

# HIV AND CONDOMS WITHIN MARRIAGE

• Anthony Fisher •

“It is never the role of the Church, or of its agencies, pastors, or members, to help people do wrong things more efficiently or safely. Nor is it ever the role of the Church just to say no and abandon people.”

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## 1. Background

On his way to Cameroon earlier this year Pope Benedict XVI dared to suggest that the distribution of condoms was not the solution to the HIV-AIDS crisis in Africa and may actually make it worse. Western commentators immediately reacted with feigned outrage. “Impeach the Pope!” wrote a columnist in the *Washington Post*. “Grievously wrong!” ruled the *New York Times*. “This Pope is a disaster,” said the *London Telegraph*. “Ignorance or ideological manipulation,” declared *The Lancet*. “Unacceptable,” thundered the Belgian parliament. Feigned outrage all this, because the pundits knew this was the well-established position of the Church<sup>1</sup>—one shared by more than a few AIDS experts.<sup>2</sup>

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<sup>1</sup>Pope Benedict had in fact already made similar points in several places: “Address to the Bishops of South Africa, Botswana, Swaziland, Namibia, and Lesotho,” 10 June 2005; “Interview on the Way to Bavaria,” 5 August 2006; “Address to the Ambassador of Namibia to the Holy See,” 13 December 2007.

<sup>2</sup>Helen Epstein, *The Invisible Cure: Africa, the West and the Fight Against AIDS*

Though largely unreported by the world's media, the pope made his comment in the context of positive proposals: first, that attention, especially by Church agencies, be given to behavioral change through "the humanization of sexuality—a spiritual and human renewal," a *conversion* of heart and life; and second, that "true friendship" be offered to those with HIV-AIDS, including standing by them and investing ourselves in their *care*. Church workers and volunteers do in fact assist millions of people around the world by raising awareness and educating about HIV; they provide medical and other support to one in every four people living with the disease, regardless of race or creed. But *conversion* and *care* are all not enough, the commentators insist: the Church should also be providing information about a third "C," *condoms*, and promoting their use by those unwilling to abstain from sexual activity.

The recently published US Catholic Relief Services (CRS) *Position on the Prevention of Sexual Transmission of HIV* goes some way to answering that demand. It requires those receiving CRS funds to provide accurate information about condoms as part of an overall HIV-prevention strategy.<sup>3</sup> This has sparked controversy about

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(New York: Farrar, Straus & Giroux, 2007); Edward Green and Allison Ruark, "AIDS and the Churches: Getting the Story Right," *First Things* 182 (April 2008): 22–26; Edward Green, et al., "A Framework of Sexual Partnerships: Risks and Implications for HIV Prevention in Africa," *Studies in Family Planning* 40, no. 1 (2009): 63–70; Matthew Hanley, "AIDS and 'Technical Solutions,'" *Ethics & Medics* 33, no. 12 (December 2008): 1–3; Matthew Hanley, Jokin de Irala, and Christina Lopez, *Avoiding Risk, Affirming Life: What the West Can Learn from Africa* (Washington, D.C.: National Catholic Bioethics Center, 2009); Norman Hearts and Sanny Chen, "Condom Promotion for AIDS Prevention in the Developing World: Is It Working?" *Studies in Family Planning* 35 (March 2004): 39–47; Chinwuba Iyizoba, "Bleak Stories Behind Failed Condom Campaigns," *Mercatornet*, 2 April 2009; Genevieve Pollock, "AIDS Worker Says Africans Don't Need Condoms," *Zenit*, 25 March 2009; Malcolm Potts, et al., "Reassessing HIV Prevention," *Science* 320 (5877) (9 May 2008): 749–50; James Shelton, "Ten Myths and One Truth About Generalised HIV Epidemics," *The Lancet* 370 (9602) (1 December 2007): 1909–11.

<sup>3</sup>E.g., Catholic Relief Services, *CRS' Position on the Prevention of Sexual Transmission of HIV* (December 2007), 4: "CRS staff should discuss this issue [resistance to condom education] privately, provide information to educate partners what the most accurate information is, and find out why they are not using it. Is it that they are not aware or that they are just [sic] ethically opposed? After discussing with the partner, if they do not change the information they are providing, CRS would be compelled to discontinue funding . . . ."

Church-sponsored condom promotion<sup>4</sup> and in some ways rehearses a debate that occurred two decades ago when the Administrative Board of the US Bishops published *The Many Faces of AIDS* (1987). At that time the Board proposed that “if grounded in the broader moral vision,” Church-sponsored educational programs “could include accurate information about prophylactic devices” and that “if it is obvious that a person [with HIV] will not act without bringing harm to others” a health professional could reasonably advise, on a personal level, that the person use condoms to minimize the harm. Local theologians such as James Keenan, S.J., Jon Fuller, S.J., Charles Curran, and Michael Place were very supportive, suggesting that this was an example of “the toleration of the lesser evil” whereby Christian leaders, right back to Augustine, have not tried to obstruct evils such as brothels when they thought such efforts likely to be ineffectual or counter-productive.<sup>5</sup> What these writers failed to

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<sup>4</sup>E.g., Germain Grisez, “The Church Betrayed?” *Catholic World Report*, April 2008, 20–24; Regina Linskey, “CRS Chairman Says Agency Practices Church Teachings on Condoms,” *Catholic News Service*, 30 April 2008; George Neumayr, “Questions and Contradictions: Spinning the CRS Controversy,” *Catholic World Report*, June 2008, 1; Gerard Bradley, “Grave Questions,” *Catholic World Report*, June 2008, 4.

<sup>5</sup>Papers published at the time or since by James Keenan, S.J., include: “Prophylactics, Toleration, and Cooperation: Contemporary Problems and Traditional Principles,” *International Philosophical Quarterly* 29, no. 2 (June 1989): 205–20; Keenan, “Living With HIV/AIDS,” *The Tablet* 249 (3 June 1995): 701; “Applying the Seventeenth-Century Casuistry of Accommodation to HIV Prevention,” *Theological Studies* 60 (1999): 492–512; “Collaboration and Cooperation in Catholic Health Care,” *Australasian Catholic Record* 77 (April 2000): 163–74; “HIV/AIDS: The Expanding Ethical Challenge,” unpublished paper given at Lauriston Jesuit Centre Edinburgh, March 2007, [www.Lauriston.org.uk/KeenanEdinburgh.pdf](http://www.Lauriston.org.uk/KeenanEdinburgh.pdf). Keenan also wrote several pieces with Jon Fuller, S.J.: “At the End of the First Generation of HIV Prevention,” in *Catholic Ethicists on HIV/AIDS Prevention*, ed. J. Keenan (New York: Continuum, 2000), 21–40; “Condoms, Catholics and HIV/AIDS Prevention,” *The Furrow* 52, no. 9 (September 2001): 459–67; “Church Politics and HIV Prevention: Why Is the Condom Question So Significant and So Neuralgic?” in *Between Poetry and Politics*, ed. Linda Hogan and Barbara FitzGerald (Dublin: Columba, 2003), 158–81; “When Condoms Aren’t Contraceptives,” *Beliefnet* 2008, [www.beliefnet.com/story/183/story\\_18346.html](http://www.beliefnet.com/story/183/story_18346.html). Charles Curran, *Catholic Moral Theology in the United States: A History* (Washington, D.C.: Georgetown University Press, 2008), 204ff.; Michael Place, “The Many Faces of AIDS,” *America* 158 (1988): 141. Authors from outside the US with similar views include: Kevin Kelly, *New Directions in Sexual Ethics: Moral Theology and the Challenge of AIDS* (London: Chapman, 2000); Enda McDonagh, “Theology

explain, however, is how actively handing out information about condoms and even counseling in favor of their use could be compared with prudential silence.

Several American bishops and theologians, and eventually Cardinal Ratzinger, expressed concerns that suggesting the use of condoms might be construed as approving or promoting extra-marital sexual activity, and could cause scandal and compromise witness; some also doubted the effectiveness of the condom strategy even from a purely pragmatic point of view.<sup>6</sup> Two years later, when the whole body of US Bishops issued its pastoral statement on HIV/AIDS, *Called to Compassion and Responsibility*, no mention was made of providing information and counseling about condoms. While urging compassion for people living with HIV, the bishops said chastity was the only “morally correct and medically sure way” to prevent transmission of the disease. This is where Catholic agencies should focus their educational efforts and no one should be fooled by “the safe-sex myth.”<sup>7</sup>

It may well be that Catholic relief agencies in several countries, not just the United States, prefer the advice in *Many Faces*;<sup>8</sup> certainly its theological supporters were undeterred. Fr. Keenan, for instance, asserted that:

The dissemination of this [condom] information whether read or heard by grandmothers, fathers, pastors, eucharistic ministers, high school students, prison inmates, or anyone else in no way constitutes “promoting the use of prophylactics,” but rather

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in a Time of AIDS,” *Irish Theological Quarterly* 60, no. 2 (1994): 81–99; Ann Smith, “Where CAFOD Stands: Should Condoms Ever Be Part of Faith-Based HIV-Prevention,” *The Tablet*, 25 September 2004, 8–9; Smith and McDonagh, *The Reality of HIV/AIDS* (Dublin: Veritas, 2003). Most of these authors would favor the distribution and more active promotion of condoms by Catholic agencies, not merely information-giving.

<sup>6</sup>E.g., “Reaction to AIDS Statement,” *Origins* 17 (24 December 1987): 489–93; “Continued Reaction to AIDS Statement” *Origins* 17 (7 January 1988): 516–22; Janet Smith, “The Many Faces of AIDS and the Toleration of the Lesser Evil,” *International Review of Natural Family Planning* 12 (1988): 82–89; Joseph Cardinal Ratzinger, “Letter to Archbishop Pio Laghi on *The Many Faces of AIDS*,” *Origins* 18, no. 8 (7 July 1988).

<sup>7</sup>National Conference of Catholic Bishops (US), *Called to Compassion and Responsibility: A Response to the HIV/AIDS Crisis* (1989).

<sup>8</sup>See, for example, “CAFOD and Condoms,” *Catholic Medical Quarterly* (February 2003): 3–4.

provides “information that is part of the factual picture” . . . . Traditionalists prefer to see a clearer description of the object of toleration or cooperation. Actually, the [1987] letter is really saying that the use of the prophylactic, not the sexual activity with the prophylactic, is being considered. They are not cooperating with the illicit sexual union, but rather with methods that protect the common good.<sup>9</sup>

Does anyone believe that the target audience of condom information campaigns is grandmothers and extraordinary ministers of Holy Communion? Would any so-called *traditionalist*, who liked clear act-descriptions, characterize condom education as part of an HIV reduction program as “promoting prophylactics without sex” or, even more vaguely, “protecting the common good”? How can the condom act prophylactically or serve the common good except by being worn during intercourse? Even if there are further intentions and motivations—as there certainly are—the immediate intention of promoting condoms is surely that they be worn during intercourse. Excluding this intention from the act description is the sort of moral acrobatics that brought pre-Vatican II casuistry into disrepute.

But, insisted Keenan, if a person is “going to have sex anyway,” then such “proposals of cooperation in no way assist the person to commit the act” but are “the lesser of two evils.” Yet if such proposals *in no way assist*, why call them proposals of *cooperation*—in good, evil, or anything? Why call them *the lesser of two evils* if they are not in some sense *evil*? And what are we to make of the notion of a person who is *going to have sex no matter what*? Are the targets of these programs completely beyond reasoning with, people so driven by instinct and lust that all that can be done for them is to help contain the harm they will do themselves and others?

While they have gained some support for their “lesser evil” cause, the pro-condomists have failed to persuade not only the pope but the curia,<sup>10</sup> various African bishops’ conferences<sup>11</sup> and other

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<sup>9</sup>Keenan, “Prophylactics, Toleration, and Cooperation,” 212.

<sup>10</sup>E.g., Joseph Cardinal Ratzinger, “Letter to Archbishop Pio Laghi on *The Many Faces of AIDS*,” 117–18; Pontifical Council for the Family, *The Truth and Meaning of Human Sexuality: Guidelines for Education within the Family* (1995), 139; Pontifical Council for the Family, *Family Values Versus Safe Sex: Reflections of Cardinal Lopez Trujillo* (2003).

<sup>11</sup>E.g., Bishops of South Africa, Botswana, and Swaziland, *A Message of Hope*, 30

bishops' conferences,<sup>12</sup> individual bishops,<sup>13</sup> and theologians.<sup>14</sup> These

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July 2001; "Kenyan Bishops Oppose Condom Distribution Programs," *Catholic World News*, 3 December 2002; "Kenya: Catholics Reaffirm Stand Against Condoms in Fighting HIV/AIDS," *Africa News*, 26 June 2007; "Tanzanian Catholic Bishops Reject School Syllabus Over Condoms," *Africa News*, 13 January 2006; Malawi Episcopal Conference, *Renewing Our Lives and Society with the Power of the Holy Spirit*, Pentecost 2006; "Cameroon Bishops Support Pope's Words on AIDS," *Zenit*, 26 March 2009; "Africa: Continent's Catholic Bishops Back Pope on Condoms," *CIS Africa*, 19 May 2009.

<sup>12</sup>E.g., the episcopal conferences of Australia (*Statement on the AIDS Crisis*, 20 May 1987), Croatia ("Croatia's Catholic Church Targets Condoms," *Agence France-Presse*, 15 February 2004), India ("Indian Church Backs Bush's Anti-HIV Formula, Nixes Condoms," *Indo-Asian News*, 30 August 2005), Peru ("Building a Culture of Life," *Catholic World Report*, March 1996), the Philippines (*Pastoral Letter on AIDS: In the Compassion of Jesus*, 23 January 1993) and Spain (Commission for Family and Life, *100 Cuestiones y respuestas sobre el 'AIDS' y la actitud de los católicos*, 23 February 2002).

<sup>13</sup>E.g., "Cardinal Egan Opposes Condom Giveaway," *National Catholic Reporter*, 2 March 2007; "Condom Debate Flares in Brazil Before Pope Visit: Cardinal Angelo Against Condoms," *Reuters*, 12 March 2007; "Use of Condoms Is a False Solution to HIV/AIDS—Nuncio Antonini," *Post* (Zambia), 5 May 2005; "Cardinal Napier: Condoms 'Clearly Don't Work,'" *Mail & Guardian* (Johannesburg), 25 January 2005; "Condoms Promote Immorality—Cardinal Wamala of Uganda," *Africa News*, 29 September 2003; "Rivera Carrera rechaza los métodos anticonceptivos dentro del matrimonio," *Crónica* (Mexico), 1 September 1997; "Cardinal Sarr: Moral Education Needed to Fight AIDS," *Zenit*, 27 March 2009; "Cardinal George Pell Says AIDS-Afflicted Countries Awash With Condoms," *AAP*, 10 April 2009; Carrie Gress, "Common Sense in Fighting AIDS: Interview with Bishop Hugh Slattery of Tzaneen," *Zenit*, 9 January 2008; George Pell, "Responsible Behaviour Makes a Difference With AIDS," *L'Osservatore Romano* 17 (2092) (29 April 2009): 14; "Africa: Continent's Catholic Bishops Back Pope on Condoms," *Catholic Information Service Africa*, 19 May 2009.

<sup>14</sup>E.g., Peter Cataldo, "Condoms and HIV Prevention: Thwarting the Procreative End," *Ethics and Medics* 30, no. 5 (May 2005): 3–4; David Crawford, "Conjugal love, Condoms, and HIV/AIDS," *Communio: International Catholic Review* 33, no. 3 (Fall 2006): 505–12; Kevin Flannery, S.J., "Preface: The Conjugal Act and the Use of Prophylactics," *NCBQ* 6, no. 4 (Winter 2006): 733–35; Luke Gormally, "Marriage and the Prophylactic Use of Condoms," *NCBQ* 5, no. 4 (Winter 2005): 735–49; Germain Grisez, "Moral Questions on Condoms and Disease Prevention," *NCBQ* 8, no. 3 (Autumn 2008): 471–76; Benedict Guevin, O.S.B., "On the Use of Condoms to Prevent Acquired Immune Deficiency Syndrome," *NCBQ* 5, no. 1 (Spring 2005): 37–39; Guevin, "The Use of Condoms to Prevent AIDS: A Response to Rhonheimer," *NCBQ* 5, no. 2 (Summer 2005): 223–25; Mark Johnson, "The Principle of Double Effect and Safe Sex in Marriage: Reflections on a Suggestion," *Linacre Quarterly* 60 (1993): 82–89;

taught that condomized intercourse is neither safe nor moral, and that cooperation in it is impermissible. But Keenan, Fuller, and Curran remained outspoken advocates for condoms within the Church, paralleling the efforts of outside groups such as some international agencies, same-sex lobby groups, and public health officials.

In this essay I revisit the issue of whether an agency or a professional, including doctors, nurses, pastors, counselors, and educators, may assist the condomizing of intercourse—as I will call it for short—in order to reduce HIV transmission *within marriage*. There are parallel but also distinct arguments to be made outside of marriage, e.g., in homosexual intercourse. There are also many ways to “assist.” Most Catholic agencies will not actually distribute condoms. But may they take part in an “ABC” program that promotes “A” for Abstinence, “B” for Be Faithful to one’s spouse (what I call “B+”) or at least to one partner (what I call “B-”), but which also encourages “C” for Condoms, especially as “a last resort” or “the lesser of two evils”? Is this cooperation in evil and, if so, is it permissible? Might an agency or individual at least provide “scientific” information about the use and benefits of condoms to HIV-discordant couples, i.e., married couples, only one of whom is HIV-positive (HIV+)?

Such questions are not merely academic. Since it was identified in 1981, AIDS is thought to have killed more than 25 million people and is the fourth leading cause of lost years of life and avoidable deaths worldwide. Given the gravity of the epidemic in some places and the tragedy it represents for many individuals, families, and communities, aid and welfare agencies are naturally concerned to do what they can to fight the spread of this disease. We all know and love people with HIV; we want to help them and to do what is effective and ethical to prevent others from joining their ranks.

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William E. May, *Catholic Bioethics and the Gift of Human Life*, 2<sup>nd</sup> ed. (Huntington, Ind.: Our Sunday Visitor, 2008), 150–54; Matthew Levering, “Natural Law and Natural Inclinations: Rhonheimer, Pinckaers, McAleer,” *The Thomist* 70, no. 2 (April 2006): 155–201; Christopher Oleson, “Nature, ‘Naturalism’ and the Immorality of Contraception: A Critique of Fr. Rhonheimer on Condom Use and Contraceptive Intent,” *NCBQ* 6, no. 4 (Winter 2006): 719–29; Janet Smith, “The Morality of Condom Use by HIV-Infected Spouses,” *The Thomist* 70, no. 1 (2006): 27–69.

## 2. Condom use by HIV-discordant spouses

The Second Vatican Council taught that the requirements of authentic conjugal love and the divine laws pertaining to the responsible transmission of life are never opposed, but must be harmonized in our choice of “acts proper to conjugal love” and “in accord with human dignity.” Foreshadowing Paul VI’s teaching about the inseparability of the unitive and procreative dimensions of the conjugal act, the council insisted that marital intercourse must “preserve the full sense of mutual self-giving and human procreation” and that subjective intentions cannot make right what is objectively wrong in this area (*Gaudium et spes*, 51).

Unpacking this notion of “acts proper to conjugal love” with the help of long-established jurisprudence and more recent personalist theology, the 1983 *Code of Canon Law* defined a conjugal act as one in which the spouses together and “in a human fashion” engage in conjugal intercourse that is *per se aptum ad generationem* (i.e., suitable in itself for procreation).<sup>15</sup> Here the Code clearly distinguishes between *impotence* to have intercourse and ejaculate seminal fluid into the vagina (which if antecedent and perpetual would nullify a marriage) and *sterility* (which does not).<sup>16</sup> This followed a long debate among canonists, which was finally settled in 1977 when the Congregation for the Doctrine of the Faith, treating the matter as one of doctrinal and not merely legal significance, taught that the incapacity that prevents marriage is incapacity *perficiendi copulam coniugalem* (to complete the conjugal act), not incapacity to conceive.<sup>17</sup>

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<sup>15</sup>CIC 1061.1. For this reason acts of anal or oral intercourse, *coitus interruptus* or penetration without ejaculation have long been held to be insufficient to consummate marriage: see *New Commentary on the Code of Canon Law*, ed. John Beal, James Coriden, and Thomas Green (New York: Paulist, 2000), 1258; Gormally, “Marriage and the Prophylactic,” at 741–47.

<sup>16</sup>CIC 1084.

<sup>17</sup>CDF, *Decretum circa impotentiam quae matrimonium dirimit* (13 May 1977) in *Acta Apostolicae Sedis* 69 (1977), 426; reprinted in Latin and English in *National Catholic Bioethics Quarterly* 6, no. 4 (Winter 2006): 753–54. In the same number of *NCBQ* see commentaries by Flannery, “Preface: The Conjugal Act and the Use of Prophylactics,” 733–35 and Urban Navarrete, S.J., “On the Decree of the Congregation for the Doctrine of the Faith Regarding Male Impotence,” 736–52; also Gormally, “Marriage and the Prophylactic,” 743–44; Aidan McGrath, O.F.M., “A Controversy Concerning Male Impotence,” *Analecta Gregoriana* 247 (1988).



Completing the conjugal act was understood by canonists then, as throughout the ecclesial tradition, to require *seminatio intra vaginam* (ejaculation into the vagina): only in this way can the spouses' bodily giving and receiving be apt for generation and so "preserve the full sense of mutual self-giving and human procreation."<sup>18</sup> *Coitus interruptus* (withdrawal before ejaculation) and condomized intercourse would not suffice.

Does the Church have any real argument for insisting that a sexual act must be completed by *seminatio intra vaginam* and so be *per se aptum ad generationem* in order to be a *conjugal* act? In the past generation the thinker who made the greatest contribution to clarifying the nature of human acts, including sexual acts, was undoubtedly G. E. M. (Elizabeth) Anscombe, the formidable Professor of Philosophy at the University of Cambridge. Since her death in 2001 she has been more fruitful than ever in publications! There are now collections of essays previously unpublished or published only in obscure places, and talks given in locations as exotic as Melbourne, Australia.<sup>19</sup> The most recent volume includes four pieces on chastity and marriage, all written in the wake of *Humanae vitae*, and I will adopt and adapt some of her arguments in this article.

From the beginning, Anscombe observed, Christian morality contrasted starkly with that of the pagans in important respects, including opposition to extra-marital sex, divorce and polygamy, contraception, abortion, and infanticide, and in valuing instead chastity, monogamy, and openness to human life. For many this

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<sup>18</sup>Martin Rhonheimer, in "The Contraceptive Choice, Condom Use, and Moral Arguments Based on Nature," *NCBQ* 7, no. 2 (Summer 2007): 273–91 at 289, says he finds it "intuitively repulsive to make the consummation of a marriage dependent on factual insemination into the woman's vagina, and to consequently consider a marriage not consummated only because intercourse was performed exclusively while using a condom." He does not treat the magisterial import of the 1977 CDF decree or the long canonical tradition which sought to express Catholic anthropology, ethics, and moral theology in its canons and judgments. See also his "The Truth About Condoms," *The Tablet* 258 (8545) (10 July 2004): 11 and "On the Use of Condoms to Prevent Acquired Immune Deficiency Syndrome," *NCBQ* 5, no. 1 (Spring 2005): 40–48.

<sup>19</sup>G.E.M. Anscombe, *Human Life, Action and Ethics*, ed. M. Geach and L. Gormally (Charlottesville, Va.: Imprint Academic, 2005); *Faith in a Hard Ground: Essays on Religion, Philosophy, and Ethics*, ed. M. Geach and L. Gormally (Charlottesville, Va.: Imprint Academic, 2008). Page numbers given parenthetically hereafter refer to the latter volume.

required a radical change of life and it situated Christianity *contra mundum* in important respects. In the face of the “obsessiveness and the mad pervasive atmospherics of disorderly sexuality” that infects some cultures, “treating sexuality just as an appetite that needs regulating according to principles of moderation” rather limps; we need signals as dramatic as consecrated virginity (210)—and, one might add, life-long marriage. Though she said she felt “reduced to stammering” about this because she was such “a mediocre worldly person,” Anscombe explained that human beings are like guided missiles honed in on God as the One thing worth knowing and loving; the astonishing possibility of eternal union with him, held out by Christianity, so grips some people that they are willing to embrace evangelical chastity. Only when we know this Christian ideal of dying to self, to the world, and to the flesh, of celibacy for the sake of the Kingdom, can we make sense of Catholic teaching on sex, marriage, and much else (173).<sup>20</sup>

In the Christian tradition sexual intercourse is for marriage, but to be a *copula coniugalis*, a conjugal act, more is required than that spouses do something sexual. St. Augustine helped clarify that a conjugal act is an act of intercourse that enables spouses to experience and express their specifically marital commitment—a commitment with a view to each other (*fides*), to their family (*proles*) and to God (*sacramentum*).<sup>21</sup> The connection between marriage and children was obvious to the ancients, and because the begetting and rearing of children is a fundamental social good, every society has institutionalized marriage.<sup>22</sup> Only a sexual act could “consummate” in a one-fleshed union the acts of will and language of the marriage vow. Whether or not it was actually fertile, to be a conjugal act it must be “a reproductive type of act”—Anscombe’s translation of *per se aptum ad generationem*. St. Thomas Aquinas in turn taught that any sexual act deliberately chosen as or rendered of a kind intrinsically unfit for generation is a “sin against nature.”<sup>23</sup> On this view ejaculating into

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<sup>20</sup>See also Dietrich von Hildebrand, *In Defense of Purity: An Analysis of the Catholic Ideals of Purity and Virginity* (Chicago: Franciscan Herald, 1970).

<sup>21</sup>Augustine, *De bono coniugalis*, 24, n. 32; cf. Pius XI, *Casti connubii: Encyclical on Christian Marriage* (1930), 10.

<sup>22</sup>Augustine, *De adulterinis coniugiis* II, 12. Gormally develops this point at length in “Marriage and the Prophylactic,” 737–40.

<sup>23</sup>Aquinas, *Summa theologiae* II-II, 154, a. 1c; a. 11c; *Summa contra gentiles* III, 122;

a condom would always be non-marital and sometimes be contraceptive, but it would also be perverse, a misuse of the reproductive faculty. In due course the moral wisdom that sexual intercourse is only morally appropriate when it is an authentic conjugal act (and that is a reproductive type of act), was accepted throughout Christian cultures, even if some Christians broke it spectacularly and most lived it rather middlingly (176).

Following Aquinas, Anscombe thought the teleology of our organs and the very language we use to describe sex are informative. We call our sex organs “genitals” or “reproductive organs” because they are *for generation*. Of course they are also about union, relationship, pleasure. Hers was not a naïve “physicalist” position. But

humanly speaking, the good and the point of a sexual act is marriage. Sexual acts that are not true marriage acts either are mere lasciviousness, or an Ersatz attempt to achieve that special unitedness which only a real commitment, marriage, can promise. For we don't invent marriage, as we may invent the terms of an association or club, any more than we invent human language. It is part of the creation of humanity and if we're lucky we find it available to us and can enter into it. If we are very unlucky we may live in a society that has wrecked or deformed this human thing. (185; cf. 210)

So to marry is not to enter into a pact of mutual complicity in any and every kind of sexual activity. It is precisely because sex concerns *fides*, *proles*, and *sacramentum* that there is “no such thing as a casual, non-significant sexual act” and why sexual acts are institutionalized in a marital commitment. Those who wish to reduce sex to “a sort of extreme kiss, which it might be rather rude to refuse” dishonor their bodies and cheapen what is naturally connected with life-giving (185–86). Anscombe's literary executor, Luke Gormally, explains:

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*Quaestiones disputate de Malo*, 15, i. See also *Casti connubii*, 54 and 56: “Since, therefore, the conjugal act is destined primarily by nature for the begetting of children, those who in exercising it deliberately frustrate its natural power purpose sin against nature and commit a deed which is shameful and intrinsically vicious. . . . Any use whatsoever of matrimony exercised in such a way that the act is deliberately frustrated in its natural power to generate life is an offense against the law of God and of nature, and those who indulge in such are branded with the guilt of a grave sin.”

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.<sup>24</sup>

When Paul VI taught in *Humanae vitae* that conjugal acts have both unitive and procreative significances that are *indissolubili nexu* and can never rightly be separated,<sup>25</sup> it was clear that he (and the long tradition for which he spoke) never meant that each conjugal act must actually be procreative or that couples must intend to make life every time they make love.<sup>26</sup> Few conjugal acts are in fact procreative. Elderly couples marry or stay married and do what couples do; younger ones likewise, even if to their great sadness they are infertile. Indeed, every woman is infertile for much of the month, yet it is permissible for a couple to have intercourse at those times, and sometimes more responsible to restrict intercourse to those times. As Patrick Lee and Robert George have recently demonstrated so clearly, these are still conjugal acts; they still have a procreative significance, because they are the type of act that can be generative and no step has been taken to denature them so that they are non-generative.<sup>27</sup> But some other sexual acts, such as *coitus interruptus*, anal sex, oral sex, mutual masturbation, and condomized

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<sup>24</sup>Gormally, "Marriage and the Prophylactic," 740.

<sup>25</sup>Paul VI, *Humanae vitae: Encyclical on Birth Control* (1968), 12; cf. John Paul II, *Familiaris consortio: Exhortation on the Christian Family in the Modern World* (1981), 11, 14 and 32.

<sup>26</sup>Paul VI, *Humanae vitae*, 11, following Pius XI, *CC* 59. Here the popes follow a tradition expressed also by Aquinas, *de Malo*, 152, ii, r. 14; cf. Gormally, "Marriage and the Prophylactic," 745.

<sup>27</sup>Patrick Lee and Robert George, "What Male-Female Complementarity Makes Possible: Marriage as a Two-in-One-Flesh Union," *Theological Studies* 69 (2008): 641–62. They are responding to writers such as Todd Salzman and Michael Lawler who regard the fact that such non-generative sexual acts are permitted in the tradition as opening the way to admitting other non-marital acts such as homosexual acts: see "Catholic Sexual Ethics: Complementarity and the Truly Human," *Theological Studies* 67 (2006): 625–52 and *The Sexual Person: Toward a Renewed Catholic Anthropology* (Washington, D.C.: Georgetown University Press, 2008). See also Gareth Moore, *The Body in Context: Sex and Catholicism* (London: Continuum, 2001), 162.

sex are not conjugal acts, even when done lovingly by spouses (197, 202–03). That condomized intercourse is also not a conjugal act is established Catholic teaching or at least a clear consequence of established Catholic teaching; it is a conclusion of sound philosophical anthropology, traditional Catholic theology, and canon law. It would follow then that even HIV-discordant married couples may not engage in condomized intercourse.<sup>28</sup>

### 3. Is this “traditional” position plausible today?

Anscombe observed that much of this thinking is opaque to modern minds that lack the sensitivities, language, and long hard practice of chastity that marked previous generations. It is also at odds with modern attitudes to sex, family size, and technology. Faithful Catholics, she thought, are now in a position similar to or worse than that of the early Christians vis-à-vis their surrounding culture. Christianity taught that “men ought to be as chaste as pagans thought honest women ought to be”; modernity teaches that “women need to be as little chaste as pagans thought men need be” (170–73).

But isn't marriage hard enough without ethicists or churchmen telling people what to do in the bedroom? Isn't the current HIV *emergency* sufficient reason to suspend such idealism? After all, where an HIV-discordant couple use a condom for a non-contraceptive reason, it looks and feels very much like normal intercourse. Fr. Martin Rhonheimer suggests that such a couple “modify the physical circumstances of their love-making” but still engage in a reproductive type of act: if it is vaginal sexual intercourse and the couple are married, then, it seems to him, it is a conjugal act.<sup>29</sup> To which

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<sup>28</sup>A similar case is made by Crawford, Gormally, Grisez, Guevin, and May.

<sup>29</sup>Rhonheimer, “The Contraceptive Choice,” 278–80, puts it thus: “the immediate (or proximate) object of one’s choice in such a case is ‘to engage in marital intercourse’ and not ‘to ejaculate into a condom’ . . . . Wearing a condom is not a means but, given the danger of infection, a *condition* for choosing to carry out the initial choice to engage in marital intercourse . . . the *condomistic* performance of sexual intercourse is a *modified* marital act . . . . If there is effective penetration and therefore ejaculation *in* the vagina (even if, because of condom use, ejaculation is not *into* it), the marital act would have been physically performed in a way which, considering the actors, has all the requisites of being the sort of act

Anscombe might respond: in characterizing an action we must describe it accurately and have an eye especially to its intended goal. In judging an action we must then ask three things about it: is what we are contemplating the sort of act it is all right to do? Are our further or surrounding intentions also right? Is the motive or spirit in which we do it also correct? A reproductive type of act by spouses is a conjugal act and “the sort of act it is all right to do”; it will be wrong, if at all, only on the second or third counts. But ejaculating into a condom or withdrawal before ejaculation is not a reproductive type of act, not a conjugal act, even if it is done for a non-contraceptive reason such as to have disease-free sex.<sup>30</sup> So it is wrong on the first count, even for the married. One could imagine a number of other non-contraceptive reasons, too, for using a condom: for research into condom effectiveness; to collect sperm for testing, artificial insemination, or IVF; to avoid an allergic reaction or a psychological aversion to skin or fluid contact; and so on. The further or surrounding intentions (such as expressing love, confirming marriage, protecting health, doing research) might be very good; the overall motivation may well be benevolent; but these cannot make a non-reproductive type of act into a conjugal one. If we intentionally forge a check in order to give money to the poor, Anscombe observed, it is still forgery, even if well-meaning forgery (183).<sup>31</sup>

If, on the other hand, there is nothing intrinsically wrong with condomized intercourse, at least between HIV-discordant spouses, then it is hard to see what is wrong with other acts of non-marital intercourse between spouses, and other acts of extra-marital

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which *can* lead to generation.”

<sup>30</sup>Gormally, “Marriage and the Prophylactic,” 745: “If a husband ejaculates into a condom, his wife is not receiving his ejaculate in her reproductive tract. His chosen act has, therefore, the character of an act from which generation *cannot* follow. That generation cannot follow is not a *per accidens* feature of the act, arising from biological characteristics of the spouses which are extrinsic to the character of the performance as such. On the contrary, it is an essential feature of the chosen character of the performance that generation cannot follow from it; it is essentially a type of act inapt for generation . . . . A condom is as inappropriate a receptacle for the deposition of semen as the anus. Choosing to ejaculate into either amounts to the choice of a type of act which *in the very character of the performance* plainly detaches sex from its ordering to the good of children.”

<sup>31</sup>The classic account is G.E.M. Anscombe, *Intention* (Ithaca: Cornell University Press, 1957).

intercourse. The rationale for the form of life that is marriage and for reserving sex to it is that this is “the sort of setup that typically provides children” and provides those children with a father and mother to care for them. But if you can turn intercourse into something other than the reproductive type of act, why restrict it to marriage? Why restrict marriage and sex to people of opposite sex or to two people only? Why bother with the hocus-pocus of a wedding ceremony? Anscombe’s point is not that there is an inevitable moral slide in these situations. It is, rather, that while old respectabilities and prejudices die hard and so some people who support condoms for HIV-discordant couples remain opposed to homosexual and other extra-marital sexual activity, they will, in the end, have “no solid reason against these things. You will have no answer to someone who proclaims, as many do, that they are good too. You cannot point to the known fact that Christianity drew people out of the pagan world, always saying no to these things.” If you are defending *some* non-marital intercourse, you have already rejected a part of the Christian tradition in concert with which much of the rest makes sense. You have, in Anscombe’s terms, rejoined the pagan world unawares (172, 183, 201, 210–11).

Condomized intercourse is not a reproductive type of act. It can also be argued that it is not a truly unitive act. In the first place the condom places a barrier to complete physical union of the spouses: while this looks like ordinary sexual intercourse the couple fail, in fact, to touch in the most intimate way; they do not become “one flesh.”<sup>32</sup> While every human being is a complete organism with respect to location, growth, nutrition, sensation, thought, motion, and emotion, yet as sexual animals human beings are incomplete: they have, as it were, only half a capacity for intercourse and reproduction. Only by physical union with a person of the opposite sex can the sexual-fertile potential of the human being be realized; only with and through each other can spouses become parents; their “one-flesh” union makes them, in this important respect, an

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<sup>32</sup>Smith, “Morality of Condom Use,” 48, observes that condomized intercourse is not truly unitive because it “is simply two bodies rubbing against each other or, in fact, rubbing against latex.” Rhonheimer, “The Contraceptive Choice,” 280, n. 16, dismisses this concern as “a psychological and perhaps aesthetic” one, not a moral one.

“organic unit.”<sup>33</sup> In the area of sexuality–fertility there is a strange math:  $1+1=1$ , and then 3, 4, 5 . . . . A condom, however, obstructs both. By rendering their sexual acts unsuited for conjoining their complementary reproductive powers, the couple not only exclude the procreative significance of their intercourse (the  $1+1=3$ ) but also diminish or exclude the unitive significance of their union (the  $1+1=1$ ). They render their intercourse unsuited to conjoining their hearts and bodies in marital union.

In his wonderfully rich catecheses on the *Theology of the Body*, Pope John Paul II taught that the conjugal act is a kind of “sacrament of the person,” signifying and effecting in bodily activity the spousal “gift of the self” in a love that is total, reciprocal, and complementary. Condomized intercourse withholds an essential component of that gift: the communication of that which, in normal circumstances, makes it both unitive and potentially procreative. It frustrates the language of unreserved gift: the bodily self is neither fully offered nor fully received. Rather than giving that which is not only a token of himself but a part of his very self, that part which is generative, the man keeps his sperm and takes it away with him. There is a holding back; the husband leaves his wife with nothing of his substance. Likewise the wife, who normally gives herself in receiving from her husband, refuses to receive or is denied a part of him. Condomized intercourse cannot express marriage in the personalist “language of the body.”<sup>34</sup>

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<sup>33</sup>This argument is articulated in Gormally, “Marriage and the Prophylactic,” 740, and developed most fully in Lee and George, “What Male-Female Complementarity Makes Possible,” 641–62.

<sup>34</sup>John Paul II, *Man and Woman He Created Them: A Theology of the Body*, trans. Michael Waldstein (Boston: Pauline, 2006). Important book-length commentaries on the pope’s theology of the body have been published by Jorge Cardinal Medina Estévez, Benedict Guevin, Richard Hogan and John LeVoir, John Kippley, Anthony Percy, Mary Prokes, Kenneth Schmitz, Walter Schu, Angelo Cardinal Scola, Mary Shivanandan, Vincent Walsh and Christopher West. Many important studies have also appeared in this journal. Far from falling into an old-fashioned “physicalism,” this account takes seriously the place of the body in the psycho-somatic whole that is the human person and in married and family life. Several authors identify an untenable dualism in the kind of thinking that dismisses attention to the body and its language as “physicalist”: e.g., Donald Ascii, *The Conjugal Act as a Personal Act* (San Francisco: Ignatius Press, 2002); Crawford, “Conjugal Love, Condoms and HIV/AIDS”; Lee and George, “What Male-Female Complementarity Makes Possible.”



I have argued that condomized intercourse is non-marital because it is not apt for generation (*proles*), nor for genuine marital union (*fides*). In the case of baptized persons the marital act is also essential for consummating the sacrament of marriage and for renewing the sacrament in ongoing conjugal communication (*sacramentum*). Consummation is seen in the canonical tradition not merely as a technical requirement but as a theological necessity for completing the sacrament: it signified a sharing in the *mysterion* of Christ's relationship to his Bride the Church. John Paul II explained that as Christ gives his substance—his Body and Blood—to his Bride on the Cross and in the Eucharist, so a husband gives of his substance to his wife. But condomized intercourse holds back from consummating that self-giving.<sup>35</sup> To say this is not to impugn the faith of the spouses or deny their desire to be united, fruitful, and graced. But by rendering sexual acts non-marital, the use of condoms renders them ineffective for signifying those things. Just as a person who puts a consecrated host in a pyx does not receive Holy Communion—even if he does this reverently—so a couple who use a condom exclude the giving and receiving required for *fides*, *proles*, and *sacramentum*.

#### 4. When condomized intercourse is also contraceptive

Some advocates of condoms for HIV-discordant couples think that provided condoms are not used contraceptively they are acceptable.<sup>36</sup> But the reasons against condomized intercourse that I have elaborated so far in this article are not about contraception. Not all condomized intercourse is in fact contraceptive. An HIV-discordant couple might, for instance, know that they are infertile due to hysterectomy, menopause, or zero sperm count. They might use a condom to reduce the risk of HIV transmission and not with a view to preventing conception. In such a case I think they would

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<sup>35</sup>Gormally, "Marriage and the Prophylactic," 748: "Marriage distinctively shares in the unity of the body of Christ as husband and wife enact in their lives both the self-giving of Christ and the receptivity of the Church. And the action which both signifies and realizes this unity is marital intercourse. But in order for it to do so, there clearly must be both a giving by the husband of his substance to his wife and a receiving of it by the wife. When this giving and receiving are fruitful in the birth of children, we have the reality that is called the 'domestic church.'"

<sup>36</sup>Rhonheimer, Keenan, Fuller, Ann Smith, and McDonagh, in the works cited.

have no objectively contraceptive end or will and their acts would not be contraceptive.<sup>37</sup> This could also be the case in a particular act of condomized intercourse even by a fertile couple. Thus *Humanae vitae* recognizes that a woman might sometimes take a medication for some therapeutic purpose, foreseeing that it has a contraceptive side-effect: the lack of a contraceptive will or intention means this is not an act of contraception.<sup>38</sup>

Nonetheless, when HIV-discordant spouses seek to reduce the risk of HIV transmission to each other, they commonly also seek to reduce the risk of transmission to any prospective child. But no prospective child can be so protected from HIV except by preventing such a child from being conceived. Just as surgical sterilization to prevent a dangerous pregnancy is still sterilization,<sup>39</sup> so contraception to prevent a child with HIV being conceived is still contraception. And contraception, according to a long line of Catholic teaching which I need not rehearse here, is intrinsically wrong, even as a means to some good end.<sup>40</sup>

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<sup>37</sup>Here I am in agreement with Rhonheimer, Grisez, and Gormally. Writers such as David Braine, Peter Cataldo, Matthew Levering, Christopher Oleson, Mary Shivanandan and Janet Smith, with whom I agree on most things, would part company from me on this. They hold that the deliberate interposition of a physical barrier preventing insemination in a chosen sexual act, whether as a means or an end, is always an act of contraception—however improbable conception might be or however noble the subjective intentions of the agents. The fact is that a condom obstructs or reduces any possible or remaining fertility; it renders the bodies and the acts of those who use it sterile. They cite in support *Humanae vitae*, 17 with its insistence on natural limits beyond which people should not go with respect to their bodies and natural functions. Condomized intercourse is inherently anti-procreative; the very act, in its fundamental structure, bespeaks contraception and so is objectively wrong. On this view even an infertile couple can perform contraceptive acts because certain acts have a *per se* contraceptive *telos* or meaning.

<sup>38</sup>Paul VI, *Humanae vitae*, 15 (citing an allocation of Pius XII): “The Church, on the contrary, does not at all consider illicit the use of those therapeutic means truly necessary to cure diseases of the organism, even if an impediment to procreation, which may be foreseen, should result therefore, provided such impediment is not, for whatever motive, directly willed (*directo intendatur*).” *Humanae vitae*, 14 likewise specifies that a contraceptive act requires *intent* that procreation be impeded. See Grisez, “Moral Questions on Condoms and Disease Prevention,” 471–72.

<sup>39</sup>As explained in CDF, *Quaecumque sterilizatio* (also known as *Haec sacra congregatio*): *Response to the American Bishops on the Question of Sterilization in Catholic Hospitals* (1975) and *Responses to Questions on Uterine Isolation and Related Matters* (1993).

<sup>40</sup>Pius XI, *Casti connubii*, 56; Pius XII, *Address to Participants in the Conference of the*

The sexual and contraceptive revolution of the 1960s and 70s enabled and magnified the trend to excluding children from marriage. The 1980s saw the advent of the “DINK”—dual income, no kids—and the HIV crisis of the 1990s added new pressure to reconceive the conjugal act as no longer required to be *per se aptum ad generationem*. One effect of the contraceptive culture, I would suggest, is that it has desensitized not only the faithful and their health professionals, but even some working in Church agencies and theology faculties to the seriousness of denaturing conjugal acts.

##### 5. Cooperation in condom use by HIV-discordant spouses

Elsewhere I have outlined the principles of cooperation in evil as articulated in the Catholic moral tradition.<sup>41</sup> *Formal* cooperation—where the cooperator’s act shares in the wrongfulness of the principal agent’s intention or will—is always wrong. But *material* cooperation—where the cooperator’s action, though good or neutral in itself, has the foreseen effect of facilitating the principal agent’s wrongdoing—is sometimes permitted.<sup>42</sup> In this tradition casuists suggested that those who manufacture and/or distribute condoms, advising on how to store, handle, and use them effectively, and encouraging condom use in extra-marital intercourse, formally cooperate in the evil of such intercourse. So too, it would seem, do

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*Italian Catholic Union of Obstetricians*, 29 October 1951; Paul VI, *Humanae vitae*, 11–14; John Paul II, *Familiaris consortio*, 32; *Address to Priests and Seminarians participating in a Seminar on Responsible Procreation*, 17 September 1983; *General Audience*, 22 August 1984; *Address to Participants in a Study Session on Responsible Procreation*, 5 June 1987; *General Audience*, 23 July 1980; CDF, *Note Regarding the Moral Rule of “Humanae vitae” and the Pastoral Duty* (1989); Pontifical Council for the Family, *Vade Mecum for Confessors Concerning Some Aspects of the Morality of Conjugal Life* (1997), 24.

<sup>41</sup>In Anthony Fisher, O.P., “Co-operation in Evil,” *Catholic Medical Quarterly* 44, no. 3 (February 1994): 5–8 and “Co-operation in Evil: Understanding the Issues,” in *Cooperation, Complicity and Conscience: Moral Problems in Healthcare, Science, Law and Public Policy*, ed. Helen Watt (London: Linacre Centre, 2005), 27–64.

<sup>42</sup>Some traditional authors also suggested that even when the cooperator denies intending the principal agent’s object, sometimes no other explanation will suffice to explain the cooperator’s action; they called this implicit formal cooperation because by its very nature or by the form it takes in the concrete situation the action could have no other meaning.

those who promote condoms as part of an “ABC” program: they may prefer that people choose “A” and “B+” over “B-” and “C”; they may abhor unchastity and promote “C” only as a last resort or a lesser evil, out of sympathy and compassion; yet still they cooperate formally in some extra-marital intercourse and this is always wrong. Despite some impressive psycho-linguistic gymnastics, efforts to characterize distributing and encouraging the effective use of condoms as merely *material* cooperation in extra-marital intercourse fail. Thus in the official policies of Catholic relief agencies the world over, these agencies insist that they do not finance, distribute, promote, urge, or even suggest the use of condoms.

Might an agency or professional at least provide “full and accurate” scientific information about the nature and appropriate storage, handling, and use of condoms, their benefits and failure rates, where to get them and so on, and thereby be only materially cooperating in extra-marital intercourse? It depends. As Germain Grisez and others have pointed out, such information-giving cannot hope to reduce the likelihood of HIV transmission unless it leads to their consistent and correct use by those engaging in risky behavior; thus some information-givers are, again, formal cooperators in the wrongful behavior.<sup>43</sup> But an information-giver might claim to be strictly neutral on whether the recipients of the information ever use it, and might seek to present their information in a way that lacks any hint of encouragement one way or the other. Whether information-giving *can* ever be so neutral, and whether agencies of a prophetic Church *should* ever attempt such neutrality, is of course debatable. Providing information on how to make a behavior safer naturally communicates implicit approval or tolerance of the behavior itself, especially in a culture that tolerates such behavior. The message conveyed is: It is acceptable to do X, as long as you take precaution Y, or at least it is “not so bad.” Anyone who proposed that Catholic agencies provide “value-free” information about safer abortion methods or less messy suicide methods would be met with incredulity if they said, “I’m not *promoting* abortion or suicide: I’m just disseminating information that might be of interest to grandmothers, ministers of Holy Communion, and high school students. It’s just part of the factual picture.” Why, people would ask, would you provide such information unless you intended people to use

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<sup>43</sup>Grisez, “The Church Betrayed?” 21–23.

it? Why on earth would you attempt to do so *dispassionately*, when you should be trying to dissuade anyone from ever using such information?

What if the information-giver was careful to quarantine this information-giving to married couples, so that no extra-marital intercourse was being encouraged? Of course some married persons might well use such information in order to engage more safely in adulterous intercourse. The information-giver might not care, as long as this reduced the risk of HIV transmission. But some information-givers might care: they might honestly say that their goal is only to prevent HIV transmission within marriage. On the face of it, this seems better. Yet it remains that the goal is to facilitate condomized and therefore non-marital intercourse, and this is formal cooperation in what I have argued above is wrongdoing.

The agency or professional might insist that they foresee but do not intend this. They might say *their* goal is only to make sure “the facts” are known rather than myths perpetuated, or only to remain in good standing with their potential clients or only to keep in the good books of the public health or NGO establishment; in so doing, they might hope to continue to do much good unrelated to condoms, including promoting abstinence and fidelity. These, it must be recognized, are good reasons, and there might be others too.<sup>44</sup> But *good* reasons are not necessarily *sufficient* reasons. We still have to ask: are there better goals or proposals to which we should devote our time and energy? Could we achieve the same goals—such as transmitting knowledge and reducing health risks—without similar or worse side-effects?<sup>45</sup> Are the hoped-for benefits really sufficient to justify tolerating the foreseeable downsides?<sup>46</sup>

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<sup>44</sup>Other good (though not necessarily sufficient) reasons might include: keeping one’s job or position or influence in the charitable sector, healthcare, education or counseling, with all the attendant opportunities this provides for doing good things; the income this brings, thereby supporting a reasonable lifestyle for oneself and one’s dependents or a reasonable margin for the institution to focus on its mission; the other, unambiguously good activities, with which this information-giving program may be intertwined; friendship with the others with whom one works; and so on.

<sup>45</sup>See Germain Grisez, *Difficult Moral Questions* (Quincy, Ill.: Franciscan Press, 1997), 883.

<sup>46</sup>Here I avoid talk of “proportionality,” “proportionate reason” or “balancing” as I think that in contemporary culture this carries the baggage of *proportionalism* or other consequentialist attempts to measure and compare incommensurable goods. Many have explained why such a balancing act is logically impossible and ethically

For material cooperation in evil to be justified, a more serious reason is required the graver, more probable, more lasting, more extensive, or less preventable are the intrinsic evil of the principal agent's act and the consequent harms to the principal agent, the cooperator and any third parties, especially the innocent. The possible reasons *for* cooperating in a "factual" information program aimed only at HIV-discordant couples have already been articulated. The reasons *against* would include that:

- this helps married persons engage in (and develop a habit of engaging in) non-marital (and often contraceptive) intercourse, with its attendant moral and spiritual consequences;
- this creates a sense of security that encourages "behavioral disinhibition" or "risk compensation" and puts those persons at physical and psychological risk;
- this gives the impression that the agency or professional thinks that some non-marital sexual activity is permissible or that contraception is permissible;
- the information-giver(s) might also be gradually desensitized to the wrongs involved, inclined to similar or worse activities in the future, and compromised in their ability to witness to true values;
- those affected might be damaged in their relationship to God, the Church, or others;
- Catholic teaching about the body, sexuality and marriage, already commonly misunderstood, will be further misconstrued and even fatally compromised by the promotion of an "exception" to the rule against non-marital (and often contraceptive) intercourse;
- consequently, it would be impossible to hold consistently to the Catholic moral tradition and to the magisterium of the recent popes in this area;
- third parties will thereby be "scandalized," i.e., led to engage in non-marital, contraceptive and/or extra-marital intercourse with or without a condom;
- this would exacerbate the logical, psychological, and sociological slide in sexual behavior, e.g., with respect to contraceptive and homosexual acts.<sup>47</sup>

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misleading, not least John Paul II in *Veritatis splendor*.

<sup>47</sup>See too Joseph Howard, "The Use of Condoms for Disease Prevention," *Linacre Quarterly* 63 (1996): 26–30.

Thus Cardinal Ratzinger wrote that:

The problem of educational programs in specifically Catholic schools and institutions requires particular attention. These facilities are called to provide their own contribution for the prevention of AIDS, in full fidelity to the moral doctrine of the Church, without at the same time engaging in compromises which may even give the impression of trying to condone practices which are immoral, for example, technical instructions in the use of prophylactic devices.<sup>48</sup>

In view of these benefits and dangers I believe it is wrong for a Catholic agency to cooperate in condom promotion and extra- or non-marital intercourse, even by the simple provision of “factual” information about the use and benefits of condoms and even if there were some effort to restrict this information-giving to HIV-discordant couples. Were a Catholic agency to believe its name or logo should not be associated with such a program,<sup>49</sup> that would be a good sign that it should be looking for a better program with which to be associated, such as providing formation in living according to the Gospel—as Pope Benedict suggested on the way to Cameroon—and warning about the spiritual, physical, emotional, and moral dangers of alternative approaches such as so-called “safe sex” with a condom.

#### 6. *The problem of duress*

What if CRS or its partners are threatened with exclusion from “the good part” of ABC programs or other good work if they refuse to take part in such information provision? The 1994 edition of the Catholic Health Association’s *Ethical and Religious Directives for Catholic Health Care Facilities* included an appendix on cooperation in evil which allowed cooperation in procedures such as sterilization on the grounds of “duress,” i.e., pressure from government, finance,

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<sup>48</sup>Ratzinger, “Letter to Archbishop Pio Laghi on *The Many Faces of AIDS*.”

<sup>49</sup>*CRS’ Position*, 4: “The policy calls upon CRS and partners to tell people the facts about condoms but does not suggest or urge them to use condoms . . . . Any written educational material that contains information about condoms **must not** carry the CRS name or logo.” (emphasis in document)

patients, or professionals.<sup>50</sup> The supporters of this appendix cited Henry Davis and others as arguing that a man may, under threat of death, destroy another man's property.<sup>51</sup> They thought this shows that immediate material cooperation in evil, though generally prohibited, is sometimes permissible and that the tradition is "flexible" enough to accommodate this. Yet it is far from clear that the man who did this would be cooperating in evil at all, since property rights are not absolute. Those who under great pressure panic or behave irrationally may have limited or no moral responsibility for what they do. Of course, they may be responsible for not resisting the pressure more determinedly or for being unprepared for it.<sup>52</sup> But "traditional authors" most often used the immediate-mediate distinction to show that such cases were often as bad as, or even equivalent to, formal cooperation. None thought that financial pressure would excuse such wrongdoing.

Whatever these traditional authors said, more contemporary commentators have noted that hospital administrators who ensure that sterilizations are performed properly in their institutions *formally* cooperate in evil, even if they disapprove of sterilization and even if they are under considerable financial or other pressure.<sup>53</sup> The CHA Appendix had little sense of the "prophetic" responsibility of Catholic institutions to bear witness to moral truths, especially in the face of attempted coercion.<sup>54</sup> The Congregation for the Doctrine of

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<sup>50</sup>Catholic Health Association, *Ethical and Religious Directives for Catholic Health Care Facilities*, 4<sup>th</sup> ed. (St. Louis: CHA, 1994), Appendix on Cooperation. The text reads: "Immediate material cooperation is wrong, except in some instances of duress. The matter of duress distinguishes immediate material cooperation from implicit formal cooperation. But immediate material cooperation—without duress—is equivalent to implicit formal cooperation and, therefore, is morally wrong."

<sup>51</sup>Keenan, "Prophylactics, Toleration and Cooperation," 216; Thomas Kopfensteiner, "The Meaning and Role of Duress in the Cooperation in Wrongdoing," *Linacre Quarterly* 70, no. 2 (May 2003): 150–58.

<sup>52</sup>Grisez, *Difficult Moral Questions*, 896.

<sup>53</sup>Orville Griese, *Catholic Identity in Health Care: Principles and Practice* (Braintree: Pope John Center, 1987), 388; Grisez, *Difficult Moral Questions*, 391–402; 892. See also Germain Grisez, *Living a Christian Life* (Quincy, Ill.: Franciscan Press, 1993); Matt McDonald, "The Limits of Cooperation," *Catholic World Report* 10, no. 11 (December 2000).

<sup>54</sup>Grisez, *Difficult Moral Questions*, 895–96.



the Faith was also troubled by the way “duress” was being used to excuse cooperation in wrongful activities, and recalled the principles clearly enunciated by Pope John Paul II in *Veritatis splendor*, 71–83 and *Evangelium vitae*, 74. The bishops responded to these criticisms by ordering an appendectomy of the cooperation section from the *Directives*.<sup>55</sup> Just as it was resolved in the 1990s that no Catholic healthcare institution could rightly cooperate in wrongful activities such as sterilization, even under financial, political, or other “duress,” so too no Catholic educational or welfare agency may claim that pressure from funding agencies, public health officials, or the NGO establishment to take part in condom information programs excuses cooperation in extra-marital, non-marital and/or contraceptive intercourse.

A more serious kind of “duress” occurs where an HIV-positive husband forces his wife to have intercourse with him: could she ask him to use a condom? Could she use a “female condom” herself? This might well be justified as an act of self-defense;<sup>56</sup> it would certainly not involve any formal cooperation in evil. Nor would most of the considerations against material cooperation described above apply to her. However, to advise a husband on how to perform an abusive act “more safely” is unlikely to be effective. Catholic agencies would do better to assist women to change or escape from such abusive situations, to educate men in sensitivity and responsibility, and to contribute to correcting the injustice of social

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<sup>55</sup>Two new directives (69 and 70) forbade Catholic providers from engaging in “immediate” material cooperation in immoral actions such as direct sterilization, abortion, and euthanasia, and cautioned against entering into arrangements with non-Catholic organizations who engage in such practices; at worst only “mediate” material cooperation with such wrongdoing would ever be permissible. Directives 70 and 71 drew attention to the risk of scandal, counseled the use of more reliable theological advisers, directed Catholic agencies periodically to reassess whether their agreements with other parties are being implemented in a way that is consistent with Catholic teaching, and insisted that the bishop has the final responsibility for addressing such issues.

<sup>56</sup>See, in a parallel situation, British Bishops’ Joint Committee on Bioethical Issues, “Use of the ‘Morning After Pill’ in Cases of Rape,” *Origins* 15, no. 39 (1986): 633–38 and “A Reply,” *Origins* 16, no. 13 (1987): 237–38; Pennsylvania Catholic Bishops’ Conference, “Guidelines for Catholic Hospitals Treating Victims of Sexual Assault,” *Origins* 22, no. 47 (1993): 81; Catholic Health Australia, *Code of Ethical Standards for Catholic Health and Aged Care Services in Australia* (Canberra: Catholic Health Australia, 2001), 3.6–3.9.

settings where women (and children) are relatively powerless to say “no.”

### 7. Prudential reasons against cooperating in condom use

I have argued in this article that for a number of reasons condom information-giving to unmarried and even to married couples is very likely wrong. One of those reasons is the false sense of security that it creates—and subsequent “risk compensation” or “behavioral disinhibition” where people take greater risks because they feel safer than is actually justified when using condoms. This is exacerbated by the common overstatement of the efficacy of “the condom solution” to HIV transmission, an overstatement present in the very description “safe sex.” How much condoms actually reduce the risk of transmitting HIV depends on the infectiousness of the HIV+ partner, the susceptibility of the HIV- partner at the time, and how effective condom use is in preventing viral transmission in that actual instance of condomized sexual activity. Studies demonstrate significant failure rates even in correct and consistent condom use and that such use is difficult to achieve in practice. Condoms are said to provide “an approximately 85% reduction in HIV transmission risk” for heterosexual couples “when infection rates are compared in always versus never users.”<sup>57</sup> Those who fail to use condoms consistently and correctly, however, and those who use them for other than vaginal intercourse (e.g., anal intercourse) have even higher failure rates. According to CRS:

many researchers believe that abstinence and partner reduction are responsible for the rapid decline in HIV in several countries

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<sup>57</sup> CRS’ Position, 1–2, and sources therein; Raul Alessandri, et al., “Condoms and Adolescent HIV: A Medical Evaluation,” *Catholic Medical Quarterly* 61, no. 3 (August 1994): 62–74; Center for Disease Control and Prevention, *Workshop Summary: Scientific Evidence on Condom Effectiveness for Sexually Transmitted Disease Prevention*, June 2000; Green, “A Framework of Sexual Partnerships”; Hugh Henry, “Can Condoms Kill?” *Catholic Medical Quarterly* 55, no. 1 (February 2005): 16–19; National Institute of Allergy and Infectious Diseases, National Institutes of Health and US Department of Health and Human Services, *Scientific Evidence on Condom Effectiveness for Sexually Transmitted Disease Prevention* (2001); S. Weller and K. Davis, “Condom Effectiveness in Reducing Heterosexual HIV Transmission—Cochrane Review,” *The Cochrane Library* 4 (2003).

around the world. Many countries that have not experienced declines in HIV have seen increases in condom use, but in every country worldwide in which HIV has declined there have been increases in Abstinence and/or Be faithful behaviors (A and B). These behavior changes (such as reducing partners) have resulted in a downward trend in HIV transmission. For example, according to scientific evidence, beginning in 2000, HIV prevalence declined in Uganda, due to change in behavior and practices, primarily the practice of multiple sexual partners.<sup>58</sup>

Describing condomized intercourse as “safe sex” in public education programs is deceptive, promotes a false sense of security, leads to higher rates of sexual activity, and encourages morally and physically unhealthy habits. As Matt Hanley, then a technical adviser to CRS on HIV/AIDS, observed, it is as if people were tackling the obesity epidemic with subsidies for weight-loss drugs but saying nothing about eating less.<sup>59</sup> Nonetheless some international agencies and much of the public health establishment, including some medical journals, remain ideologically fixated on condoms.<sup>60</sup> Rather than talk of last resorts and lesser evils, Catholic agencies and professionals should help liberate people from ideology and fixations, offer them “the big picture” about the human person, health, marriage, and sexual morality, and support them in living well. As the then-Cardinal Ratzinger wrote, it is crucial to realize “that the only medically safe means of preventing AIDS are those very types of behavior which conform to God’s law and to the truth about man which the Church has always taught and today is still called courageously to teach.”<sup>61</sup>

Much of the debate about HIV and condoms seems to assume that abstinence from sexual intercourse is impossible for most human beings and especially for married ones. This is clearly false: married couples are as free as anyone else to choose if and when to

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<sup>58</sup>CRS’ Position, 2. See also Pontifical Council for the Family, *Family Values Versus Safe Sex: Reflection by Alfonso Cardinal López Trujillo* (2003); Edward Green and Allison Ruark, “AIDS and the Churches: Getting the Story Right,” *First Things* (April 2008). Each of these works lists many sources in support.

<sup>59</sup>Hanley, “A Realistic Strategy for Fighting African AIDS.”

<sup>60</sup>Douglas Sylva, “AIDS and the Ideological Barrier,” *Ethics & Medics* 33, no. 12 (December 2008): 304.

<sup>61</sup>Ratzinger, “Letter to Archbishop Pio Laghi on *The Many Faces of AIDS*.”

have sex, and as bound as anyone else to make that choice responsibly. While sexual activity is a normal part of marriage, all couples must abstain at various times, sometimes for extended periods; for some intercourse is physically or psychologically very dangerous or difficult and abstinence, even indefinitely, may be the prudent or loving thing to do. By so doing spouses affirm rather than undermine their marriage as a communion of persons which has chronological and moral priority over its one-flesh expression.<sup>62</sup> They must find other ways of demonstrating love and experiencing physical and emotional intimacy together. Abstinence is clearly the safest course for HIV-discordant couples.<sup>63</sup>

*8. How should we cooperate with couples  
who are HIV-discordant?*

HIV-discordant couples, many of whom will have to abstain from sexual intercourse, possibly indefinitely, need counseling, education, and spiritual support from Church agencies and professionals. Just as Church agencies and the general community could do more to assist single people in their struggle with chastity, so too, many married couples need more help in dealing with sexual

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<sup>62</sup>John Paul II, *Man and Woman He Created Them: A Theology of the Body*, 19, 5.

<sup>63</sup>Even Rhonheimer, in “The Contraceptive Choice,” 277, recommends abstinence: “I actually believe that, in order to live perfect virtue [HIV-discordant spouses] in fact *should* abstain. But I also consider cases in which, because of the unwillingness or weakness of one of the spouses, this might not be a workable alternative for the other, provided the compelling and just reason of marital love exists for the other to engage in sexual intercourse . . . . The alternative to a morally good act is not always a morally evil one, but can be less good. Despite that possibility, I think there are strong prudential and pastoral reasons to never encourage the use of a condom even in such a difficult case.” Might an uninfected spouse reasonably volunteer to accept the risks of “unprotected” intercourse? Risks vary according to factors such as which of the spouses is infected, the health of the uninfected spouse, the stage of infection, the phase of the menstrual cycle during which intercourse occurs, and the efficacy of medication in reducing infectiousness (viral load can sometimes be reduced to undetectable levels). While abstinence seems the more reasonable course, one cannot exclude that a well-informed HIV-discordant married couple might, following candid and prudent discernment and while taking all morally available precautions, reasonably engage in conjugal intercourse, especially in order to consummate their marriage or to have a child.

frustration and other challenges in the physical-emotional side of their marriage.

As I intimated earlier in this article, proponents of “Harm Minimization” and “Safe Sex” strategies commonly seem to presume a rather low view of the human person: that HIV-infected persons are “going to have sex no matter what”; that they are beyond reason, influence, or conversion; and that the best we can offer is damage limitation. Such fatalism is alien to the Catholic confidence in the persuadability of the mind to truth, the convertability of the will to virtue, and the efficacy of good human and spiritual support. The Church is mandated to give witness to the life-transforming and perfective power of divine grace and so must always hold out hope to individuals that they are capable of chastity, virtue, holiness; if we imply that we expect less, we should not be surprised when people fulfill our low expectations. The witness of unmarried individuals who abstain from sexual intercourse and of couples who abstain for a time, even indefinitely, from marital intercourse in order to protect the goods of life, health, marriage, and love, must be honored and supported. Likewise the witness of individuals and agencies who focus on compassion, care, and chastity helps to evangelize a culture desperately in need of alternatives to its heart-breaking and health-breaking permissiveness. As Cardinal Ratzinger put it:

In a society which seems increasingly to downgrade the value of chastity, conjugal fidelity, and temperance, and to be preoccupied sometimes almost exclusively with physical health and temporal well-being, the Church’s responsibility is to give that kind of witness which is proper to her, namely an unequivocal witness of effective and unreserved solidarity with those who are suffering and, at the same time, a witness of defense of the dignity of human sexuality which can only be realized within the context of moral law.<sup>64</sup>

Thus to the question, “Should someone who is going to fornicate use a condom?” the Catholic answer is: “Don’t fornicate: sex is for marriage.” To the question, “Should I help someone who is going to fornicate use a condom?” the Catholic answer must be: “I will help him or her not to fornicate.” It is never the role of the Church, or of its agencies, pastors, or members, to help people do

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<sup>64</sup>Ratzinger, “Letter to Archbishop Pio Laghi on *The Many Faces of AIDS*.”

wrong things more efficiently or safely.<sup>65</sup> Nor is it ever the role of the Church just to say no and abandon people. The Church is there to preach the Gospel, whole and entire, with courage, clarity, and humility, and that includes her life-giving vision and ethic; it is also called to assist, with compassion and love, all who are tempted, fallen, or suffering in any way. This is how the Church contributes to the flourishing of human persons under grace.

### *Conclusion*

Much more might be said about the appropriate response to the HIV crisis, including the best means of prevention. Beyond promoting behavioral change, including delaying the onset of sexual activity, reducing the number of partners, and above all promoting chastity, there are many issues to be addressed such as attitudes to the body, Third World disadvantage, relations between the sexes, and moral relativism. Here I have focused on the vexed question of whether Catholic agencies and professionals should distribute or promote the use of condoms as a preventative strategy for HIV transmission or at least offer information about condom use to HIV-discordant married couples. I conclude that distribution and promotion of condoms are clearly ruled out and that even information programs are morally problematical cooperation in extra-marital sexual activity.

I have further argued that the condomized intercourse of HIV-discordant spouses is non-marital because it is not apt for generation (*proles*), for marital union (*fides*) or for spiritual communion (*sacramentum*). Whether or not it is contraceptive—and condomized intercourse often is—it is clearly not conjugal. To admit that condoms might be used by HIV-discordant couples would bring into question a great deal of Catholic teaching about sexuality and marriage, contradict the 1977 Decree of the CDF,<sup>66</sup> and make incoherent the magisterium in this area from *Casti connubii* and *Humanae vitae* through John Paul II's *Theology of the Body* and

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<sup>65</sup>This point is well made by Rhonheimer, “The Truth About Condoms.”

<sup>66</sup>This point is made by Flannery, “The Conjugal Act and the Use of Prophylactics,” 735.

beyond.<sup>67</sup> As many condom proponents recognize, and some openly celebrate, admitting this “Trojan horse” would make the Church’s continued opposition to other forms of non-marital intercourse (such as homosexual acts) and to contraception unsustainable. I have argued that information-giving to facilitate HIV-discordant couples engaging in condomized sex is unethical for Catholic agencies and professionals even when motivated purely by a desire to reduce the risk of HIV infection. I have also questioned the prudence of such strategies even from a pragmatic point of view.

The approach of Catholic leaders, agencies, and professionals to HIV can put them at odds with the powers and wisdom of the age. In the UN, the media, and some academic circles this has exposed the Church to severe criticism at times—ranging from charges of sexism and “physicalism” to the more serious accusation that the popes are personally responsible for the deaths of millions.<sup>68</sup> There is, of course, an alternative wisdom articulated in the long tradition of common sense and theology for which Paul VI stood up so bravely four decades ago, told in the “stammering” of Elizabeth Anscombe and the teaching of the recent popes, and revealed, most persuasively of all, in the compassionate action of faithful Catholics and their collaborators in the field of HIV prevention and care. □

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<sup>67</sup>As David Braine of the University of Aberdeen wrote to me: “to drive a coach and horses through the Church’s moral teaching for the purpose of making ‘a little exception’ for HIV-discordant married couples is terribly misguided. The problem for the world is the massive use of sex, heterosexual or homosexual, in such a way that any relation to procreation is irrelevant (i.e., as if sex had nothing to do with procreation). This is most people’s attitude whether the act be outside or inside marriage. To make this little exception is misleading in the total context, and constitutes a false witness to the general shape of the Church’s teaching affecting the whole area of sexuality. It conforms to the conception of people’s having a right to sex, whereas what they have a right to, so far as God and nature allow, is a true and truthful marriage.”

<sup>68</sup>E.g., articles by Barbara Dority, Austen Ivereigh, Nicholas Kristof, George Monbiot, and Michaela Wrong.