

SEX AND THE PRINCIPLE OF DOUBLE EFFECT

A Dissertation

by

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ABSTRACT

This dissertation aims to revive a traditional application of the Principle of Double Effect (PDE) to sexual acts and use that application to explain important distinctions in contemporary sexual ethics made by Aristotelean-Thomist natural law theory.

Traditionally, the PDE requires that, to be permissible, an act producing both a good effect and bad effect must meet four conditions: it must not be wrong relative to natural law, the bad effect it produces must be indirect, the good effect and bad effect must result from the same act, and the good effect must be unachievable but for the tolerance of the bad effect. Traditional applications of the PDE to sexual acts evaluate the good effect of procreation and unity against the bad effect of sexual pleasure *in isolation from procreation and unity*. To explain this traditional application, this dissertation first discusses different formulations of the PDE and contextualizes its sexual application within the manuals of moral theology developed between the Council of Trent (1545–1563) and Second Vatican Council (1962–1965). It then applies this formulation contemporarily to two arguments and a set of cases found in the context of natural law theory: the Contraception Argument, the Sterility Objection, and a set of cases concerning hysterectomy considered by the Congregation for the Doctrine of the Faith in 2018 and 1993. According to the Contraception Argument, if natural law theory prohibits contraception as a way to prevent pregnancy, then it should also prohibit Natural Family Planning (NFP), purposefully having intercourse only during infertile periods as a way to prevent pregnancy. According to the Sterility Objection, if natural law theory permits

sterile opposite-sex marriage, then it should also permit same-sex marriage, which is also sterile. According to a *responsum* issued by the Congregation for the Doctrine of the Faith in 2018, the hysterectomy of a uterus which cannot bring a fetus to term is not an act of sterilization. The permissibility of NFP, sterile opposite-sex intercourse, and the hysterectomy of a uterus incapable of bringing a fetus to term can all be defended within the Aristotelean-Thomist tradition because they meet the conditions of a sexual application of the PDE. Correspondingly, the impermissibility of contraception, same-sex intercourse, and hysterectomies causing direct sterilization can all be explained by their failure to meet the conditions of the PDE.

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CHAPTER I

INTRODUCTION

The Principle of Double Effect

A woman is carrying an ectopic pregnancy within the fallopian tube rather than within the uterus. The pregnancy would be fatal to her health if carried to term. For treatment, a physician presents her with the option either to terminate the pregnancy medically with methotrexate, or to remove the fallopian tube surgically through salpingectomy.¹ From a medical perspective, medication is preferred to surgery as a first-line, non-invasive treatment; however, from the *moral* perspective of natural law theory, this preference is questionable because it does not account for the difference between the *direct* and *indirect* termination of the pregnancy.

The relationship of each act to natural law can be evaluated through an analysis of the interaction of the same two effects: preserving the mother's life (the good effect) and terminating the life of the unborn (the bad effect). The traditional explanation is that the termination of pregnancy with methotrexate violates natural law because it constitutes abortion, while salpingectomy does not violate natural law when performed

¹ Methotrexate is a medicinal means of treating ectopic pregnancy through expulsion; Salpingectomy is a surgical means of treating ectopic pregnancy through excision of the fallopian tube entirely. See Rana P Kazmi I Singh R Afzal M Al-Abbasi F Aseeri A Singh R Khan R Anwar F (2013) Ectopic pregnancy: a review. Archives of Gynecology and Obstetrics 288:747–757. <https://www.doi.org/10.1007/s00404-013-2929-2>

as life-saving surgery.² Abortion is wrong because it entails the *direct* termination of the life of the unborn even though it might also result in the *indirect* preservation of the mother's life; however, salpingectomy is not wrong because it entails the *direct* preservation of the mother's life and only the *indirect* termination of the life of the unborn. Because this type of moral question involves two effects, one good and the other bad, the PDE can be applied to analyze those effects, to determine whether an act violates natural law and, thus, which treatment option is *morally* preferable.

Roughly, the PDE identifies an act that produces both a good effect and a bad effect as permissible if it meets four conditions: the act is not wrong in violation of natural law, the bad effect is merely tolerated as a side effect and is not itself the reason for acting, both effects are caused by the same act, and tolerance of the bad effect is the last resort to achieving the good effect. An application of the PDE to this case of ectopic pregnancy concludes that the termination of the pregnancy with methotrexate is impermissible because it constitutes abortion, while removal of the fallopian tube through salpingectomy is permissible because it constitutes lifesaving surgery. In any case, the PDE functions by identifying the type of act that is actually being performed in

² Methotrexate has recently been controversial as a permissible treatment for ectopic pregnancy. At issue is whether the drug is *directly* lethal to the embryo itself or only *indirectly* lethal to the embryo by effecting only the trophoblast, its vital organ. For the sake of example, I assume the traditional position that methotrexate is directly lethal to the embryo. See Anderson MA, Fastiggi RL, Hargroder DE, Howard, JC, Kischer CW (2011) Ectopic pregnancy and catholic morality a response to recent arguments in favor of salpingostomy and methotrexate. *The National Catholic Bioethics Quarterly* 11:65–82. <https://doi.org/10.5840/ncbq201111173>; Buskmiller C (2018) The ethics of interstitial and cesarean scar ectopic pregnancies: four case studies and a review of the literature. *The Lincare Quarterly* 85:252–269. <https://doi.org/10.1177/0024363918788858>

each option, even if both acts appear identical because they produce the same set of effects. Thus, abortion violates natural law, but salpingectomy does not.

The Aristotelean-Thomist tradition is the theoretical context of the PDE and continues St. Thomas Aquinas' method of using Aristotle's philosophy to explain Christian theology. In the Aristotelean-Thomist tradition, the rightness or wrongness of an act is determined by its relation to the absolutes of natural law. Natural law, as explained by St. Thomas, enjoins four primary precepts (*praecepta*) or teleological aims on human beings: the preservation of human life, the reproduction and raising of offspring, knowing God, and living in society. These precepts function as moral standards: acts which promote these ends are morally good; acts which are contrary to these ends are morally bad; and acts which neither promote, nor are contrary to, these ends are morally indifferent or neutral (*Summa Theologiae* 1-2, q. 94, a. 2, co.). Regarding medicine, Aristotelean-Thomist natural law, as it is called, does not require extraordinary means of keeping a patient alive; rather, it only requires that no act is done that actively kills the patient. Likewise, regarding sexuality, Aristotelean-Thomist natural law does not require humans to procreate; rather, it only requires that no sexual act be contrary to procreation.

The aim of this dissertation is to discuss how the PDE can distinguish between different types of sexual acts identified by natural law. To be more precise, this dissertation aims to revive the original sexual application of the PDE and use it to explain important distinctions in contemporary sexual ethics made by Aristotelean-Thomist natural law. The dissertation considers two arguments and a set of cases found

in the context of natural law theory: the Contralife Argument, the Sterility Objection, and a set of cases concerning hysterectomy considered by the Congregation for the Doctrine of the Faith. According to the Contralife Argument, if natural law theory prohibits contraception as a way to prevent pregnancy, then it should also prohibit Natural Family Planning (NFP)—purposefully having intercourse only during infertile periods as a way to prevent pregnancy. According to the Sterility Objection, if natural law theory permits sterile opposite-sex marriage, then it should also permit same-sex marriage, which is also sterile. According to the Congregation for the Doctrine of the Faith, the hysterectomy of a uterus which cannot bring a fetus to term is not an act of sterilization. I argue in this dissertation that the permissibility of NFP, sterile opposite-sex intercourse, and the hysterectomy of a uterus which cannot bring a fetus to term are all explainable through the PDE.

While Aristotelean-Thomist natural law teleology is the reason why permissible NFP, sterile opposite-sex intercourse, and hysterectomy for medical reasons are distinct from impermissible contraception, same-sex intercourse, and hysterectomy for sexual reasons, the PDE provides an explanation for these differences. In fact, the use of the PDE to distinguish between two identically *appearing* sexual acts was its original function within the theological manuals published between the Council of Trent (1545–1563) and the Second Vatican Council (1962–1965) to help confessors identify sins revealed by penitents during sacramental confessions.

Firstly, the dissertation considers NFP, which is used as a method used to avoid pregnancy by limiting intercourse to infertile periods. Because NFP has the same effect

as contraception, the two acts appear to be identical. Yet, according to the Aristotelean-Thomist tradition, contraception violates natural law, but NFP does not. Secondly, it considers sterile opposite-sex intercourse. Because sterile opposite-sex has the same effect as same-sex intercourse, the two acts appear to be identical. Yet, according to the Aristotelean-Thomist tradition, same-sex intercourse violates natural law, but sterile opposite-sex intercourse does not. Thirdly, it considers cases of hysterectomy, which it argues can be classified as either medical or sexual. Because medical and sexual hysterectomies entail different sets of effects, the permissibility of either can be determined by different applications of the PDE.

Curiously, while Lawrence Masek (2011) has attempted to use the PDE to distinguish NFP from contraception, neither his study on that specific issue (2011), nor his more recent treatment of the PDE in general (2021) mentioned this original function of the PDE within the manuals. The same can be said for studies which attempt to use the PDE to distinguish sterile opposite-sex intercourse from same-sex intercourse (Anderson 2013; Tully 2015). Likewise, commentators have attempted to apply the PDE to cases of hysterectomy, considering it as a medical act with the effects of preservation of a woman's life and sterilization, when it sometimes should be considered a sexual act with the effects of procreation and unity, and sexual pleasure *in isolation from procreation and unity* (the ethicists of the National Catholic Bioethics Center 2018; Bedford, Stephens, McCarthy 2018; Catron 2019; Diem 2019; Schulz and Hamant 2020). Nevertheless, since distinguishing between sexual acts was an original function of

the PDE, explanations of these distinctions made in sexual ethics by natural law theory could benefit from a revival of this application.

Thus, this dissertation argues that PDE can be used to distinguish between similarly appearing contemporary sexual acts, and that the PDE has been used in this way before to distinguish between similarly appearing sexual acts in the manuals of the Aristotelean-Thomist tradition. The PDE permits an act producing both a good effect and a bad effect if and only if the act itself is not morally wrong, the bad effect is unintended, the same cause produces both effects, and the good effect is achievable only through tolerance of the bad effect. The Aristotelean-Thomist tradition has identified procreation and unity as the good effect of sexual acts, and sexual pleasure *in isolation from procreation and unity* as the bad effect. The theological manuals produced in the period between the Council of Trent (1545–1563) and Second Vatican Council (1962–1965) discussed the moral significance of the interaction of these effects through the PDE.

The interaction of the good effect and bad effect is evaluated through the PDE to determine what kind of act it is. If an act producing these two effects meets the four conditions of the PDE, then it is permissible. If an act producing these two effects does not meet the four conditions of the PDE, then it is impermissible. The PDE, however, is not the *reason* that acts are permissible; rather, it is a *way* to identify which acts are. For example, “permissible abortion” is a contradiction in terms: if an act *appearing* to have the same effects as abortion meets the conditions of the PDE, then it is not abortion, but

rather a different act entirely. In the Aristotelean-Thomist tradition, the morality of an act is not determined by its *effects* but rather by moral absolutes of natural law.

Natural law, as grounded in Aristotelean teleology, is thought to be accessible independently of the Christian Bible but nevertheless consistent with it. Thus, a brief explanation of the religious context of Aristotelean-Thomist natural law will make it easier to understand the religious context of the PDE, which is important for its application to sexual issues. As an aspect of natural law, the same is true of the PDE. Religiously, the PDE functions as an aid to meet St. Paul's admonishment not to "do evil so that good may come" (Romans 3:8). St. Thomas alludes to this admonishment in his conclusion that "it is not lawful for anyone to take his own life for fear he should consent to sin, because 'evil must not be done that good may come'—and, in the same article on murder—alludes to what is now called the PDE in his conclusion that it is permissible to take the life of another in self-defense, provided that certain conditions are met (*Summa Theologiae* 2-2, q. 64, a. 5 ad. 3; and a. 7 co.). St. Thomas' commentary is foundational for all subsequent formulations of the PDE.

Aristotelean-Thomist Natural Law

Because the PDE originated in the Aristotelean-Thomist tradition, no discussion of the PDE would be complete without first explaining Aristotelean-Thomist natural law theory, which asserts moral absolutes. Aristotelean-Thomist natural law theory was developed within medieval Scholasticism. Having survived protestant reformation, Aristotelean-Thomist natural law theory is a distinctively Roman Catholic ethical theory despite its secular presentation and remains the standard version of natural law theory in

textbook accounts. It is “Aristotelean” because it relies on Aristotle’s metaphysics, especially his famous four causes, and it is “Thomist” because St. Thomas Aquinas applied Aristotle’s four causes to answer questions about morality. The broader Aristotelean-Thomist tradition includes this theory of natural law and extends the application of Aristotle’s four causes to other aspects of Roman Catholicism, such as sacramental theology.

Aristotle taught that things are explainable in terms of four causes: material cause (*hyle* or matter), formal cause (*eidos* or idea), efficient cause (*kinoun* or work), and final cause (*telos* or end). Medieval Scholastic philosophers further identified *teloi* as the aims, purposes, or functions with which God designed the things of the world. Indicative of God’s will, final causes became morally significant and the standard of Aristotelean-Thomist natural law. Generally, Aristotelean-Thomist natural law evaluates acts by comparing the final causes of individual acts with God’s plan for the world, which is expressed through the precepts of natural law and accessed through reason.

Metaphysically, natural law is informed by the distinction between substantial forms and real accidents. Medieval Scholastics divided the world between reality and appearance. Final causes constituted reality and were known in this capacity as substantial forms. Aristotle himself suggests that formal causes and final causes are identical in nature (for example, see his discussion in the *Physics*, 199a30). Substantial forms were defined as the minimal requirements for things to be what they are (such as what makes a thing a rock). Realities contrasted with appearances, which were known as real accidents. Since the same kind of things (such as rocks) vary widely in their

appearances (such as in color, texture, weight, and shape), it was concluded that the realities of things (their substantial forms) could not possibly be constituted by their appearances (their real accidents). For this reason, it was thought that substantial forms (reality) and real accidents (appearance) might be independent of each other.

To early modern philosophers, this reliance on Scholastic philosophy was the fundamental problem with Aristotelean-Thomist natural law because it allowed for the possibility that reality and appearance were separable. Indeed, early modern philosophers regarded Aristotelian and Scholastic philosophy as grounded in superstition because substantial forms were independent of real accidents (for example, see Hobbes' *Leviathan*, Part 4, Chapter 46). If relied upon for knowledge, the lack of interaction between the two would always lead to doubt and uncertainty (for example, see Descartes' *Meditations*, First Meditation). Early modern philosophers rejected this separation of substantial forms and real accidents by offering philosophies that fused reality with appearance. It was from these philosophies that theories of empirical natural law emerged, such as those offered by John Locke and George Berkeley.

Empirical Natural Law

While Aristotelean-Thomist natural law is referenced as the standard textbook account of natural law, philosophers in the early modern period who otherwise rejected Aristotelean-Thomist moral absolutes nevertheless saw themselves as working within the natural law tradition. An explanation of their version of natural law theory calls attention not only to the importance of Aristotelean-Thomist moral absolutes in the operation of the PDE, but also to the sexual concerns which followed from those

absolutes—both of which are absent in the early modern version of natural law I present here.

Philosopher of law H. L. A. Hart introduced the concept of an ‘empirical’ version of natural law, which he attributes to early modern philosophers: “This empirical version of natural law is based on Hobbes, *Leviathan*, chaps. 14 and 15, and Hume, *Treatise of Human Nature*, Book III, part 2; esp. ss. 2 and 4–7” (p. 303, note to p. 193). I call this version of natural he identifies simply empirical natural law. Empirical natural law is largely grounded in eighteenth-century British empiricism, including the empiricism developed by John Locke and George Berkeley. Empiricism is the theory that all knowledge, including moral knowledge, originates in sensation. In the ethical theories of Locke and Berkeley, God establishes a cause-and-effect relationship between natural law and rewards and punishments. Obedience to natural law is rewarded with pleasure, and disobedience is punished with pain. The ultimate end of this cause-and-effect relationship is society’s preservation, which God mandates through natural law and enforces with rewards and punishments.

In the first essay of his *Essays on the Law of Nature* (1663–1664), Locke considers the argument that natural law does not exist because there is wide disagreement on moral issues; however, Locke argues that such disagreement is instead evidence that natural law does exist, because the disagreement must be about *something*. He argues that “although even the more rational of men do not absolutely agree among themselves as to what the law of nature is and what its true and known precepts are, it does not follow from this that there is no law of nature at all; on the contrary it follows

rather that there is such a law, when people contend about it so fiercely” (*Essays on the Law of Nature* Essay 1; p. 86). In other words, Locke claims that disagreement on moral issues presumes the existence of natural law (which is the actual object of disagreement), even if it remains unknown to the participants.

In his famous *Essay Concerning Human Understanding* (1689), Locke gives the example of how a Christian, a Hobbist, and a ‘Heathen’ philosopher would all agree that it is wrong to break a contract “without either knowing or admitting the true ground of morality” (*Essay Concerning Human Understanding* 1.3.6; p. 69), explaining:

That Men should keep their Compacts, is certainly a great and undeniable Rule in Morality: But yet, if a Christian, who has the view of Happiness and Misery in another Life, be asked why a Man must keep his Word, he will *give* this as a *Reason*; Because God, who has the Power of eternal Life and Death, requires it of us. But if an *Hobbist* be asked why; he will answer: Because the Public requires it, and the *Leviathan* will punish you, if you do not. And if one of the old *Heathen* Philosophers had been asked, he would have answer’d: Because it was dishonest, below the Dignity of a Man, and opposite to Vertue, the highest Perfection of humane Nature, to do otherwise (*Essay Concerning Human Understanding* 1.3.5; p. 68).

According to Locke, a Christian, Hobbist, and a Heathen philosopher all reason that contracts should be kept because keeping them causes good effects, and that breaking them causes bad effects (although they differ as to what those specific good and bad effects are); however, according to Locke, breaking contracts is wrong because the

natural law prohibits breaking them, not because of the effects that occur as a result. The wrongness of breaking contracts, then, is a function of natural essences (the natural law) and not bad effects (the punishment associated with disobedience)

The reason for this, according to Locke, is that God established a link between natural law and natural effects in such a way that following natural law has the effect of preserving society, as Locke explains: “For God having, by an inseparable connexion, joined *virtue* and publick *Happiness* together; and made the Practice thereof, necessary to the preservation of Society, and visibly *beneficial* to all, with whom the Virtuous Man has to do; it is no wonder, that every one should, not only allow, but recommend, and magnifie those *Rules* to others, from whose observance of them, he is sure to reap Advantage to himself” (*Essay Concerning Human Understanding* 1.3.6; p. 69).

Society’s preservation, then, is the ultimate end of empirical natural law, which is why empirical natural law is often associated with (and mistaken for) social contractualism, a reading which was arguably promoted by Robert Nozick in his famous *Anarchy, State, and Utopia* (1974).

A closer analysis reveals the empirical aspect of Locke’s natural law theory, in that the good effects identified by all three philosophers are all reducible to pleasure, and the bad effects are all reducible to pain. For Locke, this is no accident, because it is God who rewards obedience to natural law with pleasure and punishes disobedience with pain, as: “It would be in vain for one intelligent Being, to set a Rule to the Actions of another, if he had it not in his Power, to reward the compliance with, and punish deviation from his Rule, by some Good and Evil, that is not the natural product and

consequence of the Action it self. For that being a natural Convenience, or Inconvenience, would operate of it self without a Law. This, if I mistake not, is the true nature of all *Law*, properly so called” (*Essay Concerning Human Understanding* 2.28.6; p. 351–2). Ultimately, it is God who links actions to pleasure and pain in order to encourage obedience and discourage obedience to natural law, to ensure that the natural law is followed even in cases of ignorance of those laws.

In fact, if no effects were associated with actions, Locke argues that natural law would be superfluous and unnecessary. If that were the case, moral wrongs could never be committed, because there would be no natural law to obey or disobey (and hence also no corresponding reward or punishment), as Locke explains: “And therefore, were every Action of ours concluded within it self, and drew no Consequences after it, we should undoubtedly never err in our choice of good; we should always infallibly prefer the best. Were the pains of honest Industry, and of starving with Hunger and Cold set together before us, no body would be in doubt which to chuse; were the satisfaction of a Lust, and the Joys of Heaven offered at once to any one's present Possession, he would not balance, or err in the determination of his choice” (*Essay Concerning Human Understanding* 2.21.58; pp. 272–273).

Thus, according to Locke, natural law serves as the basis of morality, and rewards and punishments occur as a result of obedience or disobedience to natural law. This means that reward and punishment (through pleasure and pain) is the result of moral and immoral behavior, but it is not the ground of morality itself—as Locke himself expressly states: “utility is not the basis of the law or the ground of obligation,

but the consequence of obedience to it” and so “the rightness of an action does not depend on its utility; on the contrary, its utility is a result of its rightness” (*Essays on the Law of Nature* Essay 8; p. 133). So, empirical natural law functions by rewarding obedience with pleasure and punishing disobedience with pain. Put differently, this means that cooperating with natural essences produces good effects, whereas not cooperating with natural essences produces bad effects. All such effects are reducible to pleasure and pain, and it is this reduction to sensation that makes Locke’s natural law theory empirical.

George Berkeley is standardly regarded as Locke’s successor in the history of empiricism, and his natural law theory is likewise empirical. Berkeley was a Church of Ireland bishop, and his account of empirical natural law is found in a series of sermons he wrote called *Passive Obedience* (1721). Like Locke, Berkeley claims that all moral ideas terminate in pleasure and pain, and that we all seek to enhance happiness and avoid unhappiness. Berkeley argues that, as infants, we were guided by the senses to associate pleasure with good, and pain with evil; however, through more experience of the world, we began to notice that present pleasure often leads to harmful effects, and that present pain often leads to good effects. Mature moral judgments, then, rely on an assessment of the consequences in total and not on initial sensations (*Passive Obedience* sec. V).

Also like Locke, Berkeley argues that the ultimate end (or natural essence) of empirical natural law is society’s preservation (or what Berkeley calls society’s “general well-being”), which is established by God and achieved through human cooperation. Berkeley explicitly states that this occurs through each individual’s contribution to

society: “the general well-being of all Men, of all Nations, of all Ages of the World, which God designs should be procured by the concurring actions of each individual. Having thus discover’d the great end, to which all Moral Obligations are Subordinate; it remains, that we enquire what Methods are necessary for the obtaining that end” (*Passive Obedience* sec. VII). Berkeley next explains how this well-being is achieved, specifically how God ensures our cooperation in order to achieve this end.

To do this, Berkeley discusses how society’s well-being is achieved in light of apparent moral disagreement and considers how such disagreement is best avoided (*Passive Obedience* sec. VIII). Berkeley first considers the possibility that society’s well-being is best achieved through the assessment of how individual actions produce optimal consequences. He dismisses this approach as a possibility by arguing, firstly, that it is impossible to account for all effects and, secondly, that any effects that are accounted for one result of subjective judgment, explaining that “however Men may differ, as to what were most proper and beneficial to the Publick to be done or omitted on particular Occasions, when they have for the most part narrow and interested Views; yet in general Conclusions, drawn from an equal and enlarged View of Things, it is not possible there should be so great, if any Disagreement at all amongst Candid, Rational Enquirers after Truth” (*Passive Obedience* sec. XXIX)

Berkeley next considers the possibility that society’s well-being is best achieved through following moral rules that promote that end. He endorses this approach by arguing that God promulgates natural laws that are conducive to society’s preservation, explaining that “For he that willeth the end, doth will the necessary means conducive to

that end; but it hath been shewn, that God willeth the Universal Well-being of mankind should be promoted by the concurrence of each particular Person; therefore every such practical Proposition, necessarily tending thereto, is to be esteemed a Decree of God, and is consequently a Law to Man” (*Passive Obedience* sec. XII).

Berkeley argues that these moral rules ensure the well-being of society because they require us to refrain from doing things which harm society. He explains that all natural laws, therefore, take the form “thou shall not” and are negative in formulation: “the Prohibitions of Vice, or Negative Precepts of the Law of Nature, as, Thou shalt not commit Adultery, Thou shalt not Forswear thy self, Thou shalt not Resist the Supreme Power, and the like, ought to be taken in a most absolute, necessary, and immutable Sense: Insomuch, that the attainment of the greatest Good, or deliverance from the greatest Evil, that can befall any Man or number of Men in this Life, may not justify the least Violation of them” (*Passive Obedience* sec. III).

Berkeley argues that only negative formulations comprise natural law because positive requirements (such as Thou shall honor God, and Thou shall honor your father and mother) often conflict with each other. In that case, natural law would be followed only circumstantially, whenever obeying them produces good effects. This would be tantamount to the analysis of the effects that individual actions produce, which Berkeley had already argued would undermine the point of natural law. Berkeley explains that these (negatively formulated) natural laws cannot be violated even by God, even when doing so would (apparently) produce good effects. God, the “Author of Nature,” Berkeley explains, “acts according to certain fixed Laws, which he will not transgress

upon the Account of Accidental Evils arising from them. Suppose a Prince, on whose Life the Welfare of a Kingdom depends, to fall down a Precipice, we have no Reason to think, that the Universal law of Gravitation wou'd be suspended in that Case. The like may be said of all other Laws of Nature, which we do not find to admit of Exceptions on particular Accounts" (*Passive Obedience* sec. XXVII). The natural laws would cease to be laws if violated even by God. If obedience to those laws happens to produce bad effects, it is because of the interaction of obedience with other effects and not because of natural law itself.

Although Locke, Berkeley, and other endorsers of empirical natural law did not believe in the medieval Scholastic concepts of substantial forms and real accidents, they nevertheless continued to endorse the existence of natural laws promulgated by God. The existence of such laws was called into question by the early developers of utilitarianism, Jeremy Bentham and John Stuart Mill. Just as Locke and Berkeley before them rejected the existence of substantial forms and real accidents as being incompatible with empiricism, Bentham and Mill rejected the existence of natural law as being incompatible with empiricism too. The resultant ethical theory, utilitarianism, is thus more empirical than empirical natural law.

Sex and the Principle of Double Effect

The chapters to follow explain how the PDE explains important distinctions made by the Aristotelean-Thomist tradition between similarly appearing sexual acts. The second chapter, "Formulations of the Principle of Double Effect," discusses five formulations of the PDE, to clarify which one is relevant to distinguishing between

sexual acts. The third chapter, “Reconsidering The Contralife Argument and the Principle of Double Effect,” argues that the PDE can successfully distinguish permissible NFP from impermissible contraception, contrary to what Jonah Pollock (2011) argued in response to Masek’s (2011) attempted application to make the same distinction. According to the Contralife Argument, consistency requires that, NFP and contraception should both be forbidden because they have same effects. The Contralife Argument itself originated within NNLT as a criticism of the papal encyclical *Humanae Vitae* (1968), which allowed NFP but forbade contraception. Because of this, the first chapter is written for a more theological readership. Its task is twofold. First, it argues why both Masek (2011) and Pollock (2011) are inaccurate in their judgements about the applicability of the PDE to sexuality. It then argues why my application of the PDE successfully distinguishes NFP from contraception.

The fourth chapter, “The Sterility Objection and the Principle of Double Effect,” argues that the PDE can successfully distinguish permissible sterile opposite-sex intercourse from impermissible same-sex intercourse. According to the Sterility Objection, consistency requires that, sterile opposite-sex intercourse and same-sex intercourse should both be permissible because they have the same effects. The Sterility Objection originated as a criticism of NNLT, which permits sterile opposite-sex intercourse but forbids same-sex intercourse even though both lack the possibility for procreation. This chapter is written for a more secular audience. Its task is to argue that the PDE can successfully distinguish between sterile opposite-sex intercourse and same-

sex intercourse only if Aristotelean-Thomist moral absolutes, which are the reason they are distinguishable, are assumed to exist.

The fifth chapter, “The Principle of Double Effect in the Congregation for the Doctrine of the Faith’s 2018 *Responsum* on Hysterectomy” argues that commentators have mistook a judgment issued by the Congregation for the Doctrine of the Faith in 2018 as a medical case, when it is really a sexual case. The correct classification of the case is important because medical acts and sexual acts entails different sets of effects and correspondingly different applications of the PDE. This chapter is written for a readership concerned with Catholic bioethics. Its task is to show how a sexual application of the PDE helps clarify a controversial case study.

CHAPTER II

FORMULATIONS OF THE PRINCIPLE OF DOUBLE EFFECT

This chapter presents, in order, what I call the Thomist Formulation, Manualist Formulation, Proportionalist Formulation, Deontological Formulation, and New Natural Legal Formulation. The Thomist Formulation and the Manualist Formulation (Mangan 1949, Connell 1967; Gury 1866) both appeal to moral absolutes, the Proportionalist Formulation appeals to consequences (Knauer 1967), the Deontological Formulation appeals to agency (Quinn 1989b), and the New Natural Legal Formulation appeals to states of affairs (Boyle 1980, Grisez 1983). The chapters that follow in this dissertation apply the Manualist Formulation to the Contralife Argument, the Sterility Objection, and cases of hysterectomy—all of which involve important distinctions in contemporary sexual ethics made within the Aristotelean-Thomist tradition.

From St. Thomas' commentary on self-defense, commentators have abstracted general conditions that now constitute those of the PDE, and they and have since debated both their number and content. While the different formulations generally, but not always, agree on basic moral conclusions, they differ in their *reasons* for reaching those conclusions, appealing variously to different moral concepts such as moral absolutes (Gury 1866, Mangan 1949, Connell 1967), consequences (Knauer 1967), agency (Quinn 1989b), and states of affairs (Boyle 1980, Grisez 1983). Each formulation can be classified as either “traditionalist” or “revisionist” depending on how explicitly it

references Aristotelean-Thomist moral absolutes. The more explicitly a formulation references Aristotelean-Thomist moral absolutes, the more likely it is to be classified as “traditionalist.” By contrast, the less explicitly a formulation references Aristotelean-Thomist moral absolutes, the more likely it is to be classified as “revisionist.” Since fidelity to the Aristotelean-Thomist tradition requires assent not only to its conclusions but also to its teleological *reasoning* in reaching those conclusions, whether a formulation *appearing* “revisionist” *actually* relies Aristotelean-Thomist moral absolutes remains a point of debate.

A survey of these different formulations is important conceptually because the PDE, traditionally understood, takes Aristotelean-Thomist moral absolutes as its moral standard (Gury 1866, Mangan 1949, Connell 1967); however, as the PDE was developed and incorporated into other ethical theories, this moral standard was either obscured (Knauer 1967) or abandoned altogether (Boyle 1980, Grisez 1983, Quinn 1989b). This survey of different formulations of the PDE is also important historically because, as the formulations were developed and increasingly secularized, the sexual application was eventually forgotten altogether. The traditional context of the PDE is needed to evaluate sexual acts because it is in relation to Aristotelean-Thomist moral absolutes that sexual pleasure *in isolation from procreation and unity* is judged to be the bad effect of sexual acts.

Donald Marquis (1991) identifies four “versions” of the PDE: “the *New Catholic Encyclopedia* statement of the doctrine, a more standard version of the traditional Catholic doctrine, Joseph Boyle's formulation of the doctrine, and Warren Quinn's

version” (p. 516). Later, Joseph Berkman (1997) discussed these versions in terms of four “contexts” assumed by theologians and philosophers who write about the PDE. According to Berkman, the PDE can be contextualized in four ways: “as interpretation of Aquinas; as a tool for manualist casuistry; as understood within proportionalist methodology; [and] as defended in relation to new natural law methodology” (p. 95). I will use Berkman’s list as my own, while also including an additional formulation listed by Marquis but not by Berkman.

What Marquis (1991) identifies as two separate “traditionalist” formulations, Berkman (1997) classifies as occurring together within in the context of Thomism. While Marquis and Berkman agree that Joseph Boyle’s formulation is representative of what is called New Natural Law Theory (NNLT), they differ in their fourth listing: Marquis identifies Warren Quinn’s formulation as an entirely different version, while Berkman does not mention Quinn’s formulation at all. Likewise, Berkman identifies an additional context of manualist casuistry, which is left unmentioned by Marquis. Here, in this introduction, I use Berkman’s listing as a framework for discussing five versions of the PDE but also include Quinn’s formulation listed by Marquis. I call these formulations the Thomist Formulation, the Manualist Formulation, the Proportionalist Formulation, the Deontological Formulation, and the New Natural Legal Formulation.

The most important formulation for the chapters in this dissertation is the Manualist Formulation, which I name for the genre of theological manuals in which it was developed. The Manualist Formulation will be used in the chapters to follow for two reasons. The first reason is that the Manualist Formulation is the formulation most likely

to be accepted by “traditionalists” and “revisionists” alike since it was often referenced by both in the development of their own formulations. The second reason is that, in contrast to the other formulations, the Manualist Formulation was explicitly applied to issues of sexuality in the theological manuals in which it was developed.

Among the most famous of manuals is the celebrated *Cursus Theologicus* of the Salmanticenses, which Joseph Mangan (1949) notes contained a specific treatise called “*De peccatis* [On sin]” originally written by Domingo de Sta Teresa in 1647 (p. 56).³ Significantly for this dissertation, Mangan writes that it is in “*De peccatis*” that “the author sets out to treat the principle of the double effect, according to his expressed intention, as it applies to the permitting of illicit sexual pleasure” (p. 56). Later, at the turn of the twentieth century, Thomas Slater (1908) published a manual in English that also included a chapter in Latin titled “*De peccatis consummates contra naturam* [On consummated acts against nature]” (vol. 1, ch. 3; pp. 330–334). Here, the author draws a comparison between a medical application of the PDE and its sexual application (vol. 1, ch. 3, art. 1, par. 3; p. 332 [Emphasis added]):

Dummodo adsit justa et proportionata causa excerendi actiones, ut a medicis qui mulieribus medentur, ex quibus praevidetur pollutio secutura quae non intenditur nec cui consensus datur, haec nullum erit peccatum, ut clarum est ex principio duplicis effectus.

³ Despite an exhaustive search, the author was unable to locate *Tomus Septimus* (t. VII) of the *Cursus Theologicus* of the Salmanticenses, the volume containing Mangan’s reference [(Parisiis, Bruxellis, 1877), t. 7, tr. 13, disp. 10 dub. 6, n. 211 ff.], in any library collection. The other volumes, however, are readily available.

[Provided that a just and proportionate cause is set to be put forth for actions, as by a physician who heals women, from which defilement which is neither intended nor to which consent is given is foreseen to be aimed at, this will not be a sin as is clear from **the principle of double effect.**]

The suggestion here is that the PDE can be used to evaluate sexual acts in the same way that it is used to evaluate medical acts: as long as the “illicit” sexual pleasure (the bad effect) is not itself consented to, the sexual act in question may be permissible for a proportionate cause. In other words, a permissible sexual act will meet the conditions of the PDE, but an impermissible sexual act will not.⁴

Writing about a case concerning sexual pleasure, Francis Jeremiah Connell (1942), a contemporary of Mangan’s, considered how a confessor priest ought to evaluate a confession involving onanism. Onanism is a type of sin that refers to the intentional ejaculation of semen outside the vagina and is named for Onan, who in the Book of Genesis, disobeyed God’s command to impregnate his sister-in-law, Tamar: “But since Onan knew that the offspring would not be his, he spilled his semen on the ground whenever he went in to his brother’s wife, so that he would not give offspring to his brother” (Genesis 38:9). As an instance of onanism, Connell presents the following case: “Julia, a married woman with four children, confesses that she has cooperated in the practice of onanism. Her husband uses a condom, and she sometimes takes a douche

⁴ Scholars have located Christianity’s aversion to sexual pleasure in the writings of St. Paul as interpreted by St. Augustine. Sexual pleasure and sexual orgasm in particular appear to have been regarded as damaging to the will, a faculty considered necessary for salvation. For a discussion of the relationship between sex and theism, see Wirkus B (2013) Sex. In: Taliaferro C, Harrison VS, Goetz S (ed) The routledge companion to theism. Routledge, New York, pp 678-689

immediately after intercourse. She pleads poverty and ill health, which the confessor believes to be the truth” (p. 55). The sin considered by Connell is *the wife’s* participation in onanism, sexual intercourse while the husband wears a condom, “permitting the man complete sexual gratification” (p. 56).

The moral issue in this type of case is whether “illicit” pleasure, the bad effect, may be permitted even if foreseen. At issue, in other words, is whether there is also a good effect that sufficiently justifies the tolerance of such pleasure. Indeed, this question is central to all applications of the PDE to sex. In other words, morally questionable are those cases in which sexual pleasure, unintended although foreseen, may be experienced in isolation from procreation, and such cases can be resolved by applying the Manualist Formulation.

While the Manualist Formulation is relevant to the *correct* application of the PDE to sexual issues, the New Natural Legal Formulation is relevant to understanding past *incorrect* applications of the PDE to sexual issues. The other three formulations clarify these two formulations by contrast. Although the Manualist Formulation has nearly the same conditions as the Thomist Formulation, the two formulations have different context, and it is the Manualist Formulation’s sacramental *context* that is relevant to its correct application to sexual issues. The Proportionalist Formulation arguably developed as an interpretation of the Manualist Formulation but without explicit reference to moral absolutes. This exposed the Proportionalist Formulation to accusations of revisionism, even though its developers saw it as an extension of traditionalism that offered a different way to access absolutes. The Deontological

Formulation developed outside of any theological context altogether and so is important to understand the reach of the PDE as an important set of conditions even in explicitly secular contexts. What follows now is a discussion of these formulations and how each interacts with the others.

The Thomist Formulation

In a much-referenced article on the history of the PDE, Joseph Mangan (1949) offers a version of what I call the Thomist Formulation. Besides presenting the case of onanism mentioned earlier (1942), Connell also offered an earlier version of this same formulation in the *New Catholic Encyclopedia* (1967). Even though Connell's formulation appeared second chronologically, Marquis (1991) argues that Mangan's formulation remains the stronger one of the two. Both of their versions assume that St. Thomas actually referenced what is now called the PDE in his commentary on self-defense and regard this commentary as a limited application of the more general principle. Because of its strong association with St. Thomas, no presentation of the PDE would be complete without a preliminary discussion of St. Thomas on self-defense beyond what I already mentioned in the first chapter.

St. Thomas discusses self-defense in two halves within his more general commentary on murder (*Summa Theologiae* 2-2, q. 64). He questions whether it is permissible to take the life of an aggressor in order to save one's own—in other words, he questions whether an act of self-defense is really a type of murder. In the first half of his answer, St. Thomas discusses the conditions in which such lethal self-defense is permissible. In the second half of his answer, St. Thomas considers the extent to which

those conditions apply to government authorities who take the life of an aggressor for the public good of their communities. In the first half, St. Thomas presents those conditions under which self-defense is permissible, with his references to “intention” being critical to Mangan (1949) and Connell (1967):

I answer that, Nothing hinders one act from having two effects, only one of which is intended [*in intentione*], while the other is beside the intention [*praeter intentionem*]. Now moral acts take their species according to what is intended [*intenditur*], and not according to what is beside the intention [*praeter intentionem*], since this is accidental as explained above (II-II:43:3; I-II:12:1). Accordingly the act of self-defense may have two effects, one is the saving of one's life, the other is the slaying of the aggressor. Therefore this act, since one's intention [*intenditur*] is to save one's own life, is not unlawful, seeing that it is natural to everything to keep itself in "being," as far as possible. And yet, though proceeding from a good intention [*ex bona intentione*], an act may be rendered unlawful, if it be out of proportion to the end. Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful, because according to the jurists {Cap. Significasti, De Homicid. volunt. vel casual.}, "it is lawful to repel force by force, provided one does not exceed the limits of a blameless defense." (*Summa Theologiae* 2-2, q. 64, a. 7 co. [Latin added])

Although St. Thomas here limits his commentary to the double effect of self-defense, both Mangan (1949) and Connell (1967) argue that he was referencing the PDE as a

more general principle and have sought to explain what St. Thomas means by that which is intended (*in intentione*) and that which is beside the intention (*praeter intentionem*).

Mangan (1949) and Connell (1967) agree that the good effect must be intended, but they differ as to how the moral agent should relate to the bad effect. Mangan's formulation requires that the moral agent not intend the bad effect at all, while Connell's formulation allows the agent merely to permit the bad effect. This difference can be seen in the four conditions offered by Mangan as follows (1949 p. 43):

1. "The action in itself from its very object be good or at least indifferent"
2. "The good effect and not the evil effect be intended"
3. "The good effect be not produced by means of the evil effect"
4. "There be a proportionally grave reason for permitting the evil effect"

Crucially, while the second condition requires that the bad effect not be intended at all, Marquis (1991) notes that the point of difference between the formulations offered by Connell and Mangan is whether the bad effect may be *permitted*.

In his listing, Mangan (1949) carefully considers St. Thomas' use of the words "intend" (*intendere*) and "intention" (*intention*). Correspondingly, Mangan's second condition is derived from the second half of St. Thomas' commentary on self-defense, in which St. Thomas discusses the only circumstance wherein intentional killing is permissible:

Nor is it necessary for salvation that a man omit the act of moderate self-defense in order to avoid killing the other man, since one is bound to take more care of one's own life than of another's. But as it is unlawful to take a man's life, except

for the public authority acting for the common good, as stated above (Article 3), it is not lawful for a man to intend [*intendat*] killing a man in self-defense, except for such as have public authority, who while intending [*intendens*] to kill a man in self-defense, refer this to the public good, as in the case of a soldier fighting against the foe, and in the minister of the judge struggling with robbers, although even these sin if they be moved by private animosity. (*Summa Theologiae* 2-2, q. 64, a. 7 co. [Latin added])

Mangan (1949) reads this passage as explicitly prohibiting intentional killing in self-defense; however, he notes an exceptions for authorities who are “acting for the common good” (*nisi publica auctoritate propter bonum commune*), or who “refer this to the public good” (*refert hoc ad publicum bonum*). According to Mangan (1949), the evil effect cannot be intended at all (as either a means or an end) because it would contradict this judgment. Therefore, Mangan (1949) interprets St. Thomas to mean that the prohibition against intentional killing is so absolute that an exception can only be made for authorities who do so for the greater good: “Therefore, according to St. Thomas’ own use of the word in article seven, ‘to intend’ also signifies to intend as a means to an end; for he limits the lawfulness of killing by public authority to killing as a means, or as an intermediary end, or as a proximate end to that of the common good” (p 49).

Referring to Mangan’s formulation, Connell (1967) offers another version of the Thomist Formulation. Connell lists the four conditions as follows (p. 880 [note added]):

1. “The act itself must [Mangan adds *in itself from its very object*] be morally good or at least indifferent.”

2. “The agent may not positively will the bad effect but may merely permit it. If he could attain the good effect without the bad effect, he should do so. The bad effect is sometimes said to be indirectly voluntary.”
3. “The good effect must flow from the action at least as immediately (in the order of causality, though not necessarily in the order of time) as the bad effect. In other words, the good effect must be produced directly by the action, not by the bad effect. Otherwise the agent would be using a bad means to a good end, which is never allowed.”
4. “The good effect must be sufficiently desirable to compensate for the allowing of the bad effect.”

Connell (1967) identifies the first and second conditions as “general rules of morality” and the third and fourth conditions as those which “pertain specifically to the principle of the double effect” (p. 880). According to Connell’s second condition, the moral agent may permit the evil effect without intending it, since a moral agent “is never allowed to perform a morally bad action” (p. 880).

Marquis (1991) notes that while Mangan distinguishes between the two effects through intention (that is, the good effect is intended, but the bad effect is not), Connell distinguishes between the two effects through positively willing and permitting (that is, the good effect is willed, but the bad effect is *merely permitted*). In other words, according to Connell (1967), the moral agent must will (and do something) to initiate the good effect while simply allowing the bad effect. By contrast, Marquis (1991) argues that Mangan’s formulation is better because it prohibits the moral agent from even

initiating the bad effect, since there is no allowance to “merely permit it” as there is in Connell’s formulation (pp. 517–518).

Interestingly, Marquis (1991) argues that the second and third conditions are redundant in Mangan’s formulation (1949):

In general, if Mangan's condition (3) is violated, then the good effect is produced by means of the evil effect. If we grant the doctrine that he who intends the end also intends the means, then the evil effect is intended. And if the evil effect is intended, then condition (2) is violated. Hence, if condition (2) is satisfied, then so is condition (3). Hence, condition (3) is redundant and DDE [Doctrine of Double Effect] can be simplified. (p. 520 [note added])

On Marquis’ reading, Mangan can eliminate the third condition, that “the good effect not be produced by means of the evil effect since it is already made redundant by the first two conditions (1949 p. 43).

The reason for this redundancy appears to be the dependence of the Thomist Formulation on Aristotelian-Thomist moral absolutes. The Thomist Formulation assumes the existence of moral absolutes and takes the act itself as its moral object. This means that evil acts must be avoided as both the ends and means of action, which is prevented by all four conditions. The next formulation, the Manualist Formulation, shares this same assumption but was developed to serve a sacramental function within moral theology.

The Manualist Formulation

As I mentioned in the first chapter, what I call the Manualist Formulation of the PDE is the most important for the chapters in this dissertation because it is the formulation of the PDE that had been applied originally to sexuality, and it is named after the manualist genre in which it was developed. In his *Compendium Theologiae Moralis* [Compendium of Moral Theology] (1866), nineteenth-century Jesuit priest and theologian Jean-Pierre Gury offered what is not only arguably the most widely referenced formulation of the PDE but that is also paradigmatic of the Manualist Formulation. Manualism emerged between the Council of Trent (1545–1563) and Second Vatican Council (1962–1965) and is itself grounded in the Aristotelean-Thomist tradition. Because of this, both the Thomist Formulation and Manualist Formulation can be classified as more traditionalist formulations of the PDE; however, Brian Besong (2015) argues that manualism is not “wedded to Thomism, but rather that Thomism makes manualism highly plausible—and Thomism is itself highly plausible” (p. 563). From the manualist perspective, this means that, although the PDE presumes Thomism, the PDE is not assumed to have been developed by St. Thomas himself. By contrast, Mangan (1949) and Connell (1967) both claim that the PDE was implicitly referenced by St. Thomas himself in his commentary on legitimate self-defense.

According to Mangan (1949), Jean-Pierre Gury was “the first of the moderns in his explanation and application of the principle of the double effect” (p. 61). Likewise, Connell (1967) comments that Gury deserves “the greatest credit in modern times for the thorough exposition of this principle as a norm applicable to the whole field of moral

theology” (p. 881). While Mangan (1949) and Connell (1967) identify Gury (1866) as having introduced the PDE into the “modern” era, Gury was historically among the later commentators working within manualism. Indeed, in his discussion of the PDE, James Keenan (1993) argues Mangan was mistaken about the origins of the PDE, which Keenan instead situates it as originating much later after St. Thomas but also before Gury:

Though Joseph Mangan once argued that Thomas Aquinas first expressed the principle of double effect, Josef Ghooos proved otherwise. Ghooos [(1951) *L'Acte à double effet: Etude de théologie positive. Ephemerides Theologiae Lovanienses* 27:30–52] showed that the moral solutions from the thirteenth through the sixteenth century were of isolated concrete cases. In the sixteenth century Bartolomeo Medina (1528-1580) and Vasquez began to name the common factors among the paradigm cases. Finally, John of St. Thomas (1589–1644) articulated the factors into the conditions of the principle as such. (p. 299 [reference added])

According to Keenan, the PDE originated not in the Scholasticism of St. Thomas but in the Neo-Scholasticism of John of St. Thomas that emerged during the counterreformation and was incorporated into the same manuals as the PDE. Both Keenan (1993) and Berkman (1997) argue that this context is crucial to understanding the original function of the PDE.

In conjunction with manualism, moral theology emerged as an important aspect of the Church’s counterreformation response between the Council of Trent (1545–1563)

and the Second Vatican Council (1962–1965). To explain this connection, Berkman (1997) links manualism to moral theology, and moral theology to the sacrament of confession:

Trent had legislated the establishment of seminaries and the discipline of *theologia moralis* [moral theology]; the purpose of the latter being to train priests to administer wisely and skillfully the sacrament of penance. “Cases of conscience” were studied by seminarians to develop the casuistical skills necessary to be skilled confessors. The principle of double effect was developed during this period as a conceptual “tool” to assist confessors in this task of discernment. (p. 91 [English added])

According to Berkman (1997), manualism was defined by an “almost complete concentration on whether acts were obligatory and/ or permissible” and excluded “explicitly theological argumentation” (p. 98). Correspondingly, from the manualist perspective, the PDE “is most adequately viewed as an aid to casuists striving properly to describe particular actions performed by penitents” (p. 97). The sacramental context of the PDE, then, is crucial to understanding its function in identifying sins committed by penitents—and, by extension, distinguishing between moral acts.

Because the PDE originated in the context of sacramental confession, Berkman (1997) claims that the ultimate aim of applications of the PDE were penitential insofar that

in the context of the manuals, the principle of double effect was employed to assist in the articulation and application of a specifically—albeit tacit—theological

conviction: the belief in the redemptive power of Christ such that the believer need no longer sin. The related Pauline prohibition against ‘doing evil that good may come’ presumed that it was possible in any particular situation for the Christian to act in a way that did not necessitate sin. (p 98)

Berkman argues that the “theology” that informed the PDE was more pastoral than dogmatic because moral theology at the time was directly related to hearing confessions, and the PDE was itself one important guide in administering the sacrament (p. 98).

More recently, Besong (2015) has argued that manualism entailed two tasks, which he identifies as “the codification of morality” and “the analysis of cases” (p. 561). While he does not directly comment on the PDE in his study, the two fundamental tasks he attributes to manualism are instructive for understanding Gury’s much referenced formulation.

Regarding the “codification of morality,” Besong (2015) mentions that manuals included moral codes alongside corresponding moral principles, and that these together were used to identify the sins committed by a penitent (p. 559). He argues that these moral principles themselves “were intended as true and practicable guidelines for avoiding evil and pursuing that goodness involved in doing one’s duty. Put differently, these norms were intended as analyses of many acts constitutive of the virtues and vices” (p. 562).

Regarding casuistry, or what he terms the “analysis of cases,” Besong (2015) describes two tasks: “first, the determination of what ought to have been done or not done in the case, and what was permissible; and second, the determination of whether

individuals centrally involved in the case committed any sin” (p. 560). The confessor’s aim was first to ascertain whether the act presented in a particular case was itself right or wrong by relating the penitent’s act to the moral code contained within a manual. His next aim was to determine the degree of culpability of the penitent. As Besong notes:

It might seem *prima facie* plausible for the contemporary reader to think that there is not much in the second casuist goal that is not already contained in the first; however, casuists were keenly aware that sin committed in a state of innocent ignorance mitigates culpability, and they were aware that conflicting opinions regarding the permissibility or wrongness of particular acts were often given to individuals from persons whose positions and training strongly suggested ethical expertise. Consequently, casuist analysis of the objective moral aspects of the case (i.e., whether a deed that formed part of the case was permissible or not) was independent of, and often just as sophisticated as, the analysis of the culpability of the agent involved. (pp. 560–561)

So, according to Besong (2015), manualism was directly concerned with penitential culpability. Moral principles were then developed within manualism and moral theology, by extension, as guides for determining which acts were right and wrong and the penitent’s degree of culpability associated with each act. The aim was to be “as clear as possible on the morality of the acts and the goodness or guilt of the agent(s)—satisfying the casuist’s first and second goals, respectively” (p 561).

Despite being widely referenced even in discussions of other formulations that have since forgotten this function within the manuals, Gury’s formulation is properly

understood within this sacramental context. According to Keenan (2010), Gury's *Compendium* was the first manual published by the Jesuit order since its restoration 1814 (p. 10). Since then, Mangan (1949), Connell (1967), and others (for example, Boyle 1980) have mentioned Gury's formulation as foundational to their own. Gury lists the conditions as follows (1866 vol. 1, sec. 9):

1. "A good end is required, or rather that the agent should not intend the bad effect, because otherwise he would intend disorder and hence do wrong."
2. "It is required that the cause be good or at least indifferent."
3. "It is required that the double effect equally follows from the cause."
4. "It is required that the good effect at least balance the bad. And indeed to be done properly, the reason is required to be proportionate to the action itself."

In terms of their literal *text*, the Thomist Formulation and Manualist Formulation are very similar: only their first and second conditions are reordered. Nevertheless, the two differ in their *context*, in how they envision the collective function of the conditions.

Although the Thomist Formulation has been attributed more directly to St. Thomas himself, the Manualist Formulation is the older formulation of the two. The Manualist Formulation envisions a more limited role for the PDE than does the Thomist Formulation. Specifically, while the Manualist Formulation construes the PDE fundamentally as an aid for hearing confessions and identifying the sins revealed therein by penitents, the Thomist Formulation construes the PDE as a moral principle much broader in application. In other words, the Manualist Formulation was developed to give the confessor insight into whether an act committed by penitent is *actually* a sin, or if it

merely *resembled* a sin in terms by sharing its identical effects. The function of the Manualist Formulation, then, was to distinguish benign acts from sinful ones in situations where both share the same set of effects. The Thomist Formulation, by contrast, retains the same conditions as the Manualist Formulation but not its sacramental function.

Even though the PDE has a more limited, sacramental role in manualism, both Keenan (1993) and Besong (2015) caution that it does not function to exculpate moral wrongdoing for the moral agent. Keenan (1993) advises that “The frequent contemporary urge to invoke the principle for certain problems and to offer solutions that are convoluted simply to conform to the principle’s conditions is disturbing”—adding that “When we try to get a solution that the principle’s four conditions will justify, so that the introduction of new techniques will make the solution conform to the principle of double effect, we have a sure sign that something is amuck in our moral reasoning” (p. 311). Likewise, Besong (2015) makes a similar point regarding manualist casuistry more broadly:

casuistry was not an enterprise of excuse-making, nor a pursuit of a freedom from the “constraint” of the moral law under the auspices of an inchoate moral particularism. On the contrary, the casuist analysis of a person’s goodness or guilt in a particular case was genuinely meant to discover the agent’s actual culpability, given what pertained to the person’s more or less well-formed conscience in those circumstances. (p 561).

Like the Thomist Formulation, the Manualist Formulation presumes that moral absolutes that must be avoided; however, unlike the Thomist Formulation, the Manualist Formulation was designed to identify sins revealed by penitents within the sacrament of confession. Because the task of a confessor was also to consider a penitent's moral knowledge, the PDE's original context is suggestive of a pastoral rather than doctrinal function. The next formulation, the Proportionalist Formulation, can be viewed as an interpretation of the Manualist Formulation, just as the Manualist Formulation can be viewed as an interpretation of St. Thomas' commentary on legitimate self-defense.

The Proportionalist Formulation

Proportionalism was a twentieth-century theological movement that emerged after the Second Vatican Council (1962–1965). According to James Keenan (2010), “proportionalists” were so called because they were perceived as replacing the identification of Aristotelian-Thomist moral absolutes with an analysis of effects as their method of moral evaluation (p. 157). Although this perception may not reflect the actual position taken by proportionalists, Christopher Kaczor (1998) argues that “with respect to double-effect reasoning, proportionalism can be better understood as an extension of manual Scholasticism than as a recovery of Aquinas” (p. 314). In fact, the willingness to criticize some of the moral conclusions reached within the Aristotelean-Thomist tradition—either of St. Thomas himself or of the Church's magisterium—is characteristic of the proportionalist movement in general.

Peter Knauer (1967), for example, who developed what I call the Proportionalist Formulation of the PDE, openly questioned St. Thomas' acceptance of the death penalty

and the Church's magisterial prohibition of contraception (pp. 152, 157–162). Indeed, commentators have suggested that proportionalism itself developed as a reactionary movement to magisterial pronouncements against contraception in *Casti Connubii* [Of Chaste Marriage] (1930) and *Humanae Vitae* [Of Human Life] (1968).

Proportionalism's willingness to challenge magisterial teaching, coupled with its less explicit reference to Aristotelean-Thomist moral absolutes, suggests that the corresponding Proportionalist Formulation can be classified as a more "revisionist" formulation of the PDE—although, as I will discuss, the proportionalists themselves would resist this classification as misconstruing their theory. The same can be said of the Proportionalist Formulation itself.

Knauer offers a formulation of the PDE that is also contingent upon commensurate reason. According to Knauer (1967), this means that the PDE is reducible to the following, single condition:

- "One may permit the evil effect of his act only if this is not intended in itself but is indirect and justified by a commensurate reason" (p. 136).

The Proportionalist Formulation is unique among the formulations discussed here because it reduces the requirements of the PDE to a single condition. Furthermore, if Kaczor's suggestion (1998, p. 314) that proportionalism is best understood as an interpretation of manualism rather than an extension of Thomism is applied to the Proportionalist Formulation itself, the Proportionalist Formulation can be understood as a refinement of the Manualist Formulation rather than an extension of the Thomist Formulation.

Consistent with proportionalism, Knauer (1967) developed his formulation of the PDE both as a way to understand the reasoning within the manuals more generally and as a specific response to the Church's prohibition of contraception, which by this time had been most recently reiterated by Pius XI in *Casti Connubii* (1930). Indeed, Berkman locates the origin of proportionalism specifically in its interpretation of the PDE (p. 100). In *Casti Connubii* (1930), Pius XI writes that

no reason, however grave, may be put forward by which anything intrinsically against nature may become conformable to nature and morally good. Since, therefore, the conjugal act is destined primarily by nature for the begetting of children, those who in exercising it deliberately [*de industria*] frustrate its natural power and purpose sin against nature and commit a deed which is shameful and intrinsically vicious (n. 54 [Latin added]).

While the pope's judgment might *appear* to be expressing an absolute prohibition, Knauer argues that this condemnation is actually more ambiguous than it may seem.

In his analysis of *Casti Connubii*, Knauer (1967) focuses on how to understand "deliberately" (*de industria*). According to Knauer, *de industria* can be understood either morally or psychologically. Knauer argues that if *de industria* is understood morally, then it becomes synonymous with *in intentione*, and contraception is indeed forbidden. This is what Pius XI is commonly understood to mean. By contrast, Knauer argues that if *de industria* is understood psychologically, then it becomes synonymous with *praeter intentionem*, and contraception might then be justified by commensurate reason after all, since it is not willed *in intentione* (p. 158). Because *de industria* can be interpreted in

two contradictory ways, Knauer concludes that the magisterial “prohibition” of contraception in *Casti Connubii* (1930) is ambiguous, suggesting contraception might sometimes be permissible.

Claims of ambiguity about contraception would be more difficult to justify after Vatican II, since Pope Paul VI issued the encyclical *Humanae Vitae* (1968) wherein he reiterated that contraception is contrary to natural law, which “teaches that each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life” (n. 11). Commentators such as Berkman (1997) have identified *Humanae Vitae* (1968) as a major impetus for the further development of proportionalism in the way it applied the PDE to contraception. According to Berkman (1997), *Humanae Vitae* (1968) references the PDE in its admission that, “Though it is true that sometimes it is lawful to tolerate a lesser moral evil in order to avoid a greater evil or in order to promote a greater good, it is never lawful, even for the gravest reasons, to do evil that good may come of it” (sec 14). By reiterating the teaching of *Casti Connubii* (1930), *Humanae Vitae* (1968) reinforced the perception of proportionalism as “revisionist.”

According to Knauer (1967), “commensurate reason” is what “determines the meaning of all other [moral] concepts” (p. 140 [note added]). That which is “commensurate,” Knauer argues, “is understandable only in relation to the whole: the value sought is commensurate when it is achieved in the highest possible measure for the whole” (p. 142). Consistent with this claim, Knauer (1967) argues that the PDE, as an expression of commensurate reason, is itself “the fundamental principle of all morality” (p. 132). Interestingly, Knauer’s reduction of the PDE to its traditional fourth condition

makes the PDE identical to the Principle of Totality, which is also a principle of Aristotelean-Thomist tradition and derived from St. Thomas' commentary on maiming (*Summa Theologiae* 2-2, q. 65, a. 1 co.). Pope Pius XII (1952) invoked the Principle of Totality to explain why a patient who is otherwise bound by the Aristotelean-Thomist prohibition against maiming, would nevertheless be justified in removing part of their body to preserve their health, since "This principle asserts that the part exists for the whole and that, consequently, the good of the part remains subordinated to the good of the whole, that the whole is a determining factor for the part and can dispose of it in its own interest. This principle flows from the essence of ideas and things and must, therefore, have an absolute value" (n. 34). As Knauer (1967) writes, his formulation of the PDE is identical to the Principle of Totality:

In my opinion the principle of totality is in reality not distinguishable from the principle of double effect. The latter bears not merely on the passive permission of an evil but relates to the most active kind of permission; concretely the act itself may cause or effect the evil; the evil is not direct unless it is willed without commensurate reason. (p. 150)

As I explained in the first chapter, according to the first precept of natural law, all things—including human beings—have a teleological aim to preserve their own being, including human life. The Principle of Totality permits parts to be sacrificed for the good of the whole, making it identical to Knauer's formulation of the PDE. Because the moral standard of the Principle of Totality is identical to the moral standard of Kanauer's

formulation, the Proportionalist Formulation and Principle of Totality are regarded as different names for the same moral principle in proportionalist ethics.

Nevertheless, despite accusations to the contrary, Knauer (1967) argues that his formulation of the PDE still depends on Aristotelean-Thomist moral absolutes, and that those moral absolutes are *accessible* through an analysis of commensurate reason. This means that the PDE itself does not presume *direct* access to Aristotelean-Thomist moral absolutes, although it does give *indirect* access to them:

If it is once established that the act is murder, then it is established that the act is morally evil. I put the question at an essentially earlier point: How can it be recognized that an act is murder? To do this, the physical fact which could be observed in a photograph does not suffice. As Thomas puts it, “moral acts are defined by what is intended in them,” or by what is directly will in them” I have sought to establish that the concept “direct” correlates with the concept “commensurate reason.” If the concept “direct” is understood in the sense of direct causality or direct attention of the person who is acting, then my thesis is understood in a false sense. It would be the worst relativism if it were seriously asserted that the moral qualification of an act depends on whether or not the person acting concentrates his attention on the good intention. (p. 155)

Absolute moral wrongs, then, are identifiable by a lack of commensurate reason.

Instructively, Knauer (1967) describes a pair of acts evaluated by the PDE as those which would appear identical if “photographed” (pp. 135, 151, 155); however, a pair of acts which *appear* to be identical at first glance may indeed not be if one can be justified

by commensurate reason (such as lifesaving surgery or salpingectomy) and the other cannot (such as maiming or abortion).

Knauer (1967) argues that this same reasoning can be seen in a close reading of St. Thomas' description of legitimate self-defense, particularly the reason St. Thomas gives for why an act is *not* permissible: "And yet, though proceeding from a good intention, an act may be rendered unlawful, if it be out of proportion to the end" (*Summa Theologiae* 2-2, q. 64, a. 7 co.). Knauer understands St. Thomas to mean here that an act is disqualified from being permissible if no commensurate reason at all can be offered for its undertaking:

the only one possibility of a moral offense is noted. Thomas does not use the criterion of "correspondence to nature." The approach taken is this: In sinning, man seeks a real good, but his act in its total existential entirety is not proportioned to this good. Then the evil arising thereby, whether it is desired or not, belongs objectively to the act and is objectively what is "intended." (p. 134)

Moral wrongdoing, then, is recognizable whenever the bad effect caused by the act is incommensurable (or disproportionate) to the good effect that is also caused by the same act. Knauer (1967) argues that this lack of commensurate reason corresponds to moral absoluteness. This means that Aristotelean-Thomist moral absolutes themselves are indirectly accessible through an evaluation of commensurate reason, and that Aristotelean-Thomist moral absolutes remain the ultimate standard of morality, even for proportionalism. For this reason, and despite accusations to the contrary, Knauer (1967)

argues that his formulation of the PDE is also consistent with the Aristotelean-Thomist tradition.

Indeed, Knauer (1967) argues that St. Thomas himself defined the permissibility or impermissibility of self-defense in terms of proportionality, citing St. Thomas' own explanation as evidence: "Wherefore if a man, in self-defense, uses more than necessary violence, it will be unlawful: whereas if he repel force with moderation his defense will be lawful" (*Summa Theologiae* 2-2, q. 64, a. 7 co.). Elsewhere, Knauer (1967) argues that an act's correspondence to its end is itself understandable only in terms of commensurate reason:

As I noted earlier, Thomas instead of requiring a commensurate reason (*ratio proportionata*) says that the entire act must correspond to its end (*actus sit proportionatus fini*); but end means nothing other than reason for the act. It is simply a matter of a correspondence between the act and its proper reason. Both requirements, that the reason for an act be commensurate (that is, that it be one commensurate to the act itself) or that the act must correspond to its reason, mean the same. An act becomes immoral when it is contradictory to the fullest achievement of its own end in relation to the whole of reality. A short-run "more" of the value is paid by a "lesser" achievement of the same value in the long run. (p. 144)

According to proportionalist ethics, then, moral rightdoing is only possible in the context of the PDE if the act in its entirety corresponds to its end, and commensurate reason must be present in order for this to occur. By contrast, the next formulation, the

Deontological Formulation, disregards proportionality and commensurability altogether and instead takes into account only the agency and intention of the moral agent.

The Deontological Formulation

In contrast to Gury (1866), Mangan (1949), Connell (1967), and Knauer (1967), who developed formulations of the PDE in theological contexts, Warren Quinn (1989b) developed a formulation of the PDE that functions within a system agency and intention. For this reason, I call his version the Deontological Formulation. Marquis (1991) includes this formulation in his listing, but Berkman (1997) does not. In explaining his formulation, Quinn (1989b) suggests that the proper way to understand the relationship between the good effect and bad effect of an act is in terms of agency and intention, rather than in terms of moral absolutes or proportionality, writing that: “The doctrine is meant to capture certain kinds of fairly common moral intuitions about pairs of cases which have the *same* consequential profile—in which agents bring about the same good result at the same cost of lives and harm suffered—but in which the character of the intention differs in the indicated way” (Quinn 1989b p. 335). Like all formulations of the PDE, the Deontological Formulation distinguishes between two acts which appear similar, but unlike the other formulations, the Deontological Formulation distinguishes between two acts by identifying the type of *agency* each act entails.

While *chronologically* situated between the Proportionalist Formulation and what I will call the New Natural Legal Formulation, the Deontological Formulation best contrasts with the Proportionalist Formulation *conceptually* because their conditions are mutually exclusive. While the Proportionalist Formulation reduces the PDE to its

traditional fourth condition: “One may permit the evil effect of his act only if this is not intended in itself but is indirect and justified by a commensurate reason” (Knauer 1967 p. 136), Quinn’s formulation, by contrast, retains only the traditional first three conditions and *excludes* the fourth (Quinn 1989b p. 334, note 3):

1. “The intended final end must be good,
2. “The intended means to it must be morally acceptable,
3. “The foreseen bad upshot must not itself be willed (that is, must not be, in some sense, intended)”

Quinn comments that he disregards the traditional fourth condition because the PDE “is probably best understood in a way that makes it noncontroversial and because I am concerned here not so much with how choices with a ‘second effect’ can be justified as with whether, *ceteris paribus*, the structure of intention makes a justificatory difference. That seems to me the fundamental question” (1989b p. 334, note 3). Also, unlike Knauer (1967) who argues that proportionality is *essential* to the PDE, Quinn (1989b) argues that proportionality is superfluous because the distinction between two otherwise identically appearing acts can be accounted for by agency alone.

Consistent with the Thomist Formulation and Manualist Formulation, the Deontological Formulation requires that the bad effect not be intended, but Quinn argues that the unintended bad effect is a function of indirect agency. Writing about Quinn’s formulation, Marquis (1991) identifies the harmful bad effect produced by indirect agency as the *unintentional* object of harm:

Instead of distinguishing between intended and unintended actions as the traditional Catholic doctrine sometimes seems to, and instead of distinguishing between intended and unintended *states of affairs* as Boyle's [New Natural Legal] version does, Quinn distinguishes between an intentional and an unintentional *object* of a harm. Persons are intentional objects of harm if agents harm them by involving them in their strategy. (p. 353 [note added])

By contrast, an impermissible act is characterized by a harmful bad effect produced by direct agency as the *intentional* object of harm.

Unlike the Thomist and Manualist Formulations which reference the *act itself* in their first two conditions, and unlike the Proportionalist Formulation which references only the act's *effects* in its single condition, Quinn's Deontological Formulation instead references the agent's *agency* regarding both ends and means of the act. It operates according to the standard that "the pursuit of a good tends to be less acceptable where a resulting harm is intended as a means than where it is merely foreseen" (1989b p. 335). By recasting the PDE in terms of direct and indirect agency, Quinn (1998b) considers the harm that would be inflicted upon the rights of victims in each. This means that PDE distinguishes the *unintentional* harm caused by an agent's *indirect* agency from the *intentional* harm caused by an agent's *direct* agency: intentional harm characterizes acts which are wrong, while unintentional harm characterizes acts which are *not* wrong.

Indeed, Quinn (1989b) suggests that harmful indirect agency should be understood by what it *lacks* relative to harmful direct agency. He defines harmful indirect agency as involving "a kind of disrespect" that is "shown in wrongly giving a

victim's interests too little weight" (p. 348). By contrast, harmful direct agency is characterized by treating victims "as if they were then and there *for his purposes*" (p. 348). Harmful direct agency, then, is characterized by the *use* of victims for the agent's end, that is "the *additional* presumption that the victim may be cast in some role that serves the agent's goal" (p. 349). This distinction between harmful direct and harmful indirect agency is significant for Quinn's formulation of the PDE because it "rests on the strong moral presumption that those who can be usefully involved in the promotion of a goal only at the cost of something protected by their independent moral rights (such as their life, their bodily integrity, or their freedom) ought, *prima facie*, to serve the goal only voluntarily" (1989b p. 349).

Quinn (1989b) himself admits that this function of the PDE against using potential victims as a means to an end is Kantian in character:

In discriminating to some extent against both forms of direct agency, the doctrine reflects a Kantian ideal of human community and interaction. Each person is to be treated, so far as possible, as existing only for purposes that he can share. This ideal is given one natural expression in the language of rights. People have a strong *prima facie* right not to be sacrificed in strategic roles over which they have no say. They have a right not to be pressed, in apparent violation of their prior rights, into the service of other people's purposes. Sometimes these additional rights may be justifiably infringed, especially when the prior right is not terribly important and the harm is limited, but in all cases they add their own burden to the opposing moral argument. (p. 350–351).

Quinn's admitted grounding of his formulation of the PDE in Kantian values rather than Aristotelean-Thomist absolutes exposes formulation to stronger arguments of "revisionism" similar to those made about others, such as the Proportionalist Formulation and what I will call the New Natural Legal Formulation. In fact, in contrast to Knauer (1967), whose formulation is often identified as "revisionist," Quinn (1989b) never mentions Aristotelean-Thomist moral absolutes or natural law at all in his discussion of the PDE.

For Quinn (1989b), the PDE functions to restrict both harmful direct and indirect agency to a much greater degree than if it were not applied at all:

The effect of the doctrine is therefore to *raise* rather than to lower moral barriers. So we should not expect a proponent of DDE to be more tolerant of harmful indirect agency than those who reject the doctrine but share the rest of his moral outlook. We should rather expect him to be *less* tolerant of harmful direct agency. (p. 346)

On this view, the PDE functions to prohibit intentions which entail direct harm and to permit those which entail only indirect and foreseeable harm. This distinction made by Quinn's formulation (1989b) is informed by what he calls the Doctrine of Doing and Allowing (DDA), which describes the relationship between moral agency and intention. As Quinn (1989a) explains in an earlier study, the DDA makes

discriminations in the sense of allowing that the pursuit of certain goods can justify the first kind of harmful agency [allowing harm] but not the second [doing harm]. I shall call the first kind of agency *negative*, since on any plausible

account it is usually a matter of what the agent does *not* do. For parallel reasons,

I shall call the disfavored kind of agency *positive*. (p. 291 [notes added]).

Furthermore, Quinn (1989b) observes that “Like the Doctrine of Doing and Allowing, the DDE discriminates between two kinds of morally problematic agency. It discriminates against agency in which there is some kind of intending of an objectionable outcome as conducive to the agent’s end, and it discriminates in favor of agency that involves only foreseeing” (p 335). In response to Quinn’s claims, Marquis (1991) argues that the moral distinction that Quinn (1989b) draws between direct and indirect agency in his formulation of the PDE is inadequate to distinguish between similarly appearing acts.

Marquis (1991) first resists Quinn’s claim that harmful direct agency is morally worse than harmful indirect agency by arguing that Quinn’s distinction fails to account for the reality that harmful indirect agency harms victims *in the same way* that Quinn claim to be exclusive to direct agency. Quinn claims that harmful direct agency is morally worse than harmful indirect agency because it violates the autonomy of victims who never agreed to be used for the moral agent’s purposes in a way that harmful indirect agency does not: “They have a right not to be pressed, in apparent violation of their prior rights, into the services of other people's purposes” (Quinn 1989b pp. 350–351). Marquis (1991), however, points out that the PDE functions to allow the unintended bad effect—that is, using victims for a proportionate reason, so the violation of victims’ autonomy is not unique to harmful direct agency and is, therefore, not what distinguishes it from harmful indirect agency (p. 358).

Marquis (1991) next resists Quinn's claim that harmful indirect agency is morally worse than harmful direct agency because harmful direct agency uses victims circumstantially in a way that harmful indirect does not: "has something in mind for his victims—he proposes to involve them in some circumstance that will be useful to him precisely because it involves them. He sees them as material to be selectively shaped or framed by his agency" (Quinn 1989b p. 348). In response, Marquis argues that the same victims are used regardless of the kind of agency and that the distinction is therefore not morally meaningful (1991 p. 538).

Lastly, Marquis resists Quinn's claim that harmful direct agency is morally worse than harmful indirect agency because harmful direct agency uses victims as means to ends, but harmful indirect agency does not (Quinn 1989b p. 350). To argue against this distinction, Marquis (1991) focuses on the ambiguity of the word "use" in the context of the PDE, arguing that it can be understood in two conflicting ways: "On the one hand," Marquis writes, "a manager can speak of using an employee to perform a certain task where such a using carries no implication that the employee was manipulated without his consent or harmed." (p. 539). In this sense, an agent (the manager in this case) may "use" someone (the employee) *with* their consent. "On the other hand," Marquis writes, "we often think of someone being used as being merely used for the purposes of the user, without regard for her intrinsic value" (p. 539). In this sense, an agent may "use" someone *without* their consent

Marquis argues that these conflicting senses of "use" present a problem for the distinction Quinn attempts to draw. Considering the implication of the first sense of

“use” for the PDE, Marquis argues that: “If the special wrongness of harming an intentional object is explicated in the first sense of 'using', then although the notion of ‘using’ might mark the distinction between using as a means to one's end and merely incidentally affecting, it is hard to see that there is any special wrongness involved in such using at all. We all quite properly use others in many way” (p. 539).

By contrast, Marquis considers the implication of the second sense of “use” for the PDE: “If the special wrongness of harming an intentional object is explicated in the second sense of ‘using’, that is, ‘merely using’, then that wrongness is understood as failing to treat the object of harm as an end in itself. This notion of wrongness is both generally accepted and clearly Kantian. However, one fails to treat both an intentional object of harm and an object who is willfully, but unintentionally, harmed as an end in itself if one harms them without their consent.” (p. 539). The first sense renders the distinction meaningless, while the second sense (though morally significant) fails to be helpful since it is precisely the kind of merely “using” that the PDE was developed to justify: “Hence, on the second horn of this dilemma, 'using' has moral significance, but does not mark the distinction Quinn needs. On the first horn, 'using' lacked moral significance at all.” (1991 p. 539). Despite Quinn’s assertions, then, it appears that, when the conditions of the PDE are understood in terms of agency and intention, the PDE becomes unable to distinguish between moral acts.

The New Natural Legal Formulation

Joseph Boyle (1980) offers the last and most recent formulation of the PDE I will discuss in this chapter. Since Boyle (1980) developed it during the twentieth-century

revival of natural law theory as “New” Natural Law Theory (NNLT), I call this formulation the New Natural Legal Formulation. Even though this historical context within NNLT situates this formulation chronologically after the Proportionalist Formulation and before the Deontological Formulation, I present this formulation last because it is the formulation used by contemporary commentators who attempt to apply the PDE to sexuality. Boyle (1980) lists the conditions of what I call the New Natural Legal Formulation as follows (p. 528):

1. “The agent’s end must be morally acceptable (*honestus*)”
2. “The cause must be good or at least indifferent”
3. “The good effect must be immediate”
4. “There must be a grave reason for positing the cause”

As I mentioned before, this formulation is the second most important formulation for the chapters in this dissertation because it is in the context of NNLT that the PDE has been *misapplied* to sexuality, either by those who endorse NNLT through the Contraception Argument (Masek 2011), or those who criticize NNLT through the Sterility Objection (Anderson 2013). Todd Salzman (2001) argues that NNLT—what he calls “Basic Goods Theory” (BGT)—is best understood in contrast to proportionalism because, even though NNLT and proportionalism both originated as responses to the Second Vatican Council (1962–1965), they differed in their response (p. 423). As Salzman (2001) points out, proportionalism and NNLT can be distinguished by the relationship that each theory draws between basic goods and the natural law (p. 426).

Whereas New Natural Law Theory developed to remain faithful to Church teaching, proportionalism developed to challenge it—particularly teachings prohibiting contraception (p. 423). As Salzman further points out, the attempt by Pope John Paul II to condemn proportionalism in his encyclical *Veritas Splendor* [The Splendor of Truth] (1993) only reignited the controversy about the extent of proportionalism’s faithfulness to Church teaching further because the description of proportionalism presented in the encyclical arguably does not match the views that proportionalists themselves actually endorsed (p. 423). This discrepancy is worth further mention since it is also the context of NNLT. According to John Paul II in *Veritas Splendor* (1993), “The *teleological ethical theories (proportionalism, consequentialism)*, while acknowledging that moral values are indicated by reason and by Revelation, maintain that it is never possible to formulate an absolute prohibition of particular kinds of behaviour which would be in conflict, in every circumstance and in every culture, with those values.” (no. 75).

In contrast to John Paul II’s suggestion in *Veritas Splendor* (1993), Knauer (1967) *did* endorse the existence of moral absolutes as the ultimate moral standard, with an analysis of proportionality being merely a way to *access* those moral absolutes. Relatedly, even Salzman (2001) argues that NNLT and proportionalism are distinguished by the *method* by which they each evaluate moral acts (p. 424). In his discussion of the NNLT, Salzman (2001) writes that “to avoid the naturalistic fallacy, the BGT denies the causal relationship posited by traditional moralists between an act and a willing subject that provides objective grounds for morally assessing the agent’s will. In the BGT, then, one can bring about an effect in the realm of physical causality

and not will it directly” (2001 p. 427). Despite the apparent departure of NNLT from the Aristotelean-Thomist understanding of the relationships between intention and morality, like the proportionalists, the New Natural Law theorists very much see themselves as working within the Aristotelean-Thomist tradition. On this point, Salzman (2001) writes:

While it is clear that the BGT would reject this analysis of its theory (since that would put it in the subjectivist camp which it adamantly opposes), it is difficult to see why this conclusion would not follow from its reasoning. In the case of a non-absolute norm, where the distinction between direct intention and indirect intention could justify certain unintended side-effects, the denial of a causal relationship between the basic goods, nature and persons claims too little.

Depending on how one describes the intention of the willing subject, as long as the unintended side-effect is not directly intended, killing or any other act that is not prohibited by an absolute norm is morally permissible. (p. 427).

Despite NNLT’s insistence on its faithfulness to the Aristotelean-Thomist tradition, Salzman’s analysis here instead suggests that a reliance of NNLT on a “modern” notion of intention and implies that the outcome of an analysis in NNLT depends on how the circumstances of a case are defined by the moral agent (for a similar suggestion, see Marquis 1991, p. 353).

In situating his account of the PDE, Boyle (1980) cites the literal text of Gury’s formulation but understands the *context* of Gury’s formulation in a modern context, rather than the penitential context of the manuals. Indeed, Boyle (1980) presents his formulation of the PDE as an interpretation of Gury’s formulation rather than as an

interpretation of St. Thomas' commentary on legitimate self-defense, which he presents as just one additional application of the PDE (p. 528–29). Significantly, the literal text of Boyle's first two conditions are almost identical to those listed by Gury (1866 vol. 1, sec. 9 [Latin added]):

1. "A good end [*finis*] is requires, or rather that the agent should not intend the bad effect, because otherwise he would intend disorder and hence do wrong."
2. "It is requires that the cause [*causa*] be good or at least indifferent."

The difference, however, is the *context* in which Boyle understands those conditions. Gury (1866) was writing in the manualist genre within the Aristotelean-Thomist tradition. As such, in Gury's listing, end (*finis*) and cause (*causa*) are to be understood as terms of Aristotelean-Thomist metaphysics. In Aristotelean-Thomist metaphysics, 'end' refers to the *telos*, final cause, or natural essence of an act which is evaluated according to the precepts of Aristotelean-Thomist natural law. By contrast, New Natural Law Theory's deemphasis of Aristotelian-Thomist teleology exposes it to a modern understanding of 'end' as referring to effect or consequence, leaving open the possibility that the rightness of the actions is contingent upon the *circumstances* of the moral agent (Marquis 1991, p. 353). Thus, Boyle's formulation (1980) and NNLT in general are sometimes classified as more "revisionist" over the objections of its practitioners.

A similar criticism can be made against another version of the New Natural Legal Formulation offered by Germain Grisez (1983), also a developer of NNLT. Grisez (1983) described the PDE as "not a normative principle but a somewhat cumbersome attempt at clarifying what one is morally responsible for in freely accepting side effects

which it would be wrong to choose” (vol. 1, ch. 12, q. F, no. 8). Grisez (1983) offers another version of the New Natural Legal Formulation and lists the conditions as follows (vol. 1, ch. 12, appendix 3):

1. “The act must not be wrong in itself, even apart from consideration of the bad effect. (Thus the principle was not used to deal with the good and the bad effects of an act admittedly excluded by an absolute norm.)”
2. “The agent’s intention must be right. (Thus if one’s precise purpose is to destroy, damage, or impede some basic human good, the deed carrying out this purpose could not be justified by the principle.)”
3. “The evil effect must not be a means to the good effect. (Thus if one chooses to destroy, damage, or impede some basic human good, although one chooses this for the sake of a good one might otherwise rightly pursue, the deed carrying out this choice could not be justified by the principle.)”
4. “There must be a proportionately grave reason to justify the act. (Thus, even if all the other conditions were fulfilled, one still might be obliged by the moral significance of the expected bad effect to abstain from the action.)”

In his analysis of NNLT, Berkman (1997) argues that the strong emphasis on voluntarism is what distinguishes NNLT from the “Old” or “Traditional” Natural Law Theory (TNLT) of the Aristotelean-Thomist tradition (p. 105). Berkman notes, however, that this voluntarism is not the voluntarism of the Aristotelean-Thomist tradition, but rather of modern philosophy of mind (p. 105). This perception is reinforced by the

second condition that Grisez offers, which requires that the moral agent have the right *intention*.

According to Berkman (1997), then, NNLT is to be understood alongside Kantian ethics and utilitarianism, themselves sometimes classified as “modern” ethical theories in contrast to the Aristotelean-Thomist tradition because of their prioritization of choice in moral evaluation rather than final or ultimate causes (*teloi*) as moral absolutes:

what differentiates post-Kantian ethical theories with regard to their emphasis on free choice is that it is employed to provide an epistemological foundation for morality. For the new natural law theory, you only enter the realm of morality when you make choices regarding which you could have done otherwise. (p. 104)

In fact, it is this deemphasis of Aristotelean-Thomist moral absolutes that G. E. M. Anscombe (1958) famously argued characterizes “modern moral philosophy” in contrast to the moral philosophy within the Aristotelean-Thomist tradition (Berkman 1997 p. 105).

Famously, Anscombe (1985) characterizes both Kantianism and consequentialism as representative of “modern” moral philosophy because they evaluate moral acts relative to their circumstances rather than Aristotelean-Thomist moral absolutes. Her criticism of consequentialism is especially relevant here, given that it is often from the perspective of consequentialism that the PDE and Aristotelean-Thomist tradition are criticized:

It is a necessary feature of consequentialism that it is a shallow philosophy. For there are always borderline cases in ethics. Now if you are either an Aristotelian, or a believer in divine law, you will deal with a borderline case by considering whether doing such-and-such in such-and-such circumstances is, say, murder, or is an act of injustice; and according as you decide it is or it isn't, you judge it to be a thing to do or not. This would be the method of casuistry; and while it may lead you to stretch a point on the circumference, it will not permit you to destroy the centre. (p. 112).

Berkman (1997) argues that this same concern for circumstantialism lies at the center of Anscombe's famous criticism of abuse of the PDE by way of intention, in particular the possibility of circumstantializing intention to meet the conditions of the New Natural Legal Formulation (1997 p. 105). Having briefly presented some important formulations of the PDE, I now turn to applying the PDE to contemporary issues of sexuality, reviving an old application of the Manualist Formulation.

CHAPTER III
RECONSIDERING THE CONTRALIFE ARGUMENT AND THE PRINCIPLE OF
DOUBLE EFFECT

NFP and contraception are both ways for couples to have marital intercourse while avoiding pregnancy; however, Church tradition allows NFP but forbids contraception as a means to achieve this same outcome (*Catechism*, n. 2370; Paul VI, *Humanae Vitae*, n. 14; John Paul II, *Familiaris Consortio*, n. 32). According to the Contralife Argument, because contraception and NFP both entail a contralife *intent* to have marital intercourse but avoid pregnancy, both should be forbidden; however, NFP *is* permitted by magisterial teaching, raising the question as to how contraception is distinctive from NFP and, correspondingly, to which I answer that the Contralife Argument *does not* succeed against NFP.⁵

Lawrence Masek (2011) has attempted to explain this distinction in terms of the Principle of Double Effect (PDE), arguing that the use of NFP meets the four conditions of the PDE, whereas the use of contraception does not. His argument depends on the definition of contraception as “*intentionally impeding procreation*” (p. 85). Specifically, he argues that NFP is permissible because it entails only contralife *motivation* but not

⁵ As Lawrence Masek (2011) points out, the Contralife Argument was formalized by Grisez G Boyle J Finnis J May WE (1988) “Every marital act ought to be open to new life”: toward a clearer understanding. *The Thomist* 52: 365–426, but, as this chapter will explain, the formalization of the argument itself emerged in response to the papal encyclical *Humanae Vitae* (1968).

contralife *intention*, writing “In general, people can intend X by having a desire for X that they hope to fulfill, or they can intend X by having X as an end or means of their actions. People who use NFP desire that human life not begin, but the non-existence of human life is neither an end nor a means of their actions” (p. 93). Masek supposes that couples can use NFP with the *motivation* to avoid pregnancy because, unlike contraception, that *motivation* entails neither the means nor ends of an *intent* to avoid pregnancy. By contrast, he argues that contraception entails contralife *intention* and is therefore forbidden.

Although Jonah Pollock (2011) acknowledges that the Contralife Argument and the Aristotelean-Thomist tradition reach the same conclusion regarding contraception, he points out that the Contralife Argument does so for different reasons centered on contralife *intention*. Pollock also argues that Masek’s application of the PDE to NFP does not succeed because Masek fails to identify a good effect and bad effect produced by the practice of NFP. While Masek does suggest family limitation as a bad effect produced by contralife intention, Pollock argues that family limitation is not a bad effect at all and has even been identified as a good effect in the papal encyclical *Humanae Vitae* (1968). From this, Pollock concludes that Masek’s application of the PDE to both contraception and NFP fails, and that the PDE has no application to the sexuality *at all*. It is this last point that this chapter argues is false; rather, it argues that the PDE can distinguish NFP from contraception, if the correct conditions are identified.

To the casual observer, it may appear that Masek and Pollock reference the same theory, because they both reference the PDE; however, a closer look reveals this not to

be the case. Masek writes from the perspective of “New” Natural Law Theory (NNLT), while Pollock writes from the perspective of “Old” or “Traditional” Natural Law Theory (TNLT). Pollock correctly points out Masek’s error is failing to identify the good and bad effects associated with NFP; however, this chapter adds that *Pollock’s* error is failing to acknowledge that the PDE has long been applied to sexuality in the Aristotelean-Thomist tradition, and that this application has largely been forgotten by revisionist theories—including NNLT referenced by Masek (2011). This omission is important because, while Pollock correctly references traditional natural law theory to criticize Masek, he reaches the wrong conclusion regarding the applicability of the PDE to NFP because he neglects to mention that the PDE has been applied to sexual issues before in the context of traditional natural law theory.

This chapter explains that the distinction between NFP and contraception is *accessible* through the application of the PDE to human sexuality; however, it emphasizes that Aristotelean-Thomist moral absolutes, and not the PDE, are the *reason* they are distinguishable. This chapter claims that NFP is a species of marital intercourse because the timing of marital intercourse is merely accidental to the essence of the act itself. By contrast, it claims that contraception is a completely different kind of sexual act. Consistent with magisterial teaching, this means that NFP is permissible, and contraception is forbidden. Therefore, this chapter argues that the PDE is a way to distinguish NFP from contraception without claiming that the PDE is the *reason* they are distinguishable. This function of the PDE is itself consistent with the Aristotelean-Thomist tradition. The PDE, in other words, functions as an explanation for a moral

distinction made in the Aristotelean-Thomist tradition, specifically to those who find moral significance in the identical *effects* of two moral acts. In this chapter, the PDE functions to distinguish NFP from contraception, which are two different acts appearing to have the same effects.

To apply the PDE, this chapter makes use of the Thomist concepts of actual and habitual intent. Actual intent is the intent that is immediately present in the agent's mind, while habitual intent is the intent to perform an act which is no longer immediately present in the agent's mind but has also not been retracted (Penner 2018, p. 104). This chapter argues that contraception entails a complete lack of either actual or habitual intent to procreate, while NFP still entails a habitual (but not actual) intent to procreate. This means that when marital intercourse is practiced with NFP, it remains marital intercourse. By contrast, a sexual act that utilizes contraception is a completely different type of forbidden act, and the PDE offers a way to access this distinction.

The PDE permits the tolerance of a bad effect in the course of achieving a good effect, as long as only the good effect is intended and the bad effect is not. The intent referenced here can be construed either as *actual* intent because the character of the act is determined by the agent's motivation at the time of the act, or as *habitual* intent because, while the moral agent may no longer have an actual intent present in the mind, that same intent may also not have been retracted and thus still remain.

This chapter argues, therefore, that marital intercourse is permissible even with the use of NFP because the use of NFP does not constitute a retraction of the intent to procreate and therefore retains the habitual intent to procreate. Contraception, however,

expresses an intent *not* to procreate. This means that if there were not at least a habitual intent to procreate, then NFP would not be used. The fact that NFP *is* used, however, is enough to establish that at least a habitual intent to procreate remains, meaning that its use does not change the character of the permissible marriage act. Using the concept of habitual intent, this chapter argues that the PDE excludes acts which do not preserve the procreative and unitive functions of permissible sex acts because they lack at least the habitual intent to procreate. The most important argument of this chapter is that this application of the PDE helps to resolve the longstanding issue within Catholic ethics to explain why the use of NFP is permissible, but the use of contraception is not. This application is supported by older applications of the PDE to sexual issues found in the theological manuals of the Aristotelean-Thomist tradition.

First, this chapter discusses the Contraceptive Argument in the context of NNL. Then, it discusses the PDE and its formulation within TNL. Next, it discusses procreation and unity in the Aristotelean-Thomist Tradition. Following that, it discusses the Thomist distinction between actual and habitual intent in the context of sacramental and moral theology. Finally, it argues how the PDE can be used to explain the difference between contraception and NFP and concludes with some final thoughts about this application.

The Contraceptive Argument and New Natural Law Theory

As natural law developed, a significant debate arose over whether the moral object is properly the *act itself* or the *end of the act*. Roughly, TNL takes the *act itself* as the moral object, while NNL takes the *end of the act* as its moral object. Melissa

Moschella (2019) explains that NNLT and TNLT are distinguishable in terms of their approach to moral evaluation: NNLT evaluates an act with reference to the basic good toward which the act is directed, while TNLT evaluates an act with reference to the essence of the act as it relates to the precepts of the Aristotelean-Thomist tradition. This means that, while TNLT and NNLT agree in many of their moral judgements, they differ in the moral *reasoning* to reach those judgments. For example, with respect to sexual ethics, Moschella explains that “New natural law theorists agree that all acts in which one uses the sexual faculties contrary to their natural purpose (if correctly understood) are in fact wrong, but they deny that this (the use of the faculties contrary to their natural purpose) is the reason why such acts are wrong” (p. 253). So, while TNLT and NNLT agree on moral judgements, they differ as to how those judgements are reached. While this agreement in moral judgement might be viewed as fidelity to the Aristotelean-Thomist tradition on the part of those who endorse NNLT, it comes at the cost of denying the metaethical relevance of the moral absolutes which are central to the Aristotelean-Thomist tradition.

Formulations of the PDE originating in NNLT also reflect this tradeoff. As I discussed earlier, Joseph Boyle (1980) offered a list of the conditions within the context of NNLT: “(1) the agent’s end must be morally acceptable (*honestus*), (2) the cause must be good or at least indifferent, (3) the good effect must be immediate, and (4) there must be a grave reason for positing the cause” (Boyle, 1980, p. 528). Notably, Boyle’s first condition requires that the agent’s *end* be morally acceptable rather than the act itself, as it is in formulations of the PDE within the context of TNLT. The Contralife Argument,

as it is now known, was developed within NNLT in response to *Humanae Vitae* (1968), which reiterated that *contraception* is wrong, to argue that *NFP* is *also* wrong.

Operating within TNL and the Aristotelean-Thomist tradition, *Humanae Vitae* (1968) teaches that “Each and every marital act must of necessity retain its intrinsic relationship to the procreation of human life” (n. 11). This principle of *Humanae Vitae* has invited multiple interpretations, including from NNLT itself. Germain Grisez, Joseph Boyle, John Finnis, and William E. May (1988), among the original developers of NNLT, have argued that “We think that the only plausible interpretation of ‘Every marital act ought to be open to new life’ is: It is wrong for those who engage in marital intercourse to attempt to impede the transmission of life which they think their act otherwise might bring about” (p. 365).

A contralife act, then, is against life because it impedes the possibility of new life, and Grisez, Boyle, Finnis, and May (1988) find precedence for this moral judgement in ancient Church tradition that characterized contraception as homicide. They explain that: “‘Contraception’ signifies only the prevention of *conception*, but the contraceptive act seeks to impede *the beginning of the life of a possible person*. The distinction is only conceptual, but we think it important, for the explicit reference to new life calls attention to the fact that contraception is a contralife act” (1988 p. 366). Contraception is wrong, then, *because of* the contralife *intention* to impede procreation. As I will argue, NFP does not entail this contralife intention, but contraception does, and the PDE can distinguish NFP from contraception.

Because it originated within NNLT, the Contralife Argument identifies contraception and NFP as morally equivalent because of the moral significance it attributes to their similar *ends*. Indeed, if made on the basis of *effects* alone, NFP is difficult to distinguish from contraception. This is why the Contralife Argument may appear persuasive to the casual observer: if contraception and NFP produce the same effects, then it would seem that the distinction between them is arbitrary. It is within this same context of NNLT that Masek (2011) attempts to apply the PDE to distinguish NFP from contraception—an attempt which I argue is ultimately unsuccessful. By contrast, I argue that the PDE can successfully distinguish NFP from contraception, provided that the double effect is identified.

Masek (2011) explicitly situates his discussion within the work of Grisez, Boyle, May, George, and Finnis (e.g. p. 84) and uses similar language similar to theirs to identify the problematic bad effect of NFP (p. 93). Seeking to remain consistent with NNLT, Masek (2011) appeals to the moral agent's *intention* in his attempt to distinguish NFP from contraception using the PDE. On this point, Masek (2011) writes: "My discussion of contraception and NFP focuses on the agent's *intention*" in contrast to other commentators (presumably writing from the perspective of TNLT and the Aristotelean-Thomist tradition) who "believe that contraception is wrong for other reasons, including that it prevents spouses from giving themselves to each other and that it violates marital chastity" (p. 84 [emphasis added]).

Specifically, Masek (2011) interprets *Humanae Vitae* as forbidding "*intentionally impeding procreation*" (p. 85). He argues that "In general, people can intend X by

having a desire for X that they hope to fulfill, or they can intend X by having X as an end or means of their actions. People who use NFP desire that human life not begin, but the non-existence of human life is neither an end nor a means of their actions” (Masek, 2011, p. 93). Masek’s argument depends on the claim that contraception entails contralife *intention*, while NFP entails only contralife *motivation* but not contralife *intention*. Pollock (2011) argues that while this distinction between contralife *motivation* and contralife *intention* may be true and even useful, he argues that Masek ultimately failed to apply the PDE successfully because he failed to identify the two effects associated with either contraception or NFP; however, I argue that two effects of both contraception and NFP can be identified, and that these effects allow the PDE to be applied to explain why NFP is permissible, but contraception is not.

Despite Pollock’s (2011) claims that double effect reasoning is inconsistent with *Humanae Vitae* (1968), Joseph Berkman (1997), in his commentary on different contexts of the PDE, argues that the PDE is also referenced in *Humanae Vitae* (1968) in its statement that, “Though it is true that sometimes it is lawful to tolerate a lesser moral evil in order to avoid a greater evil or in order to promote a greater good, it is never lawful, even for the gravest reasons, to do evil that good may come of it” (sec 14). In fact, it was precisely this mention of the PDE that commentators such as Berkman (1997) have argued was an impetus behind the development of “revisionist” ethical theories, among which NNLT is often classified because of its apparent lack of dependence on Aristotelean-Thomist moral absolutes.

Taking this same perspective, Janet Smith (1991) has argued that the Contralife Argument is unfaithful to the text of *Humanae Vitae* (1968) in its departure from from the moral absolutes of the Aristotelean-Thomist tradition:

The fact that contraception is considered to be intrinsically wrong is based on the premise that there is no justification for directly violating the ends of the sexual organs. Rather, there is a special need to protect their function and acts since their function is special. This special function is very much tied up with the uniquely important status of an act that by its nature may result in a new human life. Although all other organs and acts serve the good of life in various ways, largely indirect ways, the sexual organs and sexual activity do so in a very direct and immediate way. (p. 345)

Thus, according to Smith (1991), the arguments offered in defense of *Humanae Vitae* (1968), such as the Contralife Arugument, are themselves unfaithful to the teachings of the Church because they suggest human *intention* as the moral criterion rather than Aristotelean-Thomist moral absolutes. For now, it is sufficient to acknowledge that NNLT drives the Contralife Argument, so the controversy about the applicability of the PDE to contraception and NFP also occurs within this context. This same context, however, obscures the reality that the PDE has long been used to distinguish between sexual acts within the theological manuals of TNLT and the Aristotelean-Thomist tradition.

Procreation and Unity in the Aristotelean-Thomist Tradition

Relevant to this application of the PDE, John Paul II explained in *Familiaris Consortio* (1981) that because contraception is contrary to sexuality's procreative function, it is also contrary to its unitive function (n. 32). The *Catechism* teaches that the procreative and unitive functions of human sexuality are inseparable: procreation implies unity, and unity implies procreation (n. 2366, 2369; Feser 2015, p. 395). As explained in *Familiaris Consortio* (1981), when NFP is used, the connection between procreation and unity is preserved because "sexuality is respected and promoted in its truly and fully human dimension and is never 'used' as an 'object' that, by breaking the personal unity of soul and body, strikes at God's creation itself at the level of the deepest interaction of nature and person" (par. 32).

While procreation and unity is the good effect of human sexuality identified in the Aristotelean-Thomist tradition, sexual pleasure *in isolation from procreation and unity* is the bad effect of human sexuality identified in the Aristotelean-Thomist tradition that is relevant to identifying disordered sexual acts. As in the case of onanism presented by Connell (1952), the *Catechism* itself identifies the pursuit of sexual pleasure *in isolation from the procreative and unitive functions* as disordered, and characteristic of all species of lust (par. 2351). The condemnation of the pursuit of sexual pleasure *in isolation from procreation and unity* is also emphasized in *Familiaris Consortio* (1981, pars. 24, 37, 81). Instructively, *Familiaris Consortio* (1981) mentions contraception in particular as involving an "objectively contradictory language, namely, that of not giving oneself totally to the other. This leads not only to a positive refusal to be open to life but

also to a falsification of the inner truth of conjugal love, which is called upon to give itself in personal totality” (par. 32). In the Aristotelean-Thomist tradition, then, pleasure is neither a purpose nor end of sexuality. Although it might *motivate* procreation and unity, sexual pleasure may never be pursued *in isolation from procreation and unity*, as that isolation is essential to disordered sexual acts.

Instructively, in its discussion of the Sixth Commandment, the *Catechism* forbids any sexual act which isolates sexual pleasure from procreation (n. 2351); however, it permits sexual pleasure if it is produced by the same act with procreative potential (n. 2362). The *Catechism* lists and discusses the names of these specific acts, all of which are variations of lust (n. 2351): masturbation (n. 2352), fornication (n. 2353), pornography (n. 2354), prostitution (n. 2355), rape (n. 2356), homosexual acts (n. 2357), and contraception (n. 2370). The implication is that any act which isolates sexual pleasure from procreation *is not* permissible and is an offense against chastity.

Aristotelian-Thomist Moral Absolutes, Actual Intent, and Habitual Intent

The Aristotelean-Thomist understanding of ‘intention’ is the last concept needing clarification before the PDE can be applied to contraception and NFP. Gury (1866), like Boyle (1980), references intention in his formulation of the PDE; however, because Gury’s context is different from Boyle’s, Gury’s meaning of intention should be understood within the manualist context of TNLT and the Aristotelian-Thomist tradition, while Boyle’s meaning of intention should be understood within the contemporary modern context of NNLT.

St. Thomas himself makes a useful distinction between actual and habitual intent that is crucial for understanding how the PDE can be used to make decisions concerning human sexuality, since it is revelatory of Aristotelean-Thomist moral absolutes. St. Thomas mentions habitual intent in the context of acts associated with sacramental and moral theology. In sacramental theology, habitual intent guarantees the validity of a sacrament even in the absence of a priest's *actual* intent to perform it, provided that the other conditions necessary to its performance are also met. By uttering the words of institution, the priest expresses a habitual (if not actual) intent to perform a sacrament, fulfilling the requirements of the Church. This application of habitual intent is familiar to most Catholics; however, in moral theology, habitual intent permits marital intercourse even in the absence of an actual intent to procreate (May, Lawler, Boyle 2011, p. 67). Likewise, as St. Thomas also discusses, it is by the very act of performing marital intercourse without contraceptive impediment that a couple expresses a habitual (if not actual) intent to procreate, also fulfilling the moral requirements of the Church.

Habitual intent, then, is an important concept in sacramental theology because it guarantees the validity of the sacraments even when a priest lacks the *actual* intent to perform them. This is important because if a priest lacks any intent *at all* to perform a sacrament, then the sacrament is invalid. The lack of even habitual intent occurs whenever the priest fails to say the words of institution. For example, a priest who uses the plural, *baptizamus* (we baptize), rather than the singular, *baptizo* (I baptize), fails to do as the Church requires, and thus fails to administer the sacrament (Congregation for

the Doctrine of the Faith, 2020). To this point, St. Thomas considers the case of a distracted priest presiding at a baptism:

Although he who thinks of something else, has no actual intention, yet he has habitual intention, which suffices for the validity of the sacrament; for instance if, when a priest goes to baptize someone, he intends to do to him what the Church does. Wherefore if subsequently during the exercise of the act his mind be distracted by other matters, the sacrament is valid in virtue of his original intention. Nevertheless, the minister of a sacrament should take great care to have actual intention. But this is not entirely in man's power, because when a man wishes to be very intent on something, he begins unintentionally to think of other things, according to Psalm 39:18: "My heart hath forsaken me." (*Summa Theologiae* 3 q. 64, a. 8, ad.3).

In other words, provided that the other conditions are met, the mere utterance of the words of institution is enough to guarantee the validity of a sacrament. If the priest retracted his intention to perform the sacrament *at all*, he would never have said the required words of institution in the first place. His intent to perform the sacrament, in other words, was never retracted, although it may no longer be present in the mind. If the priest retracted *all* intention to perform the sacrament, he would have done something else and would never have said the words of institution at all. The fact that the priest *did* say the words of institution is enough to establish that the intent to perform the sacrament had, at least, never been retracted by the priest, and that habitual intent

remains. Thus, any sacrament performed with even habitual intention is valid, provided all the conditions are met.

Less familiar to most Catholics, St. Thomas also uses actual and habitual intent to describe marital intercourse. The concern here is not with *validity* of a sacrament, but rather with *permissibility* of an act. St. Thomas considers whether marital intercourse is permissible even when procreation is not intended, similar to what is now called NFP. He answers that procreation does not need to be *actually* intended, but must at least be *habitually* intended:

Consequently whenever nature alone moves a person to marital intercourse, he is not wholly excused from sin, except in so far as the movement of nature is further directed *actually or habitually* to the offspring as a good of the sacrament. Nor does it follow that the instigation of nature is evil, but that it is imperfect unless it be further directed to some marriage good. (*Summa Theologiae*, Suppl., q. 49, q. 5, ad.1 [emphasis added]).

The presumption here is that, because the married couple chose to engage in marital intercourse to the exclusion of all other possible sexual acts, they did at some point actually intend to procreate. Even if they later lack the actual intent to procreate, the couple still retains the habitual intent to procreate, as long they perform marital intercourse to its completion. Therefore, such marital intercourse remains permissible.

St. Thomas again makes a similar point when considering the performance of marital intercourse for pleasure:

Although he does not actually refer the pleasure to God, he does not place his will's last end therein; *otherwise he would seek it anywhere indifferently*. Hence it does not follow that he enjoys a creature; but he uses a creature actually for his own sake, and himself habitually, though not actually, for God's sake. (*Summa Theologiae*, Suppl. q. 49, a. 6, ad. 3 [emphasis added]).

Here, St. Thomas makes the role of habitual intent more explicit. If it were true that pleasure was the only end sought, then any other sexual act *except for* marital intercourse would have been chosen as a means to achieve that end; however, it was marital intercourse that *was* chosen for pleasure, to the exclusion of other sexual acts. Therefore, marital intercourse remains permissible because of the habitual intent to procreate. In other words, if procreation were not at least habitually intended, then a different act would have been chosen. A different act was not chosen, so the intent to procreate was never retracted. This notion is very different than modern contemporary notions of intention, such as that alluded to by Boyle (1980) in his formulation of the PDE. Although in NNLT such intention is determinative of action, it is nevertheless circumstantial and lacks reference to Aristotelean-Thomist moral absolutes.

The Contraception Argument and the Principle of Double Effect

Habitual intent informs the application of the PDE to contraception and NFP because it is revelatory of the Aristotelean-Thomist moral absolutes that make contraception and NFP essentially different. It is this difference that the PDE makes accessible. Recall that, although Gury's formulation appears similar to that offered by

Boyle (1980), its *context* is different, and that context is important for its correct application. For reference, Gury lists the conditions as follows (1866 vol. 1, sec. 9):

1. “A good end is required, or rather that the agent should not intend the bad effect, because otherwise he would intend disorder and hence do wrong.”
2. “It is required that the cause be good or at least indifferent.”
3. “It is required that the double effect equally follows from the cause.”
4. “It is required that the good effect at least balance the bad. And indeed to be done properly, the reason is required to be proportionate to the action itself.”

Before applying the PDE, I reiterate that the PDE serves as a *way to distinguish* NFP from contraception, but the PDE is itself not the *reason* contraception and NFP are *distinguishable*. NFP is ultimately distinguishable from contraception because it is an essentially different act, but the PDE gives access to that difference within TNLT and the Aristotelean-Thomist tradition. I now apply the PDE, identifying the good effect as procreation and unity and the bad effect as sexual pleasure *in isolation from procreation and unity*.

1. “A good end is required, or rather that the agent should not intend the bad effect, because otherwise he would intend disorder and hence do wrong.”

The first condition requires that the moral agent not intend the bad effect. In other traditional formulations of the PDE, this condition is listed as the second. In this case, the bad effect in question is sexual pleasure *in isolation from procreation and unity*. St. Thomas’ discussion of habitual intent revealed that if this bad effect were intended, then any other sexual act *other than* marital intercourse would have been chosen. The fact

that it was chosen at all, to the exclusion of other possibilities, means that at least habitual remains. Consistent with this reasoning, Even NFP, when trying to avoid pregnancy, entails at least a habitual intent for procreation and unity because it was chosen as a way to avoid pregnancy *to the exclusion* of all other acts, such as contraception. Contraception, by contrast, does not meet even this condition because it is an expression of the actual intent to pursue pleasure *in isolation from procreation*.

Some would argue that sexual pleasure itself is not a moral evil, and that this is true even within the Aristotelean-Thomist tradition. While it is true that the Aristotelian-Thomist tradition does not regard sexual pleasure as evil per se, it does regard it as evil *in isolation from procreation and unity*, and this isolation is what characterizes all impermissible sexual acts in the Aristotelean-Thomist tradition. So, sexual pleasure can indeed be a moral good, provided that it occurs in conjunction with procreation and unity. What this condition excludes are sexual acts done exclusively for sexual pleasure alone, such as intercourse with contraception without at least the habitual intent to procreate, as is the case with NFP.

2. “It is required that the cause be good or at least indifferent.”

The second condition, listed as the first in other traditional formulations, requires that the cause be at least neutral or even good. The same reasoning applies to this condition. The cause for having marital intercourse might be procreation, unity, or even pleasure; however, it cannot be pleasure *in isolation from procreation or unity*. NFP, when trying to avoid pregnancy, might be *motivated* by pleasure, but its *habitual intent* is either procreation or unity, or else a different act would have been chosen. Contraception, by

contrast, entails a bad cause of action, namely: pleasure *in isolation from procreation and unity*. NFP meets the second condition, but contraception does not.

Some would argue that NFP is itself morally wrong because it achieves the same end as contraception: the avoidance of pregnancy; however, this is to conflate the requirements of Aristotelean-Thomist teleology with consequentialism. What is crucial in the Aristotelean-Thomist tradition is the essence of the act itself, not the circumstances or accidents of the act. Intercourse with contraception is an essentially different kind of act than NFP: contraception uses physical or chemical impediments to prevent conception, but NFP is intercourse which happens to take place intentionally during fertile and infertile periods depending on the aims of the married couple. The timing of the intercourse is incidental regardless of aim and remains permissible.

3. “It is required that the double effect equally follows from the cause.”

The third condition requires that both effects occur simultaneously. It is perhaps through this condition that the contrast between contraception and NFP is most clearly seen, since contraception is characterized by its *opposite*. In NFP, even when trying to avoid pregnancy, sexual pleasure and procreation and unity occur simultaneously, even if conception never occurs. The reason for this is that marital intercourse, even in the case of NFP, retains its essence: the timing is merely accidental and therefore non-essential to the act. By contrast, contraception does not retain the essence of marital intercourse, and sexual pleasure occurs *in isolation from procreation and unity*.

Some would argue that NFP also separates sexual pleasure from procreation and unity when it is practiced to avoid pregnancy; however, the procreative and unitive end

of sexuality does not require every instance of sexual intercourse to end in conception. The Aristotelean-Thomist tradition requires that the individual act of intercourse be the *kind* of procreative and unitive intercourse regardless of actual outcome. To be procreative and unitive, the intercourse must involve complete ejaculation within the vagina without contraceptive impediment. NFP, regardless of aim, meets this requirement, while contraception always does not.

4. “It is required that the good effect at least balance the bad. And indeed to be done properly, the reason is required to be proportionate to the action itself.”

The fourth condition requires that the good effect and bad effect balance. In the case of contraception, sexual pleasure fails to balance with a lack of procreation and unity, since there is another option, marital intercourse, available to pursue sexual pleasure in a way that is not isolated from procreation and unity. In the case of NFP when trying to avoid pregnancy, sexual pleasure remains balanced with unity and prospects for procreation. Thus, the PDE is able to *distinguish* NFP from contraception because it meets all four conditions of the PDE, but contraception does not; however, the reason why NFP is *distinguishable* from contraception is because NFP is a species of marital intercourse, but contraception has a different essence entirely.

Some would argue that unity alone is not proportionate to justify having sexual intercourse during infertile periods using NFP; however, this again is to conflate the requirements of the Aristotelean-Thomist tradition with those of consequentialism. The timing and reasons for having intercourse are irrelevant to the essence of the act of intercourse, which is characterized by complete ejaculation within the vagina without

contraceptive impediment. As long as this takes place within marriage, the intercourse is *both* procreative *and* unitive and thus remains permissible regardless of the motivations of the couple for doing so. This is distinct from consequentialism which evaluates acts only in terms of their results.

Concluding Remarks

The PDE offers a way to explain why NFP is distinguishable from contraception: sexual intercourse during infertile periods not morally wrong, sexual pleasure *in isolation from procreation and unity* (the bad effect) is unintended, procreation and unity (the good effect) and sexual pleasure are produced by the same act, and procreation and unity cannot occur but for sexual pleasure. NFP meets these conditions, but contraception does not. The PDE gives access to the moral absolutes of the Aristotelean-Thomist tradition which regulate sexuality. NFP, therefore, is a species of sexual intercourse and remains permissible, while contraception is essentially a different act entirely.

CHAPTER IV

THE STERILITY OBJECTION AND THE PRINCIPLE OF DOUBLE EFFECT

New Natural Law Theory (NNLT) defines marriage as a union of one man and one woman for the purpose of procreation and raising children, yet NNLT permits sterile opposite-sex marriage but forbids same-sex marriage even though neither can result in procreation (Tully 2015; Girgis, George, Anderson 2010; Lee, George 1997; Finnis 1994). According to the Sterility Objection, if NNLT permits sterile opposite-sex marriage despite the impossibility of procreation, then it should also permit same-sex marriage for this same reason (Anderson 2013; Koppelman 2002, 1997; Lee, George 1997; Macedo 1995). Nevertheless, NNLT *does not* permit same-sex marriage, raising the question of why it permits sterile opposite-sex marriage, and whether the Sterility Objection succeeds in challenging this distinction.

Erik Anderson (2013) argues that the that the Sterility Objection does succeed and that the distinction NNLT draws between sterile opposite-sex marriage and same-sex marriage remains “arbitrary” and “irrational” (pp. 760, 767, 770). He argues that, since same-sex intercourse lacks procreative potential and “the ability to engage in reproductive functioning” just as opposite-sex intercourse does, then, NNLT should permit same-sex intercourse just as it permits sterile opposite-sex intercourse. By *not* permitting this, he argues, NNLT continues to make an indefensible distinction between the two, and the Sterility Objection succeeds (p. 774).

In response to Anderson, Patrick Tully (2015) argues that the Sterility Objection fails, and that Anderson's defense draws a false equivalence between sterile opposite-sex intercourse and same-sex intercourse. Tully's criticism centers on Anderson's replacement of NNLT's "acts of a reproductive *kind*" with "acts of reproductive *functioning*" (Tully 2015, p. 138 [emphasis added]). He argues that this replacement obscures what NNLT really requires, namely that "the NNLs [New Natural Lawyers] do not require that a couple be capable of engaging in acts of reproductive functioning, so understood, in order to be married. What the NNLs find necessary for marriage is that a couple be capable of engaging in acts of a reproductive kind" (p. 139).

Tully (2015) concludes that Anderson's examples (2013) of a younger couple engaging in marital intercourse during transitory infertile periods and an older couple in a permanent state of sterility engaging in marital intercourse do not support the Sterility Objection because both remain instances of *acts of a reproductive kind* unavailable to same-sex couples. These *kinds* of acts refer to the natural essences of the Aristotelean-Thomist tradition I explained in the first chapter. Tully (2015) limits his discussion to Anderson's (2013) error in conflating reproductive *functioning* with reproductive *kinds*, claiming that both a younger couple having intercourse during a transitory infertile period and an older couple in a permanent state of sterility having intercourse are *acts of a reproductive kind*, even though both lack reproductive *functioning*.

Just as the previous chapter argued that the PDE can successfully distinguish NFP from contraception, this chapter argues that the PDE can successfully distinguish sterile opposite-sex intercourse from same-sex intercourse in response to the Sterility

Objection. Even though this application of the PDE to sexuality has precedence in the Aristotelean-Thomist tradition to explain why some sexual acts are permissible and others are not, this chapter emphasizes—as in the previous one—that the PDE is not the *reason* why these acts are distinguishable. The *reason* acts are distinguishable are the Aristotelean-Thomist moral absolutes which the PDE makes accessible.

The two relevant effects of sterile opposite-sex intercourse and same-sex intercourse for this application of the PDE are the same as those of NFP and contraception: procreation and unity (the good effect) and sexual pleasure *in isolation from procreation and unity* (the bad effect). Just as in the previous chapter, to meet the conditions of the PDE: procreation and unity must be intended; sexual pleasure *in isolation from procreation* must be unintended; procreation, unity, and pleasure must occur simultaneously; and procreation and unity must not be able to occur but for sexual pleasure. Opposite-sex intercourse meets all four conditions, making it permissible even if done in a state of transitory infertility or permanent sterility, which, in Aristotelean-Thomist metaphysics, are circumstantial and, therefore, are only accidental to the essential act itself. By contrast, same-sex acts do not meet these four conditions and so remain forbidden, regardless of circumstance. This means that sterile opposite-sex intercourse remains a species of permissible opposite-sex intercourse, but same-sex intercourse is a different forbidden act entirely.

First, this chapter discusses the Sterility Objection and its context in NNLT. Next, it discusses the PDE and its application to sexuality in general. Then, it discusses the function of moral absolutes and intention within the Aristotelean-Thomist tradition.

Lastly, it applies the PDE to the Sterility Objection and ends with some concluding thoughts.

The Sterility Objection and New Natural Law Theory

Anderson (2013) notes that the argument now known as the Sterility Objection was developed further by Stephen Macedo (1995), Paul Weithman (1997), and Andrew Koppelman (1997, 2002). While Anderson (2013) cites contemporary endorsements of the Sterility Objection (for example, Corvino 2005, p. 517; Bamforth and Richards 2008, pp. 272–274), he argues that the Sterility Objection has not been adequately defended, and that his present task is to do just that (p. 760); however, I argue that the Sterility Objection fails because the PDE can successfully distinguish sterile opposite-sex intercourse from same-sex intercourse.

The Sterility Objection originated as a response to an argument made by John Finnis (1994) wherein he centralized procreative *capacity* as a requirement for permissible sexual intercourse, which NNLT and the Aristotelean-Thomist tradition confine to marriage:

The union of the reproductive organs of husband and wife really unites them biologically (and their biological reality is part of, not merely an instrument of, their *personal* reality); reproduction is one function and so, in respect of that function, the spouses are indeed one reality, and their sexual union therefore can *actualize* and allow them to *experience* their *real common good*—*their marriage* with the two goods, parenthood and friendship are the parts of its wholeness as an intelligible common good even if, independently of what the spouses will,

their capacity for biological parenthood will not be fulfilled by that act of genital union. (p. 1066).

The Sterility Objection questions specifically why NNLT regards sterile opposite-sex couples as *still* having the “capacity for biological parenthood,” or procreative capacity, while denying that same-sex couples *ever* had such a capacity. In other words, if both sterile opposite-sex couples and same-sex couples lack even the *capacity* for parenthood, a necessary condition for permissible intercourse according to NNLT, then both should be either forbidden or permitted for consistency, according to the Sterility Objection. I argue, however, that the PDE explains why sterile opposite-sex intercourse is permissible, but same-sex intercourse is not.

As Anderson (2013) notes, Stephen Macedo (1995) was among the first to object to this distinction, questioning “why should these couples be included while we exclude committed, stable, monogamous gay couples—who, no more than the sterile, choose against the good of new life and who, as much as sterile heterosexual couples, can subordinate sexual passion to love, friendship, and other ‘marital’ goods?” (p. 279). If procreative capacity cannot mean the *actual* ability to reproduce, then Macedo argues it must mean something else. Macedo (1995) then asserts that this objection suggests a “double standard” and several “puzzles” for New Natural Law theorists because both acts of intercourse produce identical effects, yet NNLT permits one but not the other (p. 279). Macedo considers other possible meanings in attempts to resolve these “puzzles,” which he argues all strengthen the case that there *should not* be any distinction made between sterile opposite-sex intercourse and same-sex intercourse.

Firstly, Macedo (1995) wonders how it can be that sterile opposite-sex couples have any more procreative capacity than same-sex couples, yet “other goods (mutuality, love, and the like) are attainable by both” (p. 279). If these other goods subordinate the good of procreation, he argues, then it would appear that NNLT only requires couples to pursue “*attainable* goods” (p. 279). If this is true, he argues, then NNLT should not draw any distinction between sterile opposite-sex intercourse and same-sex intercourse. Curiously, Macedo himself (1995) even acknowledges that NNLT evaluates moral acts in terms of their relationship to basic goods and not to the consequences they produce: “or the new natural lawyers, the essential nature of sexual acts is known by analytical inquiry, not by consequentialist calculations, or by historical or cultural investigation of actual lives. Sexual activity unconnected with the realization of real goods (as defined by natural law) is objectively valueless. The sexual act is essentially a conjugal act that realizes a tightly knit array of marital goods” (p. 283).

Secondly, Macedo (1995) wonders whether the procreative capacity ascribed to sterile opposite-sex couples but not to same-sex couples is not *actual* but merely “figurative” (p. 279). As he defines it, intercourse “figuratively” open to procreation would be such that the couples would *willingly* welcome pregnancy if conditions were different. For sterile opposite-sex couples, these conditions would be a state of fertility. For same-sex couples, these conditions would be different sexes entirely. Macedo (1995) argues that whatever the case, when understood figuratively, the procreative capacity required to reproduce is understood as a matter of degree and would not justify any distinction (p. 279).

Thirdly, perhaps having gender surgeries in mind, Macedo (1995) wonders whether it is the presence of the right sexual organs that confers procreative capacity.

Yet, he argues that

If the presence of nonworking equipment of the “right” sort is a crucial distinguishing feature of permissible sexual relationships, artifice might supply what nature has not. One gay male might have a partial sex-change operation, having his penis removed and a vagina installed. Does this allow a gay couple to re-create the appearance of biological complementarity closely enough to have valuable sex? Or suppose a gay male couple simply eschews oral sex, anal sex, and mutual masturbation in favor of intercrural sex (inserting the penis between the thighs of the partner). Would this *resemble* heterosexual intercourse closely enough to have “procreative significance?” (p. 280)

Because all of these understandings of procreative capacity fail to distinguish between sterile opposite-sex intercourse and same-sex intercourse, Macedo concludes that what is now called the Sterility Objection succeeds, and that “it is hard to see why sex between sterile couples has any more “procreative significance” than gay or lesbian sex. These cases are distinguished by appearances only, and matters of great moral significance should not hang on mere appearances” (p. 280). This point is important because, as I will argue in this chapter, it is the Sterility Objection itself that *likens* sterile opposite-sex intercourse and same-sex intercourse on the basis of their “appearances” or effects, and the Aristotelian-Thomist tradition that distinguishes them on the basis of their natural kinds, *irrespective of* those appearances, effects, circumstances, or accidents.

Anderson (2013) also mentions that Paul Weithman (1997) was the first to use the term “Sterility Objection” to refer to the kind of argument raised by Macedo (1995). Instructively, Weithman (1997) presents concerns of “sterility” as beside the point, instead suggesting that endorsements of the Sterility Objection, such as that offered by Macedo (1995) too quickly overlook the procreative capacity of sexual complementarity:

Those who criticize natural law treatments of homosexual activity are often tempted by what we might call the “sterility objection.” According to this objection, any principle strong enough to imply the licitness of homosexual sex can be exploited to show that that of sterile heterosexual couples is illicit as well. Since natural law theorists are typically committed to the illicitness of the latter and the impermissibility of the former, it is alleged that natural law arguments against homosexual activity fail. But if the notion of sexual complementarity is assumed cogent and if Finnis is granted (25) [premise 25] {p. 234: "Two people of the same sex cannot be sexually complementary"}], then he has the resources to respond to this objection. This suggests that any force the sterility objection had against Finnis's argument depends on the force of objections to (25) and to the notion of sexual complementarity. I therefore want to pursue this objections [sic.] and leave sterility aside. (p. 238 [notes added])

Besides coining the term “Sterility Objection,” Weithman’s discussion of the Sterility Objection is also instructive as it suggests a dissonance between those who insist that the Sterility Objection succeeds and those who insist that it fails. Those who endorse the

Sterility Objection, like Macedo (1995), do so because sterile opposite-sex intercourse and same-sex intercourse *appear* to be identical because of their similar effects, circumstances, and accidents. Those who reject the Sterility Objection, like Weithman (1997) himself, do so because they assume that sterile opposite-sex intercourse and same-sex intercourse are *essentially* different despite producing similar effects. This pattern of interaction between Macedo (1995) and Weithman (1997) extends to more recent debates about the Sterility Objection today.

As Anderson (2013) also notes, Andrew Koppelman (1997, 2002) offered the next significant endorsement of the Sterility Objection. In response to the same passage from Finnis (1994), Koppelman (2002) considers three objections to the distinction between sterile opposite-sex couples and same-sex couples, with the most significant of these being, for this chapter, the Sterility Objection, which Koppelman references by name in his article (1997), but not his monograph (2002). Koppelman (2002) acknowledges that the distinction between sterile opposite-sex intercourse and same-sex intercourse depends on the essence-accident distinction made by the Aristotelean-Thomist tradition and reiterated in NNLT, albeit in the language of basic goods, and he notes that “the basis of the distinction is the capacity of the heterosexual couple to engage in acts of the reproductive kind” (p. 86). Koppelman (2002) notes that

It appears that the argument can be salvaged, if at all, only by silently presupposing a kind of Aristotelean hylomorphism, in which the infertile heterosexual married couple participates imperfectly in the *idea* of one-flesh unity, but the gay couple does not participate at all. The infertile heterosexual

couple does become one organism, albeit an organism of a handicapped sort, that cannot do what a perfectly functioning organism of that kind can do. The heterosexual couple is only accidentally infertile, while the gay couple is essentially so (p. 87).

Here, Koppelman (2002) makes a similar argument as Macedo (1995), who described the unity required as “figurative” and the difference in required unity between sterile opposite-sex couples and same-sex couples as a matter of degree (p. 279). By contrast, Koppelman (2002) argues that “A sterile person’s genitals are no more suitable for generation than an unloaded gun is suitable for shooting” (p. 87).

In comparison, both Macedo (1995) and Koppelman (2002) challenge the essence-accident distinction that informs TNLT and the Aristotelean-Thomist tradition. This distinction has long been challenged and many famous arguments against it were offered by seventeenth- and eighteenth-century philosophers; however, what is significant here is *how* Macedo (1995) and Koppelman (2002) characterize that distinction. Significantly, they repeat the same error in attributing moral significance to the *effects* of moral acts, when the Aristotelean-Tradition finds only the *essences* of acts to be morally significant. Koppelman (2002) notes that

the emphasis on the social weakens the significance of the purported *biological* unity of the infertile heterosexual couple, since its status as a natural kind now seems to depend on the naturalness of marriage as an institution. Social practice is a good deal more variable than biology. It is true that children typically are raised by their biological parents, but that social practice does not constitute a

natural kind, much less a natural kind that includes instances that don't produce or raise children and excludes instances that do (p. 89).

Koppelman (2002) here argues that NNLT's appeal to biology to distinguish permissible sterile opposite-sex intercourse from same-sex intercourse is weakened by its additional appeal to sociology. Again, Koppelman (2002) grounds his endorsement of the Sterility Objection in the similar *effects* of sterile opposite-sex intercourse and same-sex intercourse, including the equal ability of same-sex couples to raise children. What Koppelman (2002) overlooks, though, is that the distinction between the two rests in the moral absolutes of the Aristotelean-Thomist tradition, which will be discussed later in this chapter.

Moral Absolutes and Intention in the Aristotelean-Thomist Tradition

Commenting on TNL's general perspective on sexuality, Edward Feser (2015) writes that "human sexual act is a seamless unity of the procreative and the unitive, directed at the same time toward both biological generation and emotional communion" (p. 395). John Paul II also commented on the inseparability of procreation and unity in the papal encyclical *Familiaris Consortio* (1981), explaining that contraception is also contrary to sexuality's unitive function *because* it is contrary to sexuality's procreative function (n. 32). Additionally, the *Catechism of the Catholic Church* describes the procreative and unitive functions as inseparable (n. 2366, 2369).

As such, pleasure itself is an important *effect* of sexuality, but its pursuit *in isolation from procreation and unity* is characteristic of acts considered disordered in the Aristotelean-Thomist tradition. Emphasizing this point, Feser (2015) writes that the

Nor is there any such thing as a sexual act which *of its nature* (as opposed to a particular individual's personal motivation) exists for the sake of pleasure alone and not for either the procreative or unitive end of sex. For as with the pleasure associated with the purely procreative sex of which animals are capable, the pleasure associated with human sexual relations exists for the sake of the natural ends of those relations—in this case, unitive as well as procreative—rather than for its own sake. It is precisely because sex involves the lovers' taking intense pleasure in each others' bodies and most intimate feelings that it is capable of uniting them as it does. Without either the unitive or procreative ends there would be no reason for nature to make sex pleasurable, and (at least for the Aristotelian-Thomistic metaphysician) nature does nothing in vain. (pp. 395–396)

Disordered sexual acts, then, are those which isolate sexual pleasure from the procreative and unitive functions of sexuality, with onanism, as in the case presented by Connell (1952), being just one such example. The pursuit of sexual pleasure *in isolation from procreation* has also been condemned in the *Catechism* as a characteristic of all species of lust (par. 2351) and by Pope John Paul II in *Familiaris Consortio* (1981, pars. 24, 37, 81). So, as Feser (2015) explains, then, pleasure is not an end in itself for sexuality in the Aristotelean-Tradition, although it might *motivate* sexuality toward its end of procreation and unity (p. 389).

As I explained in the previous chapter, St. Thomas himself considered cases that are instructive for understanding how sterile opposite-sex intercourse is distinct from

same-sex intercourse in the Aristotelean-Thomist tradition. Just as crucially for the previous chapter, St. Thomas applies the concepts of actual and habitual intent to these cases, and—significantly for this chapter—St. Thomas applies *habitual* intent to evaluate whether it is permissible for a married couple to have sexual intercourse while lacking the *actual* intent to procreate. Recall that St. Thomas explains that procreation may be either actually *or* habitually intended by the married couple. Even if the couple lacks an *actual* intent to procreate, their choice to have sexual intercourse indicates at least the *habitual* intent to procreate, because they could have chosen any other sexual act for sexual pleasure *in isolation from* procreation and unity.

Relevant to this chapter, opposite-sex intercourse (within marriage) which lacks *actual* procreative intent remains permissible, and all such intercourse retains the *habitual* intent to procreate by its very essence because the lack of procreative possibility is due to a difference in circumstance, not in essence. This means that, even if the couple lacks an *actual* intent to procreate insofar as they are *motivated* by pleasure, they nevertheless retain a *habitual* intent to procreate by virtue of choosing sexual intercourse to the exclusion of any other sexual act which entails pleasure *in isolation from procreation and unity*. This means that sexual intercourse remains permissible for a married couple irrespective of circumstance not essential to the act. In the Aristotelian-Thomist tradition, these non-essential circumstances are accidental to the essence of the act itself.

The Sterility Objection and the Principle of Double Effect

I now apply Gury's formulation of the PDE (1866 vol. 1, sec. 9) to both same-sex intercourse and sterile opposite-sex intercourse, arguing that sterile opposite-sex intercourse meets all of the conditions of the PDE, but same-sex intercourse does not. In this case, the PDE functions to explain why sterile opposite-sex intercourse is permissible, but same-sex intercourse is not. For this double-effect analysis, the good effect is *procreation and unity*, and the bad effect is sexual pleasure *in isolation from procreation and unity*. The analysis here considers these two effects in terms of Gury's four conditions.

1. "A good end is required, or rather that the agent should not intend the bad effect, because otherwise he would intend disorder and hence do wrong."

The first condition requires the moral agent *not to* intend the bad effect. This condition functions to prevent the moral agent from violating a precept of TNLT since those acts necessarily entail the intention of their contraries. In the case of sexuality, the first condition excludes all acts which entail sexual pleasure *in isolation from procreation and unity* because those acts are characterized by that bad effect. Same-sex intercourse does not meet this condition because, as a species of lust, it entails sexual pleasure *in isolation from procreation and unity*, and is, therefore, always forbidden. By contrast, sterile opposite-sex intercourse meets this condition because it entails the habitual intent to procreate, with sterility being accidental to the essential sexual act itself.

Some would argue that sterile opposite-sex couples intend sexual pleasure *in isolation from procreation and unity* just as same-sex couples do; however, this is to

overlook that what is essential to sexual intercourse in the Aristotelean-Thomist tradition is complete ejaculation within the vagina without contraceptive impediment. If complete ejaculation within the vagina occurs without contraceptive impediment, the end of procreation and unity is met. Therefore, sterile opposite-sex couples meet this end whenever complete ejaculation occurs within the vagina without contraceptive impediment, and this is something that same-sex couples are unable to do.

2. “It is required that the cause be good or at least indifferent.”

The second condition requires that the moral agent’s cause be at least neutral or indifferent, perhaps even good. The cause or reason for having sterile opposite-sex intercourse might be pleasure, unity, or (vain) procreation. Whatever the case, it cannot be sexual pleasure *in isolation from procreation* because it is the habitual intent to procreate that is essential to sexual intercourse. It is possible that sterile opposite-sex intercourse is *motivated* by sexual pleasure, but because of the essential character of the act, this motivation is directed at procreation and unity—even if neither are *accidentally* impossible. By contrast, same-sex intercourse can never be procreative or unitive in the Aristotelean-Thomist sense of unity. Same-sex intercourse, therefore, does not meet the second condition, since it is an act characterized by sexual pleasure *in isolation from procreation and unity*.

Some would argue that sterile opposite-sex intercourse is itself morally wrong because achieves the same end as same-sex intercourse; however, this objection again conflates Aristotelean-Thomist teleology with consequentialism. The act of opposite-sex intercourse is essentially different from same-sex intercourse. States of temporary

infertility and permanent sterility are only accidental to opposite-sex intercourse, so such intercourse is permissible regardless of these circumstances because its essential character remains. The requirement for sexual intercourse to result in pregnancy is standard of consequentialism rather than of natural law.

3. “It is required that the double effect equally follows from the cause.”

The third condition requires that the good effect and bad effect occur simultaneously. This condition is interesting because it means that sexual pleasure *and* procreation and unity must occur within the same act. This is true even of opposite-sex intercourse because, the accidental impossibility of procreation notwithstanding, sexual pleasure occurs within the essential confines of sexual intercourse. By contrast, same-sex intercourse necessarily separates sexual pleasure from procreation and unity, since procreation and unity (again, in the Aristotelean-Thomist sense of unity) are impossible. Therefore, opposite-sex intercourse meets the third condition, but same-sex intercourse does not.

Some would argue that sterile opposite-sex intercourse separates sexual pleasure from procreation and unity just as same-sex intercourse does; however, even permissible sterile opposite-sex intercourse requires complete ejaculation within the vagina without contraceptive impediment—a requirement that same-sex intercourse can never meet. Complete ejaculation within the vagina without contraceptive impediment (and not actual conception) is sufficient to meet the end of procreation and unity. This requirement cannot be met by same-sex intercourse. Therefore, sterile opposite-sex

intercourse causes both sexual pleasure and procreation and unity, but same-sex intercourse causes only sexual pleasure and not procreation and unity.

4. “It is required that the good effect at least balance the bad. And indeed to be done properly, the reason is required to be proportionate to the action itself.”

The fourth condition requires that the tolerance of the bad effect be a last resort, or only option, to achieve the good effect. This means that sexual pleasure is permissible only because of the necessity of sexual intercourse for procreation and unity. Without sexual intercourse, sexual pleasure would be superfluous, and, as Feser (2015) speculates, would likely not exist (p. 395 and note 10). This last condition is also central to questions, such as the one Connell (1952) considered in the case of onanism, of whether there is any good effect apart from procreation and unity that would allow the experience of sexual pleasure *in isolation from procreation and unity*, if such pleasure is not intended.

Some could argue that procreation and unity is not proportionate for sterile opposite-sex couples to justify having sexual intercourse, since conception is not possible; however, this again conflates the Aristotelean-Thomist tradition with consequentialism. Complete ejaculation within the vagina without contraceptive impediment is essential to sexual intercourse, and the states of temporary fertility or permanent sterility are accidental to it. This means that sexual intercourse remains permissible even in these states, provided that complete ejaculation with the vagina occurs, even though it is impossible for such intercourse to result in any pregnancy.

In this application of the PDE, sterile opposite-sex intercourse meets all four conditions, but same-sex intercourse meets none of them. The application of the PDE to sexuality only works if the initial Aristotelean-Thomist concepts of habitual intention, unity, and the essence-accident distinction are accepted. This application is possible only if the PDE is applied within the TNLT and Aristotelean-Thomist context in which it originated. It is also possible only if the judgement that sexual pleasure *in isolation from procreation and unity* is the bad effect. These conditions for application suggest that the PDE itself is contingent upon same-sex intercourse *already* being forbidden and sterile opposite-sex intercourse *already* being permissible before the double-effect analysis occurs. The application of the PDE function either to discover these moral absolutes or to explain them. The PDE, however, does *not* function as the *reason* that same-sex intercourse is forbidden, and sterile opposite-sex intercourse is permissible. Even if in the absence of any double-effect analysis, one act remains permissible, and the other does not.

Concluding Remarks

The PDE offers a way to explain why same-sex intercourse is distinguishable from sterile opposite-sex intercourse: like opposite-sex intercourse during infertile periods, sterile opposite-sex intercourse is not morally wrong. This is so because sexual pleasure *in isolation from procreation and unity* (the bad effect) is unintended, procreation and unity (the good effect) and sexual pleasure are produced by the same act, and procreation and unity cannot occur but for sexual pleasure. Sterile opposite-sex intercourse, like opposite-sex intercourse during infertile periods, meets these

conditions, but same-sex intercourse does not. The PDE gives access to the moral absolutes of the Aristotelean-Thomist tradition which determine the species of moral acts. Sterile opposite-sex intercourse, therefore, is a species of sexual intercourse and remains permissible, while same-sex intercourse is essentially a different act entirely and is impermissible.

CHAPTER V

THE PRINCIPLE OF DOUBLE EFFECT IN THE CONGREGATION FOR THE DOCTRINE OF THE FAITH'S 2018 *RESPONSUM* ON HYSTERECTOMY

This chapter argues that the PDE can be successfully applied to the *responsum* issued by the Congregation for the Doctrine of the Faith (CDF) in 2018, which judged hysterectomy, the surgical removal of the uterus, to be permissible if the uterus is unable to bring any pregnancy to term, if the *sexual* effects of such a hysterectomy are considered rather than its *medical* effects. Hysterectomy is typically understood to be a *medical* act; however, in the Aristotelean-Thomist tradition, it is also understandable as a *sexual* act as permanent contraception. In 1993 and 2018, the CDF issued *responsa* concerning cases of hysterectomy involving the direct and indirect removal of the uterus. Both relate to an earlier *responsum* issued by the CDF known as *Quaecumque Sterilizatio* (1975) which judged *direct* sterilization as always impermissible. This raises the question of how the CDF's 2018 *responsum* is consistent with those it issued in 1993 and 1975.

In its 1993 *responsa*, the CDF considered three cases. In the first case, the CDF judged hysterectomy to be permissible when there is a “serious threat to the life or health of the mother” (CDF 1993). As such, the hysterectomy in the first case constitutes *indirect* sterilization. In the second case, the CDF judged hysterectomy to be impermissible even when the uterus is “foreseeably incapable of carrying a future

pregnancy to term without danger to the mother” (CDF 1993). In the third case, which will be significant for my analysis of the 2018 case, the CDF also forbade tubal ligation as an alternative to the hysterectomy described in the second case, even when future pregnancy is foreseen to endanger the health of the mother. As such, the hysterectomy in the second and third 1993 cases constitutes *direct* sterilization.

In 2018, the CDF judged that hysterectomy is permissible when the uterus “is no longer suitable for procreation and medical experts have reached the certainty that an eventual pregnancy will bridge about a spontaneous abortion before the fetus is able to arrive in a viable state” (CDF 2018). In its illustrative note to the case, the CDF also suggested “recourse to infertile periods” (alluding to Natural Family Planning, or NFP) and “total abstinence” as equally permissible alternatives (CDF 2018). The CDF rested its judgement on the claim that, unlike the impermissible 1993 cases, the hysterectomy in the 2018 case “does not regard sterilization” (CDF 2018). As such, the hysterectomy in this case is neither direct nor indirect sterilization.

Despite its claim that the 2018 case does not concern sterilization, the CDF’s judgement has caused controversy amongst Catholic bioethicists who question its consistency with both the first 1993 case and with the Aristotelean-Thomist tradition itself. Commentators have sought to explain the CDF’s judgments in both the 1993 cases and 2018 case through applications of the PDE. Traditionally formulated, the PDE identifies an act producing both a good effect and bad effect as permissible if the act itself is not intrinsically wrong, the bad effect is unintended and not the reason for

acting, both effects are caused by the same act, and the good effect is only achievable but for tolerance of the bad effect.

When applying the PDE, commentators on the 1993 and 2018 cases have generally agreed that the first case of hysterectomy described in the 1993 *responsa* entails preservation of the mother's life as the good effect and sterilization as the bad effect. They also generally agree that the first hysterectomy described in the 1993 *responsa* meets the conditions of the PDE (the ethicists of the National Catholic Bioethics Center 2018; Bedford, Stephens, McCarthy 2018; Catron 2019; Diem 2019; Schulz and Hamant 2020). Other commentators have questioned the applicability of the PDE to the 2018 case and have argued that the PDE is applicable by considering similar effects as the 1993 *responsa* (Austriaco 2018) or that the PDE is not applicable to the 2018 case at all (Diem 2019, Schulz and Hamant 2020). In this chapter, however, I argue that the controversy regarding the applicability of the PDE to the 2018 case is due to a categorical error misclassifying the case as a *medical* one and thus misapplying the PDE to evaluate *medical* effects: the preservation of human life and sterilization. I argue here, rather, that the 2018 case is instead properly classified as a *sexual* one, and that the PDE is properly applied to evaluate *sexual* effects: procreation and unity, and sexual pleasure *in isolation from procreation and unity*.

Commentators have related the 2018 case to the first 1993 case, assuming that both involve *medical* acts; however, I argue that the 2018 case is more like the second and third 1993 cases because all three involve *sexual* acts rather than *medical* acts: the first 1993 case is the only *medical* one of the four. The correct classification of the cases

is important because it determines the set of effects evaluated by the PDE in each case. *Medical* and *sexual* applications of the PDE involve different sets of effects. Generally, *medical* applications evaluate the *direct* preservation of human life (the good effect) against the *indirect* termination of human life (the bad effect). By contrast, *sexual* applications of the PDE generally evaluate *direct* procreation and unity (the good effect) against *indirect* sexual pleasure *in isolation from procreation* (the bad effect). In *medical* cases of hysterectomy, direct preservation of the woman's life (the good effect) is evaluated against indirect sterilization (the bad effect). In *sexual* cases of hysterectomy, direct procreation and unity is evaluated against indirect sexual pleasure *in isolation from procreation and unity*. The effects evaluated in cases of *sexual* hysterectomy are identical to those evaluated in cases of contraception, of which *direct* sterilization is a species. I argue that these effects are important to using the PDE to evaluating the 2018 case correctly.

First, this chapter discusses explanations offered by commentators for the relationship between the CDF's 1993 *responsa* to the CDF's 2018 *responsum*, emphasizing their attempts to show that the first case of the 1993 *responsa* meets the conditions of the PDE *as a medical* act, while the 2018 *responsum* does not. Next, it argues that the 2018 *responsum* has been misclassified with the first case of the 1993 *responsa* as a *medical* case, when it should be classified as a *sexual* case with the second and third cases of the 1993 *responsa*. Finally, it argues further that the CDF's judgement in the 2018 case is explainable by the PDE when it is considered as a *sexual* act, and it ends with some concluding remarks.

The Controversy of the 2018 *Responsum*

After the CDF issued its *responsum* to the 2018 case, the ethicists of the National Catholic Bioethics Center, NCBC (2018) argued that, in the 1993 case, “The CDF’s reasoning is an application of the traditional principle of double effect: the act itself is good in its means and in its end, and there is a due proportion between the harmful and unwanted effect of sterility and the directly achieved therapeutic purpose of protecting the woman’s health or life” (p. 666). Other commentators—Elliot Louis Bedford, Travis Stephens, and C. Ryan McCarthy (2018) and Cory Catron (2019)—have echoed this double effect analysis of the 1993 case by identifying the preservation of the woman’s life and sterilization as the respective good effect and bad effect of the hysterectomy.

By contrast, commentators have been divided in their reception of the CDF’s 2018 response. The ethicists of the NCBC wondered about its applicability to any known case (p.661). Bedford, Stephens, and McCarthy (2018 p. 655), Cory Catron (2019 p. 531), and Janet Smith (2018) have resisted its apparent departure from the Aristotelean-Thomist tradition, with Smith (2018) herself summarizing this perspective, writing that “if hysterectomies in both situations are sterilizations, they should be forbidden” (p. 654). Other commentators have taken different perspectives on the 2018 case but have nevertheless attempted to apply the PDE to explain the *responsum*. Nicanor Austriaco (2018) endorsed the judgement of the CDF and has attempted to apply the PDE to explain the *responsum*: “Here, the sterilization is a foreseen but unintended consequence of a surgical act whose object is to remove a defective organ whose continued presence in the woman’s body places her health and long-term well-being at risk” (p. 652). He

further comments that the PDE *cannot* be used to justify tubal ligation because that would constitute direct sterilization (p. 652).

Joshua Schulz and William Hamant (2020) have criticized the judgement of the CDF and have considered a double effect analysis similar to that offered by Austriaco (2018). Rather than identifying the good effect as the woman's long-term health, however, Schulz and Hamant (2020) identify "*mental or spiritual health*" as the good effect and sterilization as the bad effect produced by the hysterectomy in the 2018 case (p. 191). Schulz and Hamant (2020) then dismiss this application of the PDE as "inept" and unpersuasive" and have reasoned that since "the intention guides the way one carries out an action, there is no good way to describe Deborah's [the pseudonym they give to the woman in the case] hysterectomy as anything other than direct sterilization" (p. 193 [note added]).

Usefully for this chapter, Peter Cataldo (2019) and William Diem (2019) have suggested that the CDF's judgement invites a reconsideration of the assumptions informing the 1993 *responsa*, including a reevaluation of the meaning of 'procreation' within the Aristotelean-Thomist tradition. Diem (2019) considers the 2018 case through an application of the PDE, which he ultimately rejects; however, his reasons for denying the *medical* applicability of the PDE to the 2018 case support my argument that the PDE is *sexually* applicable to that case. Because of this, his attempt to apply the PDE and his subsequent rejection of that application is worth a closer look.

Diem (2019) has argued that much of the suspicion of the 2018 *responsum* has been due to the assumption by commentators that the case parallels the 1993 *responsa*.

Diem (2019) points to the commentary offered by the ethicists of the NCBC as illustrative of his claim. His points are important for my chapter here because they inform an identification of the good effect and bad effect of a *sexual* hysterectomy to be evaluated by the PDE. Diem (2019) writes:

First, the NCBC commentary seems to presume that the 2018 *responsum* is invoking double effect just as the 1993 *responsum* did. This is evidenced by the mention of “proportionate reason.” The commentary has thus overlooked the distinction that separates the case considered in 2018 from the cases considered in 1993—namely, that the bad “effect” (i.e. sterility or the incapacity to give birth to a viable child) is not an *effect* of the intervention but an *antecedent fact*. The 2018 *responsum* is patently not invoking double effect but is making a far more radical argument, albeit an argument that applies only in a very specific set of circumstances. (p. 542).

Diem (2019) questions why the NCBC ethicists take sterilization to be the bad effect of the 2018 case when, in fact, it is really *no effect at all*. As I will argue, sterilization is not an effect evaluated by a *sexual* application of the PDE; rather, sterilization is an effect of a *medical* application of the PDE, which does not fit the CDF’s presentation of the case.

Relatedly, Diem (2019) also questions why the ethicists of the NCBC deny that the avoidance of miscarriage (what the ethicists of the NCBC call “preventing danger to a child” p. 668, note 9) to be the good effect of the hysterectomy but assume sterilization to be the bad effect of the act. Instead, Diem (2019) argues that the rejection of the

avoidance of miscarriage as the good effect of the hysterectomy actually reinforces the CDF's claim that the 2018 case *does not* concern sterilization. Diem (2019) writes:

Second, the NCBC's insistence that a danger to a possible child cannot play a role in justifying a hysterectomy (a point directly derived from the principle of double effect and explicitly taken from the 1993 *responsa*) flies in the face of the clear reasoning offered by the 2018 *responsum*. It is the certain ante- or perinatal death of the child that makes anti-procreative action impossible, and that is what renders the deliberate prevention of conception licit. The NCBC commentary is, of course, right that danger to a possible child not yet conceived cannot be a motive *for sterilization*. That would violate the principle of double effect—the good effect (avoiding some danger to the child) would be achieved through the bad effect (sterilization)—and thus would constitute direct sterilization. But the whole point of the 2018 decision is that sterilization is not an applicable category in the specific case it countenances. (p. 543).

Diem (2019) argues here that the 2018 case cannot be about danger to possible children because that would presume sterilization as an effect of hysterectomy, which it is not.

Diem (2019) concludes that the insistence on parallelism leads to erroneous attempts to apply the PDE to the 2018 case because, unlike in the 1993 case, there is no bad effect produced by the surgery: “In 2018, the question is not whether, under the principle of double effect, sterilization is justified by eliminating danger to the mother. Rather, the hysterectomy considered in 2018 simply does not constitute sterilization, and therefore the question of whether the sterilization is direct or indirect simply does not

arise” (p. 537). I argue, however, that Diem’s criticisms of the parrel treatment of the 1993 and 2018 cases *do not* suggest the inapplicability of PDE to the 2018 case altogether. Instead, I argue only that a *medical* application of the PDE does not fit the description of the 2018 case and the corresponding attempted *medical* applications of the PDE have obscured the *sexual* reality of the case and corresponding *sexual* application of the PDE.

The 2018 *Responsum* Reconsidered

The CDF’s presentation of the 2018 case is highly suggestive of a *sexual* act. In the second and third 1993 cases, the CDF notes that hysterectomy and tubal ligation “do not have a properly therapeutic character but are aimed in themselves at rendering sterile future sexual acts freely chosen. The end of avoiding risks to the mother, deriving from a possible pregnancy, is thus pursued by means of a direct sterilization, in itself always morally licit, while other ways, which are morally licit, remain open to free choice” (CDF 1993). The CDF states here that the acts of hysterectomy and tubal ligation in the 1993 cases it considered are *not* acts with a “therapeutic” (that is, *medical*) character; rather, the CDF presents them as *sexual* because hysterectomy and tubal ligation in these types of cases function to prevent pregnancy and are *not* to save a woman’s life. The CDF’s suggestion of alternative ways to avoid pregnancy “which are morally licit” reinforces this reading of the case (CDF 1993).

Comparatively, the CDF notes that the uterus in the 2018 case is “no longer suitable for procreation,” which was *not* the situation in the 1993 cases, and its inclusion again suggests that the case is also *not* medical because procreation, and not the health of

the mother, is at issue (CDF 2018). This presentation of the case as *sexual* is strengthened by the CDF’s mention of “recourse to infertile periods”—that is, Natural Family Planning (NFP)—or “total abstinence” as alternatives to the hysterectomy, similar to the same in the 1993 case (CDF 2018). This reading suggests that the CDF approached the case as *sexual* rather than *medical*, and it also invites a literal interpretation of the CDF’s judgement that the 2018 case “does not regard sterilization” (CDF 2018). The case does not involve sterilization because sterilization is one of the effects of *medical* hysterectomy, but at issue is *sexual* hysterectomy with a different set of effects. As the CDF explains, the case does not regard sterilization because the woman is already sterile:

The medical procedure should not be judged as being against procreation, because we find ourselves within an objective context in which neither procreation, nor as a consequence, an anti-procreation action, are possible. Removing a reproductive organ incapable of bringing a pregnancy to term should not therefore be qualified as direct sterilization, which is and remains intrinsically illicit as an end and as a means (CDF 2018).

When taken literally, the CDF means here that the application of the PDE is *not* about sterilization because the case is *not* about medicine. In other words, sterility is the bad effect that would be considered in a *medical* application of the PDE to the case, but this bad effect is inconsistent with a *sexual* application of the PDE. It is this *sexual* application of the PDE that I argue explains the 2018 case and the second and third 1993 cases. To argue this, I now present a brief history of the *sexual* application of the PDE

within the Aristotelian-Thomist tradition in order to draw out its distinctiveness from the more common *medical* applications attempted by commentators to explain the 2018 case.

Reclassifying the 2018 *Responsum*

As I discussed in previous chapters, contemporary iterations of the PDE draw from the formulation developed by Jean-Pierre Gury (1866) who generalized its four conditions from St. Thomas Aquinas' commentary on legitimate self-defense (*Summa Theologiae*, 2-2, q. 64, a. 7 co.), Gury's formulation is comparable to the explanation of the PDE offered by the ethicists of the NCBC (2018): "The CDF's reasoning is an application of the traditional principle of double effect: the act itself is good in its means and in its end, and there is a due proportion between the harmful and unwanted effect of sterility and the directly achieved therapeutic purpose of protecting the woman's health or life" (p. 666).

The relevant good effect of the 2018 case, however, is *not* the preservation of human life, but rather procreation and unity. Likewise, the relevant bad effect of the 2018 case is *not* sterilization, but rather sexual pleasure *in isolation from procreation and unity*, just as it was in the previous chapters. The question, then, is whether the act considered in the 2018 case constitutes hysterectomy for *sexual* reasons and, thus, is essentially a type of contraceptive. Although the hysterectomy *appears* to have the same effect as contraception, the CDF states that it does not. The PDE offers a way to explain that difference.

Because it references Aristotelean-Thomist moral absolutes, Gury's first condition (or second in other traditional formulations) is what distinguishes formulations faithful to the Aristotelean-Thomist tradition from more revisionist ones that appear to depart from it. *Medical* or *sexual* applications of the PDE have the same structure, but they differ in the *effects* they each evaluate. While the *medical* application evaluates the preservation of human life against the termination of human life (or another contralife effect such as sterility), the *sexual* application evaluates procreation and unity against sexual pleasure *in isolation from procreation and unity*. It is this set of *sexual* effects I use to apply the PDE to the 2018 case.

A permissible sexual act will meet all the conditions of the PDE but an impermissible one will not. I reiterate that meeting the conditions of the PDE is *not* the *reason* that an act is permissible; rather, the PDE serves as an *explanation* for its permissibility. Acts are permissible because of the moral absolutes established by natural law, and the PDE serves as an explanation for those moral absolutes.

1. "A good end is required, or rather that the agent should not intend the bad effect, because otherwise he would intend disorder and hence do wrong."

Gury's first condition (listed as the second in other traditional formulations) requires that the bad effect not be intended by the moral agent. In this case, the bad effect is sexual pleasure *in isolation from procreation and unity*. The CDF specifies that the 2018 case does not involve sterilization, and, as such, "neither procreation, nor as a consequence, anti-procreative action, are possible" (CDF 2018). Curiously, the CDF mentions "recourse to infertile periods" and "total abstinence" as alternatives having the same

effect as the (equally permissible) hysterectomy, but the CDF *does not* mention contraception or tubal ligation as alternatives also having those same effects.

Diem (2019) interprets this silence as implying that the CDF's reasoning *cannot* be used to justify the use of sexual intercourse with a condom because the use of a condom would constitute the "frustration of the procreative potential of a conjugal act" in a way that sterility does not (p. 541). By contrast, Caltado (2019) reaches a different conclusion that the CDF's reasoning would justify tubal ligation (p. 1). According to double effect reasoning, however, neither condom usage nor tubal ligation meet the first condition of the PDE because acts of intercourse which include them are *per se* anti-procreative acts expressive of the intent *not to* procreate. This is true even in cases of transitory infertility, as when NFP is used, and permanent sterility. In both, fertility and sterility are circumstantial, accidental, and non-essential to the act itself. When understood through the Thomist concept of habitual intent, it does not matter if sexual intercourse is done in a state of permanent sterility or transitory infertility because the timing and circumstances are accidental to the procreative and unitive essence of sexual intercourse itself. So, having intercourse even in a state of sterility is expressive of at least the habitual intent to procreate if the circumstances were different, and so the first condition is met.

2. "It is required that the cause be good or at least indifferent."

This condition requires the act itself to be either good or neutral and refers to the Aristotelean-Thomist moral absolutes. This is arguably the most controversial condition of the 2018 case. According to the CDF, the hysterectomy in the 2018 is a morally

neutral, since it is neither procreative nor anti-procreative. This condition hangs on the CDF's use of the term 'procreative' to characterize the reproductive process in its entirety rather than just conception.

3. "It is required that the double effect equally follows from the cause."

This condition requires that the same act produce the bad effect and good effect. The bad effect in this case is the sexual pleasure *in isolation from procreation and unity*, and the good effect in this case is procreation and unity itself. An act of sexual intercourse even in a state of permanent sterility remains procreative because the sterility of sexual organs is accidental to the essential nature of the act itself.

4. "It is required that the good effect at least balance the bad. And indeed to be done properly, the reason is required to be proportionate to the action itself."

This condition requires that both effects balance with each other. This is interpreted to mean that the tolerance of the bad effect is the last resort to achieving the good effect. In *medical* cases, this is generally the most controversial condition. In the Aristotelean-Thomist tradition, sexual intercourse is the only acceptable way to procreate with sexual pleasure regarded as a moral good when experienced in conjunction with this end.

Concluding Remarks

The 2018 case is a sexual case of hysterectomy and so entails a different set of effects than a medical case of hysterectomy. Cases of medical hysterectomy entail the effects of the preservation of a woman's life (the good effect) and sterilization (the bad effect), while cases of sexual hysterectomy entail the effects of procreation and unity (the good effect) and sterilization (the bad effect). These medical effects describe the

first 1993 case considered by the CDF in its *responsa*, while the sexual effects describe the second and third 1993 cases considered by the CDF, as well as its recent 2018 case. The case of hysterectomy in the second 1993 case and the case of tubal ligation in the third 1993 case constitute species of contraception and so are impermissible. The case of hysterectomy in the 2018 case does not constitute contraception according to the PDF, making intercourse occurring after the hysterectomy a species of marital intercourse. The reason for this is that the functioning of the sexual organs is only accidental to the essential nature of marital intercourse itself, which is why intercourse during periods of temporary infertility (as in cases of NFP) and permanent sterility remains permissible. It is also the reason why intercourse using contraception is impermissible. The PDE gives access to these moral absolutes of the Aristotelean-Thomist tradition and serves as an explanation of them, but the PDE itself is not the reason for the permissibility or impermissibility of an act.

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