



Articles



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Marriage and the Prophylactic Use of Condoms

Luke Gormally

The background to this article is a friendly e-mail exchange I had with Fr. Martin Rhonheimer in the late summer of 2004, following an article he published in the July 10, 2004, issue of *The Tablet*. In that article he maintained that

a married man who is HIV-infected and uses the condom to protect his wife from infection is not acting to render procreation impossible, but to prevent infection. If conception is prevented, this will be an—unintentional—side-effect and will not therefore shape the moral meaning of the act as a contraceptive act. There may be other reasons to warn against the use of a condom in such a case, or to advise total continence, but these will not be because of the Church's teaching on contraception but for pastoral or simply prudential reasons—the risk, for example, of the condom not working.¹

In the e-mail exchange, two points emerged as crucial. The first is the requirement that for an act of sexual intercourse to be marital, it should be a generative or procreative type of act, an act which *of its kind is apt for generation*. The most fundamental disagreement between Rhonheimer and me is about what is necessary for an act to be of the generative kind. This disagreement underlies the disagreement which arose between us on the second crucial point.

AUTHOR'S NOTE: An earlier version of this paper was delivered as the Linacre Lecture at Ave Maria School of Law on April 12, 2005. In revising the text for publication, I have been helped by observations from some of my original audience, as well as from my colleagues Helen Watt and Anthony McCarthy, and most particularly by criticisms from John Finnis and from Fr. Aidan McGrath, O.F.M. Since I have not taken all of the advice offered to me, I alone am responsible for errors remaining in the paper. I have not sought to alter its original character as an oral presentation.

¹ Martin Rhonheimer, "The Truth about Condoms," *The Tablet* 258.8545 (July 10, 2004): 11.

That point is that there are two ways in which a sexual act may embody an intention to act in a manner per se inapt for generation. One is by deliberately choosing a *behavioral pattern* in sexual activity which is per se inapt for generation (as people do, for example, in sodomy). The other is by deliberately producing “physical circumstances” which render inapt for generation a behavioral pattern which otherwise would be per se apt for generation (as happens when women take oral contraceptives to render infertile an act which otherwise might have been fertile).

In the e-mail debate, I argued that “condomistic” intercourse exhibits a behavioral pattern which is per se inapt for generation. Rhonheimer argued that the behavioral pattern exhibited is that of normal sexual intercourse, and that the use of a latex rubber sheath by the husband is merely a “physical circumstance” which happens to render the act inapt for generation. But since the condom in the scenario envisaged is not adopted with a contraceptive purpose, use of it does not embody an intention to act in a manner inapt for generation, and so there can be no objection to condomistic intercourse within a marriage on the basis of the type of act it is.

I have no difficulty agreeing with the claim that in the scenario envisaged by Rhonheimer, the husband is not aiming to prevent conception. So his behavior is not to be faulted on the grounds that, in acting as he does, he has the intention of preventing conception by creating a “physical circumstance” by which a generative pattern of behavior is rendered inapt for generation. In my view, his behavior is to be faulted because of the *non-generative* behavioral pattern it exhibits.

In Fr. Rhonheimer’s recent response to criticism from Fr. Benedict Guevin, readers of this journal will have encountered the claim that “the act as such [i.e. condomistic intercourse] is of a generative kind, but it is modified by human intervention.”² And since the modification is prophylactic in intent, not contraceptive, he reasserts his view that the choice of condomistic intercourse within marriage for prophylactic purposes cannot be excluded on the grounds that it is an intrinsically evil choice. He helps himself to this conclusion by insisting that the “object” of the choice to engage in condomistic intercourse is “an act of preventing HIV transmission.” But preventing HIV transmission can only be the hoped-for objective of first ensuring that ejaculation is into a condom. Fr. Rhonheimer surely foreshortens the practical reasoning of the HIV-infected husband who chooses to wear a condom. An accurate representation of the practical reasoning of the husband, as exhibited in what he does in choosing to wear a condom, would be along the following lines: “I must wear a condom *in order to ejaculate into it rather than into my wife’s vagina* so as to prevent the transmission of HIV.” The “so as to” identifies the *further intention* with which he chooses to wear the condom; the *immediate* (or *proximate*) *object* of his choice is that of ensuring ejaculation into the condom rather than into his wife’s vagina.

In what follows, I shall seek to show that an essential element of the behavioral pattern required for intercourse to be of the generative kind is ejaculation by the man

² See argument of Martin Rhonheimer, in Benedict Guevin and Martin Rhonheimer, “On the Use of Condoms to Prevent Acquired Immune Deficiency Syndrome,” *National Catholic Bioethics Quarterly* 5.1 (Spring 2005): 44.

into the woman's reproductive tract. It is essential to Fr. Rhonheimer's case to deny this. The effect of his doing so, I believe, is radically to disconnect the notion of the procreative meaning of sexual intercourse from any reasonable criterion of what is to count as generative behavior, and by the same stroke to remove the traditional content from the notion of the unitive meaning of intercourse.

Clearly, what is at issue, then, is what has to hold true of a *behavioral pattern* in sexual activity if it is to be characterized as the kind which is *apt for generation*. I shall proceed along the following lines in seeking to settle the issue.

First, I shall offer one line of reasoning for the Church's teaching that intercourse should be of the generative kind, and in doing so will seek to bring out precisely what in the behavioral pattern of generative intercourse is the necessary condition of its being unitive, and thus marital.

Then, I shall look at the development of canonical jurisprudence concerning what kind of "potency" is required in a man for him to be capable of consummating a marriage. I will show that canon law has specified that there must be a capacity for engaging in a particular kind of *performance* rather than a capacity for achieving the biological goal of that performance.

Finally, I shall conclude with some observations on why it is only if intercourse exhibits the specific behavioral pattern of that performance that it can be said to possess the symbolic, and therefore sacramental, significance that the Church attributes to the consummation of marriage.

Why Marital Intercourse Should Be of the Generative Kind

Marriage realizes a unique kind of unity of biological process, sensual experience, emotional responsiveness, and human rationality (in which I include the spiritual).

One starting point for understanding what makes marriage necessary, and what kind of relationship it is, is to look at what is evident biologically, namely, that the central purpose of sex in human life, as in other forms of animal life, is to produce offspring. Sexual organs are reproductive organs. Any biology textbook will tell you that they are part of the reproductive system. Therefore, how we conduct ourselves in the matter of sex is going to shape our relationship to the central human good of offspring, which our sexual powers exist to realize.

Human offspring are in fundamental ways different from the offspring of other animals, and it is those fundamental differences that make necessary the distinctive kind of relationship that marriage is.

Marriage exists for the good of children. Because children are such a fundamental good of human society—a good without which societies could not survive—we have the fundamental institution of marriage. Man is a political animal, Aristotle said, the kind of being who needs a civic community in order to flourish. But prior to civic community, St. Thomas Aquinas noted, human beings need the society of the family, which is ordered to meeting the most basic needs without which civil society

would not exist—namely, the begetting and rearing of children.³ That task should not be understood in minimalist terms. It is nothing less, in St. Augustine’s words, than the task of “receiving [children] lovingly, nourishing them humanely, and educating them religiously.”⁴

The first thing to be said about the marriage relationship is that it needs to be appropriate to the nature of the child. In thinking in this context about the nature of the child, we should reflect in particular on two truths emphasized in Christian teaching. The first is the truth that each human soul is directly created by God in His own image. Our very existence is a gift from God in a quite distinctive sense. In the normal use of the term *gift*, there is implied a recipient of that gift. If we think of the child herself, then the gift of human existence has no prior recipient, for the gift of human life is what brings the child into existence. Our existence has the character of sheer “givenness,” so that we are radically dependent on God. But God’s creative activity in bringing each of us into existence is an activity of collaboration, so to speak, with our parents. So a child is entrusted to his or her parents as a gift which surpasses in its nature anything they are capable of producing by the mastery of material. This is the reason why children should not be generated in a manner analogous to the productive mastery of materials.

The second truth about the child is that God’s intention for each of us is that our fulfillment as human beings should be through union with the persons of the Blessed Trinity.

These two truths mean that each child possesses a “connatural” dignity—a dignity that belongs to the child simply by virtue of his existence as a human being—which is equal in significance to the connatural dignity of the child’s parents. This equality is evidently not the equality in utility value of replaceable goods. Human beings are not replaceable, precisely because they are each created by God as unique individuals for fulfillment in union with Him. All of us are equal in having that kind of awesome dignity, a dignity in virtue of which we are irreplaceable.⁵

These truths about the child require that the relationship between a man and a woman be conducive to their treating the child as an irreplaceable gift from God, equal in dignity to themselves. A relationship between a man and a woman which securely grounds that kind of relationship to their child has two indispensable features. The first is that the man and the woman are committed to treating each other

³R. M. Spiazzi, O.P., ed., *Sancti Thomae Aquinatis in Decem Libros Ethicorum Aristotelis ad Nicomachum Expositio*, 3rd ed. (Turin, Italy: Marietti, 1964), Liber 1, Lectio 1.4, 3. See also Aquinas, *Summa theologiae*, II-II, Q. 47.10, reply 2.

⁴Augustine, *De Genesi ad litteram* 9.7.

⁵On connatural dignity, see further Luke Gormally, “Human Dignity: The Christian View and the Secularist View,” in *The Culture of Life: Foundations and Dimensions: Proceedings of the Seventh Assembly of the Pontifical Academy for Life (Vatican City: March 1–4, 2001)*, ed. Juan de Dios Vial Correa and Elio Sgreccia (Vatican City: Libreria Editrice Vaticana, 2002), 52–66; Luke Gormally, “Pope John Paul II’s Teaching on Human Dignity and Its Implications for Bioethics,” in *John Paul II’s Contribution to Catholic*

as irreplaceable, within the sexual relationship in which the child is begotten; in other words, they are committed to marriage as a lifelong bond which, negatively, excludes other sexual relationships and, positively, commits them to a shared life of mutual support. The commitment of husband and wife to an exclusive sexual relationship in which each seeks the good of the other realizes that good of marriage which Catholic tradition calls *fides*—the faithful commitment to be united in mind and body with one’s spouse in that distinctive form of friendship which is marriage.⁶ This friendship can be realized only through a self-giving love on the part of each spouse. A marriage relationship shaped by that kind of commitment provides what one might call the “moral ecology” which the child needs. A man and woman who treat each other in their sexual relationship as irreplaceable, and to be accepted and loved for just the persons they are, convey to the child a sense of his own dignity as an irreplaceable human being who is cherished for just the person he is.

The second key feature of marriage which is dictated by what is needed for the good of children is that the sexual activity of the man and woman should be consistent with their relationship being a *marital* relationship, in which they are open to children as gifts from God. What is required for the sexual expression of a relationship to be truly marital in this sense? It is that sexual intercourse should be normal intercourse which is both *unitive* and *procreative* in its *significance*. Pope Paul VI, in his encyclical *Humanae vitae*, clearly teaches that there is an “inseparable connection—established by God and not to be broken by human choice—between the unitive meaning and the procreative meaning which are both inherent in the conjugal act.”⁷ The Church teaches that intercourse does not unite a couple in an authentic way if it does not retain its procreative or generative significance.

Normal sexual intercourse is of its nature a generative or procreative type of act. It has that meaning because of the fundamental role it plays in generating new human life. Each occasion of normal sexual intercourse does not have to result in conception for it to qualify as a generative type of act. It retains its generative significance so long as those who engage in it do not do anything with the purpose of rendering it sterile when it might otherwise be fertile.

There are two reasons why it is important that sexual intercourse should be a generative type of activity, one referring to the good of the child, the other to the good of the couple.

Bioethics, ed. Christopher Tollefsen. Philosophy and Medicine, vol. 84 (Dordrecht, Netherlands: Springer, 2004), 7–33.

⁶ See John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: Oxford University Press, 1998), 145, and the references to Aquinas there.

⁷ My translation of Paul VI, *Humanae vitae*, in *Acta Apostolicae Sedis* 60 (1968): 488, n. 12. The original reads, “Huiusmodi doctrina, quae ab Ecclesiae Magisterio saepe exposita est, in nexu indissolubili nititur, a Deo statuto, quem homini sua sponte infringere non licet, inter significationem unitatis et significationem procreationis, quae ambae in actu coniugali insunt.”

Since children are the central human good that is at issue in sexual activity, it is important that people engage only in such sexual activity as leaves them well disposed to the good of children—and that means, only in marital intercourse. But if people choose to engage in sexual activity which, for one reason or another, is of a kind inapt for generation, and believe themselves justified in doing so, they embrace a rationale for sexual activity of a kind that excludes its significance as generative activity. People so disposed to think and act cannot consistently think there is a good reason for confining sexual activity to marriage. If one breaks the link between sex and marriage, one undermines the disposition to be open to the gift of a child precisely in and through one's sexual activity. To preserve in oneself the sense that *sexual activity is essentially generative activity* is to preserve in oneself a sense that it belongs only in marriage and, in doing so, to keep oneself rightly disposed to the good of children.

Deliberately non-generative completed sexual acts are not merely hostile to the good of children but, within marriage, are destructive of the unity proper to marriage. Only completed sexual acts which actualize bodily unity are capable of expressing marital unity.

Our Lord, in responding to the question of the Pharisees about the permissibility of divorce, recalled the text of Genesis 2:24, which states God's primordial plan for marriage:

Some Pharisees approached him and to test him they said, "Is it against the law for a man to divorce his wife on any pretext whatever?" He answered, "Have you not read that the Creator from the beginning made them male and female, and that He said, 'This is why a man must leave father and mother and cling to his wife and the two become one body'? They are no longer two therefore but one body. So then, what God has united, man must not divide." (Mt 19:3–6)

A man and a woman are made "one body" in normal sexual intercourse, for a sexual act which remains generative brings into being a unique kind of oneness. We exercise most of our natural capacities individually even if we depend on others to develop those capacities. I see by myself, think by myself, speak by myself. But a human individual's capacity to reproduce is, you might say, only half a capacity; it is radically incomplete: each of us needs the complementary capacity and activity of someone of the opposite sex in order to reproduce. It is in acting together in a way that is *apt for reproduction* that a man and a woman form a quasi-organic unity—they become in a sense "one body." It is not under their control that they actually conceive a child or that they are fertile.

What is under their control is that they *act* in a way which, if they are fertile, leaves open the possibility that their conjoined powers of reproduction cooperate in the conception of a child. But at the level of common-sense experience (of a kind that is transculturally accessible), it is evident that what is required *in the way of chosen behavior* for a conjoining of reproductive powers must involve the husband's ejaculating semen into his wife's vagina.

The unity thereby realized is a necessary but not sufficient condition for marital unity. After all, as St. Paul observed, "a man who goes with a prostitute is one body

with her” (1 Cor 6: 16). Unity at the level of generative performance must be the expression of an exclusive marital commitment, of that self-giving love on the part of husband and wife which is open to the gift of children and bears fruit in a community of life through which each may transcend the confining egoisms to which we are prone. In this way the structure of marriage in working for the good of children simultaneously works for the good of the spouses in drawing them into an evermore generous love for each other and for the children God gives them.

So far, in exploring the rationale of a Catholic sexual ethic, I have tried to show how the requirement that we should engage only in marital sexual activity, understood as sexual activity which is *inseparably* unitive and generative in its significance, can be seen to arise from what is needed for the good of children—the good of children being the central human good at issue in sexual activity.

It has emerged from the account I have given that a necessary condition of the “one body” unity which should characterize marriage is that sexual intercourse between husband and wife should be of the kind that is *apt for reproduction—i.e., of the generative kind*. As was noted at the outset, sexual activity may fail to be of the generative kind either through the adoption of a pattern of behavior which is *per se* inapt for generation, or through the deliberate production of “physical circumstances” that render causally inapt for generation a behavioral pattern which is otherwise apt for generation.

It is important to be clear that when we talk of a behavioral pattern, we are talking about what can be chosen: about *behavior* which can be the object of choice. I have suggested that it is phenomenologically evident that, *to be per se apt for generation*, the behavior in question must involve the husband’s ejaculation of semen into his wife’s reproductive tract. I turn now to a consideration of whether canonical jurisprudence bears out this claim.

Canon Law on the Character of Intercourse Necessary to Consummate a Marriage

In the canon law on marriage, the Church’s theology of marriage engages with the very down-to-earth realities of the relationship.⁸ One of its central concerns is distinguishing between what counts as a valid marriage and what fails to do so.

According to Canon 1061 of the current (1983) *Code of Canon Law*,

A valid marriage between baptized persons is said to be merely ratified, if it is not consummated; ratified and consummated, if the spouses have in a human manner engaged together in a conjugal act in itself apt for the generation of offspring. To this act marriage is by its nature ordered and by it the spouses become one flesh.⁹

⁸In this section, I rely heavily on Aidan McGrath, O.F.M., *A Controversy concerning Male Impotence*. Analecta Gregoriana, vol. 247 (Rome: Editrice Pontificia Università Gregoriana, 1988).

⁹*Code of Canon Law in English Translation* (London: Collins, 1983).

And in Canon 1084 we read,

Antecedent and perpetual impotence to have sexual intercourse, whether on the part of the man or on that of the woman, whether absolute or relative, by its very nature invalidates marriage.¹⁰

The sexual intercourse referred to in this canon is the kind necessary to consummate a marriage, i.e., the generative kind.¹¹

What is meant when canon law speaks of spouses engaging together “in a conjugal act in itself apt for the generation of offspring”? In the history of the Church’s doctrine of marriage, the procreation of children has been held to be the primary purpose of marital intercourse, but not the sole purpose. From early in the tradition, a secondary purpose was recognized. Augustine put it this way:

Husband and wife owe one another not only the faithful association of sexual union for the sake of getting children—which makes the first society of the human race in this our mortality—but more than that a kind of mutual service of bearing the burden of one another’s weakness, so as to prevent unlawful intercourse.¹²

This secondary purpose was known in short as the *remedium concupiscentiae*—the remedy for disordered sexual desire provided by the satisfaction of sexual desire within the honorable state of marriage. Marriage is a remedy precisely in transforming what would be disordered into something ordered through observance of the norms of marital intercourse. The *remedium concupiscentiae* was always regarded as secondary to the primary purpose, which requires that intercourse should always be of the generative kind. But that did not mean that intercourse had to be fertile, or even that a couple had to be fertile to contract a marriage. If the secondary end of marriage was realizable, a marriage could be consummated. Hence, marriage of the elderly, who were believed to be sterile, was permitted, provided they were capable of intercourse and that their intercourse was—in behavioral pattern—of the generative kind.

What did “capable of intercourse” mean? The majority of theologians and canonists prior to the late sixteenth century held that this capacity existed in the man if he was capable of erection, penetration, and the ejaculation of some semen into the vagina (whether or not the semen as such was suitable for generation), and it existed in the woman if she was capable of receiving the ejaculate in her vagina. Insemination by the husband was deemed necessary to achieving the secondary end of marriage, for without insemination there was held to be no *sedatio concupiscentiae* (assuaging of sensual desire). This view of what counted as “capacity for inter-

¹⁰ Ibid.

¹¹ By which I mean, “the generative kind *in its behavioral pattern*.” The text of the canon was emended to refer explicitly to *impotentia coeundi* (inability to have intercourse), in order to dispel any residual confusion over the concept of *impotentia generandi* (inability to procreate) that affected the debate in the early decades of the twentieth century, to which I refer later. See in particular footnote 15, below.

¹² Quoted in Elizabeth Anscombe, *Contraception and Chastity* (1977; repr., London: Catholic Truth Society, 2003), 15–16.

course” in the man was compatible in principle with holding that men who had been castrated after reaching sexual maturity and who were capable of erection, penetration, and producing a seminal ejaculate were therefore capable of consummating marriage.

This inference about eunuchs came to seem untenable to many commentators in the light of a papal brief, *Cum frequenter*, published on June 27, 1587. The brief was a response to a letter to the Secretariat of State of the Holy See written on May 30 of the previous year by Cesare Spacciani, Bishop of Novara and the papal nuncio to Spain. In the letter, Spacciani expressed concern about the serious practical and pastoral implications of the division among theologians and canonists in Spain (and, indeed, elsewhere in Europe) about the validity of marriages entered into by men who were eunuchs and castrati.¹³ According to Spacciani, there were innumerable such marriages in Spain—“*numero infinito*,” he wrote.

Little more than a year later, Pope Sixtus V issued *Cum frequenter*. It is a complex document that has given rise to an immense volume of exegesis, which of necessity I must largely ignore here. Suffice it to say that the brief required that those eunuchs who not only lacked both testicles but also were incapable of intercourse were to be prohibited from entering marriage, on the grounds that they were incapable of contracting marriage in any way whatsoever. Those who had already contracted marriages were to be separated and their marriages declared null and invalid.

What is of interest for my argument is that the description of the eunuchs in the preliminary, expository paragraph of the brief refers to them as incapable of producing “*verum semen*”—genuine semen. At the time of *Cum frequenter*, the precise contribution of the testicles to the production of semen—namely, the contribution of spermatozoa—was unknown. By the beginning of the twentieth century, however, the most influential interpretation of the phrase *verum semen* that had emerged was that it referred to what was produced in the testicles (“*in testiculis elaboratum*”).¹⁴ From this, it followed that men who are without testicles are incapable of marriage.

The view that the capacity to consummate a marriage required in a man the capacity to produce semen derived (at least in part) from the testicles decisively influenced judgments on the validity of marriages passed by judges of the Roman Rota, the highest marriage tribunal of the Church. Over the first six decades or so of the twentieth century, a number of cases came before the Rota of marriages in which

¹³ For the historical background alluded to here, see McGrath, *A Controversy concerning Male Impotence*, 13–15. It is relevant to an accurate understanding of the papal brief that probably all of the eunuchs to whom the nuncio was referring were castrati, i.e., men who had been castrated *prior to puberty* to preserve their treble or alto voices, and whose normal sexual development had in consequence been arrested. That sort of eunuch would have been incapable of what was required for the performance of normal intercourse and so incapable of achieving *sedatio concupiscentiae*.

¹⁴ McGrath names Cardinal Pietro Gasparri, in the third edition (1904) of his highly influential *Tractatus canonicus de matrimonio*, as the author who gave authoritative currency to the identification of *verum semen* with *semen in testiculis elaboratum*. McGrath, *A Controversy concerning Male Impotence*, 126–127.

the husbands, prior to marriage, had undergone vasectomies. (In consequence of the tying or cutting of the vasa deferentia, spermatozoa cannot reach the ejaculatory duct; although a man remains capable of sexual intercourse, his ejaculate contains nothing produced in the testicles.) The majority of these marriages were declared invalid by judges of the Rota. On a number of occasions, however, the Sacred Congregation of the Holy Office, the Roman dicastery now known as the Congregation for the Doctrine of the Faith, rejected the basis of those judgments, declaring that vasectomy is not an impediment to marriage.¹⁵ The situation was extremely confused and could not be allowed to continue. In consequence, Pope Paul VI ordered an in-depth investigation of the issue in 1972 by both the Congregation and the Pontifical Commission for the Revision of the Code of Canon Law.¹⁶ This resulted in the Congregation's decree of May 13, 1977, stating that it is not necessary for marital intercourse—that is, intercourse which is *of its kind apt for generation*—to involve the ejaculation of semen that has its origins (at least in part) in the testicles.¹⁷ Since there are good reasons for holding that the papal approval of the decree was *in forma specifica* (in other words, a solemn approval), the teaching of the decree rests on the authority of the Pope himself.¹⁸

What fundamental consideration lies behind the decree? The following, I think: Marriage belongs to the order of creation, and what is required for the consummation of marriage should therefore be in principle universally graspable. What is universally graspable are the elements of the performance—what I earlier called the “behavioral pattern”—which embodies marital intercourse. Those elements for the man are erection, penetration, and ejaculation within the vagina. The most important of these is the ejaculation of semen: inability to deposit semen in the vagina amounts to an inability to perform the *kind* of act which is per se apt for generation. A sexual performance in which a wife has not received within her reproductive tract her husband's semen is at a phenomenological level clearly not an act “ordered to procreation.”

It is important to emphasize that these criteria for the integrity of the act are about the nature of a *performance*. Whether a performance which follows a normal behavioral pattern (and in which neither spouse produces “physical circumstances” rendering it inapt for procreation) is actually fertile or sterile is not determined by the performance as such.

In Question 15, article 2, of his *Disputed Questions on Evil* (a question about whether every act of lust is a mortal sin), Aquinas considers an objection which seeks

¹⁵ The Holy Office judged that a man who had a vasectomy possessed a *potentia coeundi*—in particular, that he was capable of ejaculating semen—even if he did not possess a *potentia generandi*, because his semen lacked sperm. See McGrath, *A Controversy concerning Male Impotence*, 159–164.

¹⁶ McGrath, *A Controversy concerning Male Impotence*, 119–121.

¹⁷ Sacred Congregation for the Doctrine of the Faith, *Decretum circa impotentiam quae matrimonium dirimit*, in *Acta Apostolicae Sedis* 69 (1977): 426.

¹⁸ See the argument in McGrath, *A Controversy concerning Male Impotence*, 251–257, for this understanding of the authority of the decree.

to infer the permissibility of a range of non-generative sexual activities from the permissibility of intercourse in marriage with a sterile wife. He replies:

that act is said to be contrary to nature in the genus of lust from which, *according to the general character* [“species”] *of the act generation cannot follow*, but not that act from which it cannot follow because of some particular *incidental* [“accidens”] circumstance such as old age or infirmity.¹⁹

This may sound obscure. What is meant, I think, is that while the character of your performance can ensure that generation cannot follow, if what you do is the normal kind of sexual intercourse, your *happening to be sterile* does not alter the character of the act as the kind of performance which, in its behavioral pattern, is apt for generation.

What has all this to do with my argument with Fr. Rhonheimer? If a husband ejaculates into a condom, his wife is not receiving his ejaculate in her reproductive tract. His chosen act has, therefore, the character of an act from which generation *cannot* follow. That generation cannot follow is not a *per accidens* feature of the act, arising from biological characteristics of the spouses which are extrinsic to the character of the performance as such. On the contrary, it is an essential feature of the chosen character of the performance that generation cannot follow from it; it is essentially a type of act inapt for generation.

Recall Fr. Rhonheimer’s key claims. They are 1) that condomistic intercourse conforms to the normal behavioral pattern of generative intercourse, and 2) that it is rendered non-generative by producing “physical circumstances” which make sterile what might have been fertile.

The first of these claims seems to me wholly implausible. The performance that constitutes condomistic intercourse includes the man’s chosen act of sheathing his penis in a latex rubber cover in order to ensure that ejaculation is into the condom rather than his wife’s vagina. So what happens fails to instantiate an essential feature of the behavioral pattern of generative intercourse: there is no deposition of semen in the woman’s reproductive tract. A condom is as inappropriate a receptacle for the deposition of semen as the anus. Choosing to ejaculate into either amounts to the choice of a type of act which *in the very character of the performance* plainly detaches sex from its ordering to the good of children. And that, as St. Thomas teaches, is the essence of “unnatural vice.”

Fr. Rhonheimer has sought to argue that insistence on the deposition of semen in the woman’s reproductive tract as essential to the behavioral pattern of generative intercourse rests on the antiquated “scientific” assumption that semen is the uniquely generative agent. Since we now know, in the light of more accurate science, that an ovum is necessary as well as sperm for generation, we should, if we were following the logic which originally required the deposition of semen for the completion of marital

¹⁹ Thomas Aquinas, *Quaestiones Disputatae de Malo*, Q. 15.2, reply 14, in *Quaestiones Disputatae*, vol. 2, ed. P. Bazzi et al. (Turin, Italy: Marietti, 1965), 652; see also the English translation (slightly modified) in Aquinas, *On Evil*, trans. John Oesterle and Jean Oesterle (Notre Dame, IN: University of Notre Dame Press, 1995), 435 (emphasis added).

intercourse, now require the presence of an ovum if there is to be marital intercourse. But we do not. So (he concludes), we should not require the deposition of semen.

However erroneous earlier views may have been about the precise nature of the *biological* contribution husband and wife make toward generation, it has always been recognized that each made *some* contribution.²⁰ The significant difference between them is that, while the wife's behavior in intercourse has to be such that she receives her husband's deposition of semen vaginally, her precise biological contribution to generation remains—as it always has been—independent of that behavior. By contrast, the husband's contribution to generation does depend upon his willing and carrying out the marital act of ejaculating semen into his wife's reproductive tract. If he engages in coitus interruptus or condomistic intercourse, he engages in a kind of behavior which, qua performance, precisely does exclude his (possible) biological contribution to generation.

It is because of the distinctive significance for generation of the husband's chosen *behavior* that the Church's canonical jurisprudence, culminating in the authoritative determination under Pope Paul VI of what constitutes capacity to consummate a marriage, requires a specific *behavioral pattern* in the husband's performance, including ejaculation of semen in his wife's vagina. It does not require what is not controllable by chosen behavior, whether that be the condition of the semen or the fertility of the woman.

The husband's capacity to perform in accordance with such a behavioral pattern necessarily has a physiological component. There are many kinds of human performance which cannot be chosen in the absence of certain physiological capacities: think of writing, reading, sprinting, swimming, doing a cartwheel, singing the part of Sarastro in Mozart's *Magic Flute*, and so on. But the criteria for what count as such chosen performances are not reducible to physiological categories. It is simply a muddle to think that if a person insists that a particular kind of performance requires a certain kind of physiological capacity if one is to engage in it, that person has a "physicalistic" understanding of the performance, meaning an understanding which fails to recognize the essential role of intention in specifying the character of action.²¹ The fact is that one can intend and choose to do only what one is capable of doing.

But intention is not limited just by capacity. It is also the case that only certain kinds of performance can embody certain kinds of intention. As Fr. Rhonheimer has rightly noted, "not any intention can *reasonably* inform any act or behavior: one cannot swallow stones with the intention of nourishing oneself";²² nor, I would add, can one exhibit "openness to serve ... the task of transmitting human life"²³ by

²⁰ Observations over millennia about the barrenness of certain women rest on a recognition that there is *something* present in fertile women (and lacking in the barren) which contributes to generation.

²¹ I use the term "intention" to refer not just to the "further intention" with which an act is done, but also to the "proximate object" of the act.

²² Guevin and Rhonheimer, "On the Use of Condoms," 44 (original emphasis).

²³ *Ibid.*, 46.

ejaculating into a condom. Fr. Rhonheimer's interpretation of *Humanae vitae* n.12 radically disconnects the notion of "procreative meaning" from what is surely a minimal criterion of what is to count as generative or procreative behavior. That criterion, as we have seen, does not refer to biological conditions of generative success, but rather refers to a behavioral pattern which, if those conditions are present, is conducive to generation.

What Church teaching and canonical jurisprudence require in the way of physiological capacity is simply what is necessary for a human performance to be the kind that is conducive to generation *qua performance*. The biological conditions for generation do not have to exist for "one body, one flesh" unity to be actualized, but generative performance is necessary for it to be actualized.²⁴ Condomistic intercourse, as essentially non-generative, simply cannot, contrary to Fr. Rhonheimer's belief, "still [have] a point as a marital act of loving union."²⁵

The Sacramental Significance of the Behavioral Pattern of Marital Intercourse

It should by now be clear that the question about the permissibility of condomistic intercourse within marriage, which may strike some as a marginal issue, in reality goes to the heart of the Christian understanding of marriage. In this final section, I would like to bring out how fundamentally Fr. Rhonheimer's position departs from the understanding of the significance of marital intercourse within the Christian understanding of marriage as a sacrament.

A marriage is consummated only in sexual intercourse of the generative kind. Consummation belongs at the heart of the symbolic and therefore sacramental significance of marriage.

In the previous section, concerning canonical jurisprudence on consummation, I considered what is required on the side of the man in the character of sexual intercourse in order to consummate marriage. An inability to so perform is called male impotence, and if it is antecedent and permanent, it is an impediment to contracting a valid marriage. In this section, in order to bring out the symbolic and sacramental significance of marital intercourse, I first draw attention to the import of the possible canonical effect of failing to consummate marriage, namely, that the marriage can be dissolved, as Canon 1142 says, "by the Roman Pontiff for a just reason."²⁶ But as the previous Canon (1141) indicates, "a marriage which is ratified and consummated cannot be dissolved by any human power or by any cause other than death."²⁷

In the development of the Church's doctrine of marriage and its canonical practice, the rationale for this power to dissolve and its significance crystallized in the twelfth century. In Gratian's *Decretum* we find a transformed text of Pope Leo the Great that reads as follows:

²⁴ See section 2 above.

²⁵ Guevin and Rhonheimer, "On the Use of Condoms," 44.

²⁶ *Code of Canon Law in English Translation*.

²⁷ *Ibid.*

Since the social bond of marriage was instituted from the beginning in such a way that without sexual intercourse marriages would not contain the symbol of the union of Christ and the Church, there is no doubt that a woman whom we learn to have been without the nuptial mystery does not pertain to marriage.²⁸

Professor David d'Avray has recently shown that there was extensive scope for the exercise of the power to dissolve in the late Middle Ages since it was not infrequently the case that consummation was delayed, sometimes for a considerable time, after the words of present consent were exchanged by the spouses. Sometimes this was because the spouses, especially the bride, were deemed too young to consummate; sometimes the bridegroom would delay consummation until the bride's father had paid the dowry.²⁹

What is of interest here, however, is not canonical practice but the theological rationale for the canonical practice. The basis of that rationale is the famous passage in Chapter 5 of the *Letter to the Ephesians*:

Husbands should love their wives as their own bodies. He who loves his wife loves himself. For no man ever hates his own flesh, but nourishes and cherishes it, as Christ does the Church, because we are members of his body. "For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh." This mystery is a profound one, and I am saying that it refers to Christ and the Church. [Eph 5: 28–32]

In connection with this passage, recall the words just quoted from Gratian: "without sexual intercourse marriages would not contain the symbol of the union of Christ and the Church." The "one body" unity of baptized spouses actualized in intercourse is not an extrinsic symbol of the Church's unity in the body of Christ.³⁰ It is what St. Paul calls a *mysterion* of that unity, a sacramental realization of a kind of unity which shares in the unity of Christ and the Church, and in doing so reflects the nature of that unity. Now the unity of Christ and the Church is created by the self-giving love of Christ, centrally through his passion, death, and resurrection and through our participation in his victory over sin and death principally by our partaking of the risen body of Christ in the Eucharist. Marriage distinctively shares in the unity of the body of Christ as husband and wife enact in their lives both the self-giving of Christ and the receptivity of the Church. And the action which both signifies and realizes this unity is marital intercourse. But in order for it to do so, there clearly must be both a giving by the husband of his substance to his wife and a receiving of it by the wife. When this giving and receiving are fruitful in the birth of children, we have the reality that is called the "domestic church."

From this account of the sacramental significance of marital intercourse, it is clear that condomistic intercourse could not possibly be described as marital intercourse, for in condomistic intercourse there is neither the giving nor the receiving

²⁸ Gratian, *Decretum*, Pars II, C. 27, q.2, c.17, quoted in David d'Avray, *Medieval Marriage: Symbolism and Society* (Oxford: Oxford University Press, 2005), 179.

²⁹ d'Avray, *Medieval Marriage*, 180–188.

³⁰ An "extrinsic symbol" could not have the consequence marital intercourse has: indissolubility.

which are essential features of the symbolism. It seems to me that the fundamental rationale of marriage as an institution ordered to the good of children and requiring therefore that intercourse should be of the generative kind, together with the interpretation of that requirement in the canonical jurisprudence of the Church, underpinned by the theology of marriage, all point to the conclusion that condomistic intercourse exhibits a behavioral pattern of a kind that is intrinsically non-generative and hence nonmarital. And if that is so, one would have to conclude that there is no possible place for the prophylactic use of condoms within marriage.