May the State forbid Marriage because of a Social Disease?

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MAY THE STATE FORBID MARRIAGE BECAUSE OF A SOCIAL DISEASE?

AN EXTENSIVE CAMPAIGN against venereal diseases is being conducted in the United States to-day, with the active coöperation of both state and federal governments. Undoubtedly, a movement of this nature is urgently demanded, for the ravages of social diseases are indeed harrowing and their victims throughout our land are numbered by the millions. It is stated that one out of every ten persons in the United States contracts syphilis at some time in his life.[1] Surely, then, out of love for country as well as out of Christian charity all Catholics should coöperate in every lawful manner toward exterminating, or at least diminishing, these dire ailments.

One of the methods employed in this campaign is " eugenic legislation "—the passing of laws which forbid persons to marry as long as they are suffering from a venereal disease. More than half the States of the Union have already passed such laws. Some of these laws merely forbid the marriage of a diseased person; others declare the marriage of such a one null and void, at least when he has not informed the other party of his condition.[2] The usual procedure of this eugenic legislation is to oblige those intending to be married to secure a certificate from a physician, attesting that they are free from venereal diseases, before they will be granted a marriage license. The license is good for only a limited period; if not used before the expiration of that time it becomes ineffective, and if the person wishes to marry he must procure a new certificate and a new license. However, no one is permanently barred from marriage on account of the presence of a social disease; if he takes treatment and is declared cured, the disability ceases and a license is granted.

This type of eugenic legislation has won high praise, especially from persons interested in social welfare. Among those who have voiced their commendation have been some prominent Catholics, including members of the clergy. In view of this fact, and also because priests are not infrequently asked to give their opinion on such legislation—and perhaps at times even to

[1] *Time*, 31 Oct., 1938, p. 37.
[2] Alford, *Jus Matrimoniale Comparatum*, p. 148 seq.

promote it by their influence—it seems opportune to discuss at some length in the REVIEW the question of the state's power to forbid marriage to persons afflicted with a communicable venereal disease.

The first and most basic principle pertinent to the subject is this: Only the Catholic Church possesses the authority to establish impediments, whether diriment or merely prohibitive, for the marriages of baptized persons. That the Church is empowered to constitute diriment matrimonial impediments is an article of faith, solemnly defined by the Council of Trent.[3] The definition mentions only diriment impediments, because the Church's power to establish these was especially impugned by the Reformers. That ecclesiastical authority is competent to constitute merely prohibitive impediments also is implied in this same definition inasmuch as the greater power of invalidating contains the lesser power of merely forbidding. Moreover, from the early centuries the Church has been accustomed to establish and to enforce impediments, both diriment and merely prohibitive, regarding this as an application of the binding and loosing power imparted by Christ to the Apostles and to their successors in the government of the faithful.[4] The Church's authority in this matter extends to *all* baptized persons, whether Catholic or non-Catholic. However, in practice the Church does not bind non-Catholics by certain of the impediments—disparity of cult, for example.

That the Church *alone*, to the exclusion of every civil authority, can constitute matrimonial impediments for baptized persons, while probably not an article of faith, is so certain a doctrine that it would be rash to deny or doubt it.[5] A few eighteenth-century theologians, such as Tournely [6] and Billuart,[7] held that the civil power as well as the Church can establish impediments for the baptized; but this view is no longer tenable in the light of numerous papal pronouncements.[8] The Code is

[3] Denzinger, *Enchiridion*, n. 974.

[4] *Matthew*, 16:19.

[5] Cf. Wernz-Vidal, *Jus Matrimoniale*, n. 48; Gasparri, *De Matrimonio*, n. 233.

[6] *De Matrimonio*, Q. 7, a. 2.

[7] Diss. 6, a. 2.

[8] E. g. Pius VI in *Auctorem Fidei* (Denzinger, n. 1560), Leo XIII in Encyclical *Arcanum* (*Acta S. Sedis*, Vol. 12, p. 382 seq.) and in Letter to Bishop of Verona (*Acta S. Sedis*, Vol. 25, p. 459 seq.), Pius XI in Encyclical *Casti Connubii* (*Acta Ap. Sedis*, Vol. 22, p. 539 seq.)

quite explicit on this point: "It belongs *only* to the supreme authority of the Church to declare authentically when the divine law impedes or invalidates matrimony. To the same supreme authority it belongs *exclusively* to constitute other diriment or prohibitive matrimonial impediments for baptized persons after the manner of a universal or particular law." [9]

The doctrine that the Church alone has the power to establish impediments for the marriage of baptized persons is a logical deduction from indubitable Catholic tenets. By the decree of Christ Himself the valid marriage of two baptized persons is always a sacrament.[10] But the Church, and the Church alone possesses the divinely granted authority to legislate concerning the administration of the sacraments and to declare authentically what dispositions are required on the part of those who receive them. Nor is any distinction between the sacrament and the contract admissible,[11] for it is absolutely certain that the contract and the sacrament are *identical*.[12] The same process of reasoning is not applicable to the marriage of a baptized person with one who is unbaptized, for such a marriage is certainly not a sacrament for the unbaptized party, nor most probably even for the baptized party.[13] However, every marriage is at least a *res sacra*, and accordingly the type of marriage in question comes under the jurisdiction of the Church, at least from the part of the baptized person, because the Church has authority to regulate the *res sacrae* of all who bear the baptismal character. It is to be noted that Pope Leo XIII in his Encyclical *Arcanum* argued to the Church's authority over the marriages of Christians from the principle that matrimony is in itself a *res sacra*.[14]

Now, what authority has the state in the matter of matrimonial impediments? First, the state can most probably establish impediments, both prohibitive and diriment, for the marriages of *unbaptized* persons. This view, formerly rejected by

[9] Canon 1038.

[10] Denzinger, 1765; canon 1012.

[11] It was by making such a distinction that Tournely and Billuart arrived at the conclusion that the state can legislate for the contract.

[12] Cf. *Arcanum*, *Acta S. Sedis*, Vol. 12, p. 394; *Casti Connubii*, *Acta Ap. Sedis*, Vol. 22, p. 554.

[13] Hervé, *Manuale Theologiae Dogmaticae*, Vol. IV, n. 441.

[14] *Acta S. Sedis*, Vol. 12, p. 392.

a number of theologians, is nowadays favored by the majority, and is even supported by decisions of the Roman Congregations.[15] Indeed, according to Gasparri,[16] an unbaptized person contracting marriage with one who is baptized is subject to civil impediments.[17] Others however, such as De Smet,[18] hold that complete jurisdiction over such a marriage belongs to the Church by reason of the baptism of one of the parties.

Secondly, the state may legislate for the *merely* civil effects of the marriages of baptized persons. This is clearly stated in the Code.[19] The basis of this principle is the fact that marriage, besides being a sacrament or at least a *res sacra*, is also a natural institution bearing many important relations to civil society, and as such is subordinate in some measure to civil legislation. By *merely civil effects* are meant those consequences of the marriage that are separable from the lawfulness and the validity of the marriage itself—that is, those concerned with merely administrative and temporal matters, such as the dowry, the rights of succession of the children to titles and to property, etc.[20] This power of the state does not extend to any effect inseparably connected with the validity or the lawfulness of the marriage (such as the legitimacy of the children), and *a fortiori* does not embrace the right to determine the requisites for the validity or the lawfulness of the contract, in the case of baptized persons. As Pope Leo XIII asserted: "It is well to call to mind that the civil power can set up and regulate the civil effects of marriage; but what proximately concerns marriage itself must be left to the jurisdiction of the Church." [21]

Thirdly, the state may at times indirectly prevent marriages —even those of baptized persons—when the use of one of its proper civil rights entails *as a consequence* that some persons are rendered incapable, either permanently or temporarily, of

[15] Hervé, *op. cit.*, n. 496.

[16] *De Matr.*, n. 256.

[17] As is evident, if this view is followed, some difficult problems in the practical ministry can be imagined; for example, when the Catholic party of a marriage coming under the impediment of *disparitas cultus* has received the requisite dispensation from the Church, but the unbaptized party is bound by a diriment impediment of the state.

[18] *Betrothment and Marriage*, n. 438.

[19] Canon 1016.

[20] De Smet, op. cit., n. 427.

[21] *Acta S. Sedis*, Vol. 25, p. 460.

marrying or, if already married, of using their conjugal rights. Such an exercise of civil power takes place when the state condemns a criminal to prison for life, or sends soldiers to war, or segregates those afflicted with a contagious disease in order to prevent its spread. Underlying this doctrine is the well-known moral principle that a bad effect may at times be permitted as a concomitant or a consequence of a good effect. In this instance the bad effect is the restriction of the natural right to marry or to use marriage. It is to be noted that the state's reason for employing its power in such a case must be proportionate to the grave inconvenience inflicted on those inhibited.

Fourthly, the state may use its legislative and coercive powers regarding what is prescribed or forbidden by the natural law concerning marriage, in as far as violations of this law are detrimental to the welfare of civil society. This power extends to the baptized as well as to the unbaptized. De Smet says: "The state can take cognizance of offences against public order committed by Christians in their married life, and vindicate the law by the punishment of such crimes as adultery, incest and wife-murder. But it could not do so precisely in relation to the marriage as, for instance, by forbidding or suspending the cohabitation of the parties." [22] However, this power of the state over baptized persons is limited to matters prescribed or forbidden by the natural law *according to the teachings of the Catholic Church*, for, in regard to such persons, "It belongs only to the supreme authority of the Church to declare authentically when the divine law impedes or invalidates marriage." [23]

Now, if we apply these principles to the question at hand it seems to follow with irresistible logic that according to Catholic doctrine the laws of our States forbidding marriage to those afflicted with venereal diseases are encroachments on the Church's divinely granted jurisdiction. If these laws bound only unbaptized persons there would be no complaint from the standpoint of the violation of ecclesiastical rights, although even then the legality of such measures from the standpoint of the natural law could be discussed; [24] but since they bind both baptized and unbaptized, they must be regarded as transgressions

[22] *Op. cit.*, n. 427.

[23] Canon 1038, § 1.

[24] De Smet, *op cit.*, n. 422-424.

of the order of authority as established by God. This is the teaching of Sabetti-Barrett, S.J.: "Only the Church can establish impediments, whether diriment or prohibitive, for Christian marriage. . . . Leprosy and any other revolting and contagious disease, such as syphilis and epilepsy, are not impediments." [25] "All the new laws regarding eugenic marriages passed in our country violate the power of the Church." [26] Even more explicit is Damen, C.SS.R., professor of Moral Theology at the University of the Propaganda in Rome: "*Q.* May the civil authority prescribe a medical examination for those about to be married? *A.* For baptized persons the civil authority may not prescribe this examination in such wise that if this condition is not fulfilled, marriage is forbidden to them . . . for thus the state would be directly or indirectly establishing an impediment, either diriment or prohibitive, and this the state is entirely incapable of doing." [27]

But, it could be asked, do not such legislative restrictions come within the competency of the state by virtue of its authority over the civil effects of marriage, since the health of its citizens is surely a vital factor in the well-being of a nation? To this we reply that if the civil authorities concerned themselves with the *merely* natural aspects of the matter—for example, by instructing the citizens about the nature and the virulence of social diseases and by providing remedies for them—the state would be acting within its proper sphere. But once the state takes legislative or coercive action regarding the *supernatural contract* of marriage in the case of baptized persons, or determines the conditions required of those who wish to make this contract, the state is exceeding the bounds of the *merely* civil effects of marriage.

But could not the state segregate those afflicted with venereal diseases, and thus prevent them from marrying? And if the state can do this, why can it not restrain them from marrying without such segregation? The answer is that, while the state could undoubtedly segregate diseased persons *for a time* in order to cure them and to prevent the communication of the disease to others through the use of the same implements, dishes,

[25] *Compendium Theologiae Moralis*, n. 842, § 6.
[26] *Id.* n. 874, Q. 8.
[27] *Theologia Moralis*, Vol. II, n. 636.

etc. (if such segregation were reasonably deemed necessary), nevertheless the incapacity of those thus segregated to marry would be only a *consequence* of a licit and necessary use of the state's proper authority. And this is entirely different from the use of legislative measures which *directly prohibit marriage itself*, just as an operation directly intended to procure abortion is entirely different, under the moral aspect, from the necessary excision of a diseased organ which *as a consequence* brings about the ejection of a living fetus.

However, the argument that seems to be most weighty in favor of the state's power to pass eugenic legislation takes its stand on the natural law. It is proposed thus: The state may enforce the natural law governing marriage, as it does when it prohibits polygamous unions or punishes adultery. But it is against the natural law for a person afflicted with a communicable social disease to marry, because the usual consequences of such a union are the infection of the healthy consort and the procreation of diseased offspring. Consequently, the state may suspend the marriage of diseased persons until their cure is attested.

Passing over the major of this argument,[28] let us concentrate on the minor. Is it against the natural law for one afflicted with a communicable social disease to marry? All Catholic moralists admit that there is a grave violation of the natural law when a diseased person marries one who is healthy *and is not aware of the other's condition.* And Monsignor Nau states: "A confessor would be obliged to refuse absolution to a penitent determined to contract a marriage or to have marital intercourse with the consort under these circumstances." In fact, as the same writer goes on to say, a priest acquiring the knowledge of such a condition as a professional secret and not merely under the sacramental sigillum may reveal it to the innocent party.[29] But the claim that it is against the natural law for a diseased person to marry one who knows of the presence of the disease and yet is willing to enter marriage is not upheld by Catholic theologians as a group. On the contrary, we read in standard

[28] As was said above, the principle that the state may enforce the natural law regarding marriage in the case of baptized persons cannot be accepted without qualifications. However, in the present instance we can abstract from this question.
[29] *Marriage Laws of the Code*, n. 17.

authors such statements as these: "Leprosy, or any grave ailment of the same nature, even though antecedent (to the marriage) and unperceived does not impede or invalidate the contracting of the marriage." [30] "When a (social) disease is found out by both parties (of an engaged couple) they are not obliged to marry, although they may do so if they wish—the Church does not forbid them." [31]

Some theologians do not discuss explicitly the case with which we are concerned, but all treat a parallel question—the lawfulness of conjugal intercourse while one of the married parties is suffering from a serious communicable disease. And while some condemn marital relations as unlawful in such circumstances,[32] others—the majority, it would seem—teach that intercourse is *permitted* (though the healthy party is not *bound* to grant it), at least when the sin of incontinence is thereby avoided. Thus Sabetti-Barrett: "Although when the healthy party has reason to fear infection from a serious disease, this party is not obliged to give conjugal relations, yet he or she may do so out of conjugal love, and often this would be a noble deed of charity. And even though defective offspring are conceived, yet it is better to be thus than not to be at all, as St. Thomas says." [33] Father Davis, S.J., says: "If there is syphilis or other venereal disease, the conjugal act is very dangerous to the healthy party, and they must abstain, *except in grave danger of incontinence*, and after the healthy party has been informed of the condition, or with mutual consent." [34]

Of course, the case of those wishing to be married is not exactly on a par with the case of those already married, for a more serious reason is needed to excuse the acquisition of conjugal rights by a diseased person than to justify the use of rights previously acquired. Nevertheless, according to Catholic principles, there can be justifying causes in the former as well as in the latter case, and especially the benefit accruing from matrimony as a *remedium concupiscentiae*. All the physical

[30] Wernz-Vidal, *op. cit.*, n. 489. This holds *a fortiori* if both are aware of the disease.

[31] Sabetti-Barrett, *op. cit.*, n. 842, § 6.

[32] E. g. Marc, *Institutiones Morales*, II, 2103, regards intercourse as unlawful during the first and second stages of syphilis, not during the third stage. Cf. Ferreres, *Compend. Theol. Mor.* II, 1144.

[33] *Op cit.*, n. 941.

[34] *Moral and Pastoral Theology*, Vol. IV, p. 251.

afflictions that can ensue from the marriage of a diseased person, both to the healthy consort and to the offspring, are an immeasurably lesser evil than one mortal sin which the marriage could avert. Even the probability that the marriage might be productive of still-born children, deprived of the opportunity of receiving Baptism—a point which would strongly appeal to Catholics—does not militate against this principle. For it is better that these children should be thus than not be at all—better from the standpoint of the honor which their existence gives to God, better from their own standpoint, since the natural beatitude they will enjoy for all eternity in Limbo is a greater good than non-existence.

Let it not be thought that I am proposing the marriage of a diseased person as something ideal. I should strongly recommend to such a person that he remain single until he is cured. I should certainly insist that he inform the other party of his condition. But if the healthy party is aware of the circumstances and is still willing to enter wedlock, I could not accuse them of violating the natural law, especially if there is danger of sins of incontinence in the event that they remain unmarried.

Finally, let us remember that the only authority on earth empowered to declare authentically when the divine law impedes or invalidates marriage is the supreme authority of the Catholic Church.[35] Now, in the many pronouncements, so detailed and so explicit, emanating from the Holy See, where has it been declared that the natural law forbids the marriage of persons afflicted with social diseases?

Of course, in those States in which eugenic laws have already been passed, Catholics must in prudence conform to the statutes. Yet, it is well for all the members of the Church, both priests and laity, to realize that according to Catholic teaching such laws do not bind baptized persons in conscience, but are rather an infringement on the Church's authority and an unwarranted restriction of the natural right to marry. Catholics, especially priests, should be careful not to praise these laws; on the contrary, where they are not yet in existence they should use their influence to prevent their being passed. Our non-Catholic legislators could hardly be expected to appreciate the theological arguments which constitute the chief basis of our objection.

[35] Canon 1038.

But other arguments can be utilized, such as the danger that eugenic legislation will increase extramarital relations, and thus tend to the lowering of moral standards among our people. Five years ago, Monsignor Nau, writing of eugenic legislation as something proposed, said: "It would be fraught with the greater evil of concubinage."[36] Undoubtedly, this common-sense scholar predicted truly. Only a few days ago I received a letter from a young Redemptorist missionary in Puerto Rico, where the eugenic legislation went into effect on 1 September, 1937. He informs me that the number of marriages in the entire island during the year preceding the enforcement was 16,151, while the number during the first year under this legislation was 8,417. And he sums up the situation with the words: "It all adds up to the increase of concubinage." In New York City during the months July-October, 1937, the number of marriage licenses issued was 28,381. During the corresponding months of 1938—just after the eugenic legislation became operative—the number was 17,616. Now, it is true, other causes may have tended to a decrease of marriages; and perhaps too, a number of New Yorkers are going to other States to be married. Furthermore, it is only fair to state that with the passing of the months there is a gradual increase in the proportion of this year's marriages to those of last year. Thus, in July the proportion was 31%, in August 67%, in September 72% and in October 79%. Nevertheless, it is an unquestionable fact that many persons have abstained from marriage because of the eugenic legislation; and whilst it would be unjustifiable to make general accusations against the morals of these persons, it also is certainly true that many sins have been committed which would not have been committed had not the new law gone into effect.

Another argument against the eugenic law is that its purpose can be frustrated by fraudulent practices. The medical fraternity as a group is honorable; yet it surely will not be too difficult for one suffering from a venereal disease to find a doctor who will give him a clean bill of health for a sufficient remuneration, just as it was not very hard in the days of Prohibition to find a doctor willing to give a prescription for alcoholic liquor. And thus, just as in the days of Prohibition, so now it is not

[36] *Op. cit.*, n. 19.

the rich, but the poor, who will not be able to buy immunity from the law, that will feel its inconveniences.

But for Catholics the chief argument against eugenic legislation should always be the sacred character of matrimony and the consequent exclusive power of the Church to legislate for the marriages of the baptized. In the United States we are so accustomed to civil legislation on matrimony that we are liable to forget this all-important Catholic doctrine. True, up to recent times the marriage laws of the States have not imposed any conditions that are very onerous or that infringe very far on the Church's rights; and we have accepted the civil statutes without complaining. But now we are being confronted with a tendency on the part of our civil legislators to bring within the competency of the state phases of marriage that involve important moral principles and fundamental individual rights. It is imperative therefore that Catholics be alive to the situation and realize that the civil government is now arrogating to itself a sacred power that Christ wished to be exercised solely by His Church, and that in passing eugenic legislation binding on the baptized the state is going beyond its lawful sphere just as truly as if it legislated as to who should be admitted and who should not be admitted to Holy Communion.

In some European countries today the Church is engaged in a bitter struggle with the civil government in an effort to retain even the most essential elements of ecclesiastical authority over marriage. And in our country, where the majority of the legislators are quite anxious not to infringe on the religious convictions of Catholics, shall we—especially the clergy—be guilty of "bending over backward" by positively encouraging our lawmakers to assume the divinely granted rights of Christ's Church?

Will this eugenic legislation lead to a campaign for even more stringent measures to secure a healthy race? There is little reason to doubt it, especially since materialistic philosophy is the basis of this recent legislation, and to a materialist it would seem quite logical to argue: "If the state may legislate against the marriage of a diseased person, why may it not take the more effective means to prevent his propagating defective offspring by sterilizing him?" Against this materialistic attitude toward marriage Catholics are warned to be on their guard by our

present Holy Father in his glorious Encyclical *Casti Connubii:* "There are some who, over-solicitous for the cause of eugenics, not only give salutary counsel for more certainly procuring the strength and health of the future child—which indeed is not contrary to right reason—but put eugenics before aims of a higher order, and by public authority wish to prevent from marrying all those who, even though naturally fit for marriage, they consider, according to the norms and conjectures of their investigations, would through hereditary transmission bring forth defective offspring. . . . Those who act in this way are at fault in losing sight of the fact that the family is more sacred than the state, and that men are begotten not for the earth and for time, but for heaven and eternity. Although often those individuals are to be dissuaded from entering into matrimony, certainly it is wrong to brand men with the stigma of crime because they contract marriage, on the ground that, despite the fact that they are in every respect capable of matrimony, they will give birth only to defective children, even though they use all care and diligence."

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CIVIL AUTHORITIES' POWER TO DECREE MATRIMONIAL IMPEDIMENTS.

Qu. An Associated Press news despatch from Rome, under date of 10 November of this year, says that the Italian Government has decreed that marriage of an Italian citizen of the Aryan race with a person belonging to another race is null. The report has it that, as this new law is in conflict with the concordat between the Holy See and Italy, the legislation is opposed by the Vatican. But the Fascists, it is further reported, insist that the Government's prohibition of marriage between a Jew and an Aryan citizen of Italy is political and not religious, and is for that reason outside the Church's jurisdiction.

May I propose that the REVIEW state briefly the Catholic doctrine concerning the Church's jurisdiction over the contract of matrimony, and the limitations of the State's authority in this field?

Resp. It is absolutely certain, according to Catholic theological principles, that the state cannot establish any impediment, either diriment or prohibitive, for the marriage of two baptized persons. For such a marriage is always a sacrament, and accordingly is entirely subordinate to the jurisdiction of the Catholic Church, which is the only power on earth competent to determine the qualifications required on the part of the contracting parties. To apply this principle to the case proposed—if a Jewish convert wishes to marry a Christian, he is entirely free to do so as far as the binding force of the recent Italian legislation is concerned.

However, it is the more common view that the civil authorities may establish impediments for the marriage of two unbaptized persons, and even, according to some, for the marriage of a baptized person with an unbaptized person by reason of some civil disqualification in the latter. From this standpoint the recent Italian law might seem to possess binding force in the case of a marriage between two unbaptized persons or (with some probability) between one baptized and one unbaptized person.

This conclusion, however, is greatly weakened by two considerations: First, there is a concordat between the Italian Government and the Holy See, in the 34th article of which the Church's rulings regarding marriage are recognized. This

would seem to concede to the Church full jurisdiction even over the marriage of a baptized person with one who is unbaptized; so that in this case too, the recent legislation would have no binding force. Secondly, in attributing to the state the right to make impediments, theologians suppose that this right will be used reasonably. Now it is difficult to recognize as reasonable a law invalidating marriage between one of Jewish blood and one of Aryan ancestry merely because of racial differences. Such a restriction is based on a false ideology of racism, recently condemned by the Holy Father. From this standpoint even two unbaptized persons would seem to be immune in conscience from the recent legislation.