The Missing Premise in the HIV-Condom Debate

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Abstract

In a recent article in this journal, "Condoms and HIV: The State of the Debate," William Newton argues that there are basically two issues around which parties dispute. The first is whether the use of a condom by a discordant couple amounts to performing a contraceptive act. At issue here is whether a couple's use of a condom to prevent disease transmission renders the act a contraceptive act. The second issue pertains to whether the use of a condom, apart from whatever the intentions of the agents are, is itself a failure to consummate a marital act. It is the second issue that I wish to address in this paper. I aim to argue that the Canon-Law argument, as I will call it, wishes to argue that because condomistic sex fails to consummate a marriage, the sexual act performed is immoral. I argue against this inference on two grounds: the first is that the conclusion succumbs to counterexamples, and second, the inference must rely on a premise that I show is false.

Worldwide, an estimated 33.2 million people are infected with HIV/AIDS. An estimated 6,800 new cases are reported a day, and around six thousand die from the disease per day.¹ Unlike HIV/AIDS prevalence in homosexuals in the United States, most cases worldwide afflict heterosexuals.² What this means is that a large subset of cases includes individuals who are likely married, and a further subset of that class includes cases where only one spouse is infected; these are called discordant couples. Because such couples are married, sexual intercourse is not only permitted but is an important way to renew their vows. But can such couples use a condom in order to prevent the trans-

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mission of HIV? Following William Newton's assessment of the debate in his article "Condoms and HIV: The State of the Debate,"³ there are basically two issues around which parties dispute. The first is whether the use of a condom by a discordant couple amounts to performing a contraceptive act. At issue here is whether a couple's *reasons for choosing* to employ a condom render the act they perform a contraceptive act. Those reasons are, in the best-case scenario, to prevent HIV transmission from one spouse to the other. The second issue pertains to whether the use of a condom, apart from whatever the intentions of the agents are, renders the sexual act performed non-marital. Regarding this second issue, Newton notes, "The question of whether it ["condomized" intercourse] *distorts authentic marital intercourse* is, therefore, now the heart of the debate."⁴ I agree with Newton that Father Martin Rhonheimer has provided a persuasive case that discordant couples making use of a condom are not necessarily performing a contraceptive act. I wish to address the second issue in this paper. The Canon-Law argument, as I will call it, argues that 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. My aim in this paper is to challenge the Canon-Law argument on two grounds: first, the argument succumbs to counterexamples; and second, the argument concludes from "a conjugal act failing to consummate" to "the conjugal act being immoral." In spite of an initial plausibility, I show that although a defect is present, the kind of defect in question does not entail that an immoral act has been performed. I conclude by pointing out the limitations of the argument presented here.

The importance of the present project is that if Newton is right and the counter-arguments I offer here are successful, 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. I do think, however, that such use is immoral on other grounds in that it appears inconsistent with the charity owed to one's spouse. If I were infected, I would not subject my wife to the risks of transmission—and condoms are only 80 percent effective in the ideal scenario.⁵ Furthermore, I would not use the argument here to support a public policy of promoting condom use, even if that policy were specific to discordant couples. It is known that when condom use is promoted in communities previously naïve to condom use, HIV infection rates go up.⁶ The conclusions reached in this paper, then, need to be circumscribed in what they entail by way of public policy and actual practice.

The Canon-Law Argument

The Canon-Law argument begins by observing the conditions on which a marriage is consummated. The Code of Canon Law notes that,

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.⁷

Commentators on this canon have typically understood consummation to involve, at the very least, penetration of the vagina by the man's penis, and deposit of semen in the vagina, as is noted in John Beal's *New Commentary on the Code of Canon Law*:

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.⁸

The *Commentary* goes on to note that other methods of birth control that do not prevent the deposit of semen in the vagina are immoral, but that consummation may still be achieved. For example, use of oral contraceptives does not, according to the *Commentary*, prevent consummation. The Canon-Law argument, then, runs roughly as follows,

- 1) A marriage is consummated only if the conjugal act performed deposits semen in the vagina (according to the above commentary on 1061 § 1).
- 2) Semen is not deposited in the vagina when the conjugal act is modified by condom use (assumption of fact).
- 3) Therefore a conjugal act modified by condom use does not consummate the marriage (from 1 and 2).

Before proceeding to the next stage in the argument, this stage requires some comment and clarification for its specific formulation. By way of clarification: premise (1) is a necessary condition; it tells us that semen *must* be deposited in the vagina in order for consummation to occur. Failure to deposit semen in the vagina entails failure to consummate. But this is a slight departure from what canon 1061 actually says. Canon 1061 lists what are *sufficient* conditions for consummation saying, "[marriage] is called *ratum et consummatum* if the spouses have performed..." (emphasis added). But sufficient conditions are not necessary conditions and visa-versa. Furthermore, if a sufficient condition is not present, one cannot conclude much of anything. For example, it is true to say that having the flu is sufficient for feeling miserable. But if someone does not have the flu, one cannot conclude that the person does (or does not) feel miserable. Such an inference would commit the fallacy of denying the antecedent.⁹ Understood as outlining sufficient conditions for consummation, canon 1061 does not tell us what is necessary for consummation. I have rendered premise (1) a necessary condition because that is how it must be formulated in order to derive the conclusion (3) by the logical rule *modus tollens*. I see no other way of constructing the Canon-Law argument in a way that delivers (3) or something very similar.

I will return to this point below; I note it here to point out what the logical structure of the Canon-Law argument must be.

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."¹⁰ 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. In this regard, we can return to developing the rest of the argument, for (3) by itself does not specify, yet, an immoral act.

To derive the conclusion that the conjugal act of the specified type is immoral, the proponents need the following premise:

- 4) A conjugal act that is not suitable for consummating a marriage is an immoral act.

It follows that

- 5) the conjugal act modified by condom use is immoral (from [3] and [4]).

What I wish to call into question is premise (4). There are two strategies by which one can challenge (4): either, i) one can challenge the authority of Beal's *Commentary* (not the Code itself) by showing the counter-intuitive consequences that follow from accepting the *Commentary*'s interpretation, or ii) one can assume the authority of the *Commentary* but show that conjugal acts of the specified type are not immoral. Regarding this second route, one needs to show that conjugal acts which fail to consummate are not immoral simply in virtue of this failure. This latter route is consistent with the *Commentary* since the *Code*, and therefore the *Commentary* as well, is interested in identifying what kinds of conjugal acts are suitable *for consummation*. We should not expect it to identify the morality of such acts. I explore the second route alone in this article, but I note here that the first route has already been canvassed above in that the *Commentary* renders the deposit of semen to be a necessary condition for consummation, while the *Code* itself clearly does not consider it such.

Counterexamples

Consider first some counterexamples. Suppose a couple gets married and the husband suffers from retrograde ejaculation,¹¹ or he cannot produce semen because, for example, his prostate was removed secondary to prostate cancer. 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.

This counterexample, however, suffers from some defects. The examples cited (e.g., retrograde ejaculation) involve conjugal acts for which there is not a choice to prevent semen from entering the vagina. Semen fails to be deposited in the vagina due to a medical condition. The target case, however, involves a couple that chooses to use a condom. Consequently, the counterexample above does not show that the couple in the target case does something morally permissible, for the counterexamples do not involve a choice to prevent insemination.

This response has some support, but further refinements are needed. First, note that the *Commentary* does not mention a choice to inseminate as constituting consummation; rather it only notes that semen must be deposited in the vagina in virtue of intercourse. If consummation required a choice to deposit semen in the vagina, then very few couples have valid marriages—even ones that do not use a condom. I cannot imagine couples making this choice when they choose to have intercourse with one another. But if this choice is not a necessary condition for consummation, then lacking the choice or even having a contrary choice (i.e., choosing not-to-deposit-semen-in-the-vagina) would not impugn consummation. One could still argue that having such a choice is immoral, an option I consider below, but such an argument will no longer be the Canon-Law argument since the latter argument rests on the premise that not inseminating in the vagina is immoral *because* it fails to consummate the marriage. So choosing not-to-inseminate may be grounds for thinking such conjugal acts are immoral, but such a choice will not itself be the reason why consummation is eclipsed—consummation would be eclipsed because there simply is no semen in the vagina following intercourse.

Suppose, however, that an argument can be made that choosing not-to-inseminate precludes consummation. On this assumption, do we have an example showing us clearly that such an act is not immoral? Intuitions may vary, but consider the following case:

Case 1: During a medical appointment, a couple finds out that the man has retrograde ejaculation (Rej) and that he is HIV positive. After being informed of the procedure for correcting Rej and for preventing transmission, the couple chooses not to correct Rej *in order to* reduce the risk of transmitting HIV. Suppose also that resource is not an issue against correcting Rej and neither is burden of treatment—suppose some advanced laparoscopic procedure can correct it.

Are the conjugal acts they perform rendered immoral because of their choice not to correct Rej? I do not think this is the case. The only difference between this case and the original is that in Case 1, the couple chooses not to correct the pathology that renders insemination impossible, while the original lacks such a choice not to correct. (We can suppose in the original case, without damage to the intuitive appeal of the case, that the couple knows about Rej but do not will one way or the other with regard to correcting it.) As I see it, the choice not to correct Rej is for a good end (i.e., avoiding HIV transmission). The means chosen (i.e., not to correct Rej) does not in itself appear immoral at all.

Notice, however, that the choice not to correct Rej is not syntactically identical to the choice not to inseminate.¹² In this regard, an interesting flow of practical reasoning emerges. One way to describe the practical reasoning of the couple is thus: The end is to prevent HIV transmission. The means chosen is not to correct Rej. It is *foreseen* that not correcting Rej will have the effect of preventing semen from being deposited in the vagina, but that it will also have the effect of preventing HIV transmission. In fact, preventing HIV transmission *just is*, understood in its material-causal dimension, preventing semen from being deposited. But it is only the prevention of HIV transmission that “shows up” in one’s practical reasoning. This description is not an anomaly in that emergency room physicians who administer anovulants to rape victims (after appropriate testing)¹³ intend to prevent the further effect of an unjust assault. But the “further effect” *just is* conception. However, since aiming to prevent conception is arguably a contraceptive act and therefore immoral, the ER physician may not have “prevent conception” show up in her practical reasoning. But there is no reason to suppose that it does. Rather, what the ER physician is aiming to do is *understood morally* to be a defensive act. Likewise for the Rej-refusing couple. What they understand their act to be is one of disease prevention, even though preventing HIV transmission *just is* preventing the deposit of semen in the vagina.

With this flow of practical reasoning in mind, we can see the relevance of Case 1 in spite of it not being identical to the discordant couple using a condom. In both cases, semen is not deposited in the vagina, this fact is known, and the choice not-to-correct and to-use-a-condom are both to obtain the end of preventing disease transmission. It appears, then, that we have enough morally relevant analogs to say that if one is permissible, then so is the other.

An important dis-analogy exists, however; the Rej couple does not *modify* the sexual act itself, while the condom-bearing couple does. Two questions arise: does this choice to modify the sexual act entail that the condom-bearing couple choose not to inseminate? And does having such a choice necessarily render the act immoral? Doubts may persist about answering the first question, but the argument for a negative answer is good enough to mention here. I shall then argue that even if it does involve a choice not to inseminate, an immoral act is not performed.

There is at least one case where it is clear that a condom-bearing couple does not choose not to inseminate (inseminate = deposit semen in the vagina). Consider a case where the wife is infected and the husband resorts to using a condom in order to avoid contact with the wife's mucosal lining. Not-depositing-semen-in-the-vagina may not feature in the husband's practical reasoning at all.

But is not the case where the husband is infected different? It would appear that by choosing to use a condom to prevent disease transmission, the couple thereby chooses not-to-inseminate. Since insemination is what would transmit the disease, preventing insemination is what gives the choice to use a condom its rational support—that is why condom use is chosen. On the contrary, this is not the only way to describe the practical reasoning of couples making use of a condom. Consider the following case, which is meant as a hypothetical thought experiment, but possibly reflective of certain real world scenarios:

Case 2: Suppose a couple has a choice between using a condom or accessing anti-retroviral therapy to prevent transmission of HIV. 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.

It seems plausible to describe their practical reasoning as considering non-insemination as a bad thing, something inferior. Not inseminating, then, cannot be a proper object of choice; it is not something they aim at but from the perspective of the couple is better described as a side effect, something to be tolerated but not chosen. What is chosen is condom use *for reasons that it is more effective than the preferred alternative*, and not *for its effect in preventing insemination*. This case invites another general point about practical reasoning. Causal connections do not dictate the order of such reasoning. There may be a causal connection between insemination and HIV transmission, and therefore the use of condoms has a causally preventive effect on HIV transmission. But the order of practical reasoning may diverge from the order of causality—as indicated in the example. This is because the order of practical reasoning takes into account the moral goodness of various alternative options, as well as means-ends relationships. Consequently, the *reasons* for one's choice can diverge from causal relationships in the natural order. I should also point out that this divergence is not uncommon. It occurs in most every correct application of the principle of double effect where what one does is causally related to an evil state of affairs, but realizing the evil is not the agent's reason for acting.

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, and I believe, the argument here is on firmer ground than the argument against the couple choosing not to inseminate. Immoral acts are partly a function of one choosing to bring about evil states of affairs.¹⁴ 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 following intercourse 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.¹⁵ If it is not an evil state of affairs, then simply choosing that state of affairs would not make the choice immoral.¹⁶

To summarize so far, I have assumed for the sake of argument that the *Commentary* is correct in specifying the conditions for consummation as including the deposit of semen in the vagina. I have shown that on this assumption, one cannot move from

p) condomistic sex fails to consummate a marriage

to

q) condomistic sex is immoral.

Our intuitions on examples of conjugal acts that fail to deposit semen in the vagina illustrate that very likely such failure does not amount to an immoral act. Along this line of thought, it should be noted that the *Commentary* determines that couples utilizing oral contraceptives still consummate the marital act, even though they exercise a contraceptive choice. This means that the *physical location* of semen in the vagina (per a conjugal act) is what consummates the marriage. And it is hard to see how the location of semen can be morally determinative on its own. Suppose it is morally determinative as a function of a choice to prevent insemination. But here too we meet the disjunction mentioned above (i.e., either the location is an evil state of affairs or it is not). It should also be born in mind that the means chosen is for the end of preventing disease transmission. Preventing insemination is not chosen for its own sake. The significance of this point is that certain means acquire their moral character in light of the ends to which they serve. Numerous medical actions involve inducing bad states of affairs—mild pain—in order to do something good—test for a functional nervous system.¹⁷ Inflicting pain is not chosen for its own sake, but for other ends in virtue of which the moral act is specified. If we were only told that a doctor was going around inducing pain in patients *in order to inflict pain*, we would look upon her actions with a suspicious eye. But if we know the ends that such actions serve, the doctor becomes morally beyond reproach.¹⁸ And the choice to-prevent-insemination-in-the-vagina is for the sake of preventing transmission of a deadly disease. The means chosen is not itself *intrinsically* evil—at least it is not at all intuitively obvious that it is. At worst, it is evil in the same way as pain is. But if inflicting pain not for its own sake

but for the sake of a good end is permissible, then so may be preventing insemination for the sake of avoiding disease transmission.

The Deprivation Argument

In the previous section I argued that if we just assume the *Commentary*'s premise, no argument can be given for why a conjugal act which is not suitable to consummate a marriage is also, by that very fact, immoral. In this section I explore an argument that attempts to bring us from (p) to (q) (noted above).

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.¹⁹ 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.²⁰ In this regard, Alexander Pruss explains,

By the teleological analysis of organicity, to say that a man and woman jointly constitute one organism is to imply that they are united in a single action oriented in the direction of an end, and it is this teleological cooperation or striving that constitutes the organism's principle of unity. What is the end towards which this organism strives? On a biological level the answer is perfectly clear: reproduction (of a person who is the child of both partners).²¹

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.

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 can 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.²² 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.

Furthermore, certain actions may lack a good typically associated with the act and yet not be rendered immoral. For example, if one partner does not feel pleasure in having conjugal relations, the conjugal act performed is not rendered immoral even though it is deprived of a particular good, i.e., pleasure. Engaging in competitive activity can be a good, even if one or more participants do not experience the joy of winning. What is needed, then, is for the proponent to identify a good that is i) *essentially* connected to the conjugal act and ii) *willed against* when a couple uses a condom for HIV prevention.

We have already addressed why procreation does not satisfy conditions (i) and (ii), since the couple aiming to prevent HIV transmission are not, if Father Rhonheimer is right, aiming to contracept (the couple do not satisfy [ii]). Furthermore, the unitive good is not impugned, since unity is understood in light of the couple becoming one in virtue of a common end; namely, the *one body* (the husband and wife in conjugal union) is striving to create human life.

Another possible candidate good for satisfying conditions (i) and (ii) is the good of self-giving. One could enlist John Paul II's comments in *Familiaris consortio* as support:

Consequently sexuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses, is by no means something purely biological, but concerns the innermost being of the human person as such. It is realized in a truly human way only if it is an integral part of the love by which a man and a woman commit themselves totally to one another until death. The total physical self-giving would be a lie if it were not the sign and fruit of a total personal self-giving, in which the whole person, including the temporal dimension, is present.²³

And the proponent of this line of thought would have to say as well that the use of a condom preempts the good of self-giving.

The good of self-giving, however, like the good of unity, should not be understood as apart from the procreative good toward which the conjugal act is oriented. *Familiaris consortio* continues,

But when the sense and meaning of gift is lacking in sexuality, a “civilization of things and not of persons” takes over, “a civilization in which persons are used in the same way as things are used. In the context of a civilization of use, woman can become an object for man, children a hindrance to parents.”

That is, the good of self-giving can be understood by what goods are lost when self-giving is not present. And clearly the good of children is compromised. This is explained more explicitly in *Persona humana*, when it is noting why intercourse outside of the marital bond is immoral: “It is respect for [the conjugal act’s] finality that ensures the moral goodness of this act.” It then notes,

Experience teaches us that love must find its safeguard in the stability of marriage, if sexual intercourse is truly to respond to the requirements of its own finality and to those of human dignity.... Most often, in fact, premarital relations exclude the possibility of children. *What is represented to be conjugal love is not able, as it absolutely should be, to develop into paternal and maternal love.* Or, if it does happen to do so, this will be to the detriment of the children, who will be deprived of the stable environment in which they ought to develop in order to find in it the way and the means of their insertion into society as a whole.²⁴

The moral quality of the sexual act is judged in light of its finality. Its finality is its orientation toward the creation of human life. Luke Gormally explains,

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.²⁵

The giving of oneself, therefore, should be understood not in a reductionistic-physicalistic fashion whereby depositing semen in the vagina is sufficient to constitute self-giving; but rather it should be understood in relation to the procreative “finality” of the conjugal act. The “gift of self” effected through the conjugal act involves giving one’s entire self: his and her potency to create human life, and his and her entire *life* ordered to the rearing and education of children and the perfection of each spouse. Again, the moral goodness of the conjugal act is measured against the respect for its *finality*.

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. And there are acts that are non-inseminating that do preempt consummation but are not necessarily contraceptive. The task for 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 satisfying conditions i and ii

above, 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.

In conclusion, I should note the limited scope of my argument. My aim here was merely to show that the Canon-Law argument should be discarded. None of what I argue here, however, should be taken to entail that I think discordant couples may make use of condoms to prevent HIV transmission. I actually think that they should not, but neither because I think they necessarily perform a contraceptive act, nor because they perform an immoral act secondary to a failure to consummate. I have only argued for the latter disjunct here.²⁶

Notes

¹ Matthew Hanley and Jokin de Irala, *Affirming Love, Avoiding AIDS: What Africa Can Teach the West* (Philadelphia: The National Catholic Bioethics Center, 2010), 14–15.

² World Health Organization, Regional Office of South-East Asia, *HIV/AIDS in the South-East Asia Region 2009*, 8 http://www.searo.who.int/LinkFiles/Publications_HIV_AIDS_Report2009.pdf. See also A.M. Johnson and M. Laga, “Heterosexual Transmission of HIV,” *AIDS* 2 (suppl. 1) (1988): S49–S56.

³ William Newton, “Condoms and HIV: The State of the Debate,” *Linacre Quarterly* 78 (2011): 29–44.

⁴ *Ibid.*, 40.

⁵ S.C. Weller, and K. Davis-Beatty, “Condom Effectiveness in Reducing Heterosexual HIV Transmission,” *Cochrane Database of Systematic Reviews* 2002, Issue 1. Art. No.: CD003255. DOI: 10.1002/14651858.CD003255.

⁶ See Hanley and de Irala, *Affirming Love, Avoiding AIDS*, ch. 5.

⁷ *Code of Canon Law* (1983), can. 1061 §1, http://www.vatican.va/archive/ENG1104/_P3V.HTM.

⁸ John P. Beal, “Title VII: Marriage,” *New Commentary on the Code of Canon Law*, eds. John P. Beal, James A. Coriden, and Thomas J. Green (Mahwah, NJ: Paulist Press, 2000), 1258.

⁹ See Irving M. Copi, *Symbolic Logic*, 5th ed. (New York: Macmillan Publishing, 1979), 24.

¹⁰ Pope Paul VI, *Humanae vitae* (Boston: Pauline Books & Media, 1968), n. 14, emphasis added.

¹¹ For the non-physicians reading this, retrograde ejaculation involves the semen being deposited in the bladder instead of continuing down the urethra.

¹² Syntactically identical propositions are of the following sort: “I am going home after work” and “I am going home after work.” They are identical in terms of their syntax. What is noteworthy about this example is that “I am going home after work” changes in meaning depending upon to whom “I” refers.

¹³ See United States of Catholic Bishops (USCCB), *Ethical and Religious Directives for Catholic Health Care Services*, 5th ed. (Washington, D.C.: USCCB, 2009), dir. 36.

¹⁴ This should not be understood as an endorsement of consequentialism, but rather a point at home in a basic goods approach to morality and human action. See Alfonso Gomez-Lobo, *Morality and the Human Goods* (Washington, D.C.: Georgetown University Press, 2002) chs. 2 and 5.

¹⁵ There is a potential *reductio* argument on the argument I have run in the text which must be addressed. The key point made in the text is that if a state of affairs is not evil itself, then neither can choosing it render an act immoral. A putative *reductio* argument could point out that procreation is a state of affairs that may not occur among couples using NFP for pregnancy prevention, which is permissible with a grave reason. But if the couple chooses to prevent procreation, then they have performed an immoral act. Here is a case where the content of one’s choice does turn an otherwise permissible act into one that is immoral. An anonymous reviewer adds another example, that of death. Death is a physical evil, but when it is intended, the human act that results is an immoral one. My reply is essentially that procreation and death are clear cases of a good and an evil respectively. Creating human life is an unqualified good itself, but the presence of semen in the vagina is not; it is at best an instrumental good. The absence of semen in the vagina does not appear to be good or evil *in itself*, but creating human life is a good in itself. Consequently, my argument in the text is consistent with the position that choosing against procreation and and choosing for death are evils acts.

¹⁶ Don Marquis rightly notes that states of affairs are intended, not human actions. Human actions, rather, are constituted or informed by intentions. See Marquis, “Four Versions of Double Effect,” *Journal of Medicine and Philosophy* 16 (1991): 527–528.

¹⁷ Examples are from Lawrence Masek, “Intentions, Motives and the Doctrine of Double Effect,” *Philosophical Quarterly* 60 (2010): 571.

¹⁸ The point of the example with the doctor inflicting pain is not so much to highlight a difference between a physical evil, pain, and a moral evil, choosing pain, but to highlight the moral importance of whether the agent is inflicting pain *for its own sake*, or for another end. And in the case of preventing semen from entering the vagina, this is *not* chosen for its own sake, but for another end. Just as pain may be considered bad—a physical evil—so the absence of semen in the vagina following intercourse may be considered bad, or a physical evil (though I do not see this given my comments in the previous paragraphs). The morally important point, to repeat, is that the absence of semen in the vagina is not chosen for its own sake.

¹⁹ An anonymous reviewer pointed out a possible reason for why the *Commentary* allows consummation in the setting of using oral contraceptives. The suggestion is that for anovulants, the couple “cannot unerringly know if the woman

is sterilized by chemical contraception” (anonymous reviewer), and therefore, the Law assumes consummation. I think this is an interesting suggestion, but I do not think it delivers the intended result. The failure rate of condoms is widely known, and conversely, the pill is quite reliable. Furthermore, if a couple really does not want to get pregnant, they are going to use the most reliable means. And the pill is touted as being just that. So even if they “cannot unerringly know” in the case of the pill, which I doubt, then so much the worse for using condoms given the latter’s known failure rate. So, if the reason for use of the pill does not eclipse consummation for lack of certainty in preventing procreation, then use of a condom should be in the same boat.

²⁰ For excellent treatments on what the unitive good is, see Robert P. George and Patrick Lee, *Body-Self Dualism in Contemporary Ethics and Politics* (New York: Cambridge University Press, 2006), ch. 6; and Alexander R. Pruss “Christian Sexual Ethics and Teleological Organicity,” *Thomist* 64 (2000): 71–100.

²¹ Pruss, “Christian Sexual Ethics and Teleological Organicity,” 82.

²² Germain Grisez et al., “‘Every Marital Act Ought to be Open to New Life’: Toward a Clearer Understanding,” *Thomist* 52 (1988): 365–426.

²³ John Paul II, *Familiaris consortio* (1981), n. 11, http://www.vatican.va/holy_father/john_paul_ii/apost_exhortations/documents/hf_jp-ii_exh_19811122_familiaris-consortio_en.html.

²⁴ Sacred Congregation for the Doctrine of the Faith, *Persona humana* (1975), n. V, emphasis added.

²⁵ Luke Gormally, “Marriage and the Prophylactic use of Condoms,” *National Catholic Bioethics Quarterly* 5 (2005): 740.

²⁶ I would like to thank two anonymous reviewers for very helpful comments on previous drafts of this paper.