigiditate dictum est." Summa Theol. III, Suppl., q. 58, a. 2.

⁶⁰"Ad hoc autem cognoscendum, utrum sit impedimentum perpetuum vel non, Ecclesia tempus determinatum adhibuit in quo huius rei posset esse experimentum, scilicet triennium." Ibid., q. 58, a. 1. The triennial experiment, initiated in Roman Law by Justinian to prove the presence of an impotent condition, was accepted by Pope Celestine III (1191-1198) and established in decretal law by Gregory IX (1227-1241). FRATTIN, Impotence, reports (at p. 15) a minority opinion which interpreted the phrase continuo triennio mathematically while the majority opinion interpreted the time juridically.

perpetuity was not satisfied because the condition of impotence was not permanent. Even if the annulment has been granted, the former union is to be reestablished.⁶¹

Hostiensis alluded to the necessity of perpetuity when discussing the capacity of an impotent person to contract marriage even when both parties had prior knowledge of the impotent condition. He stated that the potent party was probably ignorant of the impotent condition because it was difficult to believe that a person would contract marriage with a partner who was incapable of performing the marital act.⁶²

A gradual transformation occurred in which impotence, previously examined from its predisposing physiological

⁶¹"Unde, si Ecclesia se deceptam inveniatur, per hoc quod ille in quo erat impedimentum, invenitur carnalem copulam cum alia vel cum eadem perfecisse, reintegrat matrimonium praecedens, et dirimit secundum, quamvis de eius licentia sit factum." Summa. Theol. III, Suppl., q. 58, a. 1.

⁶²Medieval canonists debated whether the knowledge of an impotent condition or lack thereof affected the validity of the marital contract. This requirement was discussed in relationship with the capacity to formulate a valid bond of marriage: "Nam si ambo sciant impotentiam, et volunt simul contrahere, vel post contractum simul remanere, hoc quidem potuerunt: non tamen credas, quod sit matrimonium: sed est decretum quia qui talem habere non potest ut uxorem, saltem habeat ut sororem [...]." HOSTIENSIS, Summa aurea, n. 6. The admonition of Hostiensis that the couple live as brother and sister was maintained by Raymond of Pennafort: "[...] quid si frigidus contrahit cum arcta, et uterque sciat suum impedimentum? Credo, nisi ambo consentiant separationi, debent simul stare, sicut frater, et soror." RAYMOND, Summa, pp. 563-564. Also see RAYMOND, Summa de matrimonio, col. 971, note 1.

cause began to be investigated according to its effect on the marital union -- the inability of the couple to achieve the ends of marriage. The impediment of impotence resulted in the inability of the afflicted person to assume the promised right to acts apt for the procreation and generation of children. Therefore, as a legal requirement, perpetuity was seen to affect the validity of marriage in relation to the moral ability or inability to remove that condition preventing the attainment of the ends of marriage.⁶³

c) Absolute or Relative Character

In the Decretals, frigidity was described as the husband's incapacity to have intercourse with either his present spouse or any woman. The condition was therefore understood to make the male absolutely impotent.⁶⁴ Panormitanus followed this opinion and stated that frigidity

⁶³See BOCCAFOLA, Perpetuity, where he states (at p. 44): "If perpetuity predominantly involves the duration of a biological condition, then it becomes primarily a medical term. Perpetuity will equal incurability, and will be determined by medical opinions and medical men. But if perpetuity is a juridic concept, then the presence or absence of physical potency will be secondary to the legal reasoning and legal proofs used to show that a particular situation fulfills the definition of perpetuity. If perpetuity is a situation of fact, it will depend on the progress of medical science, if it is a juridic concept, it will depend on the development of jurisprudence."

⁶⁴"[...] et nunc primum dixisti, te esse frigidae naturae ita, ut non potuisses coire cum illa, nec cum aliqua alia; [...]." C. 1, X, IV, 15.

caused the male to be incapable of sexual relations with all women.⁶⁵

Relative impotence was described by Raymond of Pennafort with reference to arctatio. He responded that the woman, incapable of sexual relations with her husband due to arctatio, could remarry when her capacity for intercourse could be achieved without threat to her life.⁶⁶

Furthermore, the acceptance of maleficium as a possible cause of impotence led to the understanding that this was a relative impediment rather than an absolute impediment because the incapacitated individual was excluded from sexual intercourse with just one or a few members of the opposite sex, not all.⁶⁷

⁶⁵"[...] nam frigiditas est impedimentum naturale non restrictum ad certam personam, unde si vir postea cognoverit aliam, apparet ecclesiam fuisse deceptam, cum eodem modo potuisset cognoscere primam [...]." PANORMITANUS, Commentaria, c. I, n. 7.

⁶⁶Quoting Huguccio (1210), Raymond stated: "Hugot. dicit quod est legitima persona ad contrahendum matrimonium quantum ad illum, vel eius similem, cui potest sine periculo commisceri, non quantum ad illum et eius similem cui non potest sine periculo commisceri." RAYMOND, Summa, p. 560.

⁶⁷Thomas Aquinas distinguished an absolute condition of impotence from a relative one when distinguishing maleficium from frigidity: "Tamen haec est differentia inter maleficium et frigiditatem: quia qui est impotens ex frigiditate, sicut est impotens ad unam, ita est ad aliam; et ideo, quando matrimonium dirimitur, non datur licentia ei ut alteri coniungatur. Sed ex maleficio homo potest esse impotens ad unam et non ad aliam: et ideo, quando iudicio Ecclesiae matrimonium dirimitur, utrique datur licentia ut alteram copulam quaerat." Summa Theol. Suppl., q. 58, a. 2.

Conclusion

Several important aspects relevant to our study can be identified from this brief historical review of the canonical developments of the diriment impediment of impotence. Impotence defined in terms of a person's incapacity for sexual intercourse was originally not viewed as a canonical impediment to marriage but only as a motive for separation of the spouses. However, with the resolution of the consensual and copula theories by Alexander III, impotence came to be linked to a person's inability to give consent. In other words, an impotent person was regarded as inept (inhabilis) to contract marriage (i.e., to give matrimonial consent) because he/she could not proffer the object of consent. Thus, impotence was declared a diriment impediment to marriage by common law with the promulgation of the Decretals in 1234 by Gregory IX.

Impotence was originally thought to result from natural biological causes which were intrinsic to the person. Therefore, the incapacitated person was considered to be permanently inept for marriage, that is, impotence of this kind was regarded as an absolute and permanent condition. Gradually, with the recognition of extrinsic or accidental

67 (cont'd) Thomas' distinction is discussed by BRENKLE, The Nature of Impotency, pp. 61-62.

causes of impotence, canonical doctrine admitted also relative impotence. This was true especially in regard to impotence caused by maleficium which seems to be the conceptual forerunner of functional impotence. According to common opinion, therefore, natural (intrinsic) or accidental (extrinsic) impotence, whether absolute or relative, which pre-existed the exchange of marital consent and was permanent, was recognized and accepted as a diriment impediment to establishing the marriage contract. The juridic principles of antecedence and perpetuity were incorporated into the juridic notion of impotence at the initial stages of its development.

The controversy raging at the present time in canonical doctrine and jurisprudence with regard to the principle of perpetuity is not something that has emerged only in recent times. This issue was debated from the beginning of its canonical considerations. The principle implied that the condition underlying impotence be incurable through licit and ordinary means. Historical analysis of this principle inclines us to conclude that the underlying concept was not frozen once and for all when impotence was declared a diriment impediment. The elements of incurability (licit and ordinary means) are themselves relative, that is, relative to the place, time, situation, persons etc. In other words, the very principle of perpetuity demands that it be understood and applied according to the continuing progress

in canonical and medical (psychiatric/psychological) sciences, the subject matter of the following chapters.

CHAPTER II

IMPOTENCE IN THE 1983 CODE OF CANON LAW

As we have seen in the previous chapter, the purely biological view of marriage which influenced the juridical definition of marriage in the 1917 Code also influenced the juridical norms governing impotence. In a similar vein, we can state that the holistic view of marriage taught by the Second Vatican Council has directly influenced the revision of the canons on the notion and characteristics of impotence. This is obvious in the deliberations of the coetus entrusted with the task of revising the law on marriage. These discussions, reported in Communicationes, indicate that the notion of marriage as a "communio" or "consortium totius vitae", and the most recent trends in a more personalistic understanding of "consummation", seem to have prevailed in revising the canonical norms on impotence.

The purpose of this chapter is to analyze critically the new aspects introduced into the juridical norms governing "impotence" in the new Code. This will necessarily entail a brief review of the nature of marriage and consummation. An analysis of the deliberations of the coetus on impotence will comprise a study of some descriptions of impotence along with its causes, its essential characteristics of antecedence and perpetuity, and its absolute and relative aspects. Furthermore, we will examine the question

concerning the certainty of the impotent condition if it is to invalidate a marriage, and finally, the juridical status of sterility according to canon 1098.

A) The Juridical Nature of Marriage in the 1983 Code

From the twelfth century onward, the predominant juridical notion of marriage was circumscribed in terms of a contract with the corresponding granting of the ius in corpus as the formal object of marital consent.¹

The Second Vatican Council shifted the emphasis by describing marriage in terms of a "conjugal covenant", an "intimate community of conjugal life and love", "ordained for the good of spouses, of children, and of the society." Through the actions expressive of conjugal love, spouses become one flesh and "render mutual help and service to each other through an intimate union of their persons and of

¹See cc. 1012, 1081, 2 in Codex iuris canonici, Pii X Pontificis Maximi iussu digestus, Benedicti Papae XV auctoritate promulgatus, Romae, Typis Polyglottis Vaticanis, 1917. Unless otherwise noted, this edition will be used for references to the 1917 Code of Canon Law. For a discussion on the contractual definition of marriage with its formal object defined as the granting of the ius in corpus, see F.M. CAPPELLO, Tractatus canonico-moralis de sacramentis, Vol. 5, De matrimonio, Romae, Marietti, 1950, pp. 20-23 (hereafter cited: CAPPELLO, De matrimonio); J.T. FINNEGAN, "The Current Jurisprudence concerning the Psychopathic Personality", in The Jurist, 27(1967), p. 443 (hereafter cited: FINNEGAN, "The Current Jurisprudence"); P.F. PALMER, "Christian Marriage: Contract or Covenant?", in Theological Studies, 33(1972), p. 617.

their actions" which manifests itself in the sharing of a communion of life.²

The analogy of the marital relationship with the scriptural reference to God's covenant with His people was considered a suitable way to express more clearly the personal aspects of marriage.³ During the revision process of the Code, the initial proposal of the marriage coetus to retain "contract" as a fitting description of marriage received

²See SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World, Gaudium et spes, in A.A.S., 58(1966), pp. 1067-1068 (hereafter cited: Gaudium et spes). In the Encyclical, Humanae vitae, Pope Paul VI described marriage as an interpersonal relationship by which the contracting spouses make a donatio, a self gift of one to the other for the purpose of establishing marriage. See POPE PAUL VI, Encyclical letter, Humanae vitae, July 25, 1968, in A.A.S., 60(1968), pp. 486-487. For an interpretive commentary on Paul VI's teaching on conjugal love see W.E. MAY, "An Integrist Understanding", in Dimensions of Human Sexuality, D. Doherty (ed.), Garden City, New York, Doubleday and Company, Inc., 1979, where the author interprets (at pp. 107-108) Paul VI's teaching on the unitive and procreative roles of conjugal love to blend human sexuality with the moral meaning of human actions. As such, the procreative aspect is inseparable from the unifying action in conjugal love.

³The suitability of the word "covenant" to describe marriage is discussed by W. KASPER, Theology of Christian Marriage, translated by D. Smith, New York, The Seabury Press, 1980, p. 41: "'Covenant' expresses the personal character of the consensus better than 'contract' or 'institution'. It is also able to express the legitimate intention of marriage, its public character, which is contained in the term 'contract'. A covenant is both private and public. The covenant of marriage is not only a personal bond or covenant of love - it is also a public and legal matter concerning the whole community of believers. This is, of course, why the covenant is normally concluded in facie ecclesiae."

negative criticism because it did not incorporate the insights and developments of Vatican II. When the 1980 Schema was circulated, "foedus" was substituted for "contractus" because it was judged consonant with the teachings of Vatican II.⁴ Thus in can. 1055, 1 of the 1983 Code, marriage is described as follows:

The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good of the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised⁵ by Christ the Lord to the dignity of a sacrament.

⁴The suggestions of the coetus working on marriage legislation are analyzed in depth in D.E. FELLHAUER, "The Consortium omnis vitae as a Juridical Element of Marriage", in Studia Canonica, 13(1979), pp. 101-122 (hereafter cited: FELLHAUER, "The Consortium"); T.J. GREEN, "The Revision of Marriage Law: An Exposition and Critique", in Studia Canonica, 10(1976), pp. 362-410 (hereafter cited: GREEN, "Revision of Marriage Law"); T. MACKIN, What Is Marriage?, New York, Paulist Press, 1982, pp. 283-297 (hereafter cited: MACKIN, Marriage); F.G. MORRISSEY, "Proposed Changes in the Canonical Matrimonial Legislation", in The Catholic Lawyer, 20(1974), pp. 30-43; U. NAVARRETE, "Schema iuris recogniti 'De matrimonio': Textus et observationes", in Periodica, 63(1974), pp. 611-658 (hereafter cited: NAVARRETE, "Schema iuris").

⁵Can. 1055, 1: "Matrimoniale foedus, quo vir et mulier inter se totius vitae consortium constituunt, indole sua naturali ad bonum coniugum atque ad prolis generationem et educationem ordinatum, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est." Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, Vatican City, Libreria Editrice Vaticana, 1983. The English translation is from Code of Canon Law, Latin-English Edition, translation prepared under the auspices of the Canon Law Society of America, Washington, D.C., Canon Law Society of America, 1983. Unless otherwise noted, these editions will be used for additional citations from the 1983 Code of Canon Law.

While Gaudium et spes described marriage as a "communio", the 1981 Relatio considered this term ambiguous and substituted "consortium" to effect a more precise juridical description of marriage.⁶

According to Navarrete, "consortium" is equivalent to "communio", "consuetudo", and "coniunctio". Applying Navarrete's interpretation to can. 1055, 1 we can state that marriage ("consortium") is ordered to a communion of persons with the perpetual and exclusive right over the body for those acts apt for the generation of children. As a communion of persons, marriage is further ordered to the good of the spouses which includes the "joining of tasks and mutual assistance" through cohabitation which presumes intimate union of marriage.⁷ Marriage, therefore, as a "consortium totius vitae", is equivalent to marriage in facto esse, that is, the sum of all the rights and obligations exchanged in

⁶For a commentary on the substitution of "consortium" for "communio", see PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mis Patribus Commissionis ad novissimum schema CJC exhibitarum, cum responsionibus a Secretaria et Consultoribus datis, (Patribus Commissionis stricte reservata), Città del Vaticano, Typis Polyglottis Vaticanis, 1981, pp. 244-245 (hereafter cited: 1981 Relatio).

⁷See U. NAVARRETE, "De iure ad vitae communionem: Observationes ad novum Schema canonis 1086, 2", in Periodica, 66(1977), pp. 268-270.

marital consent.⁸

According to can. 1057, 2, marriage is established through the exchange of the irrevocable personal consent of the contracting parties:

Matrimonial consent is an act of the will by which a man and a woman, through an irrevocable covenant, mutually give and accept each other in order to establish marriage.

In this canon, there is a definite change in the juridical designation of the object of marital consent. With its legal trimness, the 1917 Code defined the object of consent as the ius in corpus.¹⁰ Gaudium et spes and can. 1057, 2

⁸See L. ÖRSY, Marriage in Canon Law, Wilmington, Delaware, Michael Glazier, 1986, p. 51 where the author states: "In choosing the word consortium, canon law tries to strike a middle course between the ideal of a perfect union of minds and hearts, and the unsatisfactory state of a merely external association, so that the legitimate marital customs and traditions of various peoples could be accommodated." Also see FELLHAUER, "The Consortium", where the author states (at p. 150) that the right to the consortium can be interpreted as an aggregate of the essential matrimonial rights and obligations which includes the right to give and receive the act of intercourse performed in a human fashion.

⁹Can. 1057, 2: "Consensus matrimonialis est actus voluntatis, quo vir et mulier foedere irrevocabili sese mutuo tradunt et accipiunt ad constituendum matrimonium." The similarities in the 1917 Code, Gaudium et spes, and the 1983 Code which state that consent is the constitutive, formal element for establishing marriage, is equivalent to the traditional distinction of marriage in fieri.

¹⁰See Can. 1081, 2 (1917 Code) in which it was stated that through the act of consent, the parties exchange the right to acts apt for the procreation of children. Post-1917 Code canonists distinguished a material and formal object of marital consent. The material object was the

concur that the contracting parties themselves are the object of consent exchanged through the donatio. The parties, while not de se objects, give of themselves totally (donatio) through actions by which they communicate themselves to the other.¹¹ Furthermore, can. 1057 is an important canon, for if it can be proven that consent was absent or defective, marriage does not come into existence.¹²

10 (cont'd) contracting parties; the formal object was the marital relationship, understood as an undivided sharing of life, manifested through the act apt for the generation of children. See the discussion on the material and formal objects of marital consent in CAPPELLO, De matrimonio, p. 5; MACKIN, Marriage, pp. 210-212.

¹¹See U. NAVARETTE, Structura iuridica matrimonii secundum Concilium Vaticanum II: Momentum iuridicum amoris conjugalis, Roma, Pontificia Universitas Gregoriana, 1968, where the author states (at p. 76) that Gaudium et spes did not attempt a juridical definition of the formal object of marital consent. However, marital acts express the totality of the donatio in the right to those actions which are proper to conjugal life. The object of marital consent entails more than the right to acts apt for the generation of children. This interpretation is supported by the 1981 Relatio (at p. 258) which chose not to provide a definitive listing of the exclusions which vitiate marital consent, but encouraged doctrinal and jurisprudential investigation and reflection to supplement the apparent lacuna in law. Also see the comments of C. GALLAGHER, "Marriage and the Family in the Revised Code", in Studia Canonica, 17(1983), p. 153; L. ORSY, "Matrimonial Consent in the New Code, Glossae on Canons 1057, 1095-1103, 1107", in The Jurist, 43(1983) where the author states (at p. 36) that the ius in corpus, previously defined as the object of consent was a "distortion" because it presented "the primary end alone". The "distortion" contained in the 1917 Code has been "corrected, and marriage is designated as the object of the consent of the parties."

¹²Consent can be absent or defective by reason of a diriment impediment, a lack of or defective canonical form,

The broader description of marriage and its corresponding object of consent in the 1983 Code surpasses the purely contractual description of marriage and its object in the 1917 Code. The personalistic understanding of marriage in the 1983 Code (can. 1055, 1) states that marriage is ordered to the good of the spouses (bonum coniugum) and the procreation and education of children (bonum prolis). In marriage, the contracting spouses give and have the right to sexual acts through which they give of themselves (donatio). But the object of marital consent is not limited to the performance of these sexual acts. Many elements are essential to the establishment of the consortium. The right to sexual acts is one among many.

B) The Juridical Notion of Consummation

While consent has been defined as the efficient cause

12 (cont'd) or a lack of or defect in the act of consent itself. According to can. 1101, 2, marriage is invalidly contracted when either marriage itself, or an essential element or property has been excluded by a positive act of the will. The 1917 Code specified the exclusions as marriage itself, the right to the marital act, or an exclusion of one of the properties of marriage. See can. 1101, 2 in the 1983 Code which does not offer a definitive listing. The 1981 Relatio stated (at pp. 257-258) such elements are to be determined by doctrine and jurisprudence according to the description of marriage in can. 1055, 1. For a more recent study on the evolution of can. 1101, 2, see G. SHEEHY, "The Exclusion of Essential Elements of Matrimonial Consent. How Stands the New Code?", in Canon Law Society Newsletter, London, 1985, pp. 9-19.

of a valid bond of marriage, consummation of the marital relationship through the physical act of intercourse renders the union indissoluble. If the marriage has not been consummated, it is possible to petition the Holy Father for a dissolution of a ratum non consummatum marriage.¹³

Canon Law has not defined the specific act of intercourse by which marriage is consummated.¹⁴ However, a juridical description of the conjugal act is contained in can. 1061, 1 which distinguishes ratified and consummated marriages:

A valid marriage between baptized persons is called ratified only if it has not been consummated; it is called ratified and consummated if the parties have performed between themselves in a human manner the conjugal act which is per se suitable for the generation of children, to which marriage is ordered by its very¹⁵ nature and by which the spouses become one flesh.

¹³See c. 1142 in the 1983 Code. See cc. 1697-1706 for the procedure to be followed for the dissolution of a ratum non consummatum marriage.

¹⁴Neither the 1917 Code nor the 1983 Code provide a juridic definition of intercourse. The task of describing and defining the constitutive elements of intercourse have presumably been left to jurisprudence.

¹⁵Can. 1061, 1: "Matrimonium inter baptizatos validum dicitur ratum tantum, si non est consummatum; ratum et consummatum, si coniuges inter se humano modo posuerunt coniugalem actum per se aptum ad prolis generationem, ad quem natura sua ordinatur matrimonium, et quo coniuges fiunt una caro." The presumption of consummation once the spouses have cohabited following the celebration of marriage (can. 1061, 2) can yield to contrary proof: "Celebrato matrimonio, si coniuges cohabitaverint, praesumitur consummatio, donec contrarium probetur."

The scriptural phrase "fiunt una caro" has traditionally provided the foundation for the juridical interpretation of consummation.¹⁶ Since the successful completion of the first act of intercourse in marriage demonstrates potency, the inability to consummate the marriage demonstrates a lack of potency or impotence. From this distinction evolved a juridic description of impotence.¹⁷ The essential elements of consummation were then differentiated in relation to both the male and female. For the male, consummation was

¹⁶See can. 1015 in the 1917 Code for a similar description of consummation. For discussions of the traditional description of consummation as the act by which spouses "become one flesh", see J. MC CARTHY, "The Traditional Concept of the Impediment of Impotence", in The Irish Theological Quarterly, 19(1952), p. 231; P.V. HARRINGTON - J.B. DOYLE, "Indications and Proof of Non-Consummation", in The Linacre Quarterly, 19(1952), p. 64. For a more recent discussion of this issue, see T.P. DOYLE, "The Moral Inseparability of the Unitive and Procreative Aspects of Human Sexual Intercourse", in M.E., 109(1984), where the author, focusing on the description of marriage as a community of the whole of life states (at p. 461): "The term 'one flesh' does not refer exclusively to a joining in sexual intercourse but to the complete union. Sexual intercourse, as a complete bodily joining, symbolizes and effects the joining of the persons. The spouses become completely 'one' not because they are joined in sexual embrace but because of their conjugal covenant."

¹⁷"Impotentia coeundi, de qua agitur in can. 1068, 1, impedimentum dirimens constituyente seu potius declarante, habetur si deest facultas rite consummandi matrimonium." S.R.R. Dec., c. WYNEN, March 25, 1946, in E.I.C., 2(1946), p. 197. Yet, even though non-consummation may result from an impotent condition, the existence of the impediment is not automatically implied because the law requires it to be antecedent and perpetual. See can. 1084, 1, in the 1983 Code.

demonstrated through erection, penetration, and ejaculation in the vagina. For the woman, it was sufficient that she be capable of receiving the erect penis and the ejaculate during the act of intercourse.¹⁸ While post-1917 Code canonists discussed certain psychological elements inherent in the act of intercourse, these were not given juridic significance because consummation was judged possible through actions placed in a less than human fashion. The traditional interpretation founded on the physiological description of intercourse was thought to satisfy the minimum juridical requirements for consummation.¹⁹

Despite almost universal acceptance of this description of the marital act, some canonists and theologians challenged the purely contractual, physiological understanding

¹⁸The essential elements for the successful completion of intercourse are detailed in CAPPELLO, De matrimonio, pp. 357-362; U. NAVARRETE, "De notione et effectibus consummationis matrimonii", in Periodica, 59(1970), pp. 623-635 (hereafter cited: NAVARRETE, "De notione et effectibus consummationis").

¹⁹See CAPPELLO, De matrimonio, pp. 356-357 where the author states that consummation can be juridically interpreted to have taken place even when the action was performed under duress or while one party was intoxicated. Also see NAVARRETE, "De notione et effectibus consummationis", pp. 637-643 where the author having cited Cappello's opinion, elucidates the following minimal psychological effects: the act of intercourse must be a human act accomplished without violence or force; and it must furthermore be an act of free will performed between the parties themselves in which they give themselves, one to the other.

of marriage and consummation soon after the promulgation of the 1917 Code. A more personalistic description of marriage was offered which described sexual intercourse as the means for a husband and wife to mutually give and receive one another to establish marriage. The possibility of the procreation and generation of children flowed from this unifying action of spouses.²⁰

In response to the apparent attacks on the official teaching of the Church, the Holy Office issued a decree on April 1, 1944 reaffirming the traditional teaching of the primary and secondary ends of marriage.²¹ Additional

²⁰The new theories challenged the primary and secondary ends of marriage enumerated in can. 1013 in which the procreation of children was thought to supersede mutual assistance. For select examples of the "new approach", see D. VON HILDEBRAND, Marriage, London, Longmans, Green and Company, 1952, where he notes (at p. 21) the Church's failure to distinguish a genital act from the more comprehensive view of human sexuality. As such, the marital act is an expression of human sexuality by which the spouses mutually give and receive one another. Also see H. DOMS, The Meaning of Marriage, translated by G. Sayer, London, Sheed and Ward, 1939, where intercourse is explained (at pp. 85-86) as the means for a husband and wife to express the totality of their personhood so that the married couple realize a oneness (the "fiunt una caro"), ordered to personal fulfillment and from which follows the possibility of having children. For an informative and detailed discussion of the personalist school, see MACKIN, Marriage, pp. 225-247; J.C. FORD - G. KELLY, Contemporary Moral Theology, Vol. 2, Marriage Questions, Westminster, Maryland, The Newman Press, 1963, pp. 18-31 include the teaching of B. KREMPEL, Die Zweckfrage der Ehe in neuer Beleuchtung, Zurich, Verlagsanstalt Benziger, 1941, who taught that the only end in marriage was the perfect union of the spouses.

²¹See S.C.S.O., Decree, "De finibus matrimonii",

support was given to this decree by the October 29, 1951 Address of Pope Pius XII to the Italian Union of Catholic Midwives in which he reiterated the traditional teaching of the Church.²² But the pronouncements of the Holy Office and Pius XII did not eliminate the debate on the meaning of Christian marriage. The renewed theology of Vatican II revived the discussion on the Church's traditional teaching on the nature of marriage which invited further theological and canonical speculation and investigation.

Since the theological understanding of consummation symbolizes the indissoluble relationship between Christ and the Church, should consummation be therefore limited to the completion of the first genital act of intercourse immediately following the act of consent? Consummation could be interpreted as the ability or capacity to establish the "intimate communion of life and love" as described by the

21 (cont'd) April 1, 1944, in A.A.S., 36(1944), p. 103. An English translation of this decree is in C.L.D., 3, pp. 401-402. The Holy Office considered the following question: "Whether the opinion of certain modern writers can be admitted, who either deny that the primary end of marriage is the generation and education of children or teach that the secondary ends are not essentially subordinate to the primary end, but are equally principal and independent?"

"Reply. In the negative." For further discussion of this decree, see MACKIN, Marriage, pp. 218-238.

²²See A.A.S., 43(1951), pp. 835-854. An English translation is in C.L.D., 3, pp. 402-404.

Council Fathers.²³

In the preceding pages, we have attempted to summarize the theological and canonical reflections concerning marriage and particularly the notion of consummation. The purpose of this synthesis is twofold: 1) to demonstrate other possibilities which can be studied concerning the nature of marital consummation; and 2) to point out that marriage is a relationship, a communion of persons who speak and relate to one another through the sexual act of intercourse. Marital

²³Following the Conciliar and post-Conciliar descriptions of marriage, several authors suggested a more personalistic interpretation of consummation. For example, D. DOHERTY, "Consummation and the Indissolubility of Marriage", in Absolutes in Moral Theology?, C.E. Curran (ed.), Washington, D.C., Corpus Books, 1968, stated (at pp. 212-222) the traditional juridical interpretation of consummation was not an absolute teaching. It is within the province of canon law to specify what and how consummation occurs incorporating the insights from theology and other disciplines. Yet as NAVARRETE, "De notione et effectibus consummationis", has stated (at p. 658) the teaching on indissolubility of marriage is of divine law and therefore the Church cannot deviate from this teaching. Also see J. BERNHARD, "A propos de l'hypothèse concernant la notion de 'consommation existentielle' du mariage", in R.D.C., 20(1970), where the author, having described marriage as a permanent journey of spouses who seek their spiritual destiny, maintains (at pp. 186-187) that consummation cannot be limited to the first act of intercourse completed after the exchange of marital consent. Also see ID., "Perspectives renouvelées sur l'hypothèse de la 'consommation existentielle et dans la foi' du mariage chrétien", in R.D.C., 24(1974), pp. 334-349 where the author says (at p. 339) that short-lived marriages, marriages in which extramarital affairs are pursued, and the incapacity to live a community of life or establish an interpersonal relationship can be indicators of a lack of consummation of the marriage.

sexuality serves the twofold purpose of uniting the spouses in a unique way and encourages their love to go beyond themselves to participate in a potential, procreative action. An obvious weakness with the broader interpretations of consummation is the difficulty in translating such fluid views into a juridic language in which indissolubility and consummation of marriage can be legally expressed. Nevertheless, in view of our renewed understanding of the nature of marriage, we feel that these personalistic reflections bear definite juridic import both to the notion of consummation and to impotence.

C) The Constitutive Elements of Intercourse

The essential elements of intercourse were discussed by the coetus in its deliberations of February 16-21 and May 14-15, 1970.²⁴

The coetus unanimously affirmed that the law should not define the act of intercourse (perfect copula) by which marriage is consummated. A description, if given, should be provisory and open to change in light of scientific

²⁴In addition to the sixteen consultors and the Cardinal President and secretary, three specialists (periti) in medicine and psychiatry were invited to the February meeting in which the nature of conjugal copula and the impediment of impotence were discussed. See PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Communicationes, 6(1974), pp. 177-198, at p. 177 (hereafter cited: Communicationes).

progress. However, the law could refer to the minimal essential elements so that a juridical interpretation of consummation and impotence would be possible.²⁵

Some consultors resisted the term "perfect copula" because they thought it implied perfection. The terms "natural copula" or "conjugal copula" were proposed but other consultors requested a differentiation between the essential elements which constitute copula and those which affect consummation.²⁶

The specific essential elements for true copula were distinguished for the male and female. There was general agreement that for the male, the essential elements

²⁵"Alius pariter dicit perdifficile esse omnia elementa copulae determinare et quamvis definitionem esse periculosam, quia agitur de re intime conexas cum progressu psychologiae, physiologiae etc. Definitio, si daretur, esset provisoria et postea mutanda cum progressu illarum scientiarum. [...]"

"Nulla definitio neque descriptio copulae perfectae facienda est. Sufficit ut in normis quae attinent sive ad consummationem sive ad impedimentum impotentiae, saltem oblique illa elementa appareant quae sint necessaria ad copulam, super quae versari debeat consensus et sine quibus aliquis impotens dici debeat." Ibid., pp. 183-184.

²⁶"Aliqui consultores dicunt non esse bonam locutionem 'copula perfecta', quia verbum 'perfecta' implicat conceptum perfectionis, quae in hac materia multa dubia pareret. Dicatur potius copula naturalis vel apta vel 'coniugalis'. [...]"

"Alii consultores malunt ut distincta teneantur elementa quae constituunt copulam et elementa quae consummationem matrimonii producant." Ibid., pp. 184-185.

consisted in erection, penetration, and ejaculation in the vagina. For the woman, a vagina capable of receiving the penis and the ejaculate satisfied the canonical requirements.²⁷

Copula satiativa, the satisfaction of the sexual desires of the spouses through marital sexual activity, whether or not concupiscence was mitigated, was proposed as an alternative to clarify the juridical description of perfect copula.²⁸ One consultor recalled the Conciliar and

²⁷"His omnibus prae oculis habitis, videtur dicendum ad copulam perfectam, quatenus est actio humana, praescindendo ab actione naturae, requiri in viro erectionem et penetrationem membri virilis in vaginam mulieris ibique seminis depositionem, in muliere vaginam aptam ad receptionem membri. Semen virile requiritur et sufficit quod communiter emittitur, quin necessario sit prolificum seu etiamsi spermatozoide careat." Ibid., p. 180.

The deliberations of the marriage coetus concerning the essential elements of intercourse for men and women are discussed in more detail in the following section: The Juridical Effect of Impotence.

²⁸For an informative discussion of "copula satiativa" by the coetus, see Ibid., pp. 188-191. Concerning a description of copula satiativa, the coetus stated (at p. 183): "De copula autem satiativa videtur dicendum illam esse talem in qua duo coniuges satisfactionem libidinis assequuntur, etiamsi sedatio concupiscentiae non habeatur." While marital intercourse is said to be ordered to the satisfaction of the sexual desires of spouses, its absence does not preclude the presence of the diriment impediment of impotence provided that the essential elements of erection, penetration, and semination in the vagina have been accomplished. It was further stated that the satisfaction of sexual desire through intercourse is an effect of conjugal love and demonstrates the donatio of the spouses. For similar interpretations of copula satiativa which satisfies the sexual desire, see J. MC CARTHY, "The

post-Conciliar descriptions of marriage and conjugal love which focused on the unitive aspects of marital intercourse along with the capacity for establishing a communitas vitae et amoris coniugalis rather than the biological aspects.²⁹ In response, the President reported that the Roman Rota has always required that intercourse be completed in a natural and human fashion. Nevertheless, the juridic meaning of a natural and human way needed clarification. The discussion centered on three cases: 1) the husband who forces himself on an unwilling spouse; 2) whether the use of aphrodisiacs affects the human and natural act of marital intercourse; and 3) whether a human act is placed when the woman suffers intolerable pain during the act of intercourse.³⁰

28 (cont'd) Impediment of Impotence in Present Day Canon Law", in E.I.C., 4(1948), pp. 96-130 (hereafter cited: MC CARTHY, "Impotence").

29 "Evolutio doctrinae Ecclesiae de matrimonio versus maiorem in dies agnitionem valoris amoris coniugalis ac communionis vitae (cf. Const. Gaudium et spes et Enc. Humanae vitae), exigere videtur ut momentum non adeo peremptorium tribuatur illi elemento biologico, semini scilicet in testiculis elaborato, ad determinandam capacitatem personae ad matrimonium. Posita capacitate ad copulam unitivam, videtur capacitas agnoscenda esse ad illam 'intimam communitatem vitae et amoris coniugalis' constituendam, quae est propria matrimonii et ad quam omnes homines ius habent donec certo argumentis omnino peremptoriis contrarium probetur." Communicationes, 6(1974), p. 187.

30 "Card. Praeses dicit S. R. Rotam semper requisivisse ut copula habita sit modo humano et naturali. At merito quaeri potest quid significet 'modo naturali et humano', vel saltem negative, quid excludat ille modus naturalis et

In the first case, the majority of consultors agreed that perfect intercourse is lacking when the man forces himself upon his wife against her will. Since freedom is a presupposition for the placement of a human act, the act of intercourse, accomplished with force or against the will of the woman does not satisfy the juridical requirement of consummation.³¹

Concerning the second situation, one peritus explained that the use of aphrodisiacs may augment sexual

30 (cont'd) humanus. Ut apte procedi possit configurandi sunt aliqui casus, an scilicet habeatur copula de qua loquimur, quando:

"a) vir violenter possidet mulierem nolentem;

"b) vir vel mulier medicamina aphrodisiaca sumunt ut habiles sint ad coitum;

"c) mulier intolerabiles dolores patitur." Ibid., p. 191.

³¹"1) An habeatur vera copula (modo naturali et humano facta) quando vir violenter possidet mulierem nolentem.

"Plures consultores negative respondent, quia deest libertas, sine qua non potest haberi actus vere humanus. Consequenter, neque consummatio matrimonii per talem actum habetur." Ibid., pp. 191-192.

Also see S.R.R. Dec. c. DE JORIO, February 21, 1973, in S.R.R. Dec., 65(1973), pp. 119-129 (hereafter cited: c. DE JORIO, February 21, 1973) in which De Jorio stated that fierceness by the male when attempting consummation can arouse repugnance on the part of the woman so that she gives of her body solely for the male to satisfy his libido. This action in some persons may constitute female impotence. Likewise, if the fierceness in the male is innate, he can be said to be impotent. An English translation of this sentence is in C.L.D., 8, pp. 667-672.

satisfaction but their use does not increase the sexual capacity of the person. The majority of the consultors therefore agreed that the use of aphrodisiacs to accomplish intercourse does not impede a true act of intercourse.³²

In the third case, the consultors could not reach agreement whether perfect intercourse was had if the woman experienced intolerable pain during intercourse. Some suggested that if the woman consented to the act, then perfect intercourse was had. Others indicated that unbearable pain could be an indication of an impotent condition. It was therefore suggested that each case be judged on its own merits.³³

³²"2) An habeatur vera copula (modo naturali et humano facta) quando medicamina aphrodisiaca sumuntur ad coitum facilius perficiendum.

"Fere omnes consultores positive respondent, eo vel magis quia peritus B declarat per media aphrodisiaca non augeri potentiam coeundi sed tantum augeri sensibilitatem voluptatis." Communicationes, 6(1974), p. 192.

An earlier response of the Holy Office, "De consummatione matrimonii", February 3, 1949, in Periodica, 38(1949), stated (at p. 270) that consummation of the marriage was not impeded through the taking of aphrodisiacs so long as the parties were capable of the essential elements of intercourse.

³³"3) An habeatur vera copula (modo naturali et humano facta) quando mulier intolerabiles dolores patitur.

"Plures consultores respondent positive, dummodo mulier consentiat. [...]

"Duo consultores respondent affirmative, dummodo mulier consentiat et seposita quaestione an mulier illa censenda

The coetus further discussed the juridic effect of contraceptive intercourse and concluded that true copula and consummation were lacking if the contraceptives affected the marital act itself. However, if the contraceptive means did not affect the essential elements of intercourse, the marriage is juridically consummated. But a consensus was not reached concerning the effect of condomistic intercourse on consummation.³⁴

The fact remains that can. 1061, 1, emphatically states that the conjugal act by which marriage is consummated is to be placed "in a human manner". In addition to the essential physiological requirements, both parties must consent to performing the act of intercourse in a truly human fashion.³⁵

33 (cont'd) sit potens. Si talis enim quaestio ponatur dicendum est illam mulierem esse impotentem.

"Duo alii consultores quaerunt an per illam copulam habeatur consummatio matrimonii: unus respondet positive; alius negative. De impotentia talis mulieris, ipsi consultores censent perpendendos esse singulos casus, ratione habita causae doloris mulieris.

"Unus consultor censet veram copulam haberi etsi mulier dolores patiat; utrum autem illa copula censenda sit modo humano et naturali facta, videtur responderi adaequate non posse, cum nimis incerta sit significatio illorum verborum 'modo naturali et humano'." Communicationes, 6(1974), pp. 192-193.

³⁴See Ibid., pp. 194-195.

³⁵The Council Fathers also implied that the act of consummation was to be a human act when they stated that

The deliberations of the coetus as we have analyzed them are intended to clarify the nature of intercourse. Our analysis has led us to an initial understanding of perfect intercourse as that physical, sexual action whereby a man and a woman become one flesh through the union of their bodies. While the juridical interpretation of consummation and perfect intercourse remains essentially physiological, nevertheless, the act of intercourse must be performed in a human manner which is indicative of true donatio.

D) The Juridical Effect of Impotence

In their consent to establish a consortium totius vitae, the contracting parties exchange the fundamental right to marital acts as an expression of conjugal love ordered to the procreation of children. The juridical effect on the person who lacks the capacity to realize the promised right of intercourse and thereby effect consummation of the

35 (cont'd) conjugal acts demonstrate the required donatio: "Actus proinde, quibus coniuges intime et caste inter se uniuntur, honesti ac digni sunt et, modo vere humano exerciti, donationem mutuam significant et fovent, [...]." Gaudium et spes, p. 1070. Furthermore, the Congregation for the Sacraments, in a Circular Letter of December 20, 1986 (Prot. N. 1400/86), "De processu super matrimonio rato et non consummato", stated that the act of intercourse by which a marriage is consummated must be accomplished "humano modo". This response implies the necessity of some voluntarism on the part of parties.

marriage is stated in can. 1084, 1:

Antecedent and perpetual impotence to have intercourse, whether on the part of the man or the woman, which is either absolute or relative, of its very nature invalidates marriage.³⁶

At first glance, the changes in can. 1084, 1 effected by the coetus appear to be scant: the inclusion of "coeundi" to describe the impotent condition; the exclusion of the phrase "whether known to the other party or not"; and the terminological change that impotence "of its very nature" invalidates marriage rather than the previous formulation which recognized the foundation of impotence in "the law of nature itself". Yet we will see that these refinements, along with the previous distinctions concerning the consummation of marriage, have influenced the canonical and jurisprudential developments on the invalidating nature of impotence.

While can. 1068, 1 of the 1917 Code stated that "impotence, antecedent and perpetual" invalidated marriage, can. 1084, 1 of the new Code specifies that the impotence mentioned is specifically "impotence to have intercourse". No other kind of impotence invalidates marriage. The diriment impediment pertains to the antecedent and perpetual inability of either party to place the marital act proper to

³⁶Can. 1084, 1: "Impotentia coeundi antecedens et perpetua, sive ex parte viri sive ex parte mulieris, sive absoluta sive relativa, matrimonium ex ipsa eius natura dirimit."

marriage.³⁷

The next change pertains to the deletion of the phrase "whether known to the other party or not" (Can. 1068, 1, 1917 Code). This wording was deemed superfluous by the coetus.³⁸

The third modification of can. 1084, 1 states that impotence invalidates marriage "of its very nature" ("ex ipsa eius natura") instead of "by the law of nature itself" ("ipso naturae iure"). This change provoked more discussion than the previously cited ones. From the available reports, it seems that the Consultors could not reach unanimity whether impotence invalidated marriage "of its very nature" or "by the law of nature itself". Those who favored the retention of the 1917 Code terminology argued that marriage of its very nature is ordered to the procreation and education

³⁷The 1981 Relatio (at p. 252) retained the word "coeundi" to distinguish the diriment impediment of impotence from moral impotence, described by some canonists in the 1960's as the moral inability to assume the essential obligations of marriage. This moral inability had been likened to the diriment impediment of impotence. See the discussion in J.R. KEATING, The Bearing of Mental Impairment on the Validity of Marriage, Roma, Gregorian University Press, 1964, where the author states (at p. 180): "It is inaccurate to define the impediment of impotence as the physical inability to place actus per se aptos ad prolis generationem; it is rather the moral inability to assume the right and obligation to place actus per se aptos ad prolis generationem." A similar view is offered by FINNEGAN, "The Current Jurisprudence", p. 450.

³⁸See the brief comments of the coetus in Communicationes, 7(1975), pp. 54-56.

of children. The person incapable of performing the potentially generative act of intercourse is prohibited from marriage by the law of nature itself.³⁹ Yet others disagreed stating that the impediment, if founded in natural law, should be admitted by all people; yet this is not so. The consultors were evenly divided in their opinion and could not reach unanimity whether or not impotence invalidated marriage by the law of nature or by the nature of marriage.⁴⁰

The coetus briefly discussed the relationship between the impediment of impotence and the capacity of an impotent

³⁹"[...] matrimonium est institutum naturae, indole sua naturali ad prolis generationem et educationem ordinatum. Generatio autem fit ordinario modo per unionem sexualem viri et mulieris. Ergo qui impotentes sunt ad actus 'per se aptos ad prolis generationem' ipso iure naturae vetantur quominus matrimonium contrahant. [...]"

"Alius Consultor censet potentiam coeundi requiri iure naturae quia unio sexualis specificat societatem matrimonialem.

"Item quinque Consultores censent impotentes contrahere non posse matrimonium iure naturae, quia matrimonium ordinatur ad prolem." Ibid., p. 54.

⁴⁰See Ibid., pp. 55-56. The retention of "ex ipsa eius natura matrimonium" is consistent with the suggested text in the 1980 Schema. See c. 1037 in Codex iuris canonici, Schema Patribus Commissionis reservatum, Città del Vaticano, Libreria Editrice Vaticana, 1980. Also see c. 1084 in Codex iuris canonici: Schema novissimum iuxta placita Patrum Commissionis emendatum atque Summo Pontifici praesentatum, E Civitate Vaticana, Typis Polyglottis Vaticanis, 1982. Furthermore, the 1981 Relatio (at p. 252) retained this phraseology because the impediment of impotence cannot be dispensed.

person to give consent.⁴¹ A suggestion was made to transfer the impediment of impotence from the section on diriment impediments to the section on the incapacity for giving consent because impotence results in the inability to fulfill the object of consent. After a brief discussion, the coetus voted unanimously to keep impotence among the diriment impediments because the condition is a personal deficiency and not directly related to the faculties of the intellect and the will.⁴² It is to be noted that Canon Law and medicine

⁴¹This particular issue has been discussed by canonists even prior to the initiation of the revision of canon 1068 of the 1917 Code. See G. LESAGE, "Psychic Impotence: A Defect of Consent", in Studia Canonica, 4(1970), pp. 61-78 where the author discusses the effects of psychic impotence and the relationship between impotence and the incapacity to give the perpetual right to marital acts proper to marriage. Impotence per se vitiates consent because the very object of marital consent is impossible. In such cases, the consent is defective and the marriage invalid. Also see J.E. HUDSON, Marital Consummation according to Ecclesiastical Legislation, (Doctoral Dissertation), St. Paul University, Ottawa, Canada, 1977, pp. 258 - 266. See S.R.R. Dec., c. DOHENY, November 11, 1953, in S.R.R. Dec., 45(1953), pp. 658-665 for a similar interpretation.

⁴²"Relator refert de aliqua propositione facta transferendi can. 1068 ad caput de consensu matrimoniali. Impotentia enim non est impedimentum proprie tale, id est lex inhabilitans personam de se capacem matrimonii ineundi, sed est incapacitas praestandi obiectum consensus matrimonialis. Ideo canon de impotentia recte posset inseri statim post can. 1081, ubi obiectum consensus definitur. [...]

"Impotentia autem non se refert directe ad exercitium facultatum spiritualium; est deficientia personalis ordinis physici, quae non influit directe in ipsum exercitium facultatum. Hoc verificatur etiam in casu impotentiae functionalis: persona est incapax propter infirmitatem

describe impotence differently: Canon Law considers the male impotent when he is incapable of erection, penetration, and ejaculation in the vagina. A woman is juridically impotent when she lacks a vagina to receive the penis and the ejaculate in the act of intercourse. Medical science appears to limit its description of impotence to the inability to obtain and/or maintain an erection suitable for penetration of the vagina, and furthermore, does not attempt to use the term "frigidity".⁴³ Impotence, the inability to perform

42 (cont'd) *physicam, etsi causa huius infirmitatis sit ordinis psychici. Proinde melius est si de impotentia sermo sit in capite de impedimentis.*" Communications, 7(1975), p. 61.

⁴³For a brief commentary on the canonical approach, see P.L. FRATTIN, "Impotence in Canon Law", in The Catholic Lawyer, 9(1963), p. 118; J.J. BRENKLE, The Impediment of Male Impotence with Special Application to Paraplegia, Washington, D.C., The Catholic University of America Press, 1963, p. 81 (hereafter cited: BRENKLE, Male Impotence). See AMERICAN PSYCHIATRIC ASSOCIATION, Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition, Washington, D.C., American Psychiatric Association, 1980, at p. 280. However, in the Third Edition Revised (1987, at p. 294), what was previously described as impotence is now incorporated under the diagnostic category "Sexual Arousal Disorders" which includes female sexual arousal disorders and male erectile disorder. The terms "impotence" or "frigidity" are no longer used for diagnosis. However, the term "impotence" is still used to describe the inability to obtain an erection so as to initiate and complete the act of intercourse. See W.H. MASTERS et al., Masters and Johnson on Sex and Human Loving, Boston, Little, Brown, and Company, 1986, at p. 463: "Erectile dysfunction, or impotence, is the inability to have or maintain an erection that is firm enough for coitus."; R. CROOKS - K. BAUR, Our Sexuality, Third Edition, Menlo Park, California, The Benjamin/Cummings Publishing Company, 1987, who state (at p. 535): "The term most commonly applied to male erection difficulty is impotence."

intercourse, is juridically distinguished for males and females.

a) Male Impotence

Impotence in males is demonstrated by the inability to obtain an erection, an inability for penetration of the vagina, and/or the inability to ejaculate in the vagina. Whereas the elements of erection and penetration sparked minimal discussion, the question of semination was debated at length.

Chronologically, erection is primary in the act of intercourse and is a prerequisite for penetration of the vagina. The inability to induce or sustain an erection thus prevents penetration of the vagina. The coetus therefore discussed the use of penile prostheses which can assist in the maintenance of an erection suitable for penetration and observed that as long as the male is capable of ejaculation in the vagina, the natural act of intercourse is not impeded.⁴⁴

⁴⁴See Communicationes, 6(1974), p. 182. In the medical field, penile prostheses are customarily used when impotence is organically induced. Under some circumstances, implants are recommended for psychologically induced impotence, only after careful medical screening and psychological evaluation. For a medical and psychological discussion of the use of penile implants, see D.J. BLAKE et al., "Psychiatric Assessment of the Penile Implant Recipient", in Urology, 21(1983), pp. 252-256; J.B. HOLLANDER - A.C. DIOKNO, "Success with Penile Prosthesis from Patient's

Penetration of the vagina is a more complex issue. While some degree of penetration is necessary, it is not necessary that the entire penis penetrate the vagina. A partial penetration by the glans, permitting ejaculation in the vagina, fulfills the juridic requirement of penetration.⁴⁵ One peritus suggested that true marriage could exist without the capacity for penetration of the vagina provided that the woman accepts this situation and is content with artificial insemination. This proposal was rejected by the majority of the consultors who voted affirmatively for the necessity of penetration of the vagina for intercourse.⁴⁶

44 (cont'd) Viewpoint", in Urology, 23(1984), pp. 141-143; L.M. MARTIN - D.K. MONTAGUE, "Ejaculatory Incompetence Following Penile Prosthesis Implantation in Men with Primary Psychogenic Impotence", in Contemporary Sexual Behavior: Critical Issues in the 1970's, J. Zubin - J. Money (eds.), Baltimore, The Johns Hopkins University Press, 1973, pp. 279-293.

45 "Tradita doctrina confirmatur responso S. Officii diei 12 February 1941. Proposito dubio: 'Utrum ad copulam perfectam et ad matrimonii consummationem requiratur et sufficiat, ut vir aliquo saltem modo, etsi imperfecte, vaginam penetret atque in ea seminationem saltem partialem naturali modo peragat; an tanta vaginae penetratio requiratur, ut glans toto intra vaginam versetur'; -- responsum fuit: 'Affirmative ad primam partem; Negative ad secundam partem'." Reported in CAPPELLO, De matrimonio, p. 356. BRENKLE, Male Impotence, states (at p. 80) that anything less than penetration beyond the hymeneal membrane allowing some of the seminal fluid to be deposited within the vagina does not suffice for the juridical requirement of penetration.

46 "peritus A censet dari et consistere posse verum matrimonium, quin habeatur capacitas penetrandi vaginam.

The act of intercourse is completed by the male when ejaculation occurs in the vagina. The consultors were divided on the issue of semination. Some favored the Rotal interpretation of semen which required the presence of a testicular component in the ejaculate ("verum semen in testiculis elaboratum"). Others had a bias for the time-honored tradition in which "copula satiativa" served as juridic proof of consummation. So long as the male was capable of performing the act apt for the generation of children, the possibility of conception was presumed inherent in the three separate, but interconnected actions.⁴⁷

46 (cont'd) Sufficit ut mulier acceptet hanc situationem et contenta sit de seminatione artificiali. Non nimis insistendum est in verbis Evangelii 'fiunt una caro' ad urgendam necessitatem penetrationis. [...]

"Fere omnes consultores censent impedimentum esse in impotentia coeundi et ideo penetrationem necessariam dicunt. De casibus autem propositis a perito A, ipsi consultores censent illos in hac sede considerari non posse, quia lex agere debet de iis quae naturaliter fiunt." Communicationes, 6(1974), pp. 185-186.

⁴⁷"Alius vero notat quod in veteri traditione canonistica ad copulam perfectam requirebatur in viro membrum validum ad penetrandam vaginam et in ea semen effundendum; in muliere vero vagina capax recipiendi membrum. De natura seminis quaestio non erat, cum, supposita copula, omnia alia potentiae generandi tribuebantur. Impotentia autem generandi non dirimebat matrimonium." Communicationes, 6(1974), pp. 178-179.

The juridic interpretation of copula satiativa was understood to be satisfied when the three actions of erection, penetration, and semination occurred. For a more detailed discussion of copula satiativa by the coetus, see Ibid., 6(1974), pp. 178-181, 183-184, 186-191. Reflecting

In conjunction with the discussion on the juridical interpretation of semination, the Papal Constitution of Sixtus V, Cum frequenter (1587) was re-examined and it was suggested that a broad interpretation be given this Constitution which excluded eunuchs and spaded men from marriage because they were incapable of ordinary semination satiative of concupiscence, not necessarily because they were impotent. Furthermore, the discussion on semen as that which was elaborated in the testicles was thought to confuse impotentia coeundi with impotentia generandi.⁴⁸ Therefore, the

47 (cont'd) on the deliberation of the coetus on sterility (see Ibid., 7[1975], pp. 58-59), L. Wrenn argues that "ejaculation in the vagina" does not seem to be a constitutive element of male capacity for intercourse. He says, for example, in cases of hypospadias and epispadias, ejaculation takes place outside the vagina. According to him, therefore, persons with this problem would not be impotent but only sterile. See his Annulments, 4th Edition Revised, Washington, D.C., Canon Law Society of America, 1983, p. 9 (hereafter cited: WRENN, Annulments).

⁴⁸"Res postea implexior facta est. Primo ex Constitutione Sixti V Cum frequenter, dein ex deductionibus exaggeratis principii iuxta quod ius in corpus, per consensum traditum et acceptatum, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem esse debet (cf. can. 1081, 2).

"At ex Constitutione Sixti V non certe deducitur illum esse virum impotentem qui semen in testiculis elaboratum emittere nequeat. Sed tantum ibi asseritur eunuchos et spadones matrimonium inire non posse cum sint incapaces seminationis ordinariae seu concupiscentiae satiative et ideo nullum finem assequi valent, ne quidem illum qui secundarius habebatur, nempe remedium concupiscentiae." Communications, p. 179.

Divergent practices evolved between the Roman Rota and

suggestion was made to return to the traditional interpretation of perfect copula as that which satisfied the libido of the spouses without any reference to the composition of the semen. The traditional view appeared to be confirmed by Vatican II and would furthermore resolve the divergent practices of the Holy Office and the Roman Rota.⁴⁹ Yet other consultors maintained that perfect copula required semen elaborated in the testicles. Still another suggested that

48 (cont'd) the Holy Office concerning the capacity of vasectomized men to enter marriage. The Roman Rota applied a strict interpretation of Cum frequenter and equated vasectomized males with eunuchs and the spadones because of the similarity of the conditions which rendered the male incapable of ejaculating semen elaborated in the testicles. Therefore, the Roman Rota judged the impediment of impotence to be present in the vasectomized man who could not ejaculate semen elaborated in the testicles when the condition was antecedent and perpetual. However, when the Holy Office was approached for permission for vasectomized males to marry because of a possible diriment impediment, the Holy Office responded that there was a dubium iuris and marriage was not to be prohibited.

49 "Valde expedit, concludit consultor, ut reditus fiat ad doctrinam antiquorum secundum quos illa copula habebatur perfecta quae sit satiativa libidinis, sine respectu ad naturam veri seminis. Quae quidem doctrina hodie a multis doctoribus tenetur (25 doctores citantur) et confirmatur indirecte a Concilio Vaticano II, qui fines personales matrimonii extollit." Communicationes, 6(1974), p. 179.

Summaries of the traditional jurisprudence of the Roman Rota requiring "semen elaboratum in testiculis" are reported by C. LEFEBVRE, "L'impuissance: Science médicale et jurisprudence rotale", in L'Année canonique, 15(1971), pp. 415-427; A. MILIONI, "Il problema del 'verum semen' nelle cause di nullità matrimoniale della Sacra Romana Rota", in E.I.C. 16(1960), pp. 90-157; A. SILVESTRELLI, "Circa l'impotenza e l'inconsumazione nella giurisprudenza canonica anche del S. Ufficio", in M.E., 98(1973), pp. 112-120.

certain principles be presented to determine whether or not an act of intercourse was a complete and true human act. At the final vote, sixteen consultors voted that ordinary semination satisfied the canonical requirement of semination.⁵⁰ Furthermore, the 1977 Decree of the Sacred Congregation for the Doctrine of the Faith clarified the dubium iuris stating that the semen ejaculated in the vagina need not be elaborated in the testicles.⁵¹

b) Female Impotence

For the female, the act of intercourse requires a vagina capable of receiving the erect penis and the ejaculate. The vagina has been canonically defined as the essential organ for copulation which is apt de se for the generation of children. Therefore, the woman who lacks a vagina is certainly impotent.

The question of an artificial vagina was examined by the coetus involved in the revision of matrimonial

⁵⁰See Communicationes, 6(1974), p. 188.

⁵¹See the S.C.D.F., Decree, "Circa impotentiam quae matrimonium dirimit", in A.A.S., 69(1977), p. 426. An English translation of the Decree is in C.L.D., 8, p. 677. For a brief discussion on this Decree, see T.J. O'DONNELL, "A Recent Decision of the Holy See regarding Impotence and Sterility: Implications for Medical Practice", in The Linacre Quarterly, 45(1978), pp. 15-21; P. TOCANEL, "Sacra Congregatio pro Doctrina Fidei: Decretum circa impotentiam quae matrimonium dirimit", in Apollinaris, 50(1977), pp. 338-340.

legislation. The Presiding Cardinal pointed out that this corrective measure would be an extraordinary remedy to which the incapacitated woman is not obligated. Most of the consultants agreed that the surgical construction of an artificial vagina prior to marriage renders the woman potent and capable of intercourse. If an artificial vagina was fitted after the celebration of marriage, the woman is impotent and the marriage null because at the time consent was exchanged, the diriment impediment of impotence was present since the woman was perpetually incapable of the marriage act.⁵²

Another important question which the coetus had to address related to an artificial vagina: must the vagina be open both at the vulva and to the uterus? Canonical authors were not uniform in their opinions concerning this issue.

⁵²"Card. Praeses notat talem refectionem vaginae esse remedium extraordinarium ad quod mulier non potest obligari: hoc prae oculis habendum est in considerata quaestione de vagina artificiali.

"Fere omnes consultores censent, si mulier ante matrimonium vaginam artificialem consequitur, eam potentem habendam esse et ideo matrimonium esse validum. Si autem vagina artificialis post matrimonium contractum consequitur, tunc matrimonium est nullum, at convalidari potest.

"Duo consultores censent esse validum matrimonium si mulier, in matrimonio contrahendo, obligationem sibi assumit se medicos adituram ad reficiendam vaginam.

"Alius vero, contra hanc ultimam sententiam, dicit matrimonium in casu non esse validum, quia mulier hic et nunc non dat ius in corpus, cum nemo dare possit quod non habet." Communicationes, 6(1974), p. 196.

Some argued that it suffices for potency and thus capacity for marriage if the vagina is open at least at the vulval entrance. According to this opinion, a woman whose vagina is closed only at the entrance of the uterus would be sterile but not impotent since she is still capable of normal intercourse.⁵³ Whereas, the contrary opinion maintained that the canonical and medical notion of female potency requires that the vagina which is not in contact with the uterus is impotent, and therefore, the marriage entered into by her would be invalid.⁵⁴

The consultors discussed this issue at length and concluded, with the majority in agreement, that an occluded or equivalently occluded vagina (i.e., a vagina lacking access

⁵³See U. NAVARRETE, "De muliere excisa: Animadversiones in opus recens editum", in Periodica, 64(1975), p. 335; F. BERSINI, "De muliere excisa et de vagina occlusa in ordine ad validitatem matrimonii", in M.E., 99(1974), p. 252; I. GORDON, De processu super rato, Romae, Pontificia Universitas Gregoriana, 1974, p. 121; C. HOLBOCK, Tractatus de iurisprudencia S.R.R. iuxta decisiones quas hoc tribunal edidit ab anno 1909 usque ad annum 1946 ..., Graetiae, Libreria "Styria", 1957, pp. 75-76 (hereafter cited: HOLBOCK, Tractatus de iurisprudencia); J. MC CARTHY, The Matrimonial Impediment of Impotence with Special Reference to Physical Capacity for Marriage of an "Excised Woman" and of a "Doubly Vasectomized Man", Romae, Officium Libri Catholici, 1948, pp. 82-83; S.R.R. Dec., c. EWERS, October 28, 1961, in S.R.R. Dec., 53(1961), p. 456.

⁵⁴See M. THERIAULT, "Neo-vagin et impuissance", in Studia Canonica, 2(1968), pp. 25-76; S.R.R. Dec., c. SABATTANI, February 22, 1963, in S.R.R. Dec., 55(1963), pp. 126-145; c. DE JORIO, October 11, 1967, in Ibid., 59(1967), pp. 677-686; c. LEFEBVRE, May 24, 1975, in Ibid., 67(1975), pp. 416-423.

to the uterus) did not constitute impotence.⁵⁵ According to the mind of the coetus, a woman who has undergone a hysterectomy seems able to contract marriage validly.

The constitutive physiological elements for intercourse can be summarized for the male in the three actions of erection, penetration, and ejaculation in the vagina. If the male is incapable of one or more of these elements, he is canonically impotent and the marriage is invalid.⁵⁶ For the female, the only canonical requirement is that she possess a vagina capable of receiving the penis and the ejaculate. The woman who attempts marriage lacking a vagina whether

⁵⁵"peritus C notat vaginam aequivalenter oclusam operatione chirurgica sanari posse.

"Fere omnes consultores, attentis iis quae dicta sunt circa elementa necessaria ad copulam perfectam, censent non considerandam esse impotentem mulierem quae habet vaginam oclusam vel aequivalenter oclusam.

"Duo autem consultores censent esse impotentem mulierem cum vagina perpetuo oclusa. Si oclusio vero auferri potest, tunc idem dicendum est ac de muliere cum vagina artificiali." Communicationes, 6(1974), p. 197.

Furthermore a minority opinion considered a hysterectomy as a form of impotence because the woman was incapable of the marriage act which is potentially generative. Two other consultors thought that such a condition, if unknown at the time of marriage, could invalidate the marriage under the heading of dolus. See Ibid., p. 197.

⁵⁶These three elements are reiterated in Rotal jurisprudence. See the S.R.R. Dec. g. PARISELLA, July 13, 1968, in S.R.R. Dec., 60(1968), p. 564; c. LEFEBVRE, February 21, 1970, in Ibid., 62(1970), p. 175; c. RAAD, March 9, 1978, in E.I.C., 34(1978), pp. 362-377.

natural or artificial is juridically impotent and therefore marries invalidly. If an artificial vagina was constructed prior to marriage, the woman is considered potent and the marriage is considered valid. If it was constructed after the wedding, the marriage is invalid, but it can be convalidated.

E) The Causes of Impotence

Impotence has been traditionally distinguished according to its cause. The two juridical headings customarily used are organic and functional. Organic impotence is present when one of the vital copulatory organs is lacking, or, if all are present, they are either physically, anatomically, or organically defective. Functional impotence is operative when the necessary anatomical organs are present but defective in their functioning.⁵⁷

a) Organic Impotence

Organic impotence originates from a congenital or

⁵⁷See G. SHEEHY, "Male Psychical Impotence in Judicial Proceedings", in The Jurist, 20(1960), (hereafter cited: SHEEHY, "Impotence"), who comments (at pp. 258-259) on the traditional division of the two causes of impotence: "While the majority of authors would regard [...] functional impotence as the genus, of which 'Psychical' is merely one of the species, there are some [...] who prefer to consider 'Psychical' impotence as a distinct category - thus introducing a tripartite division of impotence: organic, functional, psychical. The diversity, however, is simply one of terms; the concepts are established beyor` question."

acquired physical defect which renders intercourse impossible. Some of the more common causes of male organic impotence presently identified are: a) an absence of the penis; b) an abnormal size or shape of the penis preventing vaginal intromission; c) hypospadias, the opening of the urethra on the undersurface of the penis preventing ejaculation in the vagina, and d) epispadias, the opening of the urethra on the dorsal surface of the penis preventing ejaculation in the vagina.⁵⁸

The more common causes of organic impotence in the female are 1) the lack of a vagina, and 2) a physical deficiency which prevents penetration beyond the hymen. The inability for penetration resulting from an extreme narrowness or smallness of the vagina can be either absolute or relative.⁵⁹ The lack of an internal female organ, for example,

⁵⁸See F.R. AZNAR GIL, El nuevo derecho matrimonial canonico, Universidad Pontificia de Salamanca, 1983, p. 175 (hereafter cited: AZNAR GIL, El nuevo derecho); F. BERSINI, Il nuovo diritto canonico matrimoniale: Commento giuridico - teologico - pastorale, 3rd Edition, Leumann (Torino), Editrice Elle Di Ci, 1985, p. 61 (hereafter cited: BERSINI, Il nuovo diritto canonico); F. DANEELS, Le mariage dans le code de droit canonique, Lucon, Cahiers du droit ecclesial, 1984, p. 27 (hereafter cited: DANEELS, Mariage).

⁵⁹See HOLBOCK, Tractatus de iurisprudencia, p. 74. Also see AZNAR GIL, El nuevo derecho, pp. 175-176; BERSINI, Il nuovo diritto canonico, p. 62; DANEELS, Mariage, pp. 27-28; WRENN, Annulments, pp. 14-16.

the absence of both ovaries, does not constitute the impediment of impotence but is rather a cause of sterility.

Most cases of organic impotence in males or females will fall into one or another of the enumerated categories. In the final analysis, any physical deformity or infirmity in the male or female which prevents intercourse can be considered an organic cause of impotence. When the organic cause is antecedent and perpetual, the incapacitated person is canonically impotent.

b) Functional Impotence

Functional impotence originates in physiological or psychological causes and is a more intricate form of impotence. The sexual organs required for the act of intercourse are present and from all appearances are properly formed, yet they are defective in their functioning so that the person is incapable of performing the act of intercourse.⁶⁰ The physiological causes can be associated with neurological abnormalities which impede the proper functioning of the sexual organs. Psychological causes occur when there is a disturbance in the psychosexual development of the individual adversely affecting the proper functioning of

⁶⁰See AZNAR GIL, El nuevo derecho, p. 165; HOLBÖCK, Tractatus de iurisprudencia, pp. 71-73; 86-87; SHEEHY, "Impotence", p. 257.

the sexual organs. While it is impossible to enumerate the precise causes of psychic impotence, some of the known and accepted psychological factors which can induce impotence include: a) anxiety or severe nervousness; b) confusions in one's sexual identity; c) sexual prejudices; d) a progressive habit of masturbation which often results in a guilt complex in the conscious and subconscious of the person; e) the effects of strong religious beliefs or moral customs in which sex is equated with sin.⁶¹ Any one or combination of these factors can induce functional impotence rendering the individual with organically-sound organs incapable of performing the act of intercourse.

During the revision process of can. 1068 (1917 Code), the coetus briefly reflected on the connection between psychic illnesses and the judgmental capacity of the contracting parties. The coetus observed that this issue was

⁶¹See M. ALPI, De viri impotentia coeundi, sive organica sive psicogena (ad usum privatum), Romae, Pontificia Universitas Gregoriana, 1979, pp. 25-28 (hereafter cited: ALPI, De viri impotentia coeundi). Also see AZNAR GIL, El nuevo derecho, pp. 177-178. For a summary presentation of the possible causes of psychic impotence acknowledged by the Rota, see "Commentary on Impotence", in The Tribunal Reporter, A.J. Maida (ed.), Vol. 1, Huntington, Indiana, Our Sunday Visitor, 1970, p. 484. It is interesting to note that the recent findings in the sciences of psychiatry and sexology include those factors acknowledged in Rotal jurisprudence. Moreover, ALPI, op. cit., pp. 25-28 and AZNAR GIL, op. cit., pp. 177-178 have incorporated these developments into their commentaries on the diriment impediment of impotence.

previously addressed under the heading of "moral impotence". Since this situation was previously referred to as moral impotence, the relator suggested that the issue should be considered in conjunction with marital consent rather than functional impotence because consent envisions the consortium totius vitae while impotence looks specifically to the act of intercourse which is per se apt for the generation of children.⁶²

⁶²"[...] Card. Praeses proponit ut cito examinetur quaestio quae ultimo loco in ordine laborum indicata est, scilicet: 'De morbis psychicis qui impediunt aestimationem validam consensus matrimonialis et discretionem circa naturam et onera eiusdem consensus, an et quo loco Codicis de iis tractandum'.

"Card. Praeses Relatorem rogat ut illustret nexum inter hanc quaestionem et quaestionem impotentiae.

"Relator dicit hanc quaestionem, quae a quibusdam sub nomine 'impotentiae moralis' proponitur, intime coneciti debere cum quaestione de consensu matrimoniali, potius quam cum quaestione de impotentia. Consensus matrimonialis enim non respicit tantum 'actus per se aptos ad prolis generationem' sed totum obiectum matrimonii (unitas, indissolubilitas, mutuum adiutorium etc.). Quaerendum nobis est an illi qui morbis psychicis laborant capaces sint eliciendi verum consensum circa omnia onera essentialia matrimonii, consensum nempe qui non sit vitiatum a constitutionalis incapacitate observandi essentielles obligationes contractus matrimonialis. Comprobatum est, ex. gr., mulierem quae nymphomania et virum qui satyriasi laborant radicaliter incapaces esse observandi fidelitatem coniugalem." Communicationes, 6(1974), p. 193. Also see the brief discussion in AZNAR GIL, El nuevo derecho, p. 156. The more precise question to be investigated is whether someone who suffers from a psychic illness is capable of giving valid consent and assuming the essential rights and obligations of marriage. Hopefully, the advances in medical science, psychology, and sexology will lead to a more complete understanding and clarification of such illnesses

While Rotal jurisprudence has acknowledged psychic impotence as a distinct cause of functional impotence, there has been a hesitancy to pronounce affirmative decisions in such cases because of the doubtfulness of the perpetual nature of the condition. Since perpetuity has been juridically interpreted in terms of incurability, the common and constant jurisprudence of the Roman Rota has argued that psychic impotence does not satisfy the juridical requirement of perpetuity because it is curable.⁶³

It is impossible to offer a taxative list of the psychological causes which directly affect the sexual capacity and functioning of a person. Each situation must be evaluated on the basis of the individual's psychosexual makeup. While the presence or diagnosis of a psychosexual dysfunction does not of itself constitute juridical proof of psychic impotence, it could provide the evidence for a formal investigation on the grounds of functional (psychic) impotence according to can. 1084, 1.

62 (cont'd) and their effects on a person's sexual capacity.

⁶³ See the cautious statements in S.R.R. Dec., c. PINNA, July 4, 1959, in S.R.R. Dec., 51(1959), p. 352 (hereafter cited, c. PINNA, July 4, 1959); c. De JORIO, February 21, 1973, p. 122; c. MASALA, March 14, 1973, in Ibid., 65(1973), p. 259; c. PARISELLA, October 10, 1974, in Ibid., 66(1974), p. 613 (hereafter cited: c. PARISELLA, October 10, 1974). The juridical requirement of perpetuity is investigated in the next section on the essential characteristics of impotence according to can. 1084, 1.

F) The Essential Characteristics of Impotence

Of itself, impotence does not always preclude marriage. Can. 1084, 1 requires that the impotent condition be antecedent and perpetual, whether absolute or relative.

a) Antecedence

The juridic requirement of antecedence requires that the impotent condition must exist at the time of consent.⁶⁴ Subsequent impotence, even when it is certain and perpetual, does not invalidate marriage because the ius in corpus which is of substance to the consortium has been given and

⁶⁴"Verum, uti expresse dicitur in relato inde ab initio canone 1068 non semper impotentia coeundi consequitur matrimonii nullitas, sed solummodo si fuerit antecedens matrimonium et perpetua seu insanabilis, idest, sit incurabilis absque vitae periculo, mediis naturalibus et licitis." S.R.R. Dec. c. GRAZIOLI, April 5, 1937, in S.R.R. Dec., 29(1937), p. 252; "Talis enim impotentia eo tantum sensu dici potest antecedens, quod causa seu dispositio, vel ineptitudo subiecti ad copulam coniugalem, matrimonium praecedunt, etsi tantum primo conatu copulae innotuerint." c. STAFFA, November 14, 1947, in Ibid., 39(1947), p. 539 (hereafter cited: c. STAFFA, November 14, 1947). Also see c. DE JORIO, February 21, 1973, pp. 122-123. See R. ALLERS, "Some Medico-Psychological Remarks on Canons 1068, 1081, and 1087", in The Jurist, 4(1944), where the author interprets (at p. 354) antecedence to mean that the impotent condition must exist prior to the first attempt of congressus and not after. BRENKLE, Male Impotence, p. 120 disagrees with Aller's opinion noting that "It is quite conceivable that impotence may arise between the marriage [...] and the first attempt to consummate the marriage. Marriage, not consummation, is the chronological dividing point between antecedent and consequent impotence."

fulfilled and can possibly be given again at a later date. When it can be proven that the impotent condition was virtually antecedent, i.e., the proximate cause and disposition of the impotent condition existed at the time of marriage, the juridic requirement of antecedence is satisfied.⁶⁵ Consequent impotence which arises following the exchange of consent could be grounds for initiating a petition to the Holy Father for the dissolution of a ratum non consummatum marriage.⁶⁶

⁶⁵"Impotentia etenim psychica, maxime si est relativa, dici potest matrimonio antecedens solummodo virtualiter, scilicet: dispositiones et causae, remote vel proxime in ipsam capacitatem coeundi cum omnibus vel cum quadam persona determinata influentes, iam in subiecto praeexistunt, sed impotentia non nisi in primo conatu actus coniugalis sese manifestat, cooperante influxu circumstantiarum physicarum et psychicarum quae momento copulae vim suam peculiariter exercent. Perdifficile est cum certitudine definire an in subiecto, qui inde a primo conatu de facto impotens ad coeundum appareat, dispositiones huic impotentiae locum dantes iam tali gradu praeexistant, ut independenter a quibuscumque circumstantiis, idem subiectum dicendum sit certo impotens, saltem relative [...]." c. DE JORIO, February 21, 1973, pp. 122-123. For similar interpretations in Rotal jurisprudence, see c. STAFFA, November 14, 1947, p. 539; c. ANNÉ, June 27, 1962, in S.R.R. Dec., 54(1962), pp. 335-336. Also see AZNAR GIL, El nuevo derecho, p 174. WRENN, Annulments, states (at p. 9) that virtual antecedence "could be verified, for example, in the case of a homosexual but not in the case of a heterosexual who found himself impotent after marriage because he found his wife's obnoxious personal habits repulsive."

⁶⁶For a more recent discussion on this issue see J.M. PINTO GOMEZ, "Incapacitas assumendi matrimonii onera in novo

b) Perpetuity

Can. 1084, 1 further requires impotence to be perpetual. The juridic concept of perpetuity has always been a controversial aspect of the diriment impediment of impotence. Canonists and Rotal jurisprudence have been especially cautious in their interpretations of the perpetuity of functional (psychic) impotence because the condition was thought to be a temporary one.⁶⁷

Traditionally, the requirement of perpetuity has been succinctly summarized in three situations: 1) when the impotent condition endures until the time of death or that which can only be removed by means of a miracle; 2) when the impotent condition can only be removed by extraordinary or

66 (cont'd) CIC", in Dilexit iustitiam, Z. Grocholewski - V.C. Orti (eds.), Città del Vaticano, Libreria Editrice Vaticana, 1984, pp. 26-27; E. OLIVARES, "Incapacitas assumendi obligationes essentielles matrimonii, debetne esse 'perpetua'?", in Periodica, 75(1986), p. 159.

⁶⁷"Sapienter proinde constans iurisprudencia Ordinis Nostri vix, immo ne vix quidem, habuit impotentiam functionalem tamquam impedimentum dirimens matrimonium, utpote dubiae perpetuitatis [...]." S.R.R. Dec., c. PINNA, July 4, 1959, p. 352. Also see c. LEFEBVRE, October 21, 1961, in S.R.R. Dec., 53(1961), p. 441; c. DE JORIO, February 21, 1973, p. 122; c. PARISELLA, October 10, 1974, p. 613; c. DI FELICE, April 4, 1979, in M.E., 104(1979), p. 295. Similar comments are offered by CAPPELLO, De matrimonio, p. 332; A. DE SMET, Tractatus theologico-canonicus de sponsalibus et matrimonio, 4th Edition, Brugis, Car. Beyaert, 1927, p. 481; F.X. WERNZ - P. VIDAL, Ius matrimoniale, Vol 5, 3rd Edition, Romae, Apud Aedes Universitatis Gregoriana, 1946, p. 265.

illicit (immoral) means; 3) a situation in which the cure involves a danger of death to the afflicted party.⁶⁸

The historical approach which equated perpetuity with the incurability of the organic cause was continued in Rotal jurisprudence.⁶⁹ Therefore, some Rotal auditors suggested that the juridic principle of perpetuity was to be interpreted factually and the judge must have moral certitude concerning the future perpetuity of the impotent condition.⁷⁰ But, in 1963, Fiore emphasized that the impediment

⁶⁸"perpetua dicitur impotentia 'quae aut sine miraculo, aut sine peccato, aut sine probabili periculo vitae auferri nequit: temporalis, quae naturalibus et licitis remediis sine tali periculo tolli potest' [...]." S.R.R. Dec., c. POMPEDDA, June 10, 1970, in S.R.R. Dec., 62(1970), p. 633 (hereafter cited: c. POMPEDDA, June 10, 1970); "Sed impotentia, de qua agitur, est etiam perpetua, sensu iuris, seu insanabilis." c. PERSIANI, November 15, 1909, in Ibid., 1(1909), p. 140. "Perpetuitas impotentiae est conceptus iuris, non merus eventus facti [...]." c. SABATTANI, April 10, 1959, in M.E., 84(1959), p. 620. Also see K.E. BOCCAFOLA, The Requirement of Perpetuity for the Impediment of Impotence, Roma, Università Gregoriana Editrice, 1975, pp. 111-112 (hereafter cited: BOCCAFOLA, Perpetuity); CAPPELLO, De matrimonio, p. 356; SHEEHY, "Impotence", explained (at pp. 284-285) that it was not the intention of the legislator to require absolute incurability of the condition, but rather that the cure be lawful without entailing a danger to the life of the afflicted party.

⁶⁹"[...] ideoque impedimentum habetur si ille rerum status certo demonstratur antecedens matrimonium, perseverans in matrimonio et omnino insanabilis [...]." S.R.R. Dec., c. MANNUCCI, January 28, 1935, in S.R.R. Dec., 27(1935), p. 42. Also see c. QUATTROCCOLO, January 4, 1941, in Ibid., 33(1941), p. 3.

⁷⁰Parrillo argued that the judge was to have moral certitude concerning the future perpetuity of the impotent condition before rendering an affirmative decision: "Non

of impotence is constituted by the perpetual physical inability to perform the marriage act regardless of its cause.⁷¹ In 1964, Sabattani explained that perpetuity is a principle of the juridic order and therefore its interpretation does not depend solely on the report of an expert.⁷² Perpetuity, then, is to be interpreted relatively according to the objective circumstances present at the time of

70 (cont'd) sufficit igitur certitudo impotentiae in actu, sed certum quoque esse oportet illam fuisse antecedentem et futuram perpetuam, ut iudex coniugii nullitatem decernere possit. Certitudo haec, quoad perpetuitatem futuram, haberi solet liquida cum agitur de impotentia organica [...]." S.R.R. Dec., c. PARRILLO, April 24, 1933, in S.R.R. Dec., 25(1933), p. 258. Parrillo's interpretation was supported by Jullien: see c. JULLIEN, February 16, 1940, in Ibid., 32(1940), p. 144; c. JULLIEN, April 16, 1943, in Ibid., 35(1943), p. 302. Morano reasoned that a previously granted ecclesiastical annulment was to be revoked because the impotent party exhibited potency at a later date. See c. MORANO, April 18, 1931, in Ibid., 23(1931), pp. 131-137. Morano's interpretation is refuted by BOCCAFOLA, Perpetuity, who states (at p. 121) that the invalidity of an annulled marriage cannot be based on a future marriage and furthermore such practices cannot be reconciled with the sanctity of marriage and its indissolubility.

⁷¹"Ad effectum irritandi nuptias absolute seu abstracte nihil confert origo, idest causa inducens incapacitatem sive in viro sive in muliere ponendi actus coniugales: ideo et doctrina et iurisprudentia canonica impedimentum impotentiae agnoscunt iure merito ubi illud provenit ex nervorum morbis, sed etiam ubi causis dumtaxat psychologicis adscribendum est; unde et de psychica impotentia, tamquam de functionalis impotentiae specie, sermo est." S.R.R. Dec., c. FIORE, December 20, 1963, in S.R.R. Dec., 55(1963), p. 991.

⁷²See S.R.R. Dec., c. SABATTANI, March 20, 1964, in S.R.R. Dec., 56(1964), pp. 253-261 (at p. 255).

marriage concerning a possible cure and the relative nature of impotence.⁷³

More recently, Klaus Von Lüdicke, a German canonist, reviewed jurisprudential developments on the juridic requirement of perpetuity in relation to impotence and can. 1095, 3^o.

In his first study,⁷⁴ Lüdicke stated that the focal point for an investigation of alleged cases of impotence is the moment of consent when the parties exchange marital rights and obligations, in particular, the perpetual

⁷³"In definito casu, [...] ratio habenda est circumstantiarum re existentium in contrahentibus. [...]"

"Criterium vero medici interventus raritatis deducendum est e peculiaribus circumstantiis personarum matrimonium contrahentium." S.R.R. Dec., c. BONET, December 22, 1960, in S.R.R., Dec., 52(1960), p. 606; "Quo igitur quaestio enodetur de perpetuitatis notione, statim ac imprimis asserendum est eam esse notionem relativam [...] idest conferendam esse cum locis, cum personis, cum remediis in regione exstantibus, cum tempore, in quibus casus singuli versantur atque probabilitatem vel possibilitatem obtinent recuperandae sanitatis. Ceterum, eiusmodi posito principio, unanimes et univoca est sive moralistarum sive canonistarum sive iurisprudentiae Nostrae sententia circa notionem perpetuitatis impotentiae." c. POMPEDDA, June 10, 1970, p. 633; c. SERRANO, October 22, 1971, in Ibid., 63(1971), p. 767. For similar interpretations, see BOCCAFOLA, Perpetuity, p. 129; SHEEHY, "Impotence", who maintains (at p. 285) that perpetuity is to be interpreted according to the circumstances prevailing at the time and place of the celebration of marriage, not according to the circumstances at the time of the formal trial.

⁷⁴See K. LÜDICKE, "Die Rechtswirkungen der heilbaren Impotenz (Überlegungen zu einen übersehenen Ehenichtigkeitsgrund)", in Archiv für katholisches Kirchenrecht, 146(1977), pp. 74-128.

(perpetuo) and exclusive right to intercourse. Since the party who is impotent is incapable of fulfilling the promised right to intercourse, he is also incapable of giving valid consent. Therefore, in addition to the incapacity to perform the act of intercourse, the consent exchanged is vitiating and the marriage is invalid.⁷⁵

In his second study,⁷⁶ Lüdicke reexamined the notion of curable impotence in light of the draft of can. 1095, 3^o (1983 Code). He noted that the incapacity to assume the essential obligations of marriage is regarded in the canon as a defect of consent without the requirement of perpetuity. Therefore, Lüdicke argues that if the theory of impediment is applicable to the principle of incapacity to assume the essential obligations of marriage, the question of perpetuity must be addressed in interpreting can. 1095, 3^o. The structure of both impediments (impotence and incapacity to assume) is the same: impossibility of fulfilling the essential obligations of marriage.⁷⁷ Lüdicke is particularly

⁷⁵See Ibid., where he formulates his argument (at pp. 112-114) on the juridic requirement of the prescribed form mandated by the Decree Tametsi of the Council of Trent and discusses (in Ibid., pp. 119-120) the issue of consent in conjunction with the decree.

⁷⁶K. LÜDICKE, "Quaestiones circa renovatum codicem, I.C. de impotentia sanabili in iure hodierno", in M.E., 108(1983), pp. 38-44.

⁷⁷See Ibid., pp. 38-39.

critical of the equation of perpetuity with incurability arguing that the impossibility of a cure cannot be applied to the duration of the marriage. Since the validity of marriage does not depend on the possibility of removing the impediment but whether the party was free from a diriment impediment at the time of consent, Lüdicke questions whether the possibility of a cure, which may never be realized, can render an invalid marriage valid.⁷⁸ Arguing that the obligation to procure a possible cure cannot be substituted for the actual exchange of the right to sexual acts, Lüdicke states that even a curably impotent condition remains an impediment if, at the moment of consent, the capacity to perform the marriage act is lacking in one of the parties. For Lüdicke, there is no obvious argument why impotence should be treated differently from the other diriment impediments or why the hope of a possible cure should remove the character of a diriment impediment.⁷⁹ Since can. 1095, 3^o does

⁷⁸See *Ibid.*, pp. 40-42 where the author states (at p. 41): "De validate matrimonii tempore contractus formaliter peracti deciditur. Si hoc momento desunt praemissae validitatis - consensus velabilitas naturalis ac iuridica - matrimonium validum esse nequit. Etiam vir et mulier sanabiliter impotentes hoc momento non sunt capaces copulae coniugalis, ergo inhabiles ad obligationes matrimonii hic et nunc adsumendas."

⁷⁹"Ius autem ad impossibile vanum est.

"Repeto: Impotentia sanabilis est impedimentum forsitan non per totum matrimonii tempus existens, quia cessat, si sanatur. Est autem impedimentum tempore contractus, et in

not require perpetuity for the psychic incapacity to assume the essential obligations of marriage but only that such be present at the exchange of consent, Lüdicke questions why perpetuity is legislated for psychic impotence.⁸⁰ This, we believe, represents a plausible and tenable canonical view.

c) Absolute or Relative Character

Can. 1084, 1 distinguishes absolute from relative impotence stating that either condition invalidates a marriage. Absolute impotence is the incapacity for marital relations with all members of the opposite sex, while relative impotence pertains to the inability to participate in coitus with one person or a few individuals but not all members of the opposite sex. While relative impotence is admitted in the law, its practical effect was questioned because in many cases, the condition could be corrected by medical, surgical, or psychological interventions.⁸¹ However, in his

79 (cont'd) hoc momento deest capacitas naturalis et inde iuridica obligationem matrimonii essentialem adimplendi. Nullum videtur argumentum, cur impotentia esset impedimentum ab omnibus aliis diversum, cur spes sanationis possibilis auferat characterem impedimenti." *Ibid.*, p. 42.

⁸⁰Lüdicke concludes this discussion by questioning whether the incapacity for assuming the essential obligations of marriage is in fact a defect of consent or rather a diriment impediment. See *Ibid.*, p. 44.

⁸¹"In praxi non facile admittenda est impotentia relativa tamquam perpetua, quia saepius per artem medicam facile curari potest [...]." CAPPELLO, De matrimonio, p. 356.

decision of June 10, 1970, Pompedda reiterated the relevance of relative impotence by stating that perpetuity is to be interpreted by examining the time and individual circumstances of the parties in a particular case.⁸²

In brief, whether the impotent condition impedes intercourse with all persons of the opposite sex, or with one specific person or even a few individuals, the issue is the same: the person is incapable of marital intercourse in this marital relationship and is therefore canonically impotent.

G) Certainty of the Impediment

The law requires certainty if impotence is to be considered a diriment impediment. According to can. 1084, 2, if the impediment of impotence is doubtful, a marriage is neither to be prohibited nor declared null, so long as a doubt exists.⁸³ The doubt can be twofold: the interpretation of the law can be doubtful (dubium iuris), or the doubt

81 (cont'd) Also see P.V. HARRINGTON, "The Impediment of Impotency and the Notion of Male Impotency", in The Jurist, 19(1959), where he states (at pp. 193 and 198) that this understanding of absolute and relative impotence is identical to that of the pre-1917 Code commentators. Also see BRENKLE, Male Impotence, p. 127; MC CARTHY, "Impotence", pp. 98-99.

⁸²See c. POMPEDDA, June 10, 1970, p. 633. Also see c. DE JORIO, February 21, 1973, pp. 119-129. Also see BOCCAFOLA, Perpetuity, p. 129; SHEEHY, "Impotence", p. 285.

⁸³Can. 1084, 2: "Si impedimentum impotentiae dubium sit, sive dubio iuris sive dubio facti, matrimonium non est impediendum, nec stante dubio, nullum declarandum."

can concern the actual presence of impotence (dubium facti). Either type of doubt suffices to make the impediment of impotence doubtful in a given case.⁸⁴

As previously noted, there existed within the Holy Office and the Roman Rota divergent opinions with regard to the requirement of verum semen. In an attempt to clarify the divergent opinions, the coetus suggested that should a petition for nullity be introduced on the grounds of doubtful impotence, a declaration of nullity be prohibited on the same grounds as long as the doubt exists. If such a petition is admitted, the Tribunal should rule in favor of the marriage.⁸⁵ The position of the coetus reflects the intent

⁸⁴See AZNAR GIL, El nuevo derecho, p. 174. Also see BERSINI, Il nuovo diritto canonico, pp. 64-65; BRENKLE, Male Impotence, p. 122; MC CARTHY, "Impotence", p. 99; M. PETRONCELLI, Diritto canonico, Napoli, Jovene, 1983, p. 297.

⁸⁵The position of the coetus reflects the intent of the Sacred Congregation for the Doctrine of the Faith (S.C.D.F) which stated that the juridic requirement of semination does not require semen elaborated in the testicles: "Ad vitandam duplicem iurisprudenciam tribunalium S. Sedis, de qua plura in praecedenti Sessione dicta sunt, proponitur ut aliqua verba addantur in hac 2, quibus congruens applicatio principiorum habeatur hoc sensu: id quod ante matrimonium uti impedimentum dubium impotentiae consideratur ideoque uti non impediens matrimonium habetur, idem post coniugium initum uti dubium impedimentum habeatur ideoque vel causa nullitatis non admittatur apud Tribunalia ecclesiastica, vel, si admittatur, fiat definitio in favorem matrimonii." Communicationes, 7(1975), p. 57. Also see U. NAVARRETE, "Schema iuris", pp. 629-634; the Decree of the Sacred Congregation, in A.A.S., 69(1977), p. 426.

of the Holy Office which stated that the juridic requirement of semination does not require semen elaborated in the testicles.

H) Sterility and Impotence

Can. 1084, 3 differentiates the juridical effect of sterility from impotence noting that sterility neither invalidates a marriage nor renders it illicit save for the prescription of dolus (can. 1098).⁸⁶ The Code of Canon Law does not define sterility. Traditionally, sterility has been described as the incapacity for generation whereas impotence is the incapacity to perform the marital act which is potentially generative.⁸⁷ As long as the parties are able to honor the perpetual and exclusive right to marital acts, they are capable of validly contracting marriage.

The juridic effect of marriage contracted through dolus is stated in can. 1098 which reads:

A person contracts invalidly who enters marriage deceived by fraud, perpetrated to obtain consent, concerning some quality of the other party which of its very nature can seriously disturb the partnership of conjugal life.⁸⁸

⁸⁶Can. 1084, 3: "Sterilitas matrimonium nec prohibet nec dirimit, firmo praescripto can. 1098."

⁸⁷See BRENKLE, Male Impotence, p. 62. Also see MC CARTHY, "Impotence", p. 99.

⁸⁸Can. 1098: "Qui matrimonium init deceptus dolo, ad

The introduction of dolus as a ground of nullity represents a significant change from the 1917 Code which did not recognize dolus as invalidating the marriage.⁸⁹ The coetus, having been urged to consider the effect of fraud or deceit on matrimonial consent, argued that the deceived person could find the establishment of the consortium impossible, especially when one partner realized that his spouse was significantly different from the person he married. After discussing the issue of fraud, the coetus voted affirmatively to admit dolus as a ground of nullity.⁹⁰

88 (cont'd) *obtinendum consensum patrato, circa aliquam alterius partis qualitatem, quae suapte natura consortium vitae coniugalis graviter perturbare potest, invalide contrahit.*"

⁸⁹See Can. 103, 2 in the 1917 Code: "Actus positi ex metu gravi et iniuste incusso vel ex dolo, valent, nisi aliud iure caveatur; [...]." No exception in matrimonial law was provided whereas the introduction of can. 1098 in the 1983 Code is an exception to can. 125, 2 of the same Code which states: "Actus positus ex metu gravi, iniuste incusso, aut ex dolo, valet, nisi aliud caveatur [...]."

⁹⁰The incorporation of this canon into the Code is a further confirmation that in order to establish the consortium totius vitae, the contracting parties must give to one another the gift of self (donatio) which includes the spiritual, psychological, physical, and intellectual makeup of the individual. For a more detailed discussion of the nullifying effects of dolus, see Communicationes, 3(1971), pp. 76-77; 9(1977), pp. 360-362 and 371-373. Also see T.J. GREEN, "The Revised Schema De matrimonio: Text and Reflections", in The Jurist, 40(1980), pp. 92-93. Also see GREEN, "Revision of Marriage Law", p. 392; P.T. SUMNER, "Dolus as a Ground for Nullity of Marriage", in Studia Canonica, 14(1980), pp. 173-175. F.G. MORRISEY, "Preparing Ourselves for the New Marriage Legislation", in The Jurist,

In order for fraud to invalidate a marriage, one of the contracting parties must be deliberately deceived about the presence or absence of a particular quality which, when discovered, seriously disturbs the consortium. The quality concealed must be real, grave, and present at the time of consent. Furthermore, the quality which caused the deceived person to make an erroneous judgment must be unknown at the time of marriage. If the fraud is recognized prior to marriage and the person consents to marriage, the consent would be valid.⁹¹ Accordingly, deceit about the quality of sterility can negate the consent of the one deceived. When the deceit concerns a quality which of its nature disturbs the consortium, the marriage is invalid.⁹²

90 (cont'd) 33(1973), says (at p. 351) that the need for legislation concerning fraud is based on the recognition of the dignity of the human person which includes the personalistic values of marriage. It was necessary therefore to protect the personal liberty of the parties entering marriage from fraud based on the important issues.

⁹¹See AZNAR GIL, El nuevo derecho, pp. 163-164; BERSINI, Il nuovo diritto canonico, p. 65; J.J. CUNEO, "Deceit/Error of Person as a caput nullitatis", in C.L.S.A. Proceedings, 1983, pp. 154-166; T.P. DOYLE, "Fraud", in The Code of Canon Law: A Text and Commentary, J.A. Coriden et al., (eds.), New York, Paulist Press, 1985, p. 781; C.A. OJEMEN, Psychological Factors in Matrimonial Consent in the Light of Canonical Legislation, Rome, Pontificia Universitas Urbaniana, 1986, pp. 194-203.

⁹²For a recent Rotal decision on this issue, see S.R.R. Dec., c. PARISELLA, March 24, 1983, in M.E., 108(1983), pp. 491-502.

Conclusion

The juridic definition of the impediment of impotence stated in can. 1084, 1 of the 1983 Code consists in a person's antecedent and perpetual inability to have intercourse. The doctrinal and jurisprudential evolution of this definition indicates certain elements constitutive of male and female capacity for intercourse. On the part of the male, erection, penetration and ejaculation in the vagina, and on the part of the female, a vagina capable of receiving the erect penis and the ejaculate constitute the essential components of conjugal intercourse. An antecedent and perpetual inability to actualize one or more of these components on the part of either one of the spouses constitutes juridic impotence. Moreover, the law requires that the intercourse be performed modo humano.

It is a legal principle that law generally does not provide definitions of concepts nor does it specify in detail the causes affecting specific juridic acts. This is generally the task of jurisprudence. Canonical doctrine and jurisprudence has distinguished impotence into organic (instrumental) and functional (neurologic and psychic). This distinction is based on the nature of the causes of impotence. Now it is a commonly admitted fact that defective or abnormal psychic processes can cause the incapacity for sexual intercourse. The admission of this fact is based on the

certain progress made by medical and psychiatric/psychological sciences. Nevertheless, law and jurisprudence expressly stipulate that the principles of antecedence and perpetuity must be verified in each case of alleged impotence before a marriage can be declared null.

The principle of antecedence essentially implies that the inability to have intercourse must be present at the time of exchanging consent. However, proof of existence of this inability prior to the moment of exchanging consent can confirm the legal presumption in favor of its presence at the time unless there is evidence to the contrary.

The requirement of perpetuity was historically satisfied when the inability to have intercourse perdured until the time of death or when it could be removed only through a miracle or extraordinary/illicit means, or when its cure involved serious harm to or death of the afflicted party. Nevertheless, canonical jurisprudence has clearly affirmed that perpetuity is a juridic concept and not an event of fact and, therefore, it is to be interpreted according to the objective circumstances of place, time, person and scientific progress present at the time of exchanging matrimonial consent.

The invalidating effect of impotence remains the same whether the condition is absolute or relative. As we shall see in the following chapters, this juridic principle is of much import in cases involving psychic impotence.

Can. 1084, 2 implicitly upholds a person's natural right to marry by stipulating the requirement of certainty of the impotent condition before a person can be prohibited from contracting marriage. Therefore, the canon expressly states that if the impotent condition is doubtful, marriage is to be neither prohibited nor declared null so long as the doubt persists. This principle will have definite influence on the practice of imposing a vetitum on a person alleged to be afflicted by an impotent condition.

Finally, can. 1084, 3 differentiates sterility from impotence. Sterility, which is essentially an incapacity for generation, does not affect the capacity to perform the marital act and, therefore, does not per se invalidate marriage. Nevertheless, the condition of sterility can become an object of fraudulent or deceitful error which can invalidate matrimonial consent according to the canonical principles of can. 1098.

CHAPTER III

IMPOTENCE FROM A PSYCHOSEXUAL PERSPECTIVE

The pioneering work of Masters and Johnson advanced our understanding of the physiology of human sexuality. Human sexual response, previously explained as a single, indivisible, biological act, is now described as a psychosexual response involving four interrelated phases. The dynamics or the process underlying this sexual response can be frustrated by specific psychosexual dysfunctions by which a party may be rendered incapable of performing the marriage act. Several factors which can cause a persistent sexual dysfunction during one or more of these phases have been identified by the science of sexology and these may be immediate and/or remote. In view of rendering all these aspects of sexual response clearer and more scientific, the American Psychiatric Association (A.P.A.) has developed a nosology of the sexual disorders to clarify the former confusing and inaccurate nomenclature that was in general use.¹

¹See AMERICAN PSYCHIATRIC ASSOCIATION, Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition Revised, Washington, D.C., American Psychiatric Association, 1987, pp. 279-296 (hereafter cited: DSM-III-R). Prior to the publication of the 3rd Edition of the Diagnostic and Statistical Manual of Mental Disorders, Washington, D.C., American Psychiatric Association, 1980, (hereafter cited: DSM-III), the diagnosis of impotence could refer to the conditions of frigidity or impotence. The psychiatric nomenclature presented in DSM-III and DSM-III-R identifies

The overall purpose of this chapter is to put in perspective the hypothesis that the incapacity to have sexual intercourse (can. 1084) can be caused by psychological factors which, in fact, can meet the juridic requirements of antecedence and perpetuity. In light of this statement, we propose that, in the presence of evidence sufficient to generate moral certitude concerning the fact of impotence caused by psychological factors, a tribunal can adjudicate the case according to the norms of can. 1084. Therefore, it is essential to examine the nature of psychic impotence from a psychosexual point of view.

Prior to the latter half of the twentieth century, there was little scientific data available on the nature of human sexual response because the investigation of sex was deemed inappropriate for scientific and academic pursuits. A brief review of the historical developments in the science of sexology is intended to demonstrate the fact that human sexual response is essentially an interaction between the mind and the body. Since the primary focus of this dissertation is psychically induced impotence, a brief, yet relatively comprehensive discussion of sexual disorders in

1 (cont'd) specific sexual disorders in a clearer and more comprehensive manner. For comments on this topic, see M.C. MAGEE, "Psychogenic Impotence: A Critical Review", in *Urology*, 15(1980), p. 437 (hereafter cited: MAGEE, "Psychogenic Impotence").

general and sexual dysfunctions in particular will be provided utilizing the nomenclature of the DSM-III-R because of its scientific organization and description of the recognized dysfunctions. While the focus is on the psychological causes purported to underlie a persistent sexual dysfunction, if a dysfunction admits a possible organic cause, this will be noted. The chapter will conclude with general remarks concerning the overall effect of the specific sexual dysfunctions upon the marital relationship and the efficacy of therapeutic interventions with a view to understanding the alleged "cures" for such dysfunctions which may help us in attempting to answer the complex question concerning the canonical requirement of "perpetuity" (incurability) of psychic impotence.

A) Historical Development of the Science of Sexology

Sexology, the scientific study of human sexual behavior, is a relatively new area of social science. This particular science emerged in the nineteenth century as a branch of psychiatry involving several pioneering physicians and scientists in its early stages of development.²

²The pioneering efforts of scientists and physicians in the nineteenth century established a foundation for the scientific data available in the twentieth century. For a more detailed discussion on the historical developments in the science of sexology, see E. BELTRAMI - N. COUTURE, "Les

Much of the previously published data was gathered from the observation and study of sexual activity in animals or from information gathered from questionnaires. The publication of Human Sexual Response,³ by Masters and Johnson introduced new insights and knowledge about the physiological responses which occur during sexual intercourse. Their following study, Human Sexual Inadequacy,⁴ described the behavioral methods used to treat sexual dysfunctions.

2 (cont'd) dysfonctions sexuelles" in Psychiatrie clinique: Approche contemporaine, P. Lalonde - F. Grunberg (eds.), Chicoutimi, G. Morin, 1983, p. 489 (hereafter cited: BELTRAMI-COUTURE, "Les dysfonctions sexuelles"); W.H. MASTERS et al., Human Sexuality, Boston, Little, Brown, and Company, 1982, pp. 12-14 (hereafter cited: MASTERS et al., Human Sexuality); R. ROSEN - L.R. ROSEN, Human Sexuality, New York, Alfred A. Knopf, Inc., 1981, pp. 13-17 (hereafter cited: ROSEN-ROSEN, Human Sexuality).

³See W.M. MASTERS - V.E. JOHNSON, Human Sexual Response, Boston, Little, Brown, and Company, 1966 (hereafter cited: MASTERS-JOHNSON, Human Sexual Response). The lack of scientific data is discussed in M.G. HARMATZ - M.A. NOVAK, Human Sexuality, New York, Harper and Row, Publishers, 1983, pp. 277-278 (hereafter cited: HARMATZ-NOVAK, Human Sexuality); G.J. TORTORA et al., Principles of Human Physiology, New York, Harper and Row Publishers, 1982, p. 364 (hereafter cited: TORTORA, Human Physiology).

⁴See W.H. MASTERS - V.E. JOHNSON, Human Sexual Inadequacy, Boston, Little, Brown, and Company, 1970 (hereafter cited: MASTERS-JOHNSON, Human Sexual Inadequacy). For critical comments on Masters and Johnson's study, especially their concentration on the purely physiological reactions of the human body, see B.J. KOGAN, Human Sexual Expression, New York, Harcourt, Brace, Jovanovich, Inc., 1973, pp. 280-281 (hereafter cited: KOGAN, Human Sexual Expression).

B) The Physiology of the Human Sexual Response

Prior to the publication of Masters and Johnson's works, a two phase theory of "tumescence" and "detumescence" was proposed by Ellis in 1936 in which sexual energy was considered an intrinsic component of human sexual response.⁵

Masters and Johnson introduced a four phase model of the human sexual response in 1966. The four phases identified were: the excitement phase which includes sexual stimulation and arousal; the plateau phase in which the sexual tension is increased; the orgasmic phase, an involuntary response to the increased sexual tension; and the resolution phase when the body and organs return to their ordinary shape and function.⁶ They further distinguished the two physiological reactions of vasocongestion and mytonia occurring during human sexual response. Vasocongestion, the primary physiologic response to sexual stimulation, is the accumulation of blood which accounts for erection of the penis and the clitoris. The secondary physiologic response

⁵Tumescence was the physiological buildup of sexual excitement leading to orgasm which when accomplished brought the individual to detumescence, a period of relaxation. See H. ELLIS, Studies in the Psychology of Sex, Vol. II, Part II, Eonism and Other Supplementary Studies, New York, Random House, 1936, pp. 142-143.

⁶For a discussion of the physiological changes during the four phases of sexual response, see W.H. MASTERS - V.E. JOHNSON, "The Sexual Response Cycle", in Exploring Human Sexuality, D. Byrne - L.A. Byrne (eds.), New York, Harper & Row, Publishers, 1977, pp. 58-62.

of myotonia produces increased muscular tension or contractions which dramatically change during the sexual response cycle, particularly in the orgasmic phase.⁷ As noted earlier, human sexual response, previously described as a sequence of biological events, was now explained as a series of phases which form a continuum.⁸

Several years later, Helen Singer Kaplan proposed a three phase model for a normal human sexual response originating in sexual desire, passing to excitement, culminating in orgasm. A significant contribution of Kaplan's model was the inclusion of desire as the initial stage for human sexual response. According to Kaplan, desire involves sensations which motivate a person to seek out or be receptive to sexual experience. When the desire phase is active, the person may experience genital sensations and be open to sexual activity. If the desire is inactive or inhibited, or the person is disinterested, the individual pressured to

⁷See MASTERS-JOHNSON, Human Sexual Response, pp. 294-300 for further details on these physiologic responses.

⁸See TORTORA, Human Physiology, p. 364 where human sexual response is described as a "multicomponent experience that also includes psychological and sociological forces." For a similar view, see B. ZILBERGELD - C.R. ELLISON, "Desire Discrepancies and Arousal Problems in Sex Therapy", in Principles and Practice of Sex Therapy, S.R. Leiblum - L.A. Pervin (eds.), New York, The Guilford Press, 1980, pp. 69-70.

participate in sexual relations can lose his appetite and become asexual. The excitement phase follows with the physiological sign of vasodilation in which the genitalia of both sexes become engorged with blood preparing the sexual organs for intercourse. The orgasmic phase is a genital response controlled by the spinal neural centers. For males and females, orgasm is a series of contractions of the genital muscles rather than a reflexive vascular action.⁹

The A.P.A. continued the scientific study of the human sexual response cycle, refining the previously proposed models into a new, four phase model consisting of the appetitive, the excitement, the orgasmic, and the resolution phases. This model resembles the earlier models with the

⁹The three phases are physiologically related yet controlled by separate neurophysiological systems. For example, the desire phase differs from the excitement and orgasmic phases because the genital organs are not necessarily involved. The physiological changes occurring in vasodilation are almost identical to those described by Masters and Johnson during vasocongestion. Furthermore, male orgasm is subdivided into two separate but coordinated reflexes of emission and ejaculation. Emission is the reflexive contraction of the muscles of the internal male reproductive organs by which seminal fluid is deposited in the posterior urethra whereupon ejaculation occurs almost immediately. Female orgasm occurs through the rhythmic contraction of the internal female reproductive organs which are usually experienced as pleasurable sensations by the woman. For a more detailed discussion on this model and the corresponding physiological changes, see H.S. KAPLAN, The New Sex Therapy: Disorders of Sexual Desire and Other New Concepts and Techniques in Sex Therapy, Vol. II, New York, Brunner/Mazel Publishers, 1979, pp. 9-23 (hereafter cited: KAPLAN, New Sex Therapy II).

exception of the appetitive phase which is characterized by fantasies about sexual activity including psychological interest in and a desire for sexual activity. The A.P.A. stated that inhibitions in the response cycle may occur at one or more of these phases, although inhibitions in the final stage are rarely of clinical significance. Accordingly, the psychosexual dysfunctions usually disturb both the subjective sense of pleasure or desire and the objective performance of the afflicted individual. However, subjective disturbances alone, without any objective signs, are rare and, conversely, inhibition in performance, without any subjective distress, is also rare.¹⁰

The purpose of surveying these models of the human sexual response cycle is to demonstrate that sex is more than a physiological response of the reproductive organs. It is a two-way interaction involving the physiologic response of the body with the appetitive or desire response of the mind. The interaction of the mind and the body contributes to or inhibits the capacity for sexual response.

C) The Human Sexual Response: Interaction of the Mind and the Body

Sexual arousal and response is not adequately described by reporting the measurable physiological reactions of the

¹⁰See DSM-III-R, p. 291 for a description of the appetitive phase.

reproductive organs. An adequate description of human sexual response can only be had by the integration of physiological and psychological responses.¹¹

A psychophysiological model was suggested by Weiss in 1972 in which sexual stimuli were described as either reflexogenic or psychogenic. Reflexogenic stimuli are automatic, conditioned responses resulting from direct tactile stimulation of the erogenous zones causing sexual arousal in a reflexive manner. Sexual arousal by psychogenic stimuli is accomplished without tactile stimulation of the genitalia. In most instances, sexual arousal is initiated by a combination of reflexogenic and psychogenic stimulation, accurately referred to as synergism.¹²

Reflexogenic stimulation is easier to interpret and demonstrate because it follows the pathway of the nervous

¹¹For example, when a person experiences fear, there are measurable physiological changes of an increased heartbeat and perspiration. Similar reactions, as previously noted, are reported with sexual arousal and response. The measurable physiological changes during arousal, excitement, and orgasm are accompanied by an emotional response within the individual.

¹²See ROSEN-ROSEN, Human Sexuality, who discuss (at p. 169) Weiss' model and the interaction of reflexogenic and psychogenic stimulation (synergism). Reflexogenic stimuli result when the brain conveys a signal to the lower spinal cord which in turn is transmitted to a particular organ for sexual arousal and response. The higher centers of the brain are not involved in reflexogenic responses. Whereas, psychogenic stimulation is processed in the higher brain centers which control sight, sound, thoughts, images, fantasies, and memories.

system whereas psychogenic stimulation is a complex process involving learning, memory, emotion, and other mental functions which does not necessarily admit the same proof. The move from the purely physiological explanation to knowing when and why a response occurs is a complicated step requiring a basic understanding of the interplay between the brain and the sex organs.¹³

Prior to the recent studies of the sexual response cycle, the human mind was excluded from consideration as a sex organ. The traditional association between sex and reproduction was the basis for this exclusion. Since sex was viewed primarily as a bodily function, and the mind was considered to be above such activity, the study of human sexuality concentrated on genital activity to the neglect of the functions of the mind -- the imagination, fantasy, and memory.¹⁴ Human response is the result of a sequence of in-

¹³The nervous system of human beings has been compared to a communication network within the body, divided into the central nervous system comprised of the brain and the spinal cord, and the peripheral nervous system comprised of nerve fibers which link the muscles, glands and sex organs with the central nervous system. Detailed discussion of the nervous system may be found in A. C. GUYTON, Function of the Human Body, 4th Edition, Philadelphia, W.B. Saunders Company, 1974, pp. 332-340 and 441-450; KAPLAN, New Sex Therapy II, pp. 9-23; TORTORA, Human Physiology, pp. 142-171; G. WAGNER - R. GREEN, Impotence: Physiological, Psychological, Surgical Diagnosis and Treatment, New York, Plenum Press, 1981, pp. 18-36 (hereafter cited: WAGNER-GREEN, Impotence).

¹⁴See D.A. SCHULTZ, Human Sexuality, Englewood Cliffs,

terdependent decisions even though it is rarely conscious. It is an automatic response conditioned by past experiences and learning.¹⁵

Once the original choice has been made to code a particular situation as sexual, the resulting narrative is carried on without further decision. It is within the history of the person that certain stimuli have been coded as sexual. The practice and organized cataloguing of information makes the connection between the stimulus and the response appear to be involuntary. However, the process remains complex and never completely automatic. There is nothing in any particular event itself which produces sexual arousal. The classification of a stimulus or response as sexual is the outcome of a history of decisions made by an individual in a particular society and culture.¹⁶

Three major cognitive components are reported to influence a human response to sexual stimulation:

¹⁴ (cont'd) New Jersey, Prentice-Hall, Inc., 1979, pp. 32-33 (hereafter cited: SCHULTZ, Human Sexuality).

¹⁵ See J.H. GAGNON, Human Sexualities, Glenview, Illinois, Scott, Foresman and Company, 1977, p. 118 (hereafter cited: GAGNON, Human Sexualities).

¹⁶ Evidence for this theory is presented in GAGNON, Human Sexualities, p. 118; A.C. KINSEY et al., Sexual Behavior in the Human Female, Philadelphia, W.B. Saunders Company, 1953, p. 644; W. SIMON - J. GAGNON, "Psychosexual Development", in Exploring Human Sexuality, D. Byrne - L.A. Byrne (eds.), New York, Harper & Row, Publishers, 1977, pp. 117-129.

informational data, affective (emotional) response, and imaginative capacity.¹⁷ An additional, important factor not included in this model is the attention given by an individual to sexual stimuli. If the stimuli are accompanied by distractions, a sexual response is unlikely to occur. Many real life situations can interfere with sexual arousal and response.¹⁸

Since the human sexual response is under the control of the cerebral cortex, it is prone to all of the problems that can be encountered in a person's life experience and

¹⁷For example, if a certain activity is perceived as unhealthy or unnatural by the informational component, this belief can influence the feelings (the affective response) and the imagery of the activity (the imaginative capacity). A conflict in the response to the stimulus occurs when there is disagreement between the fantasy and the belief of a particular act. See ROSEN-ROSEN, Human Sexuality, p. 174.

¹⁸The role of distraction was demonstrated in a laboratory experiment conducted by Geer and Führt which confirmed the fact that when asexual stimuli are introduced into erotic situations, sexual arousal is reduced. As the distraction was increased, arousal decreased. Since the experiment used male subjects, the authors state that the findings may be true for women although the study does not address itself to this question. The experiment and its corresponding results are explained in detail in J.H. GEER - R. FUHR, "Cognitive Factors in Sexual Arousal: The Role of Distraction", in Exploring Human Sexuality, D. Byrne - L.A. Byrne (eds.), New York, Harper & Row, Publishers, 1977, pp. 96-103. Preoccupations include thoughts and worries about the future, employment, children, and maintaining a household. The real life situations are discussed in ROSEN-ROSEN, Human Sexuality, p. 174; J.S. VICTOR, Human Sexuality: A Social Psychological Approach, Englewood Cliffs, New Jersey, Prentice-Hall, Inc., 1980, pp. 119-120 (hereafter cited: VICTOR, Human Sexuality).

retained in the memory. When the mind and the body do not cooperate to bring about a sexual response, serious, persistent difficulties arise in the couple's sexual relationship.

D) The Psychosexual Disorders

As we have already seen, human sexual response is a psychophysiological experience triggered by physical and psychological stimuli. A person's psychosexual development, his psychological attitude toward sex and sexuality, and the attitude towards one's partner are directly involved with and affect the physiology of human sexual response.

The second edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-II) identified in its psychiatric nosology ten different types of sexual deviations.¹⁹ Even though most psychiatric and psychological textbooks explicitly dealt with a broad range of "psychosexual disorders", the A.P.A. seems to have opted to officially recognize only "Sexual Deviations" in its manual. Accordingly it described sexual deviation in terms of sexual

¹⁹See AMERICAN PSYCHIATRIC ASSOCIATION, The Committee on Nomenclature and Statistics, Diagnostic and Statistical Manual of Mental Disorders, 2nd Edition, Washington, D.C., American Psychiatric Association, 1968, p. 44 (hereafter cited: DSM-II). The following are the sexual deviations listed in this manual: homosexuality, fetishism, pedophilia, transvestism, exhibitionism, voyeurism, sadism, masochism, other sexual deviation and unspecified sexual deviation. Unlike DSM-III and DSM-III-R, this manual does not attempt to describe these deviations.

interests directed primarily toward objects other than people of the opposite sex, toward sexual acts not usually associated with coitus, or toward coitus performed under bizarre circumstances, e.g., necrophilia, pedophilia, sexual sadism, fetishism, etc. In all these sexual deviations, the object relation is abnormal or deviant. In most cases, persons affected by these disorders may find their practices distasteful, and yet they remain unable to substitute normal heterosexual behavior.²⁰

DSM-III-R has introduced a more comprehensive approach to include under its psychiatric category of "Sexual Disorders" all sexual disorders of a psychogenic nature comprising also the subcategory of "Paraphilias" which covers all forms of "sexual deviations" previously listed in DSM-II.²¹ It uses the term "disorder" in lieu of "deviation" because deviation is basically a disorder. Deviation from normal sex object implies, in the first place, a disorder in the

²⁰See DSM-II, p. 44.

²¹See DSM-III-R, p. 279. However, see DSM-III, where the A.P.A. (at p. 279) used the term "psychosexual" to refer to the sexual dysfunctions to emphasize the fact that psychological factors are of major etiological import in the development of the dysfunctions. For a reaction to the diagnostic category "sexual dysfunctions", see VICTOR, Human Sexuality, who states (at p. 71): "The concept of sexual dysfunction focuses attention upon sexual response rather than the broader aspects of personality and sexual interaction. However, this focus is merely a convenient starting point for research, analysis, and therapy."

psychophysiological constitution of the person.

In DSM-III-R, the "Sexual Disorders" are divided into two distinct subclasses: 1) The Paraphilias: These disorders are induced by "recurrent intense sexual urges and sexually arousing fantasies"²² and 2) The Sexual Dysfunctions: These disorders are identified by an inhibition in sexual desire or the psychophysiologic changes characteristic of the complete sexual response cycle.²³ There is a residual class of sexual disorders entitled Other Sexual Disorders which include disorders not classifiable in any specific category. This third category is concerned with individuals who for example "have marked feelings of inadequacy" or seek to change their sexual orientation.²⁴

Neither DSM-II nor DSM-III-R identify impotence, whether male or female, as a distinct category of sexual disorders. However, under the subcategory of "Male

²²See DSM-III-R, pp. 279-290: The paraphilias include exhibitionism, fetishism, frotteurism, pedophilia, sexual masochism, sexual sadism, transvestic fetishism, voyeurism, and paraphilia not otherwise specified, i.e., zoophilia, coprophilia, necrophilia, etc.

²³See Ibid., pp. 290-296: Hypoactive Sexual Desire Disorder, Sexual Aversion Disorder, Female Sexual Arousal Disorder, Male Erectile Disorder, Inhibited Female Orgasm, Inhibited Male Orgasm, Premature Ejaculation, Dyspareunia, and Vaginismus.

²⁴See Ibid., p. 296: Other Sexual Disorders Not Classified Elsewhere include those with inadequate feelings concerning the shape and/or size of one's reproductive organs or distress about one's sexual orientation.

Erectile Disorder" and "Female Sexual Arousal Disorder", DSM-III-R admits a description similar to that of impotence and/or frigidity.²⁵ It is quite possible that psychiatric or psychological consideration of impotence may be restricted to the notion of sexual arousal disorders. However, canonical considerations include a much broader notion of impotence which may involve other disorders or dysfunctions. It is beyond the scope of this study to evaluate the effects of each psychosexual disorder on a person's sexual capacity. Nevertheless, because of the placement of impotence among sexual dysfunctions and because of the interrelatedness of these dysfunctions relative to one's capacity for sexual functioning, we will briefly examine each of them individually in the following section.

E) Sexual Dysfunctions

Before studying each sexual dysfunction, it is important to consider common characteristics and causes underlying this category of sexual disorders.

The DSM-III-R does not require a minimum proportion or specific type of sexual encounter to warrant a diagnosis. The diagnosis of a sexual dysfunction is made by the treating clinician only after a thorough investigation has been

²⁵Ibid., p. 294.

conducted eliminating the possibility of any organic factors. When a dysfunction is known to be caused exclusively by organic factors, it is not included in this diagnostic class.²⁶

Each of the dysfunctions may be psychogenic only or psychogenic and biogenic. They may be lifelong (primary) or acquired after a period of normal functioning (secondary), generalized (absolute) or situational (relative). When the complaint is situational, the condition is most likely to be caused by psychological factors.²⁷ In addition, the dysfunctions can be total or partial with reference to the degree of frequency of disturbance. At times there may be a correlation between personality traits and psychopathology. Recent studies suggest that the psychosexual dysfunctions may occur as the only disorder or in conjunction with other psychopathology.²⁸

²⁶For example, impotence resulting from a spinal cord injury or diabetes mellitus is classified as a physical disorder with an additional coding of a psychological reaction to an adjustment disorder. See DSM-III-R, pp. 290-291.

²⁷A dysfunction is absolute when it occurs in all situations. It is situational or relative when it is limited to a particular situation or a particular spouse. See DSM-III-R, p. 291. Also see BELTRAMI-COUTURE, "Les dysfonctions sexuelles", p. 11.

²⁸In males, for example, compulsive traits and anxiety are frequently associated with either sexual desire and/or sexual arousal disorders. Histrionic traits in women are commonly seen with a diagnosis of inhibited sexual

Organic factors have been reported to cause sexual dysfunctioning in a limited number of circumstances. Nevertheless, most sexual dysfunctioning is reported to be psychically induced. However, when a previously undiagnosed physical disorder is also responsible, both diagnoses are to be noted and given.²⁹

The psychological factors underlying sexual dysfunctioning can be immediate (current) and/or remote (historical). Immediate factors pertain to the present situation in which a person experiences fear or anxiety about his capacity for adequate sexual functioning. The fearful individual is distracted from a natural response by blocking the reception of sexual stimuli. Additional proximate factors include sexual ignorance, the excessive need to please a partner, and a failure to communicate, along with fears of sexual romantic success, and a fear of intimacy.³⁰

28 (cont'd) excitement and inhibited orgasm. See the comments in DSM-III, pp. 276-278; DSM-III-R, pp. 291-292. Also see R. BERKOW, (ed. in chief), The Merck Manual of Diagnosis and Therapy, 14th Edition, Rahway, New Jersey, Merck and Company, Inc., 1982, pp. 1632-1633 (hereafter cited: The Merck Manual).

²⁹See H.S. KAPLAN, The New Sex Therapy: Active Treatment of Sexual Dysfunctions, Vol. I, New York, Brunner-Mazel Publishers, 1974, pp. 69-74 (hereafter cited: KAPLAN, New Sex Therapy I).

³⁰See KAPLAN, New Sex Therapy I, pp. 121-134; MASTERS-JOHNSON, Human Sexual Inadequacy, pp. 11-14. G.C. DAVISON - J.M. NEALE, Abnormal Psychology, An Experimental Clinical

The historical factors which can impair sexual functioning have been identified as: a) strong religious attitudes or beliefs which denigrate sexual enjoyment; b) psychosexual trauma in which a person can trace his/her fears of sex to a particular frightening or degrading experience; c) homosexual inclinations and/or orientation; d) inadequate counselling which can either create or exacerbate sexual inadequacies; e) excessive intake of alcohol; f) physiological causes which cause sexual dysfunction; g) sociocultural factors, especially in the female dysfunctions in which women are put in the position where they must adapt, sublimate, inhibit or even distort their capacity to function sexually in order to fulfill their assigned role.³¹ Kaplan identified the deeper or historical factors as intrapsychic causes and described them according to the Freudian model of psychoanalytic conflict. This model demonstrated the necessity of analyzing the immediate causes to determine the possible presence of remote causes.³²

30 (cont'd) Approach, 3rd Edition, New York, John Wiley and Sons, Inc., 1982, (hereafter cited: DAVISON-NEALE, Abnormal Psychology) report (at p. 290) that performance fears are the result of misinformed attitudes instilled during the formative years. Nevertheless, there are people with unfortunate attitudes and experiences who do not develop sexual dysfunctions.

³¹See MASTERS-JOHNSON, Human Sexual Inadequacy, pp. 137-146.

³²See KAPLAN, New Sex Therapy II, pp. 145-163.

The psychological causes underlying sexual dysfunctions demonstrate the extent of the influence of a person's mind over his/her sexual response. In the following section, sexual dysfunctions are discussed individually with special reference to the psychological causes which affect not only the person's capacity for intercourse and consummation, but also the capacity for assuming the essential obligations of marriage, in particular, the giving and receiving of the right to heterosexual acts.

a) Female Psychic Impotence

Female psychic impotence consists in the inability of the woman due to causes of a psychic nature to receive the erect penis and the ejaculate in her vagina during intercourse. Jurisprudence has investigated cases of female psychic impotence under the clinical categories of frigidity and vaginismus. The corresponding diagnostic categories in DSM-III-R are: Female Sexual Arousal Disorder and Vaginismus.

i) Female Sexual Arousal Disorder

Female sexual arousal disorder results in the "partial or complete failure to attain or maintain the lubrication-swelling response of sexual excitement until completion of

the sexual activity".³³ This disorder was previously described under the umbrella heading of frigidity whereby the woman was thought to experience a partial or total lack of sex drive. But this diagnostic term proved to be inadequate because it was also used to describe a woman's incapacity for orgasm. Furthermore, this term portrayed the woman as cold and unfeeling who withheld her natural sexual responsiveness in order to spite men. The current advances in sexology and the publication of DSM-III and DSM-III-R have removed the pejorative terminology, especially with regard to women.³⁴

Female sexual arousal disorder is distinct from sexual desire disorders. In sexual arousal disorder, women experience sexual desire and arousal, but lack the physiological responses to prepare for intercourse. The apparent discrepancy exists between sexual desire and the sexual excitement of the woman. The idea of sexual relations is pleasurable and acceptable to the woman and she may understand the concept of sexuality, but the brain does not send "signals" to stimulate the genitalia to interpret the physical, tactile

³³See DSM-III-R, p. 294.

³⁴See HARMATZ-NOVAK, Human Sexuality, where the authors discuss (at p. 403) the negative connotations of the term "frigidity". Also see the comments of KOGAN, Human Sexual Expression, p. 283; A.K. OFFIT, The Sexual Self, Philadelphia, J.B. Lippincott Company, 1977, p. 104 (hereafter cited: OFFIT, The Sexual Self).

stimulation. For some, excitement occurs only in dreams, fantasies, or solitude. Others experience sexual excitement in most circumstances except that vaginal penetration is prohibited.³⁵ Since this disorder prevents vaginal lubrication, penetration results in a painful, distressing experience. In some cases, female sexual arousal disorder can lead to secondary problems of sexual pain disorders (dyspareunia and vaginismus) and, at times, to a complete loss of sexual desire.³⁶

Female sexual arousal disorder is contingent upon an anatomically intact reproductive system. In a minority of cases, this dysfunction can be induced by organic causes, e.g., vaginitis and pelvic pathology. When this dysfunction is situational, i.e., occurring in some situations but not in others, there is little reason to look for a physiological cause.³⁷

³⁵See HARMATZ-NOVAK, Human Sexuality, p. 404; OFFIT, The Sexual Self, pp. 109-110.

³⁶It has been reported that persistent female sexual arousal disorder (Female Inhibited Sexual Excitement) is responsible for the dysfunctions of dyspareunia and vaginismus including the possible loss of sexual desire. See H.S. KAPLAN, The Evaluation of Sexual Disorders: Psychological and Medical Aspects, New York, Brunner/Mazel Publishers, 1983, pp. 235-238 (hereafter cited: KAPLAN, Evaluation of Sexual Disorders); ROSEN-ROSEN, Human Sexuality, p. 307.

³⁷See KAPLAN, New Sex Therapy I, pp. 344-347; J.L. MC CARY, Human Sexuality: Physiological, Psychological and Sociological Factors, 2nd Edition, New York, Van Nostrand

In the majority of cases, female sexual arousal disorder is caused by psychological factors. These factors, while diverse, appear to be founded in experiences which cause a woman to associate anxiety and negative emotions with sexual responsiveness. Kaplan reports that female inhibited sexual excitement (female sexual arousal disorder) is the result of deeper sexual conflict founded in the psychosexual history of the couple's relationship.³⁸

The psychoanalytic theory suggests that an unresolved oedipal conflict or penis envy can induce this female dysfunction.³⁹ In the past, it was generally believed that this dysfunction was due to an overall personality problem. However, recent research has presented clearer evidence that female sexual arousal disorder is due to specific problems, not necessarily severe personality problems.⁴⁰

37 (cont'd) Reinhold Company, 1973, p. 345 (hereafter cited: MC CARY, Human Sexuality); S.R. WALEN et al., Clinical Guide to Behavior Therapy, Baltimore, The Williams and Wilkins Company, 1977, pp. 249-250 (hereafter cited: WALEN, Clinical Guide).

³⁸See KAPLAN, Evaluation of Sexual Disorders, p. 238.

³⁹See KAPLAN, New Sex Therapy I, pp. 353-357. Also see WALEN, Clinical Guide, in which it is reported (at p. 251) that psychoanalytic treatment which is aimed primarily at allowing the patient to gain insight into these early determinants has not been uniformly successful.

⁴⁰See J. MARAMOR, "Frigidity, Dyspareunia, and Vaginismus", in The Sexual Experience, B.J. Sadock et al. (eds.), Baltimore, The Williams and Wilkins Company, 1976, (hereafter cited: MARAMOR, "Frigidity, Dyspareunia, and

Researchers suggest the following as possible psychological causes of female inhibited sexual excitement: a restrictive upbringing, religious orthodoxy, sexual trauma, homosexual preferences, failure to resolve an identity problem and difficulties within the relationship. Regardless of its source, anxiety about sex can evoke intellectual defenses which prevent the woman from sexually responding to her husband. Anxiety over performance or a fear of losing self control can also be the cause of inhibited sexual excitement in women.⁴¹

Female sexual arousal disorder does not prevent intercourse but results in painful, often traumatic penetration because the physiologic reaction of lubrication-swelling of the vagina is lacking. When this dysfunction is persistent, other sexual dysfunctions can be generated thus disturbing the conjugal relationship. While this dysfunction does not fulfill the juridical understanding of impotence,

40 (cont'd Vaginismus") where the author states (at p. 398) that the traditional psychoanalytic orientation can no longer be considered adequate based on the research of Masters and Johnson. Maramor refers to the immediate causes and excludes the possibility of remote causes. For similar comments, see A.J. COOPER, "Some Personality Factors in Frigidity", in the Journal of Psychosomatic Research, 13(1969), pp. 149-155; VICTOR, Human Sexuality, p. 82.

⁴¹The possible psychological causes are discussed at length in MC CARY, Human Sexuality, pp. 345-346; 379-380; MARAMOR, "Frigidity, Dyspareunia, and Vaginismus", p. 400; MASTERS-JOHNSON, Human Sexual Inadequacy, pp. 229-233.

nevertheless, it is possible for impotence to result because this disorder results in painful intercourse. Since this disorder can prevent intercourse, if the juridic requirements of antecedence and perpetuity are satisfied, then impotence, according to can. 1084, 1 can be said to be present. Furthermore, it seems clear that this particular dysfunction could result in the inability of the afflicted woman to assume the essential obligations of marriage, particularly the perpetual right to sexual intercourse thereby vitiating her consent.

ii) Vaginismus

The diagnosis of vaginismus is given when there is a history of recurrent and persistent involuntary spasm of the muscles of the outer third of the vagina preventing penetration which therefore interferes with the act of intercourse.⁴² This description includes almost any diagnosis of vaginismus, from a mild form in which a woman experiences pain when intercourse is attempted to the most severe form in which vaginal penetration is impossible.⁴³

⁴²See DSM-III-R, p. 295.

⁴³For similar descriptive definitions, see KAPLAN, New Sex Therapy I, pp. 412-413; KOGAN, Human Sexual Expression, p. 289; MASTERS et al., Human Sexuality, p. 372; OFFIT, The Sexual Self, p. 117; ROSEN-ROSEN, Human Sexuality, p. 325; TORTORA, Human Physiology, p. 372; VICTOR, Human Sexuality, p. 85; WALEN, Clinical Guide, p. 272.

Vaginismus must be distinguished from a simple fear of intercourse and from those physical conditions which either cause pain during intercourse or possibly prevent vaginal penetration. Since organic causes have been implicated in this dysfunction, the definitive diagnosis of vaginismus can only be made after a physician has completed a pelvic examination.⁴⁴

Once organic causes have been ruled out, a wide variety of factors, real or imagined, are reported to be the cause of this dysfunction. Anxiety is generally assumed to be the precipitating factor.⁴⁵ In addition, the muscle spasm can serve as a protective reaction to pain, much like the protective reactions of other muscle groups in response to pain. This protective reaction occurs only when penetration is impending. Thus a woman suffering from severe vaginismus may be totally arousable and even orgasmic but cannot tolerate the thought of penetration.⁴⁶

The causes underlying the etiology of vaginismus are similar to the other sexual dysfunctions: a) a traumatic

⁴⁴Since the organic causes of vaginismus are reported to be the same as those which can induce dyspareunia, see note 83, pp. 144-145.

⁴⁵See VICTOR, Human Sexuality, p. 86.

⁴⁶See HARMATZ-NOVAK, Human Sexuality, pp. 406-407. Also see KAPLAN, Evaluation of Sexual Disorders, p. 260; MASTERS et al., Human Sexuality, pp. 372 and 378.

experience with vaginal penetration during her formative years, b) a psychological response of fear rather than an actual physical event, c) religious orthodoxy with strong restrictive mores, d) a restrictive home environment, e) a psychological reaction to rape even when no physical trauma has occurred, f) a response to a male sexual dysfunction, and g) sometimes, fears of pregnancy whether from premarital sexual activity or a fear of pregnancy at the present time.⁴⁷

If a diagnosis of vaginismus has been made, despite the fact that this dysfunction does not constitute impotence from a medical point of view, it could be possible to initiate a canonical investigation into the fact of impotence since this syndrome prevents penetration of the vagina. Furthermore, repeated unsuccessful attempts at intercourse may result in the non-consummation of the marriage. A persistent condition of vaginismus can lead to the breakup and final separation of spouses.

b) Male Psychic Impotence

The diagnostic categories of Male Erectile Disorder, Inhibited Male Orgasm, and Premature Ejaculation can

⁴⁷For a discussion of the effects of a traumatic experience, see KOGAN, Human Sexual Expression, p. 289; MC CARY, Human Sexuality, pp. 354-355; WALEN, Clinical Guide, p. 272.

constitute impotence because these dysfunctions prevent either the attainment of an erection suitable for penetration of the vagina and/or ejaculation therein.

i) Male Erectile Disorder

Male erectile disorder and its corresponding previous distinction, Male Inhibited Sexual Excitement (ISE), have been more commonly referred to as Erectile Failure (EF).⁴⁸ Since EF can result from organic or psychological factors, experts confirm the need for careful diagnosis.⁴⁹

⁴⁸ See HARMATZ-NOVAK, Human Sexuality, p. 397. Also see MASTERS et al., Human Sexuality, p. 368; B.W. MC CARTHY, "Secondary Impotence: Understanding, Prevention, and Treatment", in Counseling Men, T.M. Skovholt et al., (eds.), Monterey, California, Brooks-Cole Publishing Company, 1980, pp. 148-149.

⁴⁹ For further details on the organic factors known to cause erectile failure, see S. KENT, "Impotence as a Consequence of Organic Disease", in Geriatrics, 30(1975), pp. 155-157; J.B. MC KENDRY et al., "Erectile Impotence: A Clinical Challenge", in the Canadian Medical Association Journal, 128(1983), pp. 653-663; J.J. MULCAHY, "The Diagnosis and Management of Impotence", in The Journal of the Indiana State Medical Association, 76(1983), pp. 251-254. Furthermore, a definitive diagnosis of organic or psychological EF can be aided by a physical examination and the use of devices which measure penile tumescence. For a more detailed discussion of these newer devices, see A. ELLIS, "Treatment of Erectile Dysfunction", in Principles and Practices of Sex Therapy, S.R. Leiblum - L.A. Pervin (eds.), New York, the Guilford Press, 1980, p. 237 (hereafter cited: ELLIS, "Erectile Dysfunction"). However, D.C. SAYPOL et al., "Impotence: Are the Newer Diagnostic Methods a Necessity?", in The Journal of Urology, 130(1983), pp. 260-262 are of the opinion that EF can often be evaluated by a psychiatrist and urologist without expensive laboratory testing. When clinicians disagree as to the

The differentiation of organic from psychologically induced EF has received much attention in the last fifteen years. In the past, EF was considered to be caused by psychological causes in as many as 95% of the cases. It is now suggested by some that EF can be organically induced in as many as half of the reported cases. Yet the majority of authors maintain that EF is caused primarily by psychological causes.⁵⁰ An obvious reason for this discrepancy is the lack of precise, scientific reporting whether the condition is primary or secondary. Primary EF is diagnosed when the male has never experienced an erection. Secondary EF is acquired by an individual after having functioned normally at one time in his life. Primary EF is reportedly rare while the secondary condition is more common.⁵¹

49 (cont'd) etiology of EF, then such testing is recommended. Therefore, M. CONDRA et al, "Evaluation of the Urological Assessment in Impotence: Findings with a New Diagnostic Rating Scale", in The Journal of Urology, 151(1982), (hereafter cited: CONDRA, "Evaluation of Impotence") suggest (at p. 486) a comprehensive, multidisciplinary, multidimensional approach to improve accuracy of diagnosis.

⁵⁰See CONDRA, "Evaluation of Impotence", p. 486. Also see L.W. VLIET - J.K. MEYER, "Erectile Dysfunction: Progress in Evaluation and Treatment", in The Johns Hopkins Medical Journal, 151(1982), p. 248. In addition, see the comments of KAPLAN, Evaluation of Sexual Disorders, who reports (at p. 226) that psychogenic impotence is more common in men under forty years of age. In older men, because of the greater incidence of circulatory problems, diabetes, and medication with adverse sexual side effects, there is a higher risk of organically induced impotence.

⁵¹The psychological distinction of secondary impotence

EF results when the impulses from the brain which normally act upon the neural centers of the spinal cord to cause an erection are blocked by emotional inhibitions. Therefore, fear of failure, often associated with performance anxiety, has been identified as the greatest cause of EF. Other immediate factors include performance anxiety and negative emotional associations. For example, some men who have sustained an episode of EF become plagued by the thought of a future failure. This cycle of anxiety and fear then leads to a pattern of cyclical reaction -- the resulting failure reinforces the predisposing fear causing greater tensions and anxiety with the next attempt at intercourse. Such reaction can easily result in the condition of chronic impotence. Other immediate causes involve anxieties or repugnant emotional responses to sexual intercourse, such as shame, guilt, anger, or disgust.⁵²

51 (cont'd) is discussed in OFFIT, The Sexual Self, p. 86; KAPLAN, New Sex Therapy I, pp. 255-257; J. MARAMOR, "Impotence and Ejaculatory Disturbances", in The Sexual Experience, B.J. Sadock - A.M. Freedman (eds.), Baltimore, The Williams and Wilkins Company, 1976, (hereafter cited: MARAMOR, "Impotence") p. 405.

⁵²This type of cyclical thinking is also responsible for EF experienced on the honeymoon. Fear and anxiety about consummating the marriage can result in the inability to obtain an erection suitable for intercourse. The pattern of cyclical thinking and other immediate causes of EF are discussed in M.B. BROOKS - S.W. BROOKS, Lifelong Sexual Vigor: How to Avoid and Overcome Impotence, Garden City, New York, Doubleday and Co., Inc., 1981, pp. 71-76 (hereafter cited: BROOKS-BROOKS, Impotence); ELLIS, "Erectile

The possible remote causes can be numerous. The psychoanalytic theory views EF as the result of unresolved oedipal problems and castration anxiety, described by Kaplan in terms of sexual fears and ambivalences of which the person is unaware.⁵³ Additional remote causes are psychosocial factors: a) a restrictive upbringing, b) affiliation with an orthodox religious group with highly restrictive sexual mores, c) an orientation toward homosexual behavior, and d) the male's reaction to his first attempt at coitus which is reportedly associated with a high level of anxiety. EF is reported to occur in as many as 25% of males on this first occasion. While the majority of cases are usually treatable, the initial failure can reoccur and it is possible for the fear of failure cycle to be established.⁵⁴

52 (cont'd) Dysfunction", p. 235; KAPLAN, New Sex Therapy I, p. 127; MAGEE, "Psychogenic Impotence", p. 439; MASTERS et al., Human Sexuality, pp. 368-369; W.I. MORSE - J.M. MORSE, "Erectile Impotence Precipitated by Organic Factors and Perpetuated by Performance Anxiety", in the Canadian Medical Association Journal, 127(1982), p. 599.

⁵³For more details on the possible remote causes, see BROOKS-BROOKS, Impotence, p. 70; KAPLAN, Evaluation of Sexual Disorders, p. 233; OFFIT, The Sexual Self, pp. 193-194; WAGNER-GREEN, Impotence, pp. 74-75. Yet ELLIS, "Erectile Dysfunction", appears to show a preference (at pp. 237-238) for performance anxiety and the spectating rather than the causes espoused by the psychoanalytic theory.

⁵⁴These remote factors are reported in BROOKS-BROOKS, Impotence, pp. 75-83; KAPLAN, New Sex Therapy I, pp. 147-149; MASTERS-JOHNSON, Human Sexual Inadequacy, pp. 137-146, 171-183; WAGNER-GREEN, Impotence, p. 77. D.C. RENSHAW, "Impotence - Some Causes and Cures", in American

The alleged causes of EF are numerous. Prior to the advances in sexology, EF was always considered to be a sign of deep, underlying psychopathology. The discovery of the immediate causes of EF represents advances in the study, diagnosis, and treatment of the sexual dysfunctions. Yet the more remote causes continue to be exceedingly important in the genesis of erectile failure.⁵⁵

By its very nature, EF is a cause of stress to the individual and to the marital relationship. Since some men equate sexual capacity and performance with an understanding of their masculinity, the inability of obtaining and maintaining an erection suitable for intercourse often results in the loss of self-esteem and depression. Persistent EF may even cause the afflicted male to withdraw from all

54 (cont'd) Family Physician, 17(1978), describes the "madonna complex" (at p. 5) as a cultural attitude held by some men that sex is "dirty" and to be done only with "loose women", not with wives who are also mothers. Fearing that lust may contaminate "pure" love, impotence can result. J.R. CAVANAGH - J.B. MC GOLDRICK, Fundamental Psychiatry, Milwaukee, The Bruce Publishing Company, 1954, state (at p. 515): "The permanence of psychic factors depends to a large extent on how deeply rooted they are in the personality. Many of them may be relative but are certainly permanent as far as the particular individual is concerned."

⁵⁵See KAPLAN, Evaluation of Sexual Disorders, where she states (at p. 259): "As each etiological factor has been identified, its discoverers have believed that they found the unique cause. [...] Actually no relationship between erectile dysfunctions and one specific psychodynamic pattern has been established, yet all may have validity in some cases."

attempts to participate in intercourse.⁵⁶

When EF is present, the male is impotent because he lacks the capacity for erection and penetration. In the canonical sense, EF which is antecedent and perpetual, whether organically or psychologically induced, renders the male incapable of giving the perpetual right to the marriage act by which the spouses become one.

ii) Inhibited Male Orgasm

The diagnostic category of inhibited male orgasm incorporates two categories of ejaculatory disturbances: delayed orgasm, and the absence of ejaculation.⁵⁷ While not defined as impotence in DSM-III-R, this dysfunction has canonical implications because it prevents the juridical requirement of ejaculation within the vagina. While the afflicted individual may be capable of sexual desire, excitement, and penetration, he lacks the capacity for ejaculation during intercourse.⁵⁸ If the same individual is capable of orgasm by masturbation, foreplay, or oral sex, several authors suggest

⁵⁶See ROSEN-ROSEN, Human Sexuality, p. 307.

⁵⁷See DSM-III, p. 280 and DSM-III-R, p. 295.

⁵⁸For a more detailed discussion of this dysfunction, see B. APFELBAUM, "The Diagnosis and Treatment of Retarded Ejaculation", in Principles and Practices of Sex Therapy, S.R. Leiblum - L.A. Pervin (eds.), New York, The Guilford Press, 1980, pp. 265-269 (hereafter cited: APFELBAUM, "Retarded Ejaculation").

that the person's sexual orientation is "autosexual", that is, masturbatory, rather than heterosexual or homosexual.⁵⁹

There are relatively few organic causes of inhibited male orgasm.⁶⁰ The more commonly suggested causes of inhibited male orgasm are psychological in nature. The immediate cause appears to be anxiety which is similar to the terminology expressed by Masters and Johnson when describing the "spectator role". The psychoanalytic theory does not distinguish EF from inhibited male orgasm. Accordingly, the absence of ejaculation is considered as an expression of the person's unconscious sexual fears of castration or the unresolved oedipal complex.⁶¹

The remote causes implicated in inhibited male orgasm are: a) a restrictive home environment, b) religious orthodoxy with highly restrictive sexual mores, c) relationship difficulties, d) trauma or even a single, initial traumatic

⁵⁹The diagnosis of "autosexual" is suggested in APFELBAUM, "Retarded Ejaculation", pp. 266-267; HARMATZ-NOVAK, Human Sexuality, p. 402; KAPLAN, Evaluation of Sexual Disorders, pp. 213-214. The description of inhibited male orgasm in DSM-III or DSM-III-R does not include this particular condition.

⁶⁰Possible organic causes of inhibited male orgasm include neurological disorders, undetected diabetes, and certain medications. The organic causes are discussed in KAPLAN, Evaluation of Sexual Disorders, pp. 215-218.

⁶¹The psychoanalytic theory of inhibited male orgasm is reported in APFELBAUM, "Retarded Ejaculation", p. 275; HARMATZ-NOVAK, Human Sexuality, pp. 402-403; KAPLAN, New Sex Therapy I, pp. 325-326.

experience with the first attempt at intercourse, and e) specific fears, such as the fears of failure, intimacy, and pregnancy, many of which originate when there is premarital sexual activity.⁶²

Inhibited male orgasm directly affects the sexual relationship in marriage because this dysfunction prevents ejaculation in the vagina. Therefore, marital harmony is frustrated by the wife's inability to conceive a child. Accusations are often made against the husband to the effect that he is having extra-marital affairs. Other complaints center on a feeling of rejection by both the wife and the husband. In addition, the persistent lack of ejaculation often results in the avoidance of sexual intercourse (Sexual Aversion Disorder). The fearful husband attempts intercourse but with each failure, his resolve never to attempt intercourse at a later date is strengthened.⁶³

⁶²For a more detailed discussion of the remote causes see APFELBAUM, "Retarded Ejaculation", p. 268; KAPLAN, Evaluation of Sexual Disorders, pp. 218-219; KOGAN, Human Sexual Expression, p. 296; MARMOR, "Impotence", p. 410; MASTERS-JOHNSON, Human Sexual Inadequacy, pp. 117-126; OFFIT, The Sexual Self, pp. 100-103; ROSEN-ROSEN, Human Sexuality, p. 318.

⁶³The adverse effects of inhibited male orgasm on a marital relationship are described in APFELBAUM, "Retarded Ejaculation", p. 267; MASTERS, et al., Human Sexuality, p. 371; MC CARY, Human Sexuality, p. 344; ROSEN-ROSEN, Human Sexuality, pp. 318-319; SCHULTZ, Human Sexuality, p. 276.

iii) Premature Ejaculation

Premature ejaculation (PE) is defined as the "persistent or recurrent ejaculation with minimal sexual stimulation or before, upon, or shortly after penetration and before the person wishes it."⁶⁴

Prior to the publication of DSM-III and DSM-III-R, PE was defined by some as ejaculation which occurs before vaginal penetration or immediately after intromission while others described it according to the time which elapsed between vaginal penetration and ejaculation or according to the number of thrusts prior to ejaculation.⁶⁵ While DSM-III-R has avoided the prior confusing descriptions, the lack of specificity is to be noted in its description -- PE "occurs before the individual wishes it". DSM-III-R does not suggest a specific time frame in which to evaluate this dysfunction. Furthermore, the attention seems to focus on

⁶⁴See DSM-III-R, p. 295. A similar description was offered in DSM-III, (at p. 280): "Ejaculation which occurs before the individual wishes it, because of recurrent and persistent absence of reasonable voluntary control of ejaculation and orgasm during sexual activity."

⁶⁵See HARMATZ-NOVAK, Human Sexuality, pp. 400-401; KAPLAN, New Sex Therapy I, pp. 289-291; Z. LURIA - M.D. ROSE, Psychology of Human Sexuality, New York, John Wiley & Sons, 1979, p. 296 (hereafter cited: LURIA-ROSE, Human Sexuality); M.A. PERELMAN, "Treatment of Premature Ejaculation", in Principles and Practices of Sex Therapy, S.R. Leiblum - L.A. Pervin (eds.), New York, The Guilford Press, 1980, p. 200 (hereafter cited: PERELMAN, "Premature Ejaculation").

the male's preference for determining what is satisfying in the marital act.⁶⁶

While ejaculation is commonly thought to be under the voluntary control of the individual, such control is not always conscious. For example, ejaculations have been reported to occur during sleep or in other unconscious moments. When PE is recurrent and persistent, the crucial aspect is an absence of voluntary control over the ejaculatory reflex. Therefore, Kaplan suggests that the term premature be applied when orgasm is a reflexive, involuntary response to sexual arousal.⁶⁷

While the characteristic distinctions of primary and secondary are not customarily applied to this syndrome, Kaplan reports that absolute PE is generally caused by a lack of learning voluntary control over the ejaculatory reflex. Situational PE is thought to be more severe than an

⁶⁶See H.I. KAPLAN - B.J. SADOCK, Modern Synopsis of Psychiatry - IV, 4th Edition, Baltimore, The Williams and Wilkins Co., 1984, (hereafter cited: KAPLAN-SADOCK, Psychiatry-IV) where the authors (at pp. 462-463) critique the lack of a definite time frame in which to accurately describe PE and the subjective approach to a condition which affects the quality of a marital relationship.

⁶⁷See KAPLAN, New Sex Therapy I, p. 290. Also see H.S. KAPLAN et al., "Group Treatment of Premature Ejaculation", in Exploring Human Sexuality, D. Byrne - L.A. Byrne (eds.), New York, Harper & Row, Publishers, 1977, pp. 433-434 (hereafter cited: KAPLAN, "Premature Ejaculation"); PERELMAN, "Premature Ejaculation", p. 201; S.J. SILBER, The Male: From Infancy to Old Age, New York, Charles Scribner's Sons, 1981, p. 79.

absolute condition because the dysfunction is limited to a specific partner, or the condition exists in the marital union while the individual has control in solitary acts.⁶⁸

The organic causes of PE resulting from prostatic or urethral infections, or possibly from certain medications which can affect the central nervous system producing rapid orgasm are relatively rare.⁶⁹

The immediate psychological causes of PE include anxiety and fear about sexual performance. Other psychological causes implicated in PE are a) relational difficulties, b) affiliation with a religion with strong sexual mores, c) a traumatic experience, and d) a pattern stemming from an individual's first experience with masturbation and/or premarital sex.⁷⁰

The psychoanalytic theory considers PE to be a neurotic

⁶⁸ See KAPLAN, Evaluation of Sexual Disorders, p. 221.

⁶⁹ See Ibid., pp. 222-223 where Kaplan (at p. 222) repudiates the fact that certain drugs can cause PE. However, Kaplan acknowledges that certain surgical procedures can be instrumental in secondary PE by impairing the nerves and neural centers which control the ejaculatory reflex. See also MC CARY, Human Sexuality, pp. 339-340; MASTERS et al., Human Sexuality, pp. 376-378; ROSEN-ROSEN, Human Sexuality, p. 314; PERELMAN, "Premature Ejaculation", p. 202; J.M. RECKLER, "The Urologic Evaluation of Ejaculatory Disorders (Male Orgasm Disorders, RE and PE)", in KAPLAN, Evaluation of Sexual Disorders, pp. 139-149.

⁷⁰ These factors are discussed in HARMATZ-NOVAK, Human Sexuality, p. 401; MASTERS-JOHNSON, Human Sexual Inadequacy, pp. 116-128; KAPLAN, Evaluation of Sexual Disorders, pp. 223-224.

symptom which is amenable only to psychoanalytic treatment. The Freudian model implies that PE is caused by an unconscious, sadistic feeling or hatred toward women established during the developmental period of the personality. The unconscious anger at the parent is directed to the spouse and expressed by PE preventing the spouse from a pleasurable experience. Another theory postulates that PE is a consequence of unconscious incest-guilt or castration anxiety.⁷¹

Persistent PE seriously disturbs the sexual relationship making it neither satisfying nor enjoyable for the couple. The dysfunctional husband attempts to make love frequently and with each successive attempt, he is unsuccessful. The recurrent, unsuccessful attempts can lead to sexual avoidance on the part of the husband who develops feelings of guilt, loses confidence in himself, and questions his masculinity. While wives initially tolerate a condition of PE, they customarily become embittered losing desire and/or interest in a sexual relationship. Furthermore, they may think that their husbands consciously want to deprive them of sexual gratification in which case, the wives develop feelings of rejection.⁷²

⁷¹See HARMATZ-NOVAK, Human Sexuality, pp. 401-402; KAPLAN, "Premature Ejaculation", pp. 434-435; MARMOR, "Impotence", p. 409; PERELMAN, "Premature Ejaculation", p. 202; WALEN, Clinical Guide, p. 295.

⁷²The resulting effects of PE on the marital

c) Other Sexual Dysfunctions

The remaining sexual dysfunctions, i.e., the sexual desire disorders (Hypoactive Sexual Desire Disorder and Sexual Aversion Disorder), the sexual pain disorder (Dyspareunia) and Inhibited Female Orgasm Disorder are important for our consideration not only because they may result in impotence, but rather because of their effect on the interpersonal relationship of marriage.

i) Hypoactive Sexual Desire Disorder and Sexual Aversion Disorder

Prior to 1980, deficiencies in sexual desire were not recognized as a distinct impairment of a person's sexuality but were incorporated under the more general heading of impotence and frigidity. With the publication of DSM-III, the diagnostic category of "Inhibited Sexual Desire" (ISD) was introduced as a psychosexual dysfunction. A diagnosis of ISD was given when there was a persistent lack of interest in sex or erotic feeling in sexual situation.⁷³ However, with the publication of DSM-III-R a further distinction has been introduced in this dysfunction. Now there are two

72 (cont'd) relationship are discussed in KAPLAN, Evaluation of Sexual Disorders, pp. 221-222; KOGAN, Human Sexual Expression, p. 298; VICTOR, Human Sexuality, p. 79.

⁷³See DSM-III, p. 278.

diagnostic categories of Sexual Desire Disorders in DSM-III-R: "Hypoactive Sexual Desire Disorder" and "Sexual Aversion Disorder". However, our analysis of sexual desire disorders will focus on the previous diagnostic category of ISD because of a lack of specific literature on the new diagnostic categories.

The lack of sexual desire (ISD) is probably the most prevalent of the sexual dysfunctions.⁷⁴ Kaplan describes this dysfunction by analogy with anorexia nervosa since both syndromes result from an inhibition caused by unconscious psychological factors.⁷⁵ Feelings of discomfort, anxiety, or panic can be experienced when confronted with a sexual situation leading in some cases to a severe degree of sexual

⁷⁴See J.M. FRIEDMAN - D.R. HOGAN, "Low Sexual Desire", in Psychological Disorders, A Step by Step Treatment Manual, D.H. Barlow (ed.), New York, The Guilford Press, 1985, p. 417 (hereafter cited: FRIEDMAN-HOGAN, "Low Sexual Desire"). Also see H.S. KAPLAN, "Comprehensive Evaluation of Disorders of Sexual Desire: Introduction and Overview", in Comprehensive Evaluation of Disorders of Sexual Desire, H.S. Kaplan (ed.), Washington, D.C., American Psychiatric Press, Inc., 1985, p. 2 (hereafter cited: KAPLAN, "Comprehensive Evaluation"); H.I. LIEF, "Evaluation of Inhibited Sexual Desire: Relationship Aspects", in Comprehensive Evaluation of Disorders of Sexual Desire, H.S. Kaplan (ed.), Washington, D.C., American Psychiatric Press, Inc., 1985, (hereafter cited: LIEF, "Evaluation of ISD") where the author comments (at p. 62) that an experiment by Rado in 1949 identified internal stimulation (i.e., sexual stimulation) as the motivating force for sexual pleasure and response. According to Lief, without such stimulation, the situation is synonymous to ISD.

⁷⁵See KAPLAN, Evaluation of Sexual Disorders, p. 55.

dysfunctioning. Yet some people are capable of becoming aroused once they are involved in the sexual act.⁷⁶

Since sexual desire disorders can be biologically or psychically induced, a precise evaluation by a competent clinician is a prerequisite before making the specific diagnosis.⁷⁷ However, the sexual desire disorders often result from immediate and/or remote psychological factors. The immediate or proximate factors include: a) performance anxiety and conflicts within the relationship, b) inadequate physical and mental stimulation, c) a variation in sexual practice or choice of a sexual object, d) fear of pregnancy or

⁷⁶Such capacities, according to KAPLAN, (Evaluation of Sexual Disorders, pp. 239-241) are the result of strong fantasies by which the inhibitions are removed. The non-erotic aspects of hugging, kissing, and touching are enjoyed by some, while others dislike all manifestations of physical intimacy. The clinical manifestations of ISD are delineated in J.S. GOLDEN, "Evaluation of Inhibited Sexual Desire: Behavioral Aspects", in Comprehensive Evaluation of Disorders of Sexual Desire, H.S. Kaplan (ed.), Washington, D.C., American Psychiatric Press, Inc., 1985, p. 36 (hereafter cited: GOLDEN, "Inhibited Sexual Desire").

⁷⁷For more details concerning the possible organic causes including the influence of alcohol and drugs reported to affect sexual desire, see M. HORWITH - J. IMPERATO-MC GINLEY, "The Medical Evaluation of Disorders of Sexual Desire in Males and Females", in KAPLAN, The Evaluation of Sexual Disorders, pp. 183-195; KAPLAN, New Sex Therapy I, pp. 69-116; R.C. SCHIAVI, "Evaluation of Impaired Sexual Desire: Biological Aspects", in KAPLAN, Comprehensive Evaluation of Disorders of Sexual Desire, pp. 17-34; J. WESTERMEYER, "Alcohol, Medications, and Other Drugs", in Treatment Interventions in Human Sexuality, C.C. Nadelson - D.B. Marcotte (eds.), New York, Plenum Press, 1983, pp. 347-356.

sexually transmitted diseases, and e) sexual phobias associated with panic attacks which can be so severe that the person becomes obsessed with sexual avoidance.⁷⁸

The most commonly reported remote factors include: a) deeply ingrained cultural influences of sexual guilt and shame; b) an unconscious intrapsychic sexual conflict, and c) a fear of intimacy and commitment. The psychoanalytic theory proposes that unresolved issues during the oedipal period of development can cause inner conflicts resulting in an inhibition of sexual desire. In such cases, the person unconsciously identifies the spouse with the parent. In other cases, the trauma of rape or incest sustained during childhood can predispose the person to a situation of ISD. Furthermore, the lack of sexual desire can be a defensive inhibition in the unconscious in which case it becomes an involuntary act. For example, the person who is or has been humiliated can fear possible condemnation and rejection for past sexual failures leading to an avoidance of sexual activity. Such avoidance, while not a conscious, voluntary action, makes sense at least from a psychological point of view.⁷⁹

⁷⁸See GOLDEN, "Inhibited Sexual Desire", p. 36; KAPLAN, Evaluation of Sexual Disorders, pp. 248-249.

⁷⁹These factors are reported in KAPLAN, New Sex Therapy II, pp. 78-94; GOLDEN, "Inhibited Sexual Desire", pp. 36-43.

The sexual desire disorders, whether ISD, hypoactive sexual desire disorder, or sexual aversion disorder resulting from psychological causes can effect a serious condition of functional impotence. Of themselves, these disorders do not preclude the act of intercourse. However, when there is a persistent lack of interest in sex, marital sexual activity may be extremely limited, curtailed, or even avoided. Marital harmony is therefore disturbed even when one partner suffers from such a sexual dysfunction. The incapacitated person may not consider himself to have a problem and may even project the problem onto his spouse thinking that she has greater or insatiable needs. It has been reported that the previous distinction of male ISD usually results in the avoidance of any sexual activity because the person fears he will be incapable of satisfactorily performing the sexual act. Women, however, can disguise desire deficits and participate in intercourse seeking an opportunity for closeness and intimacy. A woman's desire can be adversely affected when the husband's failure signals that sex is not worth the effort.⁸⁰

Therefore, sexual desire disorders which result in extreme curtailment or avoidance of sexual activity

⁸⁰The possible effects of ISD (and therefore the newer diagnostic category of sexual arousal disorders) on the marital relationship are briefly discussed in ROSEN-ROSEN, Human Sexuality, pp. 327-328.

(intercourse) on the part of either partner can seriously affect the conjugal relationship.

ii) Sexual Pain Disorder (Dyspareunia)

The diagnosis of dyspareunia is given when coitus is associated with recurrent and persistent genital pain in the male or the female during the act of intercourse.⁸¹ The pain experienced can have a wide range of definitions and duration. When this dysfunction is present and active, sexual intercourse is stressful. While some afflicted individuals may be willing to experience some pain during intercourse, dyspareunia does not necessarily preclude the possibility for intercourse. However, when the pain is severe, the afflicted partner may curtail or completely avoid intercourse.⁸²

Painful intercourse in men and women can be caused by several organic problems⁸³ although the psychic factors

⁸¹See DSM-III-R, p. 295. Also see DSM-III, p. 280 in which this dysfunction was termed "Functional Dyspareunia".

⁸²See A.A. LAZARUS, "Psychological Treatment of Dyspareunia", Principles and Practices of Sex Therapy, S.R. Leiblum - L.A. Pervin (eds.), New York, The Guilford Press, 1980, p. 148 (hereafter cited: LAZARUS, "Dyspareunia").

⁸³For a discussion of the possible organic factors in dyspareunia, see KAPLAN, Evaluation of Sexual Disorders, pp. 255-263; KOGAN, Human Sexual Expression, p. 284 (for female dyspareunia) and pp. 291-292 (for male dyspareunia); MC CARY, Human Sexuality, where the author comments (at pp. 352-353) that in women, this dysfunction is frequently

appear frequently as a cause of the pain. Psychological causes can be suspected after a thorough physical examination which reveals no evidence of organic pathology. According to the psychoanalytic theory, the pain results from unconscious sexual conflicts in which anxiety, sexual conflict, and guilt is experienced as pain.⁸⁴ Developmental, traumatic, and relational factors have been implicated to induce dyspareunia. The developmental factors include: a) a history in which sex was viewed with guilt, shame, sin, and various other factors; b) traumatic events are resulting from rape, incest or illness; and c) relational factors which pertain specifically to the spouse. Additional factors for males include mild masturbatory guilt to severe sexual conflict. Females may experience guilt about intercourse and erotic pleasure, or fear of penetration of the vagina.⁸⁵

Dyspareunia often involves a broad spectrum of personalistic and idiosyncratic variables. When the condition is severe or if the psychological causes are serious

83 (cont'd) associated with tension, fear or anxiety over initial sexual intercourse; MASTERS et al., Human Sexuality, p. 378.

84 A summary of the psychoanalytic theory is presented in KAPLAN, Evaluation of Sexual Disorders, p. 258.

85 See KAPLAN, New Sex Therapy II, p. 32. Also see LAZARUS, "Dyspareunia", p. 164. For a brief listing of fears common to men and women reported to induce dyspareunia, see KOGAN, Human Sexual Expression, pp. 286-287.

enough, one or both partners may avoid, curtail or even refuse to participate in sexual relations. Therefore, as noted earlier, even though some individuals may be willing to suffer some pain during the act of intercourse, the afflicted partner may curtail or even avoid intercourse thus disrupting the conjugal relationship.

iii) Inhibited Female Orgasm

Inhibited female orgasm is the recurrent and persistent delay or absence of female orgasm following a normal sexual excitement phase during sexual activity.⁸⁶

Orgasmically inhibited women care about men and may even be interested in sexual activity. The only complaint is the difficulty in achieving an orgasm.⁸⁷ As defined, this dysfunction is not directly pertinent to our consideration of impotence because inhibited female orgasm does not prevent the penetration or ejaculation within the vagina. However, because of its possible relationship to the incapacity to assume the essential obligations of marriage, a brief analysis will be made of this dysfunction.

While the causes of inhibited female orgasm are primarily psychological, a physical examination of the woman is

⁸⁶See DSM-III, p. 279 and DSM-III-R, p. 294.

⁸⁷See KAPLAN, Evaluation of Sexual Disorders, p. 203.

important to rule out possible organic causes.⁸⁸ The psychological causes implicated in Inhibited Female Orgasm can be distinguished as immediate and remote. Fear of performance in which the woman fulfills the spectator role has been implicated as the immediate cause.⁸⁹ The remote causes of this dysfunction appear to be similar, if not identical, to those which produce some of the other psychosexual dysfunctions. Psychological factors which induce inhibited female orgasm are: a) restrictive upbringing or home environment; b) affiliation with an orthodox religious group with restrictive sexual mores; c) severe difficulties in the marital relationship; and d) fear of losing control.⁹⁰ The

⁸⁸For a descriptive listing of the organic causes implicated in inhibited female orgasm, see A. SNYDER *et al.*, "Secondary Orgasmic Dysfunction: Case Study", in Exploring Human Sexuality, D. Byrne - L.A. Byrne (eds.), New York, Harper & Row, Publishers, 1977, pp. 417-421. Also see KAPLAN, Evaluation of Sexual Disorders, pp. 205-207, who states (at p. 205): "So far, none of these [the variety of alleged physical causes] has been supported by scientific anatomic or clinical investigation."

⁸⁹See KAPLAN, New Sex Therapy II, p. 33-35; MASTERS *et al.*, Human Sexuality, p. 374; ROSEN-ROSEN, Human Sexuality, p. 322; VICTOR, Human Sexuality, p. 84.

⁹⁰For a discussion of these psychological factors, see L. BARBACH, "Group Treatment of Anorgasmic Women", in Principles and Practice of Sex Therapy, S.R. Leiblum - L.A. Pervin (eds.), New York, The Guilford Press, 1980, pp. 107-112 (hereafter cited: BARBACH, "Anorgasmic Women"); DAVISON-NEALE, Abnormal Psychology, p. 377; MASTERS-JOHNSON, Human Sexual Inadequacy, pp. 229-233; 241-244; OFFIT, The Sexual Self, pp. 120-121; ROSEN-ROSEN, Human Sexuality, p. 322; VICTOR, Human Sexuality, p. 84.

psychoanalytic theory explains the causes of inhibited female orgasm in terms of penis envy, the Electra complex, and even the prostitution complex.⁹¹

Despite the fact that women diagnosed with inhibited female orgasm are usually sexually responsive spouses, this dysfunction nevertheless produces negative psychological reactions. While Kaplan reported that inhibited female orgasm has an excellent prognosis with sex therapy, even when it results from a deeper intrapsychic relationship problem, careful evaluation concerning prognosis is necessary. While most women can reportedly learn to have orgasms, it has not been established that these same women can reach orgasm with their husbands.⁹²

Other sexual problems in the marital relationship have also been implicated as causative factors. For example, inhibited female orgasm can result from EF or ejaculatory problems with the spouse. If premature ejaculation is the

⁹¹See BARBACH, "Anorgasmic Women", p. 113; KAPLAN, Evaluation of Sexual Disorders, p. 211; OFFIT, The Sexual Self, pp. 121-121.

⁹²See DSM-III-R, p. 294. Also see KAPLAN, Evaluation of Sexual Disorders, who reports (at p. 211) that in approximately 50% of the cases, the woman is able to achieve orgasm through masturbation. The complaint concerns the woman's inability to achieve orgasm with their partners. Therefore, while the prognosis is reportedly "excellent", Kaplan notes this possible limitation: "Whether the woman will be able to achieve orgasms with her partner is not as easily predictable."

problem, the woman may complain that she is not sufficiently aroused to achieve orgasm. Furthermore, the husband may blame himself for his wife's inability to achieve orgasm thereby threatening self-esteem and future interest or desire in participating in sexual intercourse. A frequently reported cause of this dysfunction is non-sexual, relational difficulties. Since a woman's capacity for orgasm can be controlled by her feelings for her partner, any lack of communication or trust can affect and control the woman's inability to achieve orgasm.⁹³

The diagnosis of inhibited female orgasm, while not satisfying the canonical description of impotence according to canon 1084, 1, can be indicative of, or result in, the inability to assume the essential obligations of marriage, especially when the dysfunction manifests itself early in the marriage.

F) The Effects of Psychosexual Dysfunctions

Describing the effects of the psychosexual dysfunctions upon a marital relationship is a difficult task. In the absence of an absolute standard for sexual capacity, the tendency is to apply the dichotomous categories of normal or

⁹³The possible reactions within a marital relationship are briefly discussed in ROSEN-ROSEN, Human Sexuality, pp. 320-322; SCHULTZ, Human Sexuality, pp. 278-281.

abnormal, healthy or sick, to sexual functioning. Nevertheless, the sexual dysfunctions are best understood when sexual functioning is viewed within the range of capacity/incapacity.

Traditionally marriage has been viewed as a contractual relationship binding both parties to specific rights and obligations, specifically the right to sexual intercourse for the purpose of procreation. But no one can deny the fact that sexual intercourse has a unitive, affectional, and recreational role in addition to its procreative purpose. These aspects together help to create the marital relationship.⁹⁴

A common complaint of married couples is the experience of sexual dysfunctioning reported in as many as one half of all marriages. These complaints range from a simple lack of interest to a period of temporary dysfunctioning, to the

⁹⁴The unitive, affectional, recreational, and reproductive roles are discussed in F.D. COX, Human Intimacy: Marriage, the Family and Its Meaning, 2nd Edition, St. Paul, Minnesota, West Publishing Company, 1981, p. 261 (hereafter cited: COX, Human Intimacy); J. GRAMICK, "Sexual Intercourse Serves Many Purposes Which Are Equally Acceptable", in Human Sexuality, Contemporary Controversies, H. Feldman - A. Parrot (eds.), Beverly Hills, Sage Publications, 1984, pp. 89-103. V.A. HEFFERNAN, "The Primary Purpose of Intercourse is Procreation", in Human Sexuality, Contemporary Controversies, pp. 79-88 describes in detail (at p. 87) the unitive role of intercourse: "Sexual intercourse is the supreme act of physical unity far surpassing other gestures of affection. This unity helps produce the atmosphere of a loving community in which the children can thrive."

complete inability or absence of sexual intercourse.⁹⁵ The task remains to comment on the overall, adverse effects of the psychosexual dysfunctions on the individual and the couple.

One of the major contributions of Masters and Johnson was their suggestion that the sexually dysfunctional individual does not exist alone. Rather, it is the couple who are dysfunctional because any sexual incapacity affects the partner and the interpersonal relationship. Therefore, any sexual problem, especially when it is persistent, will have adverse effects upon the interpersonal relationship of marriage.⁹⁶

The sexual desire disorders (hypoactive sexual desire disorder and sexual aversion disorder) are reportedly common sexual dysfunctions which seriously affect sexual and interpersonal relationship in marriage. Sexual aversion disorder often manifests itself in the sexual arousal and/or orgasmic disorders.

Interrelational difficulties such as a fear of intimacy

⁹⁵See W.H. MASTERS et al., Masters and Johnson on Sex and Human Loving, Boston, Little, Brown and Company, 1986, pp. 441-461 (hereafter cited: MASTERS et al., Human Loving).

⁹⁶For a more detailed discussion of the relational aspect, see MASTERS-JOHNSON, Human Sexual Inadequacy, pp. 2-3, 195. Also see GAGNON, Human Sexualities, pp. 370-371; H. KATCHADOURIAN, Human Sexuality, Sense and Nonsense, San Francisco, W.H. Freeman and Company, 1974, p. 43; LURIA-ROSE, Human Sexuality, p. 288.

or anger at the partner can prevent the ability to develop sexual interest and desire for the spouse. The lack of sexual interest or desire is often interpreted by the functional partner as a lack of love and caring.⁹⁷

The dysfunction of EF affects both the individual and the couple. The dysfunctional male who has defined his masculinity by his capacity for erection will naturally withdraw from sexual intimacies with his wife with depression often following. Since depression has also been known to induce erectile difficulties, it is necessary to ascertain whether the inability to obtain an erection induced the depression or the depression resulted from EF. If the syndrome of EF is persistent, the wife often blames herself for her mate's dysfunctioning. In turn, the husband responds with guilt and humiliation which in turn increases his depression. Furthermore, the partner often experiences frustration because she desires and expects sexual satisfaction. When this is not achieved, she may completely avoid sexual contact believing that sexual intimacy is not worth the effort and consequently loses interest and desire in sexual intercourse.⁹⁸ Persistent sexual arousal disorders in

⁹⁷The adverse effects of ISD on the marital union is described in GOLDEN, "Inhibited Sexual Desire", p. 36; KAPLAN, "Comprehensive Evaluation", pp. 13-15; LIEF, "Evaluation of ISD", p. 64.

⁹⁸The effects of Male ISE on the marriage are discussed

either partner are directly affected by the interpersonal relationship of the couple which in turn affects the partner's sexual capacity.

Female sexual arousal disorder often results in the loss of sexual desire by partners. The woman either loses interest or avoids intercourse because she does not lubricate sufficiently and therefore finds penetration painful and traumatic thereby inducing the sexual pain disorders of dyspareunia and vaginismus. Likewise, the sexual pain disorders can induce female sexual arousal disorder.⁹⁹

Poor communication and a lack of trust in the marital relationship is a contributing factor in inhibited female orgasm. When the woman is persistently anorgasmic, the husband's sexual interest and participation wanes with resulting marital and sexual disharmony. In addition, inhibited female orgasm has also been known to result from the strictly male sexual dysfunctions of EF and PE.¹⁰⁰

98 (cont'd) in DAVISON-NEALE, Abnormal Psychology, p. 375; ELLIS, "Erectile Dysfunction", p. 235; LURIA-ROSE, Human Sexuality, p. 292; ROSEN-ROSEN, Human Sexuality, p. 307; WALEN, Clinical Guide, p. 279.

⁹⁹For a brief presentation of the effects of female ISE, see KAPLAN, Evaluation of Sexual Disorders, p. 235; ROSEN-ROSEN, Human Sexuality, p. 307.

¹⁰⁰The interrelational factors which can induce inhibited female orgasm are discussed in ROSEN-ROSEN, Human Sexuality, pp. 320-322; SCHULTZ, Human Sexuality, pp. 278-281.

Inhibited male orgasm is often a masked response by the husband for aversion, anger, and hostility towards his spouse. The wife often responds with feelings of rejection because her husband will not ejaculate during the act of intercourse. Even though she may achieve multiple orgasms, she is virtually frustrated with the sexual relationship and may curtail or avoid a sexual relationship with her husband.¹⁰¹

Persistent PE can result from a dissatisfying sexual/non-sexual relationship. The typical reported reaction of both partners to PE is sexual avoidance or abstinence. While the husband is humiliated, the wife often becomes embittered and responds with a lack of sexual interest and desire. Persistent PE often leads to or results from Male ISE. This dysfunction is often responsible for the serious, adverse effects of tension and unhappiness in the marriage.¹⁰²

Dyspareunia initially affects the sexual interest or

¹⁰¹The relational effects are presented in APFELBAUM, "Retarded Ejaculation", p. 267; HARMATZ-NOVAK, Human Sexuality, p. 402; KAPLAN, Evaluation of Sexual Disorders, pp. 69-70; KOGAN, Human Sexual Expression, p. 296; MASTERS et al., Human Sexuality, p. 371; MC CARY, Human Sexuality, p. 344.

¹⁰²The interrelational effects of PE are indicated in KAPLAN, New Sex Therapy I, p. 291; KOGAN, Human Sexual Expression, p. 298; MARAMOR, "Impotence", p. 405; VICTOR, Human Sexuality, p. 79; WALLEN, Clinical Guide, p. 279.

desire of the woman and later, her husband's. When functional dyspareunia is persistent, sexual desire can become inhibited and often results in the complete avoidance of intercourse. This dysfunction is often complicated by the presence of vaginismus and/or male or female inhibited sexual excitement.¹⁰³

Vaginismus is often a psychological response to a fear of intimacy in the marital relationship. The fearful woman responds with anxiety, rage, and possible distress at the thought of penetration which induces the actual dysfunction. Vaginismus is often implicated as a cause for non-consummated marriages. However, vaginismus can also be the wife's response to her husband's sexual dysfunctioning in which case the wife can lose all interest and desire for sex. The husband customarily responds to vaginismus with anger and rejection which in turn brings destruction to marital harmony. Therefore, when the sexual dysfunctions are persistent, not only is the sexual act disturbed, but the marriage relationship itself suffers.¹⁰⁴

¹⁰³A brief commentary on the effects of functional dyspareunia may be found in KAPLAN, New Sex Therapy II, p. 32.

¹⁰⁴The effects of vaginismus are discussed in COX, Human Intimacy, pp. 261-264; DAVISON-NEALE, Abnormal Psychology, pp. 378-379; KOGAN, Human Sexual Expression, pp. 289-290; S.R. LEIBLUM et al., "The Treatment of Vaginismus: Success and Failure", in Principles and Practice of Sex Therapy, S.R. Leiblum - L.A. Pervin (eds.), New York, The

As previously noted, the sexual dysfunctions are not described in DSM-III-R as constituting the condition of impotence or frigidity. Only by examining the descriptive definitions of each of the sexual dysfunctions can we deduce that the diagnostic categories speak of impotence. Thus, the sexual desire disorders (hypoactive or aversion) do not constitute impotence unless the dysfunction prevents the incapacitated individual from considering and even attempting marital intercourse in which case, it could be possible to juridically investigate an allegation of psychic impotence.

The sexual arousal disorders (female sexual arousal disorder and EF, especially EF), when diagnosed could be indicative of a psychically impotent condition. EF is a more precise description of the canonical understanding of impotence because this dysfunction results in the inability to obtain and/or maintain an erection suitable for penetration, one of the canonical requirements for intercourse. One might attempt to argue that the female dysfunction which prevents the physiologic preparation of the vagina for intercourse does not necessarily preclude the possibility of intercourse, because the woman has the required anatomical

104 (cont'd) Guilford Press, 1980, p. 168; C.C. NADELSON, "Problems in Sexual Functioning", in Treatment Interventions in Human Sexuality, C.C. Nadelson - D.B. Marcotte (eds.), New York, Plenum Press, 1983, p. 22; ROSEN-ROSEN, Human Sexuality, pp. 298-300 and 326; VICTOR, Human Sexuality, pp. 85-86.

organs to complete the act. However, if the vagina is not prepared for penetration, any attempt by the husband to complete the act of intercourse would be frustrated and a canonical understanding of impotence or non-consummation could result.

A diagnosis of sexual orgasm disorders (inhibited female orgasm and PE) is not necessarily indicative of an impotent condition. While the female dysfunction could restrict and hinder the woman's participation, it does not constitute impotence per se. However, antecedent and perpetual PE constitutes the juridic understanding of impotence because it prevents the male from depositing the ejaculate in the vagina.

The sexual pain disorders (vaginismus and dyspareunia) are not considered to constitute an impotent condition. If these dysfunctions fulfill the canonical requirements of impotence, in particular antecedence and perpetuity, then an investigation can be conducted on the grounds of canonical impotence.

Furthermore, it may be possible to conduct an investigation into the nullity of a marriage when a sexual dysfunction is alleged to be the cause of the breakdown of the marriage. All of the sexual dysfunctions can adversely affect the sexual capacity of the individual(s) to the degree that the sexual relationship becomes nonexistent. Under such circumstances, it may be possible to investigate a

petition for nullity on grounds of inability to assume the essential obligations of marriage according to canon 1095, 3^o.

G) Efficacy of Therapeutic Interventions

Prior to the publication of Human Sexual Inadequacy, sexual dysfunctions were often treated through the use of psychoanalysis. This therapy implied that sexual dysfunctioning resulted from unresolved conflicts experienced during early developmental years. The objective goal was not simply the relief of the presenting symptom, but rather an attempt to resolve the intrapsychic, underlying conflicts which would permit the incapacitated person to gain/regain healthy, sexual functioning. But it was commonly reported that when the underlying, intrapsychic problems were resolved, the sexual dysfunction perdured.¹⁰⁵

The advent of analytically oriented "new" sex therapy has been enthusiastically received by many professional sex therapists not only because of the brevity of treatment but

¹⁰⁵ For a description of the psychoanalytic approach and its effectiveness, see GAGNON, Human Sexualities, pp. 368-368; KAPLAN-SADOCK, Psychiatry-IV, p. 465; MASTERS et al., Human Loving, p. 484; S.B. LEVINE, "Overview of Sex Therapy", in The Handbook of Marriage and Marital Therapy, G.P. Scholevar (ed.), New York, Spectrum Publications, Inc., 1981, p. 424 (hereafter cited: LEVINE, "Sex Therapy").

also because of its highly effective therapeutic methods.¹⁰⁶ The "new" sex therapy is essentially a behavioral modification approach to sexual dysfunctions.¹⁰⁷ This therapy focuses on the immediate problems in sexual functioning, often resulting from performance anxiety and spectating.

Behavior modification, introduced as treatment for phobias, was modified to include the treatment of sexual dysfunctioning which was interpreted as a phobic reaction to sexual interaction. Behavior modification is largely a functional approach to treat the symptom. Intrapsychic causes, if present, are not treated. Since human sexual response is an interaction of the mind and body, there is need to investigate and treat the attitudes and underlying factors to balance the functional approach.¹⁰⁸

¹⁰⁶The greatest innovation of Masters and Johnson was the reported "cures" or "improvements" for sexual dysfunctions, particularly, EF, PE, retarded ejaculation, and vaginismus within a brief period of time. These results were enthusiastically received when compared to the length of treatment in psychoanalysis. See the discussions in KAPLAN-SADOCK, Psychiatry-IV, p. 465; LEVINE, "Sex Therapy", p. 425; MASTERS et al., Human Loving, pp. 485-488. SCHULTZ, Human Sexuality, says (at p. 270): "People may be willing to spend five years in analysis to find out why they don't like their fathers, but waiting five years for help with a sexual problem would try the patience of Job." HARMATZ-NOVAK, Human Sexuality, (at p. 410) critiqued the reported "cures" attained through the new therapy stating that such pertain to situations of simple sexual dysfunctioning.

¹⁰⁷See LEVINE, "Sex Therapy", pp. 424-427. Also see MASTERS et al., Human Loving, p. 485.

¹⁰⁸See the comments in DAVISON-NEALE, Abnormal

A reportedly effective treatment for sexual dysfunctioning is the integration of sex therapy with psychodynamic, psychoanalytic psychotherapy. This approach permits the treatment of the sexual dysfunction when it is associated with underlying psychopathology.¹⁰⁹

Many models alleging "cures" have evolved with the advent of sex therapy. A reappraisal of the reported "cures" is necessary because the science is yet so "new". The task of evaluating the effectiveness of the reported "cures" is an extremely difficult one. Several problems often exist with the published reports. The results attained concern only a small percentage of people. Control groups, needed to balance the reports, are often lacking. Furthermore, there is no standard by which sexual capacity or performance and dysfunction can be evaluated. Precise terminology and the distinctions of primary and secondary dysfunctions are often not reported when presenting the effectiveness of the proposed therapy. Selected clients who are highly motivated to seek a remedy are customarily used when reporting the attained results. An objective analysis of the outcome is

¹⁰⁸ (cont'd) Psychology, p. 385 and OFFIT, The Sexual Self, p. 147 in which both authors report the overall goal of behavior modification is to improve the "mechanical" response to human sexual response.

¹⁰⁹ This approach is reported in KAPLAN-SADOCK, Psychiatry-IV, pp. 467-469.

lacking.¹¹⁰

The alleged results have been further critiqued for the same reason that many therapists appear to imply that any sexual dysfunction can be successfully treated by sex therapy, it will probably be shown that sex therapy does not restore most people to subjective sexual health and performance. Yet the program still has its value.¹¹¹

With these few comments, a cursory glance at the effectiveness of the reported cures reveals some interesting observations. Prognosis for the sexual desire disorders is apparently poor, especially when this dysfunction is a lifelong reaction of the person. Several therapists report minimal, lasting "cures" for these dysfunctions treated by behavioral therapies.¹¹² The reference to excellent

¹¹⁰For a more detailed critique of the reported effectiveness of the newer therapies, see DAVISON-NEALE, Abnormal Psychology, p. 385; HARMATZ-NOVAK, Human Sexuality, p. 410; SCHULTZ, Human Sexuality, p. 293. For an example of selective clients, see the discussion in KAPLAN, "Premature Ejaculation", who reports (at p. 435) that Seman's therapy and results were achieved using eight clients whereupon the method was reported as being effective.

¹¹¹This reflective comment on the effectiveness of the newer therapies may be found in LEVINE, "Sex Therapy", p. 439.

¹¹²See KAPLAN, "Comprehensive Evaluation", where the author states (at p. 3) approximately 10-15% of clients with ISD respond to brief sex therapy. With this dysfunction, it is necessary to treat the intrapsychic conflicts. FRIEDMAN-HOGAN, "Low Sexual Desire", pp. 419-420 use similar

prognosis is apparently limited to situations of secondary ISE.

Inhibited female orgasm also appears to have an excellent prognosis when treated with the new therapy. It has been reported that almost all cases of anorgasmic women can learn to have orgasms. But as previously noted, it was questionable whether the woman who has learned to have orgasms can in fact experience orgasm with her spouse.¹¹³

Inhibited male orgasm does at times respond to limited, sex therapy. Statements are made to the effect that men can learn to have ejaculation in the vagina, but the prognosis is not as favorable as is the treatment of PE.¹¹⁴

¹¹² (cont'd) statistics to bolster their interpretation of the ineffectiveness of brief, limited sex therapy to treat this dysfunction. BROOKS-BROOKS, Impotence, report (at pp. 102-103) that treatment of lifelong ISD is usually unsatisfactory.

¹¹³ See KAPLAN, Evaluation of Sexual Disorders, p. 211. Similar comments are made by DAVISON-NEALE, Abnormal Psychology, pp. 376-377; WALEN, Clinical Guide, p. 265. LEVINE, "Sex Therapy", raises an interesting question (at pp. 438-439) concerning the methods and effectiveness when treating anorgasmic women. The behavioral approach teaches the woman to experience orgasm through masturbation. He questions whether the same results can be achieved through intercourse. TORTORA, Human Physiology, (at pp. 371-372) suggested sexual counselling with both partners for this dysfunction. The Merck Manual, (at p. 1636) recommends the intervention of a psychiatrist when this dysfunction is lifelong.

¹¹⁴ See KAPLAN, Evaluation of Sexual Disorders, pp. 213-214. The Merck Manual, (at p. 1635) recommends treatment with the behavioral methods. If "success" is not attained, then this dysfunction should be psychoanalytically

The recent reports on the behavioral treatment of PE suggest a favorable prognosis. However, Kaplan cautions that this therapeutic intervention which treats the symptom often with rapid improvement can, at times, affect the individual adversely by increasing his anxiety and consequent resistance to therapy.¹¹⁵ When the behavioral methods suggested by Semans, Masters and Johnson, and Kaplan are used for PE, the prognosis has been reported to be excellent. However, successful treatment of PE in marital therapy is reported to have minimal effect on the marital relationship. It appears that the behavioral methods treat merely the symptom when in fact PE is often the result of intrapsychic conflict.¹¹⁶

Vaginismus treated by behavioral methods has an apparently effective response to the brief treatment. Treatment

114 (cont'd) treated. For impressive results reported using the treatment of Masters and Johnson (the success rate was approximately 82%), see MASTERS et al., Human Loving, pp. 485-488.

¹¹⁵See KAPLAN, Evaluation of Sexual Disorders, pp. 223-224. Kaplan also reported in New Sex Therapy I, p. 257 that the prognosis is much better for secondary conditions of PE. The prognosis is largely dependant on the duration of the "symptom". Similar details appear in ROSEN-ROSEN, Human Sexuality, p. 31.

¹¹⁶KAPLAN, "Comprehensive Evaluation", pp. 222-224 reports that when behavioral methods are used to treat this dysfunction, it is the symptom which is cured. Treatment of PE is often complicated because of intrapsychic conflicts. Also see PERELMAN, "Premature Ejaculation", pp. 202-203.

usually centers on the incapacitated woman's learning to experience penetration comfortably. Others seek treatment with the hope of being "cured" so that pregnancy might occur. But again, behavior modification treats the symptom of vaginismus. The predisposing causes of vaginismus are usually not resolved by the brief intervention of the behavioral methods.¹¹⁷

While sex therapy is not a magical cure for sexual dysfunctioning, it can provide significant help to the sexually dysfunctional individual and/or couple when the causes are purely immediate.¹¹⁸ The initial results which were enthusiastically received are not as compelling at this time. Therefore, each case of alleged "cure" must be examined in its own merit with regard to the effects of sex therapies on the sexual dysfunction in question.

Conclusion

Several clinical principles of juridic import can be drawn from our study of the psychosexual aspects of impotence induced by causes of a psychic nature. First,

¹¹⁷See KAPLAN, New Sex Therapy II, p. 196. MC CARY, Human Sexuality, p. 355 reports that this dysfunction is frequently rooted in fear, guilt and shame with the result that treatment necessitates the intervention of psychotherapy, not simply learning to stretch the vaginal muscles.

¹¹⁸See MASTERS et al., Human Loving, pp. 499-501.

psychiatric and psychological sciences admit the basic anthropological principle concerning the mind-body unity in a human being. According to this principle, a human person is one unit and every human event flows from and is attributable to the whole person. Therefore, even sexual response is an expression of this intrinsic unity.

Second, this mind-body integration leads to inevitable interaction between bodily (organic/physiological) and psychic (mental) processes. As a result, both these processes influence each other in the enhancement or disintegration of the health, both bodily and mental, of a person. According to the medical data studied in this chapter, psychic impotence bears evidence to this fact. Sexual dysfunctions, therefore, are the result of defective or abnormal processes which affect negatively the functional aspects of one's sexual organs which are otherwise integral.

Third, according to the clinical data available to date, abnormal psychic processes underlying psychic impotence are caused by varied and multiple factors. Often they are also reinforced by organic or constitutional factors. Identification of these factors and the underlying processes is essential to successful treatment of psychic impotence. This has been acknowledged by experts as a difficult task and it can be done only by experts in the field.

Fourth, even though psychic impotence is often a secondary effect of certain sexual disorders (e.g.,

homosexuality, paraphilias, etc.) or other psychotic, neurotic or personality disorders, medical science implicitly identifies psychic impotence under the clinical description of the following sexual dysfunctions: on the part of the female: Sexual Arousal Disorder and Vaginismus which can at times prevent penetration of and ejaculation into the vagina; and on the part of the male: Erectile Disorder, Inhibited Male Orgasm (the absence of ejaculation in the vagina) and Premature Ejaculation which can constitute an impotent condition when penetration of and ejaculation into the vagina is rendered impossible.

Fifth, one of the important principles reaffirmed by psychiatry and psychology is that psychopathology is relational in nature. In other words, the abnormal relationships either give rise to, or intensify the underlying psychic processes. This is often verified in sexual dysfunctions. Therefore, in clinical assessment of the nature, severity, effects, and prognosis of psychic impotence, one must take into account the relational aspects of the spouses in marriage.

Sixth, clinical evidence also confirms that primary psychic impotence which is congenital or deep-rooted in the afflicted person is generally absolute and difficult to cure or ameliorate; whereas, secondary or acquired psychic impotence seems to be amenable to successful treatment. Yet even in this case, experts caution that the success would

depend on the nature of the spousal relationship. A careful and objective diagnosis of the underlying processes and factors is essential to effective treatment and this can be done only by competent experts.

Even though these are some of the important clinical principles drawn from our study of the clinical material reviewed in this chapter, canonical doctrine and jurisprudence have affirmed their theoretical and practical applicability to matrimonial cases involving psychic impotence.

CHAPTER IV

ROTAL JURISPRUDENCE ON PSYCHIC IMPOTENCE

In the past, Rotal jurisprudence has dealt with numerous matrimonial cases involving functional impotence and especially psychic impotence. Even though both canonical doctrine and jurisprudence have always admitted in principle that impotence induced by causes of a psychic nature could be considered a true impediment to marriage, there was persistent reluctance on the part of judges to pronounce affirmatively on cases involving psychic impotence. The two main reasons affirmed in jurisprudence are: first, the alleged failure on the part of medical (psychiatric/psychological) science to provide certain conclusions on the exact nature of the condition because of differing view points and, second, the belief on the part of judges that the condition is curable either naturally or through appropriate treatment.

In recent years, however, Rotal jurisprudence has drawn consistently on the progress of medical science and has given rise to several affirmative decisions in cases involving psychic impotence. Even though the traditional juridic principles on antecedence and perpetuity are consistently reiterated in almost every sentence, one cannot fail to see the integration of the clinical conclusions provided by psychiatric/psychological sciences. For example, in a most recent sentence, even the clinical definitions of different

sexual dysfunctions under consideration provided by DSM-III form the basis for juridic conclusions.¹

Therefore, in this chapter we will analyze a few select Rotal sentences of the past twenty years which, we believe, provide comprehensive treatment of both clinical and juridic principles applicable to matrimonial cases involving psychic impotence. Since these sentences deal specifically with female and male psychic impotence under the clinical categories identifiable in DSM-III and DSM-III-R, we will present our analysis as follows: under Female Psychic Impotence: Female Sexual Arousal Disorder (Frigidity) and Sexual Pain Disorder (Vaginismus) and under Male Psychic Impotence: Male Erectile Disorder and Premature Ejaculation.

It is beyond the scope of this study to include an analysis of other sexual disorders or sexual dysfunctions which may give rise to psychic impotence. However, we are of the opinion that the juridic principles applied to sexual dysfunctions discussed herein are applicable to other related disorders or dysfunctions as well.

It is our hypothesis that if a tribunal is presented with a petition for nullity on grounds of impotence caused by psychic causes and clinical diagnosis is one of the above

¹See S.R.R. Dec., c. PINTO, January 25, 1985, in M.E., 110(1985), pp. 456-467 (hereafter cited: c. PINTO, January 25, 1985).

stated sexual dysfunctions, it may be possible to investigate the case on grounds of diriment impediment of impotence and/or incapacity to assume the essential obligations of marriage.

A) Female Psychic Impotence

Female psychic impotence consists in the inability of the woman due to causes of a psychic nature to receive the erect penis and the ejaculate in her vagina during intercourse. Jurisprudence has investigated cases of female psychic impotence under the clinical categories of frigidity and vaginismus. As indicated above, these terms now correspond to the diagnostic categories of Female Sexual Arousal Disorder and Vaginismus.

a) Female Sexual Arousal Disorder (Frigidity) and Sexual Pain Disorder (Vaginismus)

Canonical jurisprudence has considered the effects of frigidity along with vaginismus in nullity cases involving female psychic impotence. As explained in Chapter III, frigidity, which was regarded as the equivalent of female impotence, is "persistent or recurrent partial or complete failure to attain or maintain the lubrication-swelling response of sexual excitement until completion of sexual activity" or "persistent or recurrent lack of a subjective sense of sexual excitement and pleasure in a female during sexual

activity."² These conditions, if serious, can cause the inability to receive the erect penis and the ejaculate in the vagina. On the other hand, vaginismus consists in the "recurrent or persistent involuntary spasm of the musculature of the outer third of the vagina that interferes with coitus."³ Again, if serious, vaginismus can render vaginal penetration either impossible or difficult.⁴ The following Rotal sentences illustrate the jurisprudential approaches adopted by Rotal judges with regard to frigidity and vaginismus.

i) Decision coram Pinto, July 15, 1977

In his sentence of July 15, 1977,⁵ Pinto introduces into Rotal jurisprudence the recent etiological findings of

²See AMERICAN PSYCHIATRIC ASSOCIATION, Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition Revised, Washington, D.C., American Psychiatric Association, 1987, p. 294 (hereafter cited: DSM-III-R). Also see ID., Diagnostic and Statistical Manual of Mental Disorders, 3rd Edition, Washington, D.C., American Psychiatric Association, 1980, p. 279 (hereafter cited: DSM-III).

³See DSM-III-R, p. 295; DSM-III, p. 280.

⁴As indicated in our introduction, an excellent jurisprudential synthesis of the clinical and juridical aspects of vaginismus is contained in the sentence of Sabattani, October 9, 1964, in S.R.R. Dec., 56(1964), pp. 682-708 (hereafter cited: c. SABATTANI, October 9, 1964).

⁵See S.R.R. Dec. c. PINTO, July 15, 1977, in M.E., 103(1978), pp. 145-157 (hereafter cited: c. PINTO, July 15, 1977). Also see c. MASALA, March 14, 1973, in S.R.R. Dec., 65(1973), pp. 258-265. This was a negative decision on a

vaginismus and frigidity and discusses the effects of these dysfunctions on the capacity for establishing an interpersonal relationship. This case originated in Toulouse, France. Consummation did not occur until the sixth month because of the woman's vaginismus. A child was conceived but died at birth. On April 5, 1973, the man presented a libellus to the Regional Tribunal which rendered an affirmative decision on December 23, 1974, on the grounds of "defect of the object due to a psychopathic disorder which rendered the woman an inept subject for conjugal life."⁶ The Defender of the Bond appealed the decision to the Rota and the case was remanded to the rotal turnus coram Pinto.

After summarizing the theological and jurisprudential developments following Vatican II in which the right to a communion of life was viewed as a constitutive element of consent, Pinto states that marriage is invalidly contracted when a person excludes the right to a communion of life by a positive act of the will, or antecedently and perpetually lacks the requisite capacity for establishing an interpersonal relationship.⁷

5 (cont'd) case involving vaginismus. Masala admits that vaginismus can render a woman incapable of sexual intercourse. But he reaffirms the difficulty in proving the requirement of incurability in cases of vaginismus.

⁶See c. PINTO, July 15, 1977, p. 145.

⁷Since the Tribunal of First Instance found the woman

Regarding psychic incapacity, two particular points must be borne in mind: a) the incapacity must be a true incapacity, not simply difficulties experienced in many marriages;⁸ and b) this incapacity must be antecedent and perpetual, that is, incurable by ordinary means.⁹

Having highlighted these principles, Pinto deals specifically with vaginismus and frigidity alleged to be the cause of rupture of conjugal life. Vaginismus which absolutely prevents intercourse invalidates marriage in virtue of natural law itself according to can. 1068, 1 (1917 Code) provided it is real, antecedent, and perpetual. According to experts, Pinto affirms, vaginismus can be so serious that

7 (cont'd) incapable of the interpersonal relationship, Pinto begins the in iure section with a detailed summary of the evolving theological and jurisprudential developments because the previously defined object of marital consent, the perpetual and exclusive right to the body, was found to be too restricted. See Ibid., pp. 146-152.

⁸See Ibid., where Pinto states (at p. 152) that marital happiness does not consist in the lack of marital difficulties but rather in overcoming them. Problems can arise because of the spouse chosen or the diverse dispositions of the partners: e.g., an introvert marries an extrovert. Successful marriages are an art founded on work requiring sacrifice. A true act of love causes the initial love to grow and last. Therefore, the incapacity which invalidates marriage must be a true incapacity and not merely a difficulty experienced in many marital relationships.

⁹See Ibid., p. 153. Pinto comments (at p. 153) that abnormal personalities, e.g., hysterical, paranoid etc., can remain in potential states for many years and only become manifest by external causes.

it can impede consummation of the marriage. But today, once this dysfunction is properly diagnosed, it can be treated effectively if both spouses cooperate with the prescribed treatment. Therefore, Pinto concludes that the requirement of perpetuity is rarely verified, and in the absence of proof of incurability, marriage cannot be declared null.¹⁰

After noting the lack of uniformity in defining frigidity, Pinto admits that this syndrome can give rise to serious conjugal difficulties. According to the recent scientific findings, frigidity is a pathological symptom of the couple rather than a manifestation of female neurosis. For a woman, sexual pleasure is indissolubly bound with the personal relationship even when the relationship is superficial, sporadic, or without much significance. Furthermore, the personal relationship involves a reciprocal exchange and influence in forming a oneness, an essential factor in establishing a satisfactory sexual life. Therefore, in every case of frigidity, the role of the partner is fundamental. Frigidity adversely affects the interpersonal relationship because the man often responds with increased sexual desire to his wife's frigidity demanding more frequent attempts at intercourse. This provokes further frustration, anger, and resentment. As a result, sexual stimulation and frequency

¹⁰See Ibid., pp. 153-154.

of intercourse diminish with an attempt to control resentment. At this point, the frustrated man withdraws affectively, behaves aggressively, and blaming his spouse, uses regressive mechanisms and/or even displays psychosomatic symptoms.¹¹

Despite these findings, Pinto states that frigidity does not constitute impotence according to can. 1068, 1. In the realm of pathology, the tendency to consider female frigidity as the opposite of male impotence is erroneous. Impotence can be compared more with vaginismus in that both conditions do not permit penetration.¹²

In the in facto section, Pinto applies these juridic principles and scientific findings to vaginismus and frigidity in two different ways. Since he has said that impotence parallels vaginismus more than frigidity, he first tries to prove that there was insufficient evidence to support the allegation of the woman's impotence because of vaginismus. While the judges admitted that the woman certainly suffered from vaginismus caused by her strict education, nevertheless, the condition ceased following surgery making sexual intercourse possible. Therefore, the judges concluded that the woman's incapacity to give the ius in corpus was not

¹¹See Ibid., pp. 154-155.

¹²See Ibid., p. 155.

perpetual. Furthermore, if the appealed decision was based on the woman's frigidity, notwithstanding the lack of perpetuity, the decision does not conform to canonical norms.¹³

Pinto then examines the woman's incapacity to give the right to the essential interpersonal relationship arising from frigidity. While the petitioner claimed that the marriage ceased because of his wife's frigidity, the experts confirmed that following surgery, the woman was capable of intercourse and found it pleasurable. In other words, there was no proof of the woman's frigidity, and even if it was present, it would have been difficult to prove its perpetuity. Therefore, the decision was negative.

There are several juridically important principles in this sentence. 1) This sentence seems to imply that the right to the body (ius in corpus) and the right to interpersonal relationship (ius ad relationem interpersonalem essentialem) are two distinct rights even though the latter lacked juridic precision at this time in the developing jurisprudence. 2) Vaginismus constitutes impotence when it is severe, antecedent, and perpetual. The difficulty remains

¹³"Concludere debemus impotentiam prius inventam, post semestrem, cesasse [sic], et ideo non constare de incapacitate conventae tradendi ius in corpus. Si appellata sententia haud obstante perpetuitatis defectu, tantummodo ob frigiditatem ab actore suisque testibus assertam contrarium edixit, hoc non congruit cum normis canonicis." *Ibid.*, p. 156.

in proving the perpetuity of the condition. 3) As a sexual dysfunction, frigidity can impede the ius ad relationem interpersonalem when it is serious, antecedent, and perpetual. Drawing on the recent findings of sexologists on the nature, etiology, and prognosis of frigidity, Pinto says that the condition does not constitute impotence according to the norm of can. 1068, 1 because frigidity does not preclude vaginal penetration. Therefore, the juridic effect of frigidity was examined in relation to the right to essential interpersonal relationship. Since frigidity is regarded as a relative condition, that is, relative to the partner in the relationship, it is difficult to prove its perpetuity. This decision, while negative, confirms the basic principle that if all juridic requirements are met, frigidity can impede the realization of the right to the essential interpersonal relationship, distinct from the right to sexual acts. This conclusion seems equally applicable to vaginismus, that is, vaginismus (or any sexual disorder or dysfunction for that matter) can be regarded as the source of incapacity for interpersonal relationship of a heterosexual nature.

ii) Decision coram Di Felice, April 4, 1979

In his decision of April 4, 1979,¹⁴ Di Felice discusses

¹⁴ See the S.R.R. Dec. c. DI FELICE, April 4, 1979, in M.E., 104(1979), pp. 294-301 (hereafter cited: c. DI FELICE, April 4, 1979).

relative psychic impotence induced by frigidity and/or vaginismus in relationship to the inability to give the perpetual and exclusive right to marital acts. The case originated in the Province of Liguria, Italy. The marriage was celebrated on June 9, 1968, following a nine year courtship. Marital difficulties surfaced at the very beginning of married life. There was a gradual loss of love, and after two and one half years of marriage, the couple separated on January 27, 1971, whereupon the woman lived with another man and through him, gave birth to a daughter. The man presented a libellus to the Ligurian Provincial Tribunal alleging relative impotence on the part of his wife. The decision of April 3, 1976, affirmative on grounds of relative impotence on the part of both parties, was appealed by the Defender of the Bond.

After reiterating the common and constant jurisprudence concerning the difficulty in proving the antecedence and perpetuity of relative functional impotence, Di Felice states that proof of perpetual functional impotence is even more difficult when it is associated with, or results from idiopathic (of unknown cause) vaginismus. Vaginismus, frequently associated with male sexual dysfunction, can be effectively treated psychologically or physiologically with the cooperation of both spouses. The findings of medical experts regarding the curability of relative male functional impotence and female psychogenic vaginismus support the

constant jurisprudence of the Rota. Therefore, ecclesiastical jurisprudence must not neglect or reject the authentic progress made by science.¹⁵ Each case must be examined individually according to its special circumstances including the expert's opinion to determine whether a Tribunal can derogate from the general doctrine on incurability of relative impotence. The possibility that vaginismus can induce antecedent and perpetual impotence in individual cases cannot be excluded.¹⁶

Di Felice reiterates the four procedural criteria proposed by Sabattani in 1964 to prove the presence of psychic impotence: a) the criterion of local objective findings: this has greater validity if it is based on extrajudicial

¹⁵Di Felice supports this statement with evidence from medical experts who maintain that male relative functional impotence and idiopathic (psychogenic) vaginismus when concurrent, are curable: "Probatio perpetuae impotentiae functionalis difficilis etiam evadit, si praefata impotentia quodammodo cum vaginismo idiopathico mulieris concurrat vel ex eo promanet, prout ex rei natura periti in arte medica, qui sanabiles huiusmodi defectus tenent, demonstrant." *Ibid.*, p. 295. Citing the Rotal decision *c. PARISELLA*, July 13, 1968, in *S.R.R. Dec.*, 60(1968), pp. 563-571, Di Felice states (at p. 296) that ecclesiastical judges are not to reject the opinion of experts unless the judge's arguments are substantial and contrary to the findings of the *periti*.

¹⁶"Ad singulos casus tamen quod attinet, videndum est, utrum peculiaria adiuncta evincantur, quibus a generali doctrina de sanabilitate impotentiae relativae iuxta iudicia a peritis ad casum prolata sit derogandum. A priori enim excludi nequit etiam ex vaginismo oriri posse impotentiam functionalem relativam, cuius antecedentia et perpetuitas ita certo probari possint, ut eadem impotentia matrimonium dirimere valeat." *c. DI FELICE*, April 4, 1979, p. 296.

examination of the woman done in view of treatment; b) the subjective criterion regarding the woman's behavior: if she appeared frightened at the time of physical consummation; c) the psychophysical criterion: if hypoplasia of the female genital organ is severe; and d) the criterion of time: if cohabitation with mutual love lasted for a reasonable length of time.¹⁷

The facts demonstrate that the man was capable of partial penetration and ejaculation despite the lack of sexual pleasure on the part of his wife.¹⁸ The absence of sexual pleasure in marriage by one or both parties may indicate a lack of marital affection, but it does not constitute proof of antecedent and perpetual impotence.¹⁹

¹⁷See Ibid., p. 296. See c. SABATTANI, October 9, 1964, pp. 699-700.

¹⁸See c. DI FELICE, April 4, 1979, p. 296 where the ponens states that in the presence of partial penetration, perfect copula (i.e., ejaculation in the vagina) is presumed unless the contrary is proven with convincing arguments.

¹⁹In his decision of October 18, 1980, Di Felice discusses the juridic effect of psychosexual anomalies acknowledged in Rotal jurisprudence: "acute state of hysteria" which impedes "discretion of judgment" and "serious nymphomania" which results in the "incapacity to assume conjugal duties". These disorders must be serious to vitiate marital consent. The particulars of the case allude to the psychosexual anomalies and the nullity of the marriage was sought on the grounds of lack of discretion of judgment and incapacity to assume conjugal duties due to the woman's frigidity. After describing frigidity as the lack of sexual desire, if not absolute repulsion for the sexual act, the ponens reports that there are effective remedies to overcome this condition and then states that according to

The woman certainly overcame her vaginismic condition because she was able to consort with another man and give birth to a child. Since the condition was curable and in fact was cured as confirmed by her doctors, the judges felt that the woman's relative psychogenic syndrome was not serious enough to impede partial penetration and probably in the course of time with appropriate psychiatric treatment, this difficulty could have been easily remedied. The case lacked proof concerning the impossibility of cure. Therefore, even if relative psychic impotence was admitted, it could not be considered perpetual.

The unanimous opinion of the three experts in the diagnosis of the woman's relative psychic impotence was overruled by the judges because in fact, the spouses had consummated the marriage despite their marital difficulties. There was no evidence to adduce moral certitude concerning antecedent and perpetual psychic impotence.

20 (cont'd) medical opinion, frigidity neither constitutes impotence nor intrinsically blocks penetration. Therefore, the court concluded that frigidity does not impede the giving or fulfilling of conjugal duties. Furthermore, if the woman was not aware of a lack of attraction for her partner prior to marriage, she cannot claim a lack of discretion of judgment. For a more complete discussion of this decision, see S.R.R. Dec. c. DI FELICE, October 18, 1980, in S.R.R. Dec., 72(1980), pp. 660-665, (at pp. 661-662). Nevertheless, Di Felice's affirmation does not rule out the possibility that in particular circumstances, frigidity can be the source of juridic incapacity provided it is antecedent and perpetual.

Several points in this sentence are important for our consideration: 1) Psychic vaginismus can be a cause of impotence provided it is serious and incurable. 2) Since psychic vaginismus is generally curable, it is difficult to prove its perpetuity. 3) Depending on the particular circumstances, the incurability of vaginismus can be proven and, consequently, the requirement of perpetuity of impotence. In other words, mere diagnosis of vaginismus does not automatically admit antecedent and perpetual impotence. 4) Psychic vaginismus and male impotence can be relative and one may influence the other. However, to declare this condition equal to relative impotence amounting to the diriment impediment, its incurability must be proven. The medical opinion seems to indicate that in the presence of mutual cooperation of the spouses, relative psychic impotence is amenable to successful treatment.

iii) Decision coram Serrano, December 14, 1979

In his December 14, 1979 decision,²⁰ Serrano interprets the juridic norm of impotence in conjunction with the evolving post-Conciliar juridical description of marriage and furthermore incorporates the recent scientific findings

²⁰See the S.R.R. Dec. c. SERRANO, December 14, 1979, in M.E., 106(1981), pp. 30-45 (hereafter cited: c. SERRANO, December 14, 1979).

concerning psychosexual dysfunctions. The case originated in Rome, Italy. The marriage was celebrated on August 21, 1971. Prior to marriage, the couple exchanged normal signs of affection without attempting intercourse. During the four years of marriage, there were several attempts at consummation but these were in vain because of a difficulty sustained by the wife during intercourse. Despite their initial well founded love and the accidental conception and birth of a son, the couple separated because the marriage could not be consummated. The husband presented a libellus to the Tribunal of Rome alleging an unhappy marriage. The affirmative decision of March 30, 1977, on grounds of respondent's frigidity, was appealed by the Defender of the Bond, and the case was judged at the Rota coram Serrano, December 14, 1979.

In the in iure section, after describing vaginismus as a form of functional impotence which often results from the first attempt at intercourse or other psychic inhibitory causes, Serrano restates the common and constant jurisprudence of the Rota which maintains the difficulty in proving the antecedence and perpetuity of vaginismus. However, Serrano reiterates the four procedural criteria of Sabattani to prove vaginismus as the source of impotence in a particular case and states that when there is a convergence of a major portion of the reported criteria with no valid reasons to the contrary, the judge may, indeed he must pronounce in

favor of the nullity although it is a matter of functional impotence.²¹

Noting that the previous bias against the perpetuity of psychic impotence has been overcome, Serrano directs that an investigation of impotence be in accord with the theological and juridical developments following Vatican II's holistic description of marriage and the 1977 Decree of the Congregation for the Doctrine of the Faith.²² But Tribunals should not be hasty to conclude a valid bond of marriage as invalid because the sexual union was imperfect. When investigating an allegation of impotence, the greatest significance should be given to a well ordered sexual life and the perpetual obligation to live together in conjugal love rather than concentrating on the capacity to perform the marital act.²³

²¹See Ibid., p. 31. See c. SABATTANI, October 9, 1964, pp. 699-700 for a description of the four procedural criteria.

²²According to Serrano, the earlier decisions concentrated on the inability to perform the physical act of intercourse. Today, impotence is more commonly described as the inability to have intercourse in marriage and this fact should be emphasized. See Ibid., pp. 31-32.

²³"Etenim sicut in quibusdam aliis iam factum est - v. gr. cum ex plus minusve generica amentia vel dementia transitus peragebatur ad specificam discretionem iudicii matrimonio proportionatam, ad capacitatem assumendi onera coniugalia, etc. - ita et in impotentia maius momentum tribuatur ordinatae vitae sexuali quam actui coniunctionis sexuum magisque attentio convertatur ad onus vitae et amoris coniugalis perpetuum quam ad quomodocumque exercitam capacitatem ad copulam." Ibid., p. 32.

Serrano discusses several important jurisprudential points concerning proof of psychic impotence:

(a) Psychic abnormalities can be sufficiently revealed from the cause of the affliction as well as from the convergence of causes and circumstances which can explain the effect of the psychic abnormality.²⁴

(b) The phrase "principal cause", when applied to functional abnormalities, demands extreme caution. For example, a condition of feeble potency could indeed be called potency describing an existential act but under certain circumstances which are by no means clear, such potency becomes impotency. Psychic impotence is almost always induced by traumatizing events: occasional failures resulting from intercourse performed under tension, for example, a young man's first experience of intercourse or a disagreeable female companion; or from incomplete relations when the female wishes to preserve her virginity. Additionally, the habit of masturbation can inhibit the act of intercourse. While these conditions can affect the capacity for sexual

²⁴Serrano explains this principle by comparison with an invalid marriage due to the absence of consent. On an individual basis, many things can serve as proof but together, the truth about the act of consent becomes clear. He states (at p. 33): "[...] ita abnormitates psychicae evincerentur tam ex causa eas adaequate inducente, quam ex concursu causarum, quin et adiunctorum, quae omnia effectum, etiam in causa principali stricte non contentum, valeant explicare [...]." *Ibid.*, p. 33.

performance, such functioning usually becomes normal once the parties are acquainted with the new sexual behavior. In the neurasthenic person, anxiety often induces the fear of failure establishing a vicious cycle affecting the spontaneous and automatic capacity for sexual performance. Repeated failures rekindle anxiety and a cycle is established.²⁵

(c) Since one individual's behavior and conscience can affect the other's sexual capacity and functioning, it must be remembered that the interpersonal relationship, at times considered accidental, is, in fact, essential.²⁶

(d) Because the interpersonal relationship is essential, the sexual act is both personal and interpersonal. The individual's capacity for performance of the marital act must be considered in accord with the principles of natural

²⁵"Immo etiam sensus vocis 'causae principalis' vel definitae psychopathiae vel termini aut rationis huiusce generis in abnormitatibus s.d. functionalibus, maxima cura adhibendus est: etenim infirma potentia - quae ideo in se potentia dici potuisset - ad actum existentialem in concretis adiunctis ponendum vocata, certa impotentia deveniet, impellentibus haud relevantibus circumstantiis [...]." *Ibid.*, p. 33.

²⁶"Oblivisci praeterea nefas est - sicut nec oblivisci potest in quacumque nullitatis matrimonii causa adeo in relatione interpersonalis radicata - habitudinem alterius ad alteram partem: quae in re adeo intima et singularitatibus intexta uti est communicatio sexuum, non modo personam eiusque indolem respicit, verum etiam modum sese gerendi et quidem in hac provincia sexus specifica [...]."

"Relatio itaque, quae quandoque cito 'accidens' habetur, vere dicitur et est in his casibus quid grave et 'essentiale'." *Ibid.*, p. 34.

law and culture. Consequently, great value is to be placed on those signs which speak of sexual ambivalence, an inadequate image of the partner, an inhibition, or fear. Furthermore, culture and social events often affect a woman's psychosexual development forming the basis of a neurosis, particularly an inhibition to sexual pleasure. Therefore, the judge should reject any idea drawn a priori from the components of sexual impotency or frigidity since the slightest thing is capable of taking on the greatest significance. The judgment of experts who can bring very valuable and hardly negligible assistance in interpreting the signs should be admitted.²⁷

Experts can offer significant opinions about the predisposing cause and the natural disposition of the party concerning curability of functional impotence. Therefore, judges are to formulate a judgment concerning the existence of impotence, whether it is curable, and whether it exists in the existential order. Since the possibility of a cure

²⁷See Ibid., pp. 34-35 where Serrano states that defensive actions result from an unconscious belief that sexual activity is dangerous. This belief causes physical interference with the physiologic reflexes resulting in impotence. Concerning the importance of experts, Serrano states (at p. 35): "Haec omnia Iudicem ducent ne de componentibus impotentiae functionalis ideam a priori exultam foveat, cum levissimum quid maximam significationem in casu assumere queat; et ut multi faciat subsidium peritorum in signis interpretandis validissimam et vix declinabilem opem afferentium."

cannot take place without the subject's cooperation, the courts should refrain from speaking about actions which could have been done but were actually not done.²⁸ Serrano concludes his juridical reasoning noting that these jurisprudential principles point to the proximate causes of functional or psychic impotence and also pertain to the incapacity to undertake and fulfill matrimonial obligations.²⁹ Therefore, the rotal turnus coram Serrano concluded that functional impotence, arising from the woman's psychic vaginismus, was antecedent and perpetual and rendered an affirmative decision.³⁰

This decision is important for our consideration of psychic impotence for several reasons. 1) Vaginismus is clearly considered to constitute psychic impotence. 2) Some of the more recently reported causes of psychic impotence, namely, the first attempts at intercourse, masturbation, traumatizing events, and cultural influences are accepted by Rotal jurisprudence. 3) Impotence is to be investigated according to the Conciliar and post-Conciliar description of marriage. 4) The greatest significance is to be given to a

²⁸See Ibid., p. 35.

²⁹See Ibid., pp. 35-36.

³⁰See Ibid., pp. 44-45. Since the decision confirmed a prior judgment not appealed by the Defender of the Bond within the time limit, the judgment was considered definitive.

well ordered sexual life in marriage rather than concentrating on a specific act of intercourse. 5) Sexual capacity and functioning are directly affected by the spouses behavior toward one another. Therefore, an evaluation of the interpersonal relationship is essential when investigating a petition alleging psychic impotence. 6) Experts can assist the judge in determining the cause and prognosis of psychic impotence, and the natural disposition of the afflicted party. 7) These principles pertain to both impotence and the capacity to accept and discharge marital obligations.

B) Male Psychic Impotence

Male psychic impotence results from the inability to obtain and/or maintain an erection suitable for penetration of and ejaculation in the vagina. The medical diagnostic categories which correspond to the canonical description of impotence include Male Erectile Disorder and Premature Ejaculation.

a) Male Erectile Disorder

The clinical definition of male erectile disorder as the "persistent or recurrent partial or complete failure to attain or maintain [an] erection" complies with the canonical description of male impotence as the inability to obtain an erection which by its very nature is necessary for the act of penetration of the vagina. According to law and

jurisprudence, when the condition is antecedent and perpetual, whether absolute or relative, the man is juridically impotent and the marriage is invalid.

i) Decision coram Pinto, January 25, 1985

In his sentence of January 25, 1985,³¹ Pinto presents an excellent synthesis of juridical principles and the most recent psychiatric/psychological findings on male psychic impotence. The case originated in Columbia, South America. The marriage, celebrated on June 13, 1969, lasted approximately six years. The male petitioner was at the time suffering from serious bouts of depression and alcoholism. A definitive separation occurred in March, 1975. No children were born of this union.

On February 9, 1976, the husband petitioned the Regional Matrimonial Tribunal for a declaration of nullity on the basis of his impotence. Toward the end of the instruction phase, the petitioner's advocate requested that the tribunal add a new caput of nullity, namely "defect of consent due to serious disturbance of personality of the spouse."³² The request was rejected despite its foundation in the acta.

On March 16, 1978, the first instance tribunal

³¹See c. PINTO, January 25, 1985, pp. 456-467. Also see c. STAFFA, April 25, 1958, in S.R.R. Dec., 50(1958), pp. 273-276.

³²See c. PINTO, January 25, 1985, p. 456.

pronounced negatively on the case. The National Appeal Tribunal of Bogota, after completing supplementary instruction on the case, overturned the decision of first instance on September 16, 1981, declaring the marriage null on the basis of impotence according to can. 1068, 1 (1917 Code). The appeal by the defender of the bond brought the case to the Rota for the third instance hearing. After much delay due to non-cooperation on the respondent's part, the Rotal turnus coram Pinto pronounced an affirmative decision declaring the marriage null on grounds of impotence caused by "psychoneurosis conversion type."³³

In the in iure section, Pinto brings together the juridical and psychological principles based on the most recent findings on sexual disorders and psychic impotence by North American experts. The first principle concerns the very notion of the impediment of impotence. Citing can. 1084, 1 (1983 Code), Pinto states that moral certainty concerning the antecedence and perpetuity of impotence which precludes the possibility of intercourse in marriage, is a prerequisite for declaring a marriage null according to this caput.³⁴

³³"Impotentiae causa est psychoneurosis conversionis orta ex matris super-protectione postumi filii necnon in huius graviter erronea sexuali educatione." Ibid., p. 466.

³⁴See Ibid., p. 457. Pinto's approach in further elaborating on these general principles conforms with Pius

Pinto describes the impotent male as being incapable of performing sexual intercourse in marriage. Capacity is demonstrated when the male penetrates the vagina in some way, even imperfectly, and completes semination, at least partial, in a natural way. The condition of male impotence can be verified in the man who suffers from erectile incapacity which sexologists simply call "sexual impotence".³⁵

Among the psychosexual disorders listed in DSM-III is "Inhibition of Sexual Excitement"³⁶ which is psychically

34 (cont'd) XII's advice about the canonical application of the valid conclusions achieved by the behavioral sciences. Pius XII said that ecclesiastical jurisprudence cannot and must not neglect the genuine progress of science which affects moral and juridical matters, nor is it permissible to blame and proper to reject them because they are new. It is necessary to examine carefully and weigh accurately whether what is presented be true knowledge, rendered certain by adequate experiment and proof, or merely vague hypotheses and theories which are not supported by positive and substantial evidence. See A.A.S., 33(1941), p. 423. Pope John Paul II reaffirmed this advice in his allocution to Rotal Officials on January 26, 1984: "But preoccupation with safeguarding the dignity and indissolubility of matrimony by setting up a barrier against abuses and laxity, which are unfortunately to be often lamented in this matter, cannot let us preclude the real and undeniable progress made by biological, psychological, psychiatric and social sciences. To do that would constitute a contradiction of the very value which is meant to be safeguarded, the really existing matrimony, not that which has only the appearances and was null from the beginning." Origins, 13(1984), p. 585.

³⁵ See c. PINTO, January 25, 1985, p. 457, where the ponens states that it is not necessary that the entire penis penetrate the vagina nor is ejaculation of semen elaborated in the testicles necessary.

³⁶ See Ibid., p. 457, where Pinto simply transposes the description from DSM-III (p. 278) on "Inhibited Sexual

induced. Pinto simply transposes the specific diagnostic criterion of ISE from DSM-III which describes the syndrome as the "partial or complete failure to attain or maintain erection until completion of the sexual act."³⁷

Furthermore, the clinical categories of primary and secondary impotence are important to prognosis and therapy and consequently to curability. Primary impotence comprises men who have never been potent with a woman, even though they may attain an erection through masturbation and had spontaneous erection in other situations.³⁸ Secondary impotence affects men who have functioned well for a certain period of time before the manifestation of erectile dysfunction.³⁹

Noting the difficulty in proving functional impotence, Pinto accords full proof to the juridical confession of the man and the confirming testimony of the spouse concerning

36 (cont'd) Excitement". In DSM-III-R, this disorder, as previously noted in Chapter III, is called "Male Erectile Disorder" and incorporated under the heading of Sexual Arousal Disorders.

³⁷See c. PINTO, January 25, 1985, p. 458. This diagnostic criterion is taken verbatim from DSM-III, p. 279.

³⁸This description was previously described as being auto-sexual. See the brief comments supra, Chapter III, p. 133.

³⁹See c. PINTO, January 25, 1985, p. 458. The distinction between primary and secondary impotence is taken directly from H.S. KAPLAN, The New Sex Therapy (1974, Italian version).

the presence of impotence. He says:

Unless it is certain that the person alleged to be suffering from impotence has lied, his judicial confession has great value in proving male impotence. The reason is that "there is probably no other medical condition which is potentially so frustrating, humiliating and destructive than impotence. In almost all cultures and all socio-economic groups the self-esteem of a man is founded so deeply on his erectile capacity. As a consequence, a secondary depression is generally followed by an episode of impotence" [...]

If the wife's testimony confirms the condition of the husband, such depositions can constitute full proof according to the norms of can. 1536, 2 of the ⁴⁰new Code unless there is well-founded doubt.

Pinto summarizes the causes of psychic impotence according to the psychoanalytic theory: "unconscious intra psychic conflicts" rooted in "unresolved oedipal conflicts" and the "concomitant feelings of fear and guilt about sex". The immediate factors are "fear of an unsuccessful sexual act", a "commanding pressure" for sexual performance, and

⁴⁰"Ad profundam viri impotentiam magnam vim habet ipsius viri judicialis confessio, nisi constet ipsum mentitum fuisse. Ratio est quia 'non c'è probabilmente nessun'altra condizione medica che sia potenzialmente tanto frustrante, umiliante e distruttiva quanto l'impotenza. In quasi tutte le culture e in quasi in tutti i gruppi socioeconomici l'autostima di un maschio si fonda in maniera preponderante sulla sua erezione. Di conseguenza, una depressione secondaria segue comunemente un episodio di impotenza' [...].

"Quodsi uxor cum marito concordet, depositiones hae plenam probationem constituere possunt ad normam novi canonis 1536, 2, nisi fundatum dubium exurgat. Ibid., p. 458.

the incapacity of the man to give himself to "sexual sensations" resulting from "guilt or conflict".⁴¹

Pinto admits alcoholism as a psychic cause of erectile dysfunction. Most recent studies demonstrate that immoderate intake of alcoholic drinks seriously affects sexual activity because it induces endocrinological (i.e. in the metabolism of androgen hormones) and neurological (the centers either of libido or of erection) disturbances. Furthermore, the petitioner was alcoholic.⁴²

The antecedence of functional impotence can be established when according to experts, concordant with the acts of the case, the causes of impotence existed at the time of celebrating marriage.

The question of perpetuity of impotence remains the most difficult problem concerning psychic impotence. Citing several Rotal decisions which distinguish the juridic concept of perpetuity from the clinical concept of incurability of impotence,⁴³ Pinto highlights the difficulty but not the

⁴¹See Ibid., p. 459.

⁴²See Ibid., p. 459.

⁴³The former jurisprudential trends resisted granting juridic relevance to psychic impotence because of the difficulty in acquiring moral certitude about its perpetuity. See the S.R.R. Dec., c. STAFFA, November 14, 1947, in S.R.R. Dec., 39(1947), pp. 536-542; c. MANNUCCI, May 4, 1934, in Ibid., 26(1934), pp. 269-276; c. PARISELLA, October 10, 1974, in Ibid., 66(1974), pp. 608-619; c. EWERS, October 19, 1974, in Ibid., pp. 654-661 (hereafter cited:

impossibility in proving the perpetuity of functional impotence. Sometimes medical science or circumstances can provide strong arguments so that moral certitude can be had concerning the nullifying defect of the marriage.⁴⁴

Concerning the requirement of certitude, the juridic question focuses on moral certitude which excludes the probability of cure even though there may remain the possibility of cure. From a clinical point of view, it cannot be said that a particular form of impotence is incurable when there is the possibility of cure. Pinto refers to "dual sex-therapy" used with considerable success by Masters and Johnson in treating persons suffering from psychosexual dysfunctions.⁴⁵ He concludes from the studies done by more recent sexologists that erectile dysfunction is a primary disorder which is more difficult to cure.⁴⁶

The elements of time and place, essential to the notion

43 (cont'd) c. EWERS, October 19, 1974); c. EWERS, November 16, 1974, in Ibid., pp. 742-748 (hereafter cited: c. EWERS, November 16, 1974).

44 "N.S.O. semper animadvertit, congruenter cum scientia medica, difficultatem probandi sive antecessionem sive insanabilitatem impotentiae functionalis: difficultas sane haud dicit impossibilitatem. Nonnumquam enim sive scientia medica sive facti peculiaris adiuncta valent tanta praebere argumenta ut moralis certitudo habeatur de vitio nuptias irritante' [...]." c. PINTO, January 25, 1985, pp. 459-460.

45 See Ibid., p. 460.

46 See Ibid.

of perpetuity, are discussed briefly by Pinto. From a juridic point of view, impotence is perpetual if it was incurable at the time of matrimonial consent even though, due to medical and scientific advances, it was curable or may have already been cured when the nullity procedure was initiated because a person incapable of handing over the formal essential object of the contract enters marriage invalidly.⁴⁷

As far as the place is concerned, from a juridic point of view, impotence is perpetual when it cannot be cured in the place where the patient lives, even though it can be cured elsewhere, which in given circumstances renders it extraordinary means. No one is to be obliged to use extraordinary means in such a situation.⁴⁸

The clinical description of the medical experts concerning the petitioner's condition led the Rotal turnus coram Pinto to conclude that the man was suffering from

⁴⁷"Ad tempus quod spectat, juridice perpetua dicetur impotentia quae insanabilis erat tempore celebrationis nuptiarum, quin obstet quod tempore processus, propter scientiae progressum, jam sanabilis sit, immo, jam tunc sanata fuerit." Ibid., p. 460. Accordingly Pinto states that the contrary norm of law in the Decretals concerned cases of doubtful impotence. These are juridic questions and not clinical.

⁴⁸"Locum autem quod attinet, juridice insanabilis dicenda est impotentia quae mederi nequit ubi patiens degit, sed sanari posset in alio loco, in adiunctis tamen quae medium extraordinarium reddunt." Ibid., p. 460.

antecedent and perpetual impotence. The perpetuity of impotence was admitted in this case because the man was not able to penetrate the vagina of his spouse or two other women following the divorce.⁴⁹ The experts declared the efficient cause of this impotence to be psychic, that is, psychoneurosis conversion type (with chronic depression). They were in agreement concerning the underlying causes of impotence: an unresolved oedipal complex and repressive sex education.⁵⁰ Pinto accordingly concluded that the petitioner's impotence which resulted in the incapacity for erection was of psychic origin and was primary and absolute. The psychoneurosis conversion type resulted from an overprotective mother of a posthumous son and his erroneous sex education which obviously preceded the wedding. When the length and depth of the neurotic process was considered along with the petitioner's age, it seems certain that a cure was practically impossible. Noting that the juridic question concerning nullity of the marriage does not depend

⁴⁹See Ibid., p. 460. Also see S.R.R. Dec. c. SABATTANI, April 10, 1959, in M.E., 84(1959), pp. 616-634, which contains a comprehensive treatise on the different aspects of perpetuity (especially pp. 620-634).

⁵⁰See c., PINTO, January 25, 1985, pp. 464-465. This psychiatric report submitted by the expert consulted for the first instance decision was substantially confirmed by those who were appointed by the second and third instance courts.

on theoretical curability but on practical curability,⁵¹ Pinto was therefore able to conclude with moral certainty concerning the petitioner's antecedent and perpetual impotence.

Several jurisprudentially positive points for our consideration of psychic impotence are offered in this affirmative decision: 1) Psychic impotence is reaffirmed as a nullifying defect of marriage. 2) The causes of psychic impotence may be varied. In this case, psychoneurosis, chronic depression, and alcoholism are considered the underlying causes. 3) The proof of the antecedence and perpetuity of psychic impotence may be difficult, but not impossible. 4) The juridic notion of perpetuity is not the same as clinical incurability. Medically a psychological condition may be curable under certain circumstances, but juridically its curability is considered only in ordinary circumstances of the person, place, and time. 5) There is a clear difference between theoretical curability and practical curability. One may claim to have a theoretical cure for a certain type of disorder. But that claim is of no value unless this person with that disorder in his particular circumstances can be cured with that particular type of therapy. Law deals with facts, not hypothetical possibilities. In other words,

⁵¹See Ibid., pp. 465-466.

a case is to be judged in its concrete circumstances of the person, place and time at the moment of exchanging the nuptial vows. When considered logically, one may naturally question the practical value maintaining the notion of perpetuity of impotence.

In summary, in a given case, if the person is judged with moral certainty to be suffering at the time of the wedding from psychic impotence, whether it be primary or secondary, absolute or relative, he should be declared incapable of honoring the essential obligation of the matrimonial contract. Hence, the marriage itself is to be declared null.

b) Premature Ejaculation

Among the orgasmic disorders is premature ejaculation which is clinically defined as the "persistent or recurrent ejaculation with minimal sexual stimulation or before, upon, or shortly after penetration and before the person wishes it."⁵² A diagnosis of premature ejaculation can be admitted as a proof in a petition alleging nullity due to impotence, provided it meets all canonical requirements.

i) Decision coram De Jorio, February 21, 1973

The marriage nullity case judged coram De Jorio on

⁵²See DSM-III-R, p. 295; DSM-III, p. 280.

February 21, 1973⁵³ involved two Italians who married on February 8, 1958. Conjugal life began with difficulties because of the man's inability to penetrate his wife's vagina and ejaculate in it in a natural manner because of insufficient erection and premature ejaculation. Furthermore, his personal sexual needs could only be satisfied through manual excitation (titillation) of his wife's genitalia. Notwithstanding this problem, the woman conceived through the semination which occurred at the entry of her vagina and a child was born on December 18, 1958. From the moment the man learned of the pregnancy, he never again attempted intercourse with his wife. After waiting in vain for several years for a change in her husband's behavior, the woman presented a petition for nullity on March 9, 1970, alleging "relative impotence on the part of the man, or probably on the part of both." The first instance tribunal, after

⁵³See S.R.R. Dec., c. DE JORIO, February 21, 1973, in S.R.R. Dec., 65(1973), pp. 119-129 (hereafter cited: c. DE JORIO, February 21, 1973). This sentence is of much juridical importance as it attempts to explain the principle of "mutual causality" which may underlie relative psychic impotence and render such impotence incurable in a particular relationship. A partial translation of this sentence may be found in C.L.D., 8, pp. 667-672. Another sentence which deals specifically with the sexual dysfunction of premature ejaculation within the context of relative psychic impotence is: c. SERRANO, October 22, 1971 in S.R.R. Dec., 63(1971), pp. 762-780. In this case, the decision was also affirmative and the man was prohibited from marrying without prior consultation with the Rotal Tribunal. The dysfunction of premature ejaculation was caused by the respondent's obsessive-compulsive disorder.

consulting two psychiatrists, declared the marriage null on grounds of "relative impotence on the part of the man." The court seems to have found sufficient evidence regarding relative impotence on the part of the man. Since the alleged impotence of the woman was only probable, the court declared negatively on this ground.

Even though the Rotal turnus could have confirmed this decision by decree in virtue of the Apostolic Letter "Causas matrimoniales", the case was submitted for an ordinary hearing on the basis of insufficient expert consultation. The Rotal court requested a urologist for an expert opinion concerning the man's impotence and submitted the case for an ordinary hearing in second instance. Since there was lack of firm proof concerning the woman's impotence, the court deemed it superfluous to proceed further on that issue.

Potency for the male consists in the capacity for penile erection, penetration, and ejaculation and that incapacity for one or more of these actions constitutes impotence to have sexual intercourse. Since potency is demonstrated by the capacity for penetration and ejaculation in the vagina, De Jorio states that the male incapable of either penetration and/or ejaculation is incapable of consent according to can. 1081, 2 (1917 Code).⁵⁴

⁵⁴"Causa vero physiologicae impotentiae in viro potest impedire aut erectionem et eiaculationem vel hanc tantum.

While specific organic factors can prevent erection and ejaculation,⁵⁵ other factors affecting the capacity for sexual acts are the misuse of coition from the onset of puberty and masturbation which frequently diminishes erectile capacity because the habit reportedly weakens the nerves which control ejaculation.⁵⁶ Noting that predominant psychological causes are varied and complex, De Jorio insists that psychic impotence is a true form of impotence even though it is difficult to ascertain its antecedence and perpetuity.⁵⁷ In order to illustrate this point, he quotes from the decision of June 27, 1962, coram Anné in which the ponens stated that the antecedence of relative psychic impotence can be considered satisfied when the dispositions and causes in-

54 (cont'd) Tamen utraque in hypothesi iure canonico habetur impotentia coeundi, non simpliciter generandi. Ex iure canonico enim potens est vir, qui valeat suo membro penetrare vaginam mulieris et in eam eiaculari. Nam qui hac capacitate careat nequit praestare consensum matrimonialem, qui 'est actus voluntatis quo utraque pars tradit et acceptat ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem' (can. 1081, 2)." c. DE JORIO, February 21, 1973, p. 121.

⁵⁵Alterations relative to the genital organs or nerve centers or lesions of the genital organs or nerve centers and fibers which intervene in the process of ejaculation or pathological changes of a general nature which debilitate the orgasm can result in ejaculatory dysfunction. See Ibid., p. 122.

⁵⁶See Ibid., p. 122.

⁵⁷"Hanc impotentiam dari extra controversiam est, sed arduum est iudicare cum certitudine de eius antecessione et perpetuitate [...]." Ibid., p. 122.

fluencing the capacity to perform intercourse are preexistent in the person even though the impotence is not manifest until the first attempt at consummation of the marriage.⁵⁸

There are some important juridical observations in Anne's statement: 1) It is difficult to ascertain the antecedence of psychic impotence. 2) The fact that the subject is unable to perform the sexual act at the very first attempt is not the ultimate basis for concluding that he is certainly impotent because such a difficulty may reveal only the inner disposition of the person. 3) In order for impotence to be declared antecedent, the severity of the disposition and other circumstances affecting conjugal relationship should be weighed carefully.

Sometimes men approach the sexual act with excessive aggression which can arouse repugnance to sexual acts,

⁵⁸"Difficultas, autem, exurgit, quando agitur de probanda impotentia, praesertim mere psychica, utpote antecedente. Impotentia etenim psychica, maxime si est relativa, dici potest matrimonio antecedens solummodo virtualiter, scilicet: dispositiones et causae, remote vel proxime in ipsam capacitatem coeundi cum omnibus vel cum quadam persona determinata influentes, iam in subiecto praeexistunt, sed impotentia nonnisi in primo conatu actus coniugalis sese manifestat, cooperante influxu circumstantiarum physicarum et psychicarum quae momento copulae vim suam peculiariter exercent. Perdifficile est cum certitudine definire an in subiecto, qui inde a primo conatu de facto impotens ad coeundum appareat, dispositiones huic impotentiae locum dantes iam tali gradu praeexistant, ut independenter a quibuscumque circumstantiis, idem subiectum dicendum sit certo impotens, saltem relative' [...]." Ibid., pp. 122-123.

especially on the part of a delicate woman. Therefore, De Jorio concludes that a woman who abhors making her body available to a sexually aggressive man must be regarded as impotent psychically, that is, in relation to such a man. Similarly, a man is to be considered impotent in relation to a woman of delicate nature if he cannot perform the copula without preliminary manual excitation.⁵⁹

The stress is on relative impotence. The psychic disposition of a person alone may not be the proximate cause of the incapacity for sexual intercourse. Mutual causality may underlie relative functional impotence. For example, a woman who abhors aggressive sexual advances may indeed be impotent with regard to men who display such behavior in sexual encounter, or a sexually debilitated man who cannot have intercourse without manual excitation of the woman may indeed be impotent in relation to a naturally delicate woman. This argument can, in fact, be extended to those cases in which psychic predispositions of certain persons may trigger impotence in persons with particular psychic makeup. While confirming the difficulty, not the impossibility of proving the perpetuity of psychic impotence, De Jorio states that

⁵⁹"Quod si vir ob naturae vitium vel ob supervenientem ante nuptias debilitatem nequeat copulam perficere absque praeliminaribus digitorum titillationibus, habendus est impotens relate ad mulierem natura delicatam." Ibid., p. 123.

scientific progress along with the opinions of experts can guide the decision of judges concerning cases involving functional impotence.⁶⁰

The evidence presented in the acts, especially the expert reports, indicated that the respondent was suffering from predominantly functional impotence of a psychogenic nature. From a psychological point of view, he had been described as "an individual with narcissistic tendencies and notable instances of self-gratification of an intellectual and aesthetic order, moderately attracted to the opposite sex as it appears from marked discrimination in the choice of his partners."⁶¹ Due to his practice of habitual masturbation from puberty and early sexual encounters, the experts concluded that the man's sex drive had been severely weakened. As a result, he experienced premature ejaculation while attempting intercourse with his wife.

Furthermore, this problem was intensified in the interpersonal relationship. The man had successful sexual acts with other women, but because of his wife's psychological and physical makeup, he could not bring himself to have

⁶⁰See Ibid., pp. 123-124.

⁶¹"[...] un individuo con tendenze narcisistiche e notevoli istanze autograticanti di ordine intellettuale ed estetico, moderatamente attratto dall'altro sesso, come appare dalle marcate discriminazioni che egli afferma di porre nella scelta della propria partner." Ibid., p. 126.

successful intercourse with her. His psychosexual problem, as related to this particular relationship, was considered to be antecedent and perpetual. Therefore, in the dispositive part of their affirmative decision, the judges concluded that the respondent was not forbidden to remarry because his impotence was determined to be relative.⁶²

Several juridically important points can be identified in this sentence. 1) The judges clearly point out that despite the difficulty in proving the antecedence and perpetuity of functional (psychic) impotence, the condition can constitute a true form of impotence. 2) Psychic impotence can be relative resulting from the psychophysical makeup of the spouses which can influence and intensify each other's existing predisposition. 3) The insights provided by the advances of scientific progress in the field of psychiatry and sexology concerning psychosexual disorders, and opinions of experts can be valuable in determining the presence of the dysfunction, its antecedence and perpetuity. 4) If all juridic requirements are verified in a concrete case, premature ejaculation (so too, erectile dysfunction) can be regarded as a true form of psychic impotence amounting to

⁶²"At eum non vetamus alias inire nuptias cum eius impotentia iudicialiter comperta sit tantum relativa, tamen hortamur ut, antequam aliud matrimonium forte contrahat, urologum et psychologum consulat, ne periculum alius offensionis (insuccesso) adeat." Ibid., p. 129.

diriment impediment of impotence. 5) In cases of relative functional impotence, the court must be cautious in restricting the exercise of one's right to marry by imposing a vetitum on the afflicted party.

ii) Decision coram Ewers, November 16, 1974

The case judged coram Ewers on November 16, 1974,⁶³ originated in the Diocese of Joliet, Illinois (U.S.A.). Conjugal life was immediately established following the marriage on March 16, 1943, and the couple were happy despite their inability to complete the marital act. There was a three year separation because of the husband's overseas military assignment. Upon his return, the couple lived together until February 26, 1946. Due to the conjugal difficulties, the woman sought and obtained a civil divorce and remarried. The man entered into two subsequent marriages with neither lasting significantly longer than the first.

In 1954, the woman requested the Tribunal of Joliet, to declare her marriage null on the basis of the man's impotence. Due to problems in processing the case, the Tribunal pronounced a negative decision only on May 26, 1966. This decision was overturned by the appeal court of Chicago on November 29, 1966, which was appealed by the Defender of

⁶³S.R.R. Dec., c. EWERS, November 16, 1974, in S.R.R. Dec., 66(1974), pp. 742-748.

the Bond. The case arrived at the Rota for the third instance hearing. Again because of the lack of cooperation on the part of principals, the Rotal turnus was able to render the decision only on November 16, 1974.

In the in iure section of this sentence, Ewers states that impotence impedes the spouses from becoming "one flesh". Organic or functional impotence, whether on the part of the man or woman, is present when there is the incapacity to deposit or receive in a natural manner the verum semen elaborated in the testicles in the vagina following penetration by the erect penis.⁶⁴

Having noted these principles, Ewers states that canonical doctrine and Rotal jurisprudence admit the invalidating nature of functional impotence provided the juridic requirements of antecedence and perpetuity are satisfied. Furthermore, Rotal jurisprudence admits the difficulty but not the impossibility of proving antecedence or perpetuity. Additionally, medical science or special circumstances can provide arguments generating moral certitude about the invalidating effect on the marriage.⁶⁵

⁶⁴See Ibid., p. 743.

⁶⁵"Nec ambigendum est impotentiam quoque functionalem, dummodo antecedentem et perpetuam, matrimonium dirimere: quod pacificum est in doctrina et iurisprudencia canonica. Insimul autem praeprimis N.S.O. semper animadvertit, congruenter cum scientia medica, difficultatem probandi sive antecessionem sive insanabilitatem impotentiae functionalis:

Since the case involved male functional impotence, Ewers then explains the elements of male impotence, particularly premature ejaculation. A male is impotent when, because of an organic or functional defect, he cannot deposit verum semen in the vagina in a natural manner. Functional impotence can affect the sexual activity of the male resulting in the inability for penile erection or ejaculation which occurs prematurely at the entrance of the vagina.⁶⁶

Ewers attempts to explain the dynamics underlying premature ejaculation which is important for our consideration. Erection is a reflex phenomenon induced by external peripheral stimuli or central endogenous stimuli. The stimuli are transmitted via the afferent nerves to the genito-spinal center Golz, situated in lumbar modulla which are then transmitted through the afferent nerves. As a reflex phenomenon, penile erection occurs independently of the will. However, the will can facilitate or impede erection only indirectly by exciting favorable or adverse conditions to that

65 (cont'd) difficultas sane haud dicit impossibilitatem. Nonnumquam etenim sive scientia medica sive facti peculiaris adiuncta valent tanta praebere argumenta ut moralis certitudo habeatur de vitio nuptias irritante." Ibid., p. 743.

66"Vir in specie impotens habetur si, ob vitium organicum aut functionale, nequeat in mulieris vaginam effundere verum semen, per erecti penis naturali modo penetrationem. Equidem, ex functionali impotentia in viro potest perturbari eiusdem activitas sexualis adeo ut, inter alia, veretrum vel non erigatur, vel praecociter et ante portas eiaculet." Ibid., p. 743.

reflex. It normally influences erection either by seeking physical or sensory images capable of exciting the reflex or provoking it through mechanical stimulation of the skin of the genitals.⁶⁷

Among the pathological states of ejaculatory disturbances is "premature ejaculation." Ejaculation consists in contractions occurring between terminal stimulation of sensory nerves in genital organs and emission of seminal fluid. These contractions can be serious causing faster ejaculatory reflexes. In more serious cases such defects render intercourse impossible when the ejaculation of semen occurs at the vaginal orifice before penetration of the vagina. Premature ejaculation is often constitutional in nature. Therefore, a congenital form can be distinguished from an acquired form arising from supervening causes.⁶⁸

Since the capacity for intercourse on the part of man requires penile erection sufficient for vaginal penetration and semination, Ewers concludes that when intercourse is impossible because of premature erection, or when ejaculation does not occur within the vagina, or an erection suitable for penetration, or premature ejaculation, the male is to be

⁶⁷See Ibid., p. 743.

⁶⁸See Ibid., p. 744.

considered canonically impotent.⁶⁹

In distinguishing the elements of erection, premature erection, sufficient erection and premature ejaculation within the act of intercourse, Ewers notes that the aspects of erection, penetration, and semination can be affected together or separately. When the dysfunction is so serious that it renders intercourse impossible, then the incapacity, provided it is antecedent and incurable, can be regarded as impotence. However, there should be moral certainty concerning these aspects before declaring in favor of nullity.

Ewers says, and rightly so, that in procedures for establishing functional impotence, the spouses' depositions confirmed by the weight of their oath, must be considered a primary argument. Ordinarily this obtains full proof only if it is supported by other arguments. Moreover, the Code requires the judge to consult experts in the field when assessing cases involving impotence. This is a preceptive

⁶⁹"Copula reapse perfici nequit, si erectio aut deest aut nimis praecox est aut sat debilis exstat, adeo ut ad penetrandum practice inefficax sit. Exstat igitur sexualis incapacitas functionalis, ubi membrum adest sed erigi non valet; ex quo patet impotentiam adesse si vir membro adeo flaccido instruat, ut hoc erectionis, saltem sufficientis, capax non sit. Insimul vir impotens habetur quoties organum copulationis, etsi physice ad normam constitutum, erigi tamen nullatenus possit, vel utcumque non tantum, vel per non tantum temporis, quantum oportet ut penetratio mulieris vasis subsequatur, et eiaculatio in vase. Pariter autem vir impotentia affectus existimatur, si seminis effusio peragi nequeat in vaginam ob praecocem eiaculationem." *Ibid.*, p. 744.

norm and, therefore, does not bind the judge under pain of nullity if he/she finds expert consultation on the matter superfluous or impossible. The judge shall always arrive at certitude from an evaluation of all the acts of the case.⁷⁰

The facts of the case revealed the respondent's incapacity for intercourse resulted from the lack of an erection sufficient to effect penetration and rapid (premature) ejaculation. His incapacity was present when consummation of the marriage was first attempted and furthermore, he was incapable of intercourse in two subsequent marriages. Therefore, the judges concluded that there was sufficient evidence to prove the presence of premature ejaculation at the time of the wedding, and its antecedence and perpetuity. The decision was in favor of nullity of this marriage.

Some important juridic and practical conclusions can be drawn from this sentence. 1) Impotence is the incapacity for sexual intercourse in marriage. 2) Sexual intercourse is not a single phase act but consists of several phases.

⁷⁰"In causis impotentiae praeprimis coniuges attentissime audiendi sunt: agitur etenim de actibus qui ex sua natura in secreto thalami ponuntur vel saltem temptantur, unde solis coniugibus, praeterquam Deo, notis. Eapropter in processibus de impotentia depositiones coniugum, iurisiurandi pondere firmatae, argumentum primum merito haberi debent.

"Quod tamen ordinario vim plenae probationis obtinet tantummodo si fulciatur aliis adminiculis et argumentis. Iudex autem ex actorum complexione semper suam certitudinem efformabit." *Ibid.*, p. 744.

3) On the part of the male partner, there should be erection of the penis which must be of sufficient rigidity and length for penetration and subsequent ejaculation in the vagina. 4) These phases of intercourse can be rendered defective by the sexual dysfunction of premature ejaculation. 5) Premature ejaculation can constitute functional impotence if it is serious, present at the time of wedding, and incurable. 6) Ewers seems to be of the opinion that premature ejaculation is normally of a constitutional nature and, therefore, not easily amenable to treatment. 7) From a procedural point of view, the depositions of spouses taken under oath constitute principal arguments which are to be supported by expert opinions and other arguments. Even though Rotal jurisprudence holds that the antecedence and perpetuity of functional impotence are difficult to prove, this sentence clearly affirms the possibility of proving these elements in individual cases. What is difficult is not always impossible, as Ewers himself says.

iii) Decision coram Ewers, June 28, 1979⁷¹

Michael, a Canadian of Italian origin, and Juliana, an Italian, became acquainted through correspondence and married on October 26, 1958, in Italy. There were serious

⁷¹S.R.R. Dec., c. EWERS, June 28, 1979, (Montreal Case) [Unpublished] (hereafter cited: c. EWERS, June 28, 1979).

difficulties in the conjugal relationship because of the "psychotic-like character" of the man, or because of his "incapacity to fulfill the conjugal duty" or because of his "excessive attachment to his parents." Following the definitive separation on February 27, 1963, the woman petitioned the Tribunal of Montreal requesting a declaration of nullity of marriage on the basis of "her husband's impotence or defect of consent due to his mental state." The first instance decision of June 6, 1968, was negative on both grounds. The petitioner then appealed to the Rota. After considerable delay because of the respondent's opposition to the procedure and the additional difficulty in obtaining expert reports, the Rotal turnus coram Ferraro⁷² on January 10, 1978, declared the marriage null on the basis of "at least relative psychophysical impotence on the part of man", rejecting the second caput. With appeal by the Defender of the Bond, the case went to a third instance hearing coram Ewers.

Ewers basically reiterates the same legal principles explained in his sentence of November 16, 1974. In both cases, the psychosexual dysfunction of "premature ejaculation" is alleged to have caused impotence. In the previous

⁷²See S.R.R. Dec., c. FERRARO, January 10, 1978, in M.E., 103(1978), pp. 280-288. Since Ewers reiterates the same principles contained in this sentence by Ferraro, we will prefer not to repeat the analysis of the same here.

case, premature ejaculation was declared to be purely psychogenic in nature while in the present case, the experts reported it to be of a psychophysical nature.

Following the Thomistic doctrine on impotence in which sexual capacity (functioning) and not the act itself is viewed as the essence of marriage, Ewers contends that the man incapable of consummating the marriage because of some organic or functional defect is prohibited from marrying by natural law itself. The incapacity for consummation lies in the inability to hand over the ius in corpus for acts per se apt for the generation of offspring.⁷³

Therefore, canonical impotence consists in the lack of potency, that is, the incapacity to consummate the marriage through conjugal intercourse, specifically in the penetration and deposition of semen in the vagina. Penetration is juridically satisfied when the penis enters the vagina permitting ejaculation. This act can be impeded either by an organic defect or neuropsychic disorder.⁷⁴

Disturbances in the physiological or nervous systems

⁷³"Quamvis actus carnalis copulae non sit de essentia matrimonii, potentia tamen ad hoc est de eius essentia, quia per matrimonium datur utrique coniugi potestas in corpore alterius, respectu copulae. Quare, deficiente hac potentia, in uno ex coniugibus, matrimonium exsistere nequit' (in IV lib. Sent., dist. 34, q. IV, art. 2, in 4)." c. EWERS, June 28, 1979, p. 4.

⁷⁴See Ibid., p. 4.

can exercise a specific influence inducing a defect in erection or ejaculation. This defect may be rendered more serious when influenced by pathological psychodynamics as reported in this case. Therefore, any cause which inhibits the sex drive (libido) can also impede sexual functioning inducing functional impotence with the result that an erection is either not desired, or if desired is of brief duration proving insufficient for vaginal penetration. Consequently, ejaculation takes place either prematurely or, if some penetration has occurred, it never takes place because of inhibition.⁷⁵

Male impotence, whether organic or functional, may result from the lack of even one element of intercourse so that a man incapable of erection, penetration, or ejaculation in the vagina is canonically impotent. Canon law furthermore determines that nullifying impotence should be antecedent and perpetual. Therefore, if consummation which provides the foundation for the mutual giving and acceptance of the perpetual and exclusive right over the body for acts apt for the generation of children is lacking perpetually,

⁷⁵"Ceterum, quaecumque libidinem inhibent, et propterea erectionem et eiaculationem impediunt, sexus functionem vitiant impotentiamque provocant functionalem. Quo fit ut erectio vel desideretur prorsus, vel parum duret nec plene sufficiat ad ingrediendam vaginam; eiaculatio autem vel praecociter ante portas fiat, vel, non obstante penetratione aliqua, numquam contingat." Ibid., p. 5.

the conjugal union cannot be effected according to can. 1081, 2 (1917 Code).⁷⁶

While emphasizing the difficulty in proving the antecedence and perpetuity of psychic impotence according to the common and constant doctrine of canonical authors and Rotal jurisprudence, Ewers states that this can be overcome by the presumption of preexisting impotence when the incapacity for intercourse was manifest at the first attempt at consummation. Furthermore, the cause of impotence from which antecedence can be deduced with even greater certainty should not be bypassed.⁷⁷ It is even more difficult to prove the perpetuity of functional impotence. But the incurability of functional impotence can be clearly demonstrated from the perpetuity of the cause to which it is ascribed. In individual cases, therefore, the difficulty adverted to in canonical jurisprudence is not insurmountable.⁷⁸

⁷⁶See Ibid., pp. 6-7.

⁷⁷See Ibid., pp. 6-7.

⁷⁸"Pariter, iuxta constantem doctrinam canonicam, difficiliter etiam probatur perpetuitas eiusmodi functionalis impotentiae. Sed imprimis insanabilitas impotentiae demonstratur manifesto ex perpetuitate causae, cui illa sit adscribenda. Insuper, quamvis nonnumquam in H.A.T. iurisprudentia exhibeatur difficultas evincendi perpetuitatem impotentiae functionalis, idque iure meritoque, nihil tamen obstat immo plura suadent ut quibusdam quidem in casibus, in quibus evidentia et insanabilia symptomata sensu non percipiuntur, rationabiliter applicari possint ac debeant." Ibid., p. 7.

Concerning the proof of impotence, Ewers says that the incapacity to have perfect intercourse is judicially proved above all by the confession of the spouses confirmed by the testimony of apt witnesses and opinions of medical experts. The judge should draw his/her moral certitude from the acts of the case.⁷⁹

Ewers makes a very important point in the in fact portion of this sentence. The petition had originally contained two distinct grounds alleging nullity of the marriage. The second ground, namely "defect of consent due to the mental state of the man", received two negative decisions and consequently was not an issue in the third instance. However, Ewers says that the two negative decisions on psychological grounds should not prohibit the court from investigating several elements relevant to the psychological condition of the respondent in order to determine the cause of impotence. The cause could very well indicate the antecedence and perpetuity of sexual defect. The most serious cause of psychosexual dysfunction is neuropsychic condition of the afflicted person.⁸⁰

⁷⁹"Tandem sufficiat recoluisse impotentiam seu incapacitatem ponendi copulam perfectam iudicialiter probari imprimis coniugum confessione, aptorum testium depositionibus confirmata atque peritorum medicorum votis exquisitis." Ibid., pp. 7-8.

⁸⁰"Ex duobus nullitatis capitibus ab actrice adductis, tantummodo alterum seu viri impotentia, uti ex causae

There was convincing proof concerning respondent's incapacity to complete conjugal act throughout married life. The expert's testimonies revealed mental deficiency and "hypochondriacal neurosis" as the source of his incapacity for penetration and ejaculation in the vagina which antedated the marriage. Therefore, the judges did not find it difficult to conclude in favor of the antecedence of impotence. Since he was never able to complete sexual intercourse in marriage, the court ruled that the impotence was at least relative to this conjugal life and perpetual. Thus Ewers clearly brings out the importance of investigating the cause of impotence especially when it is of psychogenic nature.

In brief, Ewers reiterates the following juridic principles in this sentence: 1) He reaffirms the principle that functional (psychic) impotence is a true form of impotence provided the canonical requirements of antecedence and perpetuity are met. 2) Sexual intercourse is not one simple action but consists in a complex of phases which can be rendered defective by a myriad of causes. 3) The identification of the cause underlying psychic impotence is of great

80 (cont'd) *factispecie liquet, nunc Nobis expendendum superest atque tertio in iudicii gradu definiendum; id autem haudquaquam Nosmet prohibet quin plura ad caput psychicae deordinationis seu immaturitatis spectantia attente perpendamus pro ipsius impotentiae ratione in casu statuenda, potissimum quod attinet ad antecessionem et perpetuitatem defectus sexualis quippe qui vel in conditione neuropsychica conventi suam inveniat inter ceteras gravissimam causam.* Ibid., p. 8.

practical importance in determining its antecedence and perpetuity. 4) Even though it may be difficult to prove these requirements, it is not impossible to do so if all the concrete circumstances of person, place and time are carefully investigated. 5) Premature ejaculation can be regarded as a true form of male impotence if all canonical requirements are verified in a case.

C) Psychic Impotence and Incapacity to Assume Marital Obligations

The fundamental juridic principle of natural law underlying the diriment impediment of impotence, whether it be organic or functional, is "No one can be obliged to do the impossible."⁸¹ With regard to impotence, the impossibility implied in this principle is expressed in can. 1084, 1, as the "incapacity to have intercourse" (*impotentia coeundi*). According to can. 1084, 1, the scope of impotence is restricted to one's incapacity to perform sexual acts apt for the generation of offspring. This incapacity refers to only one element of marriage. As we have already seen, the essence of marriage does not consist merely in sexual acts.

⁸¹See M. STOCKHAMMER, "Ultra posse nemo obligari", in Revista internazionale di filosofia del diritto, 36(1959), pp. 25-35. Also see A. STANKIEWICZ, "De accommodatione regulae 'impossibilium nulla obligatio est' ad incapacitatem adimplendi matrimonii obligationes", in Periodica, 68(1979), pp. 643-672.

Marriage is a "partnership of the whole of life" (consortium totius vitae) both in its temporal and spatial sense. This partnership entails much more than the right to sexual acts. Therefore, it is quite possible that the cause underlying impotence, and specifically psychic impotence, may affect one's capacity to honor other essential rights-obligations as well.

As we have explained in Chapter III, psychic impotence consists in one's incapacity for sexual intercourse induced by a psychic cause. The cause is often variable and in some cases it is probably multiple. Since the cause is psychic, it may give rise to defects in several areas of the psychosomatic aspects of the person affected by it and consequently to several grounds of nullity. In recent years, Rotal jurisprudence has attempted to address the broader issue of multiple effects of the psychic cause underlying psychic impotence on the conjugal relationship.

Prior to Vatican II, Rotal jurisprudence often looked for the caput of impotence (functional) in cases involving homosexuality.⁸² Because of difficulties in proving the

⁸²Several Rotal decisions have dealt with the effects of homosexuality on the validity of marriage: in his decision of February 16, 1940, JULLIEN acknowledged ex professo that homosexuality can cause impotence, but this is not always the case. Furthermore, he maintained that the condition resulting from homosexuality is often temporary. See S.R.R. Dec., 32(1940), pp. 141-154. Since the negative decision in the case was appealed, it was judged c.

antecedence and perpetuity of the cause of psychic impotence, Rotal decisions were consistently negative in such cases. Only when there was moral certainty that a homosexual person was antecedently and irreversibly impotent in heterosexual relationship did the Rota consider that person's marriage invalid on grounds of impotence. Even in cases of serious hypersexuality disorder or other psychosexual disorders, the juridical investigation was limited to the person's incapacity for the physical act of intercourse. In a given case, the juridic approach was to look for the presence or absence of the essential characteristics of antecedence, perpetuity, and exclusivity of the capacity for sexual intercourse.

82 (cont'd) GRAZIOLI, March 16, 1943. Grazioli also admitted that impotence can result from homosexuality. A homosexual person who abhors heterosexual intercourse may be capable of orgasm only through homosexual activity. Again, the decision was negative because of doubt concerning the element of perpetuity (incurability) of psychic impotence. But the dissolution of the marriage in question was recommended to the Holy Father. See S.R.R. Dec., 35(1943), pp. 204-221. Also see c. BONET, May 25, 1959, in Ibid., 51(1959), pp. 285-290. It is beyond the scope of this study to give adequate treatment to the discussion of homosexuality as a specific cause of psychic impotence. For an in depth historical and canonical analysis of Rotal jurisprudence on homosexuality, see W.J. TOBIN, Homosexuality and Marriage, Rome, Catholic Book Agency, 1964, pp. 79-277; J.R. SCHMIDT, "Homosexuality and the Validity of Matrimony", in The Jurist, 32(1972), pp. 381-399, 494-530; W.F. KENNY, "Homosexuality and Nullity", in The Catholic Lawyer, 17(1971), pp. 110-122; P.A. BONNET, "Omossessualita e matrimonio", in M. Theriault - J. Thorn (eds.), Le nouveau code de droit canonique - The New Code of Canon Law, Ottawa, Saint Paul University, 1986, pp. 931-957.

On December 2, 1967, the Rotal court coram Lefebvre judged affirmatively a marriage case involving homosexuality of the respondent.⁸³ Lefebvre argued that in addition to lacking discretion of judgment proportionate to marriage, the inverse homosexual, who is incapable of heterosexual relationship, is also incapable of assuming essential "conjugal duties". The affirmative decision was based not on grounds of impotence but on defective consent, that is, on the homosexual respondent's incapacity to give and receive the perpetual and exclusive right to the body to be exercised in marriage. This decision was a turning point in Rotal jurisprudence on the grounds of "incapacity to assume the essential obligations of marriage." The basic problem in the case was impotence resulting from homosexuality. Since the person was capable of the marital act at the time and able to consummate the marriage, the juridic grounds of impotence (psychic) could not be adduced in this case. However, his sexual capacity was intrinsically vitiated, thus leading to irreversible homosexual inclination. Both perpetuity and exclusivity of the right to heterosexual relationship were not present at the time of exchanging consent. In other words, the object of consent in all its essential

⁸³See S.R.R. Dec., 59(1967), pp. 798-807 (at pp. 800 and 804). Also see c. POMPEDDA, October 6, 1969, in Ibid., 61(1969), pp. 915-924.

aspects was lacking from the very beginning of marriage.

Some subsequent Rotal decisions continued the line of jurisprudential thinking initiated by Lefebvre. In his celebrated decision of February 25, 1969, Anné focused on the juridical value of "communio vitae et amoris coniugalis" as the object of consent in a case involving lesbianism.⁸⁴ On February 21, 1973, De Jorio stated that premature ejaculation can be aggravated by mutual causality of the psychosexual makeup of the spouses. With each attempt at intercourse, the spouses become alienated further, thus resulting in serious interpersonal difficulties in marital consortium.⁸⁵ The following year, Ewers described impotence in terms of incapacity of the spouses to become "one flesh" thereby affecting and preventing not only the procreative but also the unitive aspect of marital intercourse.⁸⁶ In his sentence of July 15, 1977, Pinto said that the disorders of vaginism and frigidity may constitute an incapacity for the ius ad relationem interpersonalem (communio vitae) which is distinct from the right to the marital act.⁸⁷ In two of

⁸⁴See Ibid., 61(1969), pp. 174-192 (at pp. 181-182).

⁸⁵For example, see Ibid., 65 (1973), pp. 120-129 (at pp. 122-123).

⁸⁶See Ibid., 66(1974), pp. 742-748 (at p. 743).

⁸⁷See c. FINTO, July 15, 1977, pp. 152-155. Also see c. PINTO, April 20, 1979, in M.E., 104(1979), pp. 383-395 in which the ponens, investigating the grounds of inability to

their jurisprudentially important decisions, Parisella and Raad argued that in certain sexual and personality disorders, heterosexual union at the emotional and affective level may not be possible.⁸⁸ In both cases, one involving homosexuality, and the other traumatic (sexual) neurosis, the marriages lasted until the birth of the first child, but then the severity of the psychosexual problems reached the stage where a heterosexual union was rendered impossible. The respondents in these cases were found to be radically incapable of fulfilling the obligation of perpetuity of the right to conjugal acts and communio vitae. The marital consent was invalid because of defect in its object that was intended to be exchanged. In his sentence of December 14, 1979, Serrano insisted in a similar vein on the necessity of understanding impotence and its invalidating effects upon the marital relationship in terms of conciliar and postconciliar theological and juridical developments

87 (cont'd) assume the essential obligations of marriage, made an interesting comment (at p. 385) concerning psychic impotence. Pinto proposes psychic impotence as an example which either first manifested itself when consummation was attempted, or when the psychically impotent person thought his condition had disappeared or was cured, or when an expert suggests marriage as a remedy for the psychic incapacity. The psychic incapacity is distinct from the ability to give consent.

⁸⁸ See S.R.R. Dec., c. PARISELLA, May 11, 1978, in I.D.E., 89, 3-4(1978), pp. 3-17; c. RAAD, November 13, 1979, in M.E., 105(1980), pp. 46-49.

concerning marriage.⁸⁹ Di Felice also reiterated the jurisprudential principle that any psychosexual disorder which is serious can affect either discretion of judgment and/or the capacity for assuming the essential marital obligations.⁹⁰

The Rotal decisions referred to above indicate the fact that there is an intrinsic relationship between the diriment impediment of impotence (caused by psychic anomaly) of can. 1084, 1, and the "incapacity to assume" of can. 1095, 3^o. The first element relating the two lies in the causality of both incapacities. The cause underlying "psychic incapacity" may give rise either to the diriment impediment of impotence or to the juridic incapacity to assume the essential rights and obligations of marital consortium. The second element relates to its juridic effects. The effects of both incapacities are related to the object of consent, that is, the inability of the incapacitated person to hand over the rights-obligations to one or several of the essential el-

⁸⁹See c. SERRANO, December 14, 1979, pp. 31-32 where Serrano specifically mentions the teachings of Vatican II and the 1977 Decree of the Sacred Congregation for the Doctrine of the Faith.

⁹⁰See c. DI FELICE, October 18, 1980, pp. 661-662. In this particular decision, Di Felice appears to limit these disorders to hysteria and nymphomania yet by application, we can state that any psychosexual dysfunction which is serious, antecedent, and present at the exchange of consent can have the same effect on the interpersonal relationship in marriage.

ements of the consortium totius vitae. In view of this relationship, therefore, both incapacities can be regarded as defects of consent by reason of defect of the object of consent. However, the intention of the legislator seems to affirm the position that these two incapacities are distinct and are to be considered two distinct grounds of nullity, one a diriment impediment while the other a defect of consent.⁹¹

D) Use of Expert(s)

Almost every Rotal sentence dealing with psychic defects or psychic inability exhorts on the necessity of acquiring opinions of experts in the field of medicine or psychiatry/psychology. This is a reaffirmation of the norms of cc. 1574 and 1680 of the 1983 Code.

The basic purpose of seeking expert opinion in a marriage nullity case is to enable the judge to arrive at the procedural truth, that is, the nullity of the marriage in question. In this sense, an expert's opinion constitutes an important means of proof. It has the scope of ascertaining

⁹¹Can. 1084 on impotence is placed by the legislator in the traditional category of diriment impediments while can. 1095 is presented as one of the defects of consent. A deliberate decision to differentiate these two grounds of nullity seems evident on the part of the legislator of the new Code.

a fact or the nature of a fact under consideration.⁹²

In a case of alleged psychic impotence, an expert is expected to provide the judge with objective information on the presence of a disorder or dysfunction, its exact diagnosis, the nature of the disorder, and its effects on one's mental, psychosexual and interpersonal capacity, its prognosis, etc. The report of the expert is to be drawn according to the principles of his/her discipline.

It is for the judge to weigh the opinion of the expert(s) according to canonical principles. Therefore, an expertise is not to be used automatically by the judge. It must be evaluated within the context of all the evidence that is available to the judge. Even though the judge is not bound to use the conclusions of the expert, should he/she decide to dissent, he/she should provide reasons for doing so. The law does not oblige a judge to seek expert opinion. Nevertheless, we feel that in complex cases of the kind we are dealing with in this thesis, the ecclesiastical judge should not fail to seek the help of competent experts in psychiatry or clinical psychology.⁹³

⁹²See M.F. POMPEDDA, "Incapacity to Assume the Essential Obligations of Marriage", in Incapacity for Marriage: Jurisprudence and Interpretation, R.M. Sable (ed.), Rome, Tipografia di Patrizio Graziani, 1987, pp. 207-214 (hereafter cited: POMPEDDA, "Incapacity").

⁹³In his article: "De periti interventu iudicisque decisione in vaginismi casibus", in Studi di diritto

E) Imposition of Vetitum

Can. 1058 expresses the fundamental principle that a person has the natural right to marry.⁹⁴ In light of this principle, a doubt about the capacity of a person is not sufficient to prevent him/her from marrying.⁹⁵ Should a marriage nullity case involving psychic impotence or "inability to assume" receive two conforming affirmative sentences, is a vetitum to be imposed on the person on whose incapacity the nullity is based? There are several issues to be considered here.

First, according to can. 1643, a marriage case, since it deals with the status of persons, becomes only quasi res iudicata after two conforming sentences. Therefore, in the event of two declarations of nullity on the basis of psychic impotence or psychic incapacity there is a presumption of law that the person is incapable unless the incapacity was proven to be only transitory.⁹⁶ In other words, there is a

93 (cont'd) canonico in onore di Marcello Magliocchetti, P. Fedele (ed.), Roma, Officium Libri Catholici, 1974, G.E. Cerafoli illustrates the juridic and clinical complexities of marriage cases involving functional (psychic) impotence.

⁹⁴Can. 1058. "Omnes possunt matrimonium contrahere, qui iure non prohibentur."

⁹⁵See POMPEDDA, "Incapacity", p. 215.

⁹⁶See Ibid., p. 216.

strong possibility concerning the presence of incapacity in such a person, and this would naturally call forth extreme caution in permitting him/her to enter into a future sacramental marriage.

Second, according to can. 1077, 2, only the Supreme Authority in the Church can impose a prohibition which would automatically invalidate a future marriage.⁹⁷ Therefore, as long as there is not such an invalidating vetitum, any future marriage attempted by a person who has a vetitum cannot be presumed null.

Third, as De Jorio has suggested in his sentence dealing with relative psychic impotence, imposition of a vetitum would be ill-advised in such cases. However, he wisely suggests that persons who are found psychically impotent only in a particular relationship must be advised to seek appropriate counselling or professional help before attempting another sacramental marriage. This would involve a pastoral decision.

Fourth, a vetitum would be of a permanent nature only when the psychic condition underlying the incapacity or impotence is unchangeable in an absolute sense. In other words, when psychic impotence is declared certainly incurable, a vetitum would be permanent. But, such a hypothesis

⁹⁷Can. 1077, 2. "Vetito clausulam dirimentem una suprema Ecclesiae auctoritas addere potest."

is not true in an absolute sense in cases of psychic disorders as it is not possible to attain absolute certainty concerning the incurability of the disorder.

F) Substantial Conformity of Sentences

Because of the intrinsic relationship between psychic impotence and incapacity to contract marriage (especially the incapacity to assume the essential obligations of marriage), the principle of "substantial conformity of sentences" can be applied to a marriage which may receive two conforming sentences on two divergent grounds: one on psychic impotence, and the other on incapacity to assume the essential obligations of marriage. The principle of "substantial conformity of sentences" has been explained by Anne as follows: each sentence which is declared to be conforming must be weighed in light of all the acts of the case. It is also necessary to see whether or not the two conforming decisions depend entirely on the same facts and proofs. The basis of decisions is not the legal designation (caput) but the facts and proofs presented by the parties. Therefore, if certain intrinsic correlation between both grounds is present, the declaration of substantial conformity of sentences is legitimate.⁹⁸ According to this principle, therefore, "sub-

⁹⁸See S.R.R. Dec., c. ANNE, March 11, 1975, in S.R.R. Dec., 67 (1975), pp. 93-103 at p. 97. Translation of this

stantial conformity of sentences" can be declared in a case which has received two affirmative decisions on grounds of psychic impotence (can. 1084, 1) in the first instance and incapacity to contract marriage (can. 1095, 2^o or 3^o) in the second instance.⁹⁹

Apart from a brief discussion on the convalidation of marriage invalid by reason of psychic impotence and incapacity to assume the essential obligations of marriage, we consider it beyond the scope of this study to enter into a detailed theoretical investigation of other implications of the relationship between these two grounds of nullity.

G) Convalidation of a Marriage Invalid by Reason of Psychic Impotence

Impotence is a diriment impediment which cannot be dispensed. Therefore, if one of the parties was suffering from antecedent and perpetual impotence, whether it be organic or functional (psychic), the marriage is invalid and cannot be validated until there is moral certainty concerning its cessation. Once the impediment has ceased, the consent is to

98 (cont'd) sentence may be found in C.L.D., 8, pp. 739-754. Also see A. MENDONÇA, "Incapacity to Contract Marriage: Canon 1095", in Studia Canonica, 19(1985), pp. 310-315 (hereafter cited: MENDONÇA, "Incapacity").

⁹⁹For a more recent study of this issue, see J.J. CUNEO, "Toward Understanding Conformity of Two Sentences of Nullity", in The Jurist, 46(1986), pp. 568-601.

be renewed privately and in secret by the party who is aware of the impediment as long as the other party perseveres in the consent already given (cc. 1156, 1; 1158, 2),¹⁰⁰ or by both parties according to the canonical form if the impediment is public (can. 1158, 1).¹⁰¹ Moreover, due to the very nature of this impediment, a marriage which is invalid because of it can be sanated only after it has ceased to exist

¹⁰⁰Can. 1156, 1. "Ad convalidandum matrimonium irritum ob impedimentum dirimens, requiritur ut cesset impedimentum vel ab eodem dispensetur, et consensum renovet saltem pars impedimenti conscia."

Can. 1158, 2: "Si impedimentum probari nequeat, satis est ut consensus renovetur privatim et secreto, et quidem a parte impedimenti conscia, dummodo altera in consensu praestito perseveret, aut ab utraque parte si impedimentum sit utrique parti notum."

The former canon law laid down the general principle of convalidation of a marriage invalid because of a diriment impediment. Two things are essential in this case: first, the impediment must cease to exist or be dispensed; second, consent must be renewed at least by the party aware of the impediment. The latter canon concerns a situation in which the alleged impediment cannot be proven in the external forum. For a fuller treatment of convalidation of marriage, see L.A. BOGDAN, "Simple Convalidation of Marriage in the 1983 Code of Canon Law", in The Jurist, 46(1986), pp. 511-531; J.G. JOHNSON, "The 'Simple' Convalidation as a Pastoral Problem", in Studia Canonica, 15(1981), pp. 461-479; P. FEDELE, "In tema di convalida del matrimonio nullo per difetto o vizio di consenso", in Studi di diritto canonico in onore di Marcello Magliocchetti, Vol. II, P. Fedele (ed.), Roma, Officium Libri Catholici, 1975, pp. 487-513.

¹⁰¹Can. 1158, 1: "Si impedimentum sit publicum, consensus ab utraque parte renovandus est forma canonica, salvo praescripto can. 1127, 3."

(can. 1163, 2)¹⁰² and sanation is possible if the act of consent of both parties is present.

At least on the theoretical plane, a serious problem in the validation of marriage emerges when psychic impotence is seen as the source of the juridic incapacity to assume the essential obligations of marriage. The question is: is the marriage invalid by reason of incapacity to assume the essential marital obligations to be convalidated in accordance with the norms governing diriment impediment (can. 1158) or defects of consent (can. 1159)?

The new Code distinguishes various categories of persons who contract marriage invalidly: those affected by diriment impediments (cc. 1083-1094); those who are incapable of consenting (can. 1095), and those whose marriage is invalid due to other defects of consent: lack of knowledge, error, fraud, force or fear, etc. (cc. 1096- 1103), or defects of form (can. 1108, 1). Lefebvre, who is the first canonist to deal with this issue, states that a substantial difference exists between the defect of consent due to psychic incapacity (can. 1095) and those resulting from ignorance, error, fraud, simulation, etc. On the basis of this distinction, Lefebvre argues that the juridic procedures for

¹⁰²Can. 1163, 2: "Matrimonium irritum ob impedimentum iuris naturalis aut divini positivi sanari potest solummodo postquam impedimentum cessavit."

convalidation are likewise different. Since the incapacity to consent (can. 1095) renders a person naturally incapable of positing the act of matrimonial consent, a marriage entered into in the presence of such an incapacity is not automatically convalidated once that incapacity has ceased to exist. According to Lefebvre, therefore, even though the schema did not treat psychic incapacity as a diriment impediment (nor does the new Code), the convalidation of a marriage invalid due to incapacity to consent should follow the prescription of can. 1158. That is, the parties must renew their consent according to the norms of law. This reasoning, of course, is based on the principle of analogy of law.¹⁰³

Even though Lefebvre's argument seems logical and plausible, a canonical problem remains to be resolved in the application of his proposed solution to radical sanitation (sanatio in radice) in this case. According to can. 1163, 2, a marriage which is invalid due to an impediment of the natural law or divine positive law can be sanated only after the impediment has ceased to exist. This canon as well as can. 1161, 1,¹⁰⁴ presupposes the presumption of can. 1107¹⁰⁵

¹⁰³See C. LEFEBVRE, "De defectu discretionis iudicii in rotali jurisprudentia", in Periodica, 69(1980), pp. 555-567 (at p. 556). Also see MENDONÇA, "Incapacity", pp. 308-310.

¹⁰⁴Can. 1161, 1: "Matrimonii irriti sanatio in radice est eiusdem, sine renovatione consensus, convalidatio, a

which states that even if a marriage was entered invalidly by reason of an impediment or defect of form, the consent which was furnished is presumed to continue until its revocation has been proved. In other words, unless there is proof of its invalidity or subsequent revocation, the act of consent is presumed to remain integral in a marriage which is invalid because of a diriment impediment (including impotence) or defect of form. As long as the diriment impediment has either ceased or is dispensed, renewal of consent is not required in radical sanation. However, the act of consent is non-existent in a marriage invalid due to incapacity to assume the essential marital obligations. And, according to can. 1162, 1, a marriage cannot be radically sanated if consent is lacking in either or both of the parties.¹⁰⁵ In virtue of this canon, therefore, a marriage invalid on the basis of can. 1095, 3^o, cannot be radically sanated as consent, which is the intrinsic efficient cause

104 (cont'd) *competenti auctoritate concessa, secumferens dispensationem ab impedimento, si adsit, atque a forma canonica, si servata non fuerit, necnon retractionem effectuum canonicorum ad praeteritum.*"

¹⁰⁵Can. 1107: *"Etsi matrimonium invalide ratione impedimenti vel defectus formae initum fuerit, consensus praestitus praesumitur perseverare, donec de eius revocatione constiterit."*

¹⁰⁵Can. 1162, 1: *"Si in utraque vel alterutra parte deficiat consensus, matrimonium nequit sanari in radice, sive consensus ab initio defuerit, sive ab initio praestitus, postea fuerit revocatus."*

of marriage, is lacking from the beginning. Hence, it seems canonically more appropriate to use the procedure of can. 1159¹⁰⁶ which requires renewal of consent according to the norms of law in the convalidation of marriage in which one or both parties were suffering from the incapacity of can. 1095, 3^o.

Conclusion

It seems obvious from a critical review of select Rotal sentences that the more recent jurisprudential approaches to cases involving psychic impotence take into account the reliable data and valid conclusions of modern psychiatry and psychology. Adhering steadfastly to the rules of canonical interpretation, jurisprudence reaffirms the basic principles concerning the juridic notion of impotence: that is, its constituent elements, its essential characteristics, etc. Accordingly it sets forth the following principles:

First, male psychic impotence consists in a man's

¹⁰⁶Can. 1159, 1: "Matrimonium irritum ob defectum consensus convalidatur, si pars quae non consenserat, iam consentiat, dummodo consensus ab altera parte praestitus perseveret.

2: "Si defectus consensus probari nequeat, satis est ut pars, quae non consenserat, privatim et secreto consensum praestet.

3: "Si defectus consensus probari potest, necesse est ut consensus forma canonica praestetur."

inability to attain and/or maintain an erection suitable for penetration of and ejaculation in the vagina. Similarly, female impotence is verified when a woman is unable to receive the erect penis and the ejaculate in the vagina. This inability, either on the part of the man or on the part of the woman, can result from causes of a psychic nature. If the requirement of antecedence and perpetuity is verified in each case, this psychic inability would constitute the diriment impediment of impotence as defined in can. 1084, 1.

Second, jurisprudence clearly states that the presumption concerning the difficulty in proving antecedence and perpetuity in cases of psychic impotence is not insuperable. Moral certainty with regard to the antecedence and incurability (perpetuity) can be acquired by ascertaining the presence of the disposing cause(s) underlying the alleged incapacity for intercourse. It is true that this task is difficult but not impossible.

Third, jurisprudence admits that even relative psychic impotence can constitute the diriment impediment. In this case, the dysfunction or psychopathology may mutually impede sexual intercourse in a particular relationship but not in another. Moreover, the condition may be incurable in that particular relationship and not in another.

Fourth, jurisprudence recognizes the effects of psychic impotence beyond the inability to perform the sexual act. In some cases, the causes underlying psychic impotence can

give rise also to the juridic incapacity to contract marriage either for reason of lack of discretion of judgment or incapacity to assume the essential obligations of marriage.

Fifth, jurisprudence affirms the natural right of a person to marry by advising tribunals against imposing a vetitum on those who are found to be only relatively impotent. In such cases, adequate precaution is to be taken to prevent future invalid unions by requiring the afflicted person(s) to seek expert help.

Sixth, one can see a constant reminder in jurisprudence concerning the importance and value of using experts in judging cases involving psychic impotence. Even though a judge is not absolutely bound by the opinion(s) of experts, one must have a serious reason for setting it aside. No tribunal can afford to allow this reminder to go unheeded if the protection of rights and the administration of justice are to be considered its primary mission.

According to the hypothesis proposed at the beginning of this study, a person who is psychically impotent, that is, impotent due to causes of a psychic nature, is incapable of contracting marriage because of his/her inability to establish the "partnership (consortium) of the whole of life." This would be true for two distinct juridic reasons: (1) such a person may be incapable of sexual intercourse apt for the generation of offspring, (2) he/she may be incapable of assuming the essential obligations of marriage, especially the right-obligation to "an intimate interpersonal relationship" (communio vitae). Most of our research has dealt with psychic impotence circumscribed by the principles of can. 1084, 1 of the new Code.

Our historical and canonical analysis of impotence in general and psychic impotence in particular has led us to draw the following conclusions:

First, the constitutive elements of the impediment of impotence are: on the part of the male, the incapacity for erection of the penis, penetration of and deposition of the ejaculate in the vagina; and on the part of the female, the lack of a vagina capable of receiving the erect penis and the ejaculate. The controversy over the requirement of verum semen elaboratum in testiculis is to be considered resolved by the decree of May 13, 1977, issued by the Sacred Congregation for the Doctrine of Faith.

Second, the juridic concept of impotence includes the requirements of antecedence, that is, the presence of the condition at the time of contracting marriage, and perpetuity. The requirement of perpetuity, which is a juridic concept and not an event of fact, still remains the most disputed topic both in relation to the diriment impediment of impotence and incapacity to assume the essential obligations of marriage. It should be noted that the juridic notion of "perpetuity" is not identical to the clinical or medical notion of "incurability". For "incurability" to be juridically "perpetual", the disorder or dysfunction must be of such nature (severity) that it cannot be cured through a licit, ordinary and certainly effective (i.e., with moral certainty) remedy. The law does not speak of a theoretically possible cure, but a morally certain practical (actual) cure of the disorder. That means, the question of perpetuity is brought down to the practical realm of here and now and not extended to a possible future event. In other words, the licit, ordinary and morally certain cure for the disorder must be present at the time of exchanging matrimonial consent.

Third, both canonical and medical sciences agree that besides organic and neurological causes, there can also be psychological causes of impotence. The basic medical or clinical postulate behind "sexual dysfunction" is that human sexual response, which is the result of interaction between

the mind and the body, directly affects a person's sexual capacity and functioning. Even though theories concerning causal factors underlying psychic impotence vary, there seems to be substantial agreement to the effect that it is the direct result of abnormal psychic processes which interfere with the normal mind-body interaction in sexual response. Rotal jurisprudence now clearly admits that the clinically diagnosed psychic impotence can constitute the diriment impediment of can. 1084, 1 as long as it is antecedent and perpetual.

Fourth, during the past few decades medical and psychiatric sciences have been reporting "cures" of sexual dysfunction. Often the terminology used in clinical studies seems to imply "amelioration" of the dysfunction rather than elimination of the underlying cause. It is quite possible that certain therapies designed by recent psychiatrists and psychologists are effective in rendering an allegedly impotent person capable of functioning sexually. Nevertheless, the success or failure of such therapies will have to be determined in each individual case as far as its relevance to marriage nullity is concerned. As indicated above, it is the availability of an ordinary, licit and morally certain cure at the time of exchanging consent and not a possible cure in the future that constitutes a juridic cure.

Fifth, the causes underlying a person's incapacity for sexual intercourse (psychic impotence) can affect seriously

other aspects of psychic life as well. The primary focus of our study has been psychic impotence as it is circumscribed by the principles of can. 1084, 1. The essence of marriage is not limited only to the right to sexual acts apt for the procreation of offspring. As a "partnership of the whole of life", marriage consists of several essential components to which the partners have a right. In recent years, Rotal jurisprudence has looked into the effects of psychic impotence on the "partnership" aspects of marriage, more specifically its effects on the "communio vitae" (intimate interpersonal relationship). We feel that this approach is legitimate because the effects of causes which underlie psychic impotence stretch far beyond one sexual act which is sufficient to prove one's juridic capacity to marry. This is an important aspect of psychic impotence which requires further research and study.

Sixth, our study centered on psychic impotence as a sexual dysfunction caused primarily and directly by abnormal psychic processes. But psychic impotence can also be a secondary effect of other sexual disorders, such as the paraphilias, or serious psychiatric disorders, such as hysteria, obsessive-compulsive neurosis, etc. The primary juridic effects of such disorders may be directly related to aspects of conjugal life which are not primarily sexual in nature. It is for this reason that Rotal jurisprudence has dealt with such disorders under can. 1095, 2^o - 3^o. This

presupposes that these jurisprudential approaches imply an intrinsic relationship between psychic impotence and incapacity to contract marriage. This is an important area which is open to further scientific research.

Seventh, practically every Rotal sentence on psychic impotence to date has insisted on the necessity of using clinical experts in assessing marriage cases alleged to be null on grounds of psychic impotence. It is to be noted that the importance of expert clinical advice on the medical and psychiatric aspects of psychic impotence is paramount. If adequate assistance is not sought from experts, there may be danger of subjecting the parties to the case to grave injustice. On the other hand, law itself does not bind the judge to seek expert advice under pain of nullity of the decision. Nevertheless, the principles of justice and equity are expected to prevail in judicial decisions. Expert clinical opinion should be sought on the nature, severity, and prognosis of the underlying condition. Both law and jurisprudence insist strongly on the right of the judge to assess expert reports on the basis of all proofs available to him. In other words, he is not absolutely bound by the conclusions of experts. However, should he decide to reject expert opinions, he must provide in his sentence valid reasons for his action.

Eighth, it is not uncommon for matrimonial courts to impose a vetitum on persons who are judged psychically im-

potent. This is especially true when a person's impotent condition has been found to be absolutely irremediable. Rotal jurisprudence clearly states that a person's natural right to marry is not to be restricted or denied unless there is grave reason to do so. Therefore, it advises against imposition of a vetitum on persons who are diagnosed as being only relatively impotent, that is, impotent in respect to one particular individual or in specific conditions. In such cases, however, adequate precaution is to be taken by pastors so that there is no danger of exposing the person(s) to another invalid union.

Ninth, the judicial investigation of the case involving psychic impotence should be such that the evidence gathered could be used to prove the caput of impotence or incapacity to assume the essential obligations of marriage. This approach can provide justification for the application of the principle of "substantial conformity of sentences". In virtue of this principle, a marriage which has received an affirmative decision on the grounds of impotence (psychic) in the first instance can be declared res quasi iudicata should the second instance decision be affirmative on the grounds of incapacity to assume essential marital obligations based on the same body of evidence. This way the administration of justice can be expedited in cases of this kind.

Finally, we would like to reiterate the fact that progress made both by canonical and medical sciences on the

subject matter of psychic impotence enables us to evaluate marriage cases with greater optimism. Psychiatric and psychological sciences have provided us deeper insights into the inner workings of the human psyche, especially with regard to human sexual response. Because of this, there is the possibility of obtaining objective and reliable data on a person's sexual dysfunction or disorder. Canonical jurisprudence has acknowledged this contribution and has come to the conclusion that psychic impotence can constitute the diriment impediment of impotence if the juridic requirements of antecedence and perpetuity are met in each marriage case. And jurisprudence also admits that it is not impossible to obtain moral certainty with regard to these requirements: "Ad astra per aspera!"

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