

LACK OF DISCRETION OF JUDGMENT:
CANONICAL DOCTRINE AND LEGISLATION*

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The frequency of the heading “lack of discretion of judgment” and of other headings directly involving psychopathology has increased steadily in recent years in causes of marriage nullity.¹ At times, the increase has been so great that the so-called “psychological grounds” of nullity seem to have nearly replaced the other headings under which a person may accuse before the Church the nullity of his or her marriage.² One United States canonist, in his book on declarations of nullity of marriage, written for the laity, has concluded:

Even so, what comes across clearly to those involved in marriage work is that most marriages today which go “on the rocks” can trace their failure to some form of psychological cause.³

* This study presents a part of the results of the author's doctoral research. The complete results (the doctoral dissertation) are to be published in the near future in the series *Analecta Gregoriana*, under the title, *Lack of Discretion of Judgment Because of Schizophrenia: Doctrine and Recent Rotal Jurisprudence*. The author also hopes to present the complement to the present study, namely a study of Rotal jurisprudence in the matter of lack of discretion of judgment, in a future article.

¹ The canonical term, *causa*, is translated cause throughout this article instead of the customary translation, case, in order to distinguish the process in question, i.e., the accusation of nullity of marriage and its resolution in the judicial manner, from other processes involving marriage, e.g., the petition for dispensation from a ratified and non-consummated marriage.

² A canonist of the Archdiocese of Chicago reported that in 1973 “approximately 80% of our 200-plus formal cases are being considered under the grounds of some aspect of psychic incapacity.” John V. Dolciamore, “Interpersonal Relationships and Their Effect on the Validity of Marriages,” *CLSA Proceedings* 35 (1973) 86.

In 1979 Lawrence G. Wrenn reported regarding the tribunal of the Archdiocese of Hartford: “[P]ractically all of our tribunal hearings are conducted in the private offices of the seven psychiatrists who assist our court.” He further affirmed: “About 95 percent of our cases here in Hartford are heard on psychological grounds.” Lawrence G. Wrenn, “Marriage Tribunals and the Expert,” *The Bulletin of the National Guild of Catholic Psychiatrists* 25 (1979) 53-54.

³ Terence E. Tierney, *Annulment: Do You Have a Case?* (New York: Alba House, 1978), pp. 60-61.

In practice, it would seem, in many tribunals in the United States, at least, the presumed grounds in the majority of nullity of marriage causes is lack of discretion of judgment or another “psychological grounds.”⁴ The authors of two very popular manuals on declarations of nullity, written for ecclesiastical tribunal personnel in the United States and Canada, have noted with some concern the magnitude of the increase of causes judged on “psychological grounds.”⁵

The increased frequency of the heading “lack of discretion of judgment” has not always been accompanied by a clarity regarding its exact nature. Likewise, new psychological headings have been employed which are often not clearly related to the lack of discretion of judgment and are not recognized in ecclesiastical jurisprudence as it is exemplified in Rotal jurisprudence.⁶ Often the exact distinction among these various new headings is unclear. The uncertainty and confusion can be shown, for example, in a survey of current English-language manuals on marriage nullity causes in which schizophrenia is involved directly.

The 1978 edition of the manual *Annulments* by Lawrence G. Wrenn lists schizophrenia as a cause under the heading of lack of due competence, the equivalent of the incapacity to assume the obligations of marriage in Rotal terminology, as opposed to lack of due discretion, “an absence, at least temporary absence, of

⁴ An article published in 1982 gives statistics for tribunals in the Eastern United States. Thirty-eight percent conduct “all or most trials with automatic psychological evaluation”; forty-one percent appoint a psychological expert in ninety percent of the cases they judge. See J. James Cuneo, “Lack of Due Discretion: The Judge as Expert,” *THE JURIST* 42 (1982) 148.

A Spanish psychiatrist, in a speech to members of ecclesiastical tribunals in his country, suggested that all petitions for declarations of nullity be examined first by a panel of three psychopathologists. See Baldmero Montoya Trivifio, “Anomalías psicológicas: su naturaleza y sus efectos en orden al compromiso matrimonial,” in *Curso de derecho matrimonial y procesal para profesionales del foro*, Vol. 2, Ponencias del IV Simposio de Miembros de Tribunales Eclesiásticos (Salamanca: Universidad Pontificia, 1977), pp. 211-212.

⁵ J. Edward Hudson, ed., *Handbook II for Marriage Nullity Cases* (Ottawa: Faculty of Canon Law, Saint Paul University, 1980), p. 276; Lawrence G. Wrenn, *Annulments*, 3rd ed. (Toledo, Ohio: Canon Law Society of America, 1978), p. v.

⁶ Various studies have been made of the divergence from Rotal jurisprudence in certain local ecclesiastical tribunals which have introduced new “psychological” grounds of nullity. See, for example: Massimo Fiore, “Profili emergenti della *discretio iudicii* nell'esperienza giuridica anglosassone,” *Ephemerides Iuris Canonici* 36 (1980) 262-301; Bernard Franck, “Le manque de discernement suffisant et l'incapacité à assumer les obligations du mariage, d'après la jurisprudence récente des officialités britanniques,” *L'Année Canonique* 24 (1980) 129-167; idem, “Quelques points de jurisprudence récente des officialités britanniques et allemandes,” *Revue de Droit Canonique* 32 (1982) 186-213.

maturity causing ‘an inability to give consent.’”⁷ A manual from England, *Marriage Annulment in the Catholic Church* by Ralph Brown, lists schizophrenia under the causes for the grounds *amentia*, “a Latin term which refers to a person not being in a position . . . to bring his whole mind to a decision, to making the act of consent,” as opposed to both lack of due discretion caused by “immaturity—emotional and psychological” and the incapacity to assume the obligations of marriage.⁸ A Canadian manual, *Handbook 11 for Marriage Nullity Cases*, edited by J. Edward Hudson, lists schizophrenia as a cause for the “incapacity of human responsibility” which “centers on the impossibility of giving the very object of consent,” seemingly, therefore, the equivalent of the Rota's incapacity to assume the obligations of marriage, as opposed to the “incapacity of the contractual act,” the equivalent of the Rota's lack of discretion of judgment.⁹

The confusion is not limited to English speakers. For example, in an Italian manual of canon law, published in 1980, the author of the section on marriage lists four grounds of defect of consent on the part of the intellect: mental illness, lack of discretion of judgment, error, and deceit.¹⁰ He identifies mental illness with the traditional grounds *amentia*, and defines it as “every disturbance of the mind and heart that impedes the judgment of the intellect or the sufficient use of reason.”¹¹ As causes of the defect, he lists the lack of cerebral function and psychopathological disturbances which include psychoses.¹² Schizophrenia as a psychosis, therefore, would be a direct cause of nullity of consent inasmuch as it “impedes the judgment of the intellect or the sufficient use of reason.” Discretion of judgment, according to the author, when applied to marriage,

consists in that specific disposition of the contracting party by which, beyond his adequate knowledge and understanding of the nature and essential elements of the conjugal state, he is also capable of assuming its rights and obligations.¹³

⁷ Wrenn, *Annulments*, pp. 40-41.

⁸ Ralph Brown, *Marriage Annulment in the Catholic Church: A Practical Guide* (Leigh-on-Sea, Essex: Kevin Mayhew, 1977), pp. 44-48, 50-51.

⁹ Hudson, pp. 187, 190.

¹⁰ Sabino Ardito, “Il matrimonio,” in *Il Diritto nel mistero della Chiesa*, Vol. 3 (Roma: Libreria Editrice della Pontificia University Lateranense, 1980), p. 309.

¹¹ *Ibid.*, p. 309.

¹² *Ibid.*

¹³ *Ibid.*, p. 310.

Clearly, the author has identified discretion of judgment with the Rota's capacity to assume the obligations of marriage. The author does not offer any example of what might cause the lack of discretion of judgment as he understands it.

The obscurity regarding the lack of discretion of judgment and the other “psychological grounds” is disturbing from the theoretical point of view. It is even more unacceptable from the practical point of view, the application of canonical doctrine in actual marriage nullity causes. Viewing the situation, one theologian has accused the Church of a certain hypocrisy, namely teaching the indissolubility of marriage while being ready to declare null any marriage on psychological grounds.¹⁴ Whatever the response to this accusation, a clear doctrinal exposition of the heading “lack of discretion of judgment” and of the other headings directly related to psychopathology is needed if the coherence between canonical practice and the Church's teaching on marriage is to be visible. The present study aims to foster the needed clarification by indicating possible confusions regarding the lack of discretion of judgment, and by presenting canonical legislation and doctrine in the matter.

I. POSSIBLE CONFUSIONS REGARDING THE LACK OF DISCRETION OF JUDGMENT

Two chief areas of confusion have emerged in the discussion of the effect of mental illness on marriage consent. The first is fundamental. It concerns the nature of the influence of mental illness on marriage consent. Does it constitute an impediment to marriage, a defect in consent, or some other form of nullity? The second is terminological. What is the difference between insanity (*amentia*) in the classical canonical terminology and the lack of discretion of judgment? What is the difference between the canonist's understanding and the psychiatrist's understanding of the single term, insanity? A third confusion has entered, then, as a result of the misunderstandings generated in the first two areas. Out of the lack of clarity, some canonists have deduced that the grounds of lack of discretion of judgment is a catch-all for declaring null marriages which cannot be accused of nullity under the other accepted headings. The conclusion drawn is that it is not a

¹⁴ Dennis, J. Doherty, “Marriage Annulments: Some Theological Implications,” *THE JURIST* 38 (1978) 182-183. See also Joseph P. Zwack, *Annulment: Your Chance to Remarry Within the Catholic Church* (New York: Harper and Row, 1983), pp. 6-7.

grounds of nullity at all, but rather of divorce. Each area of confusion must be examined individually.

A. Confusion About the Nature of the Grounds

In the earlier-mentioned Italian manual on marriage law the author lists as a grounds of nullity, mental illness.¹⁵ Such a heading is, canonically speaking, inaccurate. Mental illness does not cause directly the nullity of marriage. Rather, its presence in the person, in a specific manner and degree, renders null what has the appearance of a valid act of consent. In fact, not all persons who suffer from a given mental illness, e.g., schizophrenia, are prevented from validly contracting marriage; only those are whose schizophrenia has affected them in such a way that their act of marriage consent does not qualify in the law. It is here that the distinction between psychiatric and canonical categories must be made clear: the psychiatric category describes the pathology of the person, and the canonical category describes how the same pathology prevents valid marriage consent.¹⁶ It is always necessary to maintain well what one author terms “methodological purity,” i.e., the careful distinction of “prejuridical” categories and juridical categories.¹⁷

Canonists agree that according to the requirements of natural law, a person who lacks discretion of judgment does not give valid consent.¹⁸ But how this grounds fits within the various other grounds of nullity is a point of disagreement. Some hold that it is an impediment to consent, like age or impotence; others hold that it is a defect of consent, like ignorance or simulation; finally, others hold that it belongs to a logically prior category, personal incapacity for marriage consent. As will be seen in the presentation of the law in the matter, depending on the particular position canonists hold, different explanations have been given concerning the canon under which lack of discretion of judgment is said to be included implicitly. The confusion is not only theoretical in its implications; it is at the root of the lack of clarity regarding the nature of the grounds.

¹⁵ Ardito, p. 309.

¹⁶ See Pedro Lombardía and Juan Ignacio Arrieta, eds., *Código de Derecho Canónico: Edición anotada* (Pamplona: EUNSA, 1983), p. 656.

¹⁷ Ombretta Fumagalli Carulli, *Il matrimonio canonico dopo il Concilio* (Milano: Guiffre, 1978), pp. 142-143, 198-199.

¹⁸ Mario Ferraboschi, “Le anomalie psichiche nel ‘Corpus’ e nel ‘Codex iuris canonici’: Annotazioni,” in *Studi di diritto canonico in onore di Marcello Magliocchetti*, Vol. 2 (Roma: Officium Libri Catholici, 1975), pp. 529-556.

Before describing the various positions, it should be recalled that the notion of impediment in canon law has undergone significant change. Before the 1917 code it embraced prohibitions established by positive ecclesiastical law, defects of consent, and lack of form. Before the 1917 code, then, the nullifying condition of psychopathology at the time of consent would have been contained logically within the broad notion of impediment. In the 1917 code the separation of the above-mentioned three kinds of conditions was made (c. 1036, 1081, §2, and 1094). Only the conditions in the first category were called impediments. With the distinction in the 1917 code, the question arose regarding whether psychopathology was found among the impediments (in the sense of a prohibition of marriage by law) or among the defects of consent. In the 1983 code the notion of impediment is specified further. The impediments are defined as the conditions which render a person unable (*inhabilis*) to contract marriage (c. 1073), and inability (*inhabilitas*), as opposed to incapacity (*incapacitas*) which renders an act null, is defined as a condition rendering a person unable by law to place an act (c. 10). The impediments are limited to those conditions which by explicit disposition of divine or ecclesiastical law render a person, who per se is capable of contracting marriage, unable to marry. The distinction, however, is not followed fully in the 1983 code. Impotence, for example, remains among the impediments (c. 1084, §1), although it would belong more fittingly among the conditions which by natural law render null the act itself of contracting marriage. Calling to mind the above should help to understand better the various positions taken regarding the grounds of lack of discretion of judgment.¹⁹

For those who hold that the lack of discretion of judgment is an impediment, not a lack of consent, the argument centers on the objective state of inability to form marriage consent because of mental illness. For the party involved, there is no question of advertence to outside force, or to a reason for simulating consent, or to an inadequate knowledge of marriage. In fact, there is no defective consent,

¹⁹ Regarding the notion of impediment in canon law, see Franciscus Xaverius Wernz and Petrus Vidal, *lus Canonicum ad Codicis normam exactum*, Tomus 5, ed. Phillipus Aguirre, 3rd ed. (Romae: Apud Aedes Universitatis Gregoriana, 1946), pp. 176, 182-184.

For a presentation of the debate regarding the proper place of the lack of discretion of judgment among the grounds of nullity, see Federico R. Aznar Gil, “La ‘incapacitas assumendi obligationes matrimonii essentielles’ en la futura codificación,” *Revista Española de Derecho Canónico* 38 (1982) 91-93.

but rather no consent, i.e., the impossibility of consent because of the lack of a fundamental personal quality, the requisite discretion of judgment. Antonio Arregui summarizes this position:

It is a question of a unitary juridical figure by the unitarity of its juridical effects (invalidating inability) and also by the common location of its natural cause (mental disease).²⁰

Those who hold that it constitutes a defect of consent base their argument on the fact that mental illness does not appear in the taxative list of impediments in the 1917 code. They argue, then, that it is contained implicitly among the defects of consent. Authors vary regarding which canon implicitly contains the grounds, according to their conception of mental illness' effect on consent, as will be seen in the discussion of the 1917 code. They agree, however, that because of the effect of mental illness on the intellect or will or both, it causes the consent to be defective.²¹ Mario Ferraboschi writes:

Consequently, the expression, “*able by law*,” according to can. 1081, §1, should only be applied to the impediments provided for explicitly, among which there is not *insanity*. *Insanity* applies only if it implies a *lack of consent*. Consequently, can. 1081, §1 refers to it also, but in the part where it says: “*the consent of the parties creates the marriage*.”²²

Ferraboschi's point is well-taken; the impediments are limited to those listed. Further, it seems difficult to place a ground directly based on natural law among grounds, many of which are based either on positive church law, e.g., orders and the disparity of cult, or on interpretations of natural law, e.g., age and consanguinity, and from which a party can be dispensed. However, neither does the placing of the lack of discretion of judgment among the defects of consent seem proper for it involves not only a lack in the consent but a radical personal incapacity to form consent at all.

²⁰ Antonio Arregui, “Cuestiones sobre la debida discreción mental en el matrimonio canónico,” *Ius Canonicum* 5 (1965) 235.

²¹ Lamberto de Echeverría, ed., *Código de Derecho Canónico: Edición bilingüe comentada por los Profesores de la Facultad de Derecho Canónico de la Universidad de Salamanca*, 2nd ed. (Madrid: BAC, 1983), p. 530; Lombardia and Arrieta, p. 655; Francis G. Morrissey, “Proposed Changes in Canonical Matrimonial Legislation,” *The Catholic Lawyer* 20 (1974) 36.

²² Ferraboschi, p. 551.

A third position holds that lack of discretion of judgment should be placed in a separate, more fundamental category, personal incapacity.²³ A similar position holds that it should be part of a section of general norms regarding marriage consent, which would precede the presentation of impediments and defects of consent.²⁴ The third position avoids the inconsistencies involved in placing the lack of discretion of judgment among either the impediments or the defects of consent. Further, it reflects a fundamental character of the grounds: an incapacity to give consent, directly founded on the nature of man and of his act of marriage consent. The whole question of the relationship of the various grounds of nullity to each other and of their right ordering in the code is in need of further explication.

B. Terminological Confusion

Confusion also has entered into the terminology used to identify the grounds of nullity involved in the case of mental illness at the time of marriage consent. The confusion exists within the terminology used in canonical tradition and between the canonical and psychiatric use of the same term with different meanings.

1. Within Canonical Tradition

First of all, within canonical tradition different terms have been used to refer to mental illness and to persons suffering from it, but it has not always been clear what the distinctions among the various terms were, if there were differences in their meanings at all.²⁵ Without entering the discussion of all the various terminological distinctions, two fundamental points of clarification must be made.

The first clarification has to do with the whole body of terms, both classical and recent, used in the matter. The distinction between insanity (*amentia*) and semi-insanity (*dementia*, *semi-amentia*) has come down in canonical tradition to describe on the one hand a mental illness affecting all areas of the person's life, and on the other hand a mental illness affecting only a particular area of the

²³ Pietro A. D'Avack, “Per una riforma giuridica del matrimonio canonico,” *Il Diritto Ecclesiastico* 85/ 1 (1974) 17-18.

²⁴ Klaus Lüdicke, *Psychisch bedingte Eheunfähigkeit: Begriffe—Abgrenzungen-Kriterien* (Frankfurt am Main: Peter Lang, 1978), pp. 78-90.

²⁵ Regarding the history of canonical terminology concerning mental illness and the resulting confusion, see Antonio Stankiewicz, “L'incapacità psichica nel matrimonio: Terminologia, Criteri,” *Ephemerides Iuris Canonici* 36 (1980) 234-241.

person's life but equivalent to insanity in its effect on marriage consent.²⁶ Another terminology distinguished full or perfect insanity (*amentia plena vel perfecta*) from partial or imperfect insanity (*amentia semiplena vel imperfecta*) simply to indicate a mental illness which was present in a degree sufficient to invalidate consent from one not so.²⁷ Two other categories were often used as well: weakness of mind (*debilitas mentis*) or habitual partial lack of the use of reason, and disturbance of the mind (*mentis exturbatio*) or full actual, not habitual, lack of the use of reason. The prior gradually took in all cases of partial insanity, i.e., mental illnesses or mental states which did not reach the stage of depriving the person of the required use of reason. The latter referred to mental states, e.g., severe drunkenness or drug intoxication which at a given time deprived the person of the required use of reason.²⁸

Whether or not the distinctions in themselves are accurate, canonically they offer nothing to the identification of mental illness which entails nullity of consent. In the case of marriage consent, it matters not whether the mental illness or state could be described as affecting all areas of a person's life or only a part, whether it is a momentary or habitual condition. What matters is that the mental condition of the person at the time of consent was not equal to the act. One term will suffice to express the nullifying effect of the condition. Discussing the various juridical distinctions in the matter, Alexander Dordett concludes:

The determination that an illness, medically viewed, has not yet reached the critical stage and, consequently, as an *amentia imperfecta* or *non plena* escapes a full effect in the juridical sphere, is indeed correct according to the terminology presented here, which is nevertheless superfluous. One remains in the juridical sphere, and thus there is only one *amentia* which is nullifying of marriage; it is juridically always an *amentia plena*. Its contrary is the soundness of mind for a marriage contract, also, therefore, if the diagnosis of the doctors might be an impairment in the sense of an *amentia semiplena*.²⁹

²⁶ Pietro Gasparri, *Tractatus canonicus de matrimonio*, Vol. 2, 2nd ed. (In Civitatis Vaticanae Statu: Typis Polyglottis Vaticanis, 1932), pp. 14-15.

²⁷ Pietro A. D'Avack, *Cause di nullita e di divorzio nel diritto matrimoniale canonico*, 2nd ed. (Firenze: Dott. Carlo Cya, 1952), p. 177.

²⁸ D'Avack, *Cause*, pp. 207, 218.

²⁹ Alexander Dordett, *Eheschließung und Geisteskrankheit: Eine Darstellung nach der Rechtssprechung der S. Romana Rota* (Wien: Herder, 1977), pp. 21-22.

In Dordett's observation one notes, too, the confusion caused by psychiatry's and canon law's use of the same term, insanity, with different meanings, a difficulty to be addressed in the following section.

The lack of clarity in the use of multiple terms, not adequately distinct, has been further aggravated by the introduction of new terminology, specifically the lack of discretion of judgment. While canonical doctrine justifiably did not want to develop prematurely juridical categories for the interpretation of the rapidly expanding knowledge of psychiatry, for some time there has been a need to evaluate and unify various juridical categories which have filled up the vacuum and, especially, to clarify the relationship of the lack of discretion of judgment to the classical category, insanity.³⁰

The terminological confusion has been noted in studies of Rotal jurisprudence. M. A. Therme noted at the conclusion of his study of the Rotal decisions for 1968 in causes of nullity involving directly psychiatric conditions:

It seems to me that, in these eighteen sentences studied, the lack of discretion of mind, the lack of internal freedom of the will, the incapacity to assume the obligations of marriage are matters taken up with a certain "confusion" and are not sorted out as autonomous headings of nullity.³¹

If the confusion surfaced in the reading of Rotal decisions, then as might be expected, it existed to the same or greater degree on the local level.³² One author lamented the absence of any juridical measure "for determining the level of discretion of judgment, freedom of consent, equilibrium of the faculties, or capacity to assume the obligations of marriage."³³ Are these only different ways of expressing the same grounds, or is each a distinct grounds of nullity? What is it that the canonist wants to measure in each case?

The second point of clarification centers on the question, what is the difference between the classical canonical category "insanity" and the more recent category

³⁰ Dordett, pp. 20-22; Stankiewicz, pp. 246-251.

³¹ M. A. Therme, "Les causes de nullite d'ordre psychologique dans les sentences rotale de 1968," *L'Annee Canonique* 24 (1980) 354.

³² C. J. Hettinger, "Matrimonial Jurisprudence: The Second Postconciliar Decade," *THE JURIST* 37 (1977) 365-373.

³³ Miguel Aisa Gall, "Anomalias psiquicas: doctrina juridica y jurisprudencia," in *Curso de derecho matrimonial y procesal canonico para profesionales del foro*, 2:239.

“lack of discretion of judgment”?³⁴ There has been a great divergence in the understanding of the meaning of lack of discretion of judgment as was noted above.

The fact of the matter is that the lack of discretion of judgment is simply a more purely juridical term for insanity, a term which causes confusion because of its medical meaning (which is to be considered in the final part of the discussion of terminological confusion). It is possible to distinguish the two terms as expressions of severity of mental illness, but, as we noted earlier, the particular level of the mental illness, from a medical point of view, is not juridically significant for marriage consent. All that counts is that it is at the level which prevents the giving of consent.³⁵ The confusion here may have its source in the borrowing of terminology from church penal law without making the necessary adaptations. For example, while more or less discretion of judgment is important for judging culpability in penal law, in marriage law it has no application. There either is or is not consent; there cannot be more or less consent.³⁶ After a detailed discussion of the possible distinction of the two grounds, Urbano Navarrete concludes:

From this analysis, which could seem too subtle, one concludes how difficult it is, not so say impossible, to distinguish as autonomous juridical entities the two headings of nullity, which for convenience we can call “insanity” and “lack of discretion.” It is shown to be even more difficult if two other considerations are kept in mind: (1) “Insanity” includes necessarily “lack of discretion,” as is obvious; (2) the unity of the higher faculties according to scholastic psychology and the unity of the personality as it is seen by modern psychology—the latter which, by means of definite aspects, stresses yet more the psychic unity of man inasmuch as it tends to affirm that any psychic disturbance whatever touches in a certain sense the whole vegetative, sensitive, affective,

³⁴ Regarding the qualification “more recent,” it should be noted that the term discretion of judgment is not a postconciliar invention. It appears, for instance, in a decision of the Rota in 1920. See *coram* Prior, July 27, 1920, *Sacrae Romanae Rotae Decisiones seu Sententiae*, Vol. 12, p. 204, n. 3.

³⁵ G. Taylor, *Catholic Marriage Tribunal Procedure: An Introduction* (Bangalore: Theological Publications in India, 1981), pp. 132-135. See, also E. De Bekker and G. Taylor, *Parish Priests and Marriage Cases*, rev. ed. (Bangalore: Theological Publications in India, 1980), p. 114.

³⁶ Edward M. Egan, “The Nullity of Marriage for Reason of Insanity or Lack of Due Discretion of Judgment,” *Ephemerides Iuris Canonici* 39 (1983) 38-40.

volitive, and intellectual life of the individual—make it more difficult to be able to accept the “lack of discretion” as a heading of nullity or “a fact impeding of rights” different from that constituted by the incapacity to understand and to will in a general sense, that is to say, the incapacity to form purely theoretical judgments or judgments of theoretical evaluation with the consequent incapacity to make responsible decisions.³⁷

Put another way, insanity, in the canonical understanding, “inevitably entails a lack of due discretion of judgment regarding marriage.”³⁸ Several studies of Rotal jurisprudence in the matter agree that the two terms are equivalent. In fact, lack of discretion of judgment has been called “insanity in the Rotal sense.”³⁹ Often quoted is the affirmation in the decision *coram* Sabattani on February 24, 1961:

The only measure of sufficient consent is the discretion of judgment proportionate to marriage.⁴⁰

2. Between Canon Law and Psychiatry

The second area of terminological confusion is explained more simply. It arises from the use of the same term, insanity, by both canonists and psychiatrists, but with a different meaning. The term “insanity” has a long history in canon law and has a distinct juridical sense, i.e., the general notion of a mental illness which deprives the person of the requisite discretion of judgment. It is also, however, a prejuridical term which in common parlance carries usually the connotation of mental illness in either the qualified or terminal stage, and in psychiatry can refer to a species of illness, the psychoses. A contemporary dictionary of psychiatry defines insanity thus:

³⁷ Urbano Navarrete, “Problemi sull'autonomia dei capi di nullità del matrimonio per difetto di consenso causato da perturbazioni della personalità,” in *Perturbazioni psichiche e consenso matrimoniale nel diritto canonico* (Roma: Officium Libri Catholici, 1976), pp. 124-125.

³⁸ Egan, p. 17. See also *ibid.*, pp. 16-17, 45 (where Egan maintains the distinction between the two according to the criterion of severity, i.e., insanity being equivalent to lack of use of reason in a person suffering from schizophrenia in the terminal stage).

³⁹ Ralph Brown, “A Canonical Problem of Mental Incompetence in Marriage,” *The Heythrop Journal* 10 (1969) 150; Stankiewicz, pp. 239-240, 251.

⁴⁰ “Unica mensura sufficientis consensus est discretio iudicii matrimonio proportionata.” *Coram* Sabattani, February 24, 1961, *Sacrae Romanae Rotae Decisiones seu Sententiae*, Vol. 53, p. 118, n. 4.

A vague term for *psychosis*, now obsolete. Still used, however, in strictly legal contexts such as insanity defense.⁴¹

To avoid the continuation of vagueness and confusion of terms in the conversation between psychiatrist and canonist, it would seem best to discontinue the canonical use of the term “insanity” in reference to marriage consent and to use instead the term “lack of discretion of judgment,” which is not a prejudicial term and which includes all the phenomena earlier placed under the category of insanity.

C. Confusion About Marriage Law Itself

The third confusion which has entered the canonical field by means of the opening created by the two previously discussed forms of confusion is radical in its implications. Because of the frequent use of imprecise categories, like immaturity, coupled with the uncertainty about how exactly these often-called “existential” categories constitute grounds for nullity, some canonists have begun to see the lack of discretion of judgment as a way of dealing with causes which could not be decided favorably under any other heading, a way to a declaration of nullity where no grounds of nullity are apparent. One canonist wrote in 1973:

In present tribunal practice, most annulments are granted because of lack of due discretion. In general, this basis includes any insufficiency of consent as described above that is not contained in 1 through 7 [Ignorance, The Intention Not to Cohabit, etc.].⁴²

The same author calls the grounds a “subterfuge” used to dissolve marriages when intolerable “personal incompatibility” has intervened, for whatever reason.⁴³ Here must be noted, too, the whole debate on the relativity of the grounds, i.e., that the nullity rests not on the incapacity of one or the other party or both as individuals but on a defect of the relationship between the two. Limitations of space do not permit a full discussion of the question of “relative incapacity,” but

⁴¹ Subcommittee of the Joint Commission on Public Affairs of the American Psychiatric Association, ed., *A Psychiatric Glossary*, 5th ed. (Washington: American Psychiatric Association, 1980), p. 52.

⁴² Stephen J. Kelleher, *Divorce and Remarriage for Catholics?* (Garden City: Doubleday, 1973), p. 152; see also pp. 159-160.

⁴³ Kelleher, pp. 166-167.

it should be noted that such a concept is extremely ill-defined and easily gives way to the undermining of the contractual nature of marriage consent.

Presenting itself as an existential approach to marriage and claiming its basis in the teachings of the Second Vatican Council, the above position has extended itself to an attack on the contractual nature of marriage and then on the constitution of marriage by consent.⁴⁴ As a result, marriage, described as an exchange of persons, is said to be measured according to whether such a sharing of persons manifests itself in fact during the marriage.⁴⁵ One canonist writes:

The concept of marriage cannot remain, therefore, exclusively limited by the coordinates of its initial moment, because it would be equivalent to leaving in oblivion the projection that this same moment institutes in the life of the spouses. Neither is it to be outlined strictly as a contract in which are joined only ideas of legally exactable obligations, or juridical duties, and of subjective rights viewed almost solely through the prism of a vindication before tribunals.⁴⁶

The logical conclusion of these affirmations is that the basic canonical understanding of marriage is itself in serious question.⁴⁷

In the context of the marriage cause, the conclusion has been drawn that the Church has begun to grant dissolutions of marriage by the tribunal process, even though the same dissolutions still are called declarations of nullity. The further observation has been made that, perhaps, in the light of the above incoherence, the Church should devise a whole new manner of dealing with marriage causes.⁴⁸ Jean

⁴⁴ J. Dominian, “Vatican II and Marriage,” *The Clergy Review* 52 (1967) 25; John T. Finnegan, “Marriage Law,” *Chicago Studies* 15 (1976) 283, 291, 299.

⁴⁵ Dominian, p. 26.

⁴⁶ Santiago Panizo Orallo, *Nulidades de matrimonio por incapacidad (Jurisprudencia y apuntes doctrinales)*, Bibliotheca Salmanticensis, 49 (Salamanca: Universidad Pontificia de Salamanca, 1982), p. II.

⁴⁷ Eugene C. Kennedy, “Signs of Life in Marriage,” in *Divorce and Remarriage in the Catholic Church*, ed. Lawrence G. Wrenn (New York: Newman Press, 1973), pp. 131--132.

⁴⁸ Jean Bernhard, “De la 'praxis' canonique a la theorie: interpretation nouvelle de l'insuffisance d'engagement,” *Revue de Droit Canonique* 29 (1979) 146; idem, “L'evolution de la jurisprudence matrimoniale: le point de vue d'un canoniste,” *Studia Canonica* 15 (1981) 78-81.

Bernhard, who has made several studies of the new practice of ecclesiastical tribunals in causes involving psychological grounds and who finds much merit in it, nevertheless asks the telling question:

In other terms, do we not find in the current canonical practice very clear beginnings of a slipping from the expression “marriage declared null” to that of “marriage declared dissolved by itself,” at least in some cases of incapacity, of insufficiency, of lack of discretion of judgment?⁴⁹

The too rapid growth of practice without a clear and solid theoretical foundation has its most serious consequences in the confusion regarding the very nature of matrimonial law.

II. THE LAW CONCERNING LACK OF DISCRETION OF JUDGMENT

It is not the place here to treat the entire history of ecclesiastical legislation regarding mental illness and marriage consent. The subject has been treated amply elsewhere.⁵⁰ It is important, however, to examine the principal legislation up to the present to know the mind of the legislator in the matter.

A. Before the 1917 Code

The legislation up to the time of the 1917 code is important. In the absence of any more specific norm in the code regarding the effect of mental illness on marriage consent, it remained the point of reference for doctrine and jurisprudence. Two dispositions of law in the matter are found in the *Corpus Iuris Canonici*.

The first disposition is found in the Decree of Gratian and is attributed to Pope Fabian. It reads:

Neither the insane man nor the insane woman are able to contract; but if it will have been contracted they ought not to be separated.⁵¹

⁴⁹ Bernhard, “De la ‘praxis,’” p. 150.

⁵⁰ See, for example: R. Colin Pickett, *Mental Affliction and Church Law: An Historical Synopsis of Roman and Ecclesiastical Law and a Canonical Commentary* (Ottawa: The University of Ottawa Press, 1952), pp. 15-88; William M. Van Ommeren, *Mental Illness Affecting Matrimonial Consent*, Canon Law Studies, 415 (Washington: The Catholic University of America Press, 1961), pp. 3-42.

⁵¹ “Neque furiosus, neque furiosa matrimonium contrahere possunt; sed si contractum fuerit, non separentur.” c. 26. C.XXXII, q. 7.

Setting aside the questions of the actual source of the legislation and of the significance of the second part of the norm, what is said about the effect of insanity on marriage consent? The text is clear. Insanity constitutes an incapacity to enter the contract of marriage, in other words, to give marriage consent.⁵²

The second piece of legislation is found in the Decretals of Pope Gregory IX. In a letter to the Bishop of Vercelli, Pope Innocent III wrote:

The beloved son R. Alexandrinus, soldier, has set forth before us that he joined his daughter, Rufina, in marriage to a certain Opizo Lancavecla, not knowing that Opizo was insane. Whence he has asked from us humbly that we deign to have regard for both himself and his daughter. Since, moreover, the same woman is unable to remain with that man who suffers continual insanity, and since legitimate consent has not been able to take place because of the mental aberration of the insanity, we enjoin Your Fraternal Reverence by apostolic letter that after the truth has been searched out more fully, if you will have recognized the matter to be thus, you take care to separate the above-mentioned persons from each other after the refuge of an appeal has been removed. [Given in Rome at St. Peter's, the fifth Kalends of January, 1205.]⁵³

Here, again, insanity is said to prevent marriage consent from taking place. In the same manner, Saint Raymond of Periafort, compiler of the Decretals of Pope Gregory IX, writes:

Likewise, if an insane or mentally disturbed person say those words [suitable for the contracting of marriage], he does not contract because he cannot consent with his mind.⁵⁴

According to the legislation, insanity nullifies what appears to be marriage consent because the person so afflicted is incapable of giving consent.

⁵² Regarding the origin of the text, see Stankiewicz, pp. 235-236. Regarding the interpretation of the second part of the norm, see c. 25. C.XXXII, q. 7; Stankiewicz, p. 236.

⁵³ c.24.X.IV.I.

⁵⁴ Raimundus de Pennaforte, *Summa de matrimonio*, Universa Bibliotheca furlis, Vol. 1, Tomus C, ed. Xaverio Ochoa and Aloisio Diez (Roma: Commentarium pro Religiosis, 1978), tit. 2, n. 7.

B. The 1917 Code

The 1917 code is silent regarding the grounds of nullity involved in cases of insanity or lack of discretion of judgment.⁵⁵ It clearly presumes, however, that there is a grounds. Canon 1982 requires the opinion of experts “also for causes of lack of consent because of insanity.”⁵⁶ The Instruction *Provida Mater Ecclesia* simply explicates the above procedural norm without adding any new light on the nature of the grounds.⁵⁷

In the silence of the 1917 code, various unsatisfactory attempts have been made to explain the nature of the invalidating force of the lack of discretion of judgment. The pressure to provide such an explanation was increased substantially by the rapidly expanding knowledge in the field of psychiatry precisely in the period after the promulgation of the code.⁵⁸ A look at the various explanations will help to isolate what in the law up to the 1983 code was held to be the nature of the grounds. It, too, will indicate the need to understand thoroughly the classical doctrine in the matter.

The first explanation reduces lack of discretion of judgment to the grounds of ignorance defined in canon 1082 of the 1917 code. Lack of discretion of judgment is seen as a kind of insufficiency of intellectual insight into marriage, which continues after puberty, i.e., after the age at which ignorance can no longer be presumed (can. 1082, §2).⁵⁹ In the classic Wernz-Vidal text one reads:

Since consent ought to be made to that which is the object of the contract, he is incapable of entering the marriage contract, who does not know its object or is not gifted yet with such *maturity* of judgment

⁵⁵ Piero Antonio Bonnet, *L'essenza del matrimonio canonico: Contributo alto studio dell'amore coniugale, I, Il momento costitutivo del matrimonio*, (Padova: CEDAM, 1976), p. 222.

⁵⁶ The full text of the canon reads (with words quoted in italics): “*Etiam in causis defectus consensus ob amentiam, requiratur suffragium peritorum, qui infirmum, si casus ferat, eiusve acta quae amentiae suspicionem ingerunt, examinent secundum artis praecepta; insuper uti testes audiri debent periti qui infirmum antea visitaverint.*” *Codex Iuris Canonici* (1917), c. 1982.

⁵⁷ Sacra Congregatio de Disciplina Sacramentorum, “Instructio servanda a tribunalibus dioecesanis in pertractandis causis de nullitate matrimoniorum (Die 15 m. augusti a. 1936),” *Acta Apostolicae Sedis* 28 (1936) 341-342, artt. 139, 141-148, 152-154.

⁵⁸ For a summary of the various attempts to deduce the grounds of lack of discretion of judgment from the texts of the 1917 code, see Arregui, pp. 217-226.

⁵⁹ Joseph Bank, *Connubia Canonica* (Romae: Herder, 1959), pp. 341-342, 351-353.

and *discretion* that he can understand the nature and force of the object of the contract, such that, at least, in general, he grasps the conjugal burdens and responsibilities.⁶⁰

Various authors employ a similar argumentation. It is common among them to distinguish insanity and lack of discretion of judgment within the ignorance grounds: insanity being equivalent to the lack of use of reason of children under seven years of age, and lack of discretion of judgment being the lack of the greater knowledge of marriage found usually in persons at the age of puberty. Thus, discretion of judgment became known in jurisprudence as the “puberty norm.”⁶¹

So strong became the identification of discretion of judgment and cognitive level that some authors distinguished discretion of judgment from “due discretion,” “a quality of the spiritual faculties.”⁶² In 1975 a special committee of the Canon Law Society of America offered the following criticism of the draft of the code in the matter:

Canon 292, §2 on consensual capacity should speak of “defectu discretionis debitae” rather than “defectu discretionis *iudicii*” to indicate that marital discretion implies more than cognitional factors.⁶³

The explanation that the ground of lack of discretion of judgment is contained in the ground of ignorance has been subject to much criticism. The chief argument is based on the involvement of both intellect and will in discretion of judgment and on their corresponding mutual affliction by mental illness.⁶⁴

⁶⁰ Wernz and Vidal, p. 589.

⁶¹ For an example of the type of argumentation employed in the explanation, see Eudoxio Castañeda Delgado, “Sacra Romana Rota, Coram R.P.D. Pericle Felici, Ponente, Nullitatis matrimonii (ob defectum discretionis in viro affecto P.G.) Decisio diei 3 decembris 1957,” *Revista Espanola de Derecho Canonico* 13 (1958) 709-711.

⁶² John T. Finnegan, “The Capacity to Marry,” *THE JURIST* 29 (1969) 142.

⁶³ “Report of a Special Committee of the Task Force of the Canon Law Society of America on the Marriage Canons of the Proposed *Schema Documenti Pontificii Quo Disciplina Canonica de Sacramentis Recognoscitur*,” in *CLSA Proceedings* 37 (1975) 212.

⁶⁴ Dordett, pp. 19-20; Javier Hervada and Pedro Lombardia, *El derecho del Pueblo de Dios: Hacia un sistema de derecho canónico*, Vol. 3 (Derecho matrimonial [1]) (Pamplona: EUNSA, 1973), pp. 377-379; John R. Keating, *The Bearing of Mental Impairment on the Validity of Marriage: An Analysis of Rotal Jurisprudence*, *Analecta Gregoriana*, 136, (Roma: Gregorian University Press, 1964), pp. 11-13, 151-153.

The second explanation finds the grounds of lack of discretion of judgment in canon 1082, §1 of the 1917 code, too, but in a more complex derivation. According to this position, a double norm is contained therein, one for the intellect and one for the will. The intellect is to have the knowledge of marriage (discretion or deliberation of the intellect), acquired normally at puberty, and the will is to have the capacity (deliberation or deliberation of the will) sufficient to commit a mortal sin, acquired normally at the age of reason.⁶⁵

In part, at least, the complicated theory hoped to reconcile a perceived contradiction between the teachings of Saint Thomas Aquinas and Thomas Sanchez on the question, a topic to be discussed in the doctrinal section which follows. The “puberty norm” is retained for the requirement of discretion, and the so-called “mortal-sin norm” is retained for the requirement of deliberation.⁶⁶

The artificiality of the division of the intellect and the will in discretion, according to this explanation, may save what were perceived to be contradictory classical doctrines, but it corresponds poorly to the unity of the spiritual faculties in practical judgment. How can the will of a person be capable of being attracted to and choosing marriage while the intellect remains incapable of understanding properly the nature of marriage?⁶⁷

The third explanation seems to rest the discretion of judgment in a spiritual faculty additional to the intellect and the will, the so-called critical faculty. The verb “seems” is used because it is not altogether clear how the critical faculty relates to the intellect and will. The following is a typical rendition of the explanation:

In the understanding two factors come into play: the cognoscitive and the critical; by the first the understanding knows what a thing is (from the particular it arrives at the universal). By the critical faculty, nevertheless, one reaches judgment, ratiocination, pondering; thanks to

⁶⁵ Eudoxio Castañeda Delgado, *La locura y el matrimonio (Psiquiatria y Jurisprudencia de la Sagrada Rota Romano)* (Valladolid: Editorial Sever-Cuesta, n.d.), pp. 4655; Van Ommeren, pp. 123-125, 159-160.

⁶⁶ Arturo Alonso Lobo, Lorenzo Miguélez Domínguez, and Sabino Alonso Moran, *Comentarios al Código de Derecho Canónico*, Vol. 2 (Madrid: BAC, 1963), p. 605, footnote 9.

⁶⁷ Hervada and Lombardia, pp. 376-377.

the critical faculty we analyze the fittingness or not of a thing, we measure and weigh its values for the subject and determine its fittingness.⁶⁸

The notion of the critical faculty required for marriage consent remains obscure. As a separate spiritual faculty, it enjoys no basis in the metaphysical psychology of Saint Thomas Aquinas. What the notion wants to express seems rather to be an operation of the intellect and will.⁶⁹ The explanation, also, has not won acceptance in Rotal jurisprudence.⁷⁰ As an abstraction of the spiritual activity of man in the act of consent it, too, seems to divide intellect and will by placing the discretion of judgment in an operation of the intellect or a separate faculty very similar to the intellect.

The fourth explanation locates the discretion of judgment in the will alone (of which canon 1081, §2 speaks), its internal freedom, as opposed to its freedom from external coercion (the force and fear of which canon 1087, §1 speaks). The internal freedom often is not described in more detail than to say that it is freedom from internal coercion.⁷¹ Sometimes it is held to be a heading of nullity distinct from lack of discretion of judgment.⁷²

Here, again, the question must be asked, what mental illness or disturbance of the mind destroys the internal freedom of the will without simultaneously affecting the intellect? And, if the claim is made that no psychopathology need be involved, i.e., that some pressure or non-pathological immaturity is the cause (as the explanation to follow claims), what has become of the freedom of the will?

The fifth explanation sometimes is involved with the previous ones.⁷³ It equates lack of discretion of judgment with affective immaturity. The position is difficult to isolate. For one author, it must be a pathological immaturity in order possibly to affect marriage consent.⁷⁴ For another, it is called insufficient maturity

⁶⁸ Aisa Goñi, p. 226.

⁶⁹ Hervada and Lombardia, p. 377.

⁷⁰ Charles Lefebvre, “De defectu discretionis iudicii in rotali iurisprudencia,” *Periodica* 69 (1980) 565-566.

⁷¹ Juan Arias Gomez, “Los conflictos matrimoniales como presuncion de anomalias invalidantes del matrimonio in fieri: sus consecuencias: Comentario a la sentencia c. Del Amo de 7-5-1975,” *Ius Canonicum* 16 (1976) 258-259.

⁷² Panizo Orallo, pp. 161-166.

⁷³ Mario F. Pompedda, “Ancora sulle nevrosi e personality psicopatiche in rapporto al consenso matrimoniale,” in *Borderline, nevrosi e psicopatie in riferimento al consenso matrimoniale nel diritto canonico* (Roma: Officium Libri Catholici, 1981), p. 47.

⁷⁴ Panizo Orallo, pp. 29-30.

(lack of discretion of judgment) and is distinguished from both what is called a structural, constitutional trouble (habitual—*amentia* or *dementia*) and what is called a temporary difficulty (actual—*perturbatio mentis*). He defines it by means of a catalogue of symptoms.⁷⁵ For a third author, it is simple immaturity which could be caused by mental retardation, epilepsy, alcoholic intoxication, disorders of late adolescence, or pressured consent.⁷⁶

There are many difficulties with the fifth position. First of all, the term “immaturity” is hopelessly ambiguous.⁷⁷ More fundamentally it, too, fails to express the necessary unity of operation of the intellect and will in the act of consent. Mario Pompedda, Rotal judge, writes.:

In reality, *affectivity* being the whole of the psychic reaction of the individual before the passing situations of life and considering that affectivity is distinguished conceptually from psychic processes of intellectual character and that nevertheless in reality the affective and intellectual processes always are joined such that our thought impresses itself on our sentiments and, also, the force with which affects are impressed can falsify even logic: holding all this in mind, it seems that well with reason the chapter on affectivity in relation to the capacity to express a human act, and, thus, to give a full consent, be absorbed into that aspect of the “discretion of judgment” that considers the capacity of free choice, the capacity implicit in that concept.⁷⁸

There have been several other not very widely held explanations of the foundation of the grounds of lack of discretion of judgment in the 1917 code. One explanation finds it in the canon on simulation (c. 1086, §2), another in the canon on force and fear (c. 1087, §1), and another in the canon on error of quality which redounds to error of person (c. 1083, §2, 10). None of these explanations takes

⁷⁵ This is the position of Klaus Lüdicke, as proposed in a conference given at Bonn in 1979 to German-speaking officials and reported by Bernard Franck. See: Franck, “Quelques points,” 198-199 (summary of Lüdicke's position), 203-206 (listing of the twenty symptoms).

⁷⁶ Wrenn, *Annulments*, pp. 92-105.

⁷⁷ Pericle Felici, “De morbis psychicis quoad matrimonialem consensum,” *Periodica* 68 (1979) 544.

⁷⁸ Mario F Pompedda, “Nevrosi e personalita psicopatiche in rapporto al consenso matrimoniale,” in *Perturbazioni psichiche e consenso matrimoniale nel diritto canonico* (Rome: Officium Libri Catholici, 1976), p. 58.

account of the true nature of the grounds, a radical incapacity to give consent, not a defect in the consent.⁷⁹

Finally, another position identifies the lack of discretion of judgment with the incapacity to assume the obligations of marriage. The identification is based on the assertion that lack of discretion of judgment is not an incapacity to give consent but an impediment, an incapacity to bind oneself to marriage, called “moral impotence” by some.⁸⁰ The same argumentation is used by other authors to distinguish the two grounds.⁸¹ There has been much confusion in the whole matter, especially about the nature of the incapacity to assume the obligations of marriage.⁸² Pompedda explains that the incapacity to assume the obligations of marriage is a defect of consent like the lack of discretion of judgment; the former being a defect of efficacy of the consent, the latter a lack of sufficiency of the consent.⁸³

The question remains, if a psychopathology so affects a person that he cannot assume the obligations of married life, how can he have, at the same time, the discretion of judgment to consent to marriage?⁸⁴ Would it not be true that also the so-called psychosexual anomalies, historically the catalyst for the development of the grounds of incapacity to assume the obligations of marriage, prevent discretion of judgment for marriage? Even if it is not acceptable to refer to them in terms of psychopathology, how can so deeply rooted sexual anomalies not affect the affective and, thus, intellectual functioning of the person in a matter which directly involves man's sexual nature? These questions are not beside the point because, until distinction between the incapacity to assume the obligations of marriage and the lack of discretion of judgment is clarified, the nature of the lack of discretion of judgment remains obscured.

C. The 1983 Code

The 1983 code ends the silence of church legislation regarding the effect of mental illness or disturbance on marriage consent. In canon 1095, the first canon

⁷⁹ Klaus Lüdicke examines a number of these explanations. See Lüdicke, pp. 51-63.

⁸⁰ Dolciamore, p. 85; Keating, *The Bearing*, pp. 166, 168-169, 179, 191; John R. Keating, “The *Caput Nullitatis* in Insanity Cases,” *THE JURIST* 22 (1962) 410-411.

⁸¹ Bernard de Lanversin, “Levolution de la jurisprudence recente de la S. Rote en matiere de maladies mentales (A propos d'un cas d'Epilepsie psycho-motrice),” *L'Annee Canonique* 15 (1971) 408-409.

⁸² Aisa Gorii, pp. 234-239; Lüdicke, pp. 25-27.

⁸³ Pompedda, pp. 61-64. See also Egan, p. 11.

⁸⁴ Arias Gomez, pp. 238-239.

in the section concerning marriage consent, three incapacities for consent are listed: the lack of “sufficient use of reason” (c. 1095, 1°); “the serious lack of discretion of judgment regarding the essential rights and duties of marriage to be handed over and accepted mutually” (c. 1095, 2°); and the inability “to assume the essential obligations of marriage because of causes of a psychic nature” (c. 1095, 3°).⁸⁵ From the discussions of the Pontifical Commission for the Revision of the Code of Canon Law, it is clear that the canon is intended to end the silence and to define the grounds as an incapacity to give consent. In the official publication of the commission it is reported:

Even if the principles regarding the incapacity of giving valid marriage consent are contained implicitly in the law in force, it was seen as advantageous that the same be expressed more distinctly and clearly in the new law.⁸⁶

The juridical qualification of the ground is incapacity.⁸⁷ The canon is, then, a kind of general norm for the whole section on marriage consent; it establishes what is the requisite capacity to give marriage consent. From the discussions it is also clear that the ground is not a species of the ground of ignorance but rather a separate ground based on the disturbance of the intellect and will due to mental illness.⁸⁸ Further, the discussions make it clear that the lack of discretion of judgment is not to be viewed, distinct from insanity, as a species of preadolescent ignorance.⁸⁹ Further, the incapacity to assume the obligations of marriage is defined as a species of the incapacity to give consent.

A question remains regarding the text of the 1983 code. What is the distinction between the lack of sufficient use of reason and serious lack of discretion of judgment? From what can be gathered from the reports of the commission, the lack of sufficient use of reason would seem to be a more severe degree of the serious lack of discretion of judgment. The 1975 draft of the canon in question read:

⁸⁵ “Can. 1095—Sunt incapaces matrimonii contrahendi: 1° qui sufficienti rationis usu carent; 2° qui laborant gravi defectu discretionis iudicii circa iura et officia matrimonialia essentialia mutuo tradenda et acceptanda; 3° qui ob causas naturae psychicae obligationes matrimonii essentialia assumere non valent.” *Codex Iuris Canonici* (1983).

⁸⁶ *Communicationes* 3 (1971) 77. See also *Communicationes* 7 (1975) 38-39.

⁸⁷ *Communicationes* 7 (1975) 43-44.

⁸⁸ *Ibid.*, p. 46.

⁸⁹ *Ibid.*, p. 42-43, 46-47.

Can. 296 (new).

They are incapable of contracting marriage:

- 1) Who are affected by a mental illness or serious disturbance of the mind such that they, as lacking the use of reason, are unable to give matrimonial consent;
- 2) Who suffer the serious lack of discretion of judgment regarding the matrimonial rights and duties to be handed over and accepted mutually.⁹⁰

When it was suggested that the words in number one, “as lacking the use of reason,” be removed, the consultants responded that these words were necessary “because they indicate the difference between the defect treated in no. 1 and the defect treated in no. 2.”⁹¹ In other words, the source is the same, mental illness, but the effect of the illness differs in gravity in the two cases. In fact, then, the sufficient use of reason is contained within the discretion of judgment as a number of commentators on the 1917 code had indicated already. Antoni Stankiewicz, Rotal judge, writes:

And precisely in regard to this canon [can. 296, no. 2 of the 1975 schema], which *canonizes* the passage from the criterion of the *use of reason* to the *greater discretion of judgment proportionate* to the marital duties, it would be permitted to observe that the no. 2 cited absorbs the criterion of the use of reason, indicated in no. 1, inasmuch as the *simple use of reason* is necessary but not sufficient for marriage consent. The criterion of the *use of reason* is implicit in the criterion of “discretion of judgment proportionate to marriage” as its minimum essential element. And, in fact, Rotal jurisprudence examines also the cases of the more serious illnesses, like the psychoses, under the aspect of the *lack of discretion of judgment*, thus not making reference to the *simple use of reason*.⁹²

Logically and for reasons of juridical precision of terminology, it would seem better to have used only the category “lack of discretion of judgment.” A look at some of the first commentaries on the 1983 code in the matter of the distinction between lack of sufficient use of reason and lack of discretion of judgment shows

⁹⁰ *Communicationes* 9 (1977) 369.

⁹¹ *Ibid.*, p. 370.

⁹² Stankiewicz, p. 256.

that the lack of clarity here is giving place to the re-entry of many of the earlier distinctions which have caused confusion.

One commentary on the 1983 code describes the sufficient use of reason as “the capacity to know-understand the reality outside man.”⁹³ It describes its action in three successive moments: apprehension of the thing, reflection on it, and judgment.⁹⁴ The author distinguishes it from discretion of judgment or “personal maturity,” a capacity of the will alone.⁹⁵ Concerning lack of discretion of judgment he writes:

The admission of these principles and of this defect of consent, as autonomous from the lack of use of reason, was not universally accepted in traditional canonical doctrine, because it only admitted that the crisis of the human act could come from the understanding, since the will was considered as a blind faculty that followed ineluctably the dictates of reason.⁹⁶

Here enters the problem of the splitting of the intellect and will in the understanding of how mental illness affects consent.

Another commentator sees in the distinction the old distinction between insanity (*amentia*) and semi-insanity (*dementia*).⁹⁷ Another brings back the “critical faculty” theory to explain the specificity of the discretion of judgment.⁹⁸ Still other commentators view the distinction in terms of the psychiatric division between the psychoses, on the one hand, and the neuroses and personality disorders, on the other hand.⁹⁹ The last interpretation both fails to respect “methodological purity”

⁹³ Federico R. Aznar Gil, *El nuevo derecho matrimonial canonico* (Salamanca: Universidad Pontificia de Salamanca, 1983), p. 268.

⁹⁴ *Ibid.*, p. 268.

⁹⁵ *Ibid.*, p. 268.

⁹⁶ *Ibid.*, p. 268. One commentator finds it necessary to caution against an interpretation of lack of discretion of judgment in terms of immaturity. See Norbert Ruf, *Das Recht der katholischen Kirche nach dem neuen Codex Iuris Canonici für die Praxis erläutert* (Freiburg im Breisgau: Herder, 1983), p. 268. For just such an interpretation, see George V. Lobo, *The New Marriage Law* (Bombay: St. Paul Publications, 1983), pp. 64-65.

⁹⁷ Fumagalli Carulli, “La disciplina del matrimonio e il magistero conciliare,” in *La normativa del nuovo Codice*, ed. Ernesto Cappellini (Brescia: Queriniana, 1983), p. 206.

⁹⁸ Antonio Abate, “La costituzione del matrimonio nel nuovo Codice di diritto canonico,” in *La nuova legislazione canonica • Introduzione al Diritto del Popolo di Dio* (Roma: Urbaniana University Press, 1983), pp. 285-286.

⁹⁹ Francesco Bersini, *Il nuovo diritto canonico matrimoniale: Commento giuridico-teologico-pastorale* (Torino Leumann: Elle Di Ci, 1983), pp. 79-80.

and risks conveying the idea that every psychosis results in the lack of the sufficient use of reason or that a psychosis could not be the cause of the lack of discretion of judgment, the sufficient use of reason remaining intact.

It is to be hoped that the distinction in the 1983 code between lack of sufficient use of reason and lack of discretion of judgment will not regenerate old misunderstandings or create new ones regarding the discretion of judgment, “the only measure of sufficient consent.”¹⁰⁰

Having examined at length the somewhat complicated story of the dispositions of the law regarding the effect of mental illness on marriage consent, it is necessary to examine now the classical and accepted doctrine in the matter.

III. CANONICAL DOCTRINE CONCERNING LACK OF DISCRETION OF JUDGMENT

The classical canonical doctrine in the question is found in two authors chiefly, Saint Thomas Aquinas and Thomas Sanchez. After studying their texts on the question of discretion of judgment and marriage consent, attention will be given to contemporary interpreters of their teaching.

A. Saint Thomas Aquinas

The doctrine of Saint Thomas Aquinas has been considered a solid frame of reference in the difficult question of the discretion of judgment in marriage consent. The reason is the metaphysical foundations of its psychological and ethical insights.¹⁰¹ It should be said from the start that Saint Thomas did not treat the question of the effect of insanity on marriage consent directly in terms of discretion of judgment but rather in terms of use of reason.¹⁰² He taught that insanity is a “momentary impediment which hinders the cause of marriage, that is, consent.”¹⁰³ The reason it impedes consent is “because there cannot be consent where there is not use of reason.”¹⁰⁴

¹⁰⁰ Coram Sabattani, February 24, 1961, *Sacrae Romanae Rotae Decisiones seu Sententiae*, Vol. 53, p. 118, n. 4.

¹⁰¹ Heinrich Flatten, “Ehekonsens and Geisteskrankheit,” *Trierer Theologische Zeitschrift* 63 (1954) 267-268.

¹⁰² Stankiewicz, pp. 247-248.

¹⁰³ *Supplem.* 111^{ac}, q. 58, a. 3, ad 3.

¹⁰⁴ *Supplem.* 111^{ac}, q. 58, a. 3.

What does Saint Thomas mean by the use of reason? The criterion of use of reason for him is not simple but rather has three levels according to the reason's gradual natural development and strengthening. In the first stage man neither grasps a thing by himself nor is he able to grasp it through others; in the second stage man cannot grasp a thing on his own, but he is able to do so through others; in the third stage he is able to grasp things both by himself and with the help of others. According to Saint Thomas, man reaches the second stage at the end of his first seven years, and the third stage toward the end of his second seven years with regard to those things which pertain to himself (because natural reason more quickly develops with regard to them). But he adds that, with regard to matters outside himself, man's reason reaches its development toward the end of the third seven years.¹⁰⁵ Applying the doctrine to engagement and marriage, he held that the end of the first seven years (the second stage) was sufficient for engagement because the person already then was capable of promising something in the future and the end of the second seven years (the third stage) for marriage because the person was able to oblige himself with respect to matters concerning himself.¹⁰⁶

Two things should be noted. First, engagement was a promise which could be made by oneself or by others and did not have the kind of moral binding-force which it has today. Clearly, at the age of seven, the engagement promise was being made through others and had force only “inasmuch as those between whom it is contracted, arriving at the required age, do not reject it.”¹⁰⁷ Interestingly enough, in the same text Saint Thomas, speaking of the different laws regarding age for engagement and for marriage, employs the term discretion interchangeably with the term reason. He states: “[T]hey [the male and the female] acquire at the same time the use of discretion which for engagement only is required.”¹⁰⁸

The second point to be noted is that the age set for the use of reason or discretion required to marry is an approximation for Saint Thomas. Discussing the impediment of age, which he explains precisely in terms of the requirement of the use of discretion, Saint Thomas states:

¹⁰⁵ *Supplem. III^{ae}*, q. 43, a. 2.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, ad I.

¹⁰⁸ *Ibid.*, ad 3.

Because, however, the precepts of the positive law follow that which exists in many, if someone arrives at the required development before the above time, such that the strength of nature and reason *supplies for the lack of age*, the marriage is not dissolved.¹⁰⁹

The use of discretion or reason depends finally on each individual's development.

It is clear from the foregoing analysis that the criterion of use of reason in Saint Thomas is interchangeable with the criterion of use of discretion. Therefore, the criterion of the use of discretion can be understood when Saint Thomas speaks of mental illness and marriage consent, even if Saint Thomas did not use it in his altogether brief treatment of insanity's effect on marriage consent.

How does Saint Thomas describe further the use of reason or discretion in a decision like marriage? For him, it is a quality of the intellect and will, acting together, by which man is the master of his act of consent. The Angelic Doctor explains:

Man differs, however, from other irrational creatures in this: that he is the master of his acts. Whence alone those actions of which man is the master are properly called human. Man is, however, master of his acts through reason and will: whence also free will is said to be the faculty *of the will and reason*. Those actions, therefore, are called properly human, which proceed from the deliberated will.¹¹⁰

The absolute unity of intellect and will in acting, i.e., the will having deliberated or the deliberate will, is what makes an act distinctively human.¹¹¹

Saint Thomas describes the cooperation of intellect and will with regard to action (the practical judgment) on two levels. On the first level, which is called the simply practical or the speculatively practical judgment, reason offers a general imperative to the will, to which the will consents, e.g., this should be done or this is good to do. Action does not follow immediately. On the second level, which is called the practically practical judgment in classical scholastic philosophy,

¹⁰⁹ *Supplem. III^{ae}*, q. 58, a. 5.

¹¹⁰ *ST*, I^a-II^{ae}, q. I, a. 1. See also *ST*, I^a, q. 83, a. 1; *Quaes. disput. de veritate*, q. 24, a. 2; *In III Sent.*, dist. 26, q. 1, a. 1, ad 4; *SCG*, Lib. 1, cap. 72.

¹¹¹ *ST*, I^a-II^{ae}, q. 6, a. 2.

the reason intimates something to a person by moving him to it: and such an intimation is expressed by a verb in the imperative mood, for example, when it is said to someone: *Do this*.¹¹²

Action follows immediately.

The unity of the intellect and will is expressed well by the definition of the will as “intelligent desire.”¹¹³ In discussing choice, Saint Thomas states:

And, therefore, as the Philosopher says, in Book Six of the *Ethics*, [that] choice is the inquiring-desiring intellect, so that he might show decision in some manner to belong both to the will, around which and out of which the inquiry is made, and to the inquiring reason.¹¹⁴

To summarize, the capacity for the act of marriage consent is measured according to the development of the use of reason or discretion which is understood as the unitary action of both intellect and will in practical judgment. The only measure for the use of discretion is marriage, that is the strength of reason, of the intellect and will in the practical judgment, required for marriage consent.

B. Thomas Sanchez

The exact teaching of Sanchez regarding the requisite discretion for contracting marriage is disputed. With many canonists, it has been a commonplace to affirm that Sanchez, in opposition to Saint Thomas Aquinas, taught that the discretion sufficient for committing a mortal sin was the discretion required for marriage consent.¹¹⁵ The age of reason or seven years of age, then would mark the time when a person normally should possess the consensual capacity. In many authors, the doctrine is repeated without question. Putting aside the question in moral

¹¹² *ST*, I^a-II^{ae}, q. 17, a. 1. The whole analysis of practical judgment is taken from the same text. For the classical scholastic presentation, see Paulus Siwek, *Psychologia Metaphysica*, 7th ed. (Romae: Apud Aedes Universitatis Gregoriana, 1965), pp. 458, 461, 473.

¹¹³ Siwek, p. 422.

¹¹⁴ *ST*, I^a-II^{ae}, q. 14, a. 1, ad 1. In the body of the article, Saint Thomas quotes Aristotle in defining choice as “premeditated desire” (*ST*, I^a-II^{ae}, q. 14, a. 1).

¹¹⁵ See, for example: Aznar Gil, “La ‘incapacitas,’” pp. 70-71; Angelo Di Felice, “La ‘discretio iudicii matrimonii proportionata’ nella giurisprudenza rotata,” in *Perturbazioni psichiche e consenso matrimoniale nel diritto canonico*, p. 21; A. C. Jemolo, *Il matrimonio nel diritto canonico* (Milano: Francesco Vallardi, 1941), p. 123; Keating, *The Bearing*, p. 133; Pickett, pp. 86-87; Van Ommeren, pp. 33-34.

theology regarding whether a seven-year-old can commit a mortal sin or not, the position on the required intellectual-volitional capacity for marriage seems strange, especially for someone of Sanchez’ quality as a canonist.¹¹⁶ It will be necessary to look at his texts to be certain about what exactly he taught.

The text of Sanchez, which has led so many to think that he taught the so-called “mortal-sin norm” or standard of discretion of judgment, is found in his *On the Holy Sacrament of Matrimony*, Book One, On Engagement. Speaking of the promise of engagement, Sanchez notes the following underlying principles: first, the promise includes an act of the ordering and deliberating intellect and of the will binding the soul itself and making the promise; second, it can be defective in two ways, either by lack of deliberation or by lack of intention to bind oneself and to promise.

He proceeds, then, to treat the first lack, the lack of deliberation. Here he states that the lack of deliberation can arise either from the act itself, i.e., because it is done immediately and without forethought, or from the subject of the act, i.e., because he is incapable of deliberation. The subject is incapable either because he lacks the required senses by which the nature and force of engagement is known, i.e., the case of a deaf and mute person or a person mute from birth and blind, or because he lacks reason, i.e., the case of the insane and the intoxicated.¹¹⁷ When an act of promise in engagement fails because of a lack in itself, i.e., the unpremeditated act, the reason is that the subject must have that discretion required to commit serious sin.¹¹⁸ Sanchez writes:

Nevertheless, it must be said that that deliberation suffices and is required which would suffice for matter of deadly sin, such that the consent would be mortal sin; whence, if someone, pushed by anger or by another impulse of emotion, should contract engagement, if the emotion be so great that it has obscured the judgment of reason and has impeded the deliberation required for mortal sin, such that, if in that quick emotion he killed a man, it would not be mortal: then the engagement will not be valid because of lack of discretion.¹¹⁹

¹¹⁶ Egan, p. 22.

¹¹⁷ Thomas Sanchez, *De sancto matrimonii sacramento* (Venetiis: Apud Nicolaum Pezzana, 1737), Lib. 1, Disp. 8, n. 1.

¹¹⁸ On the question of the unpremeditated act, see *ibid.*, nn. 3-4.

¹¹⁹ *Ibid.*, n. 5.

Sanchez applies the same criteria to the lack in the person, the case of the insane and intoxicated. Clarifying that the failure comes from a lack of deliberation, Sanchez writes:

And, thus, let the conclusion be, that, in order for engagement to be valid, it is required that both contracting parties be in possession of their faculties, and that they have the use of reason: Wherefore, if either is insane, the engagement is invalid. ... From which [texts from the *Corpus Iuris Canonici*] it is established that nothing demanding free consent, which engagement and marriage require, can be done by an insane person.¹²⁰

The mention of marriage together with engagement has led some to conclude that Sanchez held the same norm of discretion for both engagement and marriage. It is the perceived contradiction here between what Sanchez affirms and what Saint Thomas Aquinas taught that led to the earlier-mentioned double requirement for the discretion of judgment to marry, the “puberty norm” for the intellect (Saint Thomas’ teaching) and the “mortal-sin norm” for the will (the supposed teaching of Sanchez).

The perception, however, does not seem to be the reality. Several authors, especially Hartmut Zapp in his doctoral dissertation dedicated to the question of mental illness in Sanchez’ theory of consent, find clear indications that Sanchez taught the requirement of a greater discretion for marriage than for engagement.¹²¹ First of all, Sanchez, in Book One itself, offers as support of the mortal-sin norm for engagement the fact that the engagement can be broken by the will alone of the young person when he has reached puberty, a possibility which clearly does not exist for marriage.¹²²

Secondly, in Book Seven, discussing questions of impotence, Sanchez explicitly states that not only the capacity for sexual intercourse but also the

¹²⁰ Ibid., n. 15. Sanchez describes the whole process of deliberation in a manner which conforms to Saint Thomas Aquinas’ understanding. See Sanchez, Lib. 1, Disp. 8, n. 7.

¹²¹ Dordett, pp. 14-15; Hans Niklaus Fässler, *Die Schizophrenie als Ehenichtigkeitungsgrund im kanonischen Recht: Versuch einer Bewertung der Schizophrenie nach der Spruchpraxis der Sacra Romana Rota* (Freiburg in der Schweiz: Paulusdruckerei, 1951), p. 36; Stankiewicz, p. 248; Hartmut Zapp, *Die Geisteskrankheit in der Ehekonsenslehre Thomas Sanchez’* (Köln: Bohlau, 1971), especially conclusions given on pages 129 through 132.

¹²² Sanchez, Lib. 1, Disp. 16, nn. 15-16.

discretion proper to the “very serious and perpetual bond of marriage” is required for consent. He writes:

Intercourse, much less the attempt at it, does not bring on at all a presumption of the discretion sought for marriage; however, it makes potency to be presumed. On the contrary, however, nearness to puberty permits discretion to be presumed, not, however, potency. ... The reason is: because at a tender age there is found sometimes the capacity for intercourse, ... although, however, at that time usually there is not present as much discretion as is desired for the very serious and perpetual bond of marriage.¹²³

From the above one perceives no significant difference between Saint Thomas’ and Sanchez’ teaching.

Against the argument that Sanchez applied the mortal-sin norm to marriage consent, Zapp offers three strong arguments. First, all the texts on the mortal-sin norm are taken from Book One which in Sanchez’ “clearly organized treatise on marriage” concerns engagement alone.¹²⁴ Further, Zapp points out, historically the concepts of engagement and marriage were distinguished very clearly.¹²⁵

Secondly, in the texts in question there is found generally only the term engagement, not the terms engagement and marriage. The terms engagement and marriage appear together with the term engagement in a passage (see above at footnote 120) where earlier the term engagement alone is employed. Zapp argues that it hardly would seem justified to conclude, then, that Sanchez applied the same teaching to engagement and marriage.¹²⁶

Finally, Sanchez indicates as capable of engagement all those who can enter marriage; those unfit for marriage are unfit, also, for engagement. He notes, as the exception, those who enter a valid engagement but cannot contract valid marriage. It is here that the dual requirement of potency and of capacity of judgment or discretion enters. When they or one of them is lacking, then those who have entered a valid engagement nevertheless remain incapable of marriage consent.¹²⁷

¹²³ Sanchez, Lib. 7, Disp. 104, q. 5, n. 27.

¹²⁴ Zapp, p. 129.

¹²⁵ Ibid., pp. 129-131

¹²⁶ Ibid., p. 131.

¹²⁷ Ibid., pp. 131-132.

It seems then that Sanchez, like Saint Thomas Aquinas, required for marriage consent the discretion of judgment suited to marriage. In describing the act of deliberation he follows Saint Thomas' analysis of the joint activity of the intellect and the will. Saint Thomas' doctrine, therefore, finds confirmation in Sanchez. The classical doctrine remains unified: mental illness affects marriage consent by preventing the discretion (the united activity of intellect and will in practical judgment) required for entering so serious a state, a discretion which is achieved usually at the time of puberty.

C. Contemporary Presentations

The fundamental insight of Saint Thomas and Sanchez continues to be expressed today. Richer understanding of the act of consent through the findings of psychology and psychiatry has been integrated with the classical doctrine. A brief look at some contemporary presentations of the classical doctrine will illustrate the integration and make visible the abiding truth of the classical teaching in the context of contemporary psychology. It is not possible here to study in detail all the contemporary presentations of Saint Thomas' and Sanchez' teaching. The work of Piero Antonio Bonnet, from the point of view of canonical doctrine, and the work of the Rotal judges Egan and Pompedda, from the point of view of canonical jurisprudence, have been chosen as representative expressions of the classical teaching on discretion of judgment.

Bonnet places the entire discussion of discretion of judgment in the context of man's spiritual activity as understood by Saint Thomas Aquinas. The spiritual activity of man, his knowing and willing, is directed to the good: it is "the dynamic expression of the idea."¹²⁸ Man's whole development is the "actualization of the idea in the dynamic of willing."¹²⁹ In other words, as man develops, he expresses in action his growing knowing and willing activity in response to the good. If intellect and will are distinguished logically in order to comprehend more fully their activity, ontologically they are one in human acting in general, and in marriage consent in particular.¹³⁰ The unified operation of intellect and will in human acting is what is meant by discretion of judgment.

Concerning discretion of judgment in marriage consent, Bonnet writes:

¹²⁸ "Espressione dinamica dell'idea." Bonnet, *L'essenza*, p. 270.

¹²⁹ "[L]'attualizzazione dell'idea nella dinamica del volere." Bonnet, p. 276.

¹³⁰ *Ibid.*, pp. 280-281.

It is necessary, thus, that the contracting parties not only be capable of understanding the truth but of making, as well, a right evaluation of it in order that they be considered under this aspect the adequate sufficient cause of that act of love so totally and integrally human, which is marriage in its constitutive moment. Nevertheless, we hold that that valutative [appraisal], if it can be considered a distinct aspect, must not by this, at least ordinarily, be separated from the other elements that make up that process so *profoundly and intimately unitary*, which is human knowledge for which has to be acknowledged, together with a developing dynamism, an *absolute and intrinsic harmony* of development, which imposes necessarily a single criterion for any component, when one wants to pick out a particular level of development.¹³¹

When Bonnet speaks of human knowledge in marriage consent, he intends the spiritual activity which is knowing and willing at one and the same time.

Egan describes discretion of judgment as practical judgment or deliberate will. In practical judgment, according to Egan,

the will, the rational appetite enters upon the scene. The intellect presents certain realities as good (beneficial, fitting) or bad (detrimental, unfitting). However, none are all good or all bad, at least as presented. Consequently, the will is free to choose to pursue or not to pursue the particular object which the intellect offers for its consideration. The decision, however, is made in concert with the intellect. Indeed, the activity is all of a piece, a mutual effort which is in a certain sense somewhat misrepresented when the operations of the intellect and will are described separately in order to explain the whole which they constitute.¹³²

Egan shows the various ways of describing the discretion of judgment which have been employed in Rotal jurisprudence, and concludes that the notion of practical judgment most accurately identifies it.¹³³

Pompedda describes the discretion of judgment in similar categories:

¹³¹ *Ibid.*, p. 266.

¹³² Egan, p. 14.

¹³³ *Ibid.*, pp. 17-21.

In truth, where there is deliberation, that is, where the subject reaches a definitive, practico-practical, according to the Scholastics, judgment, in particular, for example, concerning this marriage to contract, the intellect and the will each have a proper part inseparable from each other. It is the intellect which properly forms that practico-practical judgment, but it is the will which causes the intellect to view that object under the aspect of value. It does not happen, in fact, that we choose the reasons in order that, then, we set ourselves to choose such an object: but we reach this self-determination through the reciprocal causality of the intellect and of the will.¹³⁴

The inseparability of the activity of the intellect and of the will, stressed in the notion of practical judgment, reflects properly the spiritual unity of man.

Bonnet describes more in detail the level of development which brings the discretion of judgment fitting for marriage consent. The specific aspect of development involved is heterosexual relationships. The measure is the increasing awareness of both a person's own and the other's nature and consequent dignity. Bonnet marks the time for the development in late adolescence for most persons. He writes:

Only in this moment, becoming present with evergrowing strength the awareness of the virtues which constitute the dignity of man, the adolescent will begin to value them as much in his own person as also in others.¹³⁵

Bonnet isolates the intellectual and volitional moments of the discretion of judgment in consent for the purpose of clearer understanding.

In the intellectual moment the person plumbs "the sensible fact of the future sexual gift" to know the reality which it symbolizes, "manifests" the profound and, by nature, exclusive and perpetual communication in "the mystery of a union in which a man and woman mutually complement one another."¹³⁶ The volitional moment is the attraction of the person to the opposite sex under the control of the free determination to the particular person. Bonnet explains:

¹³⁴ Pompedda, "Nevrosi," p. 63. See also idem, "Ancora," pp. 42-45.

¹³⁵ Bonnet, p. 252.

¹³⁶ *ibid.*, p. 238. See also p. 98.

Thus where it would be possible to show in an individual the absolute lack of heterosexual attraction, as, for example, being pushed exclusively toward one's own sex, or also, who while there is alive in him such a tendency towards the opposite sex, it, nevertheless would be necessitated absolutely to a determined choice: or, in any case, in the one or in the other instance, he would not have respectively an inclination to the other sex or a capacity of free determination as ordinarily can be found in the last phase of adolescence; in each of these hypotheses it would be judged, in our opinion, that one is in the presence of a subject deprived of that minimum capacity of willing that has to be retained as required for contracting marriage.¹³⁷

The intellectual and volitional moments of the single reality of discretion of judgment for marriage manifest, then, the development of the individual toward the good which is marriage. As stated above, Bonnet's careful analysis of human development indicates late adolescence as ordinarily the time for such discretion to be achieved in a person.

Egan, commenting on the long debates in canonical circles concerning the measure of discretion of judgment required for marriage, states that the only measure is marriage itself, what Bonnet describes as the intellectual and volitional moments of "knowing" the reality of marriage consent.¹³⁸ There is no subjectivity involved in the criterion of marriage itself. Discussing the criterion in the context of the ecclesiastical judge who examines a cause of nullity of marriage because of mental infirmity, Egan writes:

The only norm, therefore, in cases which concern us here is marriage itself. Thus, in simplest terms, the function of the judge in such cases is to compare demonstrated limitations of capacity with true insight into what a marriage is and draw the appropriate conclusion. His work is consequently an exercise in intuition, but not merely subjective intuition. For he is considering two existential realities, namely proven compromising of intellect and will and an exclusive, life-long relationship between a man and woman which is ordered by nature itself to the procreation of children.¹³⁹

¹³⁷ *Ibid.*, p. 278.

¹³⁸ For a history of the various norms proposed in Rotal decisions, see Dordett, pp. 14-19, 87-90.

¹³⁹ Egan, p. 25.

Pompedda, who describes the two inseparable moments of the discretion of judgment required for marriage consent as critical knowledge and freedom of choice, states that doctrinally and in jurisprudence there is agreement on one criterion to measure such discretion.¹⁴⁰ He states concerning the measure:

[T]here is required a sufficient equality—we would say a *due proportion*—between the free will of the contracting party (which is the taking-charge of one's self), and the commitment to establish that very intimate communion of life, which constitutes marriage “in factio esse,” in its existence.¹⁴¹

Pompedda and Egan both stress that what is required is not some perfect understanding and prudence, the perfection of human development, but the discretion which in man's natural growth is found at a certain age and will continue to grow or mature after marriage.¹⁴²

Clearly, then, a person who has attained a certain age when ordinarily this discretion of judgment for marriage is present and yet does not enjoy such discretion, either temporarily in the moment of consent itself or as a habitual condition, must suffer from some pathology, temporary or chronic. The pathology must have so infected the person that the intellect and will together cannot express the knowing and loving act of marriage consent.

There are authors who hold that no pathology need be present to hinder discretion of judgment. If there is no pathology, then by what category would one describe the lack of a capacity in a person which God gives human nature at a certain stage of its development in the individual? Diego De Caro, psychiatric expert for the Rota, writes:

It is obvious that it is extremely dubious to consider apart from true mental pathology these so-called *disturbances of the intellect and of the will*; whence it is that a “psychological incapacity” understood in these terms could not surely not have deficiency and morbidity connotations.¹⁴³

¹⁴⁰ Pompedda, "Ancora," pp. 49-50; idem, "Nevrosi," pp. 55-57, 60-62.

¹⁴¹ Pompedda, "Nevrosi," p. 66.

¹⁴² Egan, pp. 25-26, 36-38; Pompedda, "Nevrosi," pp. 58-59.

¹⁴³ Diego De Caro, "La cosiddetta incapacitas psychologica' in riferimento alla validita del consenso matrimoniale secondo il diritto canonico," *Monitor Ecclesiasticus* 108 (1983) 213.

If the cause of the incapacity for consent is not some pathology by which the parties remain irresponsible for the action, then it must be some invalidating condition for which, at the moment of consent, they are freely responsible, and therefore the grounds of nullity would not be lack of discretion of judgment.

When lack of discretion of judgment no longer has its cause in some pathology, then every “unhappiness” in marriage suddenly becomes a sign of nullity of consent. In fact, the “unhappiness” may be quite simply the invitation to live more intensely “conjugal charity,” to find true happiness in the acceptance of suffering for love's sake.¹⁴⁴ Egan points out that in Rotal jurisprudence, those suffering from a psychosis in the prodromal stage, a neurosis, or personality disorder are not presumed to be incapable of consent because of lack of discretion of judgment. Only those in the qualified stage of a psychosis or beyond it are presumed to be incapable in such a manner.¹⁴⁵ In the prior cases it would have to be shown that the quality of the illness and its possible particular relationship to the giving of marriage consent had affected seriously the person's discretion of judgment. By means of such presumptions the Rota reflects the proper respect for man's free action in giving consent, for the nature of marriage contracted validly by the same consent, and for man's capacity, with the help of divine grace, to live faithfully the same consent.

IV. CONCLUSION

It is hoped that the study presented here has elucidated both the confusions surrounding the grounds “lack of discretion of judgment” and the other psychological headings, and the canonical legislation and doctrine underlying these grounds. What remains is to address a current reinterpretation of the classical doctrine by means of the psychology of vocation.¹⁴⁶ The reinterpretation seeks to integrate the proven findings of psychology, especially regarding the subconscious emotions, with the classical canonical doctrine. It establishes itself on the solid ground of Christian anthropology and provides, thus, an invaluable tool for the

¹⁴⁴ Ombretta Fumagalli Carulli, *Intelletto e volonta nel consenso matrimonial in diritto canonico*, 2nd ed. (Milano: Vita e Pensiero, 1981), pp. 136-137.

¹⁴⁵ Egan, p. 47.

¹⁴⁶ Giuseppe Versaldi, "Elementa psychologica matrimonialis consensus," *Periodica* 71 (1982) 179-209, 231-253.

ecclesiastical judge in the difficult task before him in every nullity of marriage cause. Time and space will not permit its discussion now.

What is clear from the presentation of the classical canonical doctrine is the nature of the grounds “lack of discretion of judgment” and its juridical qualifications. It is not, then, a new grounds, nor a subterfuge by which to declare null marriages which have not been established to be so. Rather, it is the same heading under which the Church throughout the centuries has sought to administer justice to those who accuse the nullity of their marriage because of the influence of psychopathology on the act of marriage consent.

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