On the Decree of the Congregation for the Doctrine of the Faith Regarding Male Impotence

Rev. Urbano Navarrete, S.J.

Preface: The Conjugal Act and the Use of Prophylactics

by Rev. Kevin L. Flannery, S.J.

Recently a controversy has arisen among Catholic moralists—especially, but not solely, in the English-speaking world—regarding the use of prophylactics (condoms) for preventing the spread of HIV/AIDS.[1] The issue is an important one in its own right, but the heat it has generated is primarily a consequence of the fact that it is at the heart of philosophical and theological controversies about human action, about marriage, and about sexual morality. These latter two are closely related since the marital act is the moral standard for sexual activity.

Fr. Flannery thanks Fr. Urbano Navarrete, S.J., for his help and advice in the translation of his article. He is grateful also to Msgr. Gerard McKay, Prelate Auditor of the Roman Rota, for his efficacious help with the translation; and to the participants at the Westchester Institute Scholars Forum, Washington, D.C., November 3–4, 2005, especially Fr. Stephen Brock, Dr. E. Christian Brugger, Dr. Luke Gormally, and Dr. William Murphy, for their help in thinking through some of the issues discussed in this preface and in the article.

[1] See, for instance, B. Guevin and M. Rhonheimer, "On the Use of Condoms to Prevent Acquired Immune Deficiency Syndrome," *National Catholic Bioethics Quarterly* 5.1 (2005): 37–48; L. Gormally, "Marriage and the Prophylactic Use of Condoms," *National Catholic Bioethics Quarterly* 5.4 (2005): 735–749, and also Maurizio Faggioni, "AIDS: Questioni Disputate in Ambito Coniugale," *Antonianum* 72 (1997): 447–467.

Consider the case of the sterile married couple, one spouse of which carries the potentially lethal virus. Since they cannot contracept—going "contra" conception presupposes the possibility of conception, which in their case is excluded—would it not be moral for them to make use of a prophylactic simply in order to prevent the spread of the disease? One way of arguing against the use of prophylactics even in this case would be to cite statistics regarding the failure rate of prophylactics, whether in the prevention of pregnancy or in the prevention of transmission of disease.[2] But let us suppose that modern technology can develop a prophylactic which is 100 percent effective. Would its use be permitted?

At this point we do indeed find ourselves face-to-face with some basic questions in sexual morality and morality in general. Is impeding the possibility of new human life the only way of going against marriage, that is, of sinning sexually? Can all sexual sins ultimately be reduced to sins against life or against possible life? Or are there physical characteristics of the properly conjugal act that need to be respected in order for a sexual act within marriage to be moral? In particular, does the placing of a barrier between man and wife render the conjugal act incomplete, that is, not a conjugal act at all? But, if this is the approach we take, does not sexual morality become tainted by "physicalism," such as is rejected by John Paul II in his encyclical *Veritatis splendor*?

The question of physicalism is not one we can address here.[3] But it is demonstrable, at the very least theologically, that there are physical characteristics of the properly conjugal act that need to be respected in order for a sexual act to be moral. In May 1977, the Congregation for the Doctrine of the Faith issued a decree saying that a marriage can be consummated even if the man's ejaculation, which the Decree understands as completing conjugal intercourse, does not contain semen produced in the testicles.[4] The issue had been discussed, literally, for centuries but became more pressing during the early twentieth century when various European governments initiated programs of forced vasectomy. Men who received a vasectomy could still emit an ejaculate during the sexual act, although the fluid contained no sperm and so was incapable of bringing about conception. In ecclesiastical courts prior to the Decree, the practice was to consider such men not capable of consummating marriage. The Decree countermanded this practice. What it did, therefore, was to separate the issue of procreation or possible fecundity from the issue of the physical union of the two spouses. What was necessary was not semen capable of bringing about conception, but rather, given the other necessary conditions, merely ejaculation.

Now there can be no question that when the Decree speaks of ejaculation it means ejaculation of seminal fluid into the vagina of the woman. At least for a century-and-a-half (and arguably, for longer than that), the whole controversy had been about the *character* of "semination within the vagina" [*seminatio intra vaginam*].[5] In other words, it was presup-

[2] See, for instance, Jacques Saudeau, "Le 'sexe sûr' et le préservatif face au défi du SIFA," *Medicina e Morale* 4 (1997): 689–726.

[3] I do, however, address it elsewhere: Kevin L. Flannery, "Placing Oneself 'In the Perspective of the Acting Person': *Veritatis splendor* and the Nature of the Moral Act," *Live the Truth: The Moral Legacy of John Paul II in Catholic Health Care*, in Edward J. Furton, ed. (Philadelphia: National Catholic Bioethics Center, 2005), 47–67.

[4] The Decree is found in the appendix to the article, on pages 753 and 754.

[5] See, for instance, Urbano Navarrete, S.J., "De notione et effectibus consummationis matrimonii," *Periodica* 59 (1970): 623–635; see also Ignacio Gordon, "Adnotationes quaedam de valore matrimonii virorum qui ex toto secti sunt a tempore Gratiani usque ad breve 'Cum frequenter,'" *Periodica* 66 (1977): 202–210. The latter article was written upon the

posed that "semination" was required; the question was just whether semination required the presence of semen produced in the testicles. Moreover, it would be an invalid move to argue that semination could be "within" the vagina even if the man wears a condom during the sexual act, for, if *that* counted as semination within the vagina, the issue of semen produced in the testicles would never have been posed. The fact is, then, that if the Church were to say today that it is not incompatible with the nature of the conjugal act (i.e., with ethical sexual behavior) for the husband to use a prophylactic, it would be contradicting the 1977 Decree. And this teaching has nothing to do—at least directly—with contraception; it has to do with the physical characteristics of the conjugal act.

But despite the Decree, there does remain an issue to address. The argument has been made that the 1977 Decree, and indeed canon law itself when it describes the consummating conjugal act,[6] put forward only a legal understanding of the conjugal act that ought not to have overriding influence upon how we understand sexual morality. Such arguments have been made several times in the presence of the present author. The underlying motivation, which is perfectly understandable and, indeed, commendable, is to find some way to permit the sexual relations of married couples where one spouse has HIV/AIDS.

But such arguments—the arguments, that is, about the nature of the Decree—have been made before and decisively refuted. Soon after the publication of the 1977 Decree, a number of canonists argued that, and judges issued decisions as if, the teaching of the Decree was a matter of positive Church law. Sometimes the approach was more subtle than that—that is, it was argued or assumed that the marriage impediment of impotence did indeed pertain to Church doctrine and to natural law, but that the "rules" about the characteristics of the ejaculation pertained to positive law. In reaction to such arguments and judgments, Fr. Urbano Navarrete, S.J., of the Pontifical Gregorian University, who was a member of the commission for the revision of Canon Law (which was involved in the preparation of the 1977 Decree, as mentioned in Decree itself), wrote the article which is translated in this volume.[7] In it, he draws on his extensive knowledge of philosophy, theology, and canon law as they pertain to marriage; he was also able to draw on the extensive knowledge of Fr. Ignacio Gordon, S.J., his senior colleague in the same University, who had also contributed to the process which finished with the Decree.[8]

Fr. Navarrete's article is of great interest and importance, not only because it tells us much about how the Congregation of the Doctrine of the Faith understood the Decree, but also for what it says about the relationship between positive Church law, on the one hand, and sacred doctrine and natural law, on the other. For this reason it seemed like a good idea to make the article more easily accessible to scholars working in English.

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request of the Congregation for the Doctrine of the Faith while its commission was preparing the 1977 Decree.

[6] In canon 1061 §1 [CIC (1983)], for instance, where we read: "A valid marriage between the baptized is called 'ratified only' if it has not been consummated; it is called 'ratified and consummated' if the spouses have performed between themselves in a human fashion a conjugal act which is suitable in itself for the procreation of offspring, to which marriage is ordered by its nature and by which the spouses become one flesh."

[7] Fr. Navarrete eventually became Dean of the Canon Law Faculty and Rector of the University itself. The translation of Fr. Navarette's article begins on page 736.

[8] For solid evidence of this vast knowledge, see the two articles mentioned in note 6.

ON THE NATURE AND APPLICATION OF THE DECREE OF THE CONGREGATION FOR THE DOCTRINE OF THE FAITH OF MAY 13, 1977, REGARDING MALE IMPOTENCE

Rev. Urbano Navarrete, S.J.

In its declarative section, this Decree responds to two questions, posed progressively:

- Whether the impotence that invalidates marriage consists in the incapacity, both antecedent and perpetual, whether absolute or relative, of completing conjugal intercourse.
- If affirmative, whether the ejaculation of semen produced in the testicles is necessarily required for conjugal intercourse.

To the first question, the answer is affirmative; to the second, negative.

After the promulgation of the Decree, two major questions were debated, from whose varied solution different consequent practices of great weight emerged.

The first question is this: What is the nature of the Decree? Is it a declaration of natural law or does it have the nature of positive Church law? The other question, which depends on the first, is this: What are the consequences of the Decree for the marriages of those who have undergone vasectomies, which were either still under judicial consideration or already declared null at the time of the promulgation of the Decree? And what about the consequences for men upon whom a prohibition had been imposed against their proceeding to new nuptials?

These questions were not always put forward and resolved with the clarity and certitude which the gravity of the matter demands. So we read, for example, in a case heard before Ferraro,[1] January 10, 1978: [306]

> By way of conclusion, the following two questions might reasonably be asked:
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> A) The above mentioned Decree, does it have the force of positive law? *Reply*: Affirmative, for these reasons:
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> a) since the Decree is strictly doctrinal or concerns matters of faith and morals;

The Congregation for the Doctrine of the Faith's "Decree Regarding Impotence Which Invalidates Marriage" was originally published in *AAS* 69 (1977), 426. The Decree, in both English and Latin, is found in the appendix to the present translation, on pages 753 and 754. Fr. Urbano Navarrete's original article was published as "De natura et de applicatione Decreti S. Congregationis pro Doctrina Fidei diei 13 maii 1977 circa impotentiam viri," in *Periodica* 68 (1979): 305–326. In the notes that follow, words in brackets were appended by the translator; all others are Fr. Navarrete's. In the notes, the abbreviation AAS stands for *Acta Apostolicae Sedis*. In the text, when something is emphasized, the emphasis is Fr. Navarrete's unless otherwise indicated. The translator has also inserted into the translation, in brackets, the original page numbers of the article as it appeared in *Periodica*.

[1] [Msgr. Nicola Ferraro, who was a Prelate Auditor of the Roman Rota at the time. He is referred to as the "Ponens" (presiding judge) of the case.—*K.F.*]

b) since the Commission for the revision of the Code of Canon Law was involved in its composition;

c) since the Roman Pontiff approved it in specific form;[2]

B) The same Decree, does it have retroactive force? *Reply*: Negative.

It is true that the Decree presents itself as a declaration and "provision is explicitly made ... for things past" (can. 10),[3] for it twice uses expressions such as "has always retained" and "this practice having been examined"; but, as is apparent, it does not refer to previous positive law, nor does it insist upon retroactive force.[4]

I confess that, in reading these words, I do not quite see in what respect the Decree can be said to have "the force of positive law," nor in what sense a question is raised about "the Decree's retroactive force." Nor do the reasons brought forward for either question appear to me to be consistent. Since, in this particular case, male impotence due to the incapacity to ejaculate testicular semen is not at issue, such assertions on the part of the *Ponens* have no bearing on the case. It is known, nonetheless, that after the promulgation of the Decree a number of decisions were made by ecclesiastical tribunals which rested upon a false basis since the nature of the Decree was not rightly understood, as we shall see below.

In my opinion, no serious doubt can be raised about the nature of the Decree: it is an authentic declaration, issued by virtue of the power of the magisterium of the Church, regarding the natural law [307], i.e. regarding the requisites which, by the very nature of man and the very institution of marriage as instituted by God, are demanded of a man if he is to be capable of contracting marriage. The Decree has neither the nature nor the force of positive Church law. Thus, the norms which are set out in the Code of Canon Law regarding interval, retroactivity, and the interpretation of ecclesiastical laws cannot be applied to the Decree since such norms are applicable only to the positive laws of the Church.

I
The Decree Is an Authentic Declaration of the Natural Law

Today there is hardly anyone who calls into doubt that, for someone to be capable of contracting marriage, the capacity to perform conjugal intercourse is required

[2] [The original (cited below, in note 4) adds another point: "d) because at the time the same Roman Pontiff, on January 28, 1978, deigned to declare before the Sacred Roman Rota that he approved it specifically" [AAS 20 (1978): 183–184]; the Latin is: "d) quia, demum, idem R. Pontifex, die 28 januarii a. 1978, coram S. R. Rota declarare dignatus est se illud specifice approbavisse."—*K.F.*]

[3] [1917 Code of Canon Law, c. 10: "Laws pertain to things future not to things past, unless provision is explicitly made in them for things past."—*K.F.*]

[4] Nicola Ferraro, "Nullitatis Matrimonii (M. - D.G.) (ob impotentiam viri et ob statum mentalem eiusdem viri). Sententia definitiva d. 10 jan. 1978 coram R.P.D. Nicolao Ferraro, Ponente," *Monitor Ecclesiasticus* 103 (1978): 284.

"by the very law of nature." So, the first of the two queries that the Decree poses and then resolves clearly has a merely preparatory function with respect to the second.

There is no one indeed who does not know that, historically, there have been authors who have considered those incapable of performing sexual intercourse capable of entering into marriage, provided the other party knows of the impotence and enters into marriage with a view to living chastely. Basilius Pontius (1570–1629) defends this position in an abrasive manner, accumulating arguments and authorities (understood according to his own lights) in order to prove his thesis.[5] At the time of the codification of the Code of Canon Law this position was entirely obsolete. Nonetheless, the words, "whether known to the other or not" [308] and "by the very law of nature," were inserted into canon 1068 §1 so that the teaching on impotence might be put forward more clearly and in a more complete manner.[6]

In 1905, Fr. Benedetto Ojetti proposed the following draft of the canon:

> Impotence with respect to coitus, i.e., the inability, antecedent and perpetual, to have physically complete intercourse, *by the very law of nature*, whether the impotence be had on the part of the man or on the part of the woman, *whether known to the other party or not*, whether absolute or relative, invalidates marriage.

And Fr. Ojetti notes with regard to this draft:

> It would seem that no difficulty could arise with respect to the proposed canon, at least with respect to that which is affirmed in it. The only thing that needs to be said would have to do with the phrase, "whether known to the other party or not." So, these words are included because many learned men, such as, for example, the Master of the Sentences, Paludanus, Petrus Soto, Navarrus, Vázquez, Pontius, Gónzalez, Gotti, and others have said that marriage can licitly and validly be contracted by the impotent provided that the party who is not impotent is made aware of the impotence of the other. This position is wholly to be abandoned, as is clear both because of the nature of the thing and because of the Constitution of Sixtus V, cited above.[7]

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[5] Basilius Pontius, *Tractatus de Sacramento Matrimonii*, lib. VII, cap. 55–59, 67–68. On Pontius's position, see David Marie-Bernard, *Impedimentum impotentiae, estne iuris naturalis an ecclesiastici? Crisis sententiae B. Pontii*, doctoral dissertation in the Faculty of Canon Law, Gregorian University, 1978.

[6] [Canon 1068 of the 1917 Code of Canon Law reads as follows: "§1. Antecedent and perpetual impotence, whether on the part of the man or on the part of the woman, whether known to the other or not, whether absolute or relative, by the very law of nature invalidates marriage. §2. If there is doubt regarding an impediment of impotence, whether a doubt of law or of fact, the marriage is not to be impeded. §3. Sterility neither invalidates nor impedes marriage."—*K.F.*]

[7] B. Ojetti, *Votum Consultoris: Codex Iuris Canonici*, lib. III, tit. VII, *De Matrimonio*, cap. V, *De impedimentis dirimentibus aetatis, criminis, raptus, impotentiae*, Rome: Typis Polyglottis Vaticanis (1905), 22. [The document of Sixtus V's referred to is apparently "Cum frequenter."—*K.F.*]

What I know is this: That after the promulgation of the Code, up until very recent years, no one has called into doubt that the impediment of impotence renders a marriage null by the very law of nature. No one else has put forward the position of Pontius. It is verifiable, however, that in the Commission for the revision of the Code of Canon Law, one Consultor proposed that the words "by the very law of nature" be deleted from canon 1068 §1 since he had doubts whether or not this impediment was of natural law. But all the others recommended that the words not be deleted, although they preferred that, in order to signify the same thing, instead of "by the very law of nature" [309] the phrase "on account of the very nature of marriage" be used, since this locution was viewed as more apt in this context.[8]

Now if the impediment of impotence is of natural law, it is clear that the doubts that could exist regarding the limits and scope of this impediment are doubts that have to do with natural law—in the sense that our minds do not achieve certainty as to whether certain anomalies and afflictions regarding the sexual sphere constitute impotence or not. So, it appears evident that the doubt resolved by the Decree of the Sacred Congregation for the Doctrine of the Faith—that is, whether the ejaculation of semen produced in the testicles is necessarily required for conjugal intercourse—is a doubt regarding natural law.

Nonetheless, after the promulgation of the Decree, there were those who said that the impediment of impotence was indeed of the natural law but that the necessity for conjugal intercourse of an ejaculation of semen produced in the testicles was a prescription of positive Church law. Thus, they said, what the Church has prescribed it can also abrogate. The force of the Decree is thereby reduced to the abrogation of the positive law of the Church which required ejaculation of testicular semen in order for there to be conjugal intercourse.

First of all it should be noted that we are dealing with an absolute impediment. So, if the Church by means of positive law prescribed the necessity of being able to ejaculate testicular semen, by that very prescription it would, in an absolute and perpetual manner, be depriving of the right to marry all those men who have undergone vasectomies and are not able to emit testicular semen—men who, however, would presumably be capable of marriage under natural law. No one, however, can fail to see how alien such a way of proceeding would be to the principles which govern the Church's matrimonial law. Therefore, the explanation according to which the necessity of testicular semen for conjugal intercourse would be positive law of the Church is *a priori* unacceptable. [310]

Moreover, the presupposition is utterly false. History testifies with abundant evidence that the vexed question of the necessity of testicular semen for conjugal intercourse has always been about knowledge of natural law and never about the interpretation of the positive law of the Church. In a matter so clear, let it be sufficient to recall just a few things:

[8] *Communicationes* 6 (1974): 182, 186; 7 (1975): 53–56.

1) Before the Brief "Cum frequenter" of Sixtus V (June 22, 1587), disputes regarding the capacity or lack thereof of eunuchs or castrati to enter into marriage definitely had to do with requirements issuing from natural law, or from the nature of marriage as instituted by God, and not at all with the interpretation of the positive law of the Church.[9]

2) The Brief "Cum frequenter" certainly intends to resolve a question of natural law, as is clear from the tenor of the Brief and from its express words: "We, therefore, noting that, according to canonical sanctions and *the order of nature*, those who are by nature frigid[10] and those who are impotent are considered not capable of contracting marriages …, you are to see to it that those who thus contract de facto marriages be separated and *you are to declare the marriages themselves so contracted to be null and invalid*."[11]

3) After the Brief "Cum frequenter," it was understood as an authentic interpretation of natural law.[12] Indeed, there were those who held it to be an infallible declaration of the natural law—which is obviously an exaggeration. Thus writes Cappello:

> The disposition treated in the quoted letter of Sixtus is not disciplinary but an *authentic* and *infallible* [emphasis Cappello's] declaration of divine natural law, which holds therefore for everyone, also for non-believers. It introduces or institutes nothing new. [311] Unions are declared null and without effect "howsoever" and "by whatever means" they were initiated, although [the individuals are exhorted] to live chastely and to look to each other's mutual help.[13]

It is clear that the authors who believed that the capacity to ejaculate testicular semen is not necessary did not contribute to the Brief a comparable level of doctrinal influence, and they did not call into doubt that the Brief deals with a question pertaining to natural law.

4) In the nineteenth century, there began to be performed surgeries in which all or some of the postvaginal organs in the woman were either removed or ligated, or the vasa deferentia in the male were severed. Since that time, the whole bitter dispute—which has continued to our day—about the impotence (or not) of a woman who has undergone a hysterectomy or of a man who has undergone a vasectomy has without doubt turned on a question of natural law. That is to say, it has been about determining

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[9] See I. Gordon, "Adnotationes quaedam de valore matrimonii virorum qui ex toto secti sunt a tempore Gratiani usque ad breve 'Cum frequenter,'" *Periodica* 66 (1977): 171–247.

[10] [Although Fr. Navarrete gives *frigidi sunt naturae et impotentes*, the Brief apparently reads, *frigidae sunt naturae et impotentes* (Petrus Gasparri, ed., *Codicis iuris canonici fontes* [Rome: Typis Polyglottis Vaticanis, 1947], I 298).—*K.F.*]

[11] [Although Fr. Navarrete gives *matrimonia ipsa sic contracta, nulla et invalida esse decernas*, the Brief apparently reads, *matrimonia ipsa sic de facto contracta, nulla, irrita et invalida esse decernas* (Gasparri, I 299).—*K.F.*]

[12] [The antecedent of the word *it* is not clear: the Latin reads: "3) Post Breve 'Cum frequenter,' illud intellectum est.…"—*K.F.*]

[13] Felice M. Cappello, *De matrimonio* (Turin: Marietti, 1950), 328–329.

the requirements which arise not from the positive law of the Church but from the very exigencies of man and of marriage as instituted by God. It seems incredible that a question which has so exercised writers and judges and even the highest authorities should be reduced to the interpretation of a positive law of the Church.

5) All the interventions of the Congregation of the Inquisition or the Holy Office which in any way touch upon this question, such as the responses about not impeding the marriage of women who have undergone hysterectomies or of men who have undergone vasectomies, presuppose that it is doctrinal matter or matter pertaining to natural law. Nor would such things be within the competence of this Congregation if they concerned only the interpretation and application of the positive law of the Church.

6) The concept of matrimonial consummation, and therefore the limits of the power of the Roman Pontiff to dissolve marriages that are ratified but not consummated, are certainly not [312] matters of positive human law. Therefore the Sacred Congregation for the Sacraments in considering consummation of marriage has always presented criteria founded on the concept of natural conjugal intercourse, along with the doubts and hesitations which adhere to a subject matter so resistant to human comprehension. Had it been possible to constitute or define by means of the positive law of the Church the concept of a consummated marriage, there would be no reason why the Roman Pontiff should be worried about overstepping the limits of his power to dissolve ratified but not consummated marriages, since the determination of the very concept of intercourse that consummates marriage would always in the end depend upon him. A "most serious question" regarding the indissolubility of a ratified and consummated marriage would hardly make sense.

7) The way of speaking and proceeding of ecclesiastical tribunals and especially of the Sacred Roman Rota, in treating cases of nullity by reason of impotence due to the incapacity to emit testicular semen, presupposes that it is not a question of the positive law of the Church but a doctrinal matter or one pertaining to natural law. Indeed, the chief reason why the Decree of the Sacred Congregation for the Doctrine of the Faith was issued was that, in interpreting this aspect of natural law, jurisprudence was nearly unanimous in refusing to recognize a doubt of law. Rather, in issuing judgments, it was holding as certain doctrine that the ejaculation of testicular semen was required for conjugal intercourse. For if it had recognized a doubt of law, it would have had to decide in favor of the bond, according to canon 1014.[14] Had jurisprudence done this, the Decree would not have been issued since it would not have been necessary.

8) All the studies and discussions conducted in these recent years in an official manner have presupposed that the issue turns on a question of natural law. [313] Witness the extensive studies conducted by the Preparatory Commission on the Sacra-

[14] [Canon 1014 of the 1917 Code reads: "Marriage enjoys the favor of the law; therefore, when there is doubt, the validity of a marriage is to be affirmed, until the contrary is proved (without prejudice to canon 1127)." Canon 1127 reads: "In doubtful matters, the privilege of the Faith enjoys the favor of the law."—*K.F.*]

ments of the Second Vatican Council, the Relator of which was Msgr. Pinna.[15] And witness the studies and the entire discussion of the Commission for the revision of the Code of Canon Law.[16] Witness also the studies and discussions—the substance of which, although not published, can be warranted—in the Congregation for the Doctrine of the Faith concerning the Decree in question. Why would there have been such anxieties if it was simply a matter of determining the positive law of the Church?

9) The Roman Pontiffs themselves, when they have touched upon this question, have treated it as something that does not pertain to the power of administration but to the *magisterium of the Church*. Witness Pius XII in an allocution to the Italian Society of Urology on October 8, 1953.[17] Witness especially Paul VI, in an allocution to the Prelates of the Sacred Roman Rota, January 28, 1078, making explicit reference to the Decree we are considering and without doubt intending to confront certain difficulties arising on the occasion of the Decree's publication:

> But the most relevant point, among those mentioned above, remains your well-attested willingness to follow the *indications of the magisterium*. In this regard, the Decree, published in May of last year by the Sacred Congregation for the Doctrine of the Faith and explicitly approved by Us, appears to be a particularly significant "test.…"[18] We do not doubt that such *principles of doc-*

[15] See *Quaestio* IV, *De Matrimonio*, 4, *De viri impotentia* (Rome: Typis Polyglottis Vaticanis, 1961). [Msgr. Giovanni Maria Pinna was a Prelate Auditor of the Roman Rota at the time. The translator has been unable to locate the publication mentioned by Fr. Navarrete. See, however, *Acta et Documenta Concilio Vaticano Il apparando, series II (praeparatoria); vol. III: Acta commissionum et secretariatuum praeparatoriorum Concilii Oecumenici Vaticani II; pars I: Commissiones: Theologica, De episcopis et dioeceseon regimine, De disciplina cleri et populi christiani, De religiosis, De disciplina sacramentorum* (Rome: Typis Polyglottis Vaticanis, 1969), 522–523. There, as an appendix, one finds a report from the Pontifical Commission on the Discipline of the Sacraments, of which Msgr. Pinna was a member, to the Central Pontifical Commission for the preparation of the Second Vatican Council; the title of the *relatio* is *Circa impedimentum impotentiae in viro*.—*K.F.*]

[16] See *Communicationes*, 6 (1974): 177–178; 7 (1975): 53–56.

[17] AAS, 45 (1953), 676–677. He says, in precise terms: "It is a mistake to affirm that medicine and biology would have a different concept of the 'capacity for intercourse' than do theology and canon law, and that this latter intends with this expression something other than that which nature and the Creator have determined. You need only to read the text of canon 1068 on physical 'capacity' in order to see that it intends to speak not of positive law but of natural law."

[18] [The word *test* is put in quotation marks probably because at the time the English word was not yet as common in Italian as it is today. (The Holy Father spoke in Italian.) Fr. Navarrete leaves out at this point a note giving the reference for the Decree—AAS 69 (1977), 426—and also a number of lines of the Holy Father's text, which read as follows: "You know well the origin, value and the motivations of the Decree: preceded by long and careful studies (as the brief introduction, which serves as a preamble, recalls), and supported by the authoritative opinion of the Pontifical Commission for the Revision of the Code of Canon Law, the Decree consists in two important responses, which will find frequent application in your own work." This is immediately followed by the remark, "We do not doubt that such principles of doctrine will be …," included in Fr. Navarrete's text.—*K.F.*]

> *trine* will be for you a point of reference and guide while sitting in judgment—and We shall have yet another demonstration of the prompt *adhesion to the magisterium* which this renowned tribunal of the Holy See has for centuries always professed [emphasis ours].[19] [314]

Taking into account all these things, there is no—or very little—room for doubt that the vexed question regarding the necessity (or not) of an ejaculation of testicular semen for conjugal intercourse is not about the positive law of the Church but about our knowledge of the natural law. The cited Decree, therefore, as can undoubtedly be elicited from the words of Paul VI, is of a doctrinal character: that is, it authoritatively declares[20] the natural law regarding the question debated for centuries: whether or not the capacity of ejaculating testicular semen is required in order that a man be capable of completing conjugal intercourse.[21] [315]

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[19] [That is to say, Fr. Navarrete's.—*K.F.*] AAS 70 (1978): 183–184.

[20] [The word *declarat* could be translated "clarifies"; but in employing that translation, besides weakening the implied legal authority of the document referred to, one loses the connection with standard canonical language which speaks, for instance, of "an authentic declaration the natural law." Note too that, later in the present article (i.e., on page 747), Fr. Navarrete discusses the difference between declaring and interpreting.—*K.F.*]

[21] In a case heard before Valentini, December 30, 1977, of the regional *Tribunal Flaminium*, Italy, the attempt was made to prove that the Decree of the Congregation for the Doctrine of the Faith defined a certain concept of conjugal intercourse with respect to the concept of the consummation of marriage, but did not touch the concept of impotence. It was thus concluded that as a consequence of the Decree the concept of impotence had changed not at all and that, therefore, in cases regarding nullity it was still possible to apply the concept of impotence employed by jurisprudence before the Decree; that is, in order for a man to be potent, required in him is the capacity of ejaculating semen produced in the testicles. Those who have undergone vasectomies are therefore to be considered impotent, just as they were considered before the promulgation of the Decree. Now, no one does not see that this interpretation of the Decree is wholly arbitrary and entirely destitute of foundation. It is not possible to doubt, as is unmistakably clear from the history of the question and from the very words of the Decree, that the Sacred Congregation intended to resolve the vexed question regarding the impotence of a man with respect to testicular semen. The Sacred Congregation authoritatively declared that the capacity of ejaculating semen produced in the testicles was not necessarily required in a man in order that he might be capable of completing conjugal intercourse and, therefore, of entering into marriage. The cited judgment also falls into error when it applies the norms of canon 17 to the Decree of the Sacred Congregation, as is apparent from what is said in the text. But this application is refuted in an efficient manner by Neri Capponi, who comments on the judgment. See *Il Diritto Ecclesiastico* 3–4 (1978), part 2, 53–63. [Valentini was apparently a judge in the tribunal of the ecclesiastical region of Emilia-Romagna; the tribunal there is called the *Tribunal Flaminium*, after the ancient ecclesiastical region of Flaminia, which comprised Bologna, Ravenna, Ferrara and Forlì. Canon 17 of the 1917 Code reads as follows: "§1. Laws are authentically interpreted by the legislator or his successor and by him to whom the power of interpreting is conferred by the same. §2. Authentic interpretation propounded as law has the same force as the law itself; and if it only interprets the words of a law which are in themselves certain, it need not be promulgated and it has retroactive force; if it restricts or extends a law or clarifies a doubtful law, it is not retroactive and needs to be promulgated. §3. If an interpretation is

II
Consequences of the Present Argument

1. *The norms established in the Code of Canon Law regarding interval, retroactivity, and the interpretation of ecclesiastical law do not apply to the Decree.*

A certain official has communicated to me a decree, issued by another tribunal at the end of November 1978, removing a prohibition on entering into further nuptials imposed upon a certain man whose marriage had been declared null on April 27th, that is, two weeks before the Decree of the Sacred Congregation for the Doctrine of the Faith was promulgated. The reason for the nullification was the man's impotence due to the incapacity of emitting semen produced in the testicles. In its expositive section, the decree of the tribunal, having first made reference to the text of the Decree of the Sacred Congregation for the Doctrine of the Faith, argues in the following manner:

> The title of an official decree or the terms employed in resolving doubts or queries posed or, in a word, the mode of publication of a decree make more apparent the mind of the legislator. The Sacred Congregation for the Doctrine of the Faith wished to interpret authentically the (queried) notion of the impotence that invalidates marriage.
>
> Such being the case, taking into account the general norms set out in canon 17 for the interpretation of law,[22] in the matter at hand the effects of the law are not retroactive. In its second paragraph, this canon says: "Authentic interpretation propounded as law has the same force as the law itself; … if it restricts or extends a law or clarifies a doubtful law, it is not retroactive and needs to be promulgated." Force of law comes into effect three months after the day corresponding to the number of the official commentary, i.e., of the *Acta Apostolicae Sedis*, in which a decree is published (see canon 9).[23]
>
> These legal matters having thus briefly been clarified, in the case before us the decision is to be made accordingly.
>
> Mr. […] on […] of this year, urged that, since the prohibition imposed by a decree of this tribunal has been removed, permission be granted to him to enter into new nuptials. The motive of the petition was the above-mentioned authentic interpretation which, from the month of November of the previous year, has obtained the force of law.

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issued either as a judicial decision or as a rescript in a particular matter, it does not have the force of law and binds only the persons and treats only the matters with respect to which it was issued.—*K.F.*]

[22] [See note 21 above.—*K.F.*]

[23] [Canon 9 (of the 1917 Code of Canon Law): "Laws issued by the Apostolic See are promulgated by publication in the official commentary, the *Acta Apostolicae Sedis*, unless in particular cases another means of promulgation should be prescribed; and they take effect three months after the day corresponding to the number of the *Acta*, unless according to the nature of the matter they bind immediately or in the law itself a shorter or longer interval should be specifically and expressly established."—*K.F.*]

> There remains no doubt that the prohibition imposed is now [316] without any juridical force and is therefore to be removed since the notion of impotence that invalidates marriage, as once derived from canon 1068,[24] is subject to a new authentic interpretation by order of the Decree of the Sacred Congregation for the Doctrine of the Faith, referred to above.
>
> In light of these findings, both in law and in fact, … the undersigned decree that the prohibition imposed on the originator of the case be removed so that […], unless otherwise impeded, he might be able to enter into marriage.

The fundamental error of such argumentation lies in the fact that the norms of positive law governing interval, retroactivity, and interpretation of the positive laws of the Church are being applied to a decree of the Sacred Congregation for the Doctrine of the Faith, which is not a positive law of the Church but an authentic declaration, of a doctrinal character, regarding natural law. Such argumentation rests upon a sort of juridical positivism wholly alien to the law of the Church.

It is clear, first of all, that the Decree exerts all its compulsory force from the moment of its promulgation—and the norm regarding an interval of three months from the day of promulgation in the *Acta Apostolicae Sedis* is not to be applied to it, for this holds only for positive laws of the Church.

For the sake of clarity, we can distinguish a dual force in the Decree: (1) that which has to do with the impediment of impotence itself; (2) another which pertains to the obligation of adapting judicial and administrative practice to the teaching put forward in the Decree.

As to the first, since the Decree is a doctrinal declaration regarding that which is required by natural law in order for there to be conjugal intercourse, it is clear that the Decree cannot have any objective influence in constituting the impediment of impotence. The Decree does not treat the objective reality of the impediment of impotence with respect to its scope or with respect to the limits by which it is circumscribed, nor with respect to its force in rendering a person incapable of marriage. In all these respects, the impediment of impotence objectively remains exactly the same as before the Decree. The effect of the Decree [317] is limited to resolving authoritatively, by the power of the magisterium, a doubt which existed in our imperfect knowledge of the objective reality regarding that which, by the nature of man and of marriage, is required for conjugal intercourse.

As to the second, it is clear that the Decree introduces an obligation on all those involved in the judicial and administrative affairs of the Church bearing upon the teaching of the Decree. This obligation arose, however, from the moment of the Decree's promulgation, without provision for an interval of three months. The reason is that such an obligation rests upon knowledge of objective truth regarding the impediment of impotence, not upon any positive law. Judges—and, for a similar reason, those who decide administrative matters—in order to pass judgment, must have moral certitude regarding the matter to be decided by the judgment (can.

[24] [For canon 1068, see note 6 above.—*K.F.*]

1869).[25] Now, however, in the matter before us, the doubt of law regarding the necessity (or not) of testicular semen for conjugal intercourse having been resolved by the Decree, judges are possessed of certitude, resting upon the magisterium of the Church, that testicular semen is not required for conjugal intercourse. Thus, they are obliged to make judgments in accordance with this objective certitude. There is no provision in doctrinal decisions of the magisterium for *interval*—nor is such a thing possible, given the nature of the matter.

Similarly, to speak of the *retroactivity* of the Decree introduces a confusion. The principle of the retroactivity of law pertains to positive human law and has a place only with respect to the juridical effects that depend on the will of the legislator. Thus, for example, in the radical sanation of a marriage, by the will of the legislator the canonical effects of marriage are made retroactive to the moment of the celebration of the marriage. But the Church cannot bring it about that the creation of the bond of marriage and the confection of the sacrament of some invalidly celebrated marriage is retroactive to the moment of the celebration, for this does not depend on the will [318] of the Church but rather on the exigencies of the natural and supernatural order established by God.

Given this, the legislator rightly established the general principle according to which "laws concern things future, not things past, unless express provision is made in them regarding things past" (can. 10); and, again, "authentic interpretation ... if it restricts or extends a law or clarifies a doubtful law, *is not retroactive* and needs to be promulgated" (can. 17 §2). These principles, as is perfectly apparent, are applied to the positive laws of the Church—but not at all to doctrinal declarations, although from such declarations juridical effects follow.

If the discourse is about the *retroactivity* of the Decree of the Sacred Congregation for the Doctrine of the Faith, the word "retroactivity" is being employed in a wholly inappropriate sense to signify that, in the objective order (and not by force of the Decree), the ejaculation of testicular semen was not required before the Decree, just as it is not required now, after the Decree has been issued. And, therefore, marriages initiated by those who had undergone vasectomies before the Decree were valid for the same reason as those initiated by such individuals after the Decree. But this is due not to the juridical efficacy of the Decree, which in this respect does not and could not exist, but to the objective order of the nature of man and of marriage,

[25] [Canon 1869 of the 1917 Code of Canon Law reads as follows: "§1. In order to pronounce any judgment, judges must have moral certitude about the matter to be decided by the judgment. §2. A judge must draw this certitude from acts and from things proved. §3. A judge, however, must assess proofs according to his own conscience, unless the law expressly decrees something regarding the efficacy of some proofs. §4. A judge who has not been able to arrive at this certitude is to pronounce that the right of the plaintiff is not established and is to dismiss the matter, unless it concerns a case enjoying the favor of the law, in which case the judge must pronounce for the law, but without prejudice to canon 1697, part 2." Canon 1697, §2, provides an exception in the case of doubt to the principle that possession enjoys the favor of the law.—*K.F.*]

which the Decree authentically declares. In a case heard before Raad,[26] March 15, 1978, on which occasion this question was efficiently disentangled, it was correctly concluded:

> Substantially, what is at issue is not whether or not the Decree is retroactive; at issue is rather the question whether a marriage initiated before the Decree, can be declared null because of a lack of semen produced in the testicles. And we respond in the negative.[27]

For the same reasons, the norms contained in canon 17 for the *interpretation* of positive laws of the Church cannot be applied to this Decree. [319] It is to be noted, as is acutely observed in the above-mentioned judgment issuing from the hearing before Raad, that the rotal jurisprudence regarding the necessity of semen produced in the testicles was not law but rather the application of a particular opinion or judgment regarding that which the law of nature requires for conjugal intercourse. The Auditors of the Rota considered this opinion or judgment to be certain, although many authors—and these of great note—have maintained the contrary judgment. The Decree declares simply—and, indeed, as certain doctrine—that the ejaculation of testicular semen is not required in order to have conjugal intercourse.

Nor, properly speaking, is it possible to say that the Decree *interprets* natural law, for it does not interpret it but rather declares it. For the rest, no one is unaware that, when the discourse is about natural "right" or "law," the words "right" and "law" are employed in an analogical sense relative to the same words used of positive human "right" and "law."[28] For this reason, one must be careful lest conceptual categories—and especially positive prescriptions—which hold of human right and laws be transferred and applied indiscriminately to natural "right" or "law."

2. It is impossible to remove a "prohibition" from men whose marriage has been declared null due to the incapacity of ejaculating semen produced in the testicles.

It is amazing that on the occasion of the promulgation of the Decree so many confusions emerged regarding this matter, as is evidenced by the argumentation, discussed above, adduced by that tribunal in order to remove the "prohibition" on the man whose marriage had been declared null because of an incapacity to emit

[26] [Msgr. Ignatius Raad, who was a Prelate Auditor of the Roman Rota at the time.—*K.F.*]

[27] *Monitor Ecclesiasticus* 103 (1978): 305–306; cf. 298–299.

[28] [In this essay, I have translated both *ius naturale* and *lex naturalis* as "natural law" since it is clear that with either word Fr. Navarrete refers to what we call "natural law." Here, however, he alludes to the verbal distinction between *ius* (right) and *lex* (law). That he speaks of them together in this way ("quando sermo sit de 'iure' vel 'lege' naturali"), alluding to no distinction of *meaning*, is evidence that he understands *ius naturale* and *lex naturalis* as both referring to the same thing: i.e., natural law. Had Fr. Navarrete ever used the phrase *iura naturalia* (which he never does), then the translation of that phrase would have had to be "natural rights"; but our "natural law" translates both singulars, *ius naturale* and *lex naturalis*.—*K.F.*]

testicular semen. The matter is, in my opinion, perfectly simple, once one presupposes that the impediment of impotence is of the natural law. [320]

In general, a man or a woman who has received a declaration of nullity of marriage on account of impotence, if the anomaly or disorder which was the cause of the impotence remains as previously, is not permitted to proceed to another marriage, even in the hypothetical case that the judges erred in making a judgment.

And the reason is evident: if the person was in fact impotent, he continues to be impotent and, therefore, a second marriage will be invalid *on account of the impediment of impotence*; if, however, the person, whom the judges deemed to be impotent, was objectively not impotent, his first marriage was in fact valid—albeit erroneously declared null. And, therefore, the second marriage, if attempted, will be invalid *on account of an impediment of bond*, arising from the previous valid marriage.

Matters standing thus, it is clear that the Church cannot ever permit the celebration of a second marriage of a person who has received a declaration of nullity of a previous marriage on account of impotence, unless it is verified that the disorder which in the case constituted the impotence has been cured or erroneously deemed by the judges to constitute impotence. Under whichever hypothesis, it turns out that a second marriage will be null: either on account of the impediment of impotence or on account of the impediment of bond.

For this reason, the principle, "If there is doubt regarding an impediment of impotence, whether a doubt of law or of fact, the marriage is not to be impeded" (canon 1068, § 2),[29] can be applied only to the celebration of a first marriage, and not to that of a second marriage (or of subsequent marriages), of the same person whose impotence was placed in doubt, if the person has undergone no alteration in his state of infirmity. This is clear: if the person is in fact not impotent, then the previous marriage was valid and the impediment of bond comes to bear, which prevents the second marriage from being valid. [321] If, however, the person is in fact impotent, and continues thus—in this case the second marriage will be invalid because of the impediment of impotence, in the same way that the first marriage was invalid. So, it is irregular in the extreme to have recourse to the principle, "If there is doubt regarding an impediment of impotence, the marriage is not to be impeded," when it is a matter of a person who, in his state of infirmity, underwent a null marriage and has already obtained a declaration of nullity of the previous marriage due to impotence. For it is absolutely certain that the second marriage will be invalid either because of the impediment of impotence or because of the impediment of bond.

Now then, that which holds in general for whatever case of impotence, by the same warrant and reason also holds specifically for the case in which someone obtains a declaration of nullity due to the incapacity to ejaculate testicular semen—and this wholly independently of the Decree of the Sacred Congregation for the Doctrine of the Faith. For this Decree, as we have said over and over again, alters the impediment of impotence not at all as it is in itself or as is established in the objective order by natural law itself. The Decree does nothing other than declare for us this objective order. Now

[29] [See above, note 6.—*K.F.*]

we know with certainty, founded on the magisterium of the Church, that the mere incapacity to ejaculate testicular semen never constitutes an impediment of impotence, although jurisprudence erroneously determined otherwise.

Therefore, since they are not really impotent, those who have undergone vasectomies and those in a similar condition—if, by application of a teaching which, in light of the Decree, is now shown to be false, they have obtained a declaration of nullity of marriage due to impotence—cannot proceed to other nuptials since it is certain that these second marriages will be invalid *because of the impediment of bond*.

If someone, contrary to the declaration in the Decree, should still retain that men who have undergone vasectomies are impotent, [322] he must conclude that a second marriage cannot be permitted of them, for this marriage, according to such a teaching, will be invalid due to the impediment of impotence. On this argumentation rested—wholly consistently—the practice of imposing a "prohibition" upon men who had undergone vasectomies and who obtained declarations of nullity on account of their own impotence. Thus, with respect to those who have undergone vasectomies and to those in a similar condition, clearly it is not possible under any hypothesis to remove a prohibition from entering into new nuptials, whether one holds to the teaching put forward in the Decree or whether one continues to apply the teaching which jurisprudence applied in the past.

Someone could argue: A man who, because of the incapacity to ejaculate semen produced in the testicles, has obtained, by way of two concordant judgments, a declaration of nullity of marriage is now in possession of the right to enter into new nuptials—if it is verified that he is not impotent. A tribunal can, therefore, and must remove from him the "prohibition."

But this argumentation cannot be sustained. For, by means of the same arguments and proofs which verify that such a man is now not impotent, it is also verified that he was not impotent when he celebrated marriage and that he is now restricted by the impediment of bond. It is true that the tribunal cannot call for a reexamination of the judgments issued since, the procedure being exhausted, the tribunal no longer has competency in the case; but neither in the case before us can it remove a "prohibition." For the tribunal in question can remove a "prohibition" only in so far as, by an examination of *procedural acts*, it verifies that incapacity of ejaculating testicular semen was the *sole reason* why the marriage was declared null. Moreover, in this case, by virtue of a logical and ineluctable connection, at the same time it is also verified that that marriage was valid and, therefore, that the man is in fact constrained by the impediment of bond from contracting another marriage. To cite acts of a process in order to verify that that man is not (and was not) impotent [323] but not to deduce from them the evident and necessary consequence, namely that that man is constrained by the impediment of bond, is to fall into a juridical formalism alien to sound jurisprudence and to the spirit of the law of the Church.

3. *On the rights of spouses whose marriage has been declared null due to incapacity of ejaculating semen produced in the testicles.*

Cases of nullity already decided in accordance with the teaching that jurisprudence applied before the Decree was issued create situations in the field of law par-

ticularly difficult and complex, in the solutions of which the juridical principles which regulate the exercise of rights having to do with the status of persons in the Church are to be applied. The conflicts which emerge because of the doctrinal declaration of the Decree do not differ substantially from conflicts which are forever emerging and which result in error in judging regarding cases having to do with the status of persons.

"Cases regarding the status of persons never become adjudicated matter" (can. 1903). As is clear, this fundamental principle cannot not be applied also to those marriage cases which definitively obtained an affirmative judgment due to the impediment of impotence as this was understood by jurisprudence before the Decree of the Sacred Congregation for the Doctrine of the Faith. The appropriate presuppositions being made, to all the Christian faithful belongs the right that their marriage case be admitted to a fresh examination, independently of the title according to which the case was decided. No Christian faithful can be deprived of this right.

Canon 1903 itself states that it is a consequence of a double concordant judgment in cases about the status of persons that a new proposition of a case ought not to be admitted, "unless there have been brought forward new and weighty arguments or documents." Now the Decree of the Sacred Congregation for the Doctrine of the Faith [324] constitutes a new and weighty argument, by virtue of which the new presentation of a case is to be admitted, should both or either of the spouses request it. And, as is clear, once the case is subjected to a fresh examination, it will have to be decided according to the teaching declared in the Decree.

On the other hand, either a man or a woman whose marriage has been declared null due to a man's incapacity to ejaculate testicular semen has the acquired right, based on a legal judgment legitimately issued, to be left in possession of the status in which they find themselves. The Promoter of Justice cannot interfere with this possession. This is true also in the event that the woman or even the man has entered into another marriage. For the impediment of impotence is not *by its nature public*, even though it can be proved in the external forum. Therefore, the Promoter of Justice cannot accuse a marriage by reason of impotence (can. 1971 § 1; *Inst. Provida Mater,* art. 35, 38, 39).[30] Indeed, neither is it possible to accuse a marriage of nullity due to the impediment of bond—which impediment is by its nature public—when this impediment exists in a spouse who has contracted another marriage after a previous marriage has been declared null due to the impediment of impotence—which impediment does not in fact exist. The reason is that the existence or nonexistence of the impediment of bond with respect to the second marriage depends on the existence or nonexistence of the impediment of impotence with respect to the first marriage. The Promoter of Justice is neither obliged to—nor can he—investigate the reason for the impediment of impotence on account of which the first marriage was declared null.

[30] [Canon 1971 is about those whose marriage can be challenged (i.e., "accused"); §1 says that among these are "Spouses, in all cases of separation and nullity, unless they themselves were the cause of the impediment." The Instruction *Provida Mater [Ecclesia]* (not be confused with Pius XII's Apostolic Constitution of the same name) is found at AAS 28 (1936): 313–372. The articles cited have to do with accusations.—*K.F.*]

Upon the man whose first marriage was declared null due to the incapacity to ejaculate testicular semen there ought to have been imposed a prohibition from entering into other nuptials, as is done in cases of impotence. But it can happen that a man enters into another marriage either because, due to the ignorance or negligence of the tribunal, no prohibition was imposed upon him [325] or because afterwards—again, due to the ignorance of the tribunal—the prohibition was removed or because, notwithstanding the prohibition, the man deceitfully celebrated another marriage. As demonstrated above, it is verifiable with absolute certainty that this second marriage is null: both according to the teaching that jurisprudence was applying and according to the teaching declared in the Decree of the Sacred Congregation for the Doctrine of the Faith.

There appear to be two ways in which this man might be released from the second marriage: either, in accordance with canon 1903, he asks for a fresh examination of the previous marriage or, in accordance with canon 1971, he accuses the second marriage of nullity due to the impediment of bond. This second way is open also to the second party, that is, to the wife in the second marriage. If a case involves one or the other of these ways, it is to be admitted, in as much as the case is founded upon genuine right; it is to be decided in accordance with the Decree of the Sacred Congregation for the Doctrine of the Faith.

Similarly, if a woman, having obtained a declaration of nullity due to the incapacity of a man to ejaculate testicular semen, enters into another marriage, she can pursue two avenues in order to obtain release from this marriage: either she requests a fresh examination of the previous union or she accuses the second marriage of nullity due to the impediment of bond. This second avenue is open also to the other party—that is, to the man in the second marriage.

It is true that there is a huge difference between the certitude regarding the nullity of the second marriage entered into by the party who obtained the declaration of nullity of the previous marriage due to his own impotence, and the certitude regarding the nullity of the second union entered into by the other party, that is, by the healthy party. For the certitude of the nullity of the second marriage entered into by the party who is impotent (or, at least, is so regarded) is absolute: this marriage is null either due to the impediment of impotence or due to the impediment of bond. On the other hand, certitude of the nullity of the second marriage contracted by the healthy party is not present except in so far as it is verified that [326] the other party, although judged to be impotent, is not impotent in fact. And, indeed, in the case at hand, it is verifiable that, according to the Decree of the Sacred Congregation for the Doctrine of the Faith, men who have undergone vasectomies and those in a similar condition are not impotent. Thus, it is verifiable with a certitude resting upon the authority of the Decree that there exists a bond of a previous marriage entered into by such men, even though erroneously declared null by judges.

The situation being such, one cannot deny that also women, who have entered into a second marriage after receiving a declaration of nullity for a previous union due to an incapacity of a man to ejaculate testicular semen, have the right both to request a fresh examination of the case of the previous marriage and to accuse the second of nullity due to the impediment of bond. If they should do this, the case is to

be admitted and must be decided according to the teaching of the Decree of the Sacred Congregation for the Doctrine of the Faith.

I am not unaware of how many pastoral and moral problems are bound up in the situations created because ecclesiastical jurisprudence, up until the Decree of the Sacred Congregation for the Doctrine of the Faith, applied as certain a teaching contrary to that which the Decree now puts forward. But such problems will become yet more serious if, in resolving them, we do not apply the juridical principles which regulate the exercise of rights pertaining to the determination of the status of persons in the Church.

Appendix

Text of the Decree

DECREE

Regarding Impotence Which Invalidates Marriage

The Sacred Congregation for the Doctrine of the Faith has always retained that men who have undergone a vasectomy and others placed in similar circumstances are not to be impeded from marrying as long as their impotence is not demonstrated with certainty.

Now, however, after examining this practice and after repeated studies completed by this Congregation as well as by the Commission for the revision of the Code of Canon Law, the most Eminent and most Reverend Fathers of this Sacred Congregation, in a plenary session held on Wednesday, May 11, 1977, responding to the queries proposed to it, decree the following:

1. Whether the impotence that invalidates marriage consists in the incapacity, both antecedent and perpetual, whether absolute or relative, of completing conjugal intercourse.

2. If affirmative, whether the ejaculation of semen produced in the testicles is necessarily required for conjugal intercourse.

To the first question, the answer is affirmative; to the second, negative.

And the Supreme Pontiff by Divine Providence Paul VI, in an audience granted to the undersigned Prefect of the same Congregation on Friday, the thirteenth day of the same month and year, approved said Decree and ordered it to become public law.

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

Francis [Franjo] Šeper, O.P., Prefect
✠ Bro. Jerome [Jérôme] Hamer, O. P.
Titular Archbishop of Lorium
Secretary

DECRETUM

circa impotentiam quae matrimonium dirimit

Sacra Congregatio pro Doctrina Fidei semper retinuit a matrimonio non esse impediendos eos qui vasectomiam passi sunt aliosque in similibus condicionibus versantes eo quod non certo constaret de eorum impotentia.

Iam vero, inspecta tali praxi et post iterata studia ab hac Sacra Congregatione necnon a Commissione Codici Iuris Canonici recognoscendo peracta, Em.mi ac *Rev.mi*

Patres huius S. Congregationis, in consessu plenario feriae IV, die 11 mali 1977 habito, propositis Sibi dubiis, quae sequuntur, respondendum decreverunt:

1. Utrum impotentia, quae matrimonium dirimit, consistat in incapacitate, antecedenti quidem et perpetua, sive assoluta sive relativa, perficiendi copulam coniugalem.

2. Quatenus affirmative, utrum ad copulam coniugalem requiratur necessario eiaculatio seminis in testiculis elaborati.

Ad primum: Affirmative; ad secundum: Negative.

Et in Audientia, feria VI, die 13 eiusdem mensis et anni, Summus Pontifex div. Prov. Paulus Pp. VI infrascripto Praefecto huius S. Congregationis concessa, praefatum decretum adprobavit ac publici iuris fieri iussit.

Datum Romae, ex Aedibus S. Congregationis pro Doctrina Fidei, die 13 maii 1977.

Franciscus Šeper, O.P., Praefectus
✠ Fr. Hieronymus Hamer, O. P.
Archiepiscopus tit. Loriensis
Secretarius