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The Impediment of Impotency and The Condition of Male Impotence: A Canonical-Medical Study: Part I

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The Impediment of Impotency and The Condition of Male Impotence

A Canonical-Medical Study

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Editor's Note: The study which follows was prepared at the request of His Excellency, Eric F. MacKenzie, Auxiliary Bishop of Boston, with his following remarks to precede the presentation:

THE LINACRE QUARTERLY is read chiefly by physicians and priests. The article which follows has two authors, one a priest and the other a physician. Each has his problem: the priest to write about Church law in terms that will be understood by physicians, and the physician to write in terms that will be understood by priests.

Impotency in relation to the validity of marriage is a highly specialized problem both in law and in medicine. In my judgment it is interesting and useful to put together in one treatise an authoritative statement of what is known in both disciplines.

May I, as a priest, address a preliminary word to the physicians? As you read Father Harrington's article, you may well be surprised to learn that there are two schools of thought which are quite opposed, yet each supported by leading theologians and canonists. We priests know and expect this to be true in many problems of faith and morals. You, on the other hand, may have expected that a prompt and definitive answer would be forthcoming for every problem that arises. The Church does not act with that immediate promptness. She waits, looks for information that is more and more complete, invites study and writing and comment by competent students, and only at long last, under the guidance of the Holy Spirit, announces a formal and final decision.

This treatise will do its part in the process of study and evaluation. Hence, I commend it to both priests and physicians. I trust it will have many interested readers.

PART I
CANONICAL CONSIDERATIONS

The purpose of this article is to set forth the legal definition of impotency, the constitution of the canonical impediment of impotency, a description of an impotent condition and finally a consideration of the various anatomical and physiological findings that bear on male impotency.

Since this article is primarily concerned with impotency, as a canonical impediment to marriage, which can prohibit a contemplated marriage from taking place or can invalidate a marriage that has already been contracted, the canonical definition of impotency is the one that will be considered and not the medical definition, as it is possible and probable for a divergence to exist between the two.

It is the privileged prerogative of God Himself, through the mediation of Divine Natural and Positive Law and the Supreme Pontiff, through the channels of Ecclesiastical Law, to establish impediments to christian marriage, which will affect its validity or nullity. It is the role of the canonist to consider these statutes, define them, study their gravity and extent, be prepared to apply the norms to general and specific cases and to make judgments as to the presence or absence of a given impediment in an individual instance.

When an impediment is based on anatomical findings or physiological data, the canonist will enlist the help and assistance of trained medical specialists, accept their diagnosis and prognosis and then proceed to a conclusion, which will, at all times, be guided by canonical definitions and legal jurisprudence as applied to the medical findings and not necessarily by the medical judgments themselves, since the question of deciding the presence or absence of a diriment impediment and of passing on the validity or nullity of a particular marriage is basically a juridical matter and only secondarily involves medical opinion.

The reference to impotency in the Code of Canon Law is very brief, simple and direct and, to all appearances, would give the impression that the entire matter was very clear, provided no difficulties or problems and gave rise to no controversies. However, beneath and in back of the rather innocent wording of the statute lies a long history of conceptual and notional evolution, which has included many difficulties, divergent opinions and contradictory statements. Obviously, this particular presentation must of its nature be brief and only a summary of the legal developments can be presented.

Canon 1068 of the Code of Canon Law, in two sections, contains the only reference to the impediment of impotency. It states: "Antecedent and permanent impotency, whether on the part of the man or on the part of the woman, whether known to the other party or not, whether absolute or relative, invalidates a marriage by natural law. If the impediment of impotency is doubtful, whether the doubt be one of law or of fact, a marriage is not to be prohibited." A third section of this statute, while it does not treat specifically of the impediment of impotency, does differentiate between impotency and sterility and indicates that sterility alone does not prohibit or invalidate a marriage.

The earliest legal documents, concerning impotency, that are now available to the research student are contained in the Decree of Gratian which was compiled in the twelfth century to bring together in one place all of the statutes on multitudinous subjects that formed the body of the law of that time.

No clear, definite and distinct conclusion can be drawn from the Decree of Gratian as to whether

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impotency constituted an invalidating impediment or merely could be urged as a canonical reason for the dissolution of a marriage that could not be properly consummated. The reason for this lack of clarity is the fact that, at that time. there was raging in canonical and theological circles a lively discussion between the proponents of the consensual theory and the advocates of the copular theory. The former were of the opinion that the consent alone of the parties was sufficient to bring a marriage into existence; while the latter group insisted that, in addition to mutual consent, proper consummation of the union was required before a perfect marriage was had.

Thus, those who favored the consensual theory would consider impotency to be an impediment; whereas the supporters of the copular theory, which required consummation, would look upon impotency as a canonical reason for dissolving an unconsummated marriage.

The Decree of Gratian did distinguish antecedent and subsequent impotency, between absolute and relative impotency but there is no clear reference to a distinction between temporary and permanent impotency.

The Law of Gratian did introduce an unusual distinction between natural impotency, which arose from some irregular condition within the person himself, and impotency, which had its basis in the workings of the devil, magic, sorcery or witchcraft and thus was always caused by some external agent. This latter category did furnish much interesting discussion in the canonical and theological literature from the eighteenth century and most authors considered such an impotency to be a punishment, sent by God for past misdeeds, and as such would affect only the specific couple and, in many instances, could be cured by spiritual remedies — a general confession of all sins. exorcisms, fastings, prayers and offerings, which would help to placate the offended God.

The next great compilation of law was the Decretals of Pope Gregory IX, which appeared in the thirteenth century and consisted mainly of letters from various Popes to Bishops of varying dioceses. These letters contained answers, legal interpretations and decisions with respect to problems that had originally been referred to the Holy See for solution.

In studying the decretal letters referring to impotency, there can be no doubt that, at this particular time, an impotent condition was considered to constitute an invalidating impediment that would nullify a marriage that had been contracted. The canonists, who wrote commentaries on the decretal legislation, unanimously agreed that impotency constituted a diriment impediment.

However, both the decretal legislation and the legal commentaries insisted that before an impotent condition would in fact constitute the nullifying impediment, it would have to be proved that the impotency actually existed

at the time the marriage was contracted and was therefore antecedent and also that the condition was incurable and was, therefore, permanent. The impotency could be absolute in the sense that it rendered marital relations impossible with every member of the other sex or merely relative in that it prevented sexual intercourse with a definite person or specific individuals. The condition could spring from a natural cause within the individual or could arise from an accidental cause involving some external agent.

St. Thomas Aquinas injected the note that if the impotent condition were known before the marriage, at least by the healthy party, and marriage was nevertheless contracted, the condition did not constitute an impediment even if it were permanent and the marriage would be recognized as valid. This theory was not acceptable to many canonists or theologians and very quickly disappeared from the literature.

The reason that St. Thomas' opinion did not receive the approbation of more authorities was because, in the thirteenth century, the contractual notion of marriage was being developed and was evolving. With marriage being considered as a contract, it was evident that the contracting parties assumed definite duties, responsibilities and obligations, which they were expected to fulfill. The object of the marital contract was judged to be the transferring to one's spouse of rights over one's own body, which rights were to be exercised in the performance of those acts which would provide for the generation of children and the acceptance of the rights that were transferred by one's spouse. This object of the marital contract would provide for the attainment of the purpose of marriage, which was known to be the procreation of offspring.

In the light of this new development, an impotent person could not be considered capable of transferring to anyone else rights over his body for the performance of the marriage relation because that body was incapable of participating in true sexual intercourse. In effect, the individual could not give what he did not have. Thus, an impotent person was thought incapable of assuming obligations which he could not fulfiill and it was for this precise reason that impotency was believed to constitute a diriment impediment to marriage.

It is obvious that mere knowledge of an impotent condition and acceptance of it by the healthy individual could not in any way alter the situation and render the impotent person capable not only of assuming but of fulfilling the contractual obligations of marriage and thereby attaining to the purpose of marriage. Since this was considered impossible, the theory of St. Thomas fell into disrepute and was rejected by most canonists and theologians.

From the thirteenth century up to the present day, there has been no change in the doctrine that impotency, with its proper qualifiers, constitutes a diriment impediment, which will forbid a

contemplated marriage from taking place and will invalidate a marriage, which has already been contracted. The only one addition to this law is the important reference in the Bull, *Cum Frequenter*, which was issued by Pope Sixtus V on June 27, 1587, that the invalidating impediment of impotency comes directly from divine natural law and not merely from an ecclesiastical statute. The importance of this added note is that no dispensation can ever be granted and also that the impediment binds all persons of whatever religion or creed, whether baptized or not.

This understanding of impotency is accepted by all canonists and theologians at the present time and has been accepted by them since the thirteenth century. This is one matter in which there is and has been universal and unanimous agreement, without any controversy.

A brief explanation of antecedence and permanence might be beneficial at this time.

There is no difficulty in proving the antecedence of the impotent condition, if it arises from a congenital cause or from a surgical intervention or accident, which occurred before the marriage. There were authors who thought that if the antecedence of the impotency was not definitely proved and remained in doubt, the condition was to be presumed antecedent but this opinion is no longer acceptable, since every marriage is to be presumed valid until the contrary has been proved by convincing evidence and if any doubt remains after an exhaustive and complete investigation, the doubt is to be resolved in favor of the validity of the marriage and the subsequence of the condition.

If medical science has not discovered a cure for a particular condition that causes impotency, then there is no question that the condition is permanent. If there exists a known cure but this therapy requires the intervention of a miracle or the use of illicit and sinful means or the treatment is dangerous to the body of the patient and entails a danger of death, then the impotent condition is to be judged as permanent. However, if a natural remedy is at hand, which is licit and in no way involves a danger to life, but the afflicted person refuses to avail himself of it, the impotency is to be adjudged temporary, even though the condition is, in fact, never ameliorated because a cure is available and the patient has the obligation of taking advantage of it and of rendering himself potent.

Again, if a doubt remains as to the possibility or probability of a cure or a doubt arises as to whether a particular and specific remedy approximates a miracle or entails a danger to the life of the individual or might be illicit and sinful and this doubt cannot be resolved, the condition is to be presumed temporary, the marriage is not to be prohibited and, if it has already been contracted, it is to be considered valid.

It is evident from the above that the temporary or permanent nature of an impotent condition depends

on the advances of medical science. Thus, a condition which is considered to be permanent today because no cure or remedy is known or because the known remedy is not natural, is illicit and sinful or because the remedy entails a danger to the life of the individual, may well become temporary in the future, as the development of modern medicine uncovers new procedures as it conquers new horizons.

From the thirteenth to the sixteenth century, potency was considered to be the ability to become one flesh with one's spouse and thereby to be able to consummate a marriage. In general, it was necessary and essential for a man to be moved by a desire for sexual intercourse, that he have a male organ which was erectible and which was proportionately apt for the penetration of his wife's body, that he be able to emit and deposit semen within the vagina. It would appear that if any of these elements or any combination of them or all of them were lacking or deficient or any of the organs were otherwise atrophied or paralyzed, a condition of impotence would be considered to exist.

In the canonical and theological literature of this particular period, no specific diseases or medical anomalies or abnormalties were mentioned as constituting an impotent condition. The reason most probably is that the study of anatomy, physiology and endocrinology had not evolved much by the sixteenth century.

It will be the burden of the ensuing pages to discuss the *condition* of impotency from the time of the Council of Trent in the 16th century up to the present time. This section will be of practical interest to the theologians, canonists and the medical profession because the particular cases, with which they will be associated, will ultimately be resolved by the application of the legal interpretation currently in vogue and not by the understanding of past centuries, although reference to the prior opinions has been and will be necessary to show the development and evolution of the various concepts, to lay the ground work for the modern principles and to demonstrate that the growth, from the beginning up to the present day, a span of some 800 years, has been rather stormy and turbulent.

The most important document, bearing on the subject of impotency to appear up to the 16th century was the Motu Proprio, *Cum Frequenter*, issued on June 27, 1587 by Pope Sixtus V. In this papal announcement, eunuchs and spaded men, who lacked both testicles, were to be considered unfit for marriage by natural law and the Bishops were to have the obligation of impeding marriages which these might attempt to contract or of declaring invalid the unions which these had already entered.

Since the *Cum Frequenter* was destined to play a major role and make such a great contribution to the evolution and development of the understanding of the law on impotency, it would be worthwhile, at this point, to summarize its principal tenets.

The Holy Father declared that eunuchs and spaded individuals, who lacked both testicles, are of a frigid nature, are impotent and are not to be considered apt subjects for contracting marriage; that persons thus afflicted cannot emit *verum semen* but, in their physical relations with women, produce a certain liquid which is similar to *verum semen* but which is not suitable for the generation of children and therefore does not fulfill the purpose of marriage; that these defectives presume to enter marital unions with women, not to live chastely with them as brother and sister but that they might have carnal copula with them under the pretext of a real marriage; that marriages of such persons not only serve no useful purpose, but, on the other hand, afford a definite occasion for sin and scandal and tend to the damnation of the souls of the persons involved; that the marriage of a eunuch would give scandal to his wife, who would realize the unnatural character of the sexual acts performed with him, would give the scandal of temptation to her to seek satisfactory relations elsewhere and be a scandal to others who might know of or suspect his condition.

It is evident from this summary that Pope Sixtus V did not define or describe the term *verum semen* as he probably took it for granted that it would have a definite and precise meaning for the canonists and theologians of that era and that it would be properly understood and interpreted by them. However, the fact that he did not define it accurately or describe it precisely has led to a great deal of confusion in the present day. The Holy Father did not mention directly or even infer that the *verum semen*, which eunuchs and spaded men could not emit, was manufactured in the testicles and he was careful to avoid stating where it was elaborated or in what it consisted. It would be easy to see, however, why some authors might conclude that the *verum semen* must be a testicular product because, on the one hand, direct reference was made to persons who lacked both testicles and, on the other hand, such persons were considered unfit to contract marriage because they could not emit *verum semen*. Thus, the canonists and theologians could easily fall into the fallacy of "Post hoc, ergo propter hoc" and think that the *verum semen*, which eunuchs and others could not emit, must be manufactured by the testicles, of which they were deprived.

One thing is certain and that is that the understanding of Pope Sixtus V of what constituted *verum semen* and the site of its elaboration was limited by the medical knowledge of the late 16th century which was very meagre at that time. Certainly, the knowledge of the endocrine functions and the field of endrocrinology was little, if at all, appreciated.

It is clear that semen was not thought to be *verum* merely because it contained spermatozoa since these were first discovered ninety years later in 1677 and it was not until 1875 that Oscar Hertwig first demonstrated their function.

Sanchez declared that the *Frequenter* introduced no doctrine but repeated what always been held in the law, that eunuchs were unable marry because they could not *verum semen* and any marriage attempted by them, was invalid. Ledesma and Enriquez are quoted by Sanchez as holding the same views.

Apparently, the term *verum semen* was time-honored in theological usage even before the appearance of the *Cum Frequenter*. Sanchez says that the view, demanding it for potency, was the common opinion of theologians and jurists even before the papal pronouncement and mentions that theologians, in their use of the term, refer back to the works of Galen, the Greek physician of the second century. Ferreres confirms this by stating that from the time of Galen and for more than 1300 years before Pope Sixtus V, the distinction between true and false semen was known.

According to Ferreres, *verum semen*, in the sixteenth century, signified the relatively copious and somewhat viscous ejaculate which was produced by a man capable of the marriage act. The distinction between the thin, clear fluid of distillation and the copious more viscous outpouring of pollution was identical with that which is found between true and false semen.

Nowlan, in 1945, states that, in his opinion, the notion of *verum semen*, in the writings of 16th and 17th century theologians, was a convenient designation of the difference between the eunuch and the normal man. They observed that the eunuch was capable of some sort of an ejaculate but it was slight and watery as compared with the greater quantity of thicker substance of the normal man and they rightly concluded that the former was not true semen.

Theologians of the 16th century, as well as the doctors and scientists of the same era, did not understand the physiology of semen production. Otherwise, Enriquez, a competent and capable theologian, would not have speculated on the marriageability of a eunuch who was capable of producing true semen. Since castration not only removes the spermatozoa from the ejaculate but gradually terminates the functioning of the accessory sex glands no one conversant with the true facts, could conceive of a eunuch who was capable of manufacturing *verum semen*.

From the 16th to the 18th centuries, the various authors defined the condition of impotency as the inability of the spouses to become one flesh by the emission of *verum semen* in the vagina. The question of impotency was always discussed in relation to the primary and secondary purposes of marriage: the procreation of offspring and the remedy of concupiscence. The consummation of the marital act was to be the way that these purposes of marriage were to be realized and this consummation required a copulation in which the spouses became one flesh and which was *per se* apt for generation. If the spouses did not become

one flesh with each other or the copulation was not *per se* suitable for the generation of offspring, the relationship was not real consummation and, if these elements were not realized because of the ineptness of the parties, a condition of true impotency was thought to exist. Not any type of intercourse sufficed for the satisfaction of concupiscence but only that which was of its nature apt for the generation of children.

From the above, it is evident that the authors of this period considered a close interrelationship to exist between potency, consummation of a marriage, potential generation of children, a remedy for concupiscence and the becoming one flesh by the parties.

If the marital relationship were to achieve the ends of being apt for the generation of children, even though, *de facto*, children were not born, providing a remedy for concupiscence and causing the parties to become one flesh, a mere joining of the bodies without semination would not be sufficient and *verum semen* would be required for a perfect conjugal copula. Producing, emitting and depositing *verum semen* in the vagina of the wife was considered necessary for generation.

The medical authorities of this period held that eunuchs and spaded men who lacked both testicles were incapable of producing *verum semen* and could not validly marry, because they lacked necessary organs but a man who was deprived of only one testicle could enter a valid marital contract because he could produce *verum semen*.

It is to be observed that, although all the authors mentioned *verum semen* and required it for a perfect conjugal copula, none of them described or defined it or endeavored in any way to explain or justify it.

In order that man be considered potent and be apt for contracting a valid marriage, he must have a penis that is capable of erection and of penetrating the female vagina and he must be able to produce, emit and deposit *verum semen* within the vagina. The erection must be maintained and sustained until the vagina has been penetrated and until semination has occurred within it.

Zacchias in the eighteenth century, wrote that injuries to the head, spine, lumbar region, inguinal and perineal regions, attrition of the nerve centers, catalepsis, apoplexy and paralysis can interfere with the erection of the penis and so might be causes of male impotency. He also considers cases of hypospadias where the top of the penis was imperforate and instances where the penile aperture was located in the middle or in the base of the organ as possible sources of male impotency.

Other authors discuss, as cause of impotency, the condition whereby a man cannot seminate at all or, if he does emit *verum semen*, he finds it difficult to deposit it within the vagina because of premature ejaculation.

Sanchez and Schmalzgrueber were of the opinion that a man was to be considered potent if he could only deposit part of the semen in the vagina because that portion would be sufficient to consummate the marriage and effect the union of the two spouses in one flesh.

The theologians and canonists of this period unanimously agreed that old age of and by itself did not constitute an impediment to marriage and did not necessarily cause a man to be impotent. If the elderly man could meet all the above requirements, although it was impossible for him to procreate offspring, because the semen was sterile, he could validly marry. But if the man was so exhausted and debilitated from age that he could not have perfect copula or could not produce *verum semen*, he was to be considered impotent and unable to contract a valid marriage.

The eminent canonist Cardinal Gasparri, made a distinction of great importance between the *human action*, which consists in the act of conjugal intercourse itself and is terminated by the depositing of the *verum semen* in the female vagina, and the *action of nature*, which comprises the function which occurs after the prior action has been completed, whereby the semen is brought into the uterus, advances until it meets an ovum and fertilizes it.

Antonelli, in his classical work on impotency, written in 1900, stated that the important and only purpose for the institution of marriage was to provide for the procreation of children and the propogation of offspring and that spouses became two in one flesh by cooperating in a copula that was ordinated to generation. In order for the spouses to become truly two in one flesh, there should be a uniting toward which each should make a direct contribution. This would not be possible to attain by the mere joining of the generative organs of each sex, since, in this way, each sex would remain distinct, separate and individual; what is required is for each to give something from which the oneness or unity is made.

The same author continues by saying that male semen is required for proper consummation of a marriage and therefore copula by a eunuch, who lacks both testicles, cannot be said to be *per se* apt for the procreation of children, because the defect is basic, radical and without remedy. The declarations of Pope Sixtus V did not comprise any innovation but were only a repetition of the age-old and honored law, which was in effect before the Pontiff's coronation and which was ultimately and originally based on the natural law. The reason why eunuchs, who lacked both testicles, were estopped from marrying, even though they could effect a penetration, was that they were unable to seminate.

Once again, this author constantly referred to semination, semen, *verum semen*, but refrained from giving any precise description or definition of what these signified.

Antonelli maintained that Pope Sixtus V prohibited marriage for eunuchs precisely because they could not attain the primary end of marriage, even if they could achieve the secondary purpose, because the latter cannot be sepa-

rated from the former, since it is accessory and accidental to the primary objective and came into being only after the sin of Adam and Eve.

This author maintained that it was erroneous to state that a eunuch, lacking both testicles, was not moved by concupiscence. The act of copula, he states, is governed by the nervous system and the appropriate nerve centers are found in the lumbar region. In a man, there are two nerve centers which control his ability to have sexual intercourse: *the center of erection,* which accounts for the erection of the penis and the *center of ejaculation,* which cares for the emission of semen. The eunuch is deficient in the action of the center of ejaculation but is always capable of carnal desire and erection. The cause of the carnal desire is not only the pressure of semen in the seminal vesicles but also all those causes, both physical and psychical, which excite and stimulate the nerves, thereby producing erection. The eunuch also experiences sexual desire even when with an emission of prostatic fluid and urethral mucous. Sometimes, the concupiscence of a eunuch is more vehement than a normal man and yet, despite this fact, he cannot contract a valid marriage.

According to Antonelli, if the remedy for concupiscence could be attained without reference to generation, Pope Sixtus V never would have declared invalid the marriage of eunuchs, who lacked both testicles, since they have the same, and at times more vehement, concupiscence. The marriage of such were declared invalid not because they could not achieve a satiable copula but because they could not emit *verum semen,* that was apt for generation.

(To be continued)