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EDUCATIO PROLIS
AS AN ESSENTIAL ELEMENT OF MARRIAGE

by
Kenneth W. SCHMIDT

A dissertation submitted to the Faculty of Canon
Law, Saint Paul University, Ottawa, Canada, in partial
fulfilment of the requirements for the degree of
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Ottawa, Canada
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1993



Kenneth Schmidt, Ottawa, Canada, 1993



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ABBREVIATIONS

<u>AAS</u>	=	<u>Acta Apostolicae Sedis</u>
<u>AC</u>	=	<u>L'année canonique</u>
<u>AKK</u>	=	<u>Archiv für katholisches Kirchenrecht</u>
<u>ASS</u>	=	<u>Acta Sanctae Sedis</u>
<u>CLD</u>	=	<u>The Canon Law Digest</u>
<u>CLSN</u>	=	<u>Canon Law Society of Great Britain and Ireland Newsletter</u>
<u>CSEL</u>	=	<u>Corpus scriptorum ecclesiasticorum latinorum</u>
<u>DE</u>	=	<u>Il Diritto ecclesiastico</u>
<u>DR</u>	=	<u>Discorsi e radiomessaggi di Sua Santità Pio XII</u>
<u>EIC</u>	=	<u>Ephemerides iuris canonici</u>
<u>Fontes</u>	=	<u>Codicis iuris canonici fontes</u>
<u>IC</u>	=	<u>Ius canonicum</u>
<u>ME</u>	=	<u>Monitor ecclesiasticus</u>
<u>OAK</u>	=	<u>Österreichisches Archiv für Kirchenrecht</u>
<u>Periodica</u>	=	<u>Periodica de re morali canonica liturgica</u> [1927-1989] = <u>Periodica de re canonica</u> [1990-]
<u>PK</u>	=	<u>Prawo Kanoniczne</u>
<u>PL</u>	=	<u>Patrologiae cursus completus [...]</u> [Series Latina]
<u>RDC</u>	=	<u>Revue de droit canonique</u>
<u>REDC</u>	=	<u>Revista española de derecho canónico</u>
<u>SC</u>	=	<u>Studia canonica</u>
<u>SRR Dec</u>	=	<u>Sacrae Romanae Rotae decisiones seu sententiae</u> [1909-1974] = <u>Romanae Rotae decisiones seu sententiae</u> [1975-]
<u>TPS</u>	=	<u>The Pope Speaks</u>

INTRODUCTION

The fundamental values of human society include certain rights of children. The unanimous adoption of the Declaration of the Rights of the Child by the United Nations in 1959 demonstrates that peoples throughout the world recognize those rights.¹ They include children's rights to protection, opportunities, and facilities to develop physically, mentally, morally, spiritually, and socially, in a healthy and normal manner; the right to grow and develop in health, both before and after birth; the right to grow up in the care and under the responsibility of their parents, save in exceptional circumstances, and in an atmosphere of affection, and moral and material security; the right to receive an education, for which parents hold the primary responsibility; the right to protection from neglect, cruelty, and exploitation; and the right not to engage in employment which endangers their health or education, or interferes with their physical, mental, or moral development.²

Thirty years later, the United Nations adopted a resolution concerning the Rights of the Child. The resolution invites its member States to sign and ratify the 1989 Convention on the Rights of the Child.³ That Convention more explicitly delineates the fundamental

¹ See UNITED NATIONS, Declaration of the Rights of the Child, adopted 20 November 1959, New York, United Nations, 1959, 2 pp.

² See *ibid.*, Principles 2, 4, 6, 7, and 9 respectively.

³ See UNITED NATIONS, Convention on the Rights of the Child, adopted 20 November 1989, New York, United Nations, 1989.

rights of the earlier Declaration. It acknowledges the rights of parents as well as legal guardians and those who maintain legal responsibility for a child. And it recognizes that children should grow up in a family environment, in an atmosphere of happiness, love, and understanding, in order to achieve the full and harmonious development of their personality.⁴

Five months later at the United Nations, on 20 April 1990, the Apostolic See was among the first to accede to the Convention. The statement of the Permanent Observer of the Holy See to the United Nations makes clear that "It is not governments or adult individuals that choose to grant the child rights. It is the human nature of the child that constitutes the infrangible and indivisible foundation of the child's rights [...]."⁵ And the Apostolic See emphasizes the primary and inalienable rights of parents with respect to their children, especially those rights which concern education, religion, privacy, and association with others.⁶ The Apostolic See confirms those parental rights in its own Charter of the Rights of the Family, which it issued

⁴ See *ibid.*, Preamble, p. 3.

⁵ Renato R. MARTINO, "The Rights of the Child," in L'Osservatore romano [English edition], 7 May 1990, p. 2.

⁶ See *ibid.*

in 1983 upon the request of the 1980 Synod of Bishops.⁷

Therefore, both human and religious values underline the fundamental rights of children to full human development in all of its dimensions; provisions for their health, safety, and education; and in an atmosphere of love and understanding created and fostered by their parents, who have the primary responsibility for their care. Both international documentation and canonical sources uphold those rights regarding the raising of offspring.

One may describe the raising or upbringing of children in its most inclusive or broad sense as the **education of children** (educatio prolis). The latter term derives from the Latin terms educatio and educare. However, the 1983 Code of Canon Law⁸ uses the Latin expressions in an

⁷ The Charter does not appear in AAS. See APOSTOLIC SEE, Charter of the Rights of the Family, 22 October 1983, English trans. in TPS, 29, no. 1, pp. 78-86; Italian trans. in Communicaciones, 15 (1983), pp. 140-52; French trans. in Leges annis 1979-1985 editae, collegit, digessit notisque ornavit Xaverius OCHOA, Leges Ecclesiae post Codicem iuris canonici editae, vol. 6, Roma, Commentarium pro Religiosis, 1987, n. 5002, cols. 8680-8687. For commentaries on the Charter, see Carl A. ANDERSON, "The Family and International Human Rights: A Commentary on the Charter of the Rights of the Family," in ME, 109 (1984), pp. 364-78; Daniel J. DILLABOUGH, The Vatican Charter of Rights of the Family 1983: A Study of the Charter and the Historical Social Tradition of Family Rights, Theses ad doctoratum — Academia Alfonsiana 241, Romae, Pontificia Universitas Lateranensis, Academia Alfonsiana, 1987.

⁸ Codex iuris canonici, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus, Città del Vaticano, Libreria Editrice Vaticana, 1989. The translation of individual canons is taken from The Code of Canon Law in English translation, prepared by The Canon Law Society of Great Britain and Ireland in association with The Canon Law Society of Australia and New Zealand and The Canadian Canon Law Society, London, Collins Liturgical Publications, 1983. In this study, all references to canons of the 1983 Code employ C. for canon and CC. for canons followed by the canon number(s).

equivocal manner.⁹ The canons acknowledge their different uses. Sometimes, following the common secular understanding, the words indicate formal instruction and teaching:

Among the means of advancing education, Christ's faithful are to consider schools as of great importance, since they are the principal means of helping parents to fulfill their role in education. (C. 796, §1)

At other times the words specify Christian and Catholic education, which endeavor to direct persons toward their divine destiny:

The Church has in a special way the duty and the right of educating, for it has a divine mission of helping all to arrive at the fullness of christian life. (C. 794, §1)¹⁰

Finally, the terms convey the notion of personal growth and formation which encompass all the facets of human development. Canon 795 contains all three meanings in its description of education:

Education must pay regard to the formation of the whole person, so that all may attain their eternal destiny and at the same time promote the common good of society. Children and young persons are therefore to be cared for in such a way that their physical, moral and intellectual talents may develop in a harmonious manner, so that they may attain a greater sense of responsibility and a right use of freedom, and be formed to take an active part in social life.¹¹

⁹ See Paul BAILLARGEON, The Canonical Rights and Duties of Parents in the Education of Their Children, [Doctoral thesis], Ottawa, Saint Paul University, 1987, pp. 10-13.

¹⁰ See in addition CC. 217 and 835, §4; CONCILIUM VATICANUM II, Declaration Gravissimum educationis, 28 October 1965, in AAS, 58 (1966), n. 1, p. 729; English trans. in Vatican Council II: The Conciliar and Post Conciliar Documents, ed. Austin FLANNERY, Northport, NY, Costello Publishing Co., 1975, p. 727. On the meaning of Christian education, see BAILLARGEON, The Canonical Rights and Duties of Parents, pp. 13-15.

¹¹ See also JOHN PAUL II, Apostolic exhortation Familiaris consortio, 22 November 1981, in AAS, 74 (1982), pp. 81-191; English trans. in TPS, 28 (1983), pp. 1-77.

The canon refers to the development of intellectual talents, which normally occurs through instruction. It ascribes the goal of education in part as the attainment of one's eternal destiny, which one knows and strives for as a Christian. Finally it states that education must consider the formation of the whole person, and specifically mentions the aspects of physical, moral, intellectual, and social education.

For the purposes of this study, the term **education** corresponds to this third description: a process of formation which assists children to progress toward full stature as human beings.¹²

Natural law links this education of children to marriage. The idea that procreation and education of offspring constitute an end of marriage pre-dates Roman law by several hundred years.¹³ Ulpian states that from natural law "comes the union of man and woman which we call marriage, and the procreation of children, and their rearing."¹⁴ The

¹² See lib. IV, D. XXVI, q. 1, a. 1, solutio, in THOMAS AQUINAS, Commentum en quattuor libros Sententiarum Petri Lombardi, in Opera omnia, vol. 11, Parisiis, L. Vivès, 1871-1880, p. 67.

¹³ See Theodore MACKIN, What is Marriage?, New York, Paulist Press, 1982, p. 79.

¹⁴ Ulpian, D. 1, 1, 1, 3, in The Digest of Justinian, Latin text ed. Theodor MOMMSEN, with the aid of Paul KRUEGER, English trans. ed. Alan WATSON, vol. 1, Philadelphia, University of Pennsylvania Press, 1985, p. 1.

1917 Code of Canon Law¹⁵ calls procreation and education of offspring the primary end of marriage, and the 1983 Code says that marriage by its nature is ordered to procreation and education of children. This study examines the relationship of marriage to these fundamental rights of children and their parents.

Two previous doctoral studies consider educatio prolis relative to marriage. The work of Mussio in 1939, despite its title, devotes little space to understanding the education of offspring relative to the validity of marital consent. It has, rather, the flavor of a polemic against new philosophies of education and their dangerous influences on schools.¹⁶ The later study by Mastrotto in 1984 organizes the discussion of educatio prolis into three chapters under the theological themes of the ends of marriage, the good of offspring (bonum prolis), and an essential element of the formal object of consent. Its date naturally precludes the inclusion of Rotal jurisprudence which appears after the promulgation of the 1983 Code.¹⁷

¹⁵ Codex iuris canonici, Pii X Pontificis Maximi iussi digestus, Benedicti Papae XV auctoritate promulgatus, praefatione, fontium annotatione, et indice analytico-alphabetico ab Petro Card. Gasparri auctus, Westminster, MD, Newman Press, 1952. The English translation of individual canons comes from T. Lincoln BOUSCAREN, Adam C. ELLIS, and Francis N. KORTH, Canon Law: A Text and Commentary, 4th rev. ed., Milwaukee, Bruce Publishing, 1966. Throughout this study, references to the 1917 Code employ c. for canon and cc. for canons followed by the canon number(s).

¹⁶ See John K. MUSSIO, The Education of Offspring: A Primary End of Marriage, [Doctoral thesis], Roma, Pontificium Institutum Internationale "Angelicum," 1939.

¹⁷ See Severino MASTROTTO, L'educazione della prole come elemento essenziale dell'oggetto del consenso matrimoniale, [Doctoral thesis], Roma, Pontificia Universitas Gregoriana, 1984.

Other doctoral studies approach education of offspring from another canonical perspective. The work by García López in 1979 includes a chapter which surveys the theme of the education of offspring as an effect of marriage, and the influence of a canonical separation of spouses upon it.¹⁸ Aluede Ojemen's 1986 study considers the psychological factors which may affect marital consent, including the right and obligation of educatio prolis.¹⁹ Finally, doctoral works by Baillargeon and Kowalski, both published in 1987, survey the notion of education of offspring in doctrinal and canonical literature. Neither of them considers in any detail the question of the relationship between educatio prolis and the validity of marital consent.²⁰

Important contributions by Huizing and Stankiewicz provide a solid foundation for this current study. Huizing presents a thorough history of both doctrine and jurisprudence regarding the bonum prolis, but his research ends in 1962, before the Second Vatican Council and the new Code of Canon Law.²¹ The article by Stankiewicz in 1990 builds on the

¹⁸ See Ramón GARCIA LOPEZ, Decisiones matrimoniales eclesiásticas: Efectos canónicos en los esposos y en los hijos, Collección canónica, Pamplona, Ediciones Universidad de Navarra, 1979.

¹⁹ See Cosmas ALUEDE OJEMEN, Psychological Factors in Matrimonial Consent in the Light of Canonical Legislation, [Doctoral thesis], Rome, Pontificia Universitas Urbaniana, 1986.

²⁰ See BAILLARGEON, The Canonical Rights and Duties of Parents in the Education of Their Children; and Andrzej KOWALSKI, Educazione della prole nella vigente legislazione canonica, [Doctoral thesis], Roma, Pontificia Universitas Lateranensis, 1987.

²¹ See Peter HUIZING, "Bonum prolis ut elementum essenziale obiecti formalis consensus matrimonialis," in Gregorianum, 43 (1962), pp. 657-722.

work of Huizing and more clearly delineates the themes of procreation and education of offspring. His research weaves together the highlights of theological and canonical developments, including the new Code and newly published Rotal jurisprudence. He limits the application of his research to the exclusion of the bonum prolis from marital consent.²²

Finally, an article by Mussinghoff in 1987 builds upon the work of Huizing. He includes brief surveys of theology and jurisprudence on the subject of parents and education of offspring, and the connection to marriage. He suggests many questions for further research.²³

This study differs from the the above in three basic ways: research, organization, and application. First, the comprehensive research for this study presents virtually all the discussion on this subject from antiquity up to the present day. Second, the organization of the material shows the separate but parallel development in theology, canon law, and jurisprudence. And third, the application of the research to tribunal practice is more comprehensive than any work thus far.

This study addresses three questions: 1) How does the teaching of the Roman Catholic Church relate the value of educatio prolis to marriage? 2) How does the Roman Catholic Church express and preserve the value of educatio prolis in its legislation regarding the validity

²² See Antoni STANKIEWICZ, "L'esclusione della procreazione ed educazione della prole," in La simulazione del consenso matrimoniale canonico, Studi giuridici 22, Città del Vaticano, Libreria Editrice Vaticana, 1990, pp. 149-74.

²³ See Heinz MUSSINGHOFF, "Ausschluß der Erziehung als Ehenichtigkeitsgrund?," in AKK, 156 (1987), pp. 63-94.

of marriage? 3) How does the Roman Rota interpret and apply the teaching and legislation with respect to educatio prolis in its jurisprudence? The first three chapters provide historical synopses to answer these questions.

The first chapter treats the theological understanding of educatio prolis relative to marriage. It presents the paradigms which theologians use to teach about marriage, and the emphasis that they place upon the necessity to provide for the education of offspring. It considers education in its various aspects, focusing especially upon the teaching of Augustine, Thomas Aquinas, and conciliar and papal teaching of the nineteenth and twentieth centuries.

The second chapter looks at educatio prolis from a canonical standpoint and its relationship to the validity of marriage. It places educatio prolis within the context of the canonical understanding of the bonum prolis during three historical periods relative to the two editions of the Code of Canon Law. It describes the essential content of the bonum prolis, and thereby establishes that educatio prolis belongs to the essence of marriage.

The third chapter considers educatio prolis in the jurisprudence of the Roman Rota. It highlights different approaches to the bonum prolis during the same three historical periods utilized in the second chapter. It then systematically analyzes the content of educatio prolis according to specific Rotal cases, in order to determine the aspects of education of offspring which affect the validity of marriage.

The fourth chapter considers the application of the understanding of educatio prolis in concrete tribunal cases concerning the validity of

a marriage. It addresses the concept of education and its essential components; the possible basis of nullity relative to educatio prolis; and intimations of the existence of such grounds of nullity. The chapter rests on the preceding canonical and jurisprudential analysis. It adopts an interdisciplinary approach as it introduces psychological and psychiatric sources. The study then offers additional remarks and suggestions, and concludes by raising several issues concerning educatio prolis which require further attention.

CHAPTER 1

THE THEOLOGICAL UNDERSTANDING OF EDUCATIO PROLIS RELATIVE TO MARRIAGE

Introduction

This chapter undertakes an examination of the theological teaching concerning education of offspring (educatio prolis) and its relationship to marriage. This overview provides a foundation for a closer examination in subsequent chapters of the relationship of educatio prolis to the validity of marriage according to canonical scholarship and Rotal jurisprudence.

This chapter uses a historical approach, presenting a survey of material as it appears first in the Scriptures, and then by authors in the first millennium of the Church, with a special focus on the writings of Augustine. It continues with a look at the Middle Ages, here with an emphasis on the important work of Thomas Aquinas. With the development of theology as a distinct science separate from canon law, this study turns to the Councils and papal teaching until the present for clear expressions of Catholic theology on this subject.

Theologians use several paradigms to teach about marriage, and the place therein of offspring and their upbringing by their parents. The major paradigms present offspring as a good of marriage, as an end of marriage, and as central to the meaning of marriage. The chapter also examines the necessity to provide for the physical, intellectual, moral, religious, and social well-being of offspring.

The chapter demonstrates that Catholic theology places a strong and continuous emphasis on the necessity to provide for the educatio prolis. Furthermore, such an education must address all areas of the child's development. Finally, the primary right and duty of parents to provide that education constitutes an essential element of the theology of marriage.

I. The Scriptures

The Old and New Testaments say very little about the theology of marriage relative to procreation and raising of children. The Book of Genesis contains two accounts of creation. The initial account quotes the divine commandment to the first humans, "Be fertile and multiply; fill the earth and subdue it."¹ In the second account, a woman is fashioned from the rib of a man, and "That is why a man leaves his father and mother and clings to his wife, and the two of them become one body" (Gen. 2:24). The first account seems to place more emphasis on the procreation of children, while the second account apparently stresses the union of the spouses. The tension between these two aspects of marriage has shown itself throughout Christian history and

¹ Genesis 1:28a, in The New American Bible, trans. from the original languages with critical use of all the ancient sources and the rev. New Testament, Nashville, Thomas Nelson Publishers, 1986, p. 3.

continues to the present day.²

The Old Testament contains several expressions of the duty and obligation of parents to care for their children,³ and to pass on the heritage of their religious faith to their descendants.⁴ The New Testament twice presents a father's duty to care for his children in the context of a marital relationship.⁵ General statements of personal responsibility for the care of children can be found addressed to mothers,⁶ fathers,⁷ parents,⁸ bishops and deacons,⁹ and guardians and administrators who assist heirs who are minors.¹⁰ All of these scriptural injunctions make general statements about parental responsibility, although none of them establishes an explicit theological relationship between marriage and the procreation and

² See Geoffrey ROBINSON, "Unresolved Questions in the Theology of Marriage," in The Jurist, 3 (1983), p. 69, who calls these the **procreative** and the **personalist** elements in marriage. This study focuses primarily on the procreative element, but the description of similar elements marks a significant shift which occurs in the second half of the twentieth century.

³ See, for example, Proverbs 13:24; 29:15, 17; Sirach 7:23-25; 30:1-13.

⁴ See, for example, Deuteronomy 4:9-10; 6:6-7; 11:18-19.

⁵ See Ephesians 6:4; Colossians 3:21.

⁶ See Titus 2:4.

⁷ See 1 Thessalonians 2:11-12.

⁸ See 2 Corinthians 12:14b.

⁹ See 1 Timothy 3:4, 12.

¹⁰ See Galatians 4:1.

education of children.¹¹

II. The first millennium

In the early Church, parents are held accountable for raising their children in the Christian faith. This responsibility derives from the presentation of the child for the sacrament of baptism.¹² Writings which date from the first centuries of the Church make this clear. In the West, Clement of Rome, Tertullian, and Ambrose are among those who stress that Christian education must be provided by the parents, while the Eastern authors include Clement of Alexandria, Origen, and Cyril of Alexandria.¹³ Thus, parents did not fulfill their responsibilities for providing a Christian upbringing by passing the children to a teacher or even an institution.¹⁴

The early Church faced some other issues as well. Its pastoral leaders searched the New Testament in order to understand the meaning and value of marriage in the face of attacks by various groups. They concluded that marriage and sexual intercourse within marriage rescue

¹¹ See Theodore MACKIN, What is Marriage?, New York, Paulist Press, 1982, pp. 38-126, for a fuller treatment of marriage in the early Church, its Roman context, and the early Church Fathers.

¹² See Christiane BRUSSELMANS, Les fonctions de parrainage des enfants aux premiers siècles de l'Eglise, 100-550, [Doctoral thesis], Washington, DC, Catholic University of America, 1964, p. 207.

¹³ See *ibid.*, p. 20 and passim. She stresses that the role of parents and the role of sponsor are not considered in contradistinction until the fifth century, p. 205.

¹⁴ See Henri-Irénée MARROU, A History of Education in Antiquity, trans. George Lamb, [London], Sheed and Ward, [1956], p. 314.

the human condition wounded by sin.¹⁵ In response to various challenges and exaggerations, they borrowed from pagan thinkers to explain the nature of sexuality. This has two effects: it establishes the goodness of marriage and sexuality against the attacks by ascetics, and it also confines sexuality to be used within marriage and for procreation.¹⁶

So, for example, the followers of Eustathius of Sebaste undertook a rigorous form of monastic discipline. The Council of Gangra in the fourth century¹⁷ condemned those parents who forsook their children or neglected them under the guise of such an asceticism.¹⁸ John Chrysostom (d. 407) urged parents to think of raising children as similar to the task of a sculptor, adding what they lack and removing what is superfluous.¹⁹ And he offered exhortations in his homilies, like the following: "Let everything take second place to our care for our children, our bringing them up in the discipline and instruction of

¹⁵ See MACKIN, What is Marriage?, pp. 99-100.

¹⁶ See *ibid.*, p. 121.

¹⁷ Historians do not know the precise date of the Council, but Sozomen places it before the synod of Antioch in 341; see J. VAN PAASSEN, "Gangra," in New Catholic Encyclopedia, prepared by an editorial staff at the Catholic University of America, vol. 6, Washington, DC, New York, McGraw-Hill Book Co., 1967, p. 279.

¹⁸ c. 14, D. XXX.

¹⁹ See JOHN CHRYSOSTOM, De inani gloria et de educandis liberis, in Christianity and Pagan Culture in the Later Roman Empire, Ithaca, NY, Cornell University Press, 1967, p. 22. The entire work instructs Christians how to raise children in faith and the practice of virtue.

the Lord." ²⁰

AUGUSTINE (d. 430) integrates the various aspects of marriage into a coherent systematic theology of marriage. He is also one of the most important authors on the subject of educatio prolis, if for no other reason than that most of the theologians and canonists who address the topic through the next 1600 years cite his works so frequently.

Augustine wrote on marriage in order to defend it against accusations that it is sinful. The Manicheans believed that marriage (as part of creation) is essentially evil. On the other hand, a disciple of Pelagius named Julian accused Augustine of denying the goodness of marriage. In addition, some authors were interpreting Saint Jerome's spirited defense of virginity as a depreciation of marriage. ²¹ Defending marriage as both lawful and honorable, Augustine concluded that it can be used without sin for the purposes of having children and

²⁰ JOHN CHRYSOSTOM, "Homily 21: On Ephesians 6:1-4," in On Marriage and Family Life, trans. Catharine P. Roth and David Anderson, intro. by Catharine P. Roth, Crestwood, NY, Saint Vladimir's Seminary Press, 1986, p. 68. "Omnia a nobis postponantur curae filiorum, et eorum educationi in disciplina et admonitione Domini." "Homilia XXI," in Patrologiae cursus completus, seu Bibliotheca universalis, integra, uniformis, commoda, oeconomica, omnium SS. patrum, doctorum scriptorumque ecclesiasticorum qui ab aevo apostolico ad tempora Concilii tridentini (anno 1545) pro latinis, et Concilii Florentini (ann. 1439) pro graecis floruerunt [...] [Series Graeca], vol. 62, Parisiis, excudebatur venit apud J.-P. Migne Editorem, 1862, col. 151.

²¹ See F. Javier HERVADA XIBERTA, Los fines del matrimonio: Su relevancia en la estructura jurídica matrimonial, Colección Canónica del Estudio general de Navarra 4, Publicaciones del Estudio general de Navarra 29, Pamplona, Studium Generale, 1960, p. 93; Cyril MURTAGH, "The Jurisprudential Approach to the Consortium vitae," in SC, 9 (1975), p. 323.

avoiding incontinence.²²

Thus Augustine affirms that marriage itself is a good thing, based on revelation and the presence of Jesus at the wedding in Cana.²³ In addition, Augustine names three good things about marriage: offspring, fidelity, and sacrament [indissolubility] (proles, fides, and sacramentum),²⁴ but they do not exhaust its goodness. There are other good things about marriage, such as the natural society of the spouses.²⁵

Surprisingly, the work of so many theologians and canonists begins with a presentation of the goods of marriage, but Augustine himself did not write that much about them. His thoughts on the topic consist of only a few sentences scattered throughout his work. Therefore it is expedient to focus on the content of the bonum prolis in his texts which concern the goods of marriage.

²² See AUGUSTINE, De bono coniugali, lib. I, cap. 3, n. 3, in CSEL, editum consilio et impensis Academiae Litterarum Caesarum, Vindobonensis, recensuit Iosephus ZYCHA, vol. 41, Vindobonae, F. Tempsky, 1900, p. 191 (hereafter cited as CSEL, [vol.], [p.]; PL, vol. 40, Parisiis, excudebatur et venit apud J.-P. Migne Editorem, 1845, col. 375 (hereafter cited as PL, [vol.], [col.]; "The Good of Marriage," trans. Charles T. Wilcox, in Saint Augustine: Treatises on Marriage and Other Subjects, ed. Roy J. DEFERRARI, The Fathers of the Church, vol. 27, New York, Fathers of the Church, Inc., 1955, p. 13. IDEM, De adulterinis coniugiis, lib. II, cap. 12, n. 12, in CSEL, 41, 395-96; PL, 40, 478-79; "Adulterous Marriages," trans. Charles T. Huegelmeier, in Saint Augustine: Treatises on Marriage, pp. 115-16.

²³ See AUGUSTINE, De bono coniugali, lib. I, cap. 3, n. 3, in CSEL, 41, 190; PL, 40, 375; "The Good of Marriage," p. 12.

²⁴ See ibid., lib. I, cap. 24, n. 32, in CSEL, 41, 227, which apparently erroneously labels it cap. 29; PL, 40, 394; "The Good of Marriage," p. 48.

²⁵ See ibid., lib. I, cap. 3, n. 3, in CSEL, 41, 190; PL, 40, 375; "The Good of Marriage," p. 12.

Augustine wrote De bono coniugali about the year 401 in response to the controversy begun by Jovinian, who accused Catholics of Manicheanism. In one chapter, he emphasizes the dignity of marriage and its goodness.

The good, therefore, of marriage among all nations and all men is in the cause of generation and in the fidelity of chastity; in the case of the people of God, however, it is also in the sanctity of the sacrament. [...] These are all goods on account of which marriage is²⁶ a good: offspring, fidelity, sacrament [indissolubility].

So Augustine asserts that the natural state of marriage has at least two goods, "begetting" and "fidelity of chastity." In addition, for Christians there is also a good which he calls the "sanctity of the sacrament." Then he summarizes the goodness of marriage with the three terms: offspring, fidelity, and sacrament. In this particular chapter he appears to equate the good of offspring with bearing children.

Augustine wrote De sancta virginitate shortly after the portion of De bono coniugali just cited. There he writes:

Let spouses have their blessing, not because they beget children, but because they beget them honorably and lawfully and chastely and for society, and bring up their offspring rightly, wholesomely, and with perseverance; because they keep conjugal fidelity with each other;

²⁶ Ibid., lib. I, cap. 24, n. 32, "The Good of Marriage," pp. 47-48. "Bonum igitur nuptiarum per omnes gentes atque omnes homines in causa generandi est et in fide castitatis; quod autem ad populum dei pertinet, etiam in sanctitate sacramenti [...]. haec omnia bona sunt, propter quae nuptiae bonum sunt: proles, fides, sacramentum." CSEL, 41, 226-27; PL, 40, 394, which instead reads "nuptiae bonae sunt."

because they do not desecrate the sacrament of matrimony.²⁷

In this text he links the blessing (bonum) of marriage with two actions relative to children, i.e., to beget (procreare) and to bring up (educare) offspring. In addition he recalls the goods of fidelity and sacrament [indissolubility].

Augustine offers an exegetical treatment of the Book of Genesis in De Genesi ad litteram, written between the years 401 and 415. The section which mentions marriage, in the context of the creation of humans and their fall, was likely written in 401 — in other words, at the same time as the two previous works.

This [good of marriage] is threefold: fidelity, offspring, sacrament [indissolubility] [...] "offspring" means that they are received lovingly, nourished with kindness, and raised religiously [...].²⁸

Here Augustine goes into a little more detail in describing the content of the bonum prolis. The good of offspring means that the parents receive the children with love, bring them up with tender care, and also

²⁷ AUGUSTINE, De sancta virginitate, cap. 12, n. 12, "Holy Virginity," trans. John McQuade, in Saint Augustine: Treatises on Marriage, p. 154. "Habeant coniugia bonum suum, non quia filios procreant, sed quia honeste, quia licite, quia pudice, quia socialiter procreant et procreatos pariter, salubriter, instanter educant, quia tori fidem inuicem seruant, quia sacramentum connubii non uiolant." CSEL, 41, 244-45; PL, 40, 401.

²⁸ AUGUSTINE, De Genesi ad litteram, lib. IX, cap. 7, n. 12. "hoc autem tripartitum est: fides, proles, sacramentum. [...] in prole, ut amanter suscipiatur, benigne nutriatur, religiose educetur [...]." CSEL, recensuit Iosephus ZYCHA, vol. 28, pars 1, Vindobonae, F. Tempsky, 1894, pp. 275-76; PL, 34, 97. Unless indicated otherwise, the author of this study provides all English translations.

give them a religious education (educare).²⁹ The bonum prolis refers to the manner in which the spouses raise their children.³⁰

In De nuptiis et concupiscentia, Augustine defended himself against Julian's accusations that he denied the goodness of marriage. In this later text, which he wrote about 419-420, he says:

In marriage, however, three things are highly esteemed: offspring, fidelity, sacrament [indissolubility]. But ~~offspring~~, not only that they are born, but also that they are reborn; for they are born to punishment, unless they are reborn to life.³¹

In this text, bonum prolis includes not only the physical generation of children, but their spiritual rebirth in baptism as well.

Clearly, Augustine does not limit the bonum prolis merely to procreation but also includes care for the offspring who are born. The bonum prolis seems to include physical birth, raising the children and, for Christians, providing for their spiritual welfare through baptism as well. Augustine speaks of a better marriage in which the children are also nurtured spiritually:

²⁹ See AUGUSTINE, in "The Literal Meaning of Genesis," trans. and annotated by John H. Taylor, in Ancient Christian Writers, vol. 42, New York, Newman Press, 1982, p. 78.

³⁰ Though he provides the content of the bonum prolis in this text, Augustine refers the reader to his recently published De bono coniugali for a fuller treatment of the goodness of marriage, which fertility makes honorable, and which regulates concupiscence.

³¹ AUGUSTINE, De nuptiis et concupiscentia, lib. I, cap. 17, n. 19. "In nuptiis tamen bona nuptialia diligentur: proles, fides, sacramentum. sed proles, non ut nascatur tantum uerum etiam ut renascatur; nascitur namque ad poenam, nisi renascatur ad uitam." CSEL, recensuerunt Carolus F. URBA et Iosephus ZYCHA, vol. 42, Vindobonae, F. Tempsky, 1902, p. 231; PL, 44, 424.

Marriage, therefore, is a good in which the married are better in proportion as they fear God more chastely and more faithfully, especially if they also³² nourish spiritually the children whom they desire carnally.

Parents, therefore, live out their faith more fully when they nurture their children spiritually as well as physically.

Augustine condemned the abuses that he saw in Roman society, in which spouses sought sterility or abortion, and in which selfish parents neglected their children. And so if a couple came together and had the desire or made an attempt to prevent conception, Augustine says no real marriage exists. He does refer to those who seek to make themselves sterile or seek to destroy the child as it grows in the mother's womb. Others abhor the responsibility of accepting and caring for children that they did not want or expose their children once they have been born. He argues that it is sinful and a shocking crime. And if both spouses participate in such behavior, it is not a marriage but a disgrace; if alone, the husband is an adulterer or the wife a

³² AUGUSTINE, De bono coniugali, lib. I, cap. 19, n. 22, "The Good of Marriage," p. 38. "bonum ergo sunt nuptiae, in quibus tanto meliores sunt coniugati, quanto castiores ac fideliores deum timent, maxime si filios, quos carnaliter desiderant, etiam spiritaliter [sic] nutriant." CSEL, 41, 217; PL, 40, 389.

In a separate tract on the topic of widowhood Augustine writes: "[...] yet you are deserving of merit, not because you have [children], but because you are zealous in rearing and educating them in the ways of piety." IDEM, De bono viduitatis, cap. 14, n. 18, in "The Excellence of Widowhood," trans. John McQuade, in Saint Augustine: Treatises on Various Subjects, ed. Roy J. DEFERRARI, The Fathers of the Church, vol. 16, New York, Fathers of the Church, Inc., 1952, p. 300. "[...] nec ideo laudanda es, quia eos habes, sed quia pie nutrire atque educare studes." CSEL, 41, 324-25; PL, 40, 441.

harlot.³³

In at least one place Augustine indicates that procreation of offspring has a primacy among the goods of marriage: "Therefore, the procreation of children is itself the primary, natural, legitimate purpose of marriage."³⁴ He makes this statement after he acknowledges that marriage is good, that it exists for the sake of generation, and that it also serves as a remedy for the vice of incontinence.

Nowhere does Augustine use the Latin term for end (finis) to describe any of the goods of marriage, although he makes clear that one of the purposes (causae) of marriage is the generation of offspring. Nor does he seem to be concerned with any technical vocabulary to denote an exact obligation arising from marriage. He does not make an explicit statement, i.e., "the bonum prolis is the procreation and education of offspring." Rather the overall brevity of his remarks with regard to the meaning and content of the bonum prolis suggests that he is stating the obvious to the reader — that one of the good things relative to marriage is having children and raising them.

ISIDORE of Seville (d. 636) most likely formulates three ends of marriage for the first time. One takes a spouse, he says, for the sake of offspring, for mutual assistance, and as a remedy for

³³ See AUGUSTINE, De nuptiis et concupiscentia, lib. I, cap. 15, n. 17, in CSEL, 42, 229-30; PL, 44, 423-24; "On Marriage and Concupiscence," pp. 270-71. However, one may question whether Augustine means to indicate nullity of the marriage in the modern sense.

³⁴ AUGUSTINE, De adulterinis coniugiis, lib. II, cap. 12, n. 12, "Adulterous Marriages," p. 116. "propagatio itaque filiorum ipsa est prima et naturalis et legitima causa nuptiarum." in CSEL, 41, 396; PL, 40, 479.

incontinence.³⁵ By offspring he means the hope of having offspring, and the intention to procreate and educate them to worship God.³⁶

III. The Middle Ages

By the twelfth century theological and canonical literature begins to speak regularly of ends of marriage.³⁷ The ends find their inspiration in and substitute for Augustine's goods of marriage.³⁸

Generally the authors' focus attempts to excuse the disorder associated with sexual activity, rather than offer a full exposition of the theology of marriage.³⁹ They preoccupy themselves with procreation, which exists only or primarily as a remedy for

³⁵ See lib. IX, cap. 7, n. 27, in ISIDORE, Etymologiarum sive originum libri XX, recognovit brevisque adnotatione critica instruxit W. M. LINDSAY, vol. 1, Oxonii, E Typographeo Clarendoniano, [1911]; also in PL, vol. 82, Parisiis, excudebatur et venit apud J.-P. Migne Editorem, 1850, col. 367; English trans. in ROBINSON, "Unresolved Questions," p. 75.

³⁶ As a canonist Isidore believes that the good of offspring is a substantial element in marriage; see Pedro M. ABELLAN DE ARISTIZABAL, El fin y la significación sacramental del matrimonio desde S. Anselmo hasta Guillermo de Auxerre, Biblioteca Teológica Granadina 1, Granada, Colegio de la Compañía de Jesús, 1939, pp. 20-21, nn. 98, 99. There are other ends of marriage but they have no legal significance; see ROBINSON, "Unresolved Questions," p. 75.

³⁷ For a detailed survey of the literature of the twelfth and early thirteenth century, see ABELLAN, El fin y la significación sacramental del matrimonio.

³⁸ LUIS VELA, "La doctrina de San Alfonso Maria de Ligori, sobre los fines del matrimonio," in Sal terrae, 61 (1973), p. 610.

³⁹ They vary in their description of the object which is excused: the use of marriage, the conjugal act, sexual pleasure and concupiscence. ABELLAN, El fin y la significación sacramental del matrimonio, p. 162.

concupiscence after the Fall of the first humans. The survival of the species is no longer of practical importance.

Most authors in the period simply quote Augustine, and so the obscurity about the nature of the goods and their function or content continues. Most of the authors refer to the three goods, but some say that those three are the **principal** goods.⁴⁰

The bonum prolis appears under other names including hope of offspring (spes prolis) and simply offspring (proles). The content of this good or end encompasses a broad range of understanding. Some limit the content to not impeding the effects of complete sexual union. Still, they differ about the explicit or implicit intention toward offspring which spouses must bring to marriage, and whether upbringing includes physical and/or religious education.⁴¹

Having reached the conclusion that "consent makes a marriage," some authors turn their attention to the object of that consent. In order to do so, they must ask the question, "What is the substance of marriage?" Three of the authors who creatively address the topics of the goods, ends, and substance of marriage, and the object of consent are Hugh of St. Victor, Gratian, and Peter Lombard.

HUGH OF ST. VICTOR (d. 1141) was a canon regular of Saint Augustine who taught at the University of Paris. He produced a

⁴⁰ Ibid., p. 161.

⁴¹ Ibid., pp. 163-64.

definition of marriage almost entirely his own.⁴²

Hugh proposes that there are two distinct institutions of marriage, but both are sacrament. The first institution exists before the sin of the first humans, to carry on the human race. The second institution occurs after the Fall, to provide a remedy for the weakness and sin in spouses, or more precisely in their sexuality, and gives a pretext for marriage. The three goods proposed by Augustine supply this excuse.⁴³

The good of offspring he calls the spes prolis, which means offspring are "expected devoutly, received lovingly, and nourished religiously."⁴⁴ In the next chapter he says that the spes prolis is not present in every marriage, such as those who take a vow of continence, or those who cannot bear children because of old age. Therefore, there is still a marriage even if the spes prolis is absent.⁴⁵

⁴² HUGH OF ST. VICTOR writes De sacramento coniugii as a section of his treatise De sacramentis christianae fidei, in PL, vol. 176, Parisiis, excudebatur et venit apud J.-P. Migne Editorem, 1854, col. 173-618; On the Sacraments of the Christian Faith: (De sacramentis), trans. Roy J. Deferrari, Cambridge, MA, Mediaeval Academy of America, 1951. A fuller presentation of his thought can be found in ABELLAN, El fin y la significación sacramental del matrimonio, pp. 66-74.

⁴³ HUGH OF ST. VICTOR, De sacramentis, lib. II, pars 11, cap. 3, in PL, 176, 481; On the Sacraments, p. 325. See also MACKIN, What is Marriage?, p. 156.

⁴⁴ HUGH OF ST. VICTOR, De sacramentis, lib. II, pars 11, cap. 7, On the Sacraments, p. 339. "In spe prolis, attenditur ut devote exspectetur, amanter suscipiatur, religiose nutriatur." PL, 176, 494.

⁴⁵ Ibid., lib. II, pars 11, cap. 8, in PL, 176, 495; On the Sacraments, p. 340.

Distinct from his predecessors, however, Hugh believes that the principal end of marriage is the relationship of conjugal love between the spouses. Marital consent only obliges one to form a conjugal society, common life in mutual love. Consent, then, does not imply a right or obligation to the other ends, i.e., procreation (the conjugal act), and the remedy of concupiscence. So while consent makes a marriage, spouses may in fact place two consents in order to conform to the two types of union -- a conjugal society and a sexual union.⁴⁶

GRATIAN wrote his Decretum about 1140 at the University of Bologna.⁴⁷ His concern is more practical as he speculates about the object of consent. At the same time, the ends of marriage also keep his interest. The answer that he proposes conveniently combines the two. First, marital consent must of course direct itself to the attainment of the primary end of marriage. Second, he suggests procreation as the primary end of marriage. Therefore, Gratian concludes, the object of marital consent is procreation, more specifically, the conjugal act or sexual intercourse.⁴⁸

⁴⁶ See *ibid.*, lib. II, pars 11, cap. 4, in PL, 176, 484-85; On the Sacraments, pp. 329-30; see also *IDEM*, De B. Mariae virginitate, in PL, 176, 859. See also MACKIN, What is Marriage?, p. 157; Alain MATTHEEUWS, Union et procréation: Développements de la doctrine des fins du mariage, Paris, Editions du Cerf, 1989, p. 39.

⁴⁷ Although a canonist, Gratian's work reveals a step in the development that is taking place among theologians. The difference between theologians and canonists was not so marked as it sometimes is today.

⁴⁸ See MACKIN, What is Marriage?, pp. 161-63. This study uses the expressions **sexual intercourse** and **conjugal act** interchangeably, and assumes that those acts are complete and properly performed in a human manner, according to the canonical understanding.

PETER LOMBARD (d. 1160) builds on the work of Hugh and Gratian. Like Hugh, he wrote at the University of Paris, where he completed his Libri IV sententiarum between 1155 and 1158. Lombard rejects the goods of marriage as the constitutive elements of marriage and the object of marital consent. Instead he establishes three goals of marriage. The principal goals include procreation and refuge from fornication; other worthy or permissible goals include preservation of peace, reconciliation of enemies, beauty, and wealth. But procreation is clearly a primary goal.⁴⁹

Lombard tries to determine the element which is essential to marital consent, without ruling out the possibility of virginal marriage. Like Gratian he concludes that it is not intercourse or cohabitation but consent to live in the conjugal society. And so the intention to procreate or spes prolis does not hold center place, even though it still constitutes a primary goal.⁵⁰

For the most part, those writing in the twelfth century did not consider the formulation of the three goods of marriage as a complete and perfect expression of the goodness of marriage, but as a summary of many goods, or a list of the principal goods. The goods excuse the disorder of sexual activity, thereby making marital intercourse morally

⁴⁹ See MACKIN, What is Marriage?, p. 165.

⁵⁰ See D. XXVIII, cap. 3-4, in PETER LOMBARD, Libri IV sententiarum, studio et cura PP. Collegii S. Bonaventurae in lucem editi, secunda editio ad fidem antiquiorum codicum mss. iterum recognita, Ad Claras Aquas, prope Florentiam, Ex Typographia Collegii S. Bonaventurae, 1916, pp. 927-28. See also MACKIN, What is Marriage?, pp. 166-67; ABELLAN, El fin y la significación sacramental del matrimonio, pp. 78-87.

good. Beyond justifying the conjugal act, however, their work lacks precision about the content or meaning of the goods.⁵¹

In the thirteenth century, scholastic theologians had to defend marriage against a new wave of challenges which arose from the Albigensians and Cathars, who condemned marriage and sexuality as degradations of a person.⁵² For DUNS SCOTUS (d. 1308) and BONAVENTURE (d. 1274), the object of marital consent, now considered as a contract for the exchange of rights, is the transfer of rights for sexual acts. The purpose for marriage, or for the exchange of rights, consists in the procreation and education of offspring.⁵³

There was not unanimity among the theologians, however. For example, WILLIAM OF AUXERRE (d. 1231) of Paris says that marital consent means consent to conjugal union, not solely to cohabitation or sexual intercourse. Rather, conjugal union includes the elements of cohabitation, intercourse, mutual assistance, and mutual power over the body.⁵⁴ And ALBERT THE GREAT (d. 1280) is the only teacher in the Middle Ages who sees the conjugal act not solely as an act in the natural order serving the end of procreation, but also as a personal act

⁵¹ See Francisco GIL HELLIN, "Los 'bona matrimonii' de San Agustín," in Revista agustiniana de espiritualidad, 23 (1982), p. 183; IDEM, "Los 'bona matrimonii' en [...] 'Gaudium et spes,'" p. 134.

⁵² See MACKIN, What is Marriage?, pp. 176-77.

⁵³ See *ibid.*, pp. 185-86; MATTHEEWS, Union et procréation, p. 39.

⁵⁴ See lib. IV, tr. XVII, cap. 2, q. 2, in WILLIAM OF AUXERRE, Summa aurea, cura et studio Jean RIBALLIER, vol. 4, Paris, Centre National de la Recherche Scientifique, 1985, pp. 385-86; text and trans. in David E. FELLHAUER, "The Consortium omnis vitae as a Juridical Element of Marriage," in SC, 13 (1979), p. 67.

that can be justified by a personal end.⁵⁵

WILLIAM OF AUVERGNE (d. 1249) lists five elements that describe marriage:

The first of these [communions] is [communion] in the true religion itself, which is the due worship of the divine honor. [...] The second [element] of the conjugal society is a communion of bodies for the conjugal task, that is, generation. The third is a communion of temporal goods, by which it is not lawful for one [spouse] to defraud the other. The fourth is a communion of their own bodies, and it consists in caring for and serving each other, and providing for mutual needs both in health and in sickness. The fifth is a communion of human children and of the entire family, which consists in educatio, instruction, governance, and provision for the future. [Marriage] is therefore a perfect society by these five communions, and it consists totally and integrally in these; and whoever bind themselves to each other by the bond of matrimony oblige themselves to this society and to all its parts.⁵⁶

Of course jurists find such a description of marriage "diffuse and unmanageable" and difficult to use in order to judge the sufficiency and validity of one's consent. Some criterion is necessary in order to verify empirically and to define more exactly the object of consent. The right to sexual acts as the proper object of marital consent

⁵⁵ See MATTHEEUWS, Union et procréation, p. 42.

⁵⁶ WILLIAM OF AUVERGNE, De sacramento matrimonii, cap. 6, in Opera omnia, vol. 1, Parisiis, Apud J. Dupuis, 1674, pp. 520-21: "Harum ergo prima est in ipsa vera religione, quae est divinae honorificentiae debitus cultus. [...] Secunda pax [sic; pars?] conjugalis societatis est communio corporum ad opus conjugale, seu generationis. Tertia communio bonorum temporalium, quibus non licet alterum alteri fraudem facere. Quarta communio est corporum propriorum, quae est custodiendi se invicem, ac serviendi, providendique sibi invicem tam in sanitate, quam in infirmitate. Quinta est communio hominum liberorum, totiusque familiae, quae sunt educatio, eruditio, regnum, & in posterum provisio. Est ergo perfecta societas ex his quinque communionibus, & in his integre, totaliterque consistit, & ad istam societatem se obligant, ad omnesque partes ipsius quicumque matrimoniale vinculo sibi invicem astringuntur."

fulfills those requirements.⁵⁷

The zenith of high medieval philosophy and theology comes with THOMAS AQUINAS (d. 1274). His thoughts on marriage are set out primarily in his commentary on the Sententiae of Peter Lombard.⁵⁸ Later Reginald of Piperno (d. 1290) selected and edited portions of the commentary to place in the Supplementum⁵⁹ in order to complete Aquinas' Summa theologiae.⁶⁰

Aquinas accepts the three goods of marriage as a suitable expression of the goodness of marriage; in fact, he considers them to be a complete synthesis. That is, it is more correct to say with Aquinas that marriage is three goods rather than ~~has~~ three goods. Nevertheless, he allows that the three-fold formula admits of further precision in order to express better the content of each of the goods.⁶¹

⁵⁷ See MACKIN, What is Marriage?, p. 190.

⁵⁸ THOMAS AQUINAS, Commentum in quattuor libros Sententiarum Petri Lombardi, in Opera omnia, Parisiis, L. Vivès, 1871-1880, vol. 7-11 (hereafter cited as IV Sent., [vol.], [p.]).

⁵⁹ This study uses the Leonine edition found in THOMAS AQUINAS, Sancti Thomae Aquinatis doctoris angelici opera omnia, iussu edita Leonis XIII P. M.: Tertia pars summae theologiae a quaestione LX ad quaestionem XC, ad codices manuscriptos vaticanos exacta, cum commentariis Thomae de Vio Caietani Ordinis Praedicatorum S. R. E. Cardinalis, et supplemento eiusdem tertiae partis, cura et studio fratrum eiusdem ordinis, t. 12, Romae, Ex Typographia Polyglotta S. C. de Propaganda Fide, 1906, xviii, 383; xlvi, 264 pp. (hereafter cited as Suppl., p.).

⁶⁰ See MACKIN, What is Marriage?, p. 190, note 2. This study utilizes the texts of the Suppl., but also provides references to the IV Sent.

⁶¹ GIL, "Los 'bona matrimonii' de San Agustín," pp. 183-84.

But Aquinas works within a different philosophical approach than does Augustine. Aquinas examines the finality or ends (finis) of marriage, and to do so he places the three goods in Aristotelian categories. His work overcomes some of the negativism evident in the followers of Augustine as we have just seen. Still, he integrates Augustine's goods, including the bonum prolis, into his own systematic presentation of marriage.

Aquinas begins by noting that there are two aspects of natural law. The first aspect proposes that human beings, as a part of nature, hold some things in common with animals. The second aspect concerns whatever belongs to the special rational nature of human beings, which includes our social nature and an openness to God. Marriage is established by natural law under the first aspect, because of sexual union between the partners; and also under the second aspect, because human nature wishes to place rational creatures in the world. Accordingly, humans must give attention to the corporal and spiritual growth of their offspring, under the two aspects of natural law.⁶²

A further examination of marriage points to a division of duties which corresponds somewhat to the primary and secondary ends.⁶³ One

⁶² See Louis JANNSENS, "Les grandes étapes de la morale chrétienne du mariage," in Aux sources de la morale conjugale, Gembloux, J. Duculot, [1966], p. 137. See, for example, q. XLI, a. 1, ad 1, in Suppl., p. 53; parallel in lib. IV, D. XXVI, q. 1, a. 1, ad 1, in IV Sent., 11, 67.

⁶³ See q. XLI, a. 1, respondeo, in Suppl., p. 78; parallel in lib. IV, D. XXVI, q. 1, a. 1, solutio, in IV Sent., 11, 67; and also q. LIV, a. 3, respondeo, in Suppl., p. 106; parallel in lib. IV, D. XL, q. 1, a. 3, solutio, in IV Sent., 11, 237.

essential duty of humans, in officium naturae (duty of nature), requires the preservation of the human species. Other aspects of marriage, in officium civilitatis (duty of politeness), help humans to live in society, such as friendship between the spouses and mutual help.⁶⁴ The presentation of his thoughts on the bonum prolis writings repeats and builds upon these philosophical underpinnings.

Along with Augustine, then, Aquinas presumes three goods of marriage: offspring, fidelity, and sacrament [indissolubility]. However, the procreation and education of offspring can also be called an end of marriage according to natural law:

Therefore marriage has for its principal end the procreation and education of offspring, and this end coincides with humans according to their own nature, wherefore it is common to other animals, as Ethic. VIII says. And so "offspring" is designated a good of marriage. But as for the secondary end, as the Philosopher says, only for humans does it have the sharing of tasks which are necessary for life.⁶⁵

⁶⁴ See MACKIN, What is Marriage?, p. 179. The assistance which spouses provide to one another for their own sakes differs from the assistance they provide to one another for the purpose of raising their children. Aquinas refers to the domestic tasks throughout the Suppl. under several headings, e.g., domestica conversatio, communicatio operum, vita communis in rebus domesticis, and vitam domesticam; see Theo G. BELMANS, Le sens objectif de l'agir humain: Pour relire la morale conjugale de Saint Thomas, Studi tomistici 8, Città del Vaticano, Libreria Editrice Vaticana, 1980, p. 293.

⁶⁵ "Matrimonium ergo habet pro fine principali prolis procreationem et educationem: qui quidem finis competit homini secundum naturam sui generis; unde et aliis animalibus est communis, ut dicitur in VIII Ethic. Et sic bonum matrimonii assignatur proles. Sed pro fine secundario, ut dicit Philosophus, habet in hominibus solum communicationem operum quae sunt necessaria in vita." Q. LXV, a. 1, respondeo, in Suppl., p. 132; parallel in lib. IV, D. XXXIII, q. 1, a. 1, solutio, in IV Sent., 11, 141.

So when Aquinas speaks of offspring as an end of marriage, he makes it quite clear that the end is not procreation alone, but it must include raising the children, i.e., their education (educatio): ⁶⁶

Indeed, generation of a human being would be useless unless it is followed by the necessary nurturing, because the being generated would not survive if the necessary sustenance is denied. Therefore the emission of semen ought to be ordered properly for both ⁶⁷suitable generation and education of the begotten child.

Procreation, therefore, demands as well the education of offspring for their very survival.

For Aquinas it is only natural that the parents who bring new life into the world are also the people who have the responsibility of caring for that new life. Yet a human marriage departs from the model of the animal kingdom with respect to the ties that sometimes exist, either between the animals as parents, or between the animal parents and their offspring.

⁶⁶ See pars 3, q. XXIX, a. 2, respondeo, in THOMAS AQUINAS, Sancti Thomae Aquinatis doctoris angelici opera omnia, iussu edita Leonis XIII P. M.: Tertia pars summae theologiae a quaestione I ad quaestionem LIX, ad codices manuscriptos vaticanos exacta, cum commentariis Thomae de Vio Caietani Ordinis Praedicatorum S. R. E. Cardinalis, cura et studio fratrum eiusdem ordinis, t. 11, Romae, Ex Typographia Polyglotta S. C. de Propaganda Fide, 1903, p. 312. See q. XLI, a. 1, respondeo, in Suppl., p. 78; parallel in lib. IV, D. XXVI, q. 1, a. 1, solutio, in IV Sent., 11, 67; and q. XLIX, a. 2, ad 1, in Suppl., p. 93; parallel in lib. IV, D. XXXI, q. 1, a. 2, ad 1, in IV Sent., 11, 122.

⁶⁷ "Frustra autem esset hominis generatio nisi et debita nutritio sequeretur: quia generatum non permaneret, debita nutritione subtracta. Sic igitur ordinata esse seminis debet emissio ut sequi possit et generatio conveniens, et geneti educatio." Lib. III, cap. 122, in THOMAS AQUINAS, Sancti Thomae Aquinatis doctoris angelici opera omnia, iussu edita Leonis XIII P. M.: Summa contra Gentiles, ad codices manuscriptos praesertim sancti doctoris autographum exacta, liber tertius, cum commentariis Francisci de Sylvestris Ferrariensis, cura et studio fratrum praedicatorum, t. 14, Romae, Typis Riccardi Garroni, 1926, p. 378.

Wherefore [the Philosopher] says that "the procreation of offspring is common to all animals." Yet [nature] does not incline to this [procreation] in the same way in all [animals], because the newborn offspring of some animals are able to seek food for themselves immediately, or are sufficiently fed by their mother; and in these there is no tie of a male to a female. However, in those whose offspring needs the support of both parents, although for a short time, there is a certain tie, as may be seen in certain birds. But in humans, because the child needs the parents' care for a long time, there is a very great tie of a man to⁶⁸ a woman, toward which human nature itself inclines.

Obviously, humans require the care of their parents for a long period of time after birth. In fact, Aquinas suggests that the parental responsibility is life-long:

I answer, that by the intention of nature marriage is ordered to the education of offspring not only for some [period of] time, but for the entire life of the offspring. Wherefore it is of natural law that parents "lay up treasure for their children," and that children are the heirs of parents. Therefore, since offspring are the common good of the husband and the wife, it is proper that their society remain undivided forever, according to the dictate of natural law. And thus the inseparability of marriage is of

⁶⁸ "Unde dicit [Philosophus] quod filiorum procreatio communis est omnibus animalibus. Tamen ad hoc non inclinatur eodem modo in omnibus animalibus. Quia quaedam animalia sunt quorum filii, statim nati, possunt sufficienter sibi victum quaerere, vel ad quorum sustentationem mater sufficit: et in his non est aliqua maris ad feminam determinatio. In illis autem quorum filii indigent utriusque sustentatione, sed ad parvum tempus, invenitur aliqua determinatio quantum ad tempus illud: sicut in avibus quibusdam patet. Sed in homine, quia indiget filius cura parentum usque ad magnum tempus, est maxima determinatio masculi ad feminam, ad quam etiam natura generis inclinatur." Q. XLI, a. 1, ad 1, in Suppl., pp. 78-79; parallel in lib. IV, D. XXVI, q. 1, a. 1, ad 1, in IV Sent., 11, 68.

natural law. ⁶⁹

Fulfillment of the bonum prolis, therefore, cannot cease with procreation. The good of offspring has for its end the full human development of a person. That end is best achieved within the context of marriage:

First, as regards the principal end [of marriage], which is the bonum prolis: nature does not intend only their generation, but also their growth and progress toward complete human stature, as a human being, which is the state of virtue. Wherefore, according to the Philosopher, we have three things from our parents: namely, "existence," "nurture," and "teaching." For a child could not be educated and instructed by a parent, unless it had determined and certain parents; which was not possible, unless there were some obligation on the part of the man toward a determined woman, which makes marriage. ⁷⁰

So, parents assume an obligation in marriage to raise their children.

⁶⁹ "Respondeo dicendum quod matrimonium ex intentione naturae ordinatur ad educationem prolis non solum ad aliquod tempus, sed per totam vitam prolis. Unde de lege naturae est quod parentes filiis thesaurizent, et filii parentum heredes sint. Et ideo, cum proles sit commune bonum viri et uxoris, oportet eorum societatem perpetuo permanere indivisam secundum legis naturae dictamen. Et sic inseparabilitas matrimonii est de lege naturae." Q. LXVII, a. 1, respondeo, in Suppl., p. 138; parallel in lib. IV, D. XXXIII, q. 2, a. 1, solutio, in IV Sent., 11, 148. See q. LXV, a. 3, respondeo, in Suppl., pp. 134-35; parallel in lib. IV, D. XXXIII, q. 1, a. 3, solutio, in IV Sent., 11, 145-46.

⁷⁰ "Primo, quantum ad principalem eius finem, qui est bonum prolis. Non enim intendit natura solum generationem prolis, sed traductionem et promotionem usque ad perfectum statum hominis inquantum homo est, qui est status virtutis. Unde, secundum Philosophum, tria a parentibus habemus: scilicet esse, nutrimentum et disciplinam. Filius autem a parente educari et instrui non posset nisi determinatos et certos parentes haberet. Quod non esset nisi esset aliqua obligatio viri ad mulierem determinatam, quae matrimonium facit." Q. XLI, a. 1, respondeo, in Suppl., p. 78; parallel in lib. IV, D. XXVI, q. 1, a. 1, solutio, in IV Sent., 11, 67.

In order to fulfill that obligation, Aquinas says, one must care first for their physical needs. In addition, parents must also care for the spiritual life of their offspring:

Some only propagate and preserve spiritual life through a spiritual ministry: this belongs to the Sacrament of Orders; others do this for both corporal and spiritual life, and this is brought about by the sacrament of Marriage, by which a man and a woman join in order to generate offspring and to educate them for divine worship.⁷¹

Marriage, therefore, demands that parents provide for the spiritual education as well as the physical education of their offspring.

Aquinas manifests originality in his presentation of marriage by relating other aspects of marriage to the end of offspring. He states that inseparability is of the natural law in marriage because of the necessity of caring for the offspring.⁷² The bond of marriage

⁷¹ "Sunt enim quidam propagatores et conservatores spiritualis vitae secundum spirituale ministerium tantum, ad quod pertinent ordinis sacramentum; et secundum corporalem et spiritualement simul, quod fit per sacramentum matrimonii, quo vir et mulier conveniunt ad prolem generandam et educandam ad cultum divinum." Lib. IV, cap. 58, in Summa contra Gentiles, ad codices manuscriptos praesertim sancti doctoris autographum exacta, liber quartus, cum commentariis Francisci de Sylvestris Ferrariensis, cura et studio fratrum praedicatorum, t. 15, Romae, Apud Sedem Commissionis Leoninae, Typis Riccardi Garroni, 1930, p. 194. See q. LIX, a. 1, respondeo, in Suppl., pp. 119-20; parallel in lib. IV, D. XXXIX, q. 1, a. 1, solutio, in IV Sent., 11, 224.

In another place, Aquinas describes a two-fold perfection to be sought for offspring: the first is for the body and the soul, which is of natural law; and the second is the perfection of grace. Here it may mean that to care for the "spiritual life" of offspring belongs to the second perfection, of grace; see q. LIX, a. 2, respondeo, in Suppl., p. 120; parallel in lib. IV, D. XXXIX, q. 1, a. 2, solutio, in IV Sent., 11, 225. See also q. XLIX, a. 5, ad 1, in Suppl., p. 95; parallel in lib. IV, D. XXXI, q. 2, a. 2, ad 1, in IV Sent., 11, 126.

⁷² See q. LXVII, a. 1, respondeo, in Suppl., p. 138; parallel in lib. IV, D. XXXIII, q. 2, a. 1, solutio, in IV Sent., 11, 148.

therefore demands the fidelity of the spouses as parents.⁷³

Furthermore, the sharing of tasks (communicatio operum) is not a good of marriage in itself but is directed rather to offspring:

Therefore, to the first question we must say that in "offspring" we understand not only the procreation of offspring but also their education, to which the entire sharing of tasks between the man and wife is ordered, as to an end, inasmuch as they are joined in marriage, because parents naturally "lay up treasure for their children," as II Cor. 12 shows; and thus "offspring," as a principal end, includes another as it were secondary [end].⁷⁴

Marriage thus orders the sharing of tasks by husband and wife toward their responsibilities as parents.

In the previous passage, Aquinas also makes a distinction between primary and secondary ends of marriage. The primary end of marriage is the procreation and education of offspring, and the secondary ends are the remedy of concupiscence and the mutual assistance of the spouses. However, the secondary ends possess their own inherent value and are not solely means to achieve the primary end.⁷⁵ Therefore both the primary end and the secondary ends are essential ends (finis per se). In addition, spouses may promise an indefinite number of accidental ends

⁷³ See q. XLI, a. 1, respondeo, in Suppl., p. 78; parallel in lib. IV, D. XXVI, q. 1, a. 1, solutio, in IV Sent., 11, 67.

⁷⁴ "Ad primum ergo dicendum, quod in prole non solum intelligitur procreatio prolis, sed etiam educatio ipsius, ad quam sicut ad finem ordinatur tota communicatio operum quae est inter virum et uxorem inquantum sunt matrimonio coniuncti: quia patres naturaliter thesaurizant filiis, ut patet II Cor. XII. Et sic in prole, quasi in principali fine, alius quasi secundarius includitur." Q. XLIX, a. 2, ad 1, in Suppl., p. 93; parallel in lib. IV, D. XXXI, q. 1, a. 2, ad 1, in IV Sent., 11, 122.

⁷⁵ See q. XLVIII, a. 2, ad 1, in Suppl., p. 92; parallel in lib. IV, D. XXX, q. 1, a. 3, ad 1, in IV Sent., 11, 111.

(fines per accidens).⁷⁶

Nevertheless, Aquinas concludes that **offspring**, i.e., the procreation and education of offspring, is the principal end of marriage.⁷⁷ Likely, the modern question of "hierarchy of ends" simply is not a question for Aquinas.⁷⁸ Because both the primary end and secondary ends have inherent value, and both are essential, to say that the secondary ends **contribute to the fulfillment** of the primary end seems to be descriptive, rather than evaluative of their necessity to constitute marriage.

Aquinas points out that **offspring** has an equivocal meaning. He distinguishes between offspring in suis principiis (in its foundations) and offspring in se (in itself). Offspring in suis principiis refers to the intention to have children, and it is in this sense that the end of offspring is necessary for marriage; if it is excluded, the marriage is vitiated. Offspring in se refers to the use of marriage, i.e., that children are actually born and raised.⁷⁹ But in point of fact in a particular marriage there may be no children, but that does not mean

⁷⁶ See q. XLVIII, a. 2, respondeo, in Suppl., p. 92; parallel in lib. IV, D. XXX, q. 1, a. 3, solutio, in IV Sent., 11, 111.

⁷⁷ See q. LXV, a. 1, respondeo, in Suppl., p. 132; parallel in D. XXXIII, q. 1, a. 1, solutio, in IV Sent., 11, 141; and q. XLI, a. 1, respondeo, in Suppl., p. 78; parallel in D. XXVI, q. 1, a. 1, solutio, in IV Sent., 11, 67.

⁷⁸ See JANSSENS, "Les grandes étapes," p. 140.

⁷⁹ See Cormac BURKE, "The Bonum coniugum and the Bonum prolis: Ends or Properties of Marriage?" in The Jurist, 49 (1989), p. 712, who calls the former "procreativity" and the latter "actual procreation."

that a marriage does not exist.⁸⁰

In summary, Aquinas acknowledges the three goods of marriage, but he also determines the bonum prolis to be an end of marriage. The end of offspring includes both procreation and education, or "existence, nurture, and teaching," which Aquinas attributes to Aristotle. Educatio means the complete human development of the children, which includes both physical and spiritual dimensions. Educatio prolis also comprises a necessary and primary end of marriage, and the use of the singular verb indicates that the procreative and educative aspects combine to form one end and therefore cannot be separated. The secondary ends are necessary as well, for they have their own inherent value even as they assist a couple to achieve the primary end. Because educatio demands a faithful and indissoluble marriage, it imposes a life-long responsibility of care for any children who are born.

Aquinas agrees with other authors that the object of consent is not the act of intercourse. Rather it is the association of a man and a woman oriented toward intercourse along with the other rights and duties that belong to husband and wife which result from the exchange of the authority of one another's bodies.⁸¹ But the theologians cannot discover a way to express this in juridic terms. So while they state that the object of consent is the conjugal society (and not simply conjugal intercourse), they contradict themselves by considering only

⁸⁰ See q. XLIX, a. 3, respondeo, in Suppl., p. 94; parallel in lib. IV, D. XXXI, q. 1, a. 1, solutio, in IV Sent., 11, 123.

⁸¹ See q. LXVIII, a. 1, respondeo, in Suppl., p. 92; parallel in lib. IV, D. XXVIII, q. 1, a. 4, solutio, in IV Sent., 11, 100.

sexual intercourse, with its vague relationship to procreation and education of offspring, as the real object of consent.⁸²

The COUNCIL OF FLORENCE (1438-1445) issued a bull in which a decree for the Armenians adopts Augustine's three goods of marriage. It says, in part, "a threefold good of marriage is designated. The first is offspring to be received and educated for the worship of God. The second is fidelity [...]. The third is the indivisibility of marriage [...]." ⁸³ Among the goods of marriage, the decree specifically includes the spiritual dimension of the education of offspring.

IV. From the Council of Trent to the Second Vatican Council

Although theologians continued to write about the *ends* of marriage, not until the sixteenth century do they actually attempt to specify those ends precisely, or to prioritize them.⁸⁴ Furthermore, a switch of emphasis begins, from the *goods* to the *ends* as the sufficient

⁸² See ROBINSON, "Unresolved Questions," p. 77.

⁸³ "Assignatur autem triplex bonum matrimonii. Primum est proles suscipienda et educanda ad cultum Dei. Secundum est fides [...]. Tertium indivisibilitas matrimonii [...]." CONCILIUM FLORENTINUM, "Decretum pro Armenis," ex Bulla Exsultate Deo, 22 November 1439, in Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum, quod primum edidit Henricus DENZINGER et quod funditus retractavit, auxit, notulis ornavit Adolfus SCHÖNMEITZER, ed. 35 emendata, Friburgi Brisgoviae, Herder, 1973, n. 1327, (formerly n. 702), p. 336.

⁸⁴ See Urbano NAVARRETE, "Structura iuridica matrimonii secundum Concilium Vaticanum II," in Periodica, 56 (1967), p. 356.

justification of marriage and the use of marriage.⁸⁵

While the COUNCIL OF TRENT (1545-1563) itself did not promulgate canons about marriage relative to offspring,⁸⁶ the catechism prepared by Charles Borromeo at the instruction of the Council represents clearly the ecclesial teaching of the period.⁸⁷ The object of marital consent is the bond of marriage, for which consent is the efficient cause.⁸⁸ Consent is the mutual exchange by the spouses of the right to one another's body.⁸⁹ There are three reasons (rationes) for marriage: to form a stable society, for procreation, and to overcome lust, although there may be other reasons as well.⁹⁰ There are also three goods of Christian marriage: offspring, fidelity, and sacrament [indissolubility].⁹¹

⁸⁵ At the same time, despite the shift in emphasis, the goods of marriage increase in importance as a measure of validity; see *ibid.*, p. 559.

⁸⁶ Cf. Enchiridion, nn. 1801-1812 (formerly nn. 971-982), pp. 416-17.

⁸⁷ See Catechismus ex decreto SS. Concilii Tridentini ad parochos Pii V. Pont. Max., Bassani, Remondini, 1833, xvi, 458 pp.; English trans. in The Roman Catechism, trans. and annotated in accord with Vatican II and the new Code of Canon Law by Robert I. Bradley and Eugene Kevane, Boston, Saint Paul Editions, 1985, xv, 586 pp.

⁸⁸ See pars II, cap. 8, qq. 3-4, in Catechismus, pp. 235-36; The Roman Catechism, pp. 328-29.

⁸⁹ See pars II, cap. 8, q. 6, in Catechismus, p. 236; The Roman Catechism, p. 330.

⁹⁰ See pars II, cap. 8, qq. 13-14, in Catechismus, pp. 238-39; The Roman Catechism, pp. 332-33.

⁹¹ See pars II, cap. 8, qq. 23, 25, in Catechismus, pp. 243-44; The Roman Catechism, pp. 338-39.

In three different places, the Catechism makes clear that marriage, procreation, and offspring each includes conception, birth, raising the child, its instruction and religious upbringing:

It is called "Matrimony" because the principal object which a woman should have in marriage is to become a mother, from which the word "matrimony" is derived. Motherhood -- and therefore matrimony --⁹² means the conception, the birth and rearing of offspring.

The second reason [for marriage] is another instinctive desire: to have offspring. This desire should not be so much to have heirs for one's property, as rather to provide new recipients for the gift of faith and new heirs for heaven.⁹³

The first blessing is progeny: children begotten from lawful wedlock. So much a blessing is this that St. Paul even identifies it with salvation: "Woman will be saved through bearing children" (1 Tm 2:15). The Apostle has in mind, of course, more than just the act of procreation itself; he includes the rearing of those children: their growth in the knowledge and love of God.⁹⁴

In addition, under the heading of the Fourth Commandment, the Catechism offers suggestions about parental responsibilities toward their

⁹² Pars II, cap. 8, q. 2, in The Roman Catechism, p. 328. "Matrimonium ab eo dicitur, quod feminae idcirco maxime nubere debet, ut mater fiat; vel quia prolem concipere, parere, educare, matris munus est." Catechismus, p. 235.

⁹³ Pars II, cap. 8, q. 13. in The Roman Catechism, p. 333. "Altera [ratio] est procreationis appetitus, non tam quidem ob eam rem, ut bonorum & divitiarum heredes relinquantur, quam ut verae fidei & religionis cultores educantur." Catechismus, p. 238.

⁹⁴ Pars II, cap. 8, q. 23, in The Roman Catechism, p. 338. "Primum igitur bonum est proles, hoc est liberi, qui ex justa & legitima suscipiuntur uxore. Id enim tanti fecit Apostolus, ut diceret: (1 Tim. 2:15) Salvabitur mulier per filiorum generationem. Nec vero hoc de procreatione solum sed de educatione etiam & disciplina, qua filii ad pietatem erudiuntur, intelligendum est." Catechismus, p. 243.

children.⁹⁵

After the Council of Trent the Catholic Church does not depart from its teaching about the responsibility of parents toward their children, although at times it speaks of it in a somewhat limited sense.⁹⁶

In the nineteenth century, various popes⁹⁷ begin to sound alarms about the changes in Western society and the dangers of harm to children. Mixed marriages, schools lacking religious instruction, and education provided by civil authorities -- all pose threats to the proper raising of children. The ideal, then, is Catholic upbringing in the home with Catholic religious and moral instruction provided by the parents.

PIUS VIII (1829-1830) repeats that the purpose of sacramental marriage is not simply procreation but the religious upbringing of

⁹⁵ See pars III, cap. 5, qq. 21-22, in Catechismus, pp. 290-91; The Roman Catechism, pp. 407-8.

⁹⁶ See Daniel BOUREAU, La mission des parents: Perspectives conciliaires, de Trente à Vatican II, Paris, Éditions du Cerf, 1970, 425 pp.

⁹⁷ This study refers to many papal documents, the majority of which are published in Acta Sanctae Sedis (hereafter cited as ASS, [vol.], [p.]), and Acta Apostolicae Sedis (hereafter cited as AAS, [vol.], [p.]). English trans. of the encyclicals are published in The Papal Encyclicals, ed. Claudia CARLEN, Wilmington, NC, McGrath Publishing Co., [1981]. The subtitles designate the years of the documents therein [1740-1878 = vol. 1; 1878-1903 = vol. 2; 1903-1939 = vol. 3; 1939-1958 = vol. 4; 1958-1981 = vol. 5] (although the volume numbers do not actually exist, for simplicity this work hereafter is cited as CARLEN, [vol.], [p.]). Other papal documents on marriage can be found in Matrimony, selected and arranged by the Benedictine monks of Solesmes, trans. Michael J. Byrnes, [Boston], Saint Paul Editions, 1963, 617 pp.

children.⁹⁸ He and his successor Gregory XVI treat the subject of mixed marriages. They teach that both natural and divine law demand the raising of children in such marriages in the Catholic religion.⁹⁹

At the end of the nineteenth century, LEO XIII (1878-1903) perceived the Church's struggle with movements such as liberalism, Marxism, and cultural secularism. In the face of such threats, many of his encyclical letters make mention of the parents' right and duty to educate their children. Husbands and wives are bound to give watchful care to the upbringing of their children.¹⁰⁰ He says that the natural law requires the father to provide for the basic necessities of his children.¹⁰¹ Moreover, the education of the children must include a

⁹⁸ See PIUS VIII, Encyclical letter Traditi humilitati, 24 May 1829, in Magnum bullarium romanum: Continuato, vol. 18, Graz, Akademische Druck- u. Verlagsanstalt, 1963-1964, p. 19; n. 10, in CARLEN, 1, 223.

⁹⁹ See PIUS VIII, Apostolic letter Litteris altero, 25 March 1830, in Fontes, cura Petri GASPARRI, vol. 2, Romae, Typis Polyglottis Vaticanis, 1928, n. 482, p. 734; Matrimony, p. 85; GREGORY XVI, Encyclical letter Summo iugiter studio, 27 May 1832, in Acta Gregorii Papae XVI, recensita et digesta cura ac studio Antonii Mariae BERNASCONI, vol. 1, Graz, Akademische Druck- u. Verlagsanstalt, 1971, p. 142; n. 6 in CARLEN, 1, 231.

¹⁰⁰ See LEO XIII, Encyclical letter Arcanum, 10 February 1880, in ASS, 12, 389-90; n. 12 in CARLEN, 2, 32; IDEM, Encyclical letter Officio sanctissimo, 22 December 1887, in ASS, 20, 266; n. 11 in CARLEN, 2, 152-53; IDEM, Encyclical letter Caritatis, 19 March 1894, in ASS, 26, 526; n. 5 in CARLEN, 2, 342-43.

¹⁰¹ See LEO XIII, Encyclical letter Rerum novarum, 15 May 1891, in ASS, 23, 646; n. 13 in CARLEN, 2, 244.

religious upbringing.¹⁰² The grace which parents receive in the sacrament of marriage assists them in their tasks.¹⁰³

Furthermore, parents have a natural right to raise the children to whom they give life.¹⁰⁴ It is also their duty according to both natural and divine law. Therefore, parents cannot be freed from this obligation.¹⁰⁵ In fact, parents ought to strive to have exclusive authority over their children's education.¹⁰⁶ So he issues warnings about those who try to abolish education by the parents,¹⁰⁷ those who provide an education which might harm the Catholic faith of the children,¹⁰⁸ and those who prevent instruction by ministers of the

¹⁰² See LEO XIII, Arcanum, in ASS, 12, 389-90; n. 12 in CARLEN, 2, 32; IDEM, Encyclical letter Nobilissima Gallorum gens, 8 February 1884, in ASS, 16, 243; n. 3 in CARLEN, 2, 86; IDEM, Officio sanctissimo, in ASS, 20, 266; n. 11 in CARLEN, 2, 152-53.

¹⁰³ See LEO XIII, Encyclical letter Inscrutabili Dei consilio, 21 April 1878, in ASS, 10, 590; n. 14 in CARLEN, 2, 8-9; IDEM, Arcanum, in ASS, 12, 390; n. 12 in CARLEN, 2, 32.

¹⁰⁴ See LEO XIII, Encyclical letter Sapientiae christianae, 10 January 1890, in ASS, 22, 403; n. 42 in CARLEN, 2, 221; IDEM, Rerum novarum, in ASS, 23, 645; n. 12 in CARLEN, 2, 244.

¹⁰⁵ See LEO XIII, Nobilissima Gallorum gens, in ASS, 16, 243; n. 3, in CARLEN, 2, 86; IDEM, Officio sanctissimo, in ASS, 20, 266; n. 11 in CARLEN, 2, 152-53.

¹⁰⁶ See LEO XIII, Sapientiae christianae, in ASS, 22, 403; n. 42 in CARLEN, 2, 221.

¹⁰⁷ See LEO XIII, Rerum novarum, in ASS, 23, 646; n. 14 in CARLEN, 2, 244.

¹⁰⁸ See LEO XIII, Encyclical letter Quod multum, 22 August 1886, in ASS, 19, 102; n. 8 in CARLEN, 2, 136.

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PIUS XI (1922-1939) faced a growing secularism in the world, which had an impact in part on the Christian upbringing of offspring. He wrote two very important encyclical letters which address the responsibility which parents have to raise their children. The first encyclical concerns Christian education, Divini illius Magistri; ¹¹⁰ the second one considers Christian marriage, Casti connubii. ¹¹¹

Any discussion of the educatio prolis must take into account an important paragraph in Casti connubii. After citing some of the same passages of Augustine and Aquinas which were presented above, Pius XI says:

The blessing of offspring, however, is not completed by the mere begetting of them, but something else must be added, namely the proper education of the offspring. For the most wise God would have failed to make sufficient provision for children that had been born, and so for the whole human race, if He had not given to those to whom He had entrusted the power and right to beget them, the power also and the right to educate them. For no one can fail to see that children are incapable of providing wholly for themselves, even in matters relating to their natural life, and much less in those pertaining to the supernatural, but require for many years to be helped, instructed, and educated by others. Now it is certain that both by the law of nature and of God this right and duty of educating their offspring belongs in the first place to those who began the

¹⁰⁹ See LEO XIII, Encyclical letter Humanum genus, 20 April 1884, in AAS, 16, 425; n. 21 in CARLEN, 2, 96.

¹¹⁰ PIUS XI, Encyclical letter Divini illius Magistri, 31 December 1929, in AAS, 22, 49-86; CARLEN, 3, 353-72, who uses the original Italian title of the address, Rappresentanti in terra, later translated into Latin and published in AAS. However, this study follows the customary reference to Divini illius Magistri.

¹¹¹ PIUS XI, Encyclical letter Casti connubii, 31 December 1930, in AAS, 22, 539-92, amend. p. 604; CARLEN, 3, 391-414.

work of nature by giving them birth, and they are indeed forbidden to leave unfinished this work and so expose it to certain ruin. But in matrimony provision has been made in the best possible way for this education of children that is so necessary, for, since the parents are bound together by an indissoluble bond, the care and mutual help of each is always at hand.¹¹²

There are several important points to notice in this paragraph, which the earlier encyclical letter on Christian education also raises. First of all, offspring includes both procreation and education of children. It is inconceivable that they be separate. This two-fold responsibility belongs to the parents.¹¹³ The education of the offspring is both an inalienable right and a fundamental obligation, which cannot be usurped by any earthly power.¹¹⁴ The right and mission

¹¹² Ibid., n. 16 in CARLEN, 3, 393-94. "Procreationis autem beneficio bonum prolis haud sane absolvitur, sed alterum accedat oportet, quod debita prolis educatione continetur. Parum profecto generatae proli atque adeo toti generi humano providisset sapientissimus Deus, nisi, quibus potestatem et ius dederat generandi, iisdem ius quoque et officium tribuisset educandi. Neminem enim latere potest prolem, ne in iis quidem quae ad naturalem vitam, multoque minus in iis quae ad vitam supernaturalem pertinent, sibi ipsam sufficere et providere posse, sed aliorum auxilio, institutione, educatione per multos annos indigere. Compertum autem est, natura Deoque iubentibus, hoc educandae prolis ius et officium illorum in primis esse, qui opus naturae generando coeperunt, inchoatumque, imperfectum relinquentes, certae ruinae exponere omnino vetantur. Iamvero huic tam necessariae liberorum educationi optima qua fieri potuit ratione provisum est in matrimonio, in quo, cum parentes insolubili inter se vinculo connectantur, utriusque opera mutuumque auxilium semper praesto est." AAS, 22, 545-46.

¹¹³ See PIUS XI, Divini illius Magistri, in AAS, 22, 52; n. 12 in CARLEN, 3, 354; ibid., in AAS, 22, 58-59; n. 30 in CARLEN, 3, 357.

¹¹⁴ See ibid., in AAS, 22, 59; n. 32 in CARLEN, 3, 357; ibid., in AAS, 22, 62; n. 39 in CARLEN, 3, 358; ibid., in AAS, 22, 74; n. 73 in CARLEN, 3, 364.

of education is of both natural and divine right.¹¹⁵

The education of offspring is a long-term process. The parents have both the duty and the right to care for their children until they are able to provide for themselves.¹¹⁶ Therefore, because marriage itself is indissoluble, the welfare of the children is protected in the best possible way by parents providing assistance to one another in order to fulfill their tasks.¹¹⁷

Finally, education must assist the children in both their natural and supernatural life. It includes intellectual and moral formation and the development of individual, domestic, and social relationships.¹¹⁸ The religious and moral upbringing of the children holds principal importance.¹¹⁹ For parents must understand that the procreation and education of offspring is not merely for the preservation of the human species, nor simply to raise children to worship God, but to raise them to be members of the Church of Christ.¹²⁰

The reign of PIUS XII (1939-1958) followed the rise of several totalitarian movements throughout the world, which often claim a proper

¹¹⁵ See *ibid.*, in AAS, 22, 59; n. 32 in CARLEN, 3, 357.

¹¹⁶ See *ibid.*, in AAS, 22, 59; n. 33 in CARLEN, 3, 357.

¹¹⁷ See PIUS XI, Casti connubii, in AAS, 22, 553; n. 37 in CARLEN, 3, 397.

¹¹⁸ See PIUS XI, Divini illius Magistri, in AAS, 22, 83; n. 95 in CARLEN, 3, 368.

¹¹⁹ See *ibid.*, in AAS, 22, 60; n. 36 in CARLEN, 3, 358; *ibid.*, in AAS, 22, 74; n. 74 in CARLEN, 3, 364.

¹²⁰ See PIUS XI, Casti connubii, in AAS, 22, 544-45; n. 13 in CARLEN, 3, 393.

right to educate children, thereby usurping the right of the parents. His first encyclical letter contains a section which speaks of the natural and divine law demands that parents fulfill the material and spiritual upbringing of their children.¹²¹ However, most of his thoughts about marriage and the responsibility for educatio prolis assumed by the parents are expressed in various allocutions throughout his pontificate.¹²²

One of his most important allocutions addresses the Italian Catholic Union of Midwives in 1951.¹²³ In it he calls the generatio et educatio prolis a great law which fulfills the primary end of marriage.¹²⁴ He links procreation and education of offspring as one, which he makes abundantly clear in this allocution and several others.¹²⁵ The husband and wife in their role as parents have a duty

¹²¹ See PIUS XII, Encyclical letter Summi Pontificatus, 20 October 1939, in AAS, 32, 433-35; nn. 61-67 in CARLEN, 4, 13-14.

¹²² AAS does not publish many of his allocutions; they are available in PIUS XII, Discorsi e radiomessaggi di Sua Santità Pio XII, Città del Vaticano, Tipografia Poliglotta Vaticana, [1955-1959], 20 vol. (hereafter cited as DR, [vol.], [p.]).

¹²³ See PIUS XII, Allocution to Italian Catholic Union of Midwives (= to Midwives), 29 October 1951, in AAS, 43, 835-54; "Apostolate of the Midwife," in Catholic Mind, 50, no. 1069, (1952), pp. 49-64.

¹²⁴ See *ibid.*, in AAS, 43, 852; "Apostolate of the Midwife," p. 63.

¹²⁵ See *ibid.*, in AAS, 43, 848-52; "Apostolate of the Midwife," pp. 61-63; IDEM, Allocution to newlyweds, 18 March 1942, in DR, 4, 6; Matrimony, p. 340; IDEM, Allocution to newlyweds, 22 April 1942, in DR, 4, 46; Matrimony, pp. 341-42; IDEM, Allocution to Congress XXVI of Urology (= to Urologists), 8 October 1953, in AAS, 45, 677; Matrimony, p. 460.

to raise their children,¹²⁶ a duty which belongs to them according to natural law.¹²⁷

The primary end of marriage is not limited to a biological act, but it must continue with the care for the offspring who are produced.¹²⁸ Pius XII emphasizes several times that education must include the physical, intellectual, and spiritual formation of the children.¹²⁹ Or to express it in a negative fashion, parents may not interfere with the natural development of their offspring, for example, by abortion.¹³⁰ Pius XII affirms that the children's upbringing by the

¹²⁶ See PIUS XII, Allocution to Midwives, in AAS, 43, 850-51; "Apostolate of the Midwife," p. 61; IDEM, Allocution to fathers, 18 September 1951, in AAS, 43, 733; Matrimony, p. 402; IDEM, Allocution to World Congress II of Fertility and Sterility, 19 May 1956, in AAS, 48, 469; Matrimony, pp. 484-85.

¹²⁷ See Pius XII, Allocution to Midwives, in AAS, 43, 848-49; "Apostolate of the Midwife," p. 60; IDEM, Allocution to International Congress of Catholic Doctors, 29 September 1949, in AAS, 41, 560; Matrimony, p. 384.

¹²⁸ See PIUS XII, Allocution to Midwives, in AAS, 43, 850; "Apostolate of the Midwife," pp. 60-61.

¹²⁹ See PIUS XII, Allocution to newlyweds, 3 July 1940, in DR, 2, 164; Matrimony, pp. 312-13; IDEM, Allocution to newlyweds, 15 January 1941, in DR, 2, 378; Matrimony, p. 378; IDEM, Radio message to the world, 1 June 1941, in AAS, 33, 202; Matrimony, pp. 328-29. IDEM, Allocution to Italian Catholic Action, 26 October 1941, in AAS, 33, 453-56; Selected Letters and Addresses of Pius XII, Issued in Commemoration of the Tenth Anniversary of His Coronation, London, Catholic Truth Society, [1949], pp. 267-71; IDEM, Allocution to newlyweds, 18 March 1942, in DR, 4, 6; Matrimony, p. 340; IDEM, Radio message to the world, 13 May 1942, in AAS, 34, 166; Matrimony, p. 353.

¹³⁰ See PIUS XII, Allocution to Midwives, in AAS 43, 836; "Apostolate of the Midwife," p. 49.

parents therefore constitutes a long-term responsibility.¹³¹

He states in one address that "the work of education is so important that it surpasses even the work of procreation in importance and consequences."¹³² One may summarize the teaching of Pius XII with his statement that parents are "the first and closest educators and teachers of the children of God entrusted and given" to them.¹³³

JOHN XXIII (1958-1963) is no less convinced that the act of procreation is completed by raising the children. In an address to the Sacred Roman Rota on the holiness of marriage, he says:

In the family [i.e., marriage] we have the closest and most wonderful cooperation of man with God: two human persons created to the image and likeness of God are called not just to the great work of carrying on and prolonging the work of creation through giving physical life to new beings, in whom the life-giving Spirit will infuse the powerful principle of immortal life, but also to the nobler role that completes and perfects the former — that of providing for

¹³¹ See PIUS XII, Allocation to newlyweds, 15 January 1941, in DR, 2, 378; Matrimony, p. 318; IDEM, Allocation to Urologists, in AAS, 45, 677; Matrimony, p. 460.

¹³² PIUS XII, Allocation to World Congress of Fertility, in Matrimony, p. 491. "L'oeuvre de l'éducation dépasse encore par sa portée et ses conséquences celle de la génération." AAS, 48, 473.

¹³³ PIUS XII, Allocation to newlyweds, 15 January 1941, in Matrimony, p. 318. "[...] i primi e più vicini educatori e maestri dei figli di Dio affidati e donati [...]." in DR, 2, 378. See IDEM, Allocation to Italian Association of Catholic School Teachers, 8 September 1946, in DR, 8, 218.

the human and Christian education of their offspring. ¹³⁴

Education, then, "completes and perfects" procreation. It includes the children's physical care, intellectual instruction, and religious formation. ¹³⁵ To provide such an education constitutes both a right and a duty of parents. ¹³⁶

V. From the Second Vatican Council to the present

The Second Vatican Council opened during the pontificate of John XXIII. Gaudium et spes contains the Council's fundamental treatment of marriage. ¹³⁷ An opening footnote points out that the document is divided into two sections. In order to address the relationship of the Church to the world and its people in modern times, the authors strike a balance between doctrine and its application. The first section

¹³⁴ JOHN XXIII, Allocution to the Sacred Roman Rota, 25 October 1960, in TPS, 6 (1959-1960), p. 360 (hereafter cited as TPS, [vol.], [p.]). "Nella famiglia si ha la più mirabile e stretta cooperazione dell'uomo con Dio: le due persone umane, create a immagine e somiglianza divina, sono chiamate non soltanto al grande compito di continuare e prolungare l'opera creatrice, col dare la vita fisica a nuovi esseri, cui lo Spirito vivificatore infonde il possente principio della vita immortale; ma anche all'ufficio più nobile, e che perfeziona il primo, della educazione civile e cristiana della prole." AAS, 52, 902.

¹³⁵ JOHN XXIII, Encyclical letter Mater et magistra, 15 May 1961, in AAS, 53, 411; n. 45 in CARLEN, 5, 64, which quotes Rerum novarum.

¹³⁶ See JOHN XXIII, in AAS, 52, 447; n. 195 in CARLEN, 5, 80-81; IDEM, Encyclical letter Pacem in terris, 11 April 1963, n. 17, in AAS, 55, 261; CARLEN, 5, 109.

¹³⁷ CONCILIIUM VATICANUM II, Pastoral constitution Gaudium et spes, 7 December 1965, in AAS, 58, 1025-1120; English trans. in Vatican Council II: The Conciliar and Post Conciliar Documents, ed. Austin FLANNERY, Northport, NY, Costello Publishing Co., 1975, pp. 903-1014 (hereafter cited as GS, n.).

explores doctrinal issues but keeps a pastoral perspective; the second section speaks to certain problems of special urgency, but always in the light of doctrinal principles.¹³⁸

The chapter on marriage appears in the second section.¹³⁹ So while the Council offers the world a beautiful reflection on marriage, one should not approach it expecting to find a doctrinal exposition that clarifies with great precision the various goods, ends, or essence of marriage.¹⁴⁰ Although not explicitly, the chapter certainly presents an understanding of marriage in accord with those different paradigms. However, an examination of the text does not reveal either a definition of marriage or an exposition of its various facets or components expressed in theological terminology.

To open the section, the Council acknowledges that God has endowed marriage with certain goods (bona) and ends (fines).¹⁴¹ But it never lists those goods or ends. However, a footnote refers to four sources: Augustine's De bono coniugali; Aquinas' Supplementum; the Decretum pro Armenis from the Council of Florence; and Pius XI's Casti connubii, all of which refer to the goods of marriage.¹⁴²

¹³⁸ See GS, Preface, footnote 1.

¹³⁹ See GIL, "Los 'bona matrimonii' en [...] 'Gaudium et spes,'" pp. 127-78, for a commentary on the textual development of this section.

¹⁴⁰ See León del AMO, "El amor conyugal y la nulidad de matrimonio en la jurisprudencia," in IC, 17, no. 34 (1977), p. 82.

¹⁴¹ See GS, n. 48,1.

¹⁴² See GS, n. 48,1, footnote 1.

The section on marriage only uses the phrase bonum prolis twice. The first time, it discusses the good of the spouses, offspring, and society, which certainly is not the usual presentation of the three goods of marriage.¹⁴³ The second time, it links offspring with indissolubility, i.e., offspring demands the mutual love of the spouses.¹⁴⁴ In two other places, the authors choose to use the term good of children (bonum liberorum).¹⁴⁵ The term seems to be a deliberate attempt to avoid referring to the traditional expression of the goods of marriage, because neither do the phrases bonum fidei or bonum sacramenti appear.¹⁴⁶

The document affirms the existence of ends of marriage. It says that for the spouses to be ready to cooperate with the Creator does not depreciate the other ends, but it never explicitly states what those other ends are. It does state twice that marriage and conjugal love are ordered toward the procreation and education of offspring.¹⁴⁷ So much so, in fact, that it calls offspring the "supreme gift of marriage" (praestantissimum matrimonii donum)¹⁴⁸ and its "crowning with the

¹⁴³ See GS, n. 48,1.

¹⁴⁴ See GS, n. 50,3.

¹⁴⁵ See GS, nn. 48,1 and 50,2.

¹⁴⁶ See GIL, "Los 'bona matrimonii' en [...] 'Gaudium et spes,'" p. 139.

¹⁴⁷ See GS, nn. 48,1 and 50,1. It mentions mutual support once (48,1), and never mentions the remedy of concupiscence.

¹⁴⁸ GS, n. 50,1.

highest rank" (suo fastigio coronatur). ¹⁴⁹

Rather than the common terms of good and end, the document uses several other expressions to describe the place of educatio prolis in marriage. In marriage, the spouses assume a mission (missio) ¹⁵⁰ and a role (munus) to transmit and educate human life. Fatherhood and motherhood bring with them a duty (officium) of education, especially religious education. The sacrament of marriage strengthens and consecrates the spouses for that role and dignity (dignitas). ¹⁵¹ Finally, parents have the right (ius) to procreate and educate their children within the family. ¹⁵²

Clearly then, at the heart of marriage, spouses assume a responsibility for having children and raising them. Two aspects combine to form one distinct task, indicated by the singular form of the nouns, i.e., procreation and education is a parent's mission, a role, and a right. ¹⁵³ When 150 members of the Council petitioned for a change to express clearly a link between procreation and education of offspring and the sacrament of marriage, the Commission altered the proposed text to read: ¹⁵⁴

¹⁴⁹ GS, n. 48,1.

¹⁵⁰ See GS, n. 50,2.

¹⁵¹ See GS, n. 48,2.

¹⁵² See GS, n. 52,2.

¹⁵³ See GS, nn. 48,2, and 50,2.

¹⁵⁴ See GL, "Los 'bona matrimonii' en [...] 'Gaudium et spes,'" p. 171.

Authentic married love is caught up into divine love and is directed and enriched by the redemptive power of Christ and the salvific action of the Church, with the result that the spouses are effectively led to God and are helped and strengthened in their lofty role as fathers and mothers. Spouses, therefore, are fortified and, as it were, consecrated for the duties and dignity of their state by a special sacrament [...].¹⁵⁵

The revision establishes a clear connection between the role of spouse and the role of parent.

Moreover, the Declaration Gravissimum educationis¹⁵⁶ emphasizes that parents themselves have the responsibility for the education of their children, calling it their primary and inalienable duty and right (primum et inalienabile officium et ius).¹⁵⁷ And it is intimately connected with procreation:

As it is the parents who have given life to their children, on them lies the gravest obligation of educating their family. They must therefore be recognized as being primarily and principally responsible for their education. The role of parents in education is of such importance that it is almost impossible to provide an adequate

¹⁵⁵ "Germanus amor coniugalit in divinum amorem assumitur atque redemptiva Christi et salvifica actione Ecclesiae regitur ac ditatur, ut coniuges efficaciter ad Deum ducantur atque in sublimi munere patris et matris adiuvantur et confortantur. Quapropter coniuges christiani ad sui status officia et dignitatem peculiari sacramento roborantur et veluti consecrantur [...]." GS, n. 48,2.

The Council makes this same connection in its earlier document on the Church, n. 11, in CONCILIUM VATICANUM II, Dogmatic constitution Lumen gentium, 21 November 1964, in AAS, 57, 15-16; Vatican Council II, pp. 362-63.

¹⁵⁶ CONCILIUM VATICANUM II, Declaration Gravissimum educationis, 28 October 1965, in AAS, 58, 728-39; Vatican Council II, pp. 725-37 (hereafter cited as GE, n.).

¹⁵⁷ See GE, 6,1.

substitute.¹⁵⁸

Thus the Council asserts that parents have a duty and a right, an obligation, and an irreplaceable role in the education of their offspring. In two other conciliar documents¹⁵⁹ the Council also speaks of parental responsibilities in terms of rights.¹⁶⁰

The Second Vatican Council completed its work during the pontificate of PAUL VI. He himself addressed the subject of marriage and the raising of children in his Encyclical letter Humanae vitae. As a consequence of marriage, spouses seek to develop a personal union in order to cooperate with God in the generation and education of offspring.¹⁶¹

The teaching about the ends of marriage came under attack in the early twentieth century. In the main, moral theologians employed the teaching of Augustine and Aquinas and strictly identify the three goods with the intrinsic end and properties of marriage.¹⁶² But other

¹⁵⁸ "Parentes, cum vitam filiis contulerint, prolem educandi gravissima obligatione tenentur et ideo primi et praecipui eorum educatores agnoscendi sunt. Quod munus educationis tanti ponderis est ut, ubi desit, aegre suppleri possit." GE, n. 3.

¹⁵⁹ CONCILIUM VATICANUM II, Decree Apostolicam actuositatem, 18 November 1965, in AAS, 58, 837-64; Vatican Council II, pp. 766-98 (hereafter cited as AA, n.). IDEM, Declaration Dignitatis humanae, 7 December 1965, in AAS, 58, 929-46; Vatican Council II, pp. 799-812 (hereafter cited as DH, n.).

¹⁶⁰ See AA, nn. 11 and 30; DH, n. 5.

¹⁶¹ PAUL VI, Encyclical letter Humanae vitae, 25 July 1968, nn. 8-9, in AAS, 60, 485-87; CARLEN, 5, 525. He quotes GS, n. 50 therein.

¹⁶² Francisco GIL HELLIN, "Los 'bona matrimonii' en los tratadistas actuales," in Anales valentinos, 9 (1983), pp. 45-47.

theologians, such as Herbert Doms and Bernhardin Krempel, departed from the scholastic tradition and utilize phenomenological and personalist principles to understand marriage in terms of its meaning.¹⁶³ The response came in a 1944 decree, issued by the Sacred Congregation of the Holy Office and confirmed by Pius XII, which sought to resolve any controversy. It re-states that the secondary ends of marriage are essentially subordinated to the procreation and education of children.¹⁶⁴

But the effects of the earlier theological work¹⁶⁵ may account for important shifts which occur in Humanae vitae. First of all, Paul VI appears to avoid the question of the "hierarchy of ends." He does not speak of the ends of marriage, but the two-fold meaning of marriage. Marriage is a union of the spouses for the generation of new life. Then he proceeds to argue that there exists an

[...] inseparable connection, established by God, which man on his own initiative may not break, between the unitive significance and the procreative significance which are both

¹⁶³ See R. J. LEVIS, "Marriage (Theology of)," in New Catholic Encyclopedia, vol. 9, Washington, DC, New York, McGraw-Hill Book Co., 1967, p. 268.

¹⁶⁴ SACRA CONGREGATIO SANCTI OFFICII, Decree De matrimonii finibus, 1 April 1944, in AAS, 36, 103; Matrimony, pp. 425-26, footnote 634c.

¹⁶⁵ For a more complete history of the development of personalism in ecclesial teaching, both before and after the Second Vatican Council, see Mateo MARTINEZ CAVERO, "Personalismo/Procreacionismo y esencia del matrimonio," in Revista española de teología, 49 (1989), pp. 35-67.

inherent to the marriage act. ¹⁶⁶

Thus, the conjugal act possesses not one, but two essential meanings.

JOHN PAUL II (1978-) speaks eloquently of marriage and the parental obligation of education of children. He develops this theme in his apostolic exhortation Familiaris consortio, ¹⁶⁷ which follows the 1980 Synod of Bishops. He discusses educatio prolis in a section important enough to quote in its entirety:

The task of giving education is rooted in the primary vocation of married couples to participate in God's creative activity: By begetting in love and for love a new person who has within himself or herself the vocation to growth and development, parents by that very fact take on the task of helping that person effectively to live a fully human life. As the Second Vatican Council recalled, "Since parents have conferred life on their children, they have a most solemn obligation to educate their offspring. Hence, parents must be acknowledged as the first and foremost educators of their children. Their role as educators is so decisive that scarcely anything can compensate for their failure in it. For it devolves on parents to create a family atmosphere so animated with love and reverence for God and others that a well-rounded personal and social development will be fostered among the children. Hence, the family is the first school of those social virtues which every society needs."

The right and duty of parents to give education is essential, since it is connected with the transmission of human life; it is original and primary with regard to the educational role of others, on account of the uniqueness of the loving relationship between parents and children; and it is irreplaceable and inalienable and therefore incapable

¹⁶⁶ See PAUL VI, Humanae vitae, nn. 11-12, in AAS, 60, 488-89; CARLEN, 5, 226. Mackin says that Paul VI thus asserts these two meanings of sexual intercourse are equal in value and inseparable in conduct, in What is Marriage?, pp. 28; 247, footnote 21; and 247.

¹⁶⁷ See JOHN PAUL II, Apostolic exhortation Familiaris consortio, 22 November 1981, in AAS, 74, 81-191; TFS, 28, 1-77. See also Jan GROOTAERS and Joseph A. SELLING, The 1980 Synod of Bishops "On the Role of the Family": An Exposition of the Event and an Analysis of its Texts, Bibliotheca Ephemeridum Theologicarum Lovaniensium 64, Leuven, University Press, 1983, 375 pp.

of being entirely delegated to others or usurped by others.

In addition to these characteristics, it cannot be forgotten that the most basic element, so basic that it qualifies the educational role of parents, is parental love, which finds fulfillment in the task of education as it completes and perfects its service of life. As well as being a source, the parents' love is also the animating principle and therefore the norm inspiring and guiding all concrete educational activity, enriching it with the values of kindness, constancy, goodness, service, disinterestedness and self-sacrifice that are the most precious fruit of love.¹⁶⁸

John Paul II sounds several familiar themes here. Marriage and conjugal love have as one of their aims the procreation and education of

¹⁶⁸ JOHN PAUL II, Familiaris consortio, n. 36, in TPS, 28, 31-32 (restoring the emphases found in the Latin text). "Educationis opus immittit veluti radices in primigenam coniugum vocationem, nempe ad communicandam creatricem Dei operam: in amore ex amoreque novum gignentes hominem, qui in se quoque habet vocationem ad incrementum et progressum, parentes in se recipiunt munus efficienter eum adiuvandi ad vitam usquequaque humanam ducendam. Sicut Concilium Vaticanum Secundum commonuit, 'parentes, cum vitam filiis contulerint, prolem educandi gravissima obligatione tenentur et ideo primi et praecipui eorum educatores agnoscendi sunt. Quod munus educationis tanti ponderis est ut, ubi desit, aegre suppleri possit. Parentum enim est talem familiae ambitum amore, pietate erga Deum et homines animatum creare qui integrae filiorum educationi personali et sociali faveat. Familia proinde est prima schola virtutum socialium quibus indigent omnes societates.'

"Coniugum ius officiumque instituendi definitur essentiale, quoniam cum vitae humanae transmissione cohaeret, nativum ac primarium, quatenus rescipit aliorum educandorum opus propter unicam amoris coniunctionem inter parentes et filios; nec permutandum nec alienandum, quod propterea neque aliis totum delegari licet neque ab aliis usurpari.

"Has praeter qualitates minime est obliviscendum principalem maxime partem, utpote quae educandi munus parentum circumscribat, paterne esse maternaeque amoris, qui opere institutorio consummetur, implente perficienteque vitae ministerium: parente amore fonte fit anima ideoque norma, quae movet ac dirigit omnem concretam educationis navitatem, quam illis bonis locupletat lenitatis, constantiae, bonitatis, servitii, neglectionis commodorum suorum, se abnegandi devovendique studii, quae sunt amoris pretiosissimi fructus." AAS, 74, 126-27.

children.¹⁶⁹ Procreation and education themselves are inseparable.¹⁷⁰ The parents possess the primordial right and duty to educate their offspring.¹⁷¹ Their right to educate takes precedence over the role of anyone else, and no one may delegate or usurp this right and duty.¹⁷² Conjugal love, then, is the source, the animating principle, and the norm of the educational task.¹⁷³

¹⁶⁹ See *ibid.*, n. 14, in AAS, 74, 96; TPS, 28, 11-12; and n. 41, in AAS, 74, 132; TPS, 28, 36. See also ROBINSON, "Unresolved Questions," pp. 85-86, who states that marriage "finds its *raison d'être* in the education of children, understood in its widest sense to include nurture, love, learning of interpersonal relationships between a man and a woman and a full preparation for Christian maturity."

¹⁷⁰ See *ibid.*, n. 44, in AAS, 74, 135; TPS, 28, 38. See *IDEM*, Allocation to plenary assembly I of the Pontificium Consilium pro Familia (= PCF I), 30 May 1983, nn. 4-5, in AAS, 75, 841-42; TPS, 28, 276-77; *IDEM*, Allocation to plenary assembly IV of the Pontificium Consilium pro Familia (= PCF IV), 10 October 1986, n. 3, in AAS, 79, 287.

¹⁷¹ See JOHN PAUL II, Familiaris consortio, n. 46, in AAS, 74, 138; TPS, 28, 39. See *IDEM*, Allocation to PCF I, n. 5, in AAS, 75, 842; TPS, 28, 277; *IDEM*, Allocation to PCF IV, n. 2, in AAS, 79, 287; *IDEM*, Allocation to to bishops of the United States of America, 24 September 1983, n. 3, in AAS, 76, 125; APOSTOLIC SEE, Charter of the Rights of the Family, 22 October 1983, in Leges annis 1979-1985 editae, collegit, digessit notisque ornavit Xaverius OCHOA, Leges Ecclesiae post Codicem iuris canonici editae, vol. 6, Roma, Commentarium pro Religiosis, 1987, n. 5002, art. 5, col. 8684; TPS, 29, no. 1, p. 82.

¹⁷² See JOHN PAUL II, Familiaris consortio, n. 41, in AAS, 74, 132; TPS, 28, 36. See *IDEM*, Allocation to PCF I, n. 4, in AAS, 75, 841; TPS, 28, 276; *IDEM*, Allocation to plenary assembly II of the Pontificium Consilium pro Familia, 26 May 1984, n. 5, in AAS, 76, 796.

¹⁷³ See JOHN PAUL II, Familiaris consortio, n. 36, in AAS, 74, 127; TPS, 28, 32. See also Dionigi TETTAMANZI, La famiglia, via della Chiesa, Milano, Massimo, 1987, p. 147, who suggests that the conjugal love of the parents provides an "ontological key" to understanding their role, and therefore constitutes their task.

Familiaris consortio also teaches that the education of offspring includes both the physical and spiritual formation of children.¹⁷⁴ This is obviously a process which takes place over a long period of time, starting at the moment of conception and continuing throughout childhood.¹⁷⁵ John Paul II states that the educational task finds an additional source and strength in the sacrament of marriage.¹⁷⁶ Therefore he calls the raising of children a true ministry.¹⁷⁷

In an instruction issued in 1987, the Congregation for the Doctrine of the Faith summarizes educatio prolis:

The child has the right to be conceived, carried in the womb, brought into the world and brought up within marriage: It is through the secure and recognized relationship to his own parents that the child can discover

¹⁷⁴ See JOHN PAUL II, Familiaris consortio, n. 15, in AAS, 74, 97; TPS, 28, 12; n. 21, in AAS, 74, 105-6; TPS, 28, 18; n. 28, in AAS, 74, 114; TPS, 28, 23-24. See IDEM, Allocation to bishops of the United States of America, nn. 3-4, 7, in AAS, 76, 124-25, 127.

¹⁷⁵ See JOHN PAUL II, Familiaris consortio, n. 26, in AAS, 74, 112; TPS, 28, 22, wherein he quotes his address to the United Nations on 2 October 1979.

¹⁷⁶ See *ibid.*, n. 38, in AAS, 74, 129; TPS, 28, 33. See IDEM, Allocation to PCF IV, n. 2, in AAS, 79, 287; IDEM, Allocation to plenary assembly VI of the Pontificium Consilium pro Familia, 10 June 1988, n. 3, in AAS, 80, 1772; TPS, 33, 313.

¹⁷⁷ See JOHN PAUL II, Familiaris consortio, n. 21, in AAS, 74, 105; TPS, 28, 18; n. 38, in AAS, 74, 129; TPS, 28, 34. See IDEM, Allocation to PCF IV, n. 2, in AAS, 79, 287.

his own identity and achieve his own proper human development.¹⁷⁸

The statement thereby situates the parental obligation for the education of their offspring within the marital relationship.

The document asserts that marriage does not constitute a right to children in itself.¹⁷⁹ Rather, "the fidelity of the spouses in the unity of marriage involves reciprocal respect of their right to become a father and a mother only through each other."¹⁸⁰ This assertion corresponds to Aquinas' distinction between offspring in suis principiis and offspring in se.

Conclusion

Christian theology consistently upholds the responsibility for the upbringing of children that falls to the parents. The Scriptures speak of the physical care of the offspring and the religious heritage which parents must pass on to them. And the early Church sustains this perspective as it reflects on the practice of infant baptism and the

¹⁷⁸ CONGREGATIO PRO DOCTRINA FIDEI, Instruction Donum vitae, 22 February 1987, "Respect for Human Life in Origin and the Dignity of Procreation," in TPS, 32, 147. "Filius ius habet ut concipiatur, alvo contineatur, nascatur, educetur in matrimonio: is solummodo ad suos parentes referendo, certa atque publica ratione identitatem suam cognoscere potest, atque suam hominis formationem ad maturitatem perducere." AAS, 80, 87. However, one may ask how a (non-existent) child has a right to be conceived?

¹⁷⁹ See *ibid.*, in AAS, 80, 97; TPS, 32, 153.

¹⁸⁰ *Ibid.*, in AAS, 32, 147. "Coniugum autem fidelitas, in unitate matrimonii, secumfert mutuam observantiam erga ius utriuslibet, ad hoc ut alter pater aut mater fiat solummodo per alterum." The Latin text emphasizes this sentence, in AAS, 80, 87.

role of parents in raising their children. In the development of Christian thought, theologians use several paradigms to describe marriage. They agree unanimously that within marriage parents have the primary responsibility to raise the children who are the fruit of the conjugal relationship.

Augustine teaches that offspring is one of the **goods** of marriage. He describes the bonum prolis as the procreation and education of offspring. **Offspring** includes their conception, birth, physical growth, and spiritual development. Although mentioned as early as the seventh century, Aquinas offers the classical understanding of the **ends** of marriage, one of which is offspring. This finis intends the generation and complete human development of the children, including both their physical and spiritual growth. The end of offspring is a natural consequence of what begins with the creation of new life at conception. He points out the equivocal meaning of the term proles, distinguishing offspring in suis principiis and in se.

The goods of marriage and the ends of marriage remain at the core of the theological understanding of educatio prolis and its relationship to marriage. Papal teaching of the nineteenth and twentieth centuries reiterates the responsibility of parents for the education of their offspring. As a matter of fact, the papal documents frequently refer back to the works of Augustine and Aquinas.

However, a new description of marriage according to its **meaning** finds expression in the encyclical letter Humanae vitae. Marriage has both a personal aspect, the union of the spouses, and a procreative aspect which is the offspring. Even though the theological

understanding of the ~~meaning~~ of marriage includes the same content as the goods and ends, it takes a place alongside those more traditional expressions.

One may summarize the basic theological understanding of educatio prolis relative to marriage as follows. According to both natural and divine law, the raising of children is a primary right and duty of the parents who bring the child into this world. It is almost impossible for another person to assume or replace the right and duty of the parents, for raising the children is the natural fulfillment of procreation. Procreation and education are inseparably linked as one continuous process. Education strives for the full maturity of the offspring, including their physical growth, intellectual instruction, moral and religious formation, and social and civil development. The sacrament of marriage deepens and strengthens the parental obligation and reinforces the demand to provide for the children's spiritual and moral welfare a specifically Christian upbringing.

CHAPTER 2

THE CANONICAL UNDERSTANDING OF EDUCATIO PROLIS RELATIVE TO MARRIAGE

Introduction

An act of consent (marriage in fieri) establishes the marital bond (marriage in facto esse).¹ Consent is an act of the will by which a man and a woman give and accept the ~~formal~~ object of their consent, which the law establishes. It is obvious, then, that marriage in fieri and in facto esse are intimately related to one another, for consent requires an object, and the bond (including the married life which follows) requires an act of consent in order to come into existence.

An act of consent requires the proper intention, knowledge, critical evaluation, and capacity for consent. While remaining firmly grounded in doctrine and canonical tradition, the 1983 Code expresses the object of that consent in a new way. The 1917 Code describes the object of consent as the "perpetual and exclusive ius in corpus for acts suitable in themselves for generation of offspring" (c. 1081, §2), but according to the new Code the object of consent is the man and woman,

¹ Although its classical definition is "the bond," in fact the entire marital reality which results from the act of consent may rightly be called matrimonium in facto esse; see Mario F. POMPEDDA, "Incapacity to Assume the Essential Obligations of Marriage," in Incapacity for Marriage: Jurisprudence and Interpretation, Robert M. SABLE, coordinator and editor, Acts of the III Gregorian Colloquium (1-6 September 1986), Romae, Pontificia Universitas Gregoriana, 1987, p. 161; IDEM, "Il canone 1095 del nuovo Codice di diritto canonico tra elaborazione precodificiale e prospettive di sviluppo interpretativo," in IC, 27 (1987), p. 549; James B. ZUSY, "Matrimonial Consent and Immaturity," in SC, 15 (1981), p. 200.

who "give and accept one another for the purpose of establishing a marriage" (C. 1057, §2).

In determining the object of marital consent, virtually all canonists agree that marriage must be "ordered to the procreation and education of offspring" (C. 1055, §1). The marital right and obligation "to procreate and educate offspring"² simply restates the classic theological definition of bonum prolis. The question, then, is not whether the bonum prolis is an object of marital consent. Rather, what is the canonical understanding of the **content** of the bonum prolis? Canonists often differ in their descriptions of the content of the two aspects of the bonum prolis, procreatio and educatio, for they frequently seem to overlap. Moving from mere description of content to the question of importance for the validity of marriage usually exacerbates the confusion.

The first chapter indicates three main approaches to a theological understanding of the bonum prolis, which focus on the **goods** of marriage, the **ends** of marriage, and the **meaning** of marriage. This chapter presents the canonical understanding of bonum prolis, which provides a context for an understanding of the more immediate subject of this thesis, educatio prolis. It uses a thematic approach to summarize the canonical material as it appears in three historical periods: before the 1917 Code, after the 1917 Code, and after the 1983 Code.

² See, for example, Augustine MENDONÇA, "The Theological and Juridical Aspects of Marriage," in SC, 22 (1988), p. 289; POMPEDDA, "Incapacity to Assume," p. 190; IDEM, "Il canone 1095," p. 552.

This chapter describes the content of the bonum prolis which is essential to marriage.³ The exclusion of that content, therefore, by whatever means, invalidates consent.⁴ It also proposes an outline of

³ This chapter does not address several other topics relative to the bonum prolis:

- the distinction between radical right and actual right;
- the exclusion of use or exercise of a right;
- the implementation or fulfillment of an obligation;
- proofs and presumptions about the will of the parties;
- the manner of perceiving or willing the object of consent, i.e., explicitly or implicitly, positively or negatively, actually or virtually;
- the perpetual or ad tempus exclusion of a right or obligation.

Finally, the chapter does not address the characteristics or limitations of specific marital rights and duties, apart from the conjugal right itself. See, for example, Vicente J. SUBIRA, "La incapacidad para asumir los deberes del matrimonio," in IC, 27 (1987), p. 241; F. Javier HERVADA XIBERTA and Pedro LOMBARDIA, (= HERVADA-LOMBARDIA), Derecho matrimonial, in El derecho del Pueblo de Dios: Hacia un sistema de derecho canónico, Colección Canónica de la Universidad de Navarra, Pamplona, Ediciones Universidad de Navarra, 1970, vol. III, p. 27; F. Javier HERVADA XIBERTA, "Matrimonial Law: Commentaries on Canons 1055-1165," in Canons and Commentaries on Marriage, by Ignatius GRAMUNT, Javier HERVADA and LeRoy A. WAUCK, Collegeville, MN, Liturgical Press, 1987, p. 46.

⁴ See Peter HUIZING, "Bonum prolis ut elementum essenziale obiecti formalis consensus matrimonialis," in Gregorianum, 43 (1962), p. 659. This chapter of the study treats an exclusion of a marital right or obligation without regard to its manner, i.e., by a condition, an intention, or a pact. Historically, the Decretalists require that both parties must explicitly formulate and agree to a condition contrary to the substance of marriage; this is the original meaning of in pactum deducta. Later, Sánchez says that an implicit intention against the bonum prolis may invalidate a marriage, but only if in pactum deducta, but the Rota did not accept this until 1916. After the formulation of the 1917 Code, a party must still explicitly formulate a condition in pactum deducta, but both parties do not necessarily have to hold the condition. Simulation, on the other hand, is an intention to contract but not to oblige oneself. See Thomas P. DOYLE, The Understanding of the Concept 'Bonum fidei' in the Church's Canonical Tradition, [Doctoral thesis], Canon Law Studies 496, Washington, DC, Catholic University of America, 1978, pp. 519-21. For a more extensive treatment, see N. Orville GRIESE, The Marriage Contract and the Procreation of Offspring, [Doctoral thesis], Canon Law Studies 226, Washington, DC, Catholic University of America, 1946, pp. 85-96.

the bonum prolis, so that further discussion might use vocabulary in a more consistent manner. It firmly establishes that educatio prolis in suis principiis belongs to the essence of marriage, and its exclusion renders marital consent null.

I. The bonum prolis in canonical tradition before the 1917 Code

Historically, the sciences of canon law and theology were not so distinct as they are presently. One could just as easily include in this chapter the work of authors already described in the first chapter, because their work is both canonical and theological. Bearing this in mind, the outline of the canonical understanding of the educatio prolis begins with the Decretals.⁵

A. Gregory IX and Raymond of Pennaforte

Canonists considering marriage began to look for norms of proof to determine its validity. It appears that nowhere do the Decretals treat the bonum prolis itself.⁶ Gregory IX (d. 1241) himself issues a decretal in which he offers three examples of conditions against the substance of marriage:

⁵ For a historical survey of the canonists-theologians before the Decretals, refer to Pedro M. ABELLAN DE ARISTIZABAL, El fin y la significación sacramental del matrimonio desde S. Anselmo hasta Guillermo de Auxerre, Biblioteca Teológica Granadina 1, Granada, Colegio de la Compañía de Jesús, 1939.

⁶ This conclusion comes after an examination of the Decretal texts cited in the Fontes for c. 1013, §1, which speaks of "the procreation and education of offspring."

If conditions against the substance of marriage are inserted, for example, if one person says to the other, "If you will avoid the generation of offspring," or "Until I find another person more worthy in honor or resources," or "If you will give yourself to adultery for profit," the marital contract is without effect, howsoever it may be favorable; although other conditions placed on marriage, if they are shameful or impossible, should be considered as not having been placed, because of the favor of marriage.

The three examples of invalidating conditions parallel the three goods of marriage proposed by Augustine. J. T. Noonan, Jr. suggests that when canonists later strictly identify the substance of marriage with the three goods of marriage, they go further than Gregory IX intends. Rather, he offers the examples in order to assist canonists as "objective touchstones," and not to serve as a complete definition of the substance of marriage.⁸ In fact, the Sacred Congregation of the Council later affirms (1724) that other conditions against the substance of marriage, besides the three examples given in the Decretals, are

⁷ "Si conditiones contra substantiam coniugii inserantur, puta, si alter dicat alteri: 'contraho tecum, si generationem prolis evites,' vel: 'donec inveniam aliam honore vel facultatibus digniorem,' aut: 'si pro quaestu adulterandam te tradas,' matrimonialis contractus, quantumcunque sit favorabilis, caret effectu; licet aliae conditiones appositae in matrimonio, si turpes aut impossibiles fuerint, debeant propter eius favorem pro non adiectis haberi." c. 7, X, IV, 5, in Corpus iuris canonici, editio Lipsiensis secunda post Aemilii Ludouici RICHTERI curas ad librorum manu scriptorum et editionis romanae fidem recognovit et adnotatione critica instruxit Aemilius FRIEDBURG, vol. 2, Lipsiae, Ex Officina Bernhardi Tauchnitz, 1879, col. 684. Gregory issues this decree sometime between 1227 and 1234.

⁸ See John T. NOONAN, Jr., "Marital Affection in the Canonists," in Collectanea Stephan Kuttner, vol. II, Studia Gratiana, vol. 12, curantibus Ios. FORCHIELLI - Alph. M. STICKLER, Bononiae, Institutum Gratianum, 1967, p. 508.

possible.⁹

Raymond of Pennafort (d. 1275), who collected and organized the papal decretals, also composed his own Summa de matrimonio. There, he cites Augustine's three goods of marriage, but he goes on to explain that "offspring" does not mean actual children, but the hope or desire for children. Furthermore, those offspring are sought so that they may be formed by religion. And although offspring may come in a marriage, the bonum prolis may not actually exist; nevertheless, one cannot say that the marriage ceases. It is enough that the spouses do not make an

⁹ Referring to Gregory's decretal, the text from the Congregation of the Council quotes Abbas: "'& licet Textus hic ponat tria exempla istarum conditionarum contra substantiam, tamen alia possunt reperiri,'" and then quotes Peter of Ancharano: "'& adverte, quid ista tria ponuntur in Textu gratia exempli, nam idem esset, ubicunque esset eadem ratio,'" and several other authors for support, in SACRA CONGREGATIO CONCILII, Decree Ulixbonen Occidentalis, 8 July 1724, in Thesaurus resolutionum Sacrae Congregationis Concilii, vol. 3, Urbini, Ex Typographia Ven. Cappellae Sumptibus Hieronymi Mainardi, 1739, pp. 41-42.

agreement or place a condition against the goods of marriage.¹⁰

B. From the Decretals until the 1917 Code

1. The bonum prolis in general

After the Decretals, there exists the general principle that marital consent includes the obligation to do nothing positive to impede procreation or to do nothing positive and illicit against procreation.

[...] when the intention is against the bonum prolis and fidei, as they are substantial, i.e., as an obligation, similarly they invalidate: and therefore a contrary condition in pactum deducta invalidates, because it excludes the aforesaid obligation: which follows from a simple

¹⁰ "Bona matrimonii principaliter sunt tria: fides, proles et sacramentum. Unde Augustinus: 'Nuptiale bonum tripartitum est: fides, proles, sacramentum. [...] In prole, ut amanter suscipiatur et religiose educetur.' [...]"

"Sed numquid haec tria sunt adeo necessaria, ut, si aliquod eorum defuerit, non teneat matrimonium? Ad hoc dicas quod, si tempore contractus intendant ista servare, licet postea mutatis voluntatibus contrarium faciant, tenet nihilominus matrimonium. Idem dico si nihil cogitant de istis bonis; sufficit enim quod non apponant conditionem vel pactum, ut contra faciant."

"Item nota quod bonum prolis non dicitur ipsa proles, quae quandoque quaeritur propter hereditariam successionem, sed spes vel desiderium quo proles ad hoc quaeritur, ut religione informetur. Unde multi habent prolem qui non habent bonum prolis; nec ideo tamen desinit esse coniugum." RAYMOND OF PENNAFORTE, Summa de matrimonio, n. 12, vol. 1, tomus C, in S. Raimundus de Pennaforte, curantibus Xaviero OCHOA and Aloisio DIEZ, Universa bibliotheca juris, Roma, Comentarium pro Religiosis, 1978, col. 919-20. He does not quote entirely Augustine's De Genesi ad litteram, lib. IX, cap. 7, n. 12, omitting the words "benigne nutriatur."

intention.¹¹

Thus, the exclusion of those obligations invalidates the marital consent because they concern the essence of marriage.

Although their discussions reveal some disputes about certain types of exclusion, authors propose many ways in which one may exclude the bonum prolis or the substance of marriage relative to the bonum prolis. Such an exclusion begins with an intention, pact, or condition: -- to perform incomplete intercourse:

Concerning the bonum prolis -- a pact which imposes the obligation or grants the freedom to impede generation, e.g., a condition to use a means of sterility, to commit the sin of interrupted intercourse, or to procure an abortion; a pact by whose observance either all or some of the children

¹¹ "[...] quando intentio est contra bonum prolis, & fidei, ut sunt substantia, id est, quoad obligationem, similiter irritare: & ideo irritat conditio contraria in pactum deducta, quia praedictam obligationem excludit: quod secus est de simplici intentione." Tomás SANCHEZ, De sancto matrimonii sacramento disputationum tomi tres, posterior et accuratior editio, superiorum auctoritate recognita, sparsisque hinc inde mendis, quae in priori exciderant, expurgata, Norimbergae, Sumptibus J. C. Lochneri, 1706, tom. 1, lib. II, disp. 29, n. 12, p. 152. See Ibid., lib. 5, disp. 9, n. 2, p. 414. See also HUIZING, "Bonum prolis," pp. 699-701, who cites many other sources.

are killed.¹²

— to induce sterility:

In practice, marriages contracted in the following manner are null: "I contract with you, if you will avoid the generation of offspring," e.g., ejaculating outside of the vagina, or inducing sterility, or abortion [...]. The reason is, because all these conditions are incompatible with the substance of marriage, and consequently they vitiate or invalidate marriage [...]. This selected condition is against the bonum prolis.¹³

¹² "De bono prolis: pactum quo imponitur obligatio, aut conceditur libertas, impediendi generationem, v.g. conditio de sumendo medio sterilitatis, de committendo peccato Onae, de procurando abortu; pactum ex cujus observatione liberi vel omnes vel aliqui interficiendi sunt." F. P. VAN DE BURGT, Tractatus de matrimonio, editio secunda, Ultrajecti, Apud Viduam J.R. Van Rossum, 1875, n. 63, p. 66. See Anaklet REIFFENSTUEL, Jus canonicum universum clara methodo juxta titulos quinque librorum Decretalium in quaestiones distributum, solidisque responsionibus, & objectionum solutionibus dilucidatum, Maceratae [...] Sed Prostant Venetiis, Apud Antonium Bortoli, 1746, tom. 4, lib. IV, tit. 5, n. 48, p. 68; Franz SCHMALZGRUEBER, Jus ecclesiasticum universum brevi methodo ad discentium utilitatem explicatum, seu Lucubrationes canonicae in quinque libros Decretalium Gregorii IX. Pontificis Maximi, Romae, Ex Tipographia Rev. Cam. Apostolicae, 1844, tom. 4, tit. V, § 1, n. 6, p. 390; Edouard GENICOT, Institutiones theologiae moralis, editio quarta, vol. 2, Lovanii, Typis et Sumptibus Polleunis et Ceuterick, 1902, n. 459, p. 509.

¹³ "Pro Praxi, Matrimonia sequenti modo contracta esse nulla: contraho tecum, si generationem prolis evitabis, v.gr. seminando extra vas, aut procurando sterilitatem, vel abortum [...]. Ratio est; quia hae conditiones omnes repugnant Matrimonii substantiae, consequenter vitiant aut irritant Matrimonium [...] conditio hac allegata est contra bonum prolis." REIFFENSTUEL, Jus canonicum universum, tom. 4, lib. IV, tit. 5, n. 48, p. 68. See Raffaele AVERSA A SANSEVERINO, De ordinis et matrimonii sacramentis: tractatus theologici ac morales speculativam simul & practicam doctrinam accurate ac dilucide complectentes, in Theologia scholastica universa, vol. 6, Bononiae, Typis Iacobi Montij & Caroli Zeneri, 1642, q. 3, s. 4, p. 255; SCHMALZGRUEBER, Jus ecclesiasticum universum, tom. 4, tit. V, § 1, n. 6, p. 390; VAN DE BURGT, Tractatus de matrimonio, n. 63, p. 66. See also HUIZING, "Bonum prolis," pp. 701-2, who cites over 20 additional authors who hold this opinion.

-- not to accept offspring:

wherefore if the contractants have intended not to accept or educate the offspring if God gives them, [...] the marriage thus contracted is null [...].¹⁴

-- to have an abortion:

Bonum prolis considers the procreation and education of children: conditions of emitting the semen outside of the vagina¹⁵ of procuring an abortion, etc., are opposed to this.

¹⁴ "unde si contrahentes intenderent non suscipere prolem nec educare si Deus eam daret, [...] matrimonium sic contractum esse nullum [...]." RICHARDUS DE MEDIAVILLA, [Commentarius] Super Qvatro libros sententiarum Petri Lombardi quaestiones subtilissimae, nunc demum post alias editiones diligentius ac laboriosius recognitae, & ab erroribus innumeris castigatae, necnon conclusionibus ac quotationibus ad singulas quaestiones adauctae, & illustratae, A. R. F. P. Ludovico SILVESTRIO A SANCTO, [Frankfurt am Main, Minerva, 1963], vol. 4, lib. IIII, dist. 32, a. 2, respondeo, p. 450. See INNOCENT IV, Commentaria: Apparatus in V libros Decretalium, Frankfurt/Main, Minerva GmbH, 1968, lib. IV, tit. 1, cap. 3, p. 463; ANGELUS DE CLAVASIO, "Matrimonium," in Summae angelicae de casibus conscientialibus [...] secunda pars, cum additionibus quam commodis, R.P.F. Iacobi VNGARELLI PATAUINI [...], novissime vero ab innumeris erroribus tam in textu, quam in allegationibus, & aliis annotationibus, cura ac industria D. Petri VENDRAMAENI [...], Venetiis, Apud Ioannem Variscum, & Socios, 1578, pars II, n. 24, p. 80; SANCHEZ, De sancto matrimonii sacramento, tom. 1, lib. II, disp. 29, n. 2, p. 151.

¹⁵ "Bonum prolis spectat procreationem et educationem liberorum: huic repugnant condiciones de semine extra vas emittendo, de procurando abortu, etc." GENICOT, Theologiae morales institutiones, p. 509. See REIFFENSTUEL, Jus canonicum universum, tom. 4, lib. IV, tit. 5, n. 48, p. 68; SCHMALZGRUEBER, Jus ecclesiasticum universum, tom. 4, tit. V, § 1, n. 6, p. 390; VAN DE BURGT, Tractatus de matrimonio, n. 63, p. 66. See also HUIZING, "Bonum prolis," p. 702, where he cites several other authors.

— to deny nourishment to the offspring:

[...] however the obligation to feed [the children], if they are born, is of its substance [...].¹⁶

— to hand over the offspring to the care of others:

I believe that under those conditions ought to be listed the obligation [not] to refuse to feed the offspring, if it is a matter of illicit refusal; because parents are bound by natural law to feed the offspring when they are able, while others who voluntarily accept the task are not.¹⁷

— to mutilate, maim, or blind the offspring:

It is concluded that the condition "If you kill or mutilate the offspring, or you render them maimed, or you pluck out their eyes," is contrary to the bonum prolis and so vitiates

¹⁶ "[...] est tamen de ejus substantia [...] obligatio alendi, si suscepti fuerint [...]." Basilio PONCE DE LEON [whom the literature often cites as Pontius], De sacramento matrimonii tractatus, cum appendice de matrimonio catholici cum haeretico, opus aequae canonici et civilis juris, ac sacrae theologiae professoribus utile ac necessarium, nova editio, Venetiis, Apud Laurentium Basilium, 1756, lib. III, cap. 9, n. 5, p. 89; and see lib. III, cap. 9, n. 1, p. 88. See Placidus von BÖCKHN, Commentarius in jus canonicum universum, sive in quinque libros ac titulos Decretalium Gregorii IX. Pontif. Max. et concordantes alios tam ejusdem juris canonici quam civilis, in tres tomos distributus, Salisburgi, Typis Joannis Josephi Mayr, 1739, vol. 3, tit. V, n. 51, p. 125. See also HUIZING, "Bonum prolis," p. 702.

¹⁷ "Sub iis conditionibus enumerandam censeo obligationem abiiciendi prolem alendam, si de abiiectione illicita sermo sit, quippe iure naturae parentes prolem alere tenentur, cum possunt, neque alij sunt, qui voluntarie hoc munus suscipiant." Ferdinando CASTRO PALAO, Oper[a] morali[a], de virtutibus, et vitiis contrariis, in varios tractatus, & disputationes theologicas distributi [...], novissima editio priori auctior, et emendatior, Lugduni, Sumptibus Guilielmi Barbier, 1682, vol. 5, disp. II, punct. 11, § 4, n. 4, p. 66. See BÖCKHN, Commentarius, vol. 3, tit. V, n. 51, p. 125.

marriage. ¹⁸

— to kill offspring after their birth:

[...] and therefore marriage does not exist, if a condition is placed against its substance, or its three-fold good, i.e., [against] the bonum prolis of generating and educating, e.g., "I marry you, if you will avoid the generation of offspring," "you will make yourself sterile," "you will suffocate the offspring," etc. [...]. ¹⁹

— to instruct the offspring in crime:

¹⁸ "Infertur, hanc conditionem, si prolem neces, aut mutes, aut eam mancam reddas, aut oculos eruas, esse contrariam bono prolis, atque ita vitare matrimonium." SANCHEZ, De sancto matrimonii sacramento, tom. 1, lib. V, disp. 9, n. 12, p. 415. See Martino BONACINA, De magno matrimonii sacramento, in Opera omnia, in tres tomos distributa, editio nouissima, & caeteris accuratior, sparsis hinc inde mendis, quae in prioribus exciderant expurgata, & variis additionibus, & annotationibus locupletata, tom. 1, Lvgdvni, Sumpt. FFr. Anissoniorum & Ioann. Posvel, 1678, pars II, q. 2, punct. 10, n. 10, p. 257. See AVERSA, De ordinis et matrimonii sacramentis, q. 3, s. 4, p. 255. See also HUIZING, "Bonum prolis," p. 702, who cites some other authors.

¹⁹ "[...] ergo neque subsistit matrimonium, si opponatur conditio adversa ejus substantiae, seu triplici ejus bono, scil. bono prolis generandae, & educandae v.g. duco te, si generationem prolis eviteris, sterilem te faceris, prolem suffocaveris &c. [...]." Remigio de Sant'Erasmo MASCHAT, Institutiones canonicae, novissimis pontificium constitutionibus, summariis Decretalium omnium correctionibus ex posteriori jure, et Concilii Tridentino collectis, bullarum ad ejusdem Concilii decreta specantium compendio auctae, & illustratae ab Ubaldo GIRALDO A S. CAJETANO, Ferrariae, Sumptibus Societatis, sed veneunt Venetiis, Apud Haeredes Balleonios, 1760, lib. IV, tit. 5, n. 17, p. 141. See AVERSA, De ordinis et matrimonii sacramentis, q. 3, s. 4, p. 255; BÖCKHN, Commentarius, vol. 3, tit. V, n. 51, p. 125; BONACINA, De magno matrimonii sacramento, pars II, q. 2, punct. 10, n. 10, p. 257; CASTRO, Oper[a] morali[a], vol. 5, disp. II, punct. 11, § 4, n. 4, p. 66; Pierre DENS, Tractatus de matrimonio, in Theologia ad usum seminariorum et sacrae theologiae alumnorum, editio nova emendata, vol. 7, Mechliniae, P. J. Hanicq, 1838, n. 39, § 3, p. 155; PONCE, De sacramento matrimonii tractatus, lib. III, cap. 11, n. 3, p. 92; SANCHEZ, De sancto matrimonii sacramento, tom. 1, lib. II, disp. 29, n. 2, p. 151; SCHMALZGRUEBER, Jus ecclesiasticum universum, tom. 4, tit. V, § 1, n. 6, p. 390. See also HUIZING, "Bonum prolis," p. 702, who cites many other authors as well.

[...] in our opinion a marriage contracted with the condition that the children to be accepted will be educated in magical art, in stealing etc. will not be valid [...].²⁰

— not to cohabit:

[...] a marriage contracted with a pact never to cohabit together is invalid [...] unless there is a reasonable cause, for this condition is incompatible with offspring, which it appears to impede illicitly.²¹

When authors consider the effect of an exclusion of the bonum prolis in one of the preceding forms, the subject of inducement of sterility receives the most attention. In general they agree that a past or present condition to induce sterility or that a party is sterile does not vitiate marital consent, unless that condition touches the future in some way. Although some authors dispute the suspensive nature of particular future conditions, most agree that conditions regarding the future invalidate marital consent. This applies specifically to cases in which a party at the time of marital consent places a condition to kill or abort offspring. Because they consider such a condition to be suspensive, the question arises whether, because the condition is contrary to the substance of marriage, the condition itself is invalid, or whether the marriage itself is invalid when one places such a

²⁰ "[...] in nostra sententia etiam non valiturum matrimonium ea conditione contractum, ut proles suscipiendae educetur in arte magica, ad furandum &c." BÖCKHN, Commentarius, lib. IV, tit. 5, n. 61, p. 128. See also HUIZING, "Bonum prolis," p. 709.

²¹ "Sexto, esse invalidum matrimonium contractum cum pacto numquam cohabitandi simul [...] nam haec conditio simpliciter repugnat proli quae videtur illicite impediri, praecisa rationabili causa." BONACINA, De magno matrimonii sacramento, pars II, q. 2, punct. 10, n. 15, p. 257, who cites P. de Ledesma and Juan Gutiérrez. Cf. SANCHEZ, De sancto matrimonii sacramento, tom. 1, lib. V, disp. 10, n. 5, p. 416, who also refers to P. de Ledesma. See also HUIZING, "Bonum prolis," p. 707.

condition at the time of consent. ²²

Some authors maintain that a condition not to feed the offspring or to abandon them vitiates marital consent. ²³ However, other authors hold the position that such conditions are not contrary to the bonum prolis, because the intention is not to set aside totally the obligation, but to fulfill it through the care which others provide. ²⁴ Finally, because it is not necessary that spouses cohabit all the time, the condition not to cohabit does not invalidate marital consent, unless one undertakes it so as to exclude the generation of offspring. ²⁵

²² See HUIZING, "Bonum prolis," pp. 703-6, who summarizes the discussion and provides many citations regarding this question.

²³ See BÖCKHN, Commentarius, lib. IV, tit. 5, n. 51, p. 125; CASTRO, Oper[a] morali[a], pars 5, disp. 2, punct. 11, § 4, n. 4, p. 66. Van De Burgt makes a distinction between an invalidating condition to reject children outright that will lead to their death; and a condition to hand over the children to the care of others, which is not incompatible with the substance of marriage, in VAN DE BURGT, Tractatus de matrimonio, n. 63, p. 66. He adds that, for him, a stipulation to sell the children does not seem contrary to the substance of marriage. See Joseph CARRIERE, De matrimonio, Parisiis, Méquignon Juniorum, 1837, tom. 1, n. 503, p. 352.

²⁴ See AVERSA, De ordinis et matrimonii sacramentis, q. 3, s. 4, p. 255; BONACINA, De magno matrimonii sacramento, pars II, q. 2, punct. 10, n. 15, p. 257, who cites P. de Ledesma and Juan Gutiérrez; PONCE, De sacramento matrimonii tractatus, lib. III, cap. 11, n. 3, p. 92, who admits that while abandonment appears to be contrary to the bonum prolis, it is not opposed to the reception of offspring or their life per se, but only a proper (commoda) education; SANCHEZ, De sancto matrimonii sacramento, tom. 1, lib. V, disp. 10, n. 5, p. 416, who also refers to P. de Ledesma. See also CARRIERE, De matrimonio, tom. 1, n. 502, p. 352; HUIZING, "Bonum prolis," p. 706.

²⁵ See SANCHEZ, De sancto matrimonii sacramento, tom. 1, lib. V, disp. 10, n. 5, p. 416, who cites P. de Ledesma; SCHMALZGRUEBER, Jus ecclesiasticum universum, tom. 4 tit. 5, § 5, n. 124, p. 440, simply repeats Sánchez. See also HUIZING, "Bonum prolis," p. 707.

2. The educatio prolis

Many authors make a general statement to the effect that the substance of marriage or the bonum prolis prohibits exclusion of the educatio prolis.²⁶ They also provide various examples of conditions, obligations, intentions, or agreements which are contrary to the bonum prolis. But none of the authors seems to care to differentiate between what comes under the headings procreation and education respectively. So one may conclude that the exclusion of various aspects of the bonum prolis invalidates a marriage whether one calls it an exclusion of procreatio prolis or an exclusion of educatio prolis. As shown above, those exclusions include to impede conception; to induce sterility; to

²⁶ See ANGELUS, "Matrimonium," pars II, n. 24, p. 80; AVERSA, De ordinis et matrimonii sacramentis, q. 3, s. 4, p. 255; DENS, Tractatus de matrimonio, n. 39, § 3, p. 155; DURANDUS DE SANCTO PORCIANO, [Super sententias theologicas Petri Lombardi commentariorum libri quatuor, 1549?], p. 839; GÉNICOT, Theologiae moralis institutiones, n. 459, p. 509; Augustine LEHMKUHL, Theologia moralis, 10th ed., vol. 2, Friburg, Herder, 1902, tr. 7, sect. 2, n. 689, footnote 1, p. 488; Vitus PICHLER, Jus canonicum secundum quinque Decretalium titulos Gregorii Papae IX. explicatum, exhibens succincta, et clara methodo omnes materias in scholis tractari, & in praxi quotidiana frequentius occurrere solitas, nobilioresque controversias, ex jure naturali, divino, canonico, imo & civili solide decisas, solutis passim adversantium argumentis, ed. nunc primum secundo tomo locupletata, in quo decisiones casuum ad singulos Decretalium titulos explicantur, Venetiis, Apud Nicolaum Pezzana, 1741, vol. 2, lib. IV, tit. 1, n. 131, p. 518; Ernríc PIRHING, Jus canonicum in V. libros Decretalium distributum, nova methodo explicatum [...], editio novissima, tom. 4, Venetiis, Ex Thipographia Remondiniana, 1759, lib. IV, tit. 5, § 3, n. 13, pp. 43-44; PONCE, De sacramento matrimonii tractatus, lib. III, cap. 11, n. 3, p. 92; RICHARDUS, Commentarius, vol. 4, lib. IIII, dist. 32, a. 2, respondeo, p. 450; SANCHEZ, De sancto matrimonii sacramento, tom. 1, lib. II, disp. 29, n. 12, p. 152; *Ibid.*, n. 2, p. 151; SCHMALZGRUEBER, Jus ecclesiasticum universum, tom. 4, tit. V, § 1, n. 6, p. 390. VAN DE BURGT, Tractatus de matrimonio, n. 63, p. 66, mentions examples of what is not contrary to the obligation of education.

procure an abortion, or otherwise to kill the offspring before or after their birth; to deny nourishment, abandon, or expose the offspring to danger of death; and to mutilate, maim, or blind the offspring. The authors do not conclude for nullity based upon a distinction between procreation and education, but based upon the determination that a particular exclusion is contrary to the substance of marriage, i.e., opposed to the bonum prolis.²⁷

An exception is F. P. Van De Burgt, who suggests a distinction between physical education and spiritual education of offspring.²⁸ He gives an example of an agreement to kill the offspring as contrary to their physical education. The discussion above demonstrates that many authors hold the same opinion regarding the validity of marital consent in such cases, albeit without the explicit designation as physical education.²⁹

Some authors teach that a condition or pact against the spiritual education of offspring also invalidates a marriage. The dispute

²⁷ One author who employs the distinction to his advantage is Francesco MAZZEI, De matrimonio personarum diversae religionis dissertatio, Romae, Ex Typographia Michaelis Angeli Barbiellini, 1771, cap. 2, § 19, p. 27, arguing that the bonum prolis is not only procreation but education; therefore if one concludes that a condition contrary to procreation is contrary to the substance of marriage, one must also conclude that the same is true of a condition contrary to education. This argument might be stronger except that he seems to limit education to "education in the Catholic faith."

²⁸ See VAN DE BURGT, Tractatus de matrimonio, n. 64, p. 67. Later this distinction appears more frequently as a distinction between the physical and spiritual bonum prolis rather than education.

²⁹ See John K. MUSSIO, The Education of Offspring: A Primary End of Marriage, [Doctoral thesis], Roma, Pontificium Institutum Internationale "Angelicum," 1939, p. 72.

revolves around the effect of a condition or pact to educate the offspring in infidelity or heresy. Some make a distinction between infidels and heretics, and therefore answer differently for each, while others reject the distinction.³⁰ Some maintain that a non-Christian education, i.e., infidelity, excludes the bonum prolis and therefore opposes the substance of marriage.³¹ Conversely, others speak of the essential obligation to raise any offspring in a Christian manner, although they provide no examples of a contrary condition.³² Mazzei even says that a condition to educate offspring outside the Catholic faith is contrary to the bonum prolis and the substance of marriage as a sacrament:

Now if the principal element of marriage as a sacrament is not procreation only, but also education in the

³⁰ For example, see DENS, Tractatus de matrimonio, n. 41, p. 159, on the one hand, who uses the distinction because he believes a condition to educate offspring in infidelity, but not a condition to educate in heresy, renders a marriage invalid. On the other hand, LEHMKUHL, Theologia moralis, vol. 2, tr. 7, sect. 2, n. 689, footnote 1, p. 488, rejects the distinction between infidelity and heresy; HUIZING, "Bonum prolis," p. 710, also mentions Von Scherer in this regard.

³¹ See DENS, Tractatus de matrimonio, n. 41, p. 159; Martin STEYAERT, Theologicae practicae aphorismi. Pars IV. De sacramentis cum supplemento nunc primum edito, in Opuscula, tom. 5, Lovanii, Typis Martini Van Overbeke, prope Academiam, 1742, pars IV, sect. 4, § 4, n. 9, pp. 363-64; Johann WEBER, Die kanonischen Ehehindernisse, sammt Ehescheidung und Eheprozess, mit Berücksichtigung der staatlichen Ehehindernisse in Deutschland, Oesterreich und der Schweiz, Freiburg im Breisgau, Herder, 1886, pp. 34-35, who cites M. Haeringer as well. See also GRIESE, The Marriage Contract, pp. 29-30; HUIZING, "Bonum prolis," pp. 709-10.

³² See CASTRO, Oper[a] morali[a], vol. V, disp. 2, punct. 11, § 4, n. 4, p. 66; Gilles de CONINCK [also known in the literature as De Coninck], Commentarium ac disputationum in vniuersam doctrinam D. Thomae de sacramentis et censuris tom. dvo, Antverpiae, Apud haeredes Martini Nvti & Ioannem Mervrsium, 1616, vol. 2, disp. 29, dub. 3, n. 37, p. 791.

Catholic faith, could anyone doubt that a condition contrary to this education is contrary to its very substance? Just as a condition contrary to the procreation of offspring is contrary to the substance of marriage, so it must be believed that a condition contrary to education of the offspring in the Catholic faith is contrary to the substance of marriage. By the very fact that marriage has been elevated to the dignity of a sacrament, the education of offspring in the Catholic faith is inseparable from it.³³

Others maintain that marital consent is invalid when a Catholic spouse intends to educate the offspring in heresy or schism.³⁴ Seemingly Böckhn alone holds that an agreement to educate offspring in magical

³³ "Jam vero si principale matrimonii uti sacramenti bonum prolis est non procreatio tantum, sed & in catholica fide educatio, equis dubitare poterit, quin contraria substantiae ipsius sit, conditio educationi huic contraria? Uti matrimonii substantiae est contraria conditio contraria procreationi prolis, sic contraria matrimonii substantiae censenda est conditio contraria prolis in fide catholica educationi; hoc ipso quod elevato matrimonio ad sacramenti dignitatem inseparabilis ab eo est educatio prolis in Fide catholica." MAZZEI, De matrimonio, cap. 2, § 19, p. 27.

³⁴ Franz SCHMIER, Jurisprudentia canonico-civilis, seu Jus canonicum universum, juxta V. libros Decretalium, nova et facili methodo explanatum, S. Congregationum decretis, S. Rotae Romanae decisionibus, Summorumque Pontificum constitutionibus roboratum [...], Salisburgi, Impensis & Literis Joannis Josephi Mayr, Aulico-Academici Typographi, & Bibliopolae, 1716, tom. 3, lib. V, tr. 3, cap. 5, sect. 3, § 1, nn. 56-57, p. 149; BÖCKHN defends Schmier, in Commentarius, lib. IV, tit. 5, n. 61, pp. 127-28; Hendrik J. FEYE [whom the literature also calls Feije], Dissertatio canonica de matrimoniis mixtis [...], [Doctoral thesis], Lovanii, Excudebant Valintheout et Vandenzande, 1847, pp. 163-70; MAZZEI, De matrimonio, cap. 2, § 21, p. 28; SCHMALZGRUEBER, Jus ecclesiasticum universum, tom. 4, tit. VI, § 4, n. 150, p. 508. See also DENS, Tractatus de matrimonio, n. 41, p. 159; Hendrik J. FEYE, De impedimentis et dispensationibus matrimonialibus, in usum auditorum suorum tertio edidit, Lovanii, Typis Caoli Peeters, 1885, cap. 26, n. 566, pp. 442-43, who seemingly no longer holds the opinion he expresses in his dissertation; GRIESE, The Marriage Contract, pp. 29-30; HUIZING, "Bonum prolis," pp. 708-9; Antoni STANKIEWICZ, "L'esclusione della procreazione ed educazione della prole," in La simulazione del consenso matrimoniale canonico, Studi giuridici 22, Città del Vaticano, Libreria Editrice Vaticana, 1990, p. 170.

arts, stealing, etc. also invalidates consent.³⁵

The more common opinion is that an intention, pact, or condition to raise the children in infidelity is not opposed to the substance of the bonum prolis and does not invalidate a marriage.³⁶ Nor does an agreement to educate the children in heresy constitute an exclusion of the substance of marriage which induces nullity, either because the

³⁵ See BÖCKHN, Commentarius, lib. IV, tit. 5, n. 61, p. 128.

³⁶ See CARRIERE, De matrimonio, tom. 1, n. 503, p. 352; LEHMKUHL, Theologia moralis, vol. 2, tr. VII, sect. 2, n. 689, footnote 1, p. 488. See SACRA CONGREGATIO CONCILII, "Adnotationes theologico-canonicæ R. P. D. GABRIELLI a secretis Sacrae Congregationis Concilii," [attached to Resolution Dubio super matrimoniis], 15 June 1793, in Thesaurus resolutionum Sacrae Congregationis Concilii, vol. 62, Romae, Ex Typographia Reverendae Camerae Apostolicae, 1795, § 22, p. 152, which says that parents are obliged to educate their children in the true religion; but it provides no answer to the dispute whether the pact to raise the sons in the father's non-Catholic religion and the daughters in the mother's Catholic faith affects the validity of the marriage. See also GRIESE, The Marriage Contract, pp. 30-32.

condition itself as shameful is invalid and considered as not placed,³⁷ or because the agreement to educate in heresy, pertaining as it does to the spiritual good of offspring, does not itself touch the substance of

³⁷ See Giovanni AZOR, Institutionum moralium, in quibus universae quaestiones ad conscientiam recte, aut prave factorum pertinentes, breviter tractantur, editio postrema a mendis expurgata, Lugduni, Sumptibus Iacobi Cardon & Petri Cauellat, 1625, tom. 1, lib. VIII, cap. 11, q. 6, col. 764; Martín de AZPILCUESTA [whom the literature often calls Navarrus], Conciliorum seu responsorum in quinque libros, iuxta numerum & titulos Decretalium, distributorum. tomi duo, Venetiis, Apud Iuntas, 1603, vol. 1, lib. I, consilium 1, q. 26, n. 63, p. 20; Paul LAYMANN, Theologia moralis quinque libros complectens, editio novissima, prioribus emendatior, Lugduni, Apud Petrum Valéray, 1703, lib. V, tr. 10, pars 4, cap. 14, n. 3, p. 1015; FIRHING, Jus canonicum, tom. 4, lib. IV, tit. 1, sect. 6, § 4, n. 167, p. 26; PONCE, De sacramento matrimonii tractatus, lib. VII, cap. 46, n. 8, p. 311; REIFFENSTUEL, Jus canonicum universum, tom. 4, lib. IV, tit. 1, n. 371, p. 45; SANCHEZ, De sancto matrimonii sacramento, tom. 2, lib. VII, disp. 72, n. 6, p. 239. All of the aforementioned authors are cited in SACRA CONGREGATIO CONCILII, Resolution Augustana matrimonii, 24 November 1742, in Thesaurus resolutionum Sacrae Congregationis Concilii, vol. 11, Urbini, Ex Typographia Sumptibus Hieronymi Mainardi, 1743, § Quod, p. 169. IDEM, "Matrimonium quoad conditiones in eius celebratione appositae" [= "§ II. Matrimonium"], in Collectio omnium conclusionum et resolutionum quae in causis propositis apud Sacram Congregationem Cardinalium S. Concilii Tridentini interpretum prodierunt ad eius institutione anno MDLXIV ad annum MDCCCLX distinctis titulis alphabetico ordine per materias digesta, cura et studio Salvatoris PALLOTTINI, vol. 12, Romae, Typis S. Congregationis de Propaganda Fide, 1886, n. 13, p. 448, essentially repeats Augustana matrimonii. The latter two documents seem to cite Azor improperly, and inadvertently to skip the name of Laymann within their citations; they also cite G. Gobat, A. Tanner, F. Krimer, and P. Leuren. See also DENIS, Tractatus de matrimonio, n. 41, §§ 2-4, pp. 159-60; FEYER, De impedimentis, cap. 26, n. 566, pp. 442-43; GRIESE, The Marriage Contract, p. 31, who additionally cites include Craisson, Santi and Leitner from this period.

marriage.³⁸ Finally, any plan placed in marital consent to educate offspring in other crimes does not affect its validity.³⁹

C. The basis for nullity relative to the bonum prolis

Evidently, canonists understand bonum prolis in many different ways prior to the promulgation of the 1917 Code of Canon Law. When they consider the topic with respect to the invalidity of marriage, there may be an exclusion of procreatio prolis or educatio prolis. Or there may be an exclusion of the physical or spiritual bonum prolis.

Generally canonists agree that the bonum prolis, or the substance of marriage, includes the right and obligation to the possibility of offspring, and to the physical protection of any child who might be conceived. But when the authors consider the validity of marital consent, they dispute what constitutes the essential bonum prolis, or the physical bonum prolis. Even more disagreement emerges with regard to the spiritual or religious care of offspring as essential.

Canonists vary a great deal in their arguments that inextricably link the existence of marriage and the bonum prolis, the exclusion of

³⁸ See PICHLER, Jus canonicum, vol. 2, lib. IV, tit. 1, n. 131, p. 518; CARRIERE, De matrimonio, tom. 1, n. 503, p. 352; MASCHAT, Institutiones canonicae, lib. IV, tit. 1, n. 76, p. 131. See also SACRA CONGREGATIO CONCILII, Resolution Augustana matrimonii, § At, pp. 169-70; IDEM, "§ II. Matrimonium," n. 13, p. 448; both of which cite erroneously the passage from Pichler. See also FEYE, De impedimentis, cap. 26, n. 566, p. 443, footnote 1, who cites J. Tropper and J. R. Kutschker as well; VAN DE BURGT, Tractatus de matrimonio, n. 64, pp. 68-69, who additionally cites Tanner.

³⁹ PICHLER, Jus canonicum, vol. 2, lib. IV, tit. 1, n. 131, p. 518; and VAN DE BURGT also cites R. Sasserath, in Tractatus de matrimonio, n. 64, p. 69.

which leads to the nullity of marriage. Briefly, the arguments either infer the bonum prolis from the intrinsic finality of marriage;⁴⁰ or deduce the bonum prolis from the finality of the act of consent;⁴¹ or consider the bonum prolis itself to comprise the substance of marriage.⁴² Expressed in the correlative theological terms, the bonum prolis constitutes a good, an end, or the essence of marriage.

II. The bonum prolis in the canonical tradition of the 1917 Code

After the promulgation of the 1917 Code of Canon Law, canonists take one of four fundamental positions which describe the essential content of the bonum prolis in relation to the validity of marriage.

A. The right and duty to complete conjugal acts

Several authors limit the formal object of consent (relative to the bonum prolis) to only the right-duty to carry out complete conjugal acts. In addition, spouses must perform the conjugal act in a natural

⁴⁰ See INNOCENT IV, Commentaria, lib. IV, tit. 1, cap. 3, p. 463; CONTINCK, Commentarium, disp. 29, dub. 3, n. 3, p. 791. See also HUIZING, "Bonum prolis," p. 711.

⁴¹ See BONACINA, De magno matrimonii sacramento, pars II, q. 2, punct. 10, nn. 8-9, p. 256. See also HUIZING, "Bonum prolis," pp. 711-12.

⁴² See LAYMANN, Theologia moralis, lib. V, tr. 10, pars 2, cap. 7, n. 8, p. 975. See also HUIZING, "Bonum prolis," pp. 713-14 for further citations.

human manner. ⁴³ Any condition or intention which partially or totally excludes this right-duty invalidates a marriage. ⁴⁴

Often it is believed, in fact, that the exclusion of offspring can be taken into consideration, as a ground of

⁴³ Although it aligned with this fundamental position regarding the bonum prolis, other canonists concur with the necessity that spouses engage in sexual intercourse in a natural manner; see Lorenzo MIGUELEZ DOMINGUEZ, "Del matrimonio," in Comentarios al Código de derecho canónico con el texto legal latino y castellano, por Marcelino CABREROS DE ANTA et al., vol. 2, Madrid, La Editorial Católica, 1963, n. 290, p. 437; John R. KEATING, The Bearing of Mental Impairment on the Validity of Marriage: An Analysis of Rotal Jurisprudence, Analecta Gregoriana 136, Rome, Gregorian University Press, 1964, pp. 188-89; Urbano NAVARRETE, "Problemi sull'autonomia dei capi di nullità del matrimonio per difetto di consenso causato da perturbazioni della personalità," in Quaedam problemata actualia de matrimonio, tertia editio, notabiliter aucta, Romae, Pontificia Universitas Gregoriana, 1979, pp. 264-65. It follows, therefore, that the substitution of artificial insemination for sexual intercourse also excludes the bonum prolis; see F. Javier HERVADA XIBERTA, Los fines del matrimonio: Su relevancia en la estructura jurídica matrimonial, Colección canónica del Estudio general de Navarra 4, Publicaciones del Estudio general de Navarra 29, Pamplona, Studium Generale, 1960, p. 171.

⁴⁴ See HUIZING, "Bonum prolis," pp. 663-67, who cites the following authors who hold this opinion: Ayrinhac, Bender, Claeys Bouuaert, Clerq, Conway, Creusen, De Smet, Fraghi, Giacchi, Mans, Sipos, and Vromant. In addition, see GRIESE, The Marriage Contract, pp. 21-23, 29, 79; René LEGUERRIER, "Note sur l'intention contra bonum prolis à propos de certaines sentences récentes de la S. Rote Romaine," in SC, 3 (1969), pp. 147-48.

Other authors who highlight this position, although they themselves do not hold it, include: HERVADA, Los fines del matrimonio, pp. 54-55, note 16 cites Pasquazi; IDEM, "La 'ordinatio ad fines' en el matrimonio canónico," in REDC, 18 (1963), p. 480; Luigi DE LUCA, "Un singolare caso di esclusione del 'bonum prolis,'" in EIC, 18 (1962), p. 457; Alberto de la HERA, Relevancia jurídico-canónica de la cohabitación conyugal, Colección canónica de la Universidad de Navarra, Cuadernos 7, Pamplona, Ediciones Rialp Navarra, 1966, pp. 47-52; Alberto BERNARDEZ CANTON, Curso de derecho matrimonial canónico, 4^a ed., Madrid, Editorial Tecnos, [1981], pp. 239-40; Severino MASTROTTO, L'educazione della prole come elemento essenziale dell'oggetto del consenso matrimoniale, [Doctoral thesis], Roma, Pontificia Universitas Gregoriana, 1984, pp. 16-18; Cormac BURKE, "The Bonum coniugum and the Bonum prolis: Ends or Properties of Marriage?" in The Jurist, 49 (1989), p. 712, note 33.

nullity under this heading, when it is firmly and perpetually willed to use contraceptive methods, or procedures for the elimination of pregnancy, etc. All of these, on the contrary, do not have any relevance from the juridic point of view. The "positive act of the will" by which the bonum prolis is excluded should have only for an object the conjugal act, understanding by that the [sexual] union according to nature and "in itself suitable for generation." Therefore only a person marrying who excludes the natural conjugal union with the other spouse brings about an invalid marriage under this heading; and it does not have any importance if such an exclusion is accompanied also by the exclusion of any sexual contact whatsoever or the admission of sexual relationships different from natural ones [...].⁴⁵

Thus the author permits only the conjugal act itself to have any bearing on the validity of consent.

This first position has its own logic. It rests primarily upon the legal expressions of the right over the body (c. 1081, §2, the ius in corpus) and the right to the conjugal act (c. 1086, §2, omne ius ad coniugalem actum). Its precision and clarity help when one attempts to determine the validity of a marriage.

But in practice it severely restricts the understanding of

⁴⁵ "Spesso si ritiene, infatti, che possa essere presa in considerazione, come causa di nullità a questo titolo, la esclusione della prole quando si voglia fermamente e in perpetuo usare mezzi antifecondativi, o procedimenti di eliminazione della gravidanza, etc. Tutto questo, invece, non ha alcun rilievo dal punto di vista giuridico. Il 'positivus voluntatis actus' con cui si esclude il 'bonum prolis', deve avere unicamente per oggetto l'atto coniugale, intendendosi per esso la unione secondo natura e 'per se apta ad prolis generationem'. Compie dunque un matrimonio invalido per questo titolo soltanto il nubente che escluda la unione coniugale naturale con l'altro coniuge; e non ha alcuna importanza se a tale esclusione si accompagni anche la esclusione di qualsiasi contatto sessuale o l'ammissione di rapporti sessuali differenti da quelli naturali [...]." Orio GIACCHI, Il consenso nel matrimonio canonico, Milano, A. Giuffré, 1950, p. 78; see also pp. 68, 201-6.

marriage and what constitutes a marriage.⁴⁶ This position also leads to conclusions which are contrary to the opinions of the majority of canonists,⁴⁷ as this study demonstrates below. Therefore, constant canonical tradition opposes this fundamental position.⁴⁸

B. The right and duty to complete conjugal acts, and the omission of acts which impede their effects

Many authors define and limit the formal object of consent (relative to the bonum prolis) as the right-duty to carry out complete conjugal acts and not to frustrate their effects. Activities which interfere with the natural effects of intercourse are opposed to the substance of marriage, for example, abortion or the use of contraceptive means. A condition or intention which seeks to exclude these rights-

⁴⁶ See David E. FELLHAUER, "The Consortium omnis vitae as a Juridical Element of Marriage," in SC, 13 (1979), pp. 81-82.

⁴⁷ See, for example, GRIESE, The Marriage Contract, pp. 22, 31, and 79, who says that a positive intention to impede the natural effect of the conjugal act is incompatible with the object of marital consent. But he strictly limits invalidity to only the natural effect of the conjugal act itself. He maintains that the conjugal act is directed toward conception, and therefore even an intention against offspring such as abortion or infanticide does not invalidate consent because it is not contrary to the ius in corpus. The same conclusion appears in Louis DE SMET, Tractatus theologico-canonicus de sponsalibus et matrimonio, editio quarta (Inde a Codice altera), Brugis, Car. Beyaert, 1927, n. 155, p. 130.

⁴⁸ See HUIZING, "Bonum prolis," p. 667. Some authors who specifically argue against Giacchi's position are Ermanno GRAZIANI, Volontà attuale e volontà precettiva nel negozio matrimoniale canonico, Milano, A. Giuffrè, 1956, pp. 188-89; Pio FEDELE, "L' 'ordinatio ad prolem' nel matrimonio in diritto canonico," in ETC, 13 (1957), pp. 135 and passim; and Víctor de REINA, "La simulación parcial en el matrimonio canónico," in IC, 14, no. 27 (1974), p. 42.

duties either partially or totally invalidates the act of consent. ⁴⁹

This position is also a logical one, and follows the canonical tradition that marriage includes a right-duty "not to impede procreation." Its proponents, Graziani and Fedele, believe that the bonum prolis has relevance to the validity of marriage only insofar as it defines the ius in corpus. ⁵⁰ They simply go one step further than the previous position, applying the criterion "suitable in itself for the generation of offspring" (c. 1081, §2) both to the conjugal act and its natural consequences. ⁵¹

Hervada criticizes their approach and finds it wanting. He believes that to suggest that the primary end of marriage has no little

⁴⁹ HUIZING, "Bonum prolis," pp. 667-69, cites four authors who hold this position: Cappello, Hürth, Zalba, and Zeiger. Later authors who maintain this opinion include Pio FEDELE, L' "ordinatio ad prolem" nel matrimonio in diritto canonico, Milano, A. Giuffrè, 1962, pp. 337-40; IDEM, "Prospettive de iure canonico condendo circa l'esclusione dell'essenza del matrimonio," in AC, 15 (1971), pp. 203-4; GRAZIANI, Volontà attuale, pp. 188-92.

⁵⁰ See Pio FEDELE, "L' 'ordinatio ad prolem' nel matrimonio in diritto canonico," in EIC, 13 (1957), pp. 198-201; GRAZIANI, Volontà attuale, pp. 188-92. Their arguments appear throughout their other publications.

⁵¹ Sometimes the question arises within this position about the relationship of either "negative" or "positive" actions to the inhibition of the effects of conjugal acts. That is, whether one must necessarily omit only those acts which exclude, destroy, or interfere with procreation; or whether one must also take positive steps to safeguard the natural consequences of the conjugal act, as it relates to the validity of marriage. See, for example, FEDELE, L' "ordinatio ad prolem", p. 330; HUIZING, "Bonum prolis," pp. 668-69; Ombretta FUMAGALLI CARULLI, "Innovazioni conciliari e matrimonio canonico: A proposito della evoluzione post-conciliare della giurisprudenza matrimoniale," in DE, 89, no. 1 (1978), p. 405.

or no juridic relevance to its validity cannot be justified.⁵² It seems to be only a slightly less restrictive form of literalism than the first position.

C. The right and duty to complete conjugal acts, not to impede their effects, and to the physical good of offspring

Most authors define the formal object of consent (relative to the bonum prolis) as the right-duty to carry out complete conjugal acts and their natural effects, and the right-duty to provide for the physical well-being of offspring. Anything which impedes or excludes the conception, birth, or the natural development of the offspring is contrary to the physical bonum prolis.⁵³ Therefore, a condition or intention which excludes the physical bonum prolis invalidates marital

⁵² See HERVADA, Los fines del matrimonio, pp. 63-65. For a more extensive critique of Fedele's position, see IDEM, "La 'ordinatio ad fines' en el matrimonio canónico," in REDC, 18 (1963), pp. 439-99.

⁵³ See HUIZING, "Bonum prolis," pp. 669-83, who cites many prominent canonists who maintain that the exclusion of at least some aspects of the physical bonum prolis (see below) renders a marriage null: Bertola, Blat, Boggiano, Cappello, Chelodi, Coronata, Flatten, Fliesser, Gasparri, Graziani, Jemolo, Jombart, Knecht, Linneborn, Mahoney, Marc, Merkelbach, Noldin, Payen, Prümmer, Ragusa, Regatillo, Schäffer, Timlin, Triebs, Van Welie, Vermeersch, Vlaming, Wenner, Wernz-Vidal, Woywod, and Zeiger. Apparently Huizing himself takes this position, (p. 715), but the right-duty of procreation extends only as far as the procreation and "physical existence" of the offspring, and not to any physical upbringing beyond that (pp. 721-22).

consent. 54

Descriptions of the physical bonum prolis are not always strictly congruent, but generally include safeguarding the conception, birth, and

54 In addition to those whom Huizing cites, canonists who maintain that the exclusion of the physical bonum prolis in at least some aspect renders an invalid marriage include: Edcuard GÉNICOT and Joseph SALMANS (= GÉNICOT-SALMANS), Institutiones theologiae moralis, editio deciseptima, quam paravit Albert GORTEBECKE, vol. 2, Bruxellis, Edition Universelle, [1951], p. 429; Ildefonso PRIETO LOPEZ, "Nulidad por exclusión total del matrimonio o del 'bonum prolis,'" in Las causas matrimoniales: Trabajos de la cuarta Semana de derecho canónico celebrada en el monasterio de N.^a S.^a de Montserrat, Salamanca, [n. p.], 1953, pp. 275-76; Dino STAFFA, De conditione contra matrimonii substantiam, editio secunda, Romae, Apud Custodiam Librariam Pontificii Instituti Utriusque Iuris, 1955, p. 25, note 37; Carl HOLBÖCK, Tractatus de jurisprudentia Sacrae Romanae Rotae juxta decisiones quas hoc sacrum tribunal edidit ab anno 1909 usque ad annum 1946 et publicavit in voluminibus I-XXXVIII, Gratiae, In Officina Libraria "Styria," 1957, p. 132; Juan José GARCIA FAILDE, "La prueba presuntiva en los procesos rotales de nulidad matrimonial por simulación total y parcial," in REDC, 15 (1960), p. 59; KEATING, The Bearing of Mental Impairment, pp. 188-89; Urbano NAVARRETE, "Structura iuridica matrimonii secundum Concilium Vaticanum II," in Periodica, 56 (1967), p. 560; HERVADA-LOMBARDIA, Derecho matrimonial, p. 251; Zenon GROCHOLEWSKI, De exclusione indissolubilitatis ex consensu matrimoniali eiusque probatione: Considerationes super recentiores sententias rotales, Bibliotheca "Monitor ecclesiasticus" 43, Napoli, M. D'Auria, 1973, pp. 33-34; RETNA, "La simulación parcial," p. 46; Tomás RINCON, "La jurisprudencia reciente en torno a la 'exclusio boni prolis' y la reforma del derecho matrimonial: Comentario a la sentencia c. Aisa de 4-11-75," in IC, 15, no. 30 (1975), pp. 285-86; BERNARDEZ, Curso, pp. 240-41. See also Alberto de la HERA, "Intentio contra bonum prolis: Surgencias para la reforma del canon 1086 del CIC," in IC, 7 (1967), pp. 220-21, and FUMAGALLI CARULLI, "Innovazioni conciliari," p. 410, who call such an exclusion an act against the actio naturae.

life of the offspring.⁵⁵ Authors suggest many ways that one may exclude the physical bonum prolis. Specifically, canonists argue that a marriage is invalid when consent includes a condition or intention:⁵⁶

1. Not to permit conception of offspring:

- to avoid offspring or generation;⁵⁷
- to impede the conjugal act;⁵⁸
- to employ contraceptive means;⁵⁹
- to procure sterility;⁶⁰
- to have intercourse exclusively during infertile periods;⁶¹

2. To terminate pregnancy:

⁵⁵ See HUIZING, "Bonum prolis," p. 716: "Bonum physicum prolis comprehendit [...] iura et obligationes circa conceptionem, nativitatem et vitam prolis [...]" NAVARRETE, "Structura iuridica matrimonii," Periodica, 56 (1967), p. 561: "Hoc bonum physicum amplectitur praeter copulam coniugalem, ius-obligationem ad prolis forte generatae nativitatem eiusque in vita conservationem." GROCHOLEWSKI, De exclusione indissolubilitatis, p. 33: "[...] bonum physicum prolis seu ius et correlativam obligationem ad prolem concipiendam, edendam et in vita conservandam."

⁵⁶ Because the footnotes in Huizing's article contain extensive references to primary sources, they are not repeated herein.

⁵⁷ See HUIZING, "Bonum prolis," p. 670, note 34; PRIETO, "Nulidad," p. 275; STAFFA, De conditione, p. 23; HERVADA-LOMBARDIA, Derecho matrimonial, pp. 249-51.

⁵⁸ See HUIZING, "Bonum prolis," p. 670, note 35; GARCIA, "La prueba presuntiva," p. 59; MIGUELEZ, "Del matrimonio," n. 465, p. 621.

⁵⁹ See HUIZING, "Bonum prolis," p. 671, note 38; STAFFA, De conditione, p. 23; GARCIA, "La prueba presuntiva," p. 59; BERNARDEZ, Curso, p. 240.

⁶⁰ See HUIZING, "Bonum prolis," pp. 672-74, notes 44-52; STAFFA, De conditione, p. 23.

⁶¹ See HUIZING, "Bonum prolis," p. 674, note 53.

- to employ means to eliminate pregnancy; ⁶²
- to procure an abortion; ⁶³
- not to allow the development of the offspring; ⁶⁴

3. To cause harm to offspring:

- to kill offspring after their birth; ⁶⁵
- to abandon the offspring (placing their lives in danger); ⁶⁶
- not to feed the offspring; ⁶⁷
- to inflict serious injury on offspring. ⁶⁸

⁶² See *ibid.*, p. 671, note 39.

⁶³ See *ibid.*, p. 671, note 40; GRIESE, The Marriage Contract, p. 24; GENICOT-SALMANS, Institutiones theologiae moralis, p. 429; STAFFA, De conditione, p. 23; HOLBÖCK, Tractatus de jurisprudentia, p. 131; GARCIA, "La prueba presuntiva," p. 59; KEATING, The Bearing of Mental Impairment, p. 189; FUMAGALLI CARULLI, "Innovazioni conciliari," p. 410; BERNARDEZ, Curso, p. 240.

⁶⁴ See PRIETO, "Nulidad," p. 275; MIGUELEZ, "Del matrimonio," n. 465, p. 621.

⁶⁵ See HUIZING, "Bonum prolis," p. 672, note 41; GRIESE, The Marriage Contract, p. 24; STAFFA, De conditione, p. 23; KEATING, The Bearing of Mental Impairment, p. 189; FUMAGALLI CARULLI, "Innovazioni conciliari," p. 410.

⁶⁶ See HUIZING, "Bonum prolis," p. 672, notes 42-43. This study understands the Latin verbs exponere, abdicere, and deserere to indicate the abandonment of offspring which puts them in mortal danger. But authors distinguish a condition or intention to place the offspring in an orphanage or under someone else's care, which does not invalidate consent; see HUIZING, "Bonum prolis," p. 675, note 58; GRIESE, The Marriage Contract, p. 25.

⁶⁷ See HUIZING, "Bonum prolis," p. 675, note 54; MIGUELEZ, "Del matrimonio," n. 290, p. 439. However, a marriage is valid if a mother places a condition not to provide her own milk to her children; see HUIZING, "Bonum prolis," p. 675, note 55; GRIESE, The Marriage Contract, p. 25.

⁶⁸ See HUIZING, "Bonum prolis," p. 675, notes 56-57.

Sometimes authors do not refer explicitly to the marital duties as the physical bonum prolis but simply as the bonum prolis. Navarrete, for example, includes among the essential rights and obligations of the bonum prolis the right and obligation to fatherhood and motherhood, and the rights and obligations that subsequently derive from them with regard to the offspring and their well-being.⁶⁹ And Hervada simply writes about the marital right and duty to receive or accept offspring, without reference to the bonum prolis.⁷⁰

Under the heading of bonum prolis, some authors introduce the subject of educatio.⁷¹ They also use expressions such as physical

⁶⁹ See NAVARRETE, "Problemi," p. 267.

⁷⁰ The right to receive offspring correlates to the duty not to attempt something against the life of offspring who are born; see F. Javier HERVADA XIBERTA, "El matrimonio 'in facto esse': Su estructura juridica," in IC, 1 (1961), pp. 161 and passim. See also HERVADA-LOMBARDIA, Derecho matrimonial, pp. 227 and passim.

⁷¹ Some authors speak of a right or obligation to educate offspring, but do not suggest a connection to the bonum prolis or the validity of a marriage. See William M. VAN OMMEREN, Mental Illness Affecting Matrimonial Consent, [Doctoral thesis], Canon Law Studies 415, Washington, DC, Catholic University of America, 1961, p. 56; Lawrence G. WRENN, "Updating the Law on Marriage: The Nature of Marriage and Marital Consent," in The Jurist, 27 (1967), p. 279; Paolo PICOZZA, "L'obbligo dell'educazione religiosa della prole e la libertà religiosa," in La Chiesa dopo il Concilio, Atti del Congresso internazionale di diritto canonico, Roma, 14-19 gennaio 1970, Milano, A. Giuffrè, 1972, vol. 2, pp. 1090-97; William J. TOBIN, "The Rights and Obligations of Parents with Reference to the Religious Formation of the Children," in Ius populi Dei: Miscellanea in honorem Raymundi Bidagor, Roma, Università Gregoriana Editrice, 1972, vol. 3, p. 271; Vincenzo PLUMTALLO, "La famiglia nel Concilio Vaticano II e nel Sinodo dei Vescovi del 1980," in DE, 94, no. 1 (1983), p. 482.

education,⁷² human education,⁷³ and early education⁷⁴ to indicate that children must receive some care for their general well-being. Furthermore, some canonists assert the right and obligation to educate, as one facet of the bonum prolis, pertains to the validity of marital consent.⁷⁵ Likewise, some canonists explicitly acknowledge a specific marital right and duty to educatio prolis. They maintain that its

⁷² See GÉNICOT-SALMANS, Institutiones theologiae moralis, n. 620, p. 429; GARCIA, "La prueba presuntiva," p. 60.

⁷³ See Matteo Conte da CORONATA, De sacramentis: Tractatus canonicus, vol. 3, Taurini, Marietti, 1943-1946, n. 602, p. 840.

⁷⁴ See Georges PAYEN, De matrimonio in missionibus ac potissimum in Sinis: Tractatus practicus et casus, altera editio, vol. 2, Zi-ka-wei, In Typogrpahia T'ou-sè-wè, 1936, n. 1733, p. 135.

⁷⁵ See Germain LESAGE, "Questions actuelles de jurisprudence matrimoniale," in SC, 5 (1971), p. 17: "[...] entendent donner à l'enfant conçu les soins physiques et éducatifs convenables à son développement normal." Aurelio SABATTINI, "Exclusio boni prolis ad tempus," in AKK, 144 (1975), p. 463: "[Bonum prolis] obligat non solum ad actus per se aptos ad prolis generationem, sed ad vitam servandam et educationem curandam hominis per illos actus concepti." Urbano NAVARRETE, "De iure ad vitae communionem: Observationes ad novum Schema canonis 1086 §2," in Periodica, 66 (1977), p. 256: "Bonum prolis essentielle [...] comprehendit: a) ius et relativam obligationem ad actum coniugalem modo naturali peragendum; b) praeterea ius et relativam obligationem curandi ut prolis forte generata conservetur et educetur."

exclusion, therefore, invalidates marital consent.⁷⁶

The content of that educatio prolis varies a great deal among these authors. Abbo and Gutiérrez, for example, do not provide a definition of education, emphasizing procreation and education as one end of marriage.⁷⁷ At times authors limit the concept of education to

⁷⁶ See MUSSIO, The Education of Offspring, p. 70; Pietro A. D'AVACK, Cause di nullità e di divorzio nel diritto matrimoniale canonico, nuova ed. integralmente rinnovata, Firenze, C. Cya, 1952, p. 51; GARCIA, "La prueba presuntiva," p. 60; HERVADA, "La 'ordinatio ad fines,'" pp. 480-82; Joannes ABBO, "De quibusdam quaestionibus iuris matrimonialis iuxta rotalem iurisprudentiam," in Apollinaris, 40 (1967), pp. 582-83; Germain LESAGE, "The Consortium vitae conjugalis: Nature and Applications," in SC, 6 (1972), p. 103; Anastasio GUTIERREZ, "Matrimonii essentia, finis, amor coniugalis," in Apollinaris, 46 (1973), p. 146; Alberto de la HERA, "L'ordonnance du mariage à ses fins," in AC, 17 (1973), p. 559; Aurelio TOBON MEJIA, "La distinción entre el derecho y su ejercicio: Su aplicación en las causas por exclusión de los bienes de la prole y de la fidelidad: Estudio de la reciente jurisprudencia rotal," in El consentimiento matrimonial, hoy: Trabajos de la XV Semana de derecho canónico, Barcelona, Branchs Editor, 1976, p. 209; Edward F. WEIST, Alcoholism and Marriage: An Inquiry into the Effect of Alcoholism on Matrimonial Consent, Rome, Pontificia Università Lateranense, 1977, p. 72; Paolo PICOZZA, Educazione religiosa della prole nel matrimonio sacramento, [Doctoral thesis], Roma, Università di Roma, Istituto di diritto pubblico della facoltà di giurisprudenza, 1981, p. 23 (in BONNET, "L' 'ordinatio ad bonum prolis,'" p. 310). See also ZUSY, "Matrimonial Consent," p. 220, who argues for sufficient interpersonal integration in order to conceive and educate offspring in a human manner.

⁷⁷ See ABBO, "De quibusdam questionibus iuris matrimonialis," p. 582: "[...] prolis educationem, tamquam matrimonii finem, cum practice ipsa habeatur veluti complementum ipsius procreationis." He continues in note 38: "Ius intellegi debet in sua amplitudine procreationis et educationis; natura traditionis et acceptationis mutuae non potest praescindere a fine ad quem ordinatur." GUTIERREZ, "Matrimonii essentia," p. 146: "Matrimonium in sensu stricte scientifico pro eius elementis essentialibus theologico-juridicis unum habet finem: procreationem et educationem prolis. Hic finis, cum sit a natura impositus ob transcendentale [sic] bonum generis humane, excludi nequit a contrahentibus, siquidem matrimonium contrahere velint [...]." Gutiérrez speaks of the single end of procreation and education as he introduces the section on the essential end of marriage (pp. 124-25), but speaks thereafter of procreation.

the physical care or preservation of life of the children.⁷⁸ Others speak of the obligation of parents to create a suitable environment in which the education of offspring can occur.⁷⁹ However, the content of education generally remains vague or unexpressed.⁸⁰

Finally, some canonists explicitly assert that the exclusion of educatio prolis is juridically irrelevant, because persons and institutions other than parents can supply educatio.⁸¹

A great deal of confusion related to vocabulary surrounds the issue of educatio prolis. Consider, for example, the commentary on the

⁷⁸ See HUIZING, "Bonum prolis," p. 675, note 59, cites Badii, Chelodi, Regatillo, Schäfer, and Zalba; on p. 686, he cites Ferrata; GARCIA, "La prueba presuntiva," p. 60: "También la exclusión del derecho a la educación física de los hijos anula el matrimonio [...]."

⁷⁹ Hervada writes of the right and duty to educate the offspring in the bosom of the conjugal community; see HERVADA, Los fines del matrimonio, pp. 87-100, 171-72; IDEM, "El matrimonio 'in facto esse': Su estructura jurídica," in IC, 1 (1961), pp. 162-63; HERVADA-LOMBARDIA, Derecho matrimonial, pp. 251-52. See LESAGE, "The Consortium vitae conjugalis," p. 103, who says that a marital partner has an essential right to several concrete elements, including "parental responsibility, proper to both mother and father, in the care for, love and education of children." See WEIST, Alcoholism and Marriage, pp. 67-69. See also HERA, Relevancia jurídico-canónica, p. 46.

⁸⁰ See D'AVACK, Cause di nullità, p. 51: "La procreatio atque educatio prolis, l'unitas e l'indissolubilitas costituiscono quegli essenziali requisiti del contratto matrimoniale [...];" HERVADA, "La 'ordinatio ad fines,'" pp. 480-82; TOBON, "La distinción," p. 209. See Igino NAPOLEONI, "L'esclusione dello 'ius ad prolem,'" in ETC, 43-44 (1987-1988), p. 99, where the author includes his suggestion for a textual revision of c. 1086, §2, four years after the promulgation of the new Code. See also the wide-ranging discussion in MUSSIO, The Education of Offspring, pp. 70-74.

⁸¹ See Ulrich MOSIER, "Neuestes aus der Rechtsprechung der S. R. Rota," in OAK, 26 (1975), p. 260; Carlo GULLO, "Sulla nullità del matrimonio per incapacità di educare la prole," in Il diritto di famiglia e delle persone, 9 (1980), p. 1097. See also FUMAGALLI CARULLI, "Innovazioni conciliari," p. 409.

marriage canons by Miguelez. He says that the exclusion of education does not lead to nullity, because education has nothing to do with conjugal acts. But an exception comes with an exclusion of physical education which is so radical as to deny food necessary for survival.⁸² Later he says that to impede the normal development and birth of the offspring excludes the good of offspring. However, he calls this procreation, not education.⁸³ So, the exclusion of education does not lead to nullity, although there is an exception; but the other aspects which some authors call educatio prolis he specifically labels the bonum prolis and procreation. This fluid use of terminology is evident throughout the canonical literature.

D. The right and duty to complete conjugal acts, not to impede their effects, and to the physical and spiritual good of offspring

Finally, some canonists hold the opinion that the formal object of consent (relative to the bonum prolis) is the right-duty to complete conjugal acts and their natural effects, the right-duty to provide for the physical well-being of children, and the right-duty to provide for their moral and spiritual well-being as well. Therefore, in addition to what has been described above, this position maintains that an exclusion of the right-duty to the spiritual bonum prolis invalidates a

⁸² MIGUELEZ, "Del matrimonio," n. 290, p. 439.

⁸³ Ibid., n. 465, pp. 621-22.

marriage.⁸⁴

Authors describe these particular contents of the bonum prolis variously as moral and religious training,⁸⁵ Christian instruction,⁸⁶

⁸⁴ See Bartholomew T. TIMLIN, Conditional Matrimonial Consent: A Historical Synopsis and Commentary, [Doctoral thesis], Canon Law Studies 89, Washington, DC, Catholic University of America, 1934, p. 301; MUSSIO, The Education of Offspring, p. 78; Arturo C. JEMOLO, Il matrimonio nel diritto canonico, Milano, Francesco Vallardi, 1941, n. 110, p. 210; CORONATA, De sacramentis, n. 516, p. 705, and see also n. 604 pp. 842-44; Felix M. CAPPELLO, De matrimonio, in Tractatus canonico-moralis de sacramentis, editio septima accurate emendata et aucta, vol. 5, Romae, Marietti, 1961, n. 631, p. 564; Gerardo DESIDERIO, L'educazione dei figli nella disciplina canonica, [Doctoral thesis], Pompei, Pontificia Universitas Studiorum a S. Thoma Aq. in Urbe, 1964, pp. 15-16. See also HUIZING, "Bonum prolis," pp. 684-86, who also cites Ferrata; Heinz MUSSINGHOFF, "Ausschluß der Erziehung als Ehenichtigkeitsgrund?" in AKK, 156 (1987), pp. 67-68; STANKIEWICZ, "L'esclusione," p. 170. See also Carlos SECO CARO, "La educación religiosa de los hijos y la exclusión del 'bonum prolis,'" in IC, 12, no. 27 (1972), pp. 388 and passim, esp. p. 395.

⁸⁵ See CORONATA, De sacramentis, n. 514, p. 701, and CAPPELLO, De matrimonio, n. 631, p. 564, both of whom speak of the "bonum morale et religiosum;" Vicente MONTSERRAT MELIA, Derecho matrimonial canónico: Comentario de los cánones 1012-1143; Jurisprudencia seleccionada de los Tribunales de Roma hasta el año 1960, Barcelona, Editorial Litúrgica Española, [1961], p. 13, for whom the goods of marriage include "El bien de la prole, que ha de ser educada en el conocimiento y culto de Dios." DESIDERIO, L'educazione dei figli, p. 16, considers the exclusion of the spiritual and moral personality of the offspring, in addition to the offspring's material and civil personality. SECO, "La educación religiosa de los hijos," pp. 377-95, speaks simply of religious education.

⁸⁶ See JEMOLO, Il matrimonio, n. 110, p. 210, and CAPPELLO, De matrimonio, n. 600, p. 535, who speak of educating the offspring in the Christian religion; Arnaldo BERTOLA, Il matrimonio religioso: Diritto matrimonial canonico, seconda edizione ampliata, Torino, G. Giappichelli, [1946], p. 39: "Il bonum prolis consiste nella procreazione e nella educazione christiana della prole [...]."

or Catholic education.⁸⁷

Its effect also varies sometimes according to the baptismal status and religious denomination or sect of the spouses. Here again the controversy revolves around the exclusion of Christian or Catholic education, or the intention or condition to raise the offspring in infidelity, heresy, or schism. Some authors believe that the exclusion of Christian education invalidates marital consent.⁸⁸ Others conclude that the specific formulation of the exclusion determines the validity.⁸⁹ Ultimately, the position of some remains unclear.⁹⁰

Some authors speak of a right and obligation of the parents to provide religious education, but they do not connect it to marital consent.⁹¹ The majority of canonists expressly reject the position,

⁸⁷ See TIMLIN, Conditional Matrimonial Consent, p. 301; JEMOLO, Il matrimonio, n. 135, p. 257; CORONATA, De sacramentis, n. 516, p. 705; GARCIA, "La prueba presuntiva," p. 60; DESIDERIO, L'educazione dei figli, p. 16.

⁸⁸ See JEMOLO, Il matrimonio, n. 135, p. 257; CORONATA, De sacramentis, n. 516, p. 705; DESIDERIO, L'educazione dei figli, p. 16.

⁸⁹ See TIMLIN, Conditional Matrimonial Consent, p. 301; CAPPELLO, De matrimonio, n. 631, p. 564.

⁹⁰ See BERTOLA, Il matrimonio religioso, pp. 39, 123, and MONTSERRAT, Derecho matrimonial canónico, pp. 13, 242. While they do not make an explicit statement or offer a specific example, these passages suggest that the authors believe that an exclusion of religious education may lead to the invalidity of marital consent.

⁹¹ See Donald M. ENDEBROCK, The Parental Obligation to Care for the Religious Education of Children within the Home with Special Attention to the Training of the Pre-School Child, [Doctoral thesis], Catholic University of America Studies in Sacred Theology, series 2, number 84, Washington, DC, The Catholic University of America Press, 1955, pp. 13-35; PICOZZA, "L'obbligo dell'educazione religiosa della prole," pp. 1090-97; TOBIN, "The Rights and Obligations of Parents," p. 271; PLUMITALLO, "La famiglia," p. 482.

however, that the spiritual bonum prolis has any relevance to the validity of marriage.⁹²

E. The basis for nullity relative to the bonum prolis

Almost all canonists agree that the exclusion of the bonum prolis renders a marriage invalid. The content of the bonum prolis varies a great deal, as the previous sections demonstrate. The majority of the arguments state that a condition, an intention, or a pact to exclude the bonum prolis or some essential aspect of the bonum prolis (which includes variously the procreatio prolis, educatio prolis, physical bonum prolis, or spiritual bonum prolis) makes a marriage invalid, based primarily on cc. 1013, §1; 1081, §2; 1086, §2; and 1092, §2.

The exclusion of the bonum prolis may render a marriage null either because it is contrary to the formal object of consent; because it is opposed to the substance or essence of marriage, or marriage

⁹² See HUIZING, "Bonum prolis," pp. 686-87, note 101 cites these authors: Ayrinhac, Bánk, Fraghí, Gasparri, Gougard, Jone, Knecht, Mahoney, Mans, Marc, Merkelbach, Noldin, Oesterle, Regatillo, Schäfer, Sipos, Triebs, Van Welie, Wernz-Vidal. It is also HUIZING's own position, pp. 721-22. In addition, see J. García F. BAYON, Tractatus canonico-moralis de sacramento matrimonii, vol. 1, Madrid, Editorial del C. de María, [n. d.], n. 773, p. 313; Francis J. SCHENK, The Matrimonial Impediments of Mixed Religion and Disparity of Cult, [Doctoral thesis], Canon Law Studies 51, Washington, DC, The Catholic University of America, 1929, p. 208; STAFFA, De conditione, p. 25, note 37; GRIESE, The Marriage Contract, p. 31; GARCIA, "La prueba presuntiva," p. 60; MIGUELEZ, "Del matrimonio," n. 465, p. 622; NAVARRETE, "Structura iuridica matrimonii," p. 560, note 66; FUMAGALLI CARULLI, "Innovazioni conciliari," p. 407. See also CAPPELLO, De matrimonio, n. 600, p. 535, whose position varies depending upon circumstances, so that sometimes other authors cite him to support their argument in this regard. See also MUSSINGHOFF, "Ausschluß der Eziehung," p. 68; STANKIEWICZ, "L'esclusione," p. 170.

itself; or because it excludes the primary end of marriage.⁹³

The preceding demonstrates that canonists approach the understanding of bonum prolis under the 1917 Code in two ways. One is more or less literal, and limits bonum prolis to the ius in corpus (c. 1081, §2) and omne ius ad coniugalem actum (c. 1086, §2), and the natural effects of the conjugal act. The first two positions above employ this approach. The second approach stretches the content of bonum prolis beyond the strict wording of these two canons, maintaining that the exclusion of the physical and perhaps the spiritual bonum prolis or educatio prolis also renders a marriage invalid. Sometimes authors express this broader concept as the "right to offspring," "intention of offspring," or "ordination toward offspring," or employ

⁹³ See HUIZING, "Bonum prolis," pp. 676-83; Piero A. BONNET, "L' 'ordinatio ad bonum prolis' quale causa di nullità matrimoniale," in DE, 95, no. 2 (1984), pp. 312-13. These arguments are quite different, and much ink has been devoted to distinguishing the object from the essence and the end(s) of marriage, though the final result of validity or nullity may not change. See, for example, Ermanno GRAZIANI, "Jus ad prolem," in ETC, 7 (1951), pp. 214-18; FEDELE, L' "ordinatio ad prolem" nel matrimonio in diritto canonico, pp. 1-68; HERVADA, "La 'ordinatio ad fines,'" in REDC, 18 (1963), pp. 439-99; FUMAGALLI CARULLI, "Innovazioni conciliari," pp. 405-410; José F. CASTAÑO, "¿La 'exclusio boni prolis', causa de la nulidad del matrimonio?" in REDC, 25 (1969), pp. 163-64; BONNET, "L' 'ordinatio ad bonum prolis,'" pp. 317-21; Cormac BURKE, "The Essential Obligations of Marriage," in SC, 26 (1992), pp. 386-87. See also IDEM, "The Bonum coniugum and the Bonum prolis," p. 705, note 5, and pp. 709-13, who, in his effort to clarify equivocal terminology, suggests that the bonum prolis is procreativity (openness to offspring, or proles in suis principiis) and an essential property of marriage, as contrasted with procreation (proles in se), which is an end of marriage. The distinction is not new; but it will help to follow Burke's suggestion to use another English term to express that facet of proles.

Aquinas' terminology, "proles in suis principiis." ⁹⁴ The third and fourth positions above follow this second approach.

A few authors suggest the possibility of nullity based on the guarantees (cautiones) given by the parties in particular circumstances. In the previous legislation, among other situations, both a marriage between two baptized persons, one of whom is Catholic (mixed religion), and a marriage between a non-baptized person and a Catholic (disparity of worship), require a dispensation in order to marry. An invalid marriage results from an invalid dispensation in the case of disparity of worship. ⁹⁵

In order to receive the dispensation, the law requires the prospective spouses to give certain cautiones, including a guarantee "to baptize and educate all the children in the Catholic faith alone" (c. 1061, §1, 1°). ⁹⁶ This appears to establish the necessity of an aspect of educatio prolis for the validity of marriage. So the question arises whether, when one requires a dispensation for disparity of worship, an intention not to educate the children in the Catholic faith is cause for a declaration of nullity of marriage.

⁹⁴ See STANKIEWICZ, "L'esclusione," pp. 151-56. Of course, strictly speaking, no one has a right to offspring, but in marriage one has a right to acts which may result in offspring; see HERVADA, Los fines del matrimonio, p. 79; HERA, Relevancia jurídico-canónica, p. 45; LEGUERRIER, "Note," pp. 141-42.

⁹⁵ See T. Lincoln BOUSCAREN, Adam C. ELLIS, and Francis N. KORTH, Canon Law: A Text and Commentary, 4th rev. ed., Milwaukee, Bruce Publishing, 1966, p. 546.

⁹⁶ For a treatment of this topic from a theological perspective, see Ladislav ORSY, "The Religious Education of Children Born from Mixed Marriages," in Gregorianum, 45 (1964), pp. 739-60.

Some authors indeed take the position that a dispensation is invalid for which a contractant gives the cautiones but actually holds a contrary intention, or an intention to not fulfill the guarantee,⁹⁷ e.g., not to educate the offspring in the Catholic faith.⁹⁸ They maintain that the invalidity of such a marriage, therefore, derives from the invalid dispensation due to feigned or false guarantees, rather than the intention itself. This applies explicitly to the dispensation from the diriment impediment of disparity of worship, but not from the impedient impediment of mixed religion.⁹⁹ However, the opposite opinion asserts that the validity of the dispensation, and therefore of the marriage, does not depend upon the cautiones.¹⁰⁰ Others reach the same conclusion based on legislation which followed the Second Vatican

⁹⁷ See Gerhard OESTERLE, "De cautionibus fictis," in ETC, 8 (1952), p. 73; CAPPELLO, De matrimonio, n. 312bis, pp. 298-99.

⁹⁸ See Gerhard OESTERLE, "Hindernis der Religionsverscheidenheit und geheuchelte Bürgschaft," in AKK, 131 (1962), pp. 449-50; MUSSINGHOFF, "Ausschluß der Erziehung," p. 75. See also DESIDERIO, L'educazione dei figli, p. 16. Dino STAFFA, "De conditione potestativa in contractu matrimoniali," in ETC, 79 (1954), esp. p. 651, says that the cautiones only impinge on validity if a party makes their fulfillment a condition of consent. MORRISEY raises the question hypothetically in "The Incapacity of Entering into Marriage," p. 9.

⁹⁹ MUSSINGHOFF, "Ausschluß der Erziehung," p. 76.

¹⁰⁰ See Charles E. PARK, "Insincere Ante-nuptial Guarantees," in The Ecclesiastical Review, 91 (1934), p. 458.

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The use by canonists of equivocal terminology perdures in the period prior to the promulgation of the 1983 Code. Relative to the validity of marriage, the preceding four positions demonstrate that the bonum prolis always includes procreatio prolis (at least an intentio, ius, or ordinatio ad prolem), but it may or may not include educatio prolis. Procreatio often embraces different components of the physical bonum prolis. And educatio prolis consists of various aspects of what some authors designate the physical bonum prolis, although sometimes it

101 See Urbano NAVARRETE, "Adnotationes ad Instructionem 'Matrimonii sacramentum,'" in Periodica, 55 (1966), p. 760, who says that the cautiones are no longer (non amplius) required for validity, suggesting that previously they were required; Heinrich STRAUB and Urbano NAVARRETE, "Controversia de mente Instructionis 'Matrimonii sacramentum' quoad obligationem praestandi cautiones," in Periodica, 56 (1967), pp. 489-90 and passim; Urbano NAVARRETE, "Commentarium canonicum ad Litt. Ap. motu proprio datas 'Matrimonia mixta' 31 mart. 1970," in Periodica, 59 (1970), p. 445. See also TOBIN, "The Rights and Obligations of Parents," pp. 266-68; GULLO, "Sulla nullità del matrimonio," pp. 1095-96. Cf. Matthäus KAISER, "Mischehen ohne Zusage katholischer Kindererziehung," in Theologie und Glaube, 57 (1967), p. 87.

In the 1983 Code, the situation no longer pertains for two reasons. First, while a Catholic still needs a dispensation from the impediment of disparity of worship (C. 1086), a mixed marriage no longer requires a dispensation, but only a permission (C. 1124). Second, the cautiones per se no longer exist. The law requires the fulfillment of some conditions (C. 1125), one of which is a sincere promise by the Catholic party to do all in his or her power to baptize and raise the children in the Catholic faith; the condition is not so strong as the more juridical cautio. In addition, it seems that the validity of the dispensation rests on the demonstration of a just and reasonable cause, and not the promise itself to raise the children as Catholics. Stankiewicz argues that marital validity based upon the promise to raise the children Catholic would then raise serious doubts about the validity of all marriages of baptized non-Catholics, who presumably intend to raise their children outside of the Catholic faith. Furthermore, the new legislation is written in such a way as to respect religious liberty and be sensitive to ecumenical situations. See STANKIEWICZ, "L'esclusione," p. 173; MUSSINGHOFF, "Ausschluß der Erziehung," p. 76.

includes the spiritual bonum prolis as well.

III. The bonum prolis in the canonical tradition of the 1983 Code

Although no canon uses the expression itself, the bonum prolis continues to figure in the new Code. Several developments in the canonical text have an influence upon the more recent interpretations of the bonum prolis and its relationship to marriage. First of all, the introductory canon in the section on marriage states that the marriage covenant by its nature is ordered toward the procreation and education of offspring and the good of the spouses (C. 1055, §1). So while procreation and education of offspring maintain their importance, the mention of a primary end of marriage disappears. Furthermore, the good of the spouses, which the former Code does not specify, achieves new prominence in a position parallel to procreation and education.¹⁰²

Second, the 1983 Code avoids the explicit statement of a right to the conjugal act. The object of marital consent by the spouses is to give and accept one another for the purpose of establishing marriage (C. 1057, §2). This differs markedly from the 1917 Code in which the object of consent is the ius in corpus for acts in themselves suitable for generation. The new Code does not refer either to the right over the body or the right to the conjugal act (c. 1086, §2). Still, the description of the conjugal act as suitable in itself for the generation of offspring appears now in the canon which defines ratified and

¹⁰² For a description of the development of the text of C. 1055, see Francis G. MORRISEY, "L'évolution du texte des canons 1055 et 1095," in SC, 19 (1985), pp. 16-23.

consummated marriages (C. 1061, §1).

Third, the new Code revises the canon regarding the simulation of consent (C. 1101, §2). Both Codes state that a positive act of the will to exclude marriage itself or an essential property of marriage renders the marriage invalid. But the new canon says that the exclusion of an **essential element** of marriage also invalidates a marriage. This expression replaces the right to the conjugal act of the parallel canon in the 1917 Code. The essence of marriage thereby assumes a natural significance in the determination of the validity of marriage.¹⁰³

Fourth, the 1983 Code affirms that one who enters a marriage with a condition concerning the future contracts invalidly (C. 1102, §1). However, the stipulation no longer exists which considers impossible or immoral conditions not to have been placed. So the new Code no longer mentions the suspension of validity when a party contracts marriage with a licit condition concerning the future.

Finally, a canon which has no parallel in the earlier Code describes those who are incapable of contracting marriage (C. 1095). Such persons include those who seriously lack the discretionary judgment regarding the essential rights and obligations of marriage (2°), and those who are unable to assume the essential obligations of marriage due

¹⁰³ Gerard SHEEHY, "The Exclusion of Essential Elements of Matrimonial Consent: How Stands the New Code?" in CLSN, no. 64 (1985), pp. 9-19, includes a discussion of the development of the text of C. 1101.

to psychological causes (3°).¹⁰⁴ Canonists must now reflect upon the essence of marriage, and contemplate which of its components, i.e., its elements and properties, and the rights and obligations which derive from them, constitute essential components of marriage.¹⁰⁵

The promulgation of the 1983 Code leads to different emphases in the discussions concerning the bonum prolis. For example, a condition or pact relative to education receives very little treatment.¹⁰⁶ On the other hand, many authors now concern themselves with the question of the essential elements of marriage.

¹⁰⁴ See Augustine MENDONÇA, "The Incapacity to Contract Marriage: Canon 1095," in SC, 19 (1985), pp. 261-65, 267-74, 279-90, and David E. FELLHAUER, "Psychological Incapacity for Marriage in the Revised Code of Canon Law," in Michel THERIAULT and Jean THORN, eds., (= THERIAULT-THORN), The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law, Organized by Saint Paul University and Held at the University of Ottawa, August 19-25, 1984, Ottawa, Saint Paul University, Faculty of Canon Law, 1986, pp. 1020-32, for accounts of the historical development of c. 1095 in Rotal jurisprudence. See MORRISEY, "L'évolution du texte," pp. 23-27, for a description of the textual development of the canon itself.

¹⁰⁵ In its response to suggestion from its members, the Code Commission acknowledges that doctrine and jurisprudence will assist in the determination of these essential elements; see PONTIFICIA COMMISSIO CODICI IURIS CANONICI RECOGNOSCENDO, Relatio complectens synthesim animadversionum ab Em.iss atque Exc.iss patribus commissionis ad novissimum schema Codicis iuris canonici exhibitarum, cum responsionibus a secretaria et consultoribus datis, [Città del Vaticano], Typis Polyglottis Vaticanis, 1981, pp. 257-58. John Paul II confirms this in his Allocution to the Sacred Roman Rota, 26 January 1984, in TPS, 29, 177: "There still remain canons of great importance in matrimonial law, however, which have been necessarily formulated in a generic way and which await further determination, to which especially the qualified jurisprudence of the Rota could make a valuable contribution. I think, for example, of the determination of the 'grave lack of discretionary judgment' of the 'essential rights and obligations' mentioned in Can. 1095 [...]."

¹⁰⁶ See MUSSINGHOFF, "Ausschluß der Erziehung," p. 68, note 29.

In effect, in order to determine the object of consent, one must first consider marriage itself. The first chapter indicated the three prevailing descriptions of marriage: the goods of marriage, the ends of marriage, and the meaning of marriage. Each description starts from a distinct philosophical point of view.

Of course, the 1983 Code does not provide a definition of marriage. Therefore, it is very important to examine the canons themselves to arrive at a juridical definition of marriage. In the canons, the legislator refers both to marriage in fieri and in facto esse.¹⁰⁷

One might also call such a juridical definition the essence of marriage. The essence of marriage provides the basis on which to discern the essential elements and essential properties of marriage. In turn the rights and obligations (or duties) of marriage derive from the essential elements and essential properties.¹⁰⁸ Ultimately one deems those rights and obligations essential because they constitute the essence of marriage itself.

Various authors refer to several canons in order to arrive at their list of essential elements, or essential rights and obligations, of marriage.¹⁰⁹ This study highlights the rights and obligations which

¹⁰⁷ See POMPEDDA, "Incapacity to Assume," p. 186.

¹⁰⁸ See *ibid.*, p. 184, where the author argues that properties of marriage are not strictly identified with the essence of marriage; nevertheless, the Code itself refers to unity and indissolubility as "essential properties" (C. 1056). See also C. 1101, §2.

¹⁰⁹ They include CC. 1055, 1056, 1057, 1095, 1099, 1101, 1134, 1135, and 1136.

canonists consider to flow from the ordination of marriage toward the procreation and education of offspring. Their reflections center upon four familiar themes.

A. The procreative aspect of the bonum prolis

Following long established canonical tradition, the formal object of consent includes the procreatio prolis. Procreation consists of the right and duty to natural conjugal acts. In addition, other rights and duties derive from that, which concern the extension and non-interference with the natural consequences of the conjugal act.

1. The right and duty to natural conjugal acts

First of all, the bonum prolis consists of the right-duty to place conjugal acts in a human manner. The exclusion of the right-duty to conjugal intercourse therefore renders a marriage invalid. This is consonant with the canonical tradition described earlier in this study.

The exclusion may occur when a party consents to marriage and at the same time totally rejects the right and duty to sexual intercourse, or restricts it by contraceptive methods in order to impede generation, or is not able because of a psychic disorder to consummate the marriage

or carry out the conjugal act in a natural human manner. ¹¹⁰

2. The right and duty to natural effects of conjugal acts

The bonum prolis is ordered toward procreation of offspring. So an intention or condition which is contrary to procreation, or is contrary to the natural evolution and completion of the procreative process, such as abortion, excludes the bonum prolis. The exclusion of the intention or ordinatio toward procreation invalidates marital consent. This position certainly conforms to canonical tradition. ¹¹¹

Modern science creates the possibility that conception can occur through medical procedures such as artificial insemination, asexual or

¹¹⁰ See STANKIEWICZ, "L'esclusione," p. 161; Mariano LOPEZ ALARCON and Rafael NAVARRO-VALLS, Curso de derecho matrimonial canónico y concordado, Madrid, Editorial Tecnos, 1984, pp. 173-74; José M. PINTO GOMEZ, "Incapacitas assumendi matrimonii onera in novo CIC," in Dilexit iustitiam: Studia in honorem Aurelii Card. Sabattani, curantibus Zenon GROCHOLEWSKI et Vincente CARCEL ORTI, Studi giuridici 5, Città del Vaticano, Vaticana Libreria Editrice, 1984, p. 28; Federico R. AZNAR GIL, El nuevo derecho matrimonial canónico, 2a ed. rev. y aum., Bibliotheca Salmanticensis, Estudios 60, Salamanca, Universidad Pontificia de Salamanca, 1985, p. 367; MENDONÇA, "The Theological and Juridical Aspects of Marriage," p. 290; IDEM, "The Incapacity to Contract Marriage," p. 301; IDEM, "Antisocial Personality and Nullity of Marriage," in SC, 16 (1982), pp. 86, 101-2; MORRISEY, "L'évolution du texte," pp. 27-28.

¹¹¹ See LOPEZ-NAVARRO, Curso, pp. 173-74; PINTO, "Incapacitas," p. 28; AZNAR, El nuevo derecho matrimonial canónico, p. 367; SHEEHY, "The Exclusion of Essential Elements," p. 14; MENDONÇA, "The Incapacity to Contract Marriage," p. 301; IDEM, "The Theological and Juridical Aspects of Marriage," p. 290; Antonio MOSTAZA RODRIGUEZ, "Matrimonio," in Nuevo derecho parroquial, por Julio MANZANARES, Antonio MOSTAZA, y José L. SANTOS, presentación por Antonio RUOCO VARELA, segunda edición corregida y actualizada, Madrid, Biblioteca de Autores Cristianos, 1990, p. 424; STANKIEWICZ, "L'esclusione," p. 162; HERVADA, "Obligaciones esenciales," p. 79.

in vitro fertilization, fertilization from a donor other than the spouses, and surrogate motherhood. Such behavior, independent of the conjugal act, is also contrary to the bonum prolis. The intention to exclude the bonum prolis through the use of those procedures also invalidates marital consent. ¹¹²

Nevertheless, when treating this subject canonists ought to avoid the expression right to offspring (ius ad prolem). ¹¹³ Stankiewicz rightly points out that marriage does not confer a right-duty to offspring per se, but only a right-duty to the acts which may in effect lead to offspring. A child is not something which is due to one's spouse by personal right. Rather, marriage confers the right to become a mother or father exclusively with one's spouse, not a right-duty to have children. ¹¹⁴

¹¹² See LOPEZ-NAVARRO, Curso, p. 174; Sandro GHERRO, Diritto matrimoniale canonico: Lezioni, ed. provvisorio e parziale: capp. I-VII, Padova, CEDAM, 1985, p. 231; STANKIEWICZ, "L'esclusione," p. 162.

¹¹³ See Alberto BERNARDEZ CANTON, Compendio de derecho matrimonial canónico, septima edición, Madrid, Tecnos, 1991, p. 176.

¹¹⁴ See STANKIEWICZ, "L'esclusione," pp. 160-61. See also GUTIERREZ, "Matrimonii essentia," pp. 124, 126.

B. The educative aspect of the bonum prolis

The second and more debated feature of the good of offspring as the formal object of consent is the educatio prolis. It consists of the right and duty to provide for the well-being of the offspring. The educative aspect of the bonum prolis does not exist merely as an ethical requirement but appertains to the juridic concept of marriage. ¹¹⁵

Therefore it is a question of "what is the essential minimum" of education, in which the right-duty to the transmission of human life is joined to the right-duty of its protection, reception, and growth, as a human person, in the conjugal community. The exclusion of this essential element of bonum prolis by a positive act of the will produces nullity of the marital consent (C. 1101, §2). ¹¹⁶

Many authors agree that the exclusion of educatio prolis renders null

¹¹⁵ See STANKIEWICZ, "L'esclusione," p. 166.

¹¹⁶ "Si tratta quindi del 'quid minimum essenziale' della educazione, in cui si congiungono il diritto-dovere alla trasmissione della vita umana e il diritto-dovere alla sua conservazione, accoglienza e crescita, come persona umana, nella comunità coniugale. L'esclusione di questo elemento essenziale del 'bonum prolis' con l'atto positivo di volontà produce la nullità del consenso matrimoniale (can. 1101, §2)." Ibid., p. 169.

the marital consent.¹¹⁷ In addition, some canonists support the right to education in a general way, but do not examine its relationship to

¹¹⁷ See Francis G. MORRISEY, "The Incapacity of Entering into Marriage," in SC, 8 (1974), p. 13; Antonio MOSTAZA RODRIGUEZ, "La simulación en el C.I.C. y en el proyecto de nuevo código (PNC)," in REDC, 38 (1982), p. 485; José M. GONZALEZ DEL VALLE CIENFUEGOS, Derecho canónico matrimonial: Según el Código de 1983, Colección canónico de la Universidad de Navarra, Manuales, Pamplona, Ediciones Universidad de Navarra, 1983, p. 72; Geoffrey ROBINSON, "Unresolved Questions in the Theology of Marriage," in The Jurist, 43 (1983), p. 85; Annaluisa CASIRAGHI, "Il diritto di famiglia nel nuovo Codice di diritto canonico," in THERIAULT-THORN, The New Code of Canon Law, pp. 871-72; Thomas P. DOYLE, "The Moral Inseparability of the Unitive and Procreative Aspects of Human Sexual Intercourse," in ME, 109 (1984), pp. 456-57; MASTROTTO, L'educazione della prole, p. 111; PINTO, "Incapacitas," p. 28; Giovanni BARBERINI, "Sull'applicabilità del can. 1095," in DE, 96, no. 2 (1985), p. 165; Thomas P. DOYLE, "The Theology of Marriage: Where We Are Today," in SC, 19 (1985), p. 96; Antonio MOLINO MELIA and María Elena OLMOS ORTEGA, Derecho matrimonial canónico: Sustantivo y procesal, Madrid, Civitas, 1985, p. 192; Cosmas ALUEDE OJEMEN, Psychological Factors in Matrimonial Consent in the Light of Canonical Legislation, [Doctoral thesis], Rome, Pontificia Universitas Urbaniana, 1986, p. 131; MUSSINGHOFF, "Ausschluß der Erziehung," p. 89; POMPEDDA, "Incapacity to Assume," p. 159; Bernard A. SIEGLE, Marriage According to the New Code of Canon Law, New York, Alba House, 1986, pp. 10-11, 103; Florencio TESTERA, "The Nature of Marriage," in Philippiana sacra, 21 (1986), p. 70; Luis GUTIERREZ MARTIN, La incapacidad para contraer matrimonio: Comentarios al c. 1095 del Código de derecho canónico para uso de los profesionales del foro, Bibliotheca salmanticensis, estudios 88, Salamanca, Universidad Pontificia de Salamanca, 1987, p. 87; HERVADA, "Matrimonial Law," pp. 40, 46; SUBIRA, "La incapacidad," pp. 241-42; Vidal GUITARTE IZQUIERDO, "Una contribución a la teoría de la capacidad psíquica en el negocio jurídico matrimonial a partir del can. 1095," in REDC, 45 (1988), p. 645; MOSTAZA, "Matrimonio," p. 424; BERNARDEZ, Compendio, pp. 180-81; HERVADA, "Obligaciones esenciales," pp. 79-80; Carmen ROJO, "Unidad y relevancia jurídica de los fines del matrimonio en el nuevo Código de derecho canónico," in IC, 62 (1991), pp. 705-6; Pedro Juan VILADRICH, "Matrimonial Consent," in Code of Canon Law Annotated, Latin-English edition of the Code of Canon Law and English-language translation of the 5th Spanish-language edition of the commentary prepared under the responsibility of the Instituto Martín de Azpilcueta, ed. Ernest CAPARROS, Michel THERIAULT, and Jean THORN, Montréal, Wilson & Lafleur Limitée, 1993, pp. 687, 694.

the validity of marital consent.¹¹⁸ Others persist in their disagreement.¹¹⁹

Some argue that the right-duty to educatio prolis (including the physical and spiritual bonum prolis) does not belong strictly to the spouses (qua spouses) because of their consent to marriage, and therefore has no connection to its validity. They suggest, rather, that it pertains to the relationship between spouses (qua parents) and their children. That is, the right-duty to educate offspring comes into existence out of the relationship between parents and children which derive from procreation, and not because of the relationship, rights,

¹¹⁸ See CASIRAGHI, "Il diritto di famiglia," pp. 872-75; Urbano NAVARRETE, "I beni del matrimonio: Elementi e proprietà essenziali," in La nuova legislazione matrimoniale canonica: Il consenso: Elementi essenziali, difetti, vizi, Studi giuridici 10, Città del Vaticano, Vaticana Libreria Editrice, 1986, p. 97; Domenico MOGAVERO, "L'insegnamento della religione nelle scuole secondo il Codice di diritto canonico," in ME, 112 (1987), p. 145. See also STANKIEWICZ, "L'esclusione," pp. 171-72.

¹¹⁹ Those who reject educatio prolis as an essential element of marriage under the 1983 Code include Orio GIACCHI, "La definizione del matrimonio nella riforma del diritto matrimoniale canonico," in EIC, 33 (1977), pp. 223-24 (who treats the proposed canons); BARBERINI, "Sull'applicabilità del can. 1095," p. 165; Ermanno GRAZIANI, "Essenza del matrimonio e definizione del consenso," in La nuova legislazione matrimoniale canonica, p. 26 (although he still demands the natural or ethical requirement of physical education to guarantee the survival and vitality of newborns who cannot care for themselves). See also BURKE, "The Essential Obligations of Marriage," p. 388.

and duties that derive from marriage.¹²⁰

Stankiewicz responds that marital consent establishes the educational right-duty of the spouses. For educatio prolis is inherent to the canonical understanding of marriage, which by its nature is ordered toward procreation and education of offspring. Therefore, the right-duty to educate offspring does pertain to marital consent, the same consent which establishes marriage itself, and pertains moreover to the determination of its validity.¹²¹

In the canonical tradition, the education of offspring has two components: the physical good of the offspring, and their moral and spiritual well-being.¹²²

¹²⁰ Under the 1917 Code, see GULLO, "Sulla nullità del matrimonio," pp. 1092-93; FUMAGALLI CARULLI, "Innovazioni conciliari," p. 409; HUIZING, "Bonum prolis," pp. 722-23, stating his own opinion; KAISER, "Mischehen," p. 87; HERVADA, Los fines del matrimonio, both supports this premise, based on one approach (pp. 87, 172), but also argues for a mutual obligation to educate children (pp. 87-90, 172). Under the 1983 Code, see LOPEZ-NAVARRO, Curso, p. 174; BARBERINI, "Sull'applicabilità del can. 1095," p. 165; M. Elisabetta CASELLATI ALBERTI, "Fonti del diritto di famiglia nel nuovo Codice di diritto canonico, con particolare riferimento all'educazione dei figli," in Studi sulle fonti del diritto matrimoniale canonico, a cura del Prof. Sandro GHERRO, Pubblicazioni della Facoltà di giurisprudenza dell'Università di Padova 160, Padova, CEDAM, 1988, pp. 164-65; BURKE, "The Essential Obligations of Marriage," p. 388.

¹²¹ See STANKIEWICZ, "L'esclusione," p. 168. See also DE SMET, De sponsalibus et matrimonio, n. 275, p. 236; HERVADA-LOMBARDIA, Derecho matrimonial, p. 228; TOBIN, "The Rights and Obligations of Parents," p. 256; ZUSY, "Matrimonial Consent," p. 230; GHERRO, Diritto matrimoniale canonico, p. 231.

¹²² See STANKIEWICZ, "L'esclusione," pp. 165-66, who clearly includes "physical bonum prolis" under the heading of educatio.

1. The right and duty to the physical bonum prolis

The traditional expression "physical bonum prolis" indicates the conception, the birth, and the protection of the life of offspring, as demonstrated above. Various referred to as physical,¹²³ natural,¹²⁴ or human education,¹²⁵ it sustains the natural progression of what begins with natural conjugal acts.¹²⁶ In line with earlier authors, an exclusion of the physical bonum prolis occurs when one impedes the natural development of a fetus, or intends physical harm to offspring. This includes, for example, a condition or intention to procure abortion, kill the offspring, abandon them, or mutilate them. Therefore, authors agree that an intention or condition in marital consent to exclude this essential aspect of the bonum prolis renders a

¹²³ See MASTROTTO, L'educazione della prole, p. 31; BARBERINI, "Sull'applicabilità del can. 1095," p. 165.

¹²⁴ See STANKIEWICZ, "L'esclusione," p. 169.

¹²⁵ See Francesco BERSINI, Il nuovo diritto canonico matrimoniale: Commento giuridico-teologico-pastorale, 3a ed., aggiornata e ampliata, Leumann, Editrice Elle Di Ci, 1985, p. 198.

¹²⁶ See STANKIEWICZ, "L'esclusione," p. 169.

marriage invalid. ¹²⁷

2. The right and duty to the spiritual bonum prolis

Canonical tradition also speaks of the "spiritual bonum prolis" which some authors designate as ~~moral~~ or ~~religious~~ education, and further may specify the latter as either ~~Christian~~ or ~~Catholic~~ education. For they acknowledge that humans are more than biological realities and comprise ethical and religious dimensions as well:

All of this continues to indicate that the spiritual principle and the corporeal element are in incessant interaction. [...]

The dimension which characterizes a human is the ethical one, morals. The life of humans, their acting, their decisions, are not simply responses to biological and environmental stimuli, to impulses often incontrollable; it is all pervaded by the search for the significance or

¹²⁷ See *ibid.*, pp. 166-69; MOSTAZA, "La simulación," p. 486; GONZALEZ, Derecho canónico matrimonial, p. 72; BONNET, "L' 'ordinatio ad bonum prolis,'" pp. 326-27; LOPEZ-NAVARRO, Curso, p. 160; PINTO, "Incapacitas," p. 28; MORRISEY, "L'évolution du texte," p. 28; AZNAR, El nuevo derecho matrimonial canónico, p. 367; Juan GOTI ORDEÑANA, "Anotaciones a las exclusiones de algún elemento esencial del matrimonio," in THÉRIAULT-THORN, The New Code of Canon Law, p. 1014; MASTROTTO, L'educazione della prole, p. 111; BARBERINI, "Sull'applicabilità del can. 1095," p. 165, although he states in the previous paragraph that canonical doctrine "always affirms" that education does not belong to the category of essential rights and obligations in marriage; MENDONÇA, "The Theological and Juridical Aspects of Marriage," p. 290, as well as his earlier works "The Incapacity to Contract Marriage," p. 301, and "Antisocial Personality and Nullity of Marriage," in *SC*, 16 (1982), p. 87; MOSTAZA, "Matrimonio," p. 424; BERNARDEZ, Compendio, p. 181; VILADRICH, "Matrimonial Consent," pp. 687, 694. See also Andrzej KOWALSKI, Educazione della prole nella vigente legislazione canonica, [Doctoral thesis], Roma, Pontificia Universitas Lateranensis, 1987, pp. 21-30.

meaning which life itself should have. ¹²⁸

Therefore, many recent authors conclude that the exclusion of the moral or religious education of offspring renders marital consent invalid. ¹²⁹

But some authors cite common and constant doctrine, and thereby maintain that the spiritual bonum prolis does not constitute an essential part of the formal object of consent. ¹³⁰ Stankiewicz agrees

¹²⁸ "Tutto ciò sta a indicare che il principio spirituale e l'elemento corporeo sono in una incessante interazione. [...]"

"La dimensione che caratterizza l'uomo è quella etica, la morale. La vita dell'uomo, il suo agire, le sue decisioni non sono semplici risposte a stimoli biologici e ambientali, a impulsi spesso incontrollabili; tutto è pervaso dalla ricerca di significato o di senso che deve avere la vita stessa." Lorenzo MACARIO, "L'educazione dei figli nella prospettiva pedagogica della Chiesa," in La famiglia e i suoi diritti nella comunità civile e religiosa, a cura di Tarcisio BERTONE e A. SEVERGNINI, Atti del VI Colloquio giuridico, 24-26 aprile 1986, Utrumque Ius 16, [Città del Vaticano], Libreria Editrice Vaticana, 1987, p. 270. See Stankiewicz, "L'esclusione," p. 169.

¹²⁹ See BONNET, "L' 'ordinatio ad bonum prolis,'" pp. 326-27; IDEM, Introduzione al consenso matrimoniale canonico, Pubblicazioni della Facoltà di Giurisprudenza, Dipartimento de scienze giuridiche, Università di Modena, Nuova serie 3, Milano, A. Giuffrè, 1985, p. 122; GHERRO, Diritto matrimoniale canonico, p. 231; MORRISSEY, "L'évolution du texte," p. 28; ALJEDE, Psychological Factors, pp. 291-93; MOGAVERO, "L'insegnamento della religione," p. 145; MENDONÇA, "The Theological and Juridical Aspects of Marriage," p. 290, and his earlier works "The Incapacity to Contract Marriage," p. 301, and "Antisocial Personality and Nullity of Marriage," in SC, 16 (1982), p. 87. Those who raise the question hypothetically include MUSSINGHOFF, "Ausschluß der Erziehung," p. 90, and AZNAR, El nuevo derecho matrimonial canónico, p. 367. See also Ladislav ORSY, Marriage in Canon Law: Texts and Comments, Reflections and Questions, Wilmington, DE, M. Glazier, 1986, pp. 53, 131, and KOWALSKI, Educazione della prole, pp. 21-22, both of whom argue that a complete education must include Christian education with a Catholic character, if at least one of the parents is Catholic.

¹³⁰ See STANKIEWICZ, "L'esclusione," pp. 170-72, and his arguments are found on pp. 172-74. Others who cite the common doctrine include GONZALEZ, Derecho canónico matrimonial, p. 72; MASTROTTO, L'educazione della prole, pp. 110-11; PINTO, "Incapacitas," p. 28, note 53; MOSTAZA, "La simulación," p. 486. See also BERNARDEZ, Compendio, p. 181.

that the religious education of offspring is very important. But he argues against right-duty to educate children in the Catholic faith as constitutive of marriage in fieri for three reasons.

First of all, he asserts that the right-duty to education is juridically essential to marriage only in a broad sense; i.e., it concerns the transmission and beginning of human life, and not a particular dimension of education, for example, religious education.¹³¹ Second, in a sacramental marriage, religious education to the Catholic faith is not connected directly to procreation or the beginning of human life, but rather to baptism and the initiation of the offspring into the Church of Christ.¹³²

He argues, finally, on the basis of the canon concerning mixed marriages, that the legislator separates the promise to baptize and educate the children in the Catholic faith (C. 1125, 1°) from the instruction regarding the ends and properties of marriage (3°). Therefore, to maintain that the obligation to educate the offspring means to raise them in the Catholic faith may lead to a terrible conclusion. That is, the marriages of all baptized Christians who are not Catholics may be invalid, because they do not intend to educate their children in the Catholic faith. He also questions the essential nature of education in the Catholic faith, because the validity of the local Ordinary's permission to marry does not depend upon this promise, but upon a "just and reasonable cause" (C. 1125). Stankiewicz believes

¹³¹ See STANKIEWICZ, "L'esclusione," p. 172.

¹³² See *ibid.*, pp. 172-73.

that other canonical provisions and sanctions sufficiently protect the right-duty to educate the offspring as Catholics.¹³³

Both procreation and education are essential to marriage, as C. 1055 says. But in the case of procreation, canonical tradition and jurisprudence move then to very specific examples of the exclusion of procreation, such as the conjugal act performed in an inhuman manner, contraception, sterilization, and abortion. Yet the broad meaning of procreation includes more than the conjugal act.

One may approach the matter of education in the same way. That is, one may begin by acknowledging that the right-duty to education pertains juridically in a global sense, and subsequently move to specific dimensions of education whose exclusion constitutes the exclusion of education itself. It only remains, then, to establish the essential components of the various dimensions of educatio prolis.

This study agrees with Stankiewicz that faith results from a personal decision, and that parents do not directly transmit faith to their children. Parents, therefore, cannot be held responsible for the ultimate faith decision of their children. But if two parties enter a sacramental union, it seems totally consonant with the essence of that union to conclude that the offspring will be baptized and raised as Christians. This is true in the case of mixed marriages as well. Nevertheless, a spouse may have an intention to exclude baptism itself, or an intention to provide no religious instruction or example of faith

¹³³ See *ibid.*, pp. 173-74. In his article Stankiewicz specifically refers to CC. 217; 226, §2; 774, §2; 1136, and 1366.

of any kind for their offspring. Such may be the case, for example, when spouses are baptized but never receive any religious formation, and do not live even an appearance of a religious life themselves.

Therefore, this study concludes that the exclusion of moral or religious formation, and moreover the exclusion of a specifically Christian education in marriages which are sacramental in nature, may render marital consent invalid.

C. The basis for nullity relative to the bonum prolis

The exclusion of the bonum prolis may render a marriage null either because of a lack of capacity to consent to marriage, e.g., incapacity to assume the essential obligations; or because of a defect of will, e.g., simulation or conditional consent. The majority of arguments state that the exclusion of the bonum prolis or some essential aspect of the bonum prolis (which includes variously the procreatio prolis, educatio prolis, the physical and the spiritual bonum prolis) makes a marriage invalid, based primarily on CC. 1055, §1; 1057, §2; 1095; 1101; and 1102.

Some of the confusion of terminology, such as the goods, the ends, and the properties and elements of marriage, and their relationships to the essence of marriage, to the formal act of consent, and to the rights and duties of marriage, has been clarified since the promulgation of the new Code. Not all authors are precise when they address this topic, however.

The wording of the 1917 Code requires some imaginative and strong reasoning to include certain aspects of the bonum prolis in the content

of the formal act of consent. The canons focus on the ius in corpus and the ius ad coniugalem actum, and then judicial opinions gradually offer interpretations beyond the literal meaning of the phrases. But the canons of the 1983 Code are not so restrictive. It remains clear that both procreation and education belong to the content of the bonum prolis. Nevertheless, neither the law nor those who comment upon it have clearly established or accepted a universal interpretation of each of those terms.

D. Proposal

It is obvious that much more study must transpire concerning the essential content of the bonum prolis. The following outline is an attempt to clarify the equivocal and therefore confusing terminology being used. It does not propose to circumscribe what is essential to bonum prolis, but simply to establish and delineate the meaning of some of the more commonly used expressions in order to facilitate further discussion.

Traditionally, the bonum prolis consists of procreatio and educatio, which include the following aspects:

1. Procreatio prolis

- a. Natural human sexual intercourse
- b. Orientation toward natural conception of offspring, i.e., behavior open to conception, and no behavior which leads to conception outside of natural sexual intercourse

2. Educatio prolis

- a. Physical education — intrauterine life, birth, feeding, and physical care, i.e., any time after the moment of conception
- b. Spiritual education — moral and religious formation
- c. Civil education — intellectual, social, and cultural formation.¹³⁴

First, this outline avoids a confusing redundancy of words, such as "physical bonum prolis." And second, it addresses the tendency to extend the meaning of "procreation" which broadens under the 1917 Code. The outline suggests that the heading of procreatio prolis embrace only the behavior which precedes the moment of conception. It also suggests that the heading of educatio prolis include all behavior concerning the protection and care for a child, from the moment of its conception and thereafter. The outline that Stankiewicz uses is quite similar, except that he includes acts such as abortion under the "procreative aspect," whereas this outline includes it under "physical education."

Conclusion

The essential content of the bonum prolis continues to vary, and generally to extend beyond the right to the conjugal act explicitly stated in the 1917 Code. There is more or less unanimous agreement that marriage includes the right to natural human sexual intercourse, that it demands an openness to conception and protection of the natural evolution of the child who is conceived. Furthermore, the majority of

¹³⁴ See DESIDERIO, L'educazione dei figli, p. 16, who reminds the reader that a child is a physical, spiritual, moral, and civil entity.

modern authors seem to believe that the raising of children belongs to the essential content of the bonum prolis. However, they all do not support the physical care of the offspring after their birth as essential relative to the validity of marriage. And finally, a solid minority opinion, constant in canonical tradition and apparently growing, maintains that moral and religious education also comprises an essential element of the bonum prolis.

Kowalski concludes that the education of offspring has a proper place in canonical teaching.¹³⁵ He comes to his conclusion after an in-depth study of the place of education in canonical legislation. This study reaches the same conclusion after a review of the canonical understanding of the bonum prolis and its relationship to the sacrament of marriage. It remains to determine what constitute the components of educatio prolis necessary after conception to fulfill the marital right and obligation of education of offspring. That is, what are the minimum or essential elements of educatio for the protection of fetal development, and for the child's birth, life, physical growth, and spiritual formation as a human person in a conjugal community?

The proposed use of univocal vocabulary may help to achieve precision and clarity in future discussions, as both canonists and theologians continue to explore and articulate their understanding of the bonum prolis and its relationship to the validity of marriage.

¹³⁵ "Nella dottrina canonica accade non di rado che vanga considerata come essenziale soltanto la procreazione della prole, quasi che in essa si esaurisca tutta la finalità del matrimonio. Invece l'istituto matrimoniale è ordinata, oltre che al bene dei coniugi e alla procreazione, anche all'educazione della prole. Sarebbe desiderabile che anche l'educazione della prole avesse il suo giusto posto nella dottrina canonica." KOWALSKI, Educazione della prole, p. 107.

CHAPTER 3

THE JURISPRUDENTIAL UNDERSTANDING OF EDUCATIO PROLIS RELATIVE TO MARRIAGE

Introduction

Having considered both the theological and the canonical understandings of educatio prolis, this study now undertakes an examination of jurisprudence from the Roman Rota concerning educatio prolis and its relationship to the validity of marriage.

An overview of Rotal jurisprudence concerning the bonum prolis and its relationship to the validity of marriage provides a context for the analysis of the place that educatio prolis occupies. It becomes clear that Rotal decisions argue about many of the same issues which arise in theological and canonical treatments of the bonum prolis.

The chapter confines itself to the jurisprudence of the Roman Rota. The overview of bonum prolis primarily highlights different approaches to the consideration of the content of the bonum prolis and its relationship to the validity of marriage. The chapter presents the Rotal jurisprudence of three time periods: the period immediately preceding the 1917 Code; the period of the 1917 Code; and the period following the promulgation of the 1983 Code.

Afterwards, in order to discover the aspects of educatio prolis which affect the validity of marriage in jurisprudence, the Rotal decisions which specifically treat the content of educatio prolis receive a more systematic analysis.

This chapter demonstrates that Rotal jurisprudence not only establishes the bonum prolis as an essential object of marital consent, and educatio prolis as an essential part of the bonum prolis; it also recognizes educatio prolis as an essential object of marital consent, although in a wide variety of ways.

I. The bonum prolis in Rotal jurisprudence

A. Rotal jurisprudence before the 1917 Code

In the period prior to the promulgation of the 1917 Code, accepting the doctrine on conditions established by Gregory IX in the Decretals, the Rota judges a marriage invalid if one of the parties places a condition which is contrary to the essence of marriage, which includes the bonum prolis.¹ In this period, the Rota issues declarations of nullity of marriage both in cases in which there is clear evidence of a mutual pact (deducta in pactum), and when there is no evidence or insufficient evidence of such a pact.²

The Rota considers the following conditions to be contra bonum prolis:

¹ See c. PERSIANI, 6 December 1909, in SRR Dec, 1 (1909), p. 161; c. SEBASTIANELLI, 15 December 1915, in SRR Dec, 7 (1915), pp. 460-61.

² The more common opinion in Rotal jurisprudence holds that an implicit condition is sufficient, or that an explicit condition deducta in pactum is not necessary in order to establish nullity. See c. SEBASTIANELLI, 7 February 1914, in SRR Dec, 6 (1914), p. 58; c. SEBASTIANELLI, 10 May 1916, in SRR Dec 8 (1916), p. 140; c. SINCERO, 31 October 1919, in SRR Dec, 11 (1919), p. 146; and N. Orville GRIESE, The Marriage Contract and the Procreation of Offspring, [Doctoral thesis], Canon Law Studies 226, Washington, DC, Catholic University of America, 1946, pp. 95-96.

- to exclude the generation of offspring;³
- to avoid offspring (vitare prolem);⁴
- to reject an essential obligation of marriage.⁵

The Rota also considers those cases in which there is an intention, rather than a condition, contrary to the bonum prolis.⁶ The Rota considers the following intentions to be contra bonum prolis:

- not to oblige oneself to sexual intercourse;⁷
- to exclude the obligation to accept offspring (suscipere prolem).⁸

B. Rotal jurisprudence after the 1917 Code

Rotal jurisprudence continues to use the expression contra bonum prolis as a general heading of nullity after the promulgation of the 1917 Code. Yet, the expression does not appear in any legislative text

³ See c. SEBASTIANELLI, 10 May 1916, in SRR Dec, 8 (1916), p. 140; also, a condition that children not be born (non nascantur liberi), c. SEBASTIANELLI, 7 February 1914, in SRR Dec, 6 (1914), p. 64.

⁴ See c. PERSIANI, 6 December 1909, in SRR Dec, 1 (1909), p. 161; c. PRIOR, 10 December 1914, in SRR Dec, 6 (1914), p. 342.

⁵ See c. SEBASTIANELLI, 10 May 1916, in SRR Dec, 8 (1916), p. 140.

⁶ Mori departs from the common opinion by insisting upon an explicit intention deducta in pactum: "[...] hinc in casu contracti matrimonii non sufficit ut quis habuerit intentionem contrariam bono fidei et prolis, sed debet esse expressa et in pactum deducta, ut matrimonium irritet uti disponitur [...]." c. MORI, 17 March 1910, in SRR Dec, 2 (1910), pp. 120-21; see also c. MORI, 24 July 1909, in SRR Dec, 1 (1909), pp. 106-7.

⁷ See c. MORI, 17 March 1910, in SRR Dec, 2 (1910), pp. 118, 122.

⁸ See c. SEBASTIANELLI, 15 December 1915, in SRR Dec, 7 (1915), p. 460.

in force, neither the instruction Provida mater,⁹ Crebrae allatae,¹⁰ nor the Code itself.¹¹

Although the expression bonum prolis does not appear, Rotal jurisprudence cites four canons of the 1917 Code relative to the good of offspring. In c. 1013 the primary end of marriage is the procreation and education of offspring. In c. 1081, §2 the object of marital consent is the perpetual and exclusive right over the body itself (ius in corpus) for acts which are in themselves suitable for the generation of offspring. According to c. 1086, §2, one contracts invalidly if one excludes all right to the conjugal act (omne ius ad coniugalem actum) by a positive act of the will. And finally, in c. 1092, 2°, a condition which concerns the future and is contrary to the substance of marriage invalidates consent.

Several issues commonly arise in the judicial considerations of the bonum prolis, each of which impinges upon the decision that a judge makes regarding the validity of a marriage in a particular case. The first issue focuses on the plan and the methods to exclude offspring. There are three basic ways to avoid offspring: to abstain from conjugal acts; to abstain from conjugal acts which or when they can result in

⁹ See SACRA CONGREGATIO DE DISCIPLINA SACRAMENTORUM, Instruction Provida Mater, 15 August 1936, in AAS, 28, 313-61.

¹⁰ PIUS XII, Motuo proprio Crebrae allatae, 22 February 1947, in AAS, 31, 89-117; Victor J. POSPISHIL, The Law on Marriage: Interritual Marriage Law Problems, English trans. and differential commentary, Chicago, Universe Editions, 1962, 220 pp.

¹¹ See René LEGUERRIER, "Note sur l'intention contra bonum prolis à propos de certaines sentences récentes de la S. Rote Romaine," in SC, 3 (1969), p. 139.

conception; and to use contraceptive means to prevent pregnancy (i.e., to prevent ovulation, fertilization, or implantation, or to stimulate menstruation). The form of the exclusion and especially the different methods to avoid conception play a significant role in the determination of the validity of a marriage. Accordingly, a great deal of discussion in Rotal jurisprudence centers on these points.

The second issue focuses on the "rights" related to the bonum prolis. One canon speaks of a right to the conjugal act (c. 1086, §2). Another speaks of a right over the body itself and even modifies it with the description "for acts which are of themselves suitable for the generation of offspring" (c. 1081, §2). Both of these canons express a conjugal right, namely a unique right to perform the sexual act with one's partner in marriage. At times, then, the jurisprudence undertakes to connect the two rights to one another.¹²

Judges often make a distinction between a right and the use or exercise of that right. In a similar way, they distinguish an obligation or a duty from its fulfillment. According to those who employ these distinctions, only the exclusion of a right or obligation invalidates marital consent, though we shall see later that some Rotal judges discard the distinction. When the Rota considers a possible exclusion of the bonum prolis, it presumes that a party normally excludes only the fulfillment of the obligation, but adequate proof can

¹² Rotal judges relate c. 1081, §2 to c. 1086, §2 with terms such as ideo, quare, or proinde; see c. GRAZIOLI, 28 November 1928, in SRR Dec, 20 (1928), p. 467; c. QUATTROCOLO, 11 April 1933, in SRR Dec, 25 (1933), p. 229; c. HEARD, 29 November 1934, in SRR Dec, 26 (1934), p. 758.

overturn this presumption.¹³

A third and more problematical issue centers on the 1917 Code's use of two different words, omne (c. 1086, §2) and perpetuum (c. 1081, §2), to describe the nature of the conjugal right. If one departs from the vocabulary of the canons themselves, in theory one may restrict the conjugal right in two basic ways: with regard to time and with regard to a qualification or limitation of the right.¹⁴ The first type of restriction considers whether a party grants only a temporary, interrupted, intermittent, or deferred right, versus a perpetual, permanent, or continual right. The second type of restriction considers whether a party circumscribes the right in some way through a condition, a qualification, or a limitation, versus a right that is whole, total, or absolute. These descriptions of a right, however, do not mutually exclude one another. Often they overlap when one describes the restriction of the right to the conjugal act, or when one uses the terms to describe the so-called right to offspring. That is, the time of the conjugal right might be limited according to some qualification about the time or spacing of the children's births.¹⁵

¹³ "Praesumptio autem iuris est adimplementum obligationis, et non ipsam obligationem, exclusam esse (cann. 1014 et 1086, §1). Sed praesumptio veritati cedere debet. Si igitur ex adiunctis tum ante tum post matrimonium ostendi potest alterutram partem non solum adimplementum, sed ipsam obligationem revera exclusisse, matrimonium nullum declarandum est." c. HEARD, 29 November 1934, in SRR Dec, 26 (1934), p. 758.

¹⁴ See c. FELICI, 22 October 1957, in SRR Dec, 49 (1957), p. 625.

¹⁵ For a more comprehensive treatment of this question, see Maurice B. AHERN, "The Marital Right to Children: A Tentative Re-examination," in SC, 8 (1974), pp. 91-107.

The jurisprudence reveals three approaches to the dilemma of the restriction of the conjugal right. Some jurists admit no restriction of any kind, with regard to time or with regard to qualification. They claim that any restriction of the conjugal right vitiates the marriage.¹⁶ Others permit some restriction of the right, because the restriction concerns the exercise of the right while the right itself remains intact. The restrictions may range from an abuse of the right to a proper exercise of responsible parenthood, but the marriage itself remains intact:

One who has the intention to postpone the procreation of offspring does not destroy the end to which marriage is ordered, rather the one who acts thus to safeguard the better good of the future offspring sometimes is to be commended.

Therefore, "strictly speaking, the one who only intends to postpone the generation of offspring seems rather to confirm the presumption in favor of true consent, insofar as she/he does not appear to have willed to exclude all intention of offspring. Therefore, being a mere human presumption, it allows proof to the contrary. But if the contractant, in manifesting the consent itself, had contracted with the intention to postpone the very handing over and accepting of the ius in corpus, she/he contracts invalidly, provided that one proves that this intention had entered into the marital consent itself, and had not been added to the already complete contract. In other words, where the contractant, spurning and positively rejecting natural law, presumes to say and maintain her/himself the only source of law in conjugal matters, and consequently decides the right is to be used at her/his whim, e.g., until better fortune comes, it cannot be doubted that, as long as the marriage is entered with firm certainty, marital consent can be rendered invalid by this type of intention, if it is

¹⁶ See c. DOHENY, 11 November 1959, in SRR Dec, 45 (1953), pp. 659-60.

juridically proven" [...].¹⁷

Finally, some allow the restriction of a right but hold the presumption that a perpetual exclusion of all offspring for the duration of the marriage excludes the right itself and therefore renders a marriage null.¹⁸

So, the plan and the means to exclude offspring, the notions of right and exercise of right, as well as the perpetual or temporary nature of rights emerge in the Rotal considerations of the bonum prolis. They all influence to various degrees the juridical presumptions which Rotal judges make in their decisions.

¹⁷ "Nam qui intentionem nutrit differendi prolis procreationem, non destruit finem ad quem matrimonium ordinatur, quinimmo, qui id praestat ad futurae prolis bonum melius tuendum, laude dignus aliquando praedicatur.

"Ideo, 'stricte loquendo, qui differe tantum intendit generationem prolis, praesumptionem firmare videatur potius in favorem veri consensus, quatenus non apparet eum excludere voluisse omnem intentionem prolis. Utique, agitur de mera praesumptione hominis, quae ideo contrariam admittit probationem. Si enim constiterit contrahente, in ipso consensu praestando, contraxisse cum intentione differendi ipsam traditionem et acceptionem iuris in corpus, invalide contrahit, dummodo constet hanc intentionem in ipsum consensum matrimonialem ingressam fuisse, non autem adiectam fuisse contractui iam perfecto. Aliis verbis, ubi contrahens ius naturae spernens ac positive reiciens, semetipsum unicum fontem iuris, in re coniugali, dicere ac retinere praesumat et consequenter decernat hoc iure ad proprium libitum utendum esse, ut puta si melior fortuna superventura sit, quousque de firmitate initi coniugii certitudo adepta sit, per eiusmodi intentionem, si iuridice demonstrata fuerit, posse vulnerari ipsam essentiam coniugalis consensus, ambigendam non est' [...]" (quoting an unpublished decision c. BEJAN, 24 April 1968). c. ROGERS, 25 February 1969, in SRR Dec, 61 (1969), p. 195. See c. DE JORIO, 23 June 1971, in SRR Dec, 63 (1971), p. 514. See also below for an extended discussion of ad tempus exclusions of the bonum prolis.

¹⁸ See, for example, c. FIDECICCHI, 12 July 1949, in SRR Dec, 41 (1949), p. 381.

The Rotal jurisprudence under the 1917 Code which relates the bonum prolis to the validity or nullity of marriage resists easy description or systematization. Nor does the scope of this chapter allow much detail. Therefore, it suffices to present some basic approaches to understanding the bonum prolis and to mention some of the developments and controversies that proceed from them.

1. The right to the conjugal act

As an object of marital consent, the Rotal judges link the bonum prolis to a right which the canons express in two ways, the ius in corpus¹⁹ and the ius ad coniugalem actum.²⁰ In order to be valid, marital consent must include a true exchange of these rights. Often the judges use the inclusive phrase ius coeundi to refer to both the ius ad coniugalem actum and the ius in corpus. But it is clear that the distinction between a right and the use of a right applies to each of

¹⁹ Prior makes an explicit link between the ius in corpus and the bonum prolis: "Porro, nullitas matrimonii sequitur ex consensu defectu [...] in casu quo quis alteri parti ius coeundi concedit [...] perpetuum et exclusivum, sed non in ordine ad generationem prolis (contra bonum prolis)." c. PRIOR, 31 March 1922, in SRR Dec, 14 (1922), p. 84.

²⁰ Parillo explicitly links the ius ad coniugalem actum and the bonum prolis: "Ut [...] evinci possit in foro externo, quod propositum vel conditio huiusmodi, non simpliciter comitatum sit matrimonialem consensum praevalentem et verum, sed bonum prolis, et consequenter omne ius ad coniugalem actum excluserit, necesse est ostendatur, propositum conditionemve restrinxisse consensum generalem in nuptiis positum, eumque praevalentia sua, quadamtenus suffocasse [...]." c. PARILLO, 29 April 1922, in SRR Dec, 14 (1922), pp. 124-25.

them.²¹

Those who exclude the conjugal right thereby exclude the bonum prolis. Therefore, the marriage is null due to the invalidity of marital consent. However, the exclusion of merely the exercise or fulfillment of those rights does not affect the validity of consent.²²

In this description of the bonum prolis, strictly interpreted, one must keep in mind that, at the time of consent, one must give only the right to the conjugal act. So the use of contraceptive methods or the plan to use them in the marriage has absolutely no effect on the valid exchange of that right. In fact, one can presume that the right to the conjugal act itself is intact even if there is a plan to deprive the act of its effects, because the need for that subsequent contraceptive

²¹ For example, with regard to c. 1086, §2, Chimenti writes: "[...] voluntatis actus extendi debet ad excludendum omne ius ad coniugalem actum, et non tantum ad eius adimplementum." c. CHIMENTI, 4 August 1922, in SRR Dec, 14 (1922), p. 254. And Heard writes with regard to the ius in corpus in c. 1081, §2: "Si quis tamen, accepta obligatione ad actus per se aptos ad prolis generationem, tantum propositum habet hanc obligationem non implendi, v. g. abusum matrimonii intendens per actus onanisticos, valide contrahit." c. HEARD, 29 November 1934, in SRR Dec, 26 (1934), p. 758. Later Heard writes: "Unde invalide contrahit qui positive in mente sua dicit: 'Volo matrimonium, sed nolo tradere alteri parti ius in corpus meum in ordine ad prolem.'" c. HEARD, 13 March 1948, in SRR Dec, 40 (1948), p. 87.

²² "At ubi agitur de bono prolis, sedulo distinguatur oportet inter ius coeundi et eius usum; inter assumptionem obligationis et obligationis huius executionem [...]. Qui ergo positive excludit ius coeundi ipsum, seu obligationem ipsam, is reiicit prolis bonum in huius principio, ideoque deficit consensus in verum matrimonium. E contra valide contrahit, qui intentionem habet sese obligandi, sed cum proposito hanc obligationem assumptam violandi per abusum matrimonii, procuracionem abortus, etc., salvo iure ipso." c. JULLIEN, 10 February 1926, in SRR Dec, 18 (1926), p. 23.

activity exists if and only if the conjugal act itself is complete.²³

2. Conjugal acts which are per se aptos

One of the developments in jurisprudence concerns the meaning of the clause per se aptos (suitable in themselves) to define conjugal acts. Does the phrase refer only to sexual intercourse properly performed, i.e., penetration and ejaculation of semen within the vagina? Such an understanding, derived from the canonical definitions of consummation and impotence, precludes coitus interruptus (withdrawal) or the use of a condom. Or does per se aptos also refer to sexual intercourse performed properly and not later rendered infertile? This can occur by the deliberate expulsion of the semen from the vagina; the prevention of conception, e.g., a spermicide or a diaphragm; the temporary sterilization of one of the parties, e.g., a drug; or the prevention of implantation of a fertilized ovum, e.g., an intra-uterine device.

Judges who take the first position, that per se aptos refers only to sexual intercourse properly performed, maintain that contraceptive methods which render the act infertile after the act concern only the exercise of the ius in corpus. Still, a marriage can conceivably be

²³ See LEGUERRIER, "Note," p. 145. While Giacchi maintains this theological opinion, it does not appear often in *Rotal* cases. Perhaps Wynen's decision approaches an expression of the limitation of the right to the conjugal act itself: "[...] prava prolis exclusio secumfert nullitatem matrimonii, sed ea tantum, quae compartem, in contrahendo privat ipso iure ad copulam perfectam, ex qua procreatio filiorum fieri potest, seu quae denegat tradere ius ad perficiendos actus per se aptos ad prolis generationem." *c. WYNEN*, 18 December 1947, in *SRR Dec.*, 39 (1947), p. 590.

declared null because of an intention, condition, or pact to have sexual intercourse only when a condom is used or withdrawal is practiced for the purpose of contraception. The judges reach this conclusion because the right to proper or complete intercourse itself has been denied. For example, Quattrocchio writes:

Since the substantial object of marriage is the intimacy of life, and expressly the perpetual and exclusive ius coeundi and also ordered in itself toward offspring, the act of the will to hand over this right over one's own body to the other party, and to accept the right over his/her body is required in order to constitute marital consent essentially (c. 1081, §2). Therefore if those marrying refuse the ius coeundi, in itself ordered toward offspring, there is no consent for a valid marital contract (c. 1086, §2). For indeed, since the right is related to the obligation, if one who marries excludes or limits the marital obligation, one excludes or limits the marital right itself;²⁴ therefore the consent and the marriage do not exist.

And in another decision, Felici says:

Therefore the exclusion of the use of the right or even the simple intention to abuse, e.g., by interrupted or unnatural intercourse, does not prevent one from contracting a valid marriage. However, it cannot be inferred from this that a marriage contracted with a condition to abuse the marriage itself through a shameful sin is valid; this condition, although shameful, nevertheless affects the essence of marriage, since it is correct to consider that one, who does not wish to contract unless the intercourse is performed in an interrupted and unnatural manner, by which all offspring

²⁴ "Cum obiectum substantiale matrimonii vitae sit consuetudo, et nominatim ius coeundi perpetuum et exclusivum nec non ad prolem per se ordinatum, ad matrimonialem consensum essentialiter constituendum requiritur actus voluntatis tradendi alteri parti hoc ius in corpus suum, et accipendi simile ius in corpus ipsius (can. 1081, §1). Quare si nupturiens recusat ius coeundi, per se ad prolem ordinatum, non habetur consensus pro valido matrimoniali contractu (can. 1086, §2). Quinimo cum ius sit relativum obligationi, si nupturiens obligationem matrimonialem vel excludit vel limitat, eo ipso matrimoniale ius aut excludit aut limitat; ideo deficit consensus et matrimonium." c. QUATTROCOLO, 11 April 1933, in SRR Dec, 25 (1933), pp. 228-29.

are avoided, excludes the right to offspring.²⁵

Simply put, the right only to incomplete sexual intercourse denies the right to intercourse, without regard to its suitability for procreation.

Others maintain that the second position truly pertains to the right itself. Therefore, one who consents to marriage while giving only a right to intercourse which by some means will be infertile does so invalidly. A case coram Wynen in 1947 expresses this clearly:

If the matter is considered superficially and in the abstract, it may appear that the deformed intention to frustrate the effect of intercourse can be reconciled with the handing over of the right to one's own body as regards acts per se aptos for procreation of offspring; for such a woman does not wish to impede the man from carrying out intercourse complete in itself, and her deformed intention only regards the fruit or effect of intercourse, not intercourse itself. Yet if the matter is considered concretely and carefully, such a woman must be said to vitiate her own marital consent, if she produces this consent with the described intention.

For such a woman, while she explicitly expresses and up to the wedding virtually keeps the will to perpetually impede all efficacy of natural intercourse, is proven at least implicitly to have refused to give to the man the ius in corpus for the acts, which by their very nature subject the body of the woman to the burden of pregnancy, gestation, and birth. The will of such a woman is proven contrary not only to these natural effects, but also, and even more immediately, to the very acts, from which these effects naturally flow, and moreover, and first and principally, [contrary] to the right itself, on account of which the man seeks to request such acts. Wherefore it should be declared that such a woman, who with such a deformed intention has

²⁵ "Ergo exclusio usus iuris vel etiam simplex propositum abusus, v. c. per coitum onanisticum vel sodomiticum, matrimonio valide contrahendo non obstat. Inde tamen nequit inferri validum esse matrimonium contractum cum conditione matrimonio ipso, per turpe peccatum, abutendi: haec enim conditio, licet sit turpis, inficit tamen matrimonii essentiam cum merito censeatur ius ad prolem excludere qui contrahere non vult, nisi si copula onanistice vel sodomitice exerceatur, qua scilicet omnis proles vitetur." c. FELICI, 30 March 1949, in SRR Dec., 41 (1949), p. 140.

entered marriage, did not will to give nor did she give the relative right. And it is not sufficient for the validity of marital consent to hand over one's body for a sexual life for the sake of satisfying sexual desire, but in every respect it is required that the woman give to the man the right to truly conjugal acts and that she herself accept the obligation for those same acts with their natural consequences.

Therefore although the consummation of marriage is not impeded by the described use of a pessary and spermicide, nevertheless the intention before the wedding of having recourse in perpetuity to these deformed methods of contraception substantially vitiates marital consent; certainly it is not valid, if the marital right to complete intercourse either explicitly or implicitly by a positive act of the will is excluded or restricted.²⁶

²⁶ "Si res in abstracto et superficialiter consideretur, apparere posset primum illud propositum frustrandi effectum copulae conciliari posse cum traditione iuris in proprium corpus quoad actus per se aptos ad proles generationem; nam talis mulier non vult impedire quominus vir peragat copulam per se perfectam, eiusque prava intentio respicit tantummodo fructum seu effectum copulae, non copulam ipsam. Si tamen res in concreto et attente perpendatur, eiusmodi mulier dicenda est substantialiter vitiare suum consensum matrimonialem, si hunc una cum descripta prava intentione eliciat.

"Talis enim mulier, dum explicite concipit et virtualiter usque ad nuptias servat voluntatem in perpetuum impediendi omnem efficaciam copulae naturalis, convincitur saltem implicite detrectare viro tradere ius in proprium corpus in ordine ad actus, qui ex natura sua corpus mulieris subiiciant oneri praegnationis, gestationis, partus. Huiusmodi igitur mulieris voluntas convincitur contraria esse non solum his effectibus naturalibus, sed etiam, et quidem magis immediate, ipsis actibus, ex quibus hi effectus naturali necessitate fluunt, et insuper, idque prius et principalius, ipso iuri, vi cuius vir tales actus exigere queat. Quare declarari debet eiusmodi mulierem, quae cum tali prava intentione matrimonium iniit, noluisse tradere neque tradidisse relativum ius. Ad validitatem autem consensus matrimonialis non sufficit proprium corpus tradere vitae sexuali ad explendam libidinem, sed omnino requiritur, ut mulier viro tradat ius ad actus vere coniugales et ut ipsa suscipiat obligationem ad eosdem actus cum naturalibus suis consecrariis.

"Quamvis igitur consummatio matrimonii descripto usu pessarii occlusivi et globulorum veneno imbutorum non impediatur, tamen antenuptialis intentio ad prava haec media anticonceptionalia in perpetuum recurrendi, substantialiter vitiat consensum matrimonialem, quippe qui validus non est, si matrimoniale ius ad copulam perfectam sive explicite sive implicite per positivum voluntatis actum excluditur vel restringitur." c. WYNEN, 27 February 1947, in SRR Dec, 39 (1947), pp. 122-23.

In this decision, Wynen deliberately expands the application of per se aptos beyond the specific acts of intercourse. He suggests that a judge also must take into consideration the natural end or purpose of the conjugal act. For the ius in corpus includes the right to the natural effects of intercourse, which include the possibility of pregnancy, gestation, and birth. So, a refusal to give that right and to accept the obligation of those natural effects by the will to impede those effects invalidates the marital consent. The focus does not emphasize, therefore, the means used to prevent conception or procure infertility. Rather, the will of the parties at the time of marriage determines the validity of the consent.

A judge must determine whether there exists an exclusion of the right to the conjugal act itself, or an exclusion of the right to its natural effects. Wynen adds that those rights must be given in perpetuity, so that even a restriction of the right at the time of consent invalidates the consent.²⁷ However, to give the right and then in fact to abuse it or not exercise it does not affect the validity of consent. Nor does it affect the consent to give the right and at the same time to plan to abuse it or not exercise it.²⁸

Following this opinion, some judges maintain that the marital consent is defective if one gives the right, perpetually or ad tempus, only for contraceptive intercourse, or if one excludes the right, perpetually or ad tempus, to non-contraceptive intercourse:

²⁷ See c. WYNEN, 27 February 1947, in SRR Dec, 39 (1947), p. 123.

²⁸ See c. WYNEN, 6 May 1941, in SRR Dec, 33 (1941), p. 355.

Therefore, although the man engages in intercourse in itself suitable for the generation of offspring, the marriage is invalid if he intended before the wedding to deny the natural effect of that intercourse, i.e., using contraceptive means or procuring an abortion. [...]

[...] in view of the very firm will not to procreate and take precautions to avoid conception of children [...] one cannot conclude from the acts [of the case] that the spouses are proven to have handed over to one another the right to truly conjugal acts with their natural consequences, that is, as stated in the law, the ius in corpus [...].²⁹

In another case, as proof that a woman willed to exclude the bonum prolis, the Respondent

[...] declared, at a wholly unsuspected time, that she was against procreating offspring so that she preferred to suffer from nerves rather than use marriage properly: she persevered in her determination until the end of common life, having used contraceptive medications, even though nothing except hatred for the Catholic Church prevented her from having children [...].³⁰

²⁹ "Quamvis igitur vir ponat copulam per se aptam ad generationem prolis, matrimonium dirimitur si idem ante nuptias intenderit tollere effectum naturalem talis copulae, scil. utendo mediis anticonceptionalibus [...]."

"[...] attenta voluntate firmissima non procreandi et adhibendi cautelas ne filii conciperentur [...] concedi nequit demonstrari ex actis coniuges sibi mutuo tradidisse ius ad actus vere conjugales cum naturalibus suis consecrariis, seu, prout in iure dictum est, ius in corpus [...]." c. PINNA, 31 October 1956, in SRR Dec, 48 (1956), pp. 849, 854.

³⁰ "[...] tempore prorsus insuspecto declaravit se ita contrariam esse proli procreandae ut mallet nervis laborare quam matrimonio rite uti: in qua voluntate perseveravit usque in finem vitae communis, adhibitis medicamentis anticonceptionalibus, quamvis nihil praeter odium Ecclesiae Catholicae prohibuerit quominus filios procrearet [...]." c. ROGERS, 9 November 1965, in IC, 12 (1972), p. 376. See c. WYNEN, 6 May 1941, in SRR Dec, 33 (1941), p. 355; c. WYNEN, 27 February 1947, in SRR Dec, 39 (1947), pp. 122-23, and more recently c. DAVINO, 11 November 1976, quoted in Aldo ARENA, "The Jurisprudence of the Sacred Roman Rota: Its Development and Direction after the Second Vatican Council," in SC, 12 (1978), p. 279.

Accordingly, giving a deformed right or excluding a right to either the conjugal act or the bonum prolis invalidates marriage.

Other judges, following various lines of reasoning, speak more generally of a marital right and duty "not to impede" procreation,³¹ i.e., one may not interfere with the effects of sexual intercourse which may result in conception:

In our tribunal, the term bonum prolis means that sum of rights and duties by which the parents are obligated to their offspring and which are of the essence of marriage, i.e., the right and duty not to impede the conception of the child through illicit means [...].³²

³¹ Bejan does not permit a link between the duty not to impede generation and an exclusion of the conjugal right itself: "Animadvertere praestat Codicem Iuris Canonici (can. 1081, §2, et can. 1086, §2) sufficientem habere actum coniugalem, neque requirere omnia quae ad generationem necessaria sunt. Nunc autem actus coniugalis ut recte perficiatur, requirit ex parte viri introductionem penis in vaginam et effusionem veri seminis in eandem, ex parte vero mulieris admissio utriusque. Itaque nullitas contractus matrimonialis, in quo alterutra pars, expresse vel tacite, sibi positive reservet, post copulam iuxta naturam peractam, ius impediendi prolis generationem diaphragmate quo praepediatur transitus et ingressus veri seminis in uterum, aliunde est petenda.

"In casu, mulier non excludit omne ius ad coniugalem actum, sed contractus matrimonialis causam, sine qua is nequit consistere." c. BEJAN, 9 November 1961, in SRR Dec, 53 (1961), p. 497. The decision c. BEJAN, 18 May 1964, in SRR Dec, 56 (1964), p. 385, repeats these paragraphs verbatim.

³² "Sub nomine boni prolis venit in Foro nostro summa illa iurium et officiorum, quibus erga prolem parentes tenentur, quaeque de essentia matrimonii sunt, i. e. ius et officium non impediendi, modo illegitimo, prolis conceptionem [...]." c. FILIPIAK, 15 May 1965, in SRR Dec, 57 (1965), p. 405.

Relative to the ius in corpus, Pinto writes: "In iure ad actus per se aptos ad prolis generandam includitur obligatio non impediendo effectum ad quem praefati actus ex natura sua ordinantur, nempe conceptionem [...]." c. PINTO, 28 October 1983, in SRR Dec, 75 (1983), p. 559.

Nevertheless, in the consideration of the conjugal act and its natural effects, the Rotal judges normally presume that the use of contraceptive methods, and the pre-marital plan to do so, constitutes an abuse of the right rather than an exclusion of the right. This is especially true if one uses contraceptive methods temporarily:

If, on the other hand, one only intends to defer the procreation of offspring, proposing to oneself to deprive the effect of conjugal intercourse, to a definite or indefinite period of time, seeking in the meantime only sensual pleasure in a perverse manner, one is presumed not to have willed to deprive the partner of the right,³³ but only to abuse the marriage, trampling divine law [...].

But this presumption can be overturned, for example, if a party gives the ius coeundi with a clear stipulation that intercourse will occur if and only if contraceptive methods are used. Therefore, some judges admit the presumption that a firm and tenacious exclusion of non-contraceptive intercourse establishes the exclusion of the right to intercourse itself:

The jurisprudence of our Tribunal often recalls the principle that the positive will, firmly elicited before the wedding, perpetually to have recourse to contraceptives, invalidates marital consent, if the contractant does not

³³ "Si quis, e contra, tantum intendit differre procreationem prolis, sibi proponens copulam coniugalem effectu privare, ad certum incertumve tempus, quaerendo interdum modo perverso meram voluptatem, praesumitur non voluisse compartem iure privare, sed tantum, leges divinas conculcando, matrimonio abuti [...]." c. LAMAS, 17 February 1955, in SRR Dec, 47 (1955), p. 151.

Basing himself on Pius XII's allocution to midwives, 29 October 1951, another judge writes that usually the temporary exclusion of the right concerns the use of the right but not the right itself: "De plano, vero, admittitur exclusionem temporaneam, exclusive et in perpetuum, ut plurimum, ius ipsum nequaquam respicere, sed simpliciter iuris usum." c. MATTIOLI, 28 July 1954, in SRR Dec, 46 (1954), p. 680.

wish to enter marriage except with such an intention.³⁴

Still, some judges do not accept this presumption:

Often it is said the right is proved to be excluded, if the perpetuity of the exclusion and the tenacity by which it was observed are proved. However, these two elements, although very useful for corroborating the exclusion proven another way, do not constitute proof by themselves. It depends on the circumstances.³⁵

Such judges maintain that it is not a contradiction to give a right and yet intend to refuse the right, even perpetually.

3. The primary end of marriage

Rotal jurisprudence considers the bonum prolis from another standpoint. Because the bonum prolis is the primary end of marriage (c. 1013, §1), marital consent must be ordered toward that end. This approach considers the primary end of marriage in itself, and accords it juridic importance, rather than only doctrinal or moral importance, without making recourse to the ius in corpus or ius ad coniugalem actum:

Wherefore if one contracts marriage, and at the same time [...] rejects its primary end, namely the procreation of

³⁴ "Sparsim in iurisprudencia N. S. O. revocatur principium quod penes positiva voluntas, firmiter ante nuptias elicita, in perpetuum recurrendi ad media anticonceptionalia, irritat consensum matrimoniale, si contrahens nonnisi cum tali intentione coniugium inire velit." c. BEJAN, 29 October 1966, in SRR Dec., 58 (1966), p. 766.

³⁵ "Saepius dicitur exclusum ius probari, si probatur perpetuitas exclusionis et tenacitas qua observata est. Tamen haec duo elementa, quamvis valde utilia ad corroborandam exclusionem aliunde probatam, de se probationem non constituunt. Dependet a circumstantiis." c. LAMAS, 17 February 1955, in SRR Dec., 47 (1955), p. 152.

children, [...] one contracts invalidly.³⁶

Therefore, one who at the time of marital consent excludes the primary end from marriage vitiates the consent.

Certainly the more common treatment of the bonum prolis in Rotal jurisprudence is to examine the giving and accepting of the right to sexual intercourse, and later the right to its natural effects, as the previous section demonstrates. But in 1941 Pius XII in his allocution to the Roman Rota warns against a strict separation of the conjugal act from the primary end of marriage:

Two extremes, in other words, if truth stands in the middle, are to be avoided: on the one side to deny practically or to esteem too little the secondary ends of matrimony and the generative act; on the other, to set free and separate immoderately the conjugal act from the primary end to which in all its intrinsic structure it is primarily and principally ordained.

Obviously a link exists between the two, but one may argue how they relate to one another. Does the exclusion of the right to the conjugal act lead to the exclusion of the right to the primary end, and therefore

³⁶ "Quare si quis contrahat matrimonium, et insimul [...] respuat eius finem primum, filiorum nempe procreationem, [...] invalide contrahit." c. GRAZIOLI, 4 May 1927, in SRR Dec, 19 (1927), p. 163. See c. GRAZIOLI, 28 November 1928, in SRR Dec, 20 (1928), p. 467; c. GRAZIOLI, 11 May 1944, in SRR Dec, 36 (1944), p. 329.

³⁷ PIUS XII, Allocution to the Sacred Roman Rota, 3 October 1941, in Matrimony, selected and arranged by the Benedictine monks of Solesmes, trans. Michael J. Byrnes, [Boston], Saint Paul Editions, 1963, p. 334. "Due estremi, in altre parole, se il vero sta nel mezzo, sono da fuggirsi: da una parte, il negare praticamente o il deprimere eccessivamente il fine secondario del matrimonio e dell'atto della generazione; dall'altra, lo sciogliere o il separare oltre misure l'atto coniugale dal fine primario, al quale secondo tutta la sua intrinseca struttura è primieramente e in modo principale ordinato." in AAS, 33, 423.

the marriage is null? Or does the exclusion of the right to the primary end of marriage point to the exclusion of the right to the conjugal act, and therefore the marriage is null?

Wynen asserts that a natural link exists between the primary end of marriage and the conjugal act. However, the important final object of marriage and marital consent is not the right to the conjugal act but the right to the bonum prolis, the procreation and education of offspring. Therefore, the right to the conjugal act must remain necessarily subordinate to the ends of marriage; the purpose of marriage itself is the determining factor. With explicit reference to the aforementioned papal allocution, Wynen writes a decision in 1944 which studies the ends of marriage and their relation to the conjugal act. It deserves to be quoted at length: ³⁸

a) This objective ordination of matrimony to the primary end which is included in its nature, if it is considered in the order of execution, consists in this — that the conjugal union (as much in fieri as in facto esse) contains of its very nature and can supply all that is demanded on the part of human activity and is sufficient to obtain the procreation and the education of the offspring (in a manner suitable to and worthy of human nature). Indeed, Christian marriage, of its very nature, comprises the destination, aptitude, and sufficiency to obtain this end, since all those who contract marriage or are already married are united and bound by a reciprocal right, exclusive and perpetual, to effecting acts capable of themselves to generate offspring. Therefore, having placed this right in its true light, considering the vehement urge of the sexual appetite to exercise the generative power, and keeping in mind that it is not lawful to satisfy this appetite outside of marriage, it must necessarily be concluded that the end which is the procreation and

³⁸ The publication of this judgment in AAS and its frequent citation in papal addresses underline the importance of this decision; Matrimony, p. 541, note a.

education of the offspring is sufficiently and efficaciously provided for.

This natural ordination to the primary end, this aptitude and sufficiency is achieved in every valid matrimony (even those of the sterile and of the aged) and is so essential that lacking this no marriage can exist or continue to exist. No marriage can be contracted, no marriage can exist if the basic right over the partner's body relative to the generative acts is not established or does not exist in the wedded couple. [...]

b) No less so than marriage itself, even the conjugal act is subordinated and bound to the primary end, and to such a degree, that the exercise of this act is only permitted if and inasmuch as there is verified and is observed its essential subordination to the primary end of matrimony. This subordination is secured by the fact that husband and wife, when completing the natural conjugal act, can give all that is requested and suffices on the part of human activity for the generation of offspring [...].³⁹

In this decision Wynen states that each party must give the right to the purpose or end of the establishment of marriage, to which the right to the conjugal act is subordinated.

However, he seems to disregard his own conclusion in a later case concerning an intention to have recourse in perpetuity to deformed methods of contraception:

For this is not about a mere abuse of marriage, but about consent essentially vitiated; because the defect is brought to light and proved by the ⁴⁰total and radical exclusion of the primary end of marriage.

In this decision, he appears to subordinate the primary end of marriage to the right to the conjugal act, because he says that the exclusion of

³⁹ c. WYNEN, 22 January 1944, in Matrimony, pp. 544-46; also in SRR Dec., 36 (1944), pp. 62-63.

⁴⁰ "Siquidem hic non agitur de mero abusu matrimonii, sed de consensu essentialiter vitiat; quod vitium eruitur et probatur ex totali et radicali exclusione primarii finis matrimonii." c. WYNEN, 27 February 1947, in SRR Dec., 39 (1947), p. 123.

that end of marriage proves the abuse of the right to the conjugal act.⁴¹

4. The ius ad prolem

The phrase ius ad prolem (right to offspring) in relationship to marital consent signifies that in marital consent the parties must exchange the right to that marital intercourse which must be open to offspring, i.e., open to the procreation and education of offspring.⁴² Therefore, the exclusion of offspring (exclusio prolis), or more precisely the exclusion of the ius ad prolem at the time of marital consent, vitiates that consent. Rotal judges also refer to this right as the intention of offspring (intentio prolis),⁴³ the ordering toward offspring (ordinatio ad prolem),⁴⁴ and the ordering toward the primary

⁴¹ In another decision, Wynen seems to equate the conjugal right and the primary end of marriage: "Istud ius coniugale, quod complectitur ius ad procreationem et educationem filiorum, est simul finis primarius matrimonii, cuius omnimoda exclusio secumfert nullitatem matrimonii." c. WYNEN, 24 March 1948, in SRR Dec, 40 (1948), p. 101.

⁴² Rotal jurisprudence refers to Aquinas' teaching that in marriage the end of "offspring" in suis principiis must be present, i.e., that there exists an intention to have children. Sometimes a judge equates the end of offspring in suis principiis with the ius ad prolem: "Sed si proles considerata secundum quod est in suis principiis, seu quoad ipsum ius ad prolem, tunc quidem ad essentiam matrimonii pertinet ita ut denegato iure matrimonium corrumpere debeat." c. HEARD, 30 July 1942, in SRR Dec, 34 (1942), pp. 723-24.

⁴³ The phrase intentio prolis appears in c. EWERS, 27 January 1965, in SRR Dec, 57 (1965), p. 74; c. FIORE, 13 March 1973, in SRR Dec, 65 (1973), p. 243. Both cases seem to equate the intentio prolis with the end of prolis in suis principiis.

⁴⁴ Decisions which employ the expression ordinatio ad prolem include c. FIORE, 16 December 1971, in SRR Dec, 63 (1971), p. 1013; c. EWERS, 26 October 1974, in SRR Dec, 66 (1974), p. 705; c. FIORE, 8 July 1975, in SRR Dec, 67 (1975), p. 486; and c. FIORE, 31 January 1977, in SRR Dec, 69 (1977), p. 42.

end of marriage (ordinatio ad finem).⁴⁵

The expression ius ad prolem itself can be problematical in Rotal jurisprudence.⁴⁶ Sometimes it seems to be a synonym for bonum prolis⁴⁷ or the primary end of marriage.⁴⁸ At other times it appears

⁴⁵ The phrase ordinatio ad finem appears in c. PINNA, 30 May 1965, in SRR Dec., 57 (1965), p. 445; c. PINNA, 15 December 1966, in SRR Dec., 58 (1966), p. 928; c. BEJAN, 10 May 1967, in SRR Dec., 59 (1967), p. 347. The expression deordinatio voluntatis a fine primario matrimonii appears in c. FIORE, 18 July 1967, in SRR Dec., 59 (1967), p. 593. The ordinatio ad finem seems synonymous with the intentio prolis and proles in suis principiis in c. MASALA, 29 April 1980, in SRR Dec., 72 (1980), p. 310.

⁴⁶ Taken literally, ius ad prolem suggests that sterility or any circumstances in which procreation is impossible renders a marriage impossible; see LEGUERRIER, "Note," p. 142.

⁴⁷ "Difficultas maior fit cum de exclusionem boni prolis agitur, distinctio enim cum detur inter ius ad prolem et exercitium praedicti iuris [...]." c. BONET, 28 February 1955, in SRR Dec., 47 (1955), p. 183.

"Notum est exclusionem boni prolis matrimonium invalidare eo tantummodo in casu, quo a nupturiante exclusum sit ius ad prolem [...] si nupturiens denegat comparti ius ad prolem, matrimonium consistere nequit, cum procreatio et educatio prolis sit de essentia christiani connubii [...]. c. FIDECICCHI, 12 July 1949, in SRR Dec., 41 (1949), p. 381.

⁴⁸ "Cum finis primarius matrimonii sit procreatio atque educatio prolis, qui ius ad prolem per actum positivum voluntatis suae e consensu excludit, invalide contrahit. [...] excludi debet ipsum ius ad prolem et non solum eius usus, qui ad essentiam contractus non pertinet [...]." c. HEARD, 2 February 1946, in SRR Dec., 38 (1946), p. 103.

to be the same as the ius in corpus.⁴⁹ or ius ad coniugalem actum.⁵⁰

In such decisions the judges maintain the distinction between the right and its exercise:

A contract of marriage fails, deprived of any strength whatsoever, if the ius ad prolem was excluded; not, however, if the simple exercise of the right [was excluded]. It is presumed that the right to offspring was rejected if offspring are absolutely and perpetually excluded and, on the other hand, it is presumed that it was not excluded, if it is evident that the bonum prolis was excluded ad tempus. The reason is clear, for the rejection of offspring with some limitation of time indicates that the contractants

⁴⁹ "Perpetua et absoluta exclusio prolis, ante nuptias statuta ac explicite manifestata, est validum indicium exclusionis ipsius iuris ad actus, ex se aptos ad prolem generandam. Ius vero ad prolem est de essentia consensus matrimonialis ad normam can. 1081, ideoque eius exclusio matrimonium reddit invalidum ad normam can. 1086, §2." c. DI FELICE, 13 July 1974, in SRR Dec, 66 (1974), pp. 534 35.

⁵⁰ "Neque obiiciatur, voluntatem abutendi matrimonio vel illud foedandi seu onanistice copulam matrimonii exercendi nullitatem non inducere, eo quod haec omnia iuris usum circa prolem et non ipsum ius ad prolem respiciunt; nam si coniuges vel ex ipsis unus non alio modo nisi absolute onanistice copulam exercere velint, et hac voluntate matrimonium ineant, iam ipsum ius ad prolem ipsos exclusisse coniicitur." c. GRAZIOLI, 7 August 1936, in SRR Dec, 28 (1936), p. 572.

One Rotal decision notes the variety of terms with equivalent meanings; see c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 766. He cites some of the cases quoted above.

intended a true marriage, with its essential qualities.⁵¹

The judges employ again the traditional principle that the exclusion of the right renders the marriage invalid, but the exclusion of the exercise of the right does not.

Some of the earliest published Rotal decisions present the notion of the exclusion of the ius ad prolem as a cause of nullity.⁵² But in the 1960's, a new consideration of the ius ad prolem evolved, which treats its exclusion as a separate heading of nullity, apart from the exclusion of the ius in corpus or ius ad coniugalem actum. The increased availability of new methods of contraception and the legalization of abortion create additional situations in which one may carry out the conjugal act properly performed according to the classical understanding (penetration of the vagina and emission of semen), and at

⁵¹ "Cedit nempe contractus matrimonialis, quovis robore destitutus, si ius ad prolem exclusum fuerit, non autem si iuris traditi simplex exercitium. Praesumitur ius ad prolem fuisse reiectum, si proles absolute et perpetuo excludatur, et, e contra, praesumitur illud non fuisse exclusum, si constet bonum prolis ad tempus exclusum fuisse. Ratio patet, nam reiectio prolis cum aliqua temporis limitatione indicat contrahentes verum matrimonium, cum suis essentialibus qualitatibus, intendisse." c. FIDECICCHI, 14 April 1953, in SRR Dec, pp. 252-53.

In another case, the judge distinguishes between the renunciation of the use of the right and the abuse of the right in order to impede offspring: "[...] aliud namque est concessio iure ad prolem, iuris huius usui renuntiare, et aliud usu iuris ad prolem abuti positive impediendo ne proles enascatur." c. GRAZIOLI, 7 August 1936, in SRR Dec, 28 (1936), p. 573. See also c. MATTIOLI, 27 June 1966, in SRR Dec, 58 (1966), p. 448.

⁵² See c. PRIOR, 8 February 1915, in SRR Dec, 7 (1915), p. 21, who speaks of the ordinatio ad prolem. See also c. PARILLO, 29 April 1922, in SRR Dec, 14 (1922), p. 123, who writes of marriage ordered ad finem. For other early uses in Rotal jurisprudence of the concept of the ius ad prolem, see also Peter HUIZING, "Bonum prolis ut elementum essenziale obiecti formalis consensus matrimonialis," in Gregorianum, 43 (1962), p. 693, note 24.

the same time exclude any and all possibility of offspring.⁵³

But more often, the Rotal judges perceive the exclusion of the ius ad prolem (and its synonyms) to be an exclusion of the primary end of marriage.⁵⁴ De Jorio writes many of the decisions which strongly support this position:

Since the primary end of marriage is the procreation and education of offspring (c. 1013, §1, 1°), the one who excludes it contracts invalidly. But the exclusion of offspring, in order to invalidate a marriage, must be done by a positive act of the will, which is not placed simply by having a general disposition opposed to the generation of offspring.

[...] the nullity of marriage, due to the exclusion of the bonum prolis by both or either one of the parties, is not derived from the prescription and wording of canon 1086, §2, but from the fact that procreation and education of offspring is the primary end of marriage.

It is certainly not necessary that the generation of offspring be directly sought, although it is the primary end of marriage, because it is caused by the conjugal agreement itself. But the exclusion, made by a positive act of the will, vitiates marital consent and invalidates the marriage, because it excludes the intention of offspring, without which marriage cannot exist (Aquinas, Suppl., q. 49, a. 3, c).

Therefore marriage is entered invalidly, if both or either one of the parties, in manifesting consent, excluded offspring by a positive act of the will, or conceived a firm intention not to generate offspring from the husband or

⁵³ See LEGUERRIER, "Note," p. 140.

⁵⁴ Some Rotal decisions which take this position early on include c. PINNA, 30 May 1965, in SRR Dec, 57 (1965), p. 445; c. BEJAN, 27 April 1966, in SRR Dec, 58 (1966), pp. 239-40.

wife.⁵⁵

For De Jorio and his supporters the exclusion of offspring by a positive act of the will excludes a purpose of marriage, i.e., the procreation and education of children.⁵⁶

At the same time, some judges also take the position that the distinction between the right and the exercise of the right does not apply to cases wherein there is an exclusion of the bonum prolis:

⁵⁵ "Cum finis primarius matrimonii sit procreatio atque educatio prolis (can. 1013, §1, commate 1º) qui eam excludit invalide contrahit. Sed exclusio prolis, ut invalidet matrimonium, facienda est per positivum voluntatis actum, qui non ponitur simpliciter gerendo generalem dispositionem proli generandae adversam.

"[...] nullitatem matrimonii, ob exclusum ab utraque vel alterutra parte bonum prolis, non cogi ex praescripto ac ditione canonis 1086, §2, sed ex eo quod procreatio atque educatio prolis est finis primarius matrimonii.

"Utique necesse non est ut generatio prolis, quamvis ea finis primarius matrimonii sit, directe quaeratur, quia ex ipsa pactione coniugali causatur. Sed exclusio, positivo voluntatis actu facta, consensum matrimonialem vitiat atque nuptias invalidat, quia excludit intentionem prolis, sine qua matrimonium esse non potest (S. Th., Suppl., q. XLIX, a. 3, c).

"Itaque invalide initur matrimonium, si utraque vel alterutra pars, in consensu praestando, positivo voluntatis actu excluserit prolem, seu firmum propositum conceperit numquam ex marito vel uxore generandi prolem." c. DE JORIO, 17 June 1964, in SRR Dec., 56 (1964), p. 494. In addition, see the following cases c. DE JORIO: 18 December 1963, in SRR Dec., 55 (1963), p. 911; 15 January 1964, in SRR Dec., 56 (1964), pp. 30-31; and 22 July 1964, in SRR Dec., 56 (1964), pp. 643-44.

⁵⁶ In a later development, Pinna enters into an argument with De Jorio. In the decision c. PINNA, 15 December 1966, in SRR Dec., 58 (1966), pp. 926-36, he refutes the points that De Jorio presents in c. DE JORIO, 19 February 1966, in SRR Dec., 58 (1966), pp. 96-104, and 22 July 1964, in SRR Dec., 56 (1964), pp. 642-48. Then De Jorio responds to Pinna's refutation in another decision, c. DE JORIO, 14 December 1966 in SRR Dec., 58 (1966), pp. 910-25. For an extended treatment of this debate, see Tomás RINCON, "La jurisprudencia reciente en torno a la 'exclusio boni prolis' y la reforma del derecho matrimonial: Comentario a la sentencia c. Aisa de 4-11-75," in IC, 15, no. 30 (1975), pp. 275-80.

Therefore, if it [i.e., a positive act of the will or firm intention to exclude offspring] is proved, the marriage will have to be declared null due to the exclusion of the bonum prolis, setting aside the useless question of whether both or either one of the contractants excluded the ius ad prolem or the exercise or use of the same right.⁵⁷

Previously, Rotal decisions had cited Thomas Aquinas as a source of the distinction and its application to the exclusion of the bonum prolis.⁵⁸ Still, some judges who consider the ius ad prolem as the primary end of marriage handle marital nullity as a question of the exclusion of the right or its exercise.⁵⁹

⁵⁷ "Et ideo, si id constiterit, matrimonium nullum declarandum erit ob exclusum bonum prolis, praetermittendo inutilem quaestionem utrum uterque vel alteruter contrahens excluserit ius ad prolem an eiusdem iuris exercitium seu usum." c. DE JORIO, 17 June 1964, in SRR Dec, 56 (1964), p. 494. For an extended treatment of the inadmissibility of the distinction between the right and exercise of the right in such cases, see RINCON, "La jurisprudencia reciente," pp. 272-75. See also the other decisions of De Jorio which this study cites above.

⁵⁸ Aquinas writes, "[...] duplex est integritas: una quae attenditur secundum perfectionem primam, quae consistit in ipso esse rei; alia quae attenditur secundum perfectionem secundam, quae consistit in operatione. Quia ergo carnalis commixtio est quaedam operatio sive usus matrimonii, per quod facultas ad hoc datur; ideo erit carnalis commixtio de secunda integritate matrimonii, et non de prima." Supplementum, q. XLII, a. 4, respondeo, in THOMAS AQUINAS, Sancti Thomae Aquinatis doctoris angelici opera omnia, iussu edita Leonis XIII P. M.:Tertia pars summae theologiae a quaestione LX ad quaestionem XC, ad codices manuscriptos vaticanos exacta, cum commentariis Thomae de Vio Caietani Ordinis Praedicatorum S. R. E. Cardinalis, et supplemento eiusdem tertiae partis, cura et studio fratrum eiusdem ordinis, t. 12, Romae, Ex Typographia Polyglotta S. C. de Propaganda Fide, 1906, p. 82.

Rotal decisions often cite this passage to support the distinction between the right and the exercise of the right; see, for example, c. WYNEN, 6 May 1941, in SRR Dec, 33 (1941), p. 356.

⁵⁹ See c. MATTIOLI, 27 June 1966, in SRR Dec, 58 (1966), p. 448; and c. BONET, 28 February 1955, in SRR Dec, 47 (1955), p. 183.

De Jorio argues that such an opinion manifests an incorrect understanding of Aquinas.⁶⁰ Although one may make an intellectual distinction between a right and the exercise of that right, in practice it is impossible for a party actually to give the right and to intend to deny its use at the same time. He writes:

Already the undersigned judges [...] acknowledged that a right can be separated from its exercise by the intellect. What they have flatly denied, and continue to deny, is that a contractant can hand over the right and at the same time exclude its perpetual exercise or use.

In other words the judges acknowledge that a contractant can hand over the right and afterwards deny or impede its exercise or use. But they flatly deny that, in entering marriage or giving consent, the contractants hand over and accept the ius in corpus for acts in themselves suitable for the generation of offspring if at the same time they have an intention or firm will not to allow its use.⁶¹

Nevertheless, the principle stands that one cannot at the same time give

⁶⁰ "Itaque distinctio illa inter ius et exercitium iuris, quae apud doctos et magis apud iurisprudentiam plurimum valet, est extraneas prorsus menti S. Thomae." c. DE JORIO, 22 July 1964, in SRR Dec, 56 (1964), p. 644.

⁶¹ "Iam agnoverunt infrascripti Patres [...] ius ab eiusdem exercitio intellectu secerni posse. Quod pernegarunt atque pernegant est contrahentem posse tradere ius et insimul eiusdem exercitium seu usum excludere in perpetuum.

"Aliis verbis Patres agnoscunt contrahentem posse tradere ius et postea eiusdem exercitium seu usum denegare vel praepedire. At pernegant contrahentes in matrimonio ineundo seu in consensu praestando tradere atque acceptare ius in corpus in ordine ad actus per se aptos ad prolis generationem, si insimul propositum seu firmam voluntatem gerant nullum admittendi eiusdem usum." c. DE JORIO, 14 June 1967, in SRR Dec, 59 (1967), p. 465. See c. DE JORIO, 31 May 1967, in SRR Dec, 59 (1967), p. 419.

a right and absolutely exclude its use or exercise.⁶²

De Jorio claims that the term perpetuum (c. 1081, §2) refers to the indissolubility of marriage,⁶³ and that the expression omne ius (c. 1086, §2) indicates that marriage is null if and only if one excludes absolutely every right or the total right to offspring.⁶⁴ Proponents of this view claim that there are two distinct headings of nullity related to the bonum prolis: the exclusion of the right to the conjugal act, and the exclusion of the ius ad prolem:

Wherefore, the nullity of marriage by exclusion of the bonum prolis, can be derived from two sources: either by the exclusion of the formal object of consent, or from the defect of a truly marital consent, because of a firm will, which is contrary to the ordination toward the end, to the extent that one who positively excludes offspring while manifesting consent, excludes the final cause of the

⁶² Other Rotal judges join De Jorio in this conclusion. See ARENA, "Jurisprudence", p. 281, who cites unpublished Rotal decisions of Davino, Palazzini, and Lefebvre, for whom such a distinction is "inapplicable" and "inconceivable." Arena also quotes an unpublished decision of De Jorio (12 May 1976), who believes the distinction between the right and the exercise of the right "esse merum mentis inventum quod nullam affert utilitatem in causis matrimonialibus definiendis."

⁶³ "Quoad ius vero in corpus in ordine ad actus per se aptos ad prolis generationem Patres censent illud perpetuum in can. 1081, §2 positum esse non ad significandum usum seu exercitium eiusdem nunquam praepediri posse, sed ad declarandum matrimonium esse societatem permanentem inter virum ac mulierum ad filios procreandos (cfr. can. 1082, §1)." c. DE JORIO, 28 May 1969, in SRR Dec, 61 (1969), p. 558.

⁶⁴ "At argumentum cogi nequit ex verbis quae leguntur in can. 1086, §2: 'si alterutra vel utraque pars positivo voluntatis actu excludat omne ius ad coniugalem actum invalide contrahit.' Nam excludit est verbum re negans, cum idem valeat ac neque tradere neque acceptare.

"Itaque canon hanc habet vim: qui nullum tradit vel acceptat ius ad coniugalem actum, invalide contrahit. Et ideo ex ditione canonis concludendum est ad valide contrahendum dandum esse aliquod ius ad coniugalem actum, cum qui aliquod tradat non omne excludat." c. DE JORIO, 21 March 1970, in SRR Dec, 62 (1970), p. 299. See c. DE JORIO, 23 June 1971, in SRR Dec, 63 (1971), p. 514.

contract.⁶⁵

They believe that the distinction between a right and the exercise of a right applies to the former, but not to the latter.⁶⁶ Therefore, Rotal judges deal with various situations contra bonum prolis in different ways.

Those who assert a connection between the ius ad prolem and the ius in corpus and ius ad coniugalem actum claim only one heading of nullity relative to the bonum prolis.⁶⁷ They affirm the customary distinction between a right and its exercise and handle the cases in a

⁶⁵ "Quare, nullitas matrimonii ob exclusum bonum prolis, duplici ex fonte cogi potest: vel ob exclusionem obiecti formalis consensus, vel ex defectu consensus vere matrimonialis, ob firmam voluntatem, ordinationi ad finem contrariam, quatenus qui prolem, in consensu praestando, positive excludit, ipsam contractus causam finalem excludit." c. BEJAN, 30 March 1968, in SRR Dec, 60 (1968), pp. 278-79. Other decisions which support the conclusion that there are two separate headings of nullity include c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 770; c. ANNÉ, 11 July 1972, in SRR Dec, 64 (1972), p. 430; c. ROGERS, 11 July 1972, in SRR Dec, 64 (1972), p. 442.

⁶⁶ Some Rotal judges support the notion of one heading of nullity. They accept the exclusion of offspring as rendering a marriage null because of the exclusion of the right to sexual intercourse, and they examine the validity of the marriage within the categories of right and exercise of right. See c. EWERS, 28 November 1964, in SRR Dec, 56 (1964), p. 892; c. EWERS, 27 January 1965, in SRR Dec, 57 (1965), p. 74; c. FAGIOLO, 1 June 1968, in EIC, 24 (1968), pp. 169-72; c. FAGIOLO, 2 July 1968, in SRR Dec, 60 (1968), p. 527; c. PARISELLA, 12 December 1968, in SRR Dec, 60 (1968), pp. 856-57, who cites cases of Fagiolo, Felici, and Pasquazi; c. DI FELICE, 13 May 1969, in SRR Dec, 61 (1969), p. 482; c. DI FELICE, 22 July 1970, in SRR Dec, 62 (1970), p. 816; c. PARISELLA, 27 May 1971, in SRR Dec, 63 (1971), p. 445.

⁶⁷ Right up to the promulgation of the 1983 Code of Canon Law some judges still maintain the so-called "unitary" approach to the bonum prolis, for example, c. PINTO, 28 October 1983, in SRR Dec, 75 (1983), pp. 559-60.

familiar manner.⁶⁸ So a temporary or limited exclusion of the right, e.g., an ad tempus exclusion of offspring by the use of contraception or an imposition of a limit to the number of offspring, normally affects only the exercise (or abuse) of the right. On the other hand, if the exclusion of the right to offspring is perpetual, absolute, tenacious, etc., they presume the exclusion of the right itself.⁶⁹ At times, a judge discovers that what appears to be a temporary exclusion of the right to offspring at the time of consent is actually permanent:

Not infrequently someone marries who, abhorring offspring intended to avoid them perpetually and absolutely, speaks before marriage only about a temporal exclusion and does not mention the true motives, because the person knows the wedding will not occur if the intention is brought out into the open. However, after the wedding it becomes evident that the exclusion of offspring had been made perpetually when, after the alleged motives for the temporal exclusion have ceased, the person openly expresses his/her mind and is opposed to offspring with invincible tenacity, so that the person would obtain a dissolution⁷⁰ of the conjugal life rather than accept offspring [...].

⁶⁸ See, for example, Alberto BERNARDEZ CANTON, Curso de derecho matrimonial canónico, 4^a ed., Madrid, Editorial Tecnos, [1981], p. 243.

⁶⁹ See c. DI FELICE, 13 July 1974, pp. 534-35.

⁷⁰ "Nam haud raro nupturiens qui, abhorrens a prole, eam in perpetuum et absolute intendit vitare, ante nuptias de exclusione temporali solummodo loquitur et causas non veras adducit, quod sciat nuptias non esse futuras si suam intentionem aperte pandat. Exclusionem autem prolis fuisse in perpetuum post matrimonium apparet quum, cessantibus causis pro temporali exclusione allegatis, suam mentem aperte exprimit et invincibili tenacia proli opponitur ita ut ad vitae coniugalis dissolutionem perveniat potius quam prolem admittet [...]." c. PINTO, 11 November 1971, in SRR Dec., 63 (1971), p. 872. The decision c. LEFEBVRE, 2 March 1974, in SRR Dec., 66 (1974), p. 158, quotes this passage verbatim. See c. PASQUAZI, 12 February 1959, [unpub.], quoted in c. FILIPIAK, 15 May 1965, in SRR Dec., 57 (1965), p. 405; c. LAMAS, 17 February 1955, in SRR Dec., 47 (1955), p. 151.

A party who has a reason or cause for the perpetual exclusion thus provides additional support for this presumption.

Those who maintain the existence of two distinct headings of nullity arrive at a different set of presumptions. Therefore, only an absolute and perpetual exclusion of offspring renders a marriage invalid.⁷¹ However, an ad tempus exclusion of the right to offspring (even at time of consent) does not invalidate, because the party does not lack an intention for procreation and education of offspring:

But the intention to avoid offspring, even if it be initiated and expressed in the very act of manifesting consent, does not vitiate the marriage if it is ad tempus, since the intention to generate a child or children is not lacking in the hypothesis.⁷²

Nevertheless, an ad tempus exclusion can affect validity if and only if

⁷¹ "At exclusio prolis ut irritet consensum matrimonialem debet esse absoluta ac perpetua. Id infrascripti Patres pro explorato semper habuerunt atque confirmatum censent tum in Concilio Oecumenico Vaticano II (Constitutio pastoralis Gaudium et spes, praesertim in n. 51) cum in litteris encyclicis Humanae vitae Pauli VI fel. regn., qui admittit atque definit paternitatem consciam." c. DE JORIO, 28 May 1969, in SRR Dec, 61 (1969), p. 558.

⁷² "At propositum vitandi prolem, etsi in ipso consensu praestando initum atque expressum, non irritat matrimonium si ad tempus sit, cum in hypothesi non desit intentio filium seu filios generandi." c. DE JORIO, 15 January 1964, in SRR Dec, 56 (1964), p. 31, and repeated verbatim in c. DE JORIO, 22 July 1964, in SRR Dec, 56 (1964), p. 644. See also c. EWERS, 28 November 1964, in SRR Dec, 56 (1964), p. 892.

the party places it as a present or future condition to consent.⁷³

5. Other headings of nullity relative to the bonum prolis

A few Rotal cases consider the question of feigned cautiones required for a dispensation from mixed religion or disparity of worship, and specifically the guarantee to baptize and raise the children as Catholics. Two published Rotal cases state that a dispensation granted after a party in some way gives false cautiones is still valid.⁷⁴ But later cases take the opposing position:

But there appears a certain opinion, which denies the validity of a dispensation, by the fact that through insincere guarantees conditions are only apparently but not really verified; it remains an insult to the Creator. For if they make promises with a mind not to fulfill them, [then] the danger of the undermining of the spouse or at least of educatio prolis outside the Catholic faith cannot be said de facto to be removed. Nor is it objected that the sincerity is anywhere expressly required for the validity of the dispensation being granted. [...]

If after the guarantees are given, whether seriously or falsely, the non-Catholic party or even the other spouse had expressly manifested a contrary intention or will before the dispensation was conceded, it practically destroyed the guarantees themselves. Wherefore they are to be considered not granted at all; when these are missing the impediment must not be dispensed; but perhaps the conceded

⁷³ "Si quis constituat non concedere comparti ius ponendi actus per se aptos ad prolis generationem, nisi quando concordia vitae communis experimento comprobata sit, consensum matrimonialem praestat tantummodo sub conditione de futuro, qua nondum purificata seu verificata vinculum non exsurgit.

"Quod si postea concordia absque ulla reconciliationis spe cessaverit, pars, quae consensum conditionatum praestiterat, hunc revocat, quo deficiente matrimonium iniri nequit [...]." c. DE JORIO, 6 March 1968, in SRR Dec., 60 (1968), p. 182. See ARENA, "Jurisprudence," pp. 281-83.

⁷⁴ See c. SOLIERI, 11 August 1921, in SRR Dec., 13 (1921), p. 214; and c. WYNEN, 3 March 1942, in SRR Dec., 34 (1942), p. 135.

dispensation is afflicted with nullity, since it is certainly established that the guarantees are required for validity [...].⁷⁵

They conclude that false guarantees render the dispensation invalid, thereby vitiating the consent. Under the 1983 Code, however, the question of a valid dispensation with respect to cautiones no longer pertains.

The use in Rotal jurisprudence of two other headings of nullity foreshadows the more recent development of C. 1095 in the new Code. Specifically, some judges speak of the discretion of judgment necessary for marital consent.⁷⁶ Others consider the capacity to assume the

⁷⁵ "Tamen certa videtur sententia, quae negat validitatem dispensationis, eo quod per insinceras cautiones apparenter tantum, non realiter, conditiones verificantur; manet enim contumelia Creatoris. Namque si promissiones fiant cum animo eas non implendi, nequit dici de facto remotum periculum perversionis coniugis vel saltem educationis prolis extra catholicam fidem. Nec obiiciatur sinceritatem nullibi exigi expresse ad validitatem concedendae dispensationis. [...]"

"Si post datas cautiones, serio quidem vel fecte, pars acatholica vel etiam alter coniux intentionem seu voluntatem contrariam expresse manifestaverit ante concessam dispensationem, cautiones ipsas practice deleret. Quapropter eae considerandae essent tamquam nullatenus praestitae; quibus deficientibus non esset dispensandum super impedimento; dispensatio autem forte concessa nullitate laboraret, cum certissime constet cautiones ad validitatem requiri [...]" c. BRENNAN, 26 January 1948, in SRR Dec, 40 (1948), p. 41. See c. JULIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 356; c. POMPEDDA, 30 March 1974, in SRR Dec, 66 (1974), pp. 259-60; c. DAVINO, 20 February 1974, in SRR Dec, 66 (1974), p. 115.

⁷⁶ "Attamen non quivis defectus aequilibrum vel maturitatis sufficit ad inducendam matrimonialis consensus nullitatem: istam inducere tantummodo valet defectus talis qui contrahentem efficiat incapacem liberae electionis vel adsumendi onera essentialia atque in specie tria connubii bona." c. POMPEDDA, 3 July 1979, in SRR Dec, 71 (1979), p. 388.

essential obligations of marriage.⁷⁷

6. Summation

A marriage is invalid when a party places an intention, condition, or pact contra bonum prolis. This holds true in a marital contract in which the Rota ascertains a denial of the bonum prolis itself,⁷⁸ or an exclusion of the right to sexual intercourse (the ius in corpus or ius ad coniugalem actum),⁷⁹ an exclusion of the primary end of marriage,⁸⁰ or an exclusion of the ius ad prolem.⁸¹

A Rotal turnus resolves other issues in individual cases, i.e., the relevance and employment of the distinction between a right and its use; the presumption and consequence of a temporary exclusion of a right; the meaning and application of the clause per se aptos with regard to conjugal acts; and whether the use of a particular method of contraception has any effect upon the determination of the validity of a marriage.

⁷⁷ "Incapax est assumendi onera essentialia matrimonia, non solum nupturiens qui tradere non valet iura quibus coniugium immediate ordinatur ad finem socialem primum dictum (traditionalia bona prolis, fidei et sacramenti) [...]." c. PINO, 18 December 1979, in SRR Dec, 71 (1979), p. 588.

⁷⁸ See c. GRAZIOLI, 4 May 1927, in SRR Dec, 19 (1927), p. 164.

⁷⁹ See c. FLORCZAK, 31 July 1928, in SRR Dec, 20 (1928), p. 334; c. WYNEN, 24 March 1948, in SRR Dec, 40 (1948), p. 101.

⁸⁰ See c. MATTIOLI, 27 June 1966, in SRR Dec, 58 (1966), p. 448; c. EWERS, 17 July 1965, in SRR Dec, 57 (1965), p. 575.

⁸¹ See c. HEARD, 2 February 1946, in SRR Dec, 38 (1946), p. 103; c. BEJAN, 30 March 1968, in SRR Dec, 60 (1968), pp. 278-79; c. DI FELICE, 13 May 1969, in SRR Dec, 61 (1969), p. 482.

During the period in which the 1917 Code is in effect, the Rota appears to grapple with the meaning of marriage and its expression found in the Code. In some cases, it seems to move beyond the precise wording of the canons and toward a broader level of understanding, most especially in its treatment of the right to sexual intercourse and its relation to the bonum prolis.

C. Rotal jurisprudence after the 1983 Code

While Rotal jurisprudence cites several canons of the 1983 Code relative to the bonum prolis, no canon actually uses the expression itself. Canon 1055, §1 says that, among other things, the marriage covenant is ordered toward the procreation and education of offspring. According to C. 1061, §1, marriage is ordered toward the conjugal act, performed in a human manner and suitable (per se aptum) for the generation of offspring. Canon 1102, §1 affirms that one who enters a marriage with a condition concerning the future contracts invalidly. The new canon on the simulation of consent states that a party who with a positive act of the will excludes marriage itself, an essential element of marriage, or an essential property of marriage contracts invalidly (C. 1101, §2). And C. 1095, without parallel in the earlier Code, describes those who are incapable of contracting marriage, including those who seriously lack the discretionary judgment regarding the essential rights and obligations of marriage (2°), and those who are unable to assume the essential obligations of marriage due to psychological causes (3°). Rotal cases may then state various components of marriage which the judges consider essential, i.e., its

elements and properties, some of which relate to the bonum prolis.

The explicit expression of a marital right to sexual intercourse (ius in corpus or ius ad coniugalem actum) disappears in the 1983 Code, as well as its descriptors omne and perpetuum, which had proved somewhat problematic in the past. However, the Rotal judges still maintain that such a right is exchanged in marriage, implicit in C. 1055, §1;⁸² C. 1057, §2,⁸³ and C. 1101, §2.⁸⁴ Furthermore, such acts must be suitable for the generation of offspring C. 1061, §1,⁸⁵ and the parties must be open to the effect of such acts.⁸⁶

The debate continues about the relevance and application of the distinction between a right and its exercise with regard to the bonum prolis. But again there are differences of opinion, depending on the "right" referred to. Some speak of the right to the conjugal act,⁸⁷ while others of the right to offspring.⁸⁸ The distinction seems to apply to the right to the conjugal act; so that the abuse, lack of

⁸² See c. PARISELLA, 15 December 1983, in SRR Dec, 75 (1983), p. 703.

⁸³ See c. MASALA, 28 February 1984, in SRR Dec, 76 (1984), p. 153.

⁸⁴ The argument is exceptionally clear and logical in c. POMPEDDA, 27 March 1984, in SRR Dec, 76 (1984), pp. 190-91; see also c. RAGNI, 18 December 1984, in SRR Dec, 76 (1984), p. 622.

⁸⁵ See c. PALESTRO, 29 January 1986, in ME, 111 (1986), p. 414.

⁸⁶ See c. PINTO, 6 March 1987, in ME, 113 (1988), p. 295.

⁸⁷ See c. PARISELLA, 15 December 1983, in SRR Dec, 75 (1983), p. 703; c. PINTO, 6 March 1987, in ME, 113 (1988), p. 295.

⁸⁸ See c. GIANNECCHINI, 18 February 1986, in ME, 112 (1987), p. 465.

exercise, or temporary exclusion of the right does not invalidate, while the actual exclusion of the right to sexual intercourse does invalidate.⁸⁹ Some add that a perpetual plan to abuse a right also invalidates.⁹⁰ But others speak of a two-fold exclusion of the bonum prolis,⁹¹ and they therefore distinguish between a perpetual exclusion of the ius ad prolem, which leads to invalid consent, and an expression that in some ways circumscribes the intention of offspring to some future time (ad tempus exclusion) which has no effect on the consent.⁹²

One may also express an exclusion of the bonum prolis in the form of a pact or a condition, either as an exclusion of the right to sexual intercourse,⁹³ or an exclusion of the ius ad prolem.⁹⁴

The essence of marriage forms the basis for the determination of any simulation of consent (C. 1101). Some Rotal judges believe that the

⁸⁹ See c. PARISELLA, 15 December 1983, in SRR Dec, 75 (1983), p. 703; c. MASALA, 28 February 1984, in SRR Dec, 76 (1984), p. 153; c. BRUNO, 30 March 1984, in SRR Dec, 76 (1984), p. 219; c. PINTO, 6 March 1987, in ME, 113 (1988), p. 295.

⁹⁰ See c. PALESTRO, 29 January 1986, in ME, 111 (1986), p. 415.

⁹¹ See c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 770.

⁹² See c. BURKE, 11 April 1988, in ME, 114 (1989), pp. 472-73; c. GIANNECCHINI, 18 February 1986, in ME, 112 (1987), p. 465, who nevertheless reverts to the older expression of using the right.

⁹³ See c. BRUNO, 30 March 1984, in SRR Dec, 76 (1984), p. 219; c. FIORE, 15 October 1986, in SRR Dec, 78 (1986), p. 529.

⁹⁴ See c. GIANNECCHINI, 18 February 1986, in ME, 112 (1987), p. 465; c. STANKIEWICZ, 24 March 1988, (Caracas), [unpub.], p. 10. [Msgr. Stankiewicz has kindly made the in iure sections from two of his unpublished Rotal cases available for this study (13 May 1988 and 20 April 1989, both from Caracas); but the actual facts and final decision of the case relative to educatio prolis remain unknown.]

bonum prolis belongs to the essence of marriage itself. And therefore its exclusion constitutes an exclusion of marriage itself:

When the exclusion of the bonum prolis is invoked, first a true denial of the right in suis principiis must be distinguished from the intention to have children in the future in certain perfect circumstances. The former is an absolute refusal to the partner of the right to offspring or the determinate and prevailing intention — by a positive act of the will, by a pact, [or] by a condition whenever it is expressed — perpetually and absolutely here and now to keep children from entering the marriage, so that the manifested consent exists deprived of the ordering toward offspring, which is well-known, intrinsic, and essential to marriage itself [...].⁹⁵

But most treat the bonum prolis or its various aspects as essential elements of marriage, including the various expressions of rights and obligations which follow:

- the bonum prolis itself;⁹⁶
- the ordination toward (the end of) offspring;⁹⁷

⁹⁵ "Quando invocatur exclusio boni prolis, in primis distinguenda est vera denegatio iuris in suis principiis, ab intentione filios in posterum habendi quibusdam circumstantiis expletis. Illa est absoluta recusatio comparti iuris ad prolem seu determinata ac praevalens intentio — actu positivo voluntatis pacto, conditione quandoque expressa —, perpetue absoluteque filios arcendi a matrimonio hic et nunc ineundo, ita ut consensus manifestatus exutus existat ordinatione ad prolem, quae est nota intrinseca et essentialis ipsius matrimonii." in c. GIANNECCHINI, 18 February 1986, in ME, 112 (1987), p. 465. See c. COLAGIOVANNI, 17 March 1987, in ME, 112 (1987), p. 305.

⁹⁶ See c. BRUNO, 30 March 1984, in SRR Dec, 76 (1984), p. 219: "Bonum prolis est elementum essenziale coniugii [...]." Cf. c. DE JORIO, 22 February 1984, in SRR Dec, 76 (1984), p. 109: "Proles est unum ex boni [*sic*] essentialibus matrimonii [...]."

⁹⁷ See c. COLAGIOVANNI, 17 March 1987, in ME, 112 (1987), p. 306: "[...] ad finem prolis, cum eadem ordinatio ad prolis sit de essentia matrimonii [...]."

- the ordination toward the transmission of the gift of human life;⁹⁸
- the conjugal act;⁹⁹
- the ius in corpus;¹⁰⁰
- the right to sexual intercourse in a human manner;¹⁰¹
- power (authority)¹⁰² with regard to acts which are per se aptos for generation.

Therefore, the exclusion of any of these essential rights and obligations constitutes the simulation of marital consent. A lack of discretion of judgment with regard to these rights and obligations affects the validity of marriage as well.¹⁰³ Finally, the incapacity to assume these obligations relative to the bonum prolis substantiates a

⁹⁸ See c. BURKE, 11 April 1988, in ME, 114 (1989), p. 472: "[...] haec ordinatio ad donum vitae humanae transmittendum constituat elementum essenziale matrimonii [...];" he is quoting an unpublished decision c. STANKIEWICZ, 21 July 1987, n. 6.

⁹⁹ See, for example, c. POMPEDDA, 27 March 1984, in SRR Dec, 76 (1984), p. 191; c. RAGNI, 18 December 1984, in SRR Dec, 76 (1984), p. 622.

¹⁰⁰ See c. BRUNO, 16 December 1988, in ME, 114 (1989), p. 300: "[...] ius in corpus ad prolis procreationem et educationem ordinatum [...]."

¹⁰¹ See, for example, c. PINTO, 3 December 1982, in SRR Dec, 74 (1982), pp. 567, 569-70; c. PALESTRO, 29 January 1986, in ME, 111 (1986), p. 415.

¹⁰² See c. MASALA, 28 February 1984, in SRR Dec, 76 (1984), p. 153: "Haec coniugum mutua specifica in corpus consortis personalis inviolabilisque potestas, praecise quoad actus per se aptos ad prolis generationem, essenziale foederis nuptialis elementum, seu obiectum constituit [...]."

See also c. PALESTRO, 29 January 1986, in ME, 111 (1986), p. 414.

¹⁰³ See c. STANKIEWICZ, 18 December 1986, in ME, 113 (1988), pp. 455-57.

declaration of nullity.¹⁰⁴

II. The *educatio prolis* in Rotal jurisprudence

There are many cases which touch the subject of *educatio prolis* relative to marriage. But jurists do not agree yet: 1) what constitutes *educatio prolis*, and 2) whether the *educatio prolis* or certain aspects of it have any relationship to the validity of marital consent. So most of the cases consider the education of offspring solely in iure.

A. Identification of the *educatio prolis*

At the start, one notices immediately the equivocal terminology in the Rotal jurisprudence relative to *educatio prolis*. Some Rotal judges, alluding to *educatio prolis*, simply refer to it under the heading of *bonum prolis*:

In our Tribunal, the expression *bonum prolis* includes the sum of the rights and duties to which parents are held in relation to offspring, and which are of the essence of marriage: i.e., the right and duty not to impede the conception of offspring by illicit means; to give birth in due time to the offspring conceived; and to nurture and educate the offspring born.¹⁰⁵

¹⁰⁴ See c. STANKIEWICZ, 19 December 1985, in DE, 97, no. 2 (1986), p. 317.

¹⁰⁵ "Sub nomine *boni prolis* venit, in Foro nostro, summa illa iurium et officiorum, quibus erga prolem parentes tenentur, quaeque de essentia matrimonii sunt: i.e., ius et officium non impediendi, modo illegitimo, *prolis* conceptionem; et conceptam edendi, equidem tempore debito; et editam alendi atque educandi." c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347. See also c. RAAD, 20 March 1980, in ME, 105 (1980), p. 179: "[...] talis perversio sexualis adversetur [...] bono *prolis* quatenus est contra educationem."

Others refer more specifically to the physical bonum prolis, or procreation. Stankiewicz, for example, says that the physical bonum prolis "besides the right-duty to carry out the natural conjugal act also contains the conjugal rights and obligations concerning conceiving, giving birth, and preserving the life of offspring [...]." ¹⁰⁶ Finally, some judges express the notion of educatio prolis in an explicit manner:

Moreover, both in natural and positive law the expression "exclusion of bonum prolis" is not only whatever incomplete intercourse the spouses intend to practice in order to prevent conception. It is evident it is something wider that embraces the education of children as well. ¹⁰⁷

The equivocal use of terminology continues up to the present time. ¹⁰⁸

¹⁰⁶ "[...] bonum prolis physicum, quod praeter ius-debitum peragendi actum coniugalem naturalem continet quoque iura et obligationes coniugum circa prolem concipiendam, edendam et in vita conservandam [...]." c. STANKIEWICZ, 13 May 1978, in SRR Dec, 70 (1978), p. 299.

"Similiter est de substantia eiusdem contractus, quatenus etiam primario ad prolem educandam ordinatur, officium providendi de physico bono prolis, praesertim curando ne mortis periculo exponatur." c. PINTO, 12 November 1973, in SRR Dec, 65 (1973), p. 727.

¹⁰⁷ "Nomine autem 'exclusi boni prolis' in iure tam naturali quam positivo non venit tantum quidquid per imperfectum coitum coniuges moliri intendunt ad impediendam conceptionem. Res latius patet ut complectatur etiam et sobolis educationem." c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603. See c. CANESTRI, 20 March 1948, in SRR Dec, 40 (1948), p. 94; c. CANESTRI, 26 January 1950, in SRR Dec, 42 (1950), p. 46; c. STAFFA, 7 December 1956, in SRR Dec, 48 (1956), p. 944.

¹⁰⁸ A decision c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), p. 385, uses the term education in one phrase to define it in another: "Ex quo illud natura consequitur ut educatio physica prolis [...], id est eius simpliciter conservatio et educatio [...], ex matrimoniali consensu excludi nequeat quin ipse consensus destruat."

Another decision c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12, uses the phrase physical education: "Attamen, sicut communis iurisprudencia N.F. docet, elementum essenziale ac constitutivum nonisi officium educationis physicae seu potius mere humanae constituit [...]."

B. Presentation of the educatio prolis

Some Rotal judges simply advert to educatio prolis, and leave its content undefined:

[...] the mutual handing over and accepting of the perpetual and exclusive ius in corpus for acts per se aptos for the generation of offspring, with the obligation not to impede generation, and to educate the offspring.¹⁰⁹

Moreover, those judges who devote more attention to the education of offspring do not agree on the components of educatio prolis which affect the validity of marriage. That is, regardless of the specific nomenclature or terminology which they use to designate educatio prolis, the judges circumscribe its content in several ways.

With regard to the extent of time which educatio prolis comprises,¹¹⁰ some apparently limit it to conception and gestation, so that the parties permit the birth of the child. Wynen writes:

However, this is an act in itself suitable to generate offspring on the man's part: if he penetrates the vagina of the woman, and there deposits in a natural way the semen produced in the testicles, and does not impede, either immediately or later, the offspring being born and being

¹⁰⁹ "[...] mutua traditio et acceptatio iuris in corpus perpetuum et exclusivum in ordine ad actus per se aptos ad prolis generationem, cum obligatione non impediendi generationem, et prolem educandi." c. STAFFA, 7 December 1956, in SRR Dec, 48 (1956), p. 944. See c. STANKIEWICZ, 26 May 1983, in SRR Dec, 75 (1983), p. 326; c. RAAD, 20 March 1980, in ME, 105 (1980), p. 179.

¹¹⁰ Some limit the bonum prolis to not impeding generation, but they designate this as procreation, not education, and so does not pertain to the discussion here.

alive.¹¹¹

And a few years later, he says in another decision:

For such a woman, while she explicitly forms and up to the wedding virtually maintains the will to impede perpetually all efficacy of natural intercourse, is proven at least implicitly to have refused to give to the man the ius in proprium corpus for the acts, which by their very nature subject the body of the woman to the burden of pregnancy, gestation, and birth.¹¹²

In both of his decisions, the obligation appears to cease when the child is born. The wording of other decisions suggests that the provision of education continues for at least some time after birth. Canestri says:

Wherefore, if one in a very difficult case as by right and obligation wished to conceive, but reserved to oneself thereafter the faculty to procure an abortion or, having given birth, to kill or by whatever means to abandon the offspring, one would contract invalidly.¹¹³

Like Canestri, Stankiewicz points to the obligation to raise the offspring after their birth:

¹¹¹ "[...] Actus autem per se aptus ad generandam prolem habetur ex parte viri, si is vas femineum penetrat ibique naturali modo deponit semen in testiculis elaboratum, neque impedit, sive statim sive serius, quominus proles nascatur et vivat." c. WYNEN, 9 November 1944, in SRR Dec, 36 (1944), p. 663.

¹¹² "Talis enim mulier, dum explicite concipit et virtualiter usque ad nuptias servat voluntatem in pereptum impediendi omnem efficaciam copulae naturalis, convincitur saltem implicite detrectare viro tradere ius in proprium corpus in ordine ad actus, qui ex natura sua corpus mulieris subiiciant oneri praegnationis, gestationis, partus." c. WYNEN, 27 February 1947, in SRR Dec, 39 (1947), p. 123.

¹¹³ "Unde si quis, per casum perdifficilem, vellet in iure et obligatione concipere, sed reservaret postea facultatem sibi procurandi abortum, aut, partu edito, necandi vel quoque modo deserendi prolem, invalide contraheret." c. CANESTRI, 26 January 1950, in SRR Dec, 42 (1950), p. 46. Another decision speaks of the "[...] obligationem alendi et educandi [...]." c. HEARD, 13 March 1948, in SRR Dec, 40 (1948), p. 88.

This is why "the parents, since they have given life to their children, are bound to the very serious obligation of educating them and therefore should be recognized as their first and foremost educators" [...].

This very serious obligation (c. 1113) of the formally assumed bonum prolis, i.e., in suis principiis, intervenes as a constitutive element of marriage itself [...].¹¹⁴

Some other decisions may indicate that educatio prolis exceeds the life in the womb. For example, Pinto states:

Included in the right to acts in themselves suitable for generation of offspring is the obligation not to impede the effect to which the aforementioned acts are ordered by their nature, namely conception,¹¹⁵ and the physical life and integrity of the offspring.

In another case, Canestri speaks of a right to "life and also the health of the limbs of the offspring already born," adding that "physical

¹¹⁴ "Quare, 'parentes, cum filiis contulerint, prolem educandi gravissima obligatione tenentur et ideo primi et praecipui eorum educatores agnoscendi sunt' [...].

"Haec autem gravissima obligatio (can. 1113) in bonum prolis formaliter sumptum, seu in suis principiis, tamquam elementum constitutivum ipsius matrimonii, intrat [...]." c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), p. 384; see also c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12, wherein he quotes the second paragraph. See also c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 5: "[...] prolem iam natam suscipiendi educandique (bonum prolis) [...]."

See also c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 55, who specifically rejects a condition to kill or abort the offspring, but then continues by quoting Lehmkuhl, "'quia non solum susceptio prolis, sed etiam susceptae prolis aliqualis educatio ad matrimonii essentialem finem spectat' [...]." See c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347; and also c. FILIPIAK, 15 May 1965, in SRR Dec, 57 (1965), p. 405, wherein he essentially repeats Mattioli.

¹¹⁵ "In iure ad actus per se aptos ad prolis generendam includitur obligatio non impediendi effectum ad quem praefati actus ex natura sua ordinantur, nempe conceptionem, vitam physicamque prolis integritatem." c. PINO, 28 October 1983, in SRR Dec, 75 (1983), p. 559.

educatio prolis is nothing more than procreation itself continued." ¹¹⁶

For fifty years now the Rotal jurisprudence has utilized a distinction suggested by Canestri. Educatio prolis, he says, "is distinguished as physical, which starts at conception, and moral, which takes its beginning at the origin of intellectual life." ¹¹⁷ Subsequent jurists place their disputes about raising children outside the Catholic religion under the heading of moral education, also sometimes called the spiritual bonum prolis. ¹¹⁸

One may divide the marital rights and obligations relative to the physical aspects of educatio prolis into three parts: conception; gestation (pregnancy); birth and life thereafter. Within each category the jurisprudence uses a variety of expressions to describe those rights and obligations. ¹¹⁹ With regard to conception, the marital rights and obligations include:

¹¹⁶ "[...] ad vitam necnon integritatem membrorum prolis [...]. Educatio vero physica prolis nil est nisi eiusdem procreatio continuata." c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603.

¹¹⁷ "[sobolis educatio ...] distinguitur in physicam, quae a conceptione, et moralem, quae a vitae intellectualis primordiis initium sumit." c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603.

¹¹⁸ See c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 356. This study considers below other cases that address this dispute. Cf. De Jorio, who claims that the distinction of physical and moral education does not help to resolve the controversy: "Infrascripti Patres partitionem educationis in physicam et moralem habent acute inventam, sed minime aptam ad controversiam dirimendam." c. DE JORIO, 23 June 1971, in SRR Dec, 63 (1971), p. 515.

¹¹⁹ The footnotes which follow indicate Rotal cases which explicitly include the particular right or obligation; this does not mean to suggest that the particular expression exhausts the judge's understanding of educatio prolis.

- not to impede procreation or generation; 120
- not to impede conception by illicit means; 121
- not to do anything contrary to offspring; 122
- not to engage in behavior which leads to conception outside of natural sexual intercourse; 123

The rights and obligations relative to the period of gestation require the spouse to allow the natural development of fetus, 124 which includes not to procure an abortion. 125

Another set of rights and obligations focuses on the birth, life, and care of the offspring after they are born. They include the right and obligation:

120 See c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 771; c. PINTO, 12 November 1973, in SRR Dec, 65 (1973), p. 726; and c. STANKIEWICZ, 13 May 1978, in SRR Dec, 70 (1978), p. 298.

121 See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603; c. WYNEN, 9 November 1944, in SRR Dec, 36 (1944), p. 663; c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 5.

122 See c. RAGNI, 18 December 1984, in SRR Dec, 76 (1984), p. 622.

123 For example, artificial fertilization: "Item, aliquis habere posset intentionem excludendi obiectum formale contractus, quin reicere velit finem primum (puta casum contrahentium qui deliberata voluntate statuunt recurrere ad foecundationem artificialem)." c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 771.

124 See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603; c. WYNEN, 27 February 1947, in SRR Dec, 39 (1947), p. 123; c. STANKIEWICZ, 13 May 1978, in SRR Dec, 70 (1978), p. 298.

125 See c. WYNEN, 9 November 1944, in SRR Dec, 36 (1944), p. 663; c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 355; c. CANESTRI, 26 January 1950, in SRR Dec, 42 (1950), p. 46; "filios conceptos in utero extinguere" in c. EGAN, 20 January 1978, in SRR Dec, 70 (1978), p. 30.

- to permit the birth and accept the child; ¹²⁶
- not to kill the offspring after birth; ¹²⁷
- to feed the offspring after birth; ¹²⁸
- to educate the offspring after birth; ¹²⁹
- to receive and educate the offspring in the bosom of marriage; ¹³⁰
- not to neglect, abandon, or expose the offspring to danger of death; ¹³¹

¹²⁶ See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603; c. WYNEN, 27 February 1947, in SRR Dec, 39 (1947), p. 123; c. HEARD, 17 January 1953, in SRR Dec, 45 (1953), p. 49; c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 5.

¹²⁷ See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), pp. 603-4; c. HEARD, 13 March 1948, in SRR Dec, 40 (1948), p. 88; c. CANESTRI, 20 March 1948, in SRR Dec, 40 (1948), p. 94; c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 355; c. CANESTRI, 26 January 1950, in SRR Dec, 42 (1950), p. 46; c. HEARD, 17 January 1953, in SRR Dec, 45 (1953), p. 49; c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347; c. EGAN, 20 January 1978, in SRR Dec, 70 (1978), p. 30; c. PINTO, 28 October 1983, in SRR Dec, 75 (1983), p. 560.

¹²⁸ See c. HEARD, 13 March 1948, in SRR Dec, 40 (1948), p. 88; c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347.

¹²⁹ See c. HEARD, 17 January 1953, in SRR Dec, 45 (1953), p. 49; c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 5.

¹³⁰ See c. RAGNI, 18 December 1984, in SRR Dec, 76 (1984), p. 622.

¹³¹ See c. CANESTRI, 26 January 1950, in SRR Dec, 42 (1950), p. 46; c. HEARD, 17 January 1953, in SRR Dec, 45 (1953), p. 49; c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347; c. PINTO, 12 November 1973, in SRR Dec, 65 (1973), p. 726; c. PINTO, 28 October 1983, in SRR Dec, 75 (1983), p. 560.

-- not to mutilate the offspring, including maiming them or plucking out their eyes. ¹³²

Finally, the marital rights and obligations considered under the heading of moral (or spiritual) educatio prolis include:

- not to raise the offspring in prostitution; ¹³³
- not to educate the offspring in heresy or infidelity; ¹³⁴
- not to raise the offspring of a mixed marriage in the religion of the spouse who is not Catholic. ¹³⁵

Regardless of whether they derive from the bonum prolis, physical bonum prolis, or educatio prolis, the majority of authors agree that in order to understand educatio prolis one must consider the rights and obligations not to impede conception by illicit means, to allow the natural development of offspring while in the womb, to permit the offspring's birth, to accept the child at birth, and to permit the child to live and grow in safety. Some suggest further rights and obligations relative to the moral or spiritual education of offspring. Moreover, the consideration of any relationship between marital consent and these rights and obligations relative to educatio prolis leads to an exploration of their effect upon the validity of that consent.

¹³² See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), pp. 603-4; c. CANESTRI, 20 March 1948, in SRR Dec, 40 (1948), p. 94; c. PINTO, 28 October 1983, in SRR Dec, 75 (1983), p. 560.

¹³³ See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603.

¹³⁴ See c. BRENNAN, 26 January 1948, in SRR Dec, 40 (1948), p. 42; c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 355; c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 765.

¹³⁵ See c. CANESTRI, 20 March 1948, in SRR Dec, 40 (1948), p. 94.

C. Argumentation concerning the educatio prolis

1. Jurisprudence which favors a link between educatio prolis and the validity of marriage

Rotal cases use several arguments in support of their conclusion that educatio prolis has a relationship to the validity of marriage.

In the first significant case, decided in 1941, Canestri argues that according to natural law the principal ends of marriage, the procreation and education of offspring, are equal. The physical education of a child is simply allowing an act of procreation to continue its natural evolution.¹³⁶ He restates his argument in another decision in 1950, complaining that too often authors focus on the exclusion of offspring in the act of intercourse, and forget the right and obligation to educate them.¹³⁷

Several Rotal decisions argue that educatio prolis as well as

¹³⁶ See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603.

¹³⁷ See c. CANESTRI, 13 November 1943, in SRR Dec, 35 (1943), p. 818; c. CANESTRI, 26 January 1950, in SRR Dec, 42 (1950), p. 46. Sometimes the reason for the exclusion of offspring is the obligation to raise children, and the serious burden it represents. The nullity of the marriage rests on the exclusion of offspring, however, and not the exclusion of their education, which presumably would have been excluded if offspring had been born. See, for example, c. PARISELLA, 16 February 1984, in SRR Dec, 76 (1984), p. 97, in which witnesses assert that the respondent lacked a maternal instinct, and children would have been a hindrance to her career. Stankiewicz also refers to this cause of nullity, and cites three unpublished Rotal cases, in c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12.

procreation belongs to the primary end of marriage.¹³⁸ Others state that the right and obligation to educate offspring belong to the substance or essence of marriage,¹³⁹ while other cases say that such a right and obligation belong to the substance of the marital contract,¹⁴⁰ or the principal or primary end of the contract.¹⁴¹ Finally, a few decisions make reference to the cause (causa) of the marital contract.¹⁴²

The most recent cases include educatio prolis among the essential elements, rights, and obligations of marriage.¹⁴³

¹³⁸ See c. WYNEN, 9 November 1944, in SRR Dec., 36 (1944), p. 663; c. JULLIEN, 16 October 1948, in SRR Dec., 40 (1948), p. 355; c. CANESTRI, 26 January 1950, in SRR Dec., 42 (1950), p. 46; c. MATTIOLI, 22 May 1958, in SRR Dec., 50 (1958), p. 347; c. FILIPIAK, 15 May 1965, in SRR Dec., 57 (1965), p. 405; c. STANKIEWICZ, 13 May 1978, in SRR Dec., 70 (1978), p. 299.

¹³⁹ See c. CANESTRI, 8 July 1941, in SRR Dec., 33 (1941), p. 603; c. MATTIOLI, 22 May 1958, in SRR Dec., 50 (1958), p. 347.

¹⁴⁰ See c. PINTO, 12 November 1973, in SRR Dec., 65 (1973), p. 726.

¹⁴¹ See c. CANESTRI, 20 March 1948, in SRR Dec., 40 (1948), p. 94; c. PINTO, 28 October 1983, in SRR Dec., 75 (1983), p. 560.

¹⁴² See c. BEJAN, 29 October 1966, in SRR Dec., 58 (1966), pp. 771-72. De Jorio responds that the notion of a cause of a contract is uncertain among legal experts, and virtually unknown to canonists: "[...] conceptus causae contractus penes legisperitos non sit certus ac definitus, canonistis vero fere ignotus." c. DE JORIO, 23 June 1971, in SRR Dec., 63 (1971), pp. 514-15. See also c. STANKIEWICZ, 26 May 1983, in SRR Dec., 75 (1983), p. 326.

¹⁴³ See c. STANKIEWICZ, 13 May 1978, in SRR Dec., 70 (1978), p. 300; c. RAAD, 20 March 1980, in ME, 105 (1980), p. 178; c. STANKIEWICZ, 23 July 1981, in SRR Dec., 73 (1981), p. 384; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], pp. 5, 12.

2. Jurisprudence which opposes a link between educatio prolis and the validity of marriage

There are two cases in more recent Rotal jurisprudence which, with regard to educatio prolis, seem to take an adverse position toward its effect upon the validity of marriage.

A case c. Pinto distinguishes between the rights and duties of marriage that are essential, and those that are necessary merely for the integrity of marriage. Among the former is the duty to provide for the physical bonum prolis, especially safeguarding the offspring from the danger of death. But the duty of a suitable (commoda) education pertains only to the integrity of the marital contract. Yet, he goes no further in defining either physical bonum prolis or suitable education. And in fact he quotes as support for his position the very same passage from Stella which others use to support other judicial opinions concerning educatio prolis.¹⁴⁴

A decision c. De Jorio states that, although together they comprise the primary end of marriage, procreation and education are markedly different in reality. On the one hand, procreation requires much less time; the conjugal act leading to conception transpires in a few moments, and gestation lasts only through a period of several months. Education, on the other hand, "demands several things and for a long period of time." De Jorio notes that Canestri and Bejan make a

¹⁴⁴ See c. PINTO, 12 November 1973, in SRR Dec, 65 (1973), p. 727.

distinction between physical and moral education.¹⁴⁵ He rejects that distinction, however, because what Canestri designates "physical education" is simply the development and completion of physical generation. It appears that De Jorio prefers to call it **procreation** rather than **education**. He concludes, therefore, that educatio prolis does not have any juridic relationship to valid marital consent.¹⁴⁶

Furthermore, a suitable education can be provided by persons other than parents. Such a decision by the parents is not an exclusion of education but precisely a desire to provide a better education. Finally, with an implicit reference to c. 1113, he agrees with Staffa that a condition or pact to educate offspring in heresy or infidelity does not invalidate a marriage. Therefore, if such a condition or pact concerning **religious** education does not affect validity, then neither do those regarding the provision of **civil** or **social** education.¹⁴⁷ This again leads to the conclusion that for De Jorio the provision of **physical** education is equivalent to procreation, i.e., the conjugal act properly performed, and gestation, or what others called the **physical bonum prolis**.

In a case c. Lefebvre, the position is more difficult to ascertain. Lefebvre deduces that an end of a marriage may be missing,

¹⁴⁵ See c. CANESTRI, 8 July 1941, in SRR Dec., 33 (1941), p. 603; c. CANESTRI, 26 January 1950, in SRR Dec., 42 (1950), p. 46. These passages are quoted in c. BEJAN, 29 October 1966, in SRR Dec., 58 (1966), pp. 769-70.

¹⁴⁶ See c. DE JORIO, 23 June 1971, in SRR Dec., 63 (1971), pp. 515-16.

¹⁴⁷ See ibid., p. 516.

and the marriage may still be valid, because the exclusion of an end of marriage in itself does not have juridic relevance. It is only insofar as that end is a constitutive object of consent that it affects marital validity.¹⁴⁸ The example he uses is the exclusion of the educatio prolis. He says it is not clear why the primary end of marriage is arbitrarily restricted to procreation, because education by itself could also seem to be the primary end of marriage. And yet, "Indeed no one intends to contract invalidly by a positive act of the will excluding the education of offspring." Sometimes a party may exclude an end of marriage while the marriage itself remains valid, e.g., mutual assistance, or the inability to procreate due to sterility. Therefore Lefebvre believes that the exclusion of an end of marriage does not have juridic relevance. Rather a judge bases a determination of marital nullity on the exclusion of a formal object of consent, i.e., one of its constitutive elements. But it remains unclear whether Lefebvre rejects the possibility that an exclusion of educatio prolis can lead to invalid consent, or whether he simply uses educatio prolis as an example to distinguish the ends of marriage and the formal essential object of

¹⁴⁸ See c. LEFEBVRE, 2 March 1974, in SRR Dec, 66 (1974), p. 156; Lefebvre seems to conclude, following Giacchi, that only the exclusion of the right to the conjugal act itself is sufficient to declare nullity by exclusion of the bonum prolis (Ibid., pp. 156-57). See also c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), pp. 771-72.

marriage. 149

Among those who seem to reject any connection between educatio prolis and the validity of marriage, the equivocal use of terminology intrudes again upon an attempt to arrive at a clear understanding. The confusion means that with further discussion, if judges avoid reference to some of the problematic nomenclature, they might indeed agree as regards components of educatio prolis.

149 "Etenim ipse can. 1013, §1 definit: 'Matrimonii finis primarius est procreatio atque educatio prolis', et nullo modo apparet ratio cur modo arbitratio restringatur finis iste ad procreationem, dum etiam educatio solum videatur similiter ut matrimonii finis primarius. Nec quisquam intendit invalide contrahere positivo voluntatis actu exclusionis educationis prolis.

"Sed nec desunt casus in quibus diversi fines matrimonii possint 'mancare tutti e il matrimonio essere ugualmente valido', v. g. in causis in quibus quaedam pars sterilitate afficitur et exinde prolem nequit generare, dum propter diversitates indolis sive moralis sive physiologicae, nec locum habent mutuum adiutorium et remedium concupiscentiae. Proinde concludit professor O. Giacchi: 'Appunto per questo nella struttura giuridica del singolo matrimonio, e quindi per la sua validità, i fini non possono venire in considerazione per se stessi' [...].

"Exinde recte concludi posse videtur: 'Se la volontà del nubente si dirige ad escludere un fine del matrimonio, essa non ha alcun rilievo giuridico' [...].

"Proinde haud potest teneri necessario invalidum matrimonium ratione exclusionis asserti 'iuris ad prolem', quae requiratur, sed ratione exclusi 'iuris ad actus per se aptos ad prolis generationem', et hoc solummodo considerari potest uti elementum constitutivum matrimonii, utpote eius obiectum formale referens." c. LEFEBVRE, 2 March 1974, in SRR Dec, 66 (1974), pp. 156-57. Raad quotes the initial statement of Lefebvre as a support of his conclusion that educatio prolis is an essential obligation of marriage; c. RAAD, 20 March 1980, in ME, 105 (1980), p. 178.

3. Jurisprudence which favors a link between the spiritual bonum prolis and the validity of marriage

Although he takes a contrary position, Brennan acknowledges that some people maintain that an exclusion of the spiritual bonum prolis may render a marriage invalid. But he provides no jurisprudence or other sources to support this statement.

Because few things suffice for a condition contrary to the spiritual bonum prolis or contrary to the Catholic education of the offspring. Passing over the opinion of those who believed that sort of condition in pactum deductam always renders marriage invalid; and also the opinion which maintained that the pact to educate the offspring in infidelity vitiated the marriage, but not the pact to educate them in heresy or schism; the common doctrine of the canonists denies that this condition destroys marriage, even if in pactum deductam [...]. For a condition to educate the offspring outside the Catholic religion is not contrary to the substance of marriage [...].¹⁵⁰

Jullien says the same thing a few months later:

Would it be against the bonum prolis and therefore against the essential end of marriage, to have a positive will, i.e., a condition or an agreement to have the child educated in heresy? In other words, would the party who is imbued in heresy to such a degree that he/she has a positive will to educate the child in heresy, contract invalidly?

There are some authors who even today hold an affirmative opinion in the case, or that the marriage in the

¹⁵⁰ "Quod ad conditionem contra spirituale bonum prolis seu contra catholicam educationem prolis pauca sufficiant. Praetermissa opinione illorum, qui censebant eiusmodi conditionem in pactum deductam semper reddere invalidum matrimonium; necnon sententia, quae tenuit irritare coniugium pactum educandi prolem in infidelitate, non vero pactum eam educandi in haeresi vel schismate; doctrina communis canonistarum negat hanc conditionem, etsi in pactum deductam, matrimonium dirimere [...]. Conditio enim educandi prolem extra catholicam religionem non est contra matrimonii substantiam [...]." c. BRENNAN, 26 January 1948, in SRR Dec, 40 (1948), p. 42.

case is invalid.¹⁵¹

In several decisions Canestri also points to disagreement among canonists, but never states his own opinion.¹⁵² So apparently no Rotal jurisprudence to this date has taken the position that the spiritual bonum prolis has any relevance to the validity of marital consent.

4. Jurisprudence which opposes a link between the spiritual bonum prolis and the validity of marriage

A few decisions of the Rota consider the spiritual bonum prolis. They conclude that to educate the offspring in heresy or infidelity is not contrary to natural or positive law, and therefore it cannot affect the validity of marital consent.¹⁵³ Stankiewicz argues that

marriage by its very nature is ordered to the procreation and education of offspring (C. 1055, §1), the duty of education in its essence cannot exceed the natural substance of marriage, which is the same in every marriage both for

¹⁵¹ "At quaeritur: an sit contra bonum prolis ideoque contra finem matrimonii essentialem voluntas positiva, seu conditio, vel pactum, ut proles educetur in haeresi; aliis verbis, an pars, quae spiritu haeretico ita fallatur ut habeat positivam voluntatem educandi prolem in haeresi, invalide contrahat.

"Affirmativam sententiam, seu matrimonium esse nullum in casu, quidam adhuc sustinent." c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 355.

¹⁵² See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603; c. CANESTRI, 20 March 1948, in SRR Dec, 40 (1948), p. 94; c. CANESTRI, 26 January 1950, in SRR Dec, 42 (1950), p. 46.

¹⁵³ See c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 356; c. HEARD, 17 January 1953, in SRR Dec, 45 (1953), p. 49; c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 765; c. DE JORIO, 23 June 1971, in SRR Dec, 63 (1971), p. 515; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12.

non-Catholics and for Catholics.¹⁵⁴

Such judges believe that the spiritual bonum prolis is not of the substance or essence of marriage.¹⁵⁵ For to exclude the spiritual bonum prolis excludes neither the preservation (conservatio) nor the educatio prolis.¹⁵⁶ Furthermore, says Stankiewicz, the Code prohibits marriages entered with this shameful intention (C. 1124), and there are canonical penalties for Catholic parents who raise their children outside the Catholic religion (C. 1366).¹⁵⁷

5. Jurisprudence with regard to other aspects of educatio prolis and the validity of marriage

Only a couple of cases published by the Rota touch upon other aspects of educatio prolis.

Canon 1113 of the 1917 Code calls for parents to provide for the religious, moral, physical, and civil education of their children. Stankiewicz calls this very serious obligation an essential element of marriage: "This very serious obligation (c. 1113) formally assumed into

¹⁵⁴ "[...] matrimonium indole sua naturali ad prolis generationem educationemque ordinetur (can.1055,\$1), nec officium educationis in sua essentia excedere potest naturalem substantiam matrimonii, quae eadem est in omni coniugio tum pro acatholicis tum pro catholicis." c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 13.

¹⁵⁵ See c. BRENNAN, 26 January 1948, in SRR Dec, 40 (1948), p. 42; c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 356; c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 765; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12.

¹⁵⁶ See c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 356; c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 765; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12.

¹⁵⁷ See c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 13.

the bonum prolis, i.e., in suis principiis, becomes a constitutive element of marriage itself [...]."¹⁵⁸ Eight years later, in another case, he refers to the parallel canon in the 1983 Code (C. 1136). That canon enunciates the parental obligation to provide for the children's physical, social, cultural, moral, and religious education. Then Stankiewicz quotes his earlier decision, calling this very serious duty a constitutive element of marriage.¹⁵⁹

Pinto makes a distinction within educatio prolis between the physical bonum prolis and suitable education. He says that the duty to provide a suitable education belongs to the integrity of the marital contract, but not to its substance. Unfortunately, he never defines the term suitable (commoda), so the components of a suitable education remain unknown.¹⁶⁰

In another case, after determining that the condition to impede or to deny the religious education of offspring does not vitiate marital consent, De Jorio declares that even less does the condition not to provide social or civil education invalidate marriage.¹⁶¹

¹⁵⁸ "Haec autem gravissima obligatio (can. 1113) in bonum prolis formaliter sumptum, seu in suis principiis, tamquam elementum constitutivum ipsius matrimonii, intrat [...]." c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), p. 384.

¹⁵⁹ See c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12.

¹⁶⁰ See c. PINTO, 12 November 1973, in SRR Dec, 65 (1973), pp. 726-27.

¹⁶¹ "[...] si conditio negandi proli nasciturae religiosam educationem, immo eam impediendi, matrimonium non irritat, minus id irritat conditio ei non suppediendi civilem seu socialem educationem." c. DE JORIO, 23 June 1971, in SRR Dec, 63 (1971), p. 516, which appears to improperly mark this quotation of Staffa.

D. The basis for nullity relative to the educatio prolis

Apparently, just two published cases heard by the Rota make a judgment relative to educatio prolis and the validity of marriage.¹⁶² The first case c. Raad concludes that the marriage is valid, because the facts do not establish the existence of the cause of incapacity to assume the obligation of educatio prolis; i.e., the disorder of incurable incestuous tendencies did not exist at the time of marital consent.¹⁶³ The second case c. Stankiewicz determines that the respondent was unable to assume and fulfill the obligations of marriage, including the educatio prolis.¹⁶⁴

The other jurisprudence of the Rota only considers educatio prolis within the law section of its decisions. Under the 1917 Code, Rotal jurisprudence utilizes the following grounds for the possible determination of nullity of marriage with regard to some aspect of the educatio prolis:

¹⁶² That is, apart from an intention, condition, or pact to impede conception, which this study treats above under the headings of nullity relative to the bonum prolis.

¹⁶³ See c. RAAD, 20 March 1980, in ME, 105 (1980), p. 183.

¹⁶⁴ See c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), pp. 388 and passim. See c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], pp. 3-13, in which he focuses also on educatio prolis as a constitutive element of the bonum prolis.

- illicit object of consent, i.e., an illicit intention to act or reservation to oneself of an illicit right (c. 1081, §2) ¹⁶⁵
- the simulation of consent, i.e., the exclusion of a right or obligation (c. 1086, §2); ¹⁶⁶
- a future condition (c. 1092, 2°) or pact; ¹⁶⁷
- serious lack of discretion of judgment (lack of free will); ¹⁶⁸
- incapacity to assume and fulfill an essential obligation. ¹⁶⁹

Under the 1983 Code, the Rotal cases mention as possible grounds of nullity relative to aspects of educatio prolis: the simulation of consent (C. 1101, §2), ¹⁷⁰ and the incapacity to assume an essential

¹⁶⁵ See c. WYNEN, 9 November 1944, in SRR Dec, 36 (1944), p. 663; c. WYNEN, 27 February 1947, in SRR Dec, 39 (1947), p. 123; c. HEARD, 13 March 1948, in SRR Dec, 40 (1948), p. 88; c. CANESTRI, 20 March 1948, in SRR Dec, 40 (1948), p. 94; c. CANESTRI, 26 January 1950, in SRR Dec, 42 (1950), p. 46; c. STAFFA, 7 December 1956, in SRR Dec, 48 (1956), p. 944; c. EGAN, 20 January 1978, in SRR Dec, 70 (1978), p. 30; c. PINTO, 28 October 1983, in SRR Dec, 75 (1983), p. 559.

¹⁶⁶ See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603; c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347; c. FILIPIAK, 15 May 1965, in SRR Dec, 57 (1965), p. 405; c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 765; c. EGAN, 20 January 1978, in SRR Dec, 70 (1978), p. 30; c. PINTO, 28 October 1983, in SRR Dec, 75 (1983), p. 559.

¹⁶⁷ See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), pp. 603-4; c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347; c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 355, who also deals with three possible conditions against the spiritual bonum prolis, but discards each of them for canonical reasons, see *ibid.*, pp. 357-58.

¹⁶⁸ See c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), p. 385.

¹⁶⁹ See c. RAAD, 20 March 1980, in ME, 105 (1980), p. 178; c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), pp. 385-86.

¹⁷⁰ See c. STANKIEWICZ, 24 March 1988, (Caracas), [unpub.], p. 9; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12.

obligation of marriage (C. 1095, 3°). ¹⁷¹

Conclusion

Within the jurisprudence of the Rota, the equivocal terminology hinders any systematic treatment of the bonum prolis. The content of expressions, such as physical bonum prolis, spiritual bonum prolis, and educatio prolis, may overlap. One example is the myriad of headings under which falls the right and obligation not to impede conception of offspring; at different times it is placed under procreation, education, or the physical good of offspring.

During the last fifty years the Rota demonstrates a tendency to extend the understanding of the bonum prolis beyond the right to the conjugal act itself so as to include its natural consequences. To summarize, the Rotal jurisprudence with respect to the bonum prolis now includes aspects of **procreation**, namely sexual intercourse or the conjugal act, performed properly and in a human manner; openness to the natural effects of the conjugal act, i.e., openness to conception, and no behavior intended to lead to conception outside of natural sexual intercourse; and aspects of **education** i.e., the safeguarding of the offspring after the moment of conception, during gestation, at birth and into life thereafter.

¹⁷¹ "Profecto tota agendi ratio conventi eius incapacitatem assumendi obligationes matrimoniales tuum [sic] quoad bonum coniugum tum quoad bonum prolis sub respectu educatorio." c. STANKIEWICZ, 19 December 1985, in DE, 97, no. 2 (1986), p. 323. See also c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 5.

Educatio prolis consists of physical, moral, religious (spiritual), civil, social, and cultural dimensions, according to the two canonical codes and Rotal jurisprudence. The jurisprudence strongly supports the consideration of components of physical education as essential elements of marriage; it almost unanimously rejects spiritual (religious) and moral education as essential; and it virtually omits any consideration of civil education (c. 1113), or social and cultural education (C. 1136).

CHAPTER 4

EDUCATIO PROLIS AND POSSIBLE HEADINGS OF NULLITY

Introduction

Papal and conciliar teaching and subsequent canonical and jurisprudential developments acknowledge the education of offspring as a constitutive part of the bonum prolis. Furthermore, canon law and jurisprudence also indicate that educatio prolis consists of several components without which education itself does not exist. Because of their constitutive nature, the denial of the right or obligation to any of those components renders marital consent null. After establishing principles related to the education of offspring, it is important to examine its applicability in concrete cases, with a view to providing practical guidelines to marriage tribunals which may face cases involving the question of educatio prolis.

This chapter, therefore, first examines briefly the canonical concept of education and its essential components as a foundation for the subsequent discussion. Second, it suggests possible headings of nullity which a judge may employ with respect to educatio prolis. Third, it highlights some of the mental disorders and other behavioral indications which might suggest the possible existence of such grounds. Although the chapter rests primarily on the preceding canonical and jurisprudential analysis, in one section it adopts an interdisciplinary approach which includes psychological and psychiatric sources. Finally, the chapter raises several issues which require more exploration.

I. The canonical concept of education

Canon 795 demands that education strive for the formation of the whole person. In order to achieve its purposes, such an education requires both a proper setting and several components in order to be complete.

A. The context for the education of offspring

Parents must assume the responsibility for their offspring's education. This parental obligation finds its roots in marriage, in which they assume the duty of creating a family whose atmosphere supports the children's well-rounded development. In his apostolic exhortation on the family, John Paul II writes:

The task of giving education is rooted in the primary vocation of married couples to participate in God's creative activity: By begetting in love and for love a new person who has within himself or herself the vocation to growth and development, parents by that very fact take on the task of helping that person effectively to live a fully human life.¹

The 1983 Code emphasizes the right and obligation of parents to educate their offspring:

¹ See JOHN PAUL II, Apostolic exhortation Familiaris consortio, 22 November 1981, n. 36, in AAS, 74, 126; English trans. in TPS, 28, 31 (hereafter cited as FC, n.). "Educationis opus immittit veluti radices in primigeniam coniugum vocationem, nempe ad communicandam creatricem Dei operam: in amore ex amoreque novum gignentes hominem, qui in se quoque habet vocationem ad incrementum et progressum, parentes in se recipiunt munus efficienter eum adiuvandi ad vitam usquequaque humanam ducendam." in AAS, 74 (1982), p. 126. See Andrzej KOWALSKI, Educazione della prole nella vigente legislazione canonica, [Doctoral thesis], Roma, Pontificia Universitas Lateranensis, 1987, pp. 28-31.

Parents, and those who take their place, have both the obligation and the right to educate their children. (C. 793, §1)

And it similarly places that obligation within marriage and the family:

Those who are married are bound by the special obligation, in accordance with their own vocation, to strive for the building up of the people of God through their marriage and family.

Because they gave life to their children, parents have the most serious obligation and the right to educate them. [...] (C. 226)²

The obligation to educate, then, proceeds from the act of procreation.

Because parents hold the primary place in the task of education, their right to educate their offspring is irreplaceable and inalienable. They may neither totally delegate it to others, nor may others usurp the parental role.³ But parents should collaborate with others, including teachers and schools (C. 796, §2), the Church (C. 794, §1), and civil authority (C. 793, §2).⁴

However, the right and obligation to educate offspring pertain to all parents, including those who have children outside of marriage. The

² See Paul BAILLARGEON, The Canonical Rights and Duties of Parents in the Education of Their Children, [Doctoral thesis], Ottawa, Saint Paul University, 1987, pp. 285-88. See chapter 1, which examines the theological sources underlying CC. 226 and 793, §1.

³ See FC, n. 36; KOWALSKI, Educazione della prole, pp. 31-32.

⁴ See FC, n. 40; BAILLARGEON, The Canonical Rights and Duties of Parents, pp. 42-58; Annaluisa CASIRAGHI, "Il diritto di famiglia nel nuovo Codice di diritto canonico," in Michel THÉRIAULT and Jean THORN, eds. (= THÉRIAULT-THORN), The New Code of Canon Law: Proceedings of the 5th International Congress of Canon Law, Organized by Saint Paul University and Held at the University of Ottawa, August 19-25, 1984, Ottawa, Saint Paul University, Faculty of Canon Law, 1986, pp. 875-78; KOWALSKI, Educazione della prole, pp. 32, 39.

parental obligation perdures, even after a decree of marital separation or judgment of nullity (CC. 1154 and 1689).⁵ Additionally, the Code recognizes that at times circumstances require that other persons take the place of parents either temporarily or permanently, e.g., due to illness, incarceration, or death of the parents.⁶

Understandably, then, the responsibility to educate offspring requires adequate preparation of the couple before their marriage and the birth of their children (C. 1063).⁷

Moreover, conjugal love expresses itself in the education of offspring who are the fruit of that love. The communion of the spouses inspires all the educational activity of the parents and becomes the guarantee of its fulfillment.⁸ The interpersonal relationship of the spouses establishes and nourishes them in their role as parents, and in

⁵ With regard to similar legislation in the 1917 Code (c. 1132), see Eugene A. FORBES, The Canonical Separation of Consorts: An Historical Synopsis and Commentary on Canons 1128-1132, [Doctoral thesis], Ottawa, The Catholic University of Ottawa, 1947, pp. 309-10; William J. TOBIN, "The Rights and Obligations of Parents with Reference to the Religious Formation of the Children," in Ius populi Dei: Miscellanea in honorem Raymundi Bidagor, vol. 3, Roma, Università Gregoriana Editrice, 1972, p. 265; Ramón GARCIA LOPEZ, Decisiones matrimoniales eclesíasticas: Efectos canónicos en los esposos y en los hijos, Colección canónica, Pamplona, Ediciones Universidad de Navarra, 1979, pp. 124-36.

⁶ See CC. 774, §2; 793, §1; 868, §1, 1º; 874, §1, 1º; 914; see also C. 1366. See TOBIN, "The Rights and Obligations of Parents," p. 264; BAILLARGEON, The Canonical Rights and Duties of Parents, pp. 3-5; KOWALSKI, Educazione della prole, p. 33.

⁷ See KOWALSKI, Educazione della prole, pp. 36-39, for further treatment of this topic.

⁸ See FC, nn. 36, 41; KOWALSKI, Educazione della prole, pp. 33-35.

turn they embrace their children in that communion of love.⁹

All of this has obvious ramifications with regard to the education of offspring and marital consent. The spouses must consent to establish a community of life suitable to raise their children. Therefore, in order to insure adequate education of offspring, spouses must be able to establish an interpersonal bond between themselves, for the sake of their offspring. They must be able to work together, to assume a union of tasks related to the good of the offspring.¹⁰ Moreover, each spouse must be willing to assume the proper responsibility as father or mother.¹¹ The spouses must possess adequate communication skills in order to function as parents.¹² And undoubtedly spouses must also possess the capacity to establish an interpersonal relationship with their offspring.¹³

⁹ See FC, nn. 21, 43, 64; KOWALSKI, Educazione della prole, pp. 35-36.

¹⁰ See c. PINTO, 20 April 1979, in SRR Dec, 71 (1979), pp. 193, 201. See also Augustine MENDONÇA, "The Effects of Personality Disorders on Matrimonial Consent," in SC, 21 (1987), p. 109.

¹¹ See Germain LESAGE, "The Consortium vitae conjugalis: Nature and Applications," in SC, 6 (1972), p. 103.

¹² See James B. ZUSY, "Matrimonial Consent and Immaturity," in SC, 15 (1981), p. 230. He lists the characteristics of interpersonal integration necessary to place marital consent on p. 234.

¹³ See c. PARISELLA, 25 November 1976, in SRR Dec, 68 (1976), p. 462; c. SERRANO, 18 November 1977, in SRR Dec, 69 (1977), p. 460. See also ZUSY, "Matrimonial Consent," p. 230.

B. Essential components of education

Canon 1136 says that "Parents have the most grave obligation and the primary right and responsibility to do all in their power to ensure their children's physical, social, cultural, moral, and religious upbringing" (educatio). Such an education should take place within the context of marriage and family. It remains to consider which components of these dimensions of education constitute essential components of educatio prolis relative to marital consent.

1. The essence of education

Theological reflection on marriage helps one to discern and understand the essence of marriage, receiving its juridic designation as the formal object of marital consent. In the Code of Canon Law, marriage consists of essential elements and essential properties. The various essential elements, in turn, each comprise constitutive rights and obligations, but the Code does not enumerate them.

Previous chapters demonstrate that educatio prolis constitutes one of the essential elements of marriage, deriving from the bonum prolis to which marriage is ordered. The essential right and obligation to educate any offspring which come into a marriage flow from that essential element of educatio prolis. Before one can apprehend the content of that essential right and obligation, one must set forth the essential content of educatio itself. Therefore, in order to consent to marriage, one must know the essential components of education. This prepares one to make a mature judgment, to assume educatio prolis as an obligation, to include all those components, and not to substitute others at the moment of consent.

By definition, something is essential to an entity if it belongs to the very nature of that entity. Something essential to an object proves itself absolutely necessary for the existence of that object. What is absolutely necessary to conclude that education exists?

One approach restricts the answer to a theoretical definition of education itself. Another approach suggests that the answer begins with an analysis of the objective of education, e.g., what children need for complete human development. The essence of education then consists of everything which addresses or satisfies those needs.

To follow the first course leads to circular argumentation, because to define the essence of education means to define its substantial and accidental components. However, one can define the substantial and accidental components only when one knows what constitutes the essence of education. So, to define education objectively and to specify its essential components only succeeds if consensus exists.

To follow the second course permits the establishment of criteria by which to judge the accuracy of the definition and the enumeration of its essential components. One way to define education is to consider the purpose of education. If a particular component does not serve the purpose of education, one can conclude that it does not comprise an essential component of education.

2. The purpose of education

What is the purpose, goal, or objective of education? Certainly a general answer is obvious enough — to raise healthy offspring. But a

more precise statement of the purpose of education very much influences the eventual determination of the essential components. For example, the objective of mere survival of offspring, i.e., keeping them alive, demands much less education than the goal of raising children who progress to physical, emotional, intellectual, and spiritual maturity.

It is important to note that the defining of education and its essential components must always keep in mind the question of what it means to be human. Any answer cannot limit itself simply to the physiological understanding of human life. It must also take into account knowledge about human beings which derives from psychology and sociology, anthropology, and theology.

This conclusion originates from the movement occurring in two areas of Rotal jurisprudence. The first concerns the development in understanding another essential element of marriage. The second concerns the juridical understanding of marriage itself.

First, the preceding chapters clearly set forth the evolution of the meaning of procreatio prolis relative to marriage. Rotal jurisprudence of recent years extends the understanding of procreatio prolis beyond the right to the conjugal act. According to current jurisprudence, procreatio prolis requires an openness to the natural consequences of sexual intercourse performed "in a human manner" (C. 1061, §1).

One may no longer restrict the juridical understanding of procreatio prolis merely to its physiological component, the conjugal act. One must consider as well the manner in which one performs the act, i.e., in a ~~human~~ manner. Such a qualification requires further

exploration, but its presence signals a departure from a purely physical understanding of the essential element of procreatio prolis.

Second, marriage itself becomes the formal object of consent in the 1983 Code, a marked shift from the ius in corpus of the 1917 Code. Rotal jurisprudence has applied the fruit of serious theological investigation and canonical reflection on knowledge gained from the natural and social sciences. It now recognizes that the essence of marriage consists of more than an exchange of rights for a physical relationship, i.e., sexual intercourse. Rather, a whole complex of rights and obligations constitutes a conjugal relationship, a human community of life and love which includes emotional, religious, social, and cultural factors as well. So jurisprudence continues to explore all the dimensions of human existence as they impinge on the personal and interpersonal nature of marriage.

Rotal jurisprudence now examines more than the physical aspect of both the procreatio prolis and the formal object of marital consent. Likewise a consideration of educatio prolis must take into account more than the physical survival of the children after their birth. True education must reflect all the important dimensions which comprise human existence. Because the human person consists of body, affect, mind, and spirit, any education of the person must direct itself toward the same

(C. 795).¹⁴ An approach that minimizes education by referring only to its physiological component does not suffice juridically.

3. Principles of educatio prolis

In light of the foregoing analysis, the following principles are extremely important to the understanding of the essential components of educatio prolis:

1. Parents possess the primary right and obligation to educate their offspring. No other person or institution may usurp that right and obligation. Others may assist and collaborate with the parents to fulfill their obligation, however.

2. Education must concern itself with children of all ages. Children develop different needs and abilities through their infancy, prepubescence, and adolescence, to mature adulthood. In order to meet those needs and respond to their various abilities, education must adjust concomitantly.

3. Education must occur in the context of interpersonal relationships. The most important relationship for education consists of parents and their children. Schools, for example, cannot supply all of the educational needs of children.

¹⁴ See Gerardo DESIDERIO, L'educazione dei figli nella disciplina canonica, [Doctoral thesis], Pompei, Pontificia Universitas Studiorum a S. Thoma Aq. in Urbe, 1964, p. 16; Lorenzo MACARIO, "L'educazione dei figli nella prospettiva pedagogica della Chiesa," in La famiglia e i suoi diritti nella comunità civile e religiosa, a cura di Tarcisio BERTONE e A. SEVERGNINI, Atti del VI Colloquio giuridico, 24-26 aprile 1986, Utrumque Ius 16, [Città del Vaticano], Libreria Editrice Vaticana, 1987, p. 270.

4. Education must concern itself with all dimensions of human existence. These include children's physical and emotional well-being, intellectual instruction, moral and religious formation, social and cultural guidance. The exclusion of any essential dimension of education in fact precludes education itself.

5. The juridic notion of educatio prolis concerns the marital consent to raise children. Parents may or may not in fact fulfill that essential obligation during the marriage. The actual education which takes place does not in itself lead to a decision of nullity of marriage although it may provide indicators of invalid marital consent.

6. Some limitations circumscribe the fulfillment of the right and obligation of educatio prolis. Parents must do all in their power (pro viribus) to ensure the complete education of their offspring. The obligations must be reasonable, i.e., congruent with nature and the dictates of reason; possible, for no one is obliged to do the impossible. Although particular circumstances may mitigate the obligation, they must be very serious in order to alleviate or excuse the serious obligation of educatio prolis.¹⁵

4. Essential components of educatio prolis

The essential juridic components of educatio prolis established by canon law and jurisprudence thus far pertain primarily to physical

¹⁵ See F. Javier HERVADA XIBERTA and Pedro LOMBARDIA (= HERVADA-LOMBARDIA), Derecho matrimonial, vol. 3, in El derecho del Pueblo de Dios: Hacia un sistema de derecho canónico, Colección canónica de la Universidad de Navarra, Pamplona, Ediciones Universidad de Navarra, 1970, p. 229. See also DESIDERIO, L'educazione dei figli, pp. 27-28.

education. Some canonists also point to components of spiritual education in some cases. The preceding chapters demonstrate that, while keeping in mind the above principles, valid marital consent must include consent to protection of the life, health, and safety of children, both during the period of gestation and after their birth. Furthermore, based upon the conclusion made earlier in this study, baptized persons who enter the sacrament of marriage must consent to provide Christian education for their children.

Specifically, recall that the essential juridic components of educatio prolis include the right and obligation to protect the life and health of unborn children; not to procure an abortion; not to kill or physically harm children after their birth; not to neglect, abandon, or expose them to danger of death; and to feed the offspring.

II. The possible basis for nullity relative to educatio prolis

The essential components of the education of offspring bear directly upon the question of validity of marital consent. This section treats the specific applicability of educatio prolis under various headings of nullity of marriage. The grounds proposed here consider the prerequisite knowledge of education, and the critical evaluation, intention, and capacity to assume the essential obligation of education of offspring at the moment of consent.

A. Simulation of consent

If a person simulates consent in relation to an essential element of marriage, or substitutes a personal concept which does not correspond

to Church teaching, then the consent itself is invalid (C. 1101, §2). The theology of marriage maintains that the essence of marriage includes an orientation to educatio prolis, i.e., educatio prolis constitutes one of the essential elements of marriage. Therefore, a person who withholds or rejects consent to that essential element, or substitutes another concept of educatio which is not consonant with the teaching of the Church, vitiates the marital consent.¹⁶

Simulation of marital consent also occurs through the exclusion of the **content** of an essential element of marriage. In other words, the exclusion of any essential right or obligation relative to an essential element results in the exclusion of the essential element itself. Therefore, the exclusion of an essential right or obligation relative to

¹⁶ See John K. MUSSIO, The Education of Offspring: A Primary End of Marriage, [Doctoral thesis], Roma, Pontificium Institutum Internationale "Angelicum," 1939, p. 25; VLAMING, Praelectiones iuris matrimonii, pp. 70-72; Giovanni BARBERINI, "Sull'applicabilità del can. 1095," in DE, 96, no. 2 (1985), p. 165; Antonio MOLINO MELIA and María Elena OLMOS ORTEGA (= MOLINO-OLMOS), Derecho matrimonial canónico: Sustantivo y procesal, Madrid, Civitas, 1985, p. 226; Heinz MUSSINGHOFF, "Ausschluß der Erziehung als Ehenichtigkeitsgrund?" in AKK, 156 (1987), pp. 89-90, 92; Augustine MENDONÇA, "The Theological and Juridical Aspects of Marriage," in SC, 22 (1988), p. 291, footnote 90; Antoni STANKIEWICZ, "L'esclusione della procreazione ed educazione della prole," in La simulazione del consenso matrimoniale canonico, Studi giuridici 22, Città del Vaticano, Libreria Editrice Vaticana, 1990, p. 169; Pedro Juan VILADRICH, "Matrimonial Consent," in Code of Canon Law Annotated, Latin-English edition, of the Code of Canon Law and English-language translation of the 5th Spanish-language edition of the commentary prepared under the responsibility of the Instituto Martín de Azpilcueta, ed. Ernest CAPARROS, Michel THÉRIAULT, and Jean THORN, Montréal, Wilson & Lafleur Limitée, 1993, p. 694. In Rotal jurisprudence, see c. BEJAN, 29 October 1966, in SRR Dec, 58 (1966), p. 765; c. STANKIEWICZ, 13 May 1978, in SRR Dec, 70 (1978), p. 299; c. FILIPIAK, 15 May 1965, in SRR Dec, 57 (1965), p. 405; c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), p. 385; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12.

the education of offspring by a positive act of the will also invalidates marital consent.

Moreover, the essential obligations have certain essential characteristics. Hervada describes these obligations as **mutual, permanent, exclusive, and irrevocable**.¹⁷ Viladrich and Subirá add the demand that, besides the attributes above, an essential obligation must be **continuous**.¹⁸ So a person who places marital consent while excluding one of these attributes of an essential right or obligation relative to the essential element of educatio prolis renders the consent invalid.

In order to establish the existence of the simulation of consent, the court must take into account the declarations of the parties and testimony of the witnesses, and any documentary proof. The court must look at the circumstances surrounding the courtship, engagement, and marriage, and the parties' motivation for simulation, and their beliefs and attitudes toward marriage and offspring, as possible indications of their intention before marriage. It should also consider the jurisprudence in similar cases, and the presumptions of law, especially

¹⁷ See F. Javier HERVADA XIBERTA, "Matrimonial Law: Commentaries on Canons 1055-1165," in Ignatius GRAMUNT, Javier HERVADA and LeRoy A. WAUCK, Canons and Commentaries on Marriage, Collegeville, MN, Liturgical Press, 1987, p. 46. For an explanation of each of these attributes, see HERVADA-LOMBARDIA, Derecho matrimonial, pp. 227-28.

¹⁸ See VILADRICH, "Matrimonial Consent," pp. 687, 694; Vicente J. SUBIRA, "La incapacidad para asumir los deberes del matrimonio," in IC, 27 (1987), p. 241; HERVADA-LOMBARDIA, Derecho matrimonial, pp. 227-28, includes "continuous" in his list, but the later work "Matrimonial Law," omits it.

those concerning a right and the exercise of that right.¹⁹

Possible motives for simulation include: a desire to avoid offspring because of their gender, or fear of a physical or mental handicap, genetic defect, or disease;²⁰ a desire to avoid offspring until or after attainment of a certain status or condition, e.g., until a certain number of years pass, or achievement of a certain economic level;²¹ the fear of being a poor parent;²² and the spouses' desire for freedom from the responsibility of children.²³

Simulation relative to the essential element of educatio prolis exists when a person at the time of marital consent has an intention

¹⁹ See Lawrence G. WRENN, Annulments, 4th ed. rev., Washington, DC, The Canon Law Society of America, 1983, pp. 85-87; BERSINI, Il nuovo diritto, p. 116; MOLINA-OLMOS, Derecho matrimonial canónico, p. 226; P. Bruno BOCCARDELLI, "La prova della simulazione del consenso matrimoniale," in La simulazione del consenso matrimoniale canonico, Studi giuridici 22, Città del Vaticano, Libreria Editrice Vaticana, 1990, pp. 221-35; Alberto BERNARDEZ CANTON, Compendio de derecho matrimonial canónico, septima edición, Madrid, Tecnos, 1991, pp. 177-83.

²⁰ See, for example, c. STANKIEWICZ, 26 May 1983, in SRR Dec, 75 (1983), pp. 327-28, who suggests the fear of hereditary disease as a motive for the total exclusion of offspring. See also c. DI FELICE, 13 May 1969, in ME, 95, (1970), p. 437.

²¹ See c. STANKIEWICZ, 24 March 1988, (Caracas), [unpub.], pp. 9-11.

²² See c. DI FELICE, 13 May 1969, in ME, 95, (1970), pp. 437-38.

²³ See c. STANKIEWICZ, 24 March 1988, (Caracas), [unpub.], p. 9; and c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12.

contrary to the physical life or health of the offspring.²⁴ Authors also suggest that simulation may exist when a person consents while maintaining an intention to give birth, but then sell the children, or completely hand them over to the care of other persons, such as a nanny and tutor;²⁵ or an intention to deny any religious education to any offspring who may be born.²⁶

B. Grave lack of discretion of judgment

Marital consent presupposes the psychic capacity to elicit a human act proportionate to the rights and obligations of marriage. If that ability is absent at the moment of consent, due to a grave lack of discretion of judgment concerning the essential rights and obligations of marriage, one is incapable of placing consent validly (C. 1095, 2°). Therefore, if a person lacks the capacity to consent due to a grave lack of discretion of judgment about the essential rights and obligations associated with the education of offspring, then the marriage is

²⁴ See c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603; c. WYNEN, 9 November 1944, in SRR Dec, 36 (1944), p. 663; c. HEARD, 13 March 1948, in SRR Dec, 40 (1948), p. 88; c. CANESTRI, 20 March 1948, in SRR Dec, 40 (1948), p. 94; c. JULLIEN, 16 October 1948, in SRR Dec, 40 (1948), p. 355; c. CANESTRI, 26 January 1950, in SRR Dec, 42 (1950), p. 46; c. MATTIOLI, 22 May 1958, in SRR Dec, 50 (1958), p. 347; c. FILIPIAK, 15 May 1965, in SRR Dec, 57 (1965), p. 405; c. EGAN, 20 January 1978, in SRR Dec, 70 (1978), p. 30; c. STANKIEWICZ, 13 May 1978, in SRR Dec, 70 (1978), p. 299; c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), p. 385; c. PINTO, 28 October 1983, in SRR Dec, 75 (1983), pp. 559-60; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 12.

²⁵ See MUSSINGHOFF, "Ausschluß der Erziehung," p. 92.

²⁶ See MUSSIO, The Education of Offspring, pp. 73-74.

invalid.²⁷

To establish the existence of a grave lack of discretion of judgment at the time of consent, courts must consider the statements of the parties and witnesses. Information regarding the behavior and the physical and mental states of the parties leading to the engagement and at the wedding itself can provide important support. In some cases, the services of an expert may help to demonstrate the existence and severity of a mental impairment. An examination of jurisprudence in similar cases may also assist the court to reach a decision.

A grave lack of discretion of judgment concerning the essential obligation of educatio prolis exists when a person at the time of marital consent lacks sufficient comprehension and free will to assume the right and obligation of education of offspring.²⁸ According to Pompedda, who outlines the various capacities required for the appropriate discretion of judgment,²⁹ a person must also possess sufficient critical evaluation concerning the essential obligation of educatio prolis.

²⁷ See ZUSY, "Matrimonial Consent," p. 228; Augustine MENDONÇA, "The Incapacity to Contract Marriage: Canon 1095," in SC, 19 (1985), p. 278; Vidal GUTIARTE IZQUIERDO, "Una contribución a la teoría de la capacidad psíquica en el negocio jurídico matrimonial a partir del can. 1095," in REDC, 45 (1988), p. 645; F. Javier HERVADA XIBERTA, "Obligaciones esenciales del matrimonio," in IC, 31 (1991), pp. 60, 79-80; VILADRICH, "Matrimonial Consent," p. 686. In jurisprudence, see also c. BROWN, [Tribunal of Westminster], 26 February 1976, in CLSN, no. 31 (1976), pp. 43-44.

²⁸ See c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), p. 385.

²⁹ See Mario F. POMPEDDA, "Maturità psichica e matrimonio nei canoni 1095, 1096," in Apollinaris, 57 (1984), p. 134; MENDONÇA, "The Incapacity to Contract Marriage," p. 275.

C. Incapacity to assume the essential obligations of marriage

The incapacity at the time of consent to assume all the essential obligations of marriage vitiates the consent (C. 1095, 3°). If one is unable to fulfill an essential obligation, then one is unable to assume the obligation required in marital consent.³⁰ Therefore, a person must be able to assume the essential obligation to educate any offspring which might be the fruit of the marriage, and able to fulfill that obligation.³¹

³⁰ See David E. FELLHAUER, "Psychological Incapacity for Marriage in the Revised Code of Canon Law," in THERIAULT-THORN, The New Code of Canon Law, p. 1027, who quotes the coetus revising the canons on marriage; MENDONÇA, "The Incapacity to Contract Marriage," p. 295; Mario F. POMPEDDA, "Incapacity to Assume the Essential Obligations of Marriage," in Incapacity for Marriage: Jurisprudence and Interpretation, Robert M. SABLE, coordinator and editor, Acts of the III Gregorian Colloquium (1-6 September 1986), Romae, Pontificia Universitas Gregoriana, 1987, pp. 160-62.

³¹ See MOLINA-OLMOS, Derecho matrimonial canónico, p. 192; Cosmas ALUEDE OJEMEN, Psychological Factors in Matrimonial Consent in the Light of Canonical Legislation, [Doctoral thesis], Rome, Pontificia Universitas Urbaniana, 1986, pp. 131, 136-37, 291-93; POMPEDDA, "Incapacity to Assume," p. 190; MUSSINGHOFF, "Ausschluß der Erziehung," p. 93; MENDONÇA, "The Theological and Juridical Aspects of Marriage," p. 291, footnote 90; GUITARTE, "Una contribución a la teoría de la capacidad psíquica," p. 645; HERVADA, "Obligaciones esenciales," pp. 79-80; VILADRICH, "Matrimonial Consent," p. 687. See also LESAGE, "The Consortium vitae conjugalis," p. 103. For Rotal jurisprudence, see c. STANKIEWICZ, 23 July 1981, in SRR Dec. 73 (1981), p. 385; c. STANKIEWICZ, 19 December 1985, in DE, 97, no. 2 (1986), p. 323; c. STANKIEWICZ, 20 April 1989, (Caracas), [unpub.], p. 5. For other jurisprudence, see c. BROWN, [Tribunal of Westminster], 31 October 1974, P.N. 1-007/74, [unpub.], [p. 1 and passim]; c. MORRISEY, [Provincial Tribunal of Québec], 11 June 1975, in SC, 9 (1975), p. 185; c. CUCSCHIERI, [Toronto Regional Tribunal], 26 January 1982, in SC, 16 (1982), p. 430; c. RIERA, [Ecclesiastical Tribunal of Barcelona], 2 May 1985, in Revista jurídica de Cataluña, 2 (1986), p. 590.

In order to establish the incapacity to assume the essential obligations, the court must prove that a cause of a psychological nature exists in the contractant at the time of marital consent. The cause must be serious enough to prevent the consent.³² Usually this requires the assistance of experts to demonstrate the existence and severity of the impairment and its repercussion on the assumption and fulfillment of the essential obligations of marriage. The court must also consider the declarations of the parties and testimony of the witnesses. It must take into account as well the circumstances and events leading to the moment of consent. Jurisprudence from similar cases can assist the decision-making process. Presumptions also have an important role in this type of case.³³

Persons do not render valid marital consent to the essential obligation of educatio proles when they lack the psychic capacity to

³² See MENDONÇA, "The Incapacity to Contract Marriage, p. 308; Francis G. MORRISEY, "L'évolution du texte des canons 1055 et 1095," in SC, 19 (1985), pp. 28-29; Aidan MC GRATH, "On the Gravity of Causes of a Psychological Nature in the Proof of Inability to Assume the Essential Obligations of Marriage," in SC, 22 (1988), p. 74.

³³ See WRENN, Annulments, pp. 43-44; MENDONÇA, "The Incapacity to Contract Marriage, pp. 320-24.

assume the obligation of protecting and caring for their offspring,³⁴
perhaps due to an incestuous anomaly.³⁵

D. Conditional consent

The 1983 Code stipulates that a person may not place a condition concerning the future in marital consent. If one enters marriage with a condition regarding the future, the marriage is invalid (C. 1102, §1).³⁶ Therefore, a person must consent without placing any condition concerning the future education of any offspring.

³⁴ See c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), pp. 388-90; c. STANKIEWICZ, 19 December 1985, in DE, 97, no. 2 (1986), p. 323. For other jurisprudence, see c. BROWN, [Tribunal of Westminster], 31 October 1974, P.N. 1-007/74, [unpub.], [p. 4]; c. MORRISEY, [Provincial Tribunal of Québec], 11 June 1975, in SC, 9 (1975), p. 185; c. RIERA, [Ecclesiastical Tribunal of Barcelona], 2 May 1985, in Revista jurídica de Cataluña, 2 (1986), pp. 589-90. In canonical literature, see John R. KEATING, The Bearing of Mental Impairment on the Validity of Marriage: An Analysis of Rotal Jurisprudence, Analecta Gregoriana 136, Rome, Gregorian University Press, 1964, p. 189; LESAGE, "The Consortium vitae conjugalis," p. 103; José M. PINTO GOMEZ, "Incapacitas assumendi matrimonii onera in novo CIC," in Dilexit iustitiam: Studia in honorem Aurelii Card. Sabattani, curantibus Zenon GROCHOLEWSKI et Vincente CARCEL ORTI, Studi giuridici 5, Città del Vaticano, Vaticana Libreria Editrice, 1984, p. 28; ALUEDE, Psychological Factors, p. 136; MUSSINGHOFF, "Ausschluß der Erziehung," p. 93. See also KOWALSKI, Educazione della prole, p. 32.

³⁵ See c. RAAD, 20 March 1980, in ME, 105 (1980), pp. 179-80. See also PINTO, "Incapacitas," p. 28; MOLINA-OLMOS, Derecho matrimonial canónico, p. 192; MUSSINGHOFF, "Ausschluß der Erziehung," p. 93, all of whom cite the Raad decision.

³⁶ When judging a case, one must give special attention to the time of consent, because the 1917 Code considers as non-existent any "future conditions" which are "necessary, impossible, or immoral" and not contrary to the substance of marriage, i.e., as if they had not been made (C. 1092, 1°). Licit "future conditions" suspended the validity of the marriage until the fulfillment or verification of the condition (C. 1092, 3°). See also Lynda A. ROBITAILLE, "Conditioned Consent: Natural Law and Human Positive Law," in SC, 26 (1992), pp. 75-110.

To establish the existence of a condition regarding the future, one must consider the possibility of a condition, either implicit or explicit in words or in actions. Courts also must rely upon the statements of the parties and witnesses, made especially tempore non suspecto, although they may be able to provide documents to support their position. Information concerning the motive, circumstances, and the behavior of the parties before the marriage, and after the discovery or non-fulfillment of the condition — all may provide additional support to prove the existence of a condition.³⁷

Conditions concerning the future education of offspring include intentions provided above under the heading of simulation but expressed as a condition to consent.³⁸

E. Ignorance

In order to enter marriage, one must have a minimal knowledge about the substance of marriage, and the law presumes as much after puberty. A minimal knowledge of marriage includes the recognition that "it is ordered to the procreation of children." But proof that a capable person nevertheless lacks such knowledge overturns the presumption of law, and the consent itself is void (C. 1096).

The fact that the canonical text requires knowledge of marriage ordered to procreation of offspring, and not also to education, raises a

³⁷ See WRENN, Annulments, pp. 103-8.

³⁸ For example, see c. CANESTRI, 8 July 1941, in SRR Dec, 33 (1941), p. 603; c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), p. 385.

difficulty. Ignorance concerning the substance of an act results in the invalidity of that act (C. 126). But is it not precisely the essential nature of education which this study demonstrates? In order to elicit marital consent, it seems that a person may not be ignorant of the fact that marriage is ordered to education of offspring as well. In other words, a person must know that marriage is ordered to procreation, and that it is ordered toward raising a family. ³⁹

In order to overturn the presumption of the law and thereby establish the presence of ignorance, one must prove that a person lacks sufficient knowledge (C. 1096, §2). The court must consider the declarations of the parties, testimony of witnesses, and perhaps the services of an expert to demonstrate an inability to know or understand. It can also look at the circumstances that support such a lack of knowledge and any specific behavior that supports the existence of ignorance. ⁴⁰

Ignorance concerning the education of offspring might occur in a milieu in which a person does not know that marriage demands safeguarding the life and caring for all offspring who are born. In

³⁹ See HERVADA, "Matrimonial Law," p. 41. For jurisprudence, see c. MATTIOLI, 25 November 1964, in SRR Dec, 56 (1964), p. 868. See also Rolando ZERA, De ignorantia in re matrimoniali: Eius natura iuridica quoad consensus validitatem deque eiusdem probatione in iudicio, Romae, [Ancora], 1978, pp. 63-64. Cf. Vincent M. SMITH, Ignorance Affecting Matrimonial Consent, [Doctoral thesis], Canon Law Studies 245, Washington, DC, The Catholic University of America, 1950, pp. 89-90, and MUSSINGHOFF, "Ausschluß der Erziehung," p. 74, who say one may not apply this canon to education of offspring because the text speaks only of ignorance concerning procreation.

⁴⁰ See WRENN, Annulments, p. 77.

other words, a person may believe that it is consonant with marriage to kill the offspring of a certain gender.⁴¹ Such persons do not possess the requisite knowledge that marriage is ordered toward procreation of offspring, and their education which follows as a natural consequence.

F. Error of quality

An error concerning the personal quality of a person normally does not affect the validity of consent. However, if in error one directly and principally intends a personal quality, it renders the marriage invalid (C. 1097, §2). If in error, for example, a person directly and principally intends some quality in order to educate the offspring which may come into the marriage, it renders the marriage invalid.⁴²

Error may result when a quality sought and presumed to exist does not in fact exist. Or error may result from the presence of a totally abhorrent quality. In either case, the quality must be of such importance that the person merits only secondary importance in comparison to the quality. The court must consider the declarations of the parties and testimony of witnesses to establish the existence of error. Documents, including "false documentation," may also constitute proof. A crucial item of proof in a case of error concerns the reaction of a party to the discovery of the presence or absence of a particular quality. The immediate breakup of conjugal life constitutes much

⁴¹ See c. MATTIOLI, 25 November 1964, in SRR Dec, 56 (1964), p. 868.

⁴² See MUSSINGHOFF, "Ausschluß der Erziehung," pp. 93-94.

stronger proof; the delay of a breakup, on the other hand, makes proof of error much more difficult.⁴³

Gangoiti lists several personal qualities that may adversely affect the exercise of the rights and obligations of marriage. They include such defects as hereditary disease, children from a previous union, and a criminal record.⁴⁴ However, a party may directly and principally intend a quality opposite to such defects, in order to educate their children. Also, one may conclude that the essential element of educatio prolis pertains to Gangoiti's final suggestion of any defect of persons or objects which lack the essential constitutive elements of marriage. Then tribunals may apply it to concrete cases concerning education of offspring. Mussinghoff suggests that the quality of religion also may result in error relative to educatio prolis.⁴⁵

⁴³ See J. James CUNEO, "Deceit/Error of Person as a Caput nullitatis," in Canon Law Society of America, Proceedings of the Forty-Fifth Annual Convention, San Francisco, California, October 10-13, 1983, Washington, DC, Canon Law Society of America, 1984, pp. 162-63; Ladislav ORSY, Marriage in Canon Law: Texts and Comments, Reflections and Questions, Wilmington, DE, M. Glazier, 1986, pp. 134-38.

⁴⁴ See Benito GANGOITI, "Dolus, vel melius, error constituitne titulum sive causam nullitatis matrimonii?" in Angelicum, 50 (1973), pp. 405-6. CUNEO, "Deceit/Error of Person," p. 163, footnote 13; and Kevin W. VANN, Canon 1098 of the Revised Code of Canon Law: History, Development, and Implications, [Doctoral thesis], Romae, Pontificia Studiorum Universitas a S. Thoma Aq. in Urbe, 1985, p. 195, both cite in English Gangoiti's list of qualities.

⁴⁵ See MUSSINGHOFF, "Ausschluß der Erziehung," p. 94. Such an error comes about when a party seeks a Catholic partner in order to provide a Catholic education for their offspring in the existing atheistic environment.

G. Deceit

A person may deceive another about a personal quality, in order to obtain marital consent. If that deceit seriously disturbs their marital relationship, it invalidates the marriage (C. 1098). If a person fraudulently conceals a personal quality which relates to the education of offspring, and which can seriously disrupt their conjugal life, the marriage is invalid.⁴⁶

In order to establish the existence of deceit, the court must consider the declarations of the parties and testimony of the witnesses. Documents may provide proof as well. Other information, such as the motivation for the deceit, or a personal history of deception, may offer additional support. The court must also show the existence of deliberate misrepresentation whose intention was to induce another into marriage. The absence or presence of the quality must create a potentially disruptive situation in the marriage.⁴⁷

Deceit relative to the education of offspring may involve personal qualities, such as those mentioned above under the heading of error.⁴⁸ Mussinghoff also suggests that deceit applies when a party conceals a

⁴⁶ See *ibid.*, pp. 93-94. In a more general manner, authors consider deceit concerning a deficiency of a person or the object in the essential constitutive elements of marriage; see GANGOITI, "Dolus," p. 406; CUNEO, "Deceit/Error of Person," p. 166; VANN, Canon 1098, p. 195.

⁴⁷ See Ellsworth KNEAL et al., "A Proposed In iure Section for the New Statute of Fraud," in The Jurist, 42 (1982), pp. 221-22; CUNEO, "Deceit/Error of Person," p. 166; WRENN, Annulments, pp. 79-80; ORSY, Marriage in Canon Law, p. 139; VANN, Canon 1098, pp. 194-95.

⁴⁸ See GANGOITI, "Dolus," p. 406; CUNEO, "Deceit/Error of Person," p. 163, footnote 13; VANN, Canon 1098, p. 195.

previous contract to sell the children.⁴⁹

III. Intimations of nullity relative to educatio prolis

The mental disorder or behavior pattern of a party may point to the possible nullity of a marriage. Such a case requires further investigation in order to establish that they in fact underlie a person's critical ability, intention, or capacity to consent validly to the education of offspring. For its purposes, this study identifies four categories of indicators relative to educatio prolis: personality disorders; other disorders; personal life history; and emotional and behavioral indications.

A. Personality disorders

Among mental disorders,⁵⁰ several personality disorders have a direct effect upon the ability to raise children. The particular characteristics of those personality disorders impinge upon the

⁴⁹ See MUSSINGHOFF, "Ausschluß der Erziehung," pp. 93-94.

⁵⁰ This study uses three primary sources: AMERICAN PSYCHIATRIC ASSOCIATION, Diagnostic and Statistical Manual of Mental Disorders, third ed., revised, Washington, DC, American Psychiatric Association, 1987, (hereafter cited as DSM III-R, pp.), presents the psychiatric diagnostic criteria. Theodore MILLON, Disorders of Personality: DSM III: Axis II, New York, John Wiley & Sons, 1981, describes the behavior, self-understanding, and most importantly for this study, the style of relating interpersonally, which may affect the capacity to assume the essential obligations of marriage. Aaron T. BECK, Arthur FREEMAN, et al. (= BECK et al.), Cognitive Therapy of Personality Disorders, New York, Guilford Press, [1990], summarizes for each disorder a person's views and beliefs, and the emotions and behavior to which they lead, all of which may affect the discretionary judgment necessary for marital consent.

knowledge, critical faculty, capacity, or intention to consent to the education of offspring. Therefore, the existence of such a personality disorder in a person renders his or her marital consent invalid.⁵¹

1. Antisocial

Persons with an antisocial personality disorder manifest a long pattern of irresponsible and antisocial behavior. They may be unable to maintain consistent work behavior or honor financial obligations. They may fail to conform to societal and legal norms. They may equally demonstrate a total disregard for the truth and a tendency to deceive others. They may not exhibit much tolerance for boredom or frustration and may seem impulsive. They may be aggressive, show a strong desire to dominate and humiliate others, and manifest reckless disregard for the safety of others. Frequently they fail to become independent self-supporting adults and may live in institutions for many years.⁵²

A person with an antisocial personality disorder may be unable to function as a parent. Indications include a child's malnutrition or illness which results from a lack of hygiene; failure to procure medical care for a child who is seriously ill, or to arrange for a

⁵¹ For an introduction to personality and personality disorders, see MENDONÇA, "The Effects of Personality Disorders," pp. 69-82. He also addresses the juridic effects of several personality disorders, which this study notes under the specific disorder below. See also Lourdes RUANO ESPINA, La incapacidad para asumir las obligaciones esenciales del matrimonio por causas psíquicas, como capítulo de nulidad, Barcelona, Librería Bosch, 1989, pp. 189-98.

⁵² See DSM III-R, pp. 342-46; MILLON, Disorders of Personality, pp. 198-203; BECK et al., Cognitive Therapy, pp. 48-49.

caretaker when the parent is absent; a child who depends on others outside the immediate family for food or shelter; a parent who squanders money on personal items which the family requires for necessities.⁵³

Someone with an antisocial personality disorder clearly lacks the capacity to assume the essential obligation of educating offspring. The list just recited above suggests many indications of parents who may be incapable of taking care of the simplest needs to protect the health of their children. Their recklessness may indicate an incapacity to safeguard their children's welfare. Additionally, they may not be able over a period of time to provide for basic food, clothing, and shelter for their family. They may not be able to create a suitable home environment as they impulsively move from place to place. Such persons may not be able to tolerate either the boredom or frustration of the day-to-day responsibilities of raising a family. They may lack the capacity to establish an interpersonal relationship with their offspring or to establish proper parental authority and discipline due to their desire to dominate and humiliate others.⁵⁴ Persons with an antisocial personality disorder may lack the capacity to make a mature decision

⁵³ See DSM III-R, pp. 345-46.

⁵⁴ See also H. Leslie BROWN and Bernard O'CONNOR (= BROWN-O'CONNOR), "The Assessment and Management of 'Personality Disorders' in Matrimonial Tribunal Procedure," in SC, 11 (1977), p. 185; PINTO, "Incapacitas," p. 34; MENDONÇA, "The Effects of Personality Disorders," pp. 107-10.

concerning the raising of children.⁵⁵ Finally, such persons may lie about themselves or their beliefs, with regard to education of offspring, in order to marry, raising the possibilities of simulation, deceit, or error.

2. Borderline

A borderline personality disorder may manifest itself as a pattern of instability, impulsivity, and unpredictability in several areas. Persons with this disorder frequently show uncertainty about issues of self-image and identity. Intensity and instability usually disturb their interpersonal relationships, so they may make frantic efforts to avoid abandonment. They may also shift rapidly and erratically from one mood or attitude to another.

Persons with a borderline personality disorder may have such a need to avoid desertion that they sacrifice themselves in the process, insinuating themselves into the lives of others so that they are not only useful but needed. Therefore, they may be incapable of raising children to a mature level of independence. Furthermore, their failure to create a secure and rewarding dependency relationship can lead to affective responses, which result in effectively avoiding responsibilities and placing additional responsibilities upon their

⁵⁵ See also BROWN-O'CONNOR, "The Assessment and Management of 'Personality Disorders,'" p. 185; MENDONÇA, "The Effects of Personality Disorders," pp. 87-91, 94, 104-5.

families.⁵⁶

As they consider whether to enter a relationship into which offspring may come, such persons may lack sufficient discretion of judgment. They cannot make a mature and free decision to raise children, instead desiring to enter a relationship in which they will experience the dependence of their children. Nor are they able to assume the responsibilities of raising a family, or to allow the necessary freedom for their children to grow into responsible and self-sufficient adults. Therefore, they lack the capacity to assume the essential obligation of educatio prolis.⁵⁷

3. Dependent

Persons with a dependent personality disorder show a pattern of dependent and submissive behavior. They may require an excessive amount of reassurance and advice in order to make common decisions. Such persons prefer to yield and to placate and allow others to make their decisions. They may not be able, therefore, to initiate tasks independently. Or they may claim weakness and inferiority in order to avoid assuming responsibility.⁵⁸

⁵⁶ See DSM III-R, pp. 346-47; MILLON, Disorders of Personality, pp. 349-52.

⁵⁷ See also MENDONÇA, "The Effects of Personality Disorders," pp. 113-16.

⁵⁸ See DSM III-R, pp. 353-54; MILLON, Disorders of Personality, pp. 112-15; BECK et al., Cognitive Therapy, pp. 44-45.

Because they lack the capacity to decide for themselves, the dependent personality disorder renders persons incapable of the necessary discretion of judgment concerning the essential obligation of raising offspring. For a parent must be able to make decisions, fulfill responsibilities, maintain discipline, and exercise parental authority in a mature fashion. So, a need for constant reassurance and advice, and an inability to make decisions for themselves, to initiate tasks independently, and to assume responsibility — all raise the possibility of an incapacity to assume the obligation of educatio prolis.

4. Histrionic

A pattern of excessive emotion and a constant search to be the center of attention exhibits itself in persons with a histrionic (formerly hysterical) personality disorder. Such persons are self-centered and show little tolerance for the frustration of delayed gratification. In their interpersonal relationships, they may enter into dependency, demanding reassurance, approval, or praise. So, they may engage in a variety of maneuvers to gain favorable response, including a readiness to conform to the wishes or expectations of others.⁵⁹

Because of their own self-centeredness, persons with a histrionic personality disorder may not be able to raise children. For either the child becomes the focus of attention, drawing attention away from the

⁵⁹ See DSM III-R, pp. 348-49; MILLON, Disorders of Personality, pp. 139-43; BECK et al., Cognitive Therapy, pp. 50-51.

parent and suffering the consequences. Or, as parents they simply neglect the needs of the child in order to achieve their own needs and to attain self-gratification. Such persons reveal an incapacity to assume the essential obligation of raising children. Their need for approval and their willingness to conform to the expectations of others also provides a possible motivation for simulation of marital consent regarding education of offspring. Finally, the disorder may affect the capacity for proper discretion of judgment concerning the essential obligation of educatio prolis.⁶⁰

5. Narcissistic

Persons with a narcissistic personality disorder manifest a pattern of grandiosity and extreme sensitivity to evaluation by others. Typically, they strive to reinforce and strengthen a fragile self-esteem. They may be overly self-centered, and then expect others to serve and obey them. They demonstrate an inability to recognize and experience the feelings of others, so they manipulate or exploit interpersonal relationships, either to achieve their own ends, or to increase their own power, reputation, or sense of achievement.⁶¹

Because they cannot respond to their children with empathy, persons with a narcissistic personality disorder are not able to enter

⁶⁰ See also BROWN-O'CONNOR, "The Assessment and Management of 'Personality Disorders,'" pp. 183-84; MENDONÇA, "The Effects of Personality Disorders," pp. 94-101, 110-13.

⁶¹ See DSM III-R, pp. 349-51; MILLON, Disorders of Personality, pp. 166-69; BECK et al., Cognitive Therapy, pp. 49-50.

an interpersonal relationship with them. Instead, they may exploit their children for their own ends or self-aggrandizement, treating their children like servants. This disorder may result in children who are simply neglected or children who are so dependent that they never mature to self-sufficient adulthood. Such persons lack the capacity to assume the essential obligation of educatio prolis.⁶²

6. Paranoid

Those who exhibit a paranoid personality disorder show a thoroughgoing and unjustified tendency to interpret the actions of others as deliberately threatening or demeaning. So they dare not trust anyone and strive to be free of all personal entanglements and obligations. As a result of this disorder they become fearful, insensitive, angry, and hostile toward others.⁶³

Precisely because of a deep desire to be free of personal obligations, persons with a paranoid personality disorder are not able to assume the essential obligation to educate their offspring. They may not be capable of creating a suitable environment to raise offspring. As parents, they cannot demonstrate trust or sensitivity toward their own children or they express an unwarranted hostility toward them. Thus, they demonstrate the absence of a capacity to enter into an

⁶² See also Robert J. SANSON, "Narcissistic Personality Disorder: Possible Effects on the Validity of Marital Consent," in ME, 113 (1988), pp. 541-81, and 114 (1989), pp. 405-18.

⁶³ See DSM III-R, pp. 337-39; MILLON, Disorders of Personality, pp. 379-83; BECK et al., Cognitive Therapy, pp. 47 48.

interpersonal relationship with them. Furthermore, the lack of critical self-perception interferes with the discretion of judgment necessary to make the decision to marry and raise children. ⁶⁴

7. Passive aggressive

A pattern of passive resistance to demands upon their personal performance reveals itself in persons with a passive aggressive personality disorder. When they do not wish to do a required task, they procrastinate to the point of missing deadlines, they deliberately respond in a slow manner, or they carry out the job carelessly. Such persons avoid their own obligations and then, by failing to do their part, obstruct the efforts of others as well. They possess chronic impatience and a low tolerance for frustration, resulting in unjustifiable protests that others are placing unreasonable demands on them. ⁶⁵

Persons with a passive aggressive personality disorder are particularly dangerous as parents. Children, and especially infants, often demand and require immediate attention to their basic needs. Yet those with a passive aggressive personality disorder show little tolerance for frustration and chronic impatience when things do not proceed in a manner to their liking. So they may respond to their

⁶⁴ See also BROWN-O'CONNOR, "The Assessment and Management of 'Personality Disorders,'" p. 186; PINTO, "Incapacitas," p. 34; MENDONÇA, "The Effects of Personality Disorders," pp. 92-94, 106-7.

⁶⁵ See DSM III-R, pp. 356-58; MILLON, Disorders of Personality, pp. 254-58; BECK et al., Cognitive Therapy, pp. 45-46.

children by procrastinating, avoiding responsibility, responding when they get around to it, or obstructing others in the performance of their necessary tasks. This disorder renders a person incapable of assuming the essential obligation of educatio prolis.⁶⁶

8. Sadistic

A sadistic personality disorder manifests itself in a pattern of cruel, demeaning, and aggressive behavior.⁶⁷ Persons with this disorder prompt others to act through intimidation. They use cruelty or violence to establish dominance over others, and then treat those under their control with harsh discipline. In this manner, they restrict the autonomy of people with whom they have a close relationship.⁶⁸

These proposed symptoms of a sadistic personality disorder do not apply to someone who only directs such behavior toward one person. Nevertheless, parents who direct such a pattern of behavior toward a child, for example, demonstrate an obvious incapacity to assume the obligation of educatio prolis.

⁶⁶ See c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 (1981), pp. 383-91, who concludes that the passive aggressive personality of one party contributed to an incapacity to maintain, in part, the obligation of educatio prolis. See also MENDONÇA, "The Effects of Personality Disorders," pp. 117-20.

⁶⁷ One finds this proposal for the diagnosis of a sadistic personality disorder in Appendix A of the DSM III-R, to facilitate further study and research. The American Psychiatric Association has not yet formally adopted it.

⁶⁸ See DSM III-R, pp. 369-71.

9. Schizoid

Persons with a schizoid personality disorder neither desire nor enjoy close personal relationships, including being part of a family. They are self-absorbed, unable to respond to others, and lack social skills. They prefer, rather, to remain isolated and willingly sacrifice intimacy to preserve their independence.⁶⁹

The motivations of those with a schizoid personality disorder who wish to raise a family are therefore suspect, thus raising the possibility of simulation or defective discretion of judgment.⁷⁰ More probably, such persons lack the capacity to establish an interpersonal relationship with their children, so that they are unable to assume the essential obligation of educatio prolis.

B. Other disorders

Besides personality disorders, other conditions may render a person unable to consent to marriage relative to the education of offspring.

1. Multiple sclerosis

Because multiple sclerosis attacks the central nervous system it may cause severe physiological and psychological impairment in some people. The primary psychological effects consist of cognitive and

⁶⁹ See *ibid.*, pp. 339-40; MILLON, Disorders of Personality, pp. 283-85; BECK et al., Cognitive Therapy, pp. 51-52.

⁷⁰ See also BROWN-O'CONNOR, "The Assessment and Management of 'Personality Disorders,'" p. 187.

affective disturbances. In serious cases those changes may deprive persons of the capacity for discretionary judgment concerning the commitment to raise children, or render them incapable of assuming the essential obligation of educatio prolis.⁷¹

2. Pedophilia, rape, and sexual abuse

The diagnosis of pedophilia describes a person who experiences intense recurring sexual urges and fantasies about sexual activity with a prepubescent child. Those who act on those urges manifest a wide variety of behaviors, from exposing themselves, undressing the child, touching or fondling the child, to engaging in sexual acts with the child. They use varying degrees of force to achieve those ends. They may threaten the child to prevent disclosure. Some may even develop complicated techniques to obtain children.⁷²

Other behaviors, such as incest, sexual abuse, and rape, may include sexual activity with one's children or stepchildren. Such behaviors do not always conform strictly to the diagnosis of pedophilia or another mental disorder per se, due to the age of the child, or the singular nature of the activity. However, the description of pedophilia, as well as numerous scientific studies, clearly suggest that

⁷¹ See Augustine MENDONÇA, "The Effects of Multiple Sclerosis on Matrimonial Consent," in SC, 21 (1987), pp. 419-50. In his article he refers to an unpublished sentence g. Kinlin, of the Toronto Regional Tribunal, who finds the marriage null due to one party's incapacity to assume the perpetuity of the rights and obligations of marriage, including the obligation of emotional and psychological well-being of the child (pp. 444-49).

⁷² See DSM III-R, pp. 284-85.

any sexual activity with one's children or stepchildren has serious repercussions on their lives.⁷³

First, the children of such families may suffer both immediate and long-term effects. They may experience serious and chronic stress, with inevitable influence on their growth and personality development. They may develop any of a wide variety of disorders. The very fact of sexual activity with one's offspring suggests an incapacity to understand educatio prolis. The willingness to participate in such activity with one's children, regardless of its traumatic and enduring effects, points to a possible incapacity to assume that obligation.⁷⁴

3. Psychoactive substance dependence

Persons with the disorder of psychoactive substance dependence manifest a cluster of cognitive, behavioral, and physiological symptoms which indicate impaired control of the use of that substance, and its continued use despite adverse consequences. Dependence differs from abuse, in which one does not demonstrate all of the symptoms of dependence on a psychoactive substance. Dependence shows various degrees of severity, and one may achieve partial or full remission of substance dependence. Although the symptoms of dependence may be less prominent or not even appear in particular instances, they remain the

⁷³ See Nira SANGAL, The Effects of Incest on Matrimonial Consent, [Doctoral thesis], Ottawa, Saint Paul University, 1993, xv, 292 pp.

⁷⁴ For Rotal jurisprudence, see c. RAAD, 20 March 1980, in ME, 105 (1980), p. 179. See also PINTO, "Incapacitas," pp. 31-32; Augustine MENDONÇA, "Recent Rotal Jurisprudence on the Effects of Sexual Disorders on Matrimonial Consent," in SC, 26 (1992), p. 230.

same regardless of the substance. Psychoactive substances include alcohol; amphetamines and similarly acting substances; cannabis, e.g., marijuana, hashish, and THC; cocaine; hallucinogens, e.g., LSD and mescaline; inhalants, e.g., paint thinner and cleaning fluid; nicotine; opioids, e.g., heroin and morphine; phencyclidine (PCP) and similarly acting substances; sedatives, hypnotics, and anxiolytics, e.g., barbiturates and sleeping pills.

Persons with psychoactive substance dependence may spend a great deal of time in activities in order to procure the substance, use it, or recover from its use. Their symptoms of intoxication or withdrawal may prevent or hinder the fulfillment of their obligations. And they may reduce or relinquish other activities because of the substance use.⁷⁵

Psychoactive substance dependence seriously affects the dependent persons and their interpersonal relationships, especially their spouse and family.⁷⁶ According to their state of intoxication or withdrawal at the time of marital consent, persons with substance dependence may not be able to consent to educatio prolis. The severity of their dependence may indicate an incapacity to assume the essential obligation

⁷⁵ See DSM III-R, pp. 165-85.

⁷⁶ See Edward KAUFMAN and E. Mansell PATTISON, "The Family and Alcoholism," in E. Mansell PATTISON and Edward KAUFMAN, eds., Encyclopedic Handbook of Alcoholism, New York, Gardner Press, 1982, pp. 667-68; Joseph C. KERN, "Management of Children of Alcoholics," in Sheldon ZIMBERG et al., eds., Practical Approaches to Alcoholism Psychotherapy, 2d ed., New York and London, Plenum Press, 1985, p. 316.

of raising offspring.⁷⁷

4. Schizophrenia

Persons with schizophrenia exhibit psychotic symptoms in several areas. They may experience delusions or hallucinations. They may show disturbances in their thought processes, affect, perception, and volition. Such persons may develop difficulties with their sense of self, their interpersonal relationships, and their connection to the external world. Schizophrenia progresses through several phases, and one may not observe its presence until significant deterioration occurs.⁷⁸

Persons with schizophrenia, depending upon its degree of progression, may not be able to evaluate and freely choose to enter a relationship in which they may have to raise offspring. Or they may simply be incapable of raising children because of their own debilitating illness. Thus, such persons may lack the discretion necessary to place marital consent, or they may not be capable of assuming the essential obligation of educatio prolis.⁷⁹

⁷⁷ See Edward F. WEIST, Alcoholism and Marriage: An Inquiry into the Effect of Alcoholism on Matrimonial Consent, Rome, Pontificia Università Lateranense, 1977, pp. 57-72; BARBERINI, "Sull'applicabilità del can. 1095," p. 165; RUANO, La incapacidad para asumir, pp. 152-72.

⁷⁸ See DSM III-R, pp. 187-98.

⁷⁹ See also Augustine MENDONÇA, "Schizophrenia and Nullity of Marriage," in SC, 17 (1983), pp. 197-237; RUANO, La incapacidad para asumir, pp. 123-32.

C. Personal life history

Sometimes the familial events and experiences of a person's childhood greatly influence his or her capacity to raise children. The person learns cognitive, affective, and behavioral patterns in order to survive. But those same learned patterns can later prove harmful to oneself and one's children. They may lead to misconceptions concerning the content of education. They may distort one's judgment about raising offspring, and they can render one incapable of assuming the obligation of educatio prolis.

A child who experiences sexual abuse, or whose parents manifest certain personality disorders or substance dependence, tends toward those same conditions. Many adults with the disorder of pedophilia sustained sexual abuse in their own childhood.⁸⁰ Likewise, the children of parents with antisocial or histrionic personality disorders show an increased likelihood to develop the same disorders.⁸¹

Psychoactive substance dependence and the behaviors which accompany it often pass from one generation to the next.⁸² The complex of mental, emotional, and behavioral characteristics of an adult child of an alcoholic, for example, may indicate an inability to enter and maintain an interpersonal relationship with one's offspring. The symptoms may be serious enough to establish an incapacity to assume the

⁸⁰ See DSM III-R, p. 285.

⁸¹ See *ibid.*, pp. 343, 349.

⁸² See Robert A. LEWIS, "The Family and Addictions: An Introduction," in Family Relations, 38 (1989), p. 254.

obligation of educatio prolis.⁸³

Therefore, particular information from a family history may provide another indication about a person's knowledge, critical ability, and capacity relative to educatio prolis.

D. Emotional and behavioral indications

At times testimony of parties or witnesses may provide clues about the knowledge, attitudes, or behavior of the parties regarding educatio prolis. Those clues should prompt further examination into possible disorders, motivations, or causes whose juridic effect may be the nullity of marital consent. Some indications worth investigating more closely include:

- refusal to give birth or raise children because of their gender, handicap, disease, or genetic problem;
- physical abandonment, neglect, or abuse of a child;
- sexual abuse of the child, or of the parent as a child;
- intention or desire to place all children for adoption;
- parent does not fulfill legal obligation of child support;
- parent has history of transience, unemployment, and financial mismanagement;
- neglect or refusal to provide for intellectual education of a child;
- emotional distance, neglect, or abuse of a child;
- misuse or abuse of parental authority or discipline;
- misdirected desire to give birth or raise children;

⁸³ See Wayne KRITSBERG, The Adult Children of Alcoholics Syndrome: From Discovery to Recovery, Pompano Beach, FL, Health Communications, 1986, pp. 35-44.

- self-centeredness of a parent to the neglect or harm of a child;
- refusal of parent to duly recognize autonomy of a child;
- fear of parent concerning giving birth, passing a hereditary disease, or being a poor parent;
- parent makes no contribution toward raising the child;
- parents pass all responsibility for raising the child to others;
- raising a child in an environment or as an instrument for crime, immorality, or scandal;
- parent uses a child for pornographic purposes or prostitution;
- neglect or refusal of parent to present a child for baptism, religious formation, or preparation for reception of sacraments;
- parents leave all religious decisions for the child to make later;
- raising a child in an environment of black arts, satanic worship, or pagan cult;
- isolation or confinement of a child to prevent social interaction;
- coercion of a child to particular state of life or profession;
- personality disorder of parent which may affect education adversely;
- parent manifests signs of substance abuse or dependence;
- family history suggests substance abuse or dependence, or a personality disorder.

This list does not exhaust the possibilities. The presence of any such intention, behavior, or disorder does not lead to an automatic declaration of nullity of marriage. But it does urge one to look for further evidence relative to educatio prolis.

IV. Issues for further discussion

Many other issues remain concerning educatio prolis and its relationship to marriage and marital consent.

A. Dimensions of education

Canon 1136 specifies five dimensions of an offspring's education. What juridic significance do they have with regard to marriage? In the canonical and jurisprudential treatment of the content of educatio until now, the discussion focuses almost entirely on the physical dimensions of education.⁸⁴ The other dimensions of this most grave obligation of the parents, as well as the physical one, require much more exploration. Research must consider the content in general of the various dimensions of education and then the essential components of each dimension relative to marital consent.

Canonists suggest that **physical** education considers not only the physiological existence of the children, but also their intellectual growth, and their emotional development.⁸⁵ **Moral** education consists in the maturation of human or natural values, and the movement toward

⁸⁴ Only a few authors consider the specific content of the various facets of education listed in C. 1136 or its predecessor c. 1113. See Louis DE SMET, Tractatus theologico-canonicus de sponsalibus et matrimonio, editio quarta (Inde a Codice altera), Brugis, Car. Beyaert, 1927, nn. 273-275, pp. 234-36; Franz X. WERNZ, Ius matrimoniale, in Ius canonicum: Ad codicis normam exactum, opera Petri VIDAL (= WERNZ-VIDAL), editio tertia a Philippo AGUIRRE recognita, vol. 5, Romae, Aedes Universitatis Gregoriana, 1946, n. 602, pp. 761-62; Theodorus VLAMING, Praelectiones iuris matrimonii ad normam Codicis iuris canonici, quarto edidit L. BENDER, Bussum in Hollandia, P. Brand, 1950, pp. 471-79; Felix M. CAPPELLO, De matrimonio, in Tractatus canonico-moralis de sacramentis, editio septima accurate emendata et aucta, vol. 5, Romae, Marietti, 1947-1961, nn. 741-743, pp. 668-70; DESIDERIO, L'educazione dei figli, pp. 23-28; GARCIA, Decisiones matrimoniales eclesiasticas, p. 122, who repeats De Smet; BATILLARGEON, The Canonical Rights and Duties of Parents, pp. 15-23; KOWALSKI, Educazione della prole, pp. 40-77, who then adds affective, vocational and professional education in pp. 77-89.

⁸⁵ See MUSSINGHOFF, "Ausschluß der Erziehung," p. 91.

perfection as a human being. Religious education, on the other hand, concerns the divine origin and goal of humanity, and specifically refers to Christian and Catholic formation.⁸⁶ Social education includes development of the virtues and skills necessary to live and participate in public life.⁸⁷ Cultural education concerns participation and appreciation for the humanities and arts, as well as the natural and human sciences, history, philosophy, and theology.⁸⁸

B. Age of children

For what period of time do parents bear the obligation to raise their children? The answer touches upon the determination of capacity to educate. Several canonists assert that the education of offspring must begin at the moment of conception,⁸⁹ but the duration of that obligation remains undetermined. For example, because of a personality

⁸⁶ See Communicationes, 5 (1973), p. 76.

⁸⁷ CONCILIIUM VATICANUM II, Declaration Gravissimum educationis, 28 October 1965, n. 1, in AAS, 58, 730; English trans. in Vatican Council II: The Conciliar and Post Conciliar Documents, ed. Austin FLANNERY, Northport, NY, Costello Publishing Co., 1975, p. 727.

⁸⁸ The Second Vatican Council treats the proper development of culture as one of the more urgent problems of the modern world; see CONCILIIUM VATICANUM II, Pastoral constitution Gaudium et spes, 7 December 1965, n. 46, in AAS, 58, 1066; Vatican Council II, p. 948 (hereafter cited as GS, n.). It considers the subject in GS, nn. 53-63, and specifically cultural education in n. 61.

⁸⁹ See DE SMET, De sponsalibus et matrimonio, nn. 273-274, pp. 234-35; MUSSIO, The Education of Offspring, p. 25; VLAMING, Praelectiones iuris matrimonii, p. 475; GARCIA, Decisiones matrimoniales eclesiasticas, p. 122; Hugo MONTES BRUNET, "Famiglia ed educazione," in La "Familiaris consortio" nel commento di H. Alessandri [et al.], Pastorale 8, Città del Vaticano, Libreria Editrice Vaticana, [1982], p. 166; KOWALSKI, Educazione della prole, pp. 23, 41, 103-5.

disorder, the parent may be incapable of educating offspring of certain ages, or they can no longer raise their children because their disorder has progressed to a particular stage. Such parents may not be able to assume the perpetual obligation of educatio prolis.⁹⁰

Some authors maintain that the obligation to educate offspring continues until adulthood, or to the age of majority.⁹¹ Others point out that children become capable of exercising certain rights at various ages, at which time their parents' obligation either alters or disappears.⁹² They suggest that the obligation decreases as the offspring advance in age, until they reach the age of majority.⁹³ Although each answer resolves some questions, it raises other difficulties about the essential obligation and essential components of education. The issue requires further study, particularly from a juridic standpoint.

C. Education of stepchildren

Does a spouse at the time of consent assume the obligation to educate the offspring of the other spouse from a previous relationship? Hervada answers affirmatively, stating that the question centers on the

⁹⁰ See GUITARTE, "Una contribución a la teoría de la capacidad psíquica," p. 645.

⁹¹ See MONTES, "Famiglia ed educazione," p. 166; KOWALSKI, Educazione della prole, pp. 23, 48, 103.

⁹² For example, in the 1983 Code persons may exercise various rights at the age of reason, and at the ages of 14, 16, 17, 18, and 21.

⁹³ See MUSSIO, The Education of Offspring, pp. 24-28; VLAMING, Praelectiones iuris matrimonii, pp. 470-71.

conjugal relationship. The educative facet of fatherhood and motherhood demands that parents integrate children from a previous relationship into a new nuclear family.⁹⁴ In a Rotal decision c. Stankiewicz, the mother was not able to assume the essential obligation to raise the children of her husband, but the decision does not address the question of stepchildren in an explicit manner.⁹⁵ Not everyone may agree with this argument and its implications.

D. Cultural variations in education

What significance should one give to regional, ethnic, and cultural variations in education? Insofar as they arise from differences in understanding the essence and purpose of education and its components, they may influence the effect of education of offspring relative to marital consent. For example, cultures may vary in their understanding of what constitutes abuse or appropriate disciplinary behavior.⁹⁶ Authors note that ethnic and cultural values and customs affect the understanding of marriage and the bonum prolis.⁹⁷ It seems likely that cultural differences may affect both the understanding and

⁹⁴ See HERVADA-LOMBARDIA, Derecho matrimonial, pp. 251-52.

⁹⁵ See c. STANKIEWICZ, 23 July 1981, in SRR Dec 73 (1981), pp. 383-91.

⁹⁶ See GARANZINI, "Troubled Homes," in Pastoral Psychology, 36 (1988), pp. 222-24.

⁹⁷ See José M. SERRANO RUIZ, "Values in the Formation of Christian Marriage," in Vidyaiyoti, 38 (1978), pp. 155-58. In Rotal jurisprudence, see c. MATTIOLI, 28 July 1954, in SRR Dec, 46 (1954), p. 679.

capacity for educatio prolis and its essential components, and they require a closer look.⁹⁸

E. Obligation for Christian education in sacramental marriage

Do additional essential obligations regarding education fall to those who enter a sacramental marriage? Or more specifically, must two Christians also assume the essential obligation of Christian education in their marital consent? Then, how might a mixed marriage affect that obligation?

Authors concede that the obligation of Christian education falls to those who enter a sacramental marriage, but the obligation does not belong to the essence of marriage or affect its validity.⁹⁹ But other canonists suggest that in a sacramental marriage spouses assume the additional obligation of Christian education of their offspring.¹⁰⁰

⁹⁸ See Marc de MUELENAERE, The Canonical Significance of Marital Fidelity Among the Bantu of South Africa, [Doctoral thesis], Ottawa, Saint Paul University, 1985, pp. 38-42; MUSSINGHOFF, "Ausschluß der Erziehung," p. 93; MENDONÇA, "The Theological and Juridical Aspects of Marriage," p. 291. On the other hand, documents such as the Apostolic See's Charter of Rights of the Family, and the United Nations' Declaration of the Rights of the Child and Convention on the Rights of the Child, provide a common foundation on the rights of children.

⁹⁹ See MUSSIO, The Education of Offspring, pp. 78-79. But even Mussio concedes that some degree of religious and moral education belongs to the essence of marriage and affects its validity (pp. 77-78).

¹⁰⁰ See KOWALSKI, Educazione della prole, pp. 23, 103. See also José Luis LARRABE, El matrimonio cristiano y la familia, Historia salutis 19, Madrid, [Editorial católica], 1973, pp. 114-15, who claims this opinion rests on the work of Augustine. See also Severino MASTROTTI, L'educazione della prole come elemento essenziale dell'oggetto del consenso matrimoniale, [Doctoral thesis], Roma, Pontificia Universitas Gregoriana, 1984, pp. 109-10.

Cappello even admits the possibility that an intention or condition against Christian or Catholic education may render a marriage null in specific circumstances.¹⁰¹

On the other hand, Stankiewicz argues that education of the offspring in the Catholic faith does not pertain to the substance of marriage. He reasons that the obligation of education cannot exceed the natural substance of marriage, which remains the same for Catholics and others.¹⁰² He also argues that religious education in the Catholic faith does not derive from the physical procreation of offspring, but from their baptism. Finally, in cases of mixed marriage, the promise to fulfill the obligation of Catholic education exists apart from the instructions to the future spouses about the purpose and essential properties of marriage (C. 1125, 1° and 3°). Therefore, he concludes, one cannot consider the obligation to educate offspring in the Catholic faith an essential element of marriage, or necessary in order to constitute marriage.¹⁰³

F. Family life and education of offspring

Does a juridic connection exist between the rights of the family and the rights and obligations of marriage?¹⁰⁴ For marriage has as one

¹⁰¹ CAPPELLO, De matrimonio, n. 600,2,6°, p. 535, and n. 631,4, p. 564.

¹⁰² See c. STANKIEWICZ, 20 April 1989, [unpub.], p. 13.

¹⁰³ See STANKIEWICZ, "L'esclusione," pp. 172-74.

¹⁰⁴ See MUSSINGHOFF, "Ausschluß der Erziehung," p. 94.

of its purposes "the procreation and education of offspring," by which one says that marriage has for its purpose the creation of family life.¹⁰⁵ The absence of children in a marriage, because the mother does not conceive or give birth, or because the children have matured and left home, does not mean that a family does not exist or disappears.¹⁰⁶ Perhaps one could say that the rights of the family consist of the rights and obligations of the spouses together with the rights and obligations of the parents and the children. What constitutes the essence of a family, before, after, or without children? And what is the relationship between the essence of family life and the essential right and obligation of educatio prolis in the context of marriage?¹⁰⁷ The Catholic Church's traditional support of family life can contribute significantly to the exploration of this issue.

G. Source of the obligation to educate offspring

Where does the obligation to educate offspring, which appears in ecclesiastical law, originate? Some authors assert that the obligation derives from natural law, while others state its origin lies in divine

¹⁰⁵ See Geoffrey ROBINSON, "Unresolved Questions in the Theology of Marriage," in The Jurist, 43 (1983), pp. 85-86.

¹⁰⁶ See John L. BOOJAMRA, "Theological and Pedagogical Perspectives on the Family as Educator," in Greek Orthodox Theological Review, 29 (1984), pp. 12-13.

¹⁰⁷ See, for example, *ibid.*, pp. 1-34.

law as well as natural law.¹⁰⁸ The answer may play a significant role in the determination of the understanding of education and its essential components.¹⁰⁹

Conclusion

Education refers to a process of formation which assists offspring to grow and progress toward maturity and adulthood. Such an education best takes place in the context of marriage and family life. There, the parents must establish an interpersonal relationship with their children, which fosters education.

¹⁰⁸ An argument for the natural law origin of the bonum prolis, including its educational aspect, appears in MUSSIO, The Education of Offspring, pp. 13-21. Other proponents of the natural law origin of the obligation to educate include WERNZ-VIDAL, Ius canonicum, n. 602, p. 761; Carl HOLBÖCK, Tractatus de jurisprudentia Sacrae Romanae Rotae juxta decisiones quas hoc sacrum tribunal edidit ab anno 1909 usque ad annum 1946 et publicavit in voluminibus I-XXXVIII, Gratiae, In Officina Libraria "Styria," 1957, p. 132; HERVADA-LOMBARDIA, Derecho matrimonial, p. 255; TOBIN, "The Rights and Obligations of Parents," p. 72; GARCIA, Decisiones matrimoniales eclesiásticas, p. 121; Francesco BERSINI, "La famiglia e il matrimonio nel nuovo Codice di diritto canonico," in La civiltà cattolica, 134, no. 2 (1983), pp. 127-28; Ermanno GRAZIANI, "Essenza del matrimonio e definizione del consenso," in La nuova legislazione matrimoniale canonica: Il consenso: Elementi essenziali, difetti, vizi, Studi giuridici 10, Città del Vaticano, Vaticana Libreria Editrice, 1986, p. 26; Domenico MOGAVERO, "L'insegnamento della religione nelle scuole secondo il Codice di diritto canonico," in ME, 112 (1987), p. 145; Sebastiano VILLEGIANTE, "L'amore coniugale e il consenso matrimoniale canonico (Lettera aperta a Pio Fedele)," in EIC, 46, no. 1 (1990), pp. 100-2.

Those who point to both natural and divine law as sources include Donald M. ENDEBROCK, The Parental Obligation to Care for the Religious Education of Children within the Home with Special Attention to the Training of the Pre-School Child, [Doctoral thesis], Catholic University of America Studies in Sacred Theology, series 2, number 84, Washington, DC, The Catholic University of America Press, 1955, p. 29; BAILLARGEON, The Canonical Rights and Duties of Parents, p. 23; KOWALSKI, Educazione della prole, pp. 28-29; MUSSINGHOFF, "Ausschluß der Erziehung," pp. 78-79.

¹⁰⁹ See KOWALSKI, Educazione della prole, pp. 29, 103.

Education has several important dimensions, which the 1983 Code calls physical, moral, religious, social, and cultural. The essential components of these various dimensions together achieve the purpose of education of offspring, to which marriage is ordered. Some limitations apply to its fulfillment, which does not affect the validity of marital consent.

Several headings of nullity pertain to the necessary knowledge, intention, and capacity for educatio prolis. Various causes include personality disorders, other disorders, and events of one's personal life history with profound repercussions. Often a case includes indicators of an emotional or behavioral nature. They should prompt further examination into possible disorders, motivations, or causes whose juridic effect may be the nullity of marital consent. Finally, several issues remain relative to educatio prolis that deserve further exploration, and require interdisciplinary inquiry involving the fields of philosophy and science, theology and canon law.

Admittedly this chapter raises important questions, and presents a wide variety of suggestions and ideas. But this design should prompt judges to consider the real possibility of cases appearing in their tribunals in which the evidence relative to educatio prolis in that marriage supports a decree of nullity. And it anticipates that canonists will continue to explore, clarify, and expand the understanding of educatio prolis as an essential element and obligation of marriage, the essential components of education, and their relationship to marital consent.

GENERAL CONCLUSION

Human society supports the fundamental right of children to receive a wholesome education. The primary care and responsibility for such an education belongs to the parents. The Roman Catholic Church defends that parental right and obligation, both in the international forum and in its own legislation.

Offspring are one of the good things that come from marriage. The notion of the bonum prolis counters claims that marriage is sinful or that it ranks second to virginity. Christian theology uses various paradigms to teach about marriage, but it always includes the education of offspring among the goods, ends, or meaning of marriage. Procreation and education constitute one continuous process of formation. Together they strive for the full human maturity of offspring.

The canonical and jurisprudential development of the concept of the bonum prolis parallel one another in a swing from literal adherence to the wording of the 1917 Code, to a tendency to extend the content of the bonum prolis. They constantly maintain that procreation and education of offspring constitute a good and an end of marriage. But at times they restrict that good or end to a juridical right to the conjugal act in marriage, with only brief allusions to educatio prolis. In the last fifty years, the efforts of canonists reaffirm the full meaning of the bonum prolis.

This integral process of procreation and education thus recovers its proper place as a constitutive element of the essence of marriage and, consequently, an element of the formal object of marital consent.

In delineating the essential juridic components of the bonum prolis, the use of equivocal language often hampers the discussion. Therefore, this study makes a distinction between procreation and education of offspring. If the former indicates sexual intercourse and the orientation of the conjugal act to offspring, then the latter includes everything subsequent to the moment of conception, i.e. gestation, birth, and life thereafter.

Admittedly, the development of the theological, canonical, and jurisprudential understandings of educatio prolis parallel one another, but only to a certain extent. Theology, canon law, and jurisprudence agree upon several essential components of educatio prolis. Almost unanimous agreement exists concerning aspects of physical education of offspring.

Physical education denotes the protection of the life and well-being of children. Specific juridic essential components of physical education include the protection of the life and health of unborn children; not to procure an abortion; not to kill or physically harm children after their birth; not to neglect, abandon, or expose the offspring to danger of death; and to feed them. But a human being exists as more than a corporeal being.

Theologians consistently refer to the dimensions of moral and religious education as a parental obligation. Some canonists include aspects of the spiritual bonum prolis within the substance of marriage, especially in the context of sacramental marriage. But until now Rotal jurisprudence does not consider the dimensions of moral and religious education to pertain to the essence of marriage. However, this study

concludes that the essence of a sacramental marriage must include the Christian education of the offspring (C. 226, §2). Essential juridic components of a specifically Christian education include baptism and Christian religious instruction.

Finally, theologians mention the social and cultural dimensions of education, and C. 1136 specifies them as facets of the parental obligation toward their offspring. But beyond that they receive very little attention in canon law, and virtually none in Rotal jurisprudence. All of these dimensions of education require much more study, so as not to reduce the essence to education solely to its physiological components.

This study indicates several possible headings of nullity relative to educatio prolis. Tribunals must consider whether a party possesses the knowledge, critical ability, intention, and capacity for educatio prolis at the moment of consent. Their absence renders the marriage invalid.

Many causes, of a psychic nature as well as life experiences, may lead to nullity of marriage with respect to educatio prolis. Tribunals may discover intimations of such causes in the testimonies of the parties and their witnesses which call for further investigation. It is important to remember, however, that the determination of nullity of a marriage does not rest upon poor attempts or even complete absence of the education of offspring, but invalid consent to educatio prolis.

Several issues with regard to educatio prolis require further exploration. Researchers must continue to explore the developmental needs of children within different socio-cultural contexts, and to

determine characteristics of the various dimensions of education. Canon law and jurisprudence must continue to examine and apply the results of that research, in order to further establish essential components of children's education. They must investigate the nature of sacramental marriage, and the essential obligations regarding education of offspring which flow from it. They must address these questions, among others, so as to uphold the dignity and value of marriage, the well-being of offspring, and the essential parental right and obligation to educate them.

APPENDIX

This appendix presents a model in iure section of a judicial sentence on educatio prolis. It considers the education of offspring under three possible headings of nullity: grave lack of discretion of judgment (C. 1095, 2°), incapacity to assume the essential obligations of marriage (C. 1095, 3°), and the simulation of consent (C. 1101). The model includes these headings of nullity because the Roman Rota has published jurisprudence relative to educatio prolis under all three of them.

Doctrine:

1. The teaching of the Catholic Church at the Second Vatican Council describes marriage as a covenant by which the spouses give themselves and accept each other to establish a community of conjugal life and love, of its very nature ordered to the good of the spouses, of their children, and of society (Pastoral constitution Gaudium et spes, 7 December 1965, in AAS, 58 (1966), n. 48, pp. 1067-68).

2. Among the good things of marriage, Augustine names the good of offspring (bonum prolis) (De bono coniugali, I, 24, 32, in PL, vol. 40, Parisiis, excudebatur et venit apud J.-P. Migne Editorem, 1845, col. 394). Augustine does not limit the good of offspring to procreation, but includes their care after their birth (educare) (De sancta virginitate, 12, 12, in PL, vol. 40, col. 401). For Christians, it also includes the spiritual care of the children through baptism (De nuptiis et concupiscentia, I, 17, 19, in PL, vol. 44, col. 424).

3. Among the ends of marriage, Hugh of St. Victor speaks of the hope of offspring (spes prolis), which means that offspring are "waited for devotedly, accepted lovingly, and nurtured religiously" (HUGH OF ST. VICTOR, De sacramentis christianae fidei, II, 11, 7, in PL, vol. 176, Parisiis, excudebatur et venit apud J.-P. Migne Editorem, 1854, col. 494). Scholastic theologians such as Duns Scotus and Bonaventure consider the rights exchanged in the act of marital consent, which include procreation and education of offspring (T. MACKIN, What is Marriage?, New York, Paulist Press, 1982, pp. 185-86).

4. Thomas Aquinas speaks of three ends of marriage, including offspring, which indicates both their procreation and their education (Summa theologiae, pars 3, q. 29, a. 2, in Sancti Thomae Aquinatis doctoris angelici opera omnia, iussu edita Leonis XIII P. M. [...] [= Opera omnia], Romae, Ex Typographia Polyglotta S. C. de Propaganda Fide, 1903, tom. 11, p. 312; IDEM, Supplementum, q. 49, a. 2, ad 1, in Opera omnia, Romae, Ex Typographia Polyglotta S. C. de Propaganda Fide, 1906, tom. 12, p. 93). "For nature does not only intend the generation of children, but also their growth and progress toward complete human stature [...]" (Supplementum, q. 41, a. 1, p. 78). Parents must care for the physical life of their children, and their spiritual life as well (Summa contra Gentiles, IV, 58, in Opera omnia, Romae apud sedem commissionis leoninae, Typis Riccardi Garroni, 1930, tom. 15, p. 194). Aquinas concludes that "offspring," i.e. the procreation and education of offspring, constitutes the principal end of marriage (Supplementum, q. 41, a. 1, p. 78; q. 65, a. 1, p. 132). He points out that offspring has an equivocal meaning, and thus distinguishes between offspring in

suis principiis and offspring in se. Offspring in suis principiis refers to the intention to have and raise children, and in this sense the end of marriage is necessary for marriage. Offspring in se refers to the use of marriage and the actual birth and upbringing of children, whose absence does not vitiate a marriage (Supplementum, q. 49, a. 3, p. 94).

5. The Council of Florence later adopts Augustine's threefold good of marriage, whose first good is "offspring to be received and educated for the worship of God" ("Decretum pro Armenis," ex Bulla Exsultate Deo, 22 November 1439, in Enchiridion symbolorum, definitionum et declarationum de rebus fidei et morum, quod primum edidit Henricus DENZINGER et quod funditus retractavit, auxit, notulis ornavit Adolfus SCHÖNMETZER, ed. 35 emendata, Friburgi Brisgoviae, Herder, 1973, n. 1327 [formerly n. 702]).

6. Papal teaching confirms that the purpose of marriage does not consist simply in procreation but also in the upbringing of children, including their religious education. (PIUS VIII, Encyclical letter Traditi humilitati, 24 May 1829, n. 10, in Magnum bullarium romanum: Continuatio, vol. 18, Graz, Akademische Druck- u. Verlagsanstalt, 1963-1964, p. 19; LEO XIII, Encyclical letter Arcanum, 10 February 1880, n. 12, in AAS, vol. 12, pp. 389-90; PIUS XI, Encyclical letter Divini illius Magistri, 31 December 1929, nn. 32, 36, in AAS, 22 [1930], pp. 59-60; PIUS XI, Encyclical letter Casti connubii, 31 December 1930, nn. 13, 16, in AAS, 22 [1930], pp. 544-46; PIUS XII, Allocution to the Catholic Union of Midwives, 29 October 1951, in AAS, 43 [1951], pp. 848-52; JOHN PAUL II, Apostolic exhortation

Familiaris consortio, 22 November 1981, n. 36, in AAS, 74 [1982], pp. 126-27).

Pius XII states in one address that "the work of education is so important that it surpasses even the work of procreation in importance and consequences" (Allocution to World Congress of Fertility, in AAS, 48 [1956], p. 473). John XXIII says that human and Christian education "completes and perfects" procreation (Allocution to the Sacred Roman Rota, 25 October 1960, in AAS, 52 [1960], p. 902).

According to both natural and divine law, the parents possess both the right and the duty to raise the children to whom they give life (LEO XIII, Encyclical letter Sapientiae christianae, 10 January 1880, n. 42, in ASS, vol. 22, p. 403; Encyclical letter Nobilissima Gallorum gens, 8 February 1884, n. 3, in ASS, vol. 16, p. 243; PIUS XI, Divini illius Magistri, n. 32, p. 59; Pius XI, Casti connubii, n. 16, pp. 545-46; JOHN XXIII, Encyclical letter Mater et magistra, 15 May 1961, n. 195, in AAS, 52 [1960], p. 447; JOHN PAUL II, Familiaris consortio, n. 46, p. 138).

7. The Second Vatican Council reaffirms that marriage is ordered toward the procreation and education of offspring (Gaudium et spes, nn. 48, 50, pp. 1067, 1070). It emphasizes that parents have the primary right and responsibility for the education of their children (Declaration Gravissimum educationis, 28 October 1965, n. 6, in AAS, 58 [1966], p. 733), which is intimately connected with their procreation (Ibid., n. 3, p. 731).

8. Such an education includes many dimensions, including physical, intellectual, moral, and spiritual formation (PIUS XI, Divini

illius Magistri, n. 95, p. 83; JOHN XIII, Mater et magistra, n. 45, p. 411; JOHN PAUL II, Familiaris consortio, n. 15, p. 97).

Legislation:

9. The marriage covenant by its very nature is ordered, together with the good of spouses, to the procreation and education of offspring (C. 1055, §1). Marriage is brought into existence by lawfully manifested consent, an act of the will to give and accept one another for the purpose of establishing a marriage (C. 1057). Those who marry must have the ability to critically evaluate the essential rights and obligations of marriage (C. 1095, 2°). Persons who, because of causes of a psychological nature, are unable to assume the essential obligations of marriage, are incapable of contracting marriage (C. 1095, 3°). Nor may they positively exclude an essential element of marriage (C. 1101, §2).

10. In canonical tradition, the bonum prolis includes the educatio prolis. As such, the education of offspring pertains to the essence of marriage. Therefore, the education of offspring constitutes one of the essential elements of marriage. (R. AVERSA, De ordinis et matrimonii sacramentis, q. 3, s. 4, in Theologia scholastica universa, vol. 6, Bononiae, Typis Iacobi Montij & Caroli Zeneri, 1642, p. 255; P. DENS, Tractatus de matrimonio, n. 39, § 3, in Theologia ad usum seminariorum et sacrae theologiae alumnorum, editio nova emendata, vol. 7, Mechliniae, P. J. Hanicq, 1838, p. 155; E. GÉNICOT, Theologiae moralis institutiones, editio quarta, vol. 2, Lovanii, Typis et Sumptibus Polleunis et Ceuterick, 1902, n. 459, p. 509; E. PIRHING, Jus

canonicum[...], editio novissima, tom. 4, Venetiis, Ex Thipographia Remondiniana, 1759, lib. IV, tit. 5, § 3, n. 13, pp. 43-44; T. SANCHEZ, De sancto matrimonii sacramento disputationum tomi tres, posterior et accuratior editio, Norimbergae, Sumptibus J. C. Lochneri, 1706, tom. 1, lib. II, disp. 29, n. 12, p. 152; F. SCHMALZGRUEBER, Jus ecclesiasticum universum [...], Romae, Ex Tipographia Rev. Cam. Apostolicae, 1844, tom. 4, tit. V, § 1, n. 6, p. 390; A. SABATTANI, "Exclusio boni prolis ad tempus," in AKK, 144 [1975], p. 463; U. NAVARRETE, "De iure ad vitae communionem: Observationes ad novum Schema canonis 1086 §2," in Periodica, 66 [1977], p. 256; S. MASTROTTO, L'educazione della prole come elemento essenziale dell'oggetto del consenso matrimoniale, [Doctoral thesis], Roma, Pontificia Universitas Gregoriana, 1984, p. 111; A. STANKIEWICZ, "L'esclusione della procreazione ed educazione della prole," in La simulazione del consenso matrimoniale canonico, Studi giuridici 22, Città del Vaticano, Libreria Editrice Vaticana, 1990, p. 166).

Therefore, those who marry must have the capacity to critically evaluate and to assume the essential right and obligation of educatio prolis. Nor may they positively exclude the essential element of education of offspring. The grave obligation of the parents to ensure the education of their offspring includes several dimensions, including physical, social, cultural, moral and religious upbringing (C. 1136).

11. The right and obligation of education of offspring includes the right and obligation not to procure an abortion, or otherwise to kill the offspring before or after its birth; not to deny nourishment to the offspring, or abandon or expose the offspring to the danger of

death; and not to mutilate, maim, or harm the offspring (A. REIFFENSTUEL, Jus canonicum universum [...], Maceratae [...] Sed Prostant Venetiis, Apud Antonium Bortoli, 1746, tom. 4, lib. IV, tit. 5, n. 48, p. 68; B. PONCE DE LEON [Pontius], De sacramento matrimonii tractatus [...], nova editio, Venetiis, Apud Laurentium Basilium, 1756, lib. III, cap. 9, n. 5, p. 89; P. BÖCKHN, Commentarius in jus canonicum universum, Salisburgi, Typis Joannis Josephi Mayr, vol. 3, tit. V, n. 51, p. 125; SANCHEZ, De sancto matrimonii sacramento, tom. 1, lib. V, disp. 9, n. 12; P. HUIZING, "Bonum prolis ut elementum essenziale obiecti formalis consensus matrimonialis," in Gregorianum, 43 (1962), pp. 671-75; STANKIEWICZ, "L'esclusione della procreazione ed educazione della prole," pp. 166-69).

12. Some authors maintain that parents have a right and duty to provide for the moral and spiritual bonum prolis as well (A. JEMOLO, Il matrimonio nel diritto canonico, Milano, Francesco Vallardi, 1941, n. 110, p. 210; M. CORONATA, De sacramentis, vol. 3, Taurini, Marietti, 1943-1946, n. 516, p. 705, and see also n. 604 pp. 842-44; F. CAPPELLO, De matrimonio, in Tractatus canonico-moralis de sacramentis, editio septima accurate emendata et aucta, vol. 5, Romae, Marietti, 1961, n. 631, p. 564). They teach that it is contrary to the substance of Christian marriage to consent with an intention or condition to educate the offspring in heresy (F. SCHMIER, Jurisprudentia canonico-civilis, Salisburgi, Impensis & Literis Joannis Josephi Mayr, Aulico-Academici Typographi, & Bibliopolae, 1716, tom. 3, lib. V, tr. 3, cap. 5, sect. 3, § 1, nn. 56-57, p. 149; BÖCKHN defends Schmier in Commentarius, lib. IV, tit. 5, n. 61, pp. 127-28; SCHMALZGRUEBER, Jus ecclesiasticum

universum, tom. 4, tit. VI, § 4, n. 150, p. 508), or in a non-Christian religion (DENS, Tractatus de matrimonio, n. 41; HUIZING, "Bonum prolis," pp. 709-10).

Jurisprudence:

13. For the past fifty years Rotal jurisprudence has included aspects of educatio prolis in its consideration of the bonum prolis relative to the validity of marriage. Often called the physical bonum prolis in the past, recent Rotal decisions include educatio prolis among the essential elements, rights, and obligations of marriage (c. STANKIEWICZ, 13 May 1978, in SRR Dec, 70 [1978], p. 300; c. RAAD, 20 March 1980, in ME, 105 [1980], p. 178; c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 [1981], p. 384).

Among the essential rights and obligations of marriage, Rotal jurisprudence includes the following rights and obligations concerning the education of offspring: not to abort the conceived offspring (c. WYNEN, 9 November 1944, in SRR Dec, 36 [1944], p. 663; c. EGAN, 20 January 1978, in SRR Dec, 70 [1978], p. 30); not to kill the offspring after their birth (c. CANESTRI, 20 March 1948, in SRR Dec, 40 [1948], p. 94; c. JULLIEN, 16 October 1948, in SRR Dec, 40 [1948], p. 355); to feed the offspring (c. HEARD, 13 March 1948, in SRR Dec, 40 [1948], p. 88); not to neglect the offspring (c. CANESTRI, 26 January 1950, in SRR Dec, 42 [1950], p. 46); not to abandon or expose the offspring to danger of death (c. HEARD, 17 January 1953, in SRR Dec, 45 [1953], p. 49; c. PINTO, 12 November 1973, in SRR Dec, 65 [1973], p. 726); not to maim the offspring (c. CANESTRI, 8 July 1941, in SRR Dec, 33 [1941],

pp. 603-4; c. PINTO, 28 October 1983, in SRR Dec, 75 [1983], p. 560).

The Rota examines the education of offspring under several headings of nullity, including grave lack of discretion of judgment, and incapacity to assume an essential obligation of marriage, and simulation of marital consent.

A) Grave lack of discretion of judgment

14. In Rotal jurisprudence the possession of "discretion of judgment" is interpreted as the ability to make a mature decision. In order to make a mature decision to give marital consent, therefore, three essential components must exist (c. POMPEDDA, 22 January 1979, in SRR Dec, 71 [1988], p. 19):

Abstract knowledge: an intellectual understanding of the rights and duties of marriage (c. PRIOR, 14 November 1919, in SRR Dec, 11 [1919], p. 174);

Critical evaluation: an ability to judge and reason, to make new and logical judgments (c. FELICI, 3 December 1957, in SRR Dec, 49 [1957], p. 788);

Psychological freedom: the freedom of the will to choose and to make a commitment, i.e. freedom from immature, obsessive or overpowering ideas, fantasies, or other internal stimulations (c. HEARD, 5 June 1941, in SRR Dec, 33 [1941], 489-90; c. LEFEBVRE, 12 January 1967, in SRR Dec, 59 [1967], p. 5; c. PINTO, 26 June 1969, in SRR Dec, 61 [1969], p. 655; c. ANNE, 26 January 1971, in SRR Dec, 63 [1971], p. 67).

Jurisprudence has also established that discretion of judgment may be impeded in two ways: either by a temporary impairment, such as intoxication at the time of consent; or by a habitual or long-lasting impairment, such as a mental illness (c. ANNE, 28 June 1965, in SRR Dec, 57 [1965], pp. 501-14).

15. Finally, the discretion of judgment for marital consent must concern the essential rights and obligations given and accepted in marriage. Therefore, if a person lacks the capacity to consent due to a serious lack of discretion of judgment about the essential rights and obligations associated with the education of offspring, then the marriage is invalid (c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 [1981], p. 385; c. STANSKIEWICZ, 24 March 1988, [Caracas], [unpub.], p. 9; c. STANKIEWICZ, 20 April 1989, [Caracas], [unpub.], p. 12).

16. To establish the existence of a grave lack of discretion of judgment at the time of consent, courts must consider the testimony of the parties and the witnesses. Information regarding the behavior, and the physical and mental states of the parties leading to the engagement and at the wedding itself can provide important support. In some cases, the testimony of an expert may help to demonstrate the existence and severity of a mental impairment (C. 1574). An examination of jurisprudence in similar cases may also assist the court to reach a decision.

B) Incapacity to assume the essential obligations of marriage

17. The principle of natural law that "No one is obliged to the impossible" provides the basis for the requirement that one who contracts marriage must be able to assume all of the essential obligations of marriage.

A person may be rendered incapable of assuming an essential obligation of marriage because of causes of a psychological nature. Such causes already treated by Rotal jurisprudence include psychoactive

substance dependence, incestuous anomaly, and personality disorders, such as paranoid, hysterical, antisocial, passive-aggressive, obsessive-compulsive, and borderline personalities (A. MENDONÇA, "The Effects of Personality Disorders on Matrimonial Consent," in SC, 21 [1987], pp. 67-123).

Rotal jurisprudence establishes that, in order to render marital consent invalid, the incapacity must exist at the moment of consent. The incapacity must be serious, but not necessarily incurable, although incurability enhances its probative value (c. RAAD, 13 November 1979, in ME, 105 [1980], p. 37). The incapacity must create an impossibility, not just a difficulty, to assume the essential obligations of marriage (M. POMPEDDA, "De incapacitate adsumendi obligationes matrimonii essentielles: Potissimum iuxta Rotalem iurisprudentiam," in Periodica, 75 [1986], pp. 150-51). Some members of the Rota argue that an incapacity might exist in a relative manner, i.e. between a certain man and a certain woman, although perhaps it would not exist for either of them in a different relationship (c. SERRANO, 18 November 1977, in SRR Dec, 69 [1977], pp. 457-67).

Canonists continue to study the psychological effects of other illnesses, such as schizophrenia, multiple sclerosis, and personal development which occurs in dysfunctional settings, such as sexual abuse (A. MENDONÇA, "Schizophrenia and Nullity of Marriage," in SC, 17 [1983], pp. 197-237; IDEM, "The Effects of Multiple Sclerosis on Matrimonial Consent," in SC, 21 [1987], pp. 419-50; N. SANGAL, The Effects of Incest on Matrimonial Consent, [Doctoral thesis], Ottawa, Saint Paul University, 1993, 290 pp.).

18. A person who lacks the capacity to assume the essential obligation of educatio prolis, because of causes of a psychological nature, cannot validly consent to marriage (c. RAAD, 20 March 1980, in ME, 105 [1980], p. 178; c. STANKIEWICZ, 23 July 1981, in SRR Dec, 73 [1981], pp. 385-86; c. STANKIEWICZ, 19 December 1985, in DE, 97, no. 2 [1986], p. 323).

19. In order to establish the incapacity to assume the essential obligations, the court must prove that a cause of a psychological nature exists in the contractant at the time of marital consent. The cause must be serious enough to prevent the consent. Usually this requires the assistance of experts to demonstrate the existence and severity of the impairment (C. 1680) and its repercussion on the assumption and fulfillment of the essential obligations of marriage. The court must also consider the testimony of the parties and witnesses. It must take into account the circumstances and events leading to the moment of consent, while jurisprudence from similar cases can assist the decision-making process.

C) Simulation of consent

20. A person who withholds or rejects consent to an essential element of marriage, or substitutes another concept which is not consonant with the teaching of the Church, vitiates the marital consent. Simulation of marital consent also occurs through the exclusion of the content of an essential element of marriage. In other words, the exclusion of any essential right or obligation relative to an essential element results in the exclusion of the essential element itself.

21. A person who, with a positive act of the will, withholds or rejects consent to the essential element of educatio prolis, or an essential right or obligation relative to education of offspring, or substitutes another concept of educatio which is not consonant with the teaching of the Church, vitiates the marital consent (c. CANESTRI, 8 July 1941, in SRR Dec, 33 [1941], p. 603; c. MATTIOLI, 22 May 1958, in SRR Dec, 50 [1958], p. 347; c. FILIPIAK, 15 May 1965, in SRR Dec, 57 [1965], p. 405; c. BEJAN, 29 October 1966, in SRR Dec, 58 [1966], p. 765; c. EGAN, 20 January 1978, in SRR Dec, 70 [1978], p. 30; c. PINTO, 28 October 1983, in SRR Dec, 75 [1983], p. 559).

22. In order to establish the existence of the simulation of consent, the court must take into account the testimony of the parties and witnesses, and any documentary proof. The court must look at the circumstances surrounding the courtship, engagement, and marriage, and the parties' motivation for simulation, and beliefs and attitudes toward marriage and offspring, as possible indications of their intention before marriage. It should also consider the jurisprudence in similar cases.

23. In some cases, one can prove the invalidity of consent only long after the wedding day (c. SERRANO, 5 April 1973, in SRR Dec, 65 [1973], p. 334).

24. The declaration of invalidity of marriage does not require absolute certainty. Rather, it suffices for a judge to exclude well-founded or reasonable doubts, thereby establishing the necessary moral certainty. Using both knowledge and conscience, a judge must decide whether the proofs and investigations are adequate. Sometimes, taken

singly, they do not provide a solid foundation for certitude; however, taken together, they leave no room for prudent doubt by a person of sound judgment. Moreover, after reaching an objective moral certainty, a judge need not continue so as to attain a still higher degree (PIUS XII, Allocution to the Sacred Roman Rota, 1 October 1942, in AAS, 34 [1941], pp. 338-42).

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