Article

“Validity” and “liceity” in conjugal acts: A reply to Stephen Napier on the HIV- condom debate

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Stephen Napier has argued against the soundness of what he calls the “Canon-Law argument” against the moral permissibility of a couple employing a condom for the sake of one spouse avoiding the contraction of HIV from the other spouse. Without an attempt to provide a full defense of the Canon-Law argument per se, this paper argues that Napier has not shown that argument to be inadequate. Napier’s critique of that argument suffers from unsubstantiated counterexamples and from a failure to take into account analogous senses of “procreative end” in reference to the conjugal act. Using magisterial documents and canonical sources, this paper suggests that the distinction between validity and liceity can be usefully applied to conjugal acts.

Lay Summary: Stephen Napier has argued in favor of the claim that there is no plausible argument for thinking that married couples who use a condom in order to prevent HIV transmission are necessarily doing something morally wrong. In responding to Napier by showing that his arguments in favor of his claim are inconclusive, this article introduces a distinction, frequently used in sacramental theology, between validity and liceity (lawfulness) and applies this distinction to marital actions. I argue that some modifications to marital actions make them merely unlawful, whereas other modifications—such as using an intact condom—make them both unlawful and “invalid.”

Keywords: Condom, HIV, Validity, Liceity, Conjugal act, Marriage, Consummation, Contraception

In his article in this journal, “The Missing Premise in the HIV-Condom Debate,” Stephen Napier argues against the soundness of what he calls the “Canon-Law argument” against the moral permissibility of a couple employing a condom for the sake of one spouse avoiding the contraction of HIV from the other (infected) spouse (Napier 2011). As Napier presents the Canon-Law argument, “consummation is the archetypal sexual act; but because modifying the conjugal act with use of a condom

prevents consummation—understood, then, as a conjugal act that is not of the consummative-type—the conjugal act performed is defective and therefore immoral” (Napier 2011, 402). Napier challenges the Canon-Law argument in two ways. First, he believes that the Canon-Law argument succumbs to counterexamples; and second, he believes that the argument is without sound foundation insofar as it concludes from “a conjugal act failing to consummate” to “the conjugal act being immoral.” Napier

aims to show that, while there is a defect present in “a conjugal act failing to consummate,” such a defect does not necessarily entail that an immoral act has been performed (Napier 2011, 402).

According to Napier, it is no small matter if the Canon-Law argument can be shown inadequate. For he believes that if his project sufficiently shows that the argument fails, “then there is no plausible argument for thinking that discordant couples who use a condom *in order to* prevent HIV transmission are thereby performing an intrinsically evil act” (Napier 2011, 402).¹ In the present paper, I will argue that Napier has not shown the Canon-Law argument to be inadequate. The counterexamples offered by Napier are unsubstantiated, and his critique of what he calls “the deprivation argument,” used in support of the Canon-Law argument, does not sufficiently take into account analogous senses of “procreative end” in reference to the conjugal act.

The critique of Napier’s case will follow the order of his article. First, Napier’s presentation of the Canon-Law argument will be analyzed, together with certain preliminary statements he makes concerning texts from the Code of Canon Law, a commentary on the Code, and Pope Paul VI. Second, Napier’s putative counterexamples will be analyzed. Third, Napier’s presentation and criticism of what he calls “the deprivation argument” will be analyzed. In all three sections significant problems with certain positions of Napier will be uncovered.

ANALYSIS OF NAPIER’S PRESENTATION OF THE CANON-LAW ARGUMENT

It will be useful to provide Napier’s rendition of the Canon-Law argument, and then address his explanatory comments. According to Napier, the Canon-Law

argument can be stated in the following way.

- (1) A marriage is consummated only if the conjugal act performed deposits semen in the vagina....
- (2) Semen is not deposited in the vagina when the conjugal act is modified by condom use....
- (3) Therefore a conjugal act modified by condom use does not consummate the marriage....
- (4) A conjugal act that is not suitable for consummating a marriage is an immoral act.
- (5) It follows that the conjugal act modified by condom use is immoral. (Napier 2011, 403–4)

Napier formulated the first premise based on two sources, canon 1061 §1 of the 1983 Code of Canon Law, and John Beal’s entry on “Title VII: Marriage,” in the *New Commentary on the Code of Canon Law*. The relevant part of canon 1061 §1 states:

it [marriage] is called *ratum et consummatum* if the spouses have performed between themselves in a human fashion a conjugal act which is suitable in itself [*per se aptum*] for the procreation of offspring, to which marriage is ordered by its nature and by which the spouses become one flesh.²

Napier notes that commentators on this canon have typically understood that consummation must involve, at the very least, both vaginal penetration by the male organ and the deposition of semen in the vagina. In support, Napier quotes the following from Beal’s commentary.

Consummation was not effected, however, by *coitus interruptus* in which the man penetrated the woman’s vagina but withdrew before ejaculation or by intercourse using a condom. In both cases, consummation did not occur

because of the failure to ejaculate semen in the vagina. (Beal 2000, 1258)

Napier also notes how, according to the *Commentary*, even though other methods of birth control, such as those involving the use of oral contraceptives, are regarded as immoral, consummation is still achieved provided the methods do not prevent the deposition of semen in the manner described above (Napier 2011, 403).

Considering the sources that provide the foundation for premise (1) of the Canon-Law argument, Napier makes two important points. The first point is that canon 1061 §1, considered in itself, lists only sufficient, not necessary, conditions for the consummation of marriage. The canon says that “marriage is called ratified and consummated *if* spouses have performed...” The canon does not say “marriage is called ratified and consummated *only if* spouses have performed...” Hence, the canon does not tell us what is strictly necessary for consummation, but only some conditions that, when met, give certainty that consummation has taken place (Napier 2011, 403).

Napier’s second important point is related to the first. Since, the Code itself appears to offer only *sufficient* conditions for consummation, the *Commentary* appears to go beyond the Code by considering vaginal penetration and consequent deposition of semen to be *necessary* conditions. Hence, Napier considers that it is possible to challenge the authority of the *Commentary* without challenging the authority of the Code itself. Napier notes that this would be one possible way to challenge the Canon-Law argument. One could show “the counter-intuitive consequences that follow from accepting the *Commentary’s* interpretation” of the Code, and thereby refute the Canon-Law argument that rests upon that interpretation, while at the same time respecting the authority of

the Code (Napier 2011, 404). Napier does not focus his challenge in this way. For the sake of argument, he practically assumes the *Commentary* as authoritative. Making this assumption appears to have been necessary in Napier’s understanding in order to frame premise (1) of the Canon-Law argument in terms of necessary conditions for consummation.

It should be noted at this point that it would be possible to support premise (1) of the Canon-Law argument without relying upon any presumed authority of the *Commentary*, and even if Napier were correct in his own interpretation of canon 1061 §1 as providing merely sufficient and not necessary conditions for consummation. Certain ecclesiastical authority has already settled the *necessary and sufficient* conditions for the consummation of marriage. The following judgment from the Supreme Sacred Congregation of the Holy Office, of February 27, 1941, makes this clear.

Treating a matrimonial case, this Supreme Sacred Congregation, in the plenary assembly of the fourth day of the week, February 12, 1941, has placed a question which it here publishes with its solution:

“Whether for perfect copulation and for the consummation of matrimony, it is required and suffices, that the man, at least in some way, even if incompletely, penetrates the vagina, and immediately in it accomplishes in a natural manner at least a partial semination; or whether such penetration of the vagina is required, so that the entire *glans* dwells within the vagina?”

Response: “*Affirmative* to the first part. *Negative* to the second part.”

The Holy Father, in the audience of the fifth day of the week, February 27, 1941, granted to His Excellency the Monsignor Assessor of the Holy Office, ordered that the aforementioned decision be communicated to N.N. by the direction of this Holy Dicastery.³

The affirmative response to the first part of the inquiry confirms what are the *necessary and sufficient* conditions for “perfect” or complete copulation and for the consummation of marriage: (at least) partial vaginal penetration by the man, and his consequent (at least) partial semination in a natural manner. The further relevance of this response from the Holy Office will be considered later.

Before addressing Napier’s main challenges to the Canon-Law argument, which are challenges principally to premise (4), it is necessary to treat one other point he considers in relation to the formulation of the argument as a whole.

Another clarification is that the Canon-Law argument is framed with reference to a type of conjugal act; specifically a conjugal act that is not suitable for consummation. This way of formulating the argument is in keeping with the Church’s teaching on sexuality. For example, *Humanae vitae* defines a direct sterilization (whether temporary or permanent) as “every action which, either in anticipation of the conjugal act, or in its accomplishment, ... proposes, whether as an end or as a means to render procreation impossible.” What is at stake in the Canon-law argument, then, is to argue that there are two sub-types of conjugal acts: those that are suitable for consummation and those that are not. Those that are not are claimed to be immoral.⁴ (Napier 2011, 404)

There is a very important and profound distinction here, *if* what Napier has said is correct. Do the Canon-Law argument and, more importantly, *Humanae vitae*, imply that one can rightly distinguish between two “sub-types” of *conjugal acts*: “those that are suitable for consummation and those that are not”? To frame things according to the decision of the Holy Office, one might ask: Is there a distinction between the “perfect copulation” of spouses and the *conjugal act*? If the

necessary and sufficient conditions for perfect copulation and for the consummation of marriage simply are penetration and subsequent insemination,⁵ there does not appear to be any room for a conjugal act that is not suitable for consummation. Moreover, there is nothing in the sources cited by Napier that requires a distinction between conjugal acts that are suitable for consummation and conjugal acts that are not suitable for consummation.

Evidently, Napier reads canon 1061 §1, “[marriage] is called *ratum et consummatum* if the spouses have performed between themselves in a human fashion *a conjugal act which is suitable in itself for the procreation of offspring*,” with the last italicized part being understood as addressing a distinct *type* or species of conjugal act, with the implied possibility of other types or species of conjugal act. A difficulty with this understanding is locating some *genus* of *conjugal act* in something other than *perfect copulation* (as defined by the Holy Office) between spouses. One way to avoid this difficulty is to read the italicized part that follows *conjugal act* in a way that explains rather than in a way that specifically distinguishes. It may be helpful to point out that the English translation adds “which is” after “conjugal act.” A more direct translation from the Latin may be “conjugal act suitable in itself for the generation of offspring” (*coniugalem actum per se aptum ad prolis generationem*). “Suitable in itself for the generation of offspring,” may serve as an *explanation* of conjugal act; that is, a consummating act is a complete conjugal act, and a complete conjugal act is what is suitable in itself for the generation of offspring. This reading would very readily harmonize with the definition of the Holy Office. I am not presently arguing that this is the only way to read the words following “conjugal act” in the context of canon 1061 §1, only that this is a plausible and different reading from that

seemingly assumed by Napier. In any case, this is sufficient to show that Napier has not established his distinction between subtypes of conjugal acts (those suitable for consummation and those not suitable) from his reference to canon 1061 §1.

But there is another issue related to the use of terms that should be clarified, and which may be directly relevant for understanding the text from *Humanae vitae* quoted by Napier. Sometimes ecclesiastical documents conveniently use terms for descriptions that are given more according to appearances rather than according to what is really or ontologically taking place. This happens even in the Code of Canon Law itself. For example, canon 1107 states: "Even if a marriage has been entered into invalidly by reason of an impediment or defect of form, the consent given is presumed to persist until its withdrawal has been established" (Caparros, Thériault, and Thorn 1993, 700).⁶ "A marriage entered into" or "begun" (*initum*) "invalidly" is no *real* marriage. The man and woman are not truly married, that is, united by a marriage bond, whether natural or sacramental. Still, there is a sense in which the two did "go through the motions" of contracting marriage. In that way it makes sense to speak about their "marriage entered into." These words have a true descriptive value, in terms of appearances, regarding the man and woman "going through the motions" of contracting marriage and intending to do so. Speaking of their "marriage" begun invalidly in the context of canon 1107 is more convenient than saying something such as, "Even if a man and a woman mean to give matrimonial consent and outwardly manifest their wills to consent in such ways that, all things being equal, are apt to establish the bond of marriage, but with the matrimonial bond not obtaining by reason of an impediment or

defect of form, the consent given is presumed to persist until its withdrawal has been established."

Descriptions according to appearances abound especially in sacramental matters. This is understandable, since with the sacraments a key distinction is found in the valid versus the invalid administration or confecting of a sacrament.⁷ For example, in the case of Baptism, the Congregation for the Doctrine of the Faith, on February 1, 2008, responded to the following two questions.

Q. 1. Whether baptism is valid conferred with the formulas: "I baptize you in the name of the Creator, and of the Redeemer, and of the Sanctifier" and "I baptize you in the name of the Creator, and of the Liberator, and of the Sustainer"?

Q. 2. Whether those who were baptized with those formulas are to be baptized absolutely?

Responses: to the first: negative; to the second: affirmative.⁸

It is noticeable that the questions speak of "baptism" as some act that can take place but with certain formulas that are said to be invalidating of the sacrament. In such a case, no real sacrament of baptism takes place. Consequently, those who receive "baptism" with the invalidating formulas are to be baptized truly and without any conditions ("absolutely"). Still, there is a way in which the action of washing certain individuals in a context where the person washing and the person washed, intending Christian baptism, can be described (and are described by the Congregation for the Doctrine of the Faith) as conferring or receiving "baptism." It can be argued that something similar is operative in the language of Pope Paul VI, when in the section of *Humanae vitae* quoted by Napier, the Holy Father condemned "every action which, either in anticipation

of the conjugal act, or in its accomplishment, ... proposes, whether as an end or as a means to render procreation impossible.” It seems plausible that “conjugal act” here is meant in more of a descriptive sense, that is, according to certain recognizable appearances. It may happen that some married couples “go through the motions” of sexual intercourse, even desiring and believing their intercourse to be “conjugal” (at least insofar as they may believe it to be representative of their marital love), but with some essential conditions lacking for their sexual acts to be in themselves apt for the generation of life (i.e., lacking the necessary and sufficient conditions for perfect copulation or consummation). Such couples might be said to engage in the “conjugal act” in a merely descriptive way, but not in a real or valid way. But here it is necessary to make one final distinction.

The responses from the Congregation for the Doctrine of the Faith on baptism addressed only cases where something necessary for the validity of the sacrament was lacking (in the cases addressed, the proper form was lacking). There are also cases where something could be lacking that affects not the validity of the sacrament, but its fruitful reception. In the case of baptism, this could happen, for example, if the recipient freely received the rite of baptism (the consent of an adult recipient being necessary for validity), but internally refused to repent of his mortal sins. The sacrament would be valid, and there would be an indelible character of baptism imprinted on the soul of the recipient, but because of his willful lack of repentance, the man put an obstacle to the sanctifying grace that would otherwise be given by the sacrament. Hence the man’s reception, though valid, would be “unfruitful.” There does not appear to be any reason why the statement from *Humanae vitae* cannot admit of an analogous case in

relation to the conjugal act. Sometimes a husband and wife might perform a conjugal act in a *merely* descriptive sense, when the sexual act is actually *invalid*, in relation to the necessary conditions for perfect copulation or a conjugal act in the true, consummating sense. This could be the case, for example, with the use of an intact condom, inasmuch as the condom prevents the necessary condition of intra-vaginal semination in the natural manner. But other times, it may happen that the couple perform a *valid* conjugal act, because the necessary conditions for perfect copulation/consummation are freely performed, but their act is lacking on at least the moral level, due to something done before the act (e.g., taking an oral contraceptive) or something planned (e.g., the introduction of a spermicide immediately after intercourse) intended to render the act unfruitful. Pope Paul VI’s statement appears to be broad enough to condemn both those acts which impede a “conjugal act” from being fully procreative due to depriving the act of some condition necessary for a valid conjugal act (here “conjugal act” is used in a way like “baptism” lacking an essential element), and those which retain the necessary conditions for a valid conjugal act but which are *merely* morally deprived by the bad wills (in relation to bad actions done or planned that are aimed at rendering the conjugal act unfruitful) of the couple involved (in such cases “conjugal act” can be used strictly, but in a way analogous to how baptism may be said to be “unfruitful”). Freely “depriving” in either case is morally bad, but in the first case the deprivation is generally worse due to the nature of the deprivation *as invalidating*.

Some of the above considerations will be relevant below when addressing Napier’s analysis of what he calls the “deprivation argument.” But it is first necessary to treat of certain

counterexamples Napier offers in order to challenge premise (4) of the Canon-Law argument.

A CRITIQUE OF THE COUNTEREXAMPLES OFFERED BY NAPIER

Opening his section on counterexamples to the Canon-Law argument, Napier presents the following hypothetical case, with subsequent comments.

Suppose a couple gets married and the husband suffers from retrograde ejaculation, or he cannot produce semen because, for example, his prostate was removed secondary to prostate cancer.⁹ Does the couple do something immoral? Canonists will probably say that upon knowing this fact, they could have the marriage annulled because it was not consummated. But the question is not whether it could be annulled, but whether they perform an immoral act. In the case just noted, it appears that there are conjugal acts that are not sufficient to consummate a marriage, but do not appear to be immoral. Therefore failure to consummate cannot be held out as a marker for identifying immoral conjugal acts.¹⁰ (Napier 2011, 404–5)

A page later, Napier adds this qualification to the case above: “We can suppose in the original case, without damage to the intuitive appeal of the case, that the couple knows about Rej [retrograde ejaculation] but do not will one way or the other with regard to correcting it” (Napier 2011, 406). This addition brings the case very close to another hypothetical situation Napier presents (which he calls “Case 1,” as distinguished from “the original case”) where due to finding out about the husband’s HIV positive status, the couple chooses not to correct the Rej. The difference between the cases is located especially in the clear choice not to correct the Rej,

with the implication that the couple will continue to have intercourse, whereas the original couple does not directly and explicitly make a choice to avoid correcting the Rej. It is clear in this section that “Case 1” builds upon “the original case.”

Napier offers another case which is different in several respects from the first two. Readers are asked to suppose that a couple, not troubled by Rej, has a choice between anti-retroviral therapy or using a condom to prevent HIV transmission.

The couple considers insemination a great good for many reasons, including that it realizes and completes physical union which gives rise to a greater psychological connectedness. Clearly, the couple considers insemination a great good, something worth trying to achieve. Suppose, however, that anti-retroviral therapy is significantly less effective than condom use in preventing HIV transmission. They opt to use a condom, though reluctantly and only insofar as it represents the more effective means of preventing HIV transmission. (Napier 2011, 407)

This case is significantly different from the first two cases. Due to his analysis of the order of practical reasoning that he gives following the presentation of this case, Napier does not believe that the couple necessarily *chooses* “non-insemination.” Perhaps aware that he might meet with some disagreement regarding what is involved in the couple’s object of choice, Napier goes on to make the following comments, which connect the three cases together.

Even if the choice for a condom involves a choice not to inseminate, there is still the question about whether this is an immoral choice. I think not...Immoral acts are partly a function of one choosing to bring about evil states of affairs. But the absence of semen in the vagina is exactly what happens in Case 1 and in

the original case. If the failure to deposit semen in the vagina does not render the original case or Case 1 immoral, how can *choosing* such a state of affairs render the act immoral? Either the absence of semen in the vagina is an evil state of affairs or it is not. If it is, then Case 1 and the original case would involve “objectively” immoral acts. But our intuitions say otherwise. If it is not an evil state of affairs, then simply choosing that state of affairs would not make the choice immoral. (Napier 2011, 407–8)

It is evident from these last comments, that the cases after the original case ultimately have persuasive force for one whose intuitions agree with Napier. Hence, it will be most profitable to analyze what Napier’s intuitions about the original case are, and whether such intuitions are justified.

It can be a difficult matter in general to argue based on an appeal to intuitions. This is the case because personal intuitions are often grounded in presuppositions not shared by all others. Depending on whether one agrees with Napier’s understanding of the premises of the Canon-Law argument, one may or may not be inclined to share his intuitions regarding the “original case” and the other cases based on it in the “counterexamples” section of his article. For example, regarding the “original case,” Napier wrote: “in the case just noted, it appears that there are conjugal acts that are not sufficient to consummate a marriage, but do not appear to be immoral.” But it has been shown to be doubtful that there are truly “valid” “conjugal acts” that are not sufficient to consummate a marriage. Hence, if someone does not believe Napier has sufficiently established that there is a true distinction to be made between authentic “types” of conjugal acts, those suitable to consummate and those not suitable to consummate, then he might be hesitant

to agree with Napier that the sexual acts in the “original case” “do not appear to be immoral.”

There appears to be no obvious reason given in the section on “counterexamples” that explains why readers would be thought to agree intuitively with Napier’s own intuitions on the “original case.” It is possible that many would be inclined to disagree intuitively with Napier, especially when the above critique of the first part of his article has been considered. One could reasonably explain an intuition opposed to Napier’s intuition regarding the “original case” along the following lines. If a couple knows with certainty that the husband’s case of Rej means that no insemination whatsoever (even partial) is possible in their sexual act, then freely choosing to engage in a sexual act that will terminate *only* in Rej is to engage freely in a completed (in the sense of climax achieved) sexual act that is invalid or essentially lacking as a conjugal act. Why one should not intuit such an act as inherently unreasonable, and consequently not to be done, is not directly addressed by Napier.¹¹ He seems to rely too readily not only on his own intuitions as coinciding with those of his readers, but also on his assumptions about the existence of “types” of conjugal acts, those which consummate and those which do not.

NAPIER’S TREATMENT OF “THE DEPRIVATION ARGUMENT”

In the final section of his article, Napier explores an argument that attempts to justify the logical move from “condomistic sex fails to consummate a marriage,” to “condomistic sex is immoral.” There are several important statements in this section that need to be set together in order to present and critique Napier’s

assessment of what he calls “the deprivation argument.”

If one accepts a “privation” account of the wrongness of actions, then there is an argument for moving from “failure to consummate” to “immoral act.” Roughly, on the privation account of evil, immoral actions are immoral because they do not obtain what they ought to obtain. If a sexual act between spouses is ordered to consummation, then failing to consummate would specify the sexual act in question as immoral: such an act would be deprived of what it ought to obtain.

But it is at this very point that the deprivation argument meets a hurdle. According to the *Commentary*, the use of oral contraceptives does not preclude consummation, even though procreation is prevented. What, then, is the good lost in preventing insemination, since it is obviously not procreation? If one says marital union on the grounds that consummation is about confirming the union made in the vows, then one has abandoned the traditional understanding that union is achieved through, or at least, being open to, procreation. Husband and wife become one body—the one body being *one* in virtue of a distinct end, or *telos*, namely, procreation.

...The notion of unity just is being ordered to the good of procreation. What is good about being united is that the unity is constituted by two persons becoming one in order to create another human being.¹²

Another hurdle concerns not only identifying the good being deprived but to argue that in so depriving the conjugal act of that good, one is performing an immoral act. It may seem obvious that depriving an act of a good entails performing an immoral act, but certain acts tolerate some privations without being rendered immoral. The conjugal act is ordered to procreation; being procreative constitutes its very essence and meaning.

But if a conjugal act is infecund, and therefore deprived of a good to which the act is ordered, it is not thereby an immoral act. Of course, if there is a *choice* to render the conjugal act infecund, then one has acted *against* a good of which the act is essentially ordered. But such a choice is not necessarily made in using a condom for HIV prevention. Rather, the choice to use a condom for HIV prevention is structured more like the choice of a couple practicing NFP for pregnancy prevention. The choice to use a condom is not to prevent procreation; rather not-being-procreative is an unintended side effect. Likewise, the NFP couple does not choose to render the conjugal act infecund; rather, being infecund is an unintended side effect of having relations when the woman is not fertile. In both cases, the conjugal act is deprived of its essential end, procreation; but neither act is evil. They are not evil, at least, in virtue of the conjugal act not being procreative because not being procreative is not what is chosen.

[Lastly,] According to the *Commentary*, there are acts which are contraceptive and therefore immoral, but they do not preempt consummation, e.g., use of oral contraceptives ... The task of the proponent of the Canon-Law argument is to pick out a good that is impugned in conjugal acts that are non-inseminating. If there is no moral good [that can be identified as i) essentially connected to the conjugal act and ii) willed against when a couple uses a condom for HIV prevention], then there are no grounds upon which to say that a conjugal act that is non-consummative is also immoral. An immoral act requires the deprivation of a good, and since consummation can be achieved even while acting against the good of procreation, there is no good “left over” that could ground a non-consummative act as being immoral. The goods of unity and self-giving are understood in light of the conjugal act’s finality, its procreative end. It seems, very

plausible, then, that for non-inseminating conjugal acts, there is not a *choice* to act against a good, a good that is *essentially* connected to the conjugal act. (Napier 2011, 409–12)

This lengthy set of quotations is necessary to understand a flaw that appears to be at the heart of Napier’s critiques of the Canon-Law argument and of the “deprivation argument” used in support of the Canon-Law argument.

In several places above Napier writes as though the good that is deprived in the intercourse using a condom cannot be “procreation,” because traditional canonical understanding allows consummation to take place even when “procreation” is already deprived or acted against by the couple using methods of birth control such as oral contraceptives. The last three sentences of the quotation especially bring together Napier’s thoughts on these matters. The “procreative end” of the conjugal act is said to ground the goods of unity and self-giving that can and should be present in the conjugal act. So, as long as consummation can be achieved while spouses act against the good of “procreation” by the use of oral contraceptives, there appears to be no good “left over” that could ground the condomistic or otherwise non-consummative act as immoral. But an important question needs to be asked: Has Napier adequately represented what he refers to as the “procreative end” of marriage or of the conjugal act?

To address better this question, it will be useful to consider an important text from around the same time (but shortly after) the decision from the Holy Office on the necessary and sufficient conditions for the consummation of marriage. On January 22, 1944, the *Sacra Romana Rota* issued an explanation of the ends of marriage, as part of a judgment dealing with a

matrimonial case. The explanation was then published in the *Acta Apostolicae Sedis*.¹³ Numbers 11, 14, and 15 contain particularly relevant material for understanding different senses of “the procreative end” of marriage and of the conjugal act.

11.—A. The primary end of Matrimony.

The primary and principal, one and indivisible *finis operis* of matrimony which uniquely specifies its nature is the procreation and education of the offspring. This end can be considered a) *active*, b) *passive*, c) *sub utroque respectu*. Considered as *active* it regards the activity of the wedded couples, namely the wedded couple inasmuch as they procreate and educate the offspring; intended as *passive* it regards the offspring inasmuch as they are procreated and educated; taken *sub utroque respectu* it considers the wedded couple and the offspring together. The secondary ends, which are ordained to the primary end, can regard rather one aspect than another—active or passive—but they can also regard in an equal measure both aspects.

14.—b) No less so than marriage itself, even the conjugal act is subordinated and bound to the primary end, and to such a degree, that the exercise of this act is only permitted if and inasmuch as there is verified and is observed its essential subordination to the primary end of matrimony. This subordination is secured by the fact that husband and wife, when completing the natural conjugal act, can give all that is required and suffices [*requiruntur et sufficiunt*] on the part of human activity for the generation of offspring ...

15.—This subordination to the primary end which exists through its natural structure in the naturally completed conjugal act, is observed and is verified even in the wedded union of sterile persons and of others who for causes extrinsic to

the act cannot generate offspring with the natural use of marriage.¹⁴

While not a document of the Magisterium per se, the threefold distinction made in number 11 is very useful for approaching an understanding of the procreative end of marriage in light of the magisterial tradition. This end can be understood on the *active* side from the point of view of the couple *procreating*, and on the *passive* side insofar as the offspring is said to be *procreated* consequent the activity of the couple. Furthermore, *the end of procreation is present in some ("active") way* when the "husband and wife, when completing the natural conjugal act, can give all that is required and suffices on the part of human activity for the generation of offspring" (n. 14). When this statement is taken in conjunction with the judgment from the Holy Office just three years prior to the Rota explanation, a profound harmony of texts becomes evident. The Holy Office judgment states explicitly what elements are *required and sufficient* for husband and wife to *complete* the natural conjugal act: vaginal penetration and subsequent insemination in a natural manner. Here the Rota views the required and sufficient conditions for the generation of offspring from the point of view of the activity of the married couple. When the couple naturally completes the conjugal act, "through its natural structure" (n. 15), they are in a true way engaging in activity that is ordered (or subordinated) to procreation (in the active sense) *even if* the spouses themselves are sterile.

The explanation from the Rota, especially when taken together with the Holy Office judgment, allows one to respond to Napier's charge that some good other than "procreation" must be located for the Canon-Law argument to work if at the same time one wants to allow for practices such as oral contraceptive use to be

simultaneously against the procreative good and not impede consummation. Immoral uses of oral contraceptives (and other equivalent methods) may impede *procreation* in the *passive* sense (considering the offspring as conceived or generated), but insofar as they do not impede the natural structure of the conjugal act—penetration and insemination (which are per se apt for the generation of offspring, even if offspring do not in fact result)—oral contraceptives do not *entirely* impede *procreation* in the *active* sense. The case is essentially different when a condom is used. Now procreation *both actively and passively considered* is impeded.¹⁵ The good of procreation, or the essential ordering of the sexual activity of the spouses to the good of procreation, is *entirely* removed. To place directly the cause (as in the use of the intact condom) that immediately removes entirely the good of procreation from the sexual act between spouses is to act *against* the marital good of procreation, which according to Napier should be counted as immoral.

CONCLUSION

Having considered in detail Napier's understanding of the Canon-Law argument, the sources that provide its premises, Napier's counterexamples, and his critique of "the deprivation argument" used in support of the Canon-Law argument, and finding serious problems in all these areas, it seems justifiable to return to the original thesis. Napier has not proved the Canon-Law argument to be inadequate. This has been shown without the requirement of positively demonstrating the soundness of the Canon-Law argument as expressed by Napier. To do that adequately and convincingly would be a more comprehensive project. The present paper has had the modest goal of

pointing out reasonable doubt that should be had for Napier’s claim that “there is no plausible argument for thinking that discordant couples who use a condom *in order to* prevent HIV transmission are thereby performing an intrinsically evil act.”¹⁶

One final analogy with a sacramental case might be helpful in closing. The following is not intended as a proof of any sort, rather it is offered as a kind of thought experiment that might illustrate how important physical contact can be for the validity of some actions. Let us take the hypothetical case, that hopefully is never actual, of a catechumen who due to a severe form of aquagenic pruritus (and who refrains as far as possible from skin contact with water) arranges with a well-meaning but misguided priest for the administration of Baptism with an impervious sheet of plastic placed over the head of the catechumen in such a way that the water will flow all over the plastic on his head but without any water actually coming into physical contact with him. Provided that the minister and the recipient both intend Christian Baptism, and true and natural water is applied with the proper Trinitarian form, has the man sacramentally received Baptism? The answer is no.¹⁷ Even though there may be a sort of descriptive way in which he can be said to have “been washed,” there is *no real and true washing of the man* in the way necessary to baptize *sacramentally*. That is to say, there is no *valid* sacramental administration or reception of Baptism. The people in the hypothetical case can be supposed to act in (gross) invincible ignorance. But they are at least materially abusing the Sacrament. The gift of Baptism was not given to men to be administered or received in the manner described. By the design of God, direct physical contact in this case is necessary for valid sacramental action. It may be that direct physical contact by way

of insemination, as described in the 1941 decree from the Holy Office, is necessary for valid conjugal communion in relation to the conjugal act in a way similar to how direct physical contact in the case of bodily washing with water is necessary for valid Baptism. At the very least, it would not be surprising.

NOTES

- 1 “Discordant couple” here refers to a married couple of which only one person is infected with HIV.
- 2 This is the canon as quoted by Napier (2011, 403). He cites http://www.vatican.va/archive/ENG1104/_P3V.HTM. The original Latin text of the whole canon is the following: “Matrimonium inter baptizatos validum dicitur ratum tantum, si non est consummatum; ratum et consummatum, si coniuges inter se humano modo posuerunt coniugalem actum per se aptum ad prolis generationem, ad quem natura sua ordinatur matrimonium, et quo coniuges fiunt una caro.”
- 3 This is my translation of the Italian and Latin texts found in Hartman Batzill, *Decisiones Sanctae Sedis de Usu et Abusu Matrimonii* (Batzill 1944, 44–45):

Trattando un caso matrimoniale, questa Suprema S. Congregazione nella riunione plenaria di feria IV, 12 Febbraio 1941, si è posto un dubbio che qui si riporta con la sua soluzione:

“Utrum ad copulam perfectam et ad matrimonii consummationem requiratur et sufficiat, ut vir aliquo saltem modo, etsi imperfecte vaginam penetret, atque immediate in ea seminationem saltem partialem naturali modo peragat; an tanta vaginae penetratio requiratur, ut glans tota intra vaginam versetur”.

R.—“*Affirmative* ad primam partem. *Negative* ad secundam partem.”

Il S. Padre, nell’Udienza di feria V, 27 Febbraio 1941, concessa a

S. E. Mons. Assessore del S. Ufficio, ha disposto che la predetta decisione fosse comunicata a N. N. per norma di cotesto S. Dicastero.

It should be noted that there is no document of the Magisterium, text of canon law, or principle of canonical jurisprudence since this intervention from the Holy Office that supports the opinion of Napier that canon 1061 §1 of the 1983 Code should be read as providing only sufficient conditions for the consummation of matrimony. Moreover, while the rules of grammar and syntax materially allow Napier's interpretation as a logical possibility, formally to approve of that interpretation would require a reading of canon 1061 §1 according to a hermeneutic of discontinuity and rupture. Such discontinuity would be not only in relation to the 1941 teaching of the Holy Office, but also in relation to canonical doctrine that has continued to be handed on even after the 1983 Code. On the latter point, see [Beal \(2000, 1364\)](#).

4 Napier is quoting from Pope Paul VI, *Humanae vitae*, n. 14.

5 Stating the conditions this way does not deny that the conditions for perfect copulation need to be posited in a "human fashion," as a human act, as the full text of canon 1061 §1 makes clear (see note 2 above). For clarity on what it means to accomplish the conjugal act in a "human fashion" (*humano modo*), see the circular letter of the Sacred Congregation for the Sacraments, December 20, 1986: "for a marriage to be consummated it is necessary that there be a human act on the part of both spouses; it is sufficient for it to be virtually voluntary, provided it was not extorted through violence. No weight is given to other psychological elements which render the act easier or more loving" (English translation in Woestman, *Special Marriage Cases*, 119–6; as quoted in [Beal 2000, 1364](#)). Hence, for its *validity* consummation must be voluntary, but it need not be virtuous. This distinction will be important below.

6 The original Latin text is "Etsi matrimonium invalide ratione impedimenti vel defectus formae initum fuerit, consensus praestitus praesumitur perseverare, donec de eius revocatione constiterit."

7 Generally, a sacrament is "*valid*: when all the elements essential to the confection or constitution of the sacrament have been employed; *invalid*: when any such element is lacking." ([Halligan 1963, 3](#), emphasis in original.)

8 "D. 1. Utrum validus sit baptismus collatus cum formulis «I baptize you in the name of the Creator, and of the Redeemer, and of the Sanctifier» et «I baptize you in the name of the Creator, and of the Liberator, and of the Sustainer»? D. 2. Utrum qui baptizati sunt cum his formulis absolute baptizandi sunt? **RESPONSA** Ad primum: Negative. Ad secundum: Affirmative." ([Congregation for the Doctrine of the Faith 2008](#))

9 In a note for the first sentence, Napier describes retrograde ejaculation as involving "the semen being deposited in the bladder instead of continuing down the urethra" ([Napier 2011, 412](#)).

10 Surely Napier is factually mistaken when he writes that "Canonists will probably say that upon knowing this fact, they could have the marriage annulled because it was not consummated." A marriage would not be "annulled" *because it was not consummated*. As evident from the full text of canon 1061 §1, consummation is not essential to the *ratification* of marriage. Hence, a valid marriage can exist even if such a marriage is never in fact consummated (as the marriage of Mary and Joseph confirms). A *merely ratified* marriage can be *dissolved*, by dispensation from the pope (see canon 1142) for a just reason. But this is essentially different from a declaration of nullity. The case which Napier introduces could have grounds of nullity if the retrograde ejaculation amounted to the impediment of impotence (and provided such impotence could be proven to have existed as perpetual and antecedent to the marriage itself) (see canon 1084).

11 Another example with a sacramental matter might be useful for intuitional comparison. Suppose a priest suffered from a speech impediment that became

progressively worse over time, to the point where he simply could not pronounce certain words, including “body” and “blood,” and he even loses the ability to speak in full sentences. Assuming that his physical articulations of these words and his ability to speak (even quietly) in full sentences are together necessary for the valid confectio of the Holy Eucharist, it is not hard to see why he simply should not “go through the motions” of the Holy Sacrifice *as though he is really offering the Mass and confecting the Holy Eucharist*. He should not do this *because he is not really able to offer and confect*. He may not be intentionally malicious (subjectively) if he tries, but he is objectively acting unreasonably in relation to the Holy Eucharist itself.

It should be noted that the evaluation of the reasonableness of this situation could change if the priest is not *certain* that his speech impediment will be an obstacle in all cases. Similarly, the reasonableness of completed sexual activity between a married couple may not have to be judged in an absolutely negative way if there is not certainty that Rej prohibits all insemination in the natural manner.

According to the May 13, 1977, decision of the Congregation for the Doctrine of the Faith, while *some* semen must be emitted for conjugal copulation to take place, it is not necessary that the semen contains contents “produced in the testicles.” Beyond this judgment, the Holy See has not specified what particular glands must contribute to the contents of the insemination. The text of the 1977 decree is presented below.

“The Sacred Congregation for the Doctrine of the Faith has always held that those who have undergone a vasectomy and those who find themselves in similar circumstances, such that their impotency is not established with certainty, are not impeded from marriage.

“Furthermore, having examined this position and after repeated studies conducted by this Sacred Congregation and the Commission for the revision of the Code of Canon Law, the Cardinals and Bishops, members of this Sacred Congregation, in the plenary meeting held on Wednesday, May 11, 1977, chose to

respond to the following proposed doubts:

“1. Whether the impotence that renders a marriage null consists in the antecedent and perpetual incapacity, whether absolute or relative, to complete the conjugal act [*copulam coniugalem*].

“2. If affirmative, whether the conjugal act necessarily requires the ejaculation of semen produced in the testicles.

“Regarding the first: affirmative, regarding the second: negative.

“In the Audience granted to the undersigned Prefect of this Sacred Congregation on May 13, 1977, the Holy Father by divine Providence, Paul VI, approved the above decree and ordered it to be published.

“Given at Rome, from the Seat of the Sacred Congregation for the Doctrine of the Faith, May 13, 1977.

“Franjo Cardinal Šeper, Prefect

“Jérôme Hamer, O.P., Titular Archbishop of Lorum, Secretary” (*Congregation for the Doctrine of the Faith* 1977).

- 12 My principal purpose for providing the texts from Napier in this section is to present his reasoning in its fullness and proper context (for the sake of my own critique). Nevertheless, I think it may be useful to point out that the last four sentences, as well as the second to last of the entire quotation, provide helpful insights for understanding how the ends of marriage may be considered in relation to each other, especially in light of recent magisterial and canonical sources (e.g., canon 1055 of the 1983 Code of Canon Law). Napier’s assertion that the unitive aspect of the conjugal act should be understood in relation to that act’s procreative finality harmonizes very well with recent teachings on the inseparability of the ends of marriage and of the marital act. See, for example, the teaching of the *Catechism of the Catholic Church* (1997), n. 2363: “the spouses’ union achieves the twofold end of marriage: the good of the spouses themselves and the transmission of life. These two meanings or values of marriage cannot be separated without altering the couple’s spiritual life and compromising the goods of marriage and the future of the family. The conjugal love of man and woman thus stands under the twofold obligation of fidelity and fecundity.” Three paragraphs later, the

- Catechism* implies that the procreative end of marriage should also be understood in light of the union of the spouses. See n. 2366: "Fecundity is a gift, *an end of marriage*, for conjugal love naturally tends to be fruitful. A child does not come from outside as something added on to the mutual love of the spouses, but springs from the very heart of that mutual giving, as its fruit and fulfillment." The same paragraph concludes with two quotations from numbers 11 and 12 of *Humanae vitae*, which address the inseparability of the unitive and procreative significances of the conjugal act. "So the Church, which is 'on the side of life,' teaches that 'it is necessary that each and every marriage act remain ordered per se to the procreation of human life.' 'This particular doctrine, expounded on numerous occasions by the Magisterium, is based on the inseparable connection, established by God, which man on his own initiative may not break, between the unitive significance and the procreative significance which are both inherent to the marriage act.'"
- 13 *Acta Apostolicae Sedis* 36 (1944) 179–200. Considering the explanation from the Rota, Ramón García de Haro writes: "although it does not properly constitute the Magisterium, it enjoys a certain authority—as an authorized opinion—both by having been inserted into the *Acta Apostolicae Sedis* and by the use that it has received in the documents of the Magisterium" (García de Haro 1993, 192). For a summary and explanation of the text from the Rota concerning the ends of marriage, see Asci (2002).
 - 14 English translation (except for small modifications) found in Liebard (1978, 73–74).
 - 15 A very similar use of language in relation to the active/passive senses of the procreative end of marriage and of the marital act can be found in the writings of various mariologists, when treating of the sense in which Immaculate Conception of the Blessed Virgin Mary took place. For example, Roschini (1948, 19) divides the consideration of *conception* into the following: "Conception is divided into: Active (=the generative act of the parents); Passive (=the terminus of the generative act of the parents, or, the human fetus produced from it); Inchoate [passive] (*before* the fetus is informed with the rational soul); Consummate [passive] (*in the very instant* in which the fetus is animated by the rational soul)." See also Merkelbach (1939, 107) and Alastruey (1963, 92–93).
 - 16 For reasons based on teachings and interventions from the Magisterium and Roman Curia that would challenge Napier's thesis from a different (but complementary) perspective from that of the present article, see Arias (2011).
 - 17 For expositions of sacramental principles that require this negative response, see, for example, Halligan (1963, 33–34), Davis (1958, 43), and Pohle (1940, 217).

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