

Indissolubility, Divorce and Holy Communion: An Open Response to Germain Grisez, John Finnis and William May

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I

Gentlemen, I read in the June 1994 edition of this Journal your Open Letter to Bishops Saier, Lehmann and Kasper (hereafter *NB*) concerning their joint Letter regarding Pastoral Ministry to the Divorced and Remarried (hereafter *PL*) and their Principles of Pastoral Care (hereafter *PPC*). Both their letter and yours concern me to the extent that, as you correctly point out, they concern "the entire Church" (*NB*, 321). As a theologian in the Church, entrusted with the theological education of the Church, married, divorced and remarried and celibate alike, I was both delighted to read your letter and intrigued by its argument. I thought you and I and the body of the Church might benefit from further clarification. You will be aware that the Congregation for the Doctrine of the Faith (hereafter *CDF*) and the three Bishops issued in September 1994 further communications on this topic, published in *Origins*, October 27, 1994 (hereafter *OS*). I shall return to these in my final section.

Your letter delighted me because it sought to do the theologian's task, the pursuit in the scientific manner proper to theology of a deeper understanding of the Word of God and the communication of that understanding. I am delighted to pursue the matter further with you, for your argument intrigued me, as much as from what it left unsaid as from what it said. For the sake of conciseness and clarity, I choose to deal with only two focused, and not unconnected, matters which are of concern to me as both a theologian and a marriage (and divorce) counsellor.

The first concerns the official teaching and practice of the Catholic Church about marriage and divorce and your argument about the word of the Lord and the notion of indissolubility-excluding-the-very-possibility-of-exception. The second concerns a general teaching of the Catholic Church which gets specified in a not uncommon divorce case,

which you articulate well. It is the case in which a putative spouse can judge in faithful honesty that “since my irreparably destroyed marriage never was a real marriage, I am free to be married to my present partner. And, while I did not obtain an annulment from a Church tribunal and did not marry my present partner in the Church, this partnership is a valid marriage...and, provided I am not guilty of some other mortal sin, I may receive communion” (NB, 323). I shall deal with each matter in turn.

II

You do not, I am afraid, articulate the first matter well. Your argument is flawed doctrinally and historically. The Bishops, you say incompletely, claim that “the Church cannot assume the right to disregard the word of Jesus regarding the indissolubility of marriage” (NB, 325). That is not exactly what they said, neither in German nor in the *Origins* translation. Both the German text and the English translation had a semi-colon where you put a period after *marriage*. The Bishops added after the semi-colon “but equally it (the Church) cannot shut its eyes to the failure of many marriages” (PL, II), a not inconsiderable and balancing addition. Their hint of possible exceptions on the basis of particular situations is supported in the word of God as much as the word of Jesus on marriage and divorce.

You will notice that I have chosen the phrase *word of God* over your phrase *word of Jesus*. I do so for two Catholic reasons. First, that is the standard Catholic way of referring to the New Testament, which is what is at stake here (cf. *Dei Verbum*, the Word of God). Second, while the contemporary Catholic Church is very secure in its belief that it has in the New Testament the Word of God in the words of men, it is not nearly as secure in any claim to have any precise word of Jesus.

What we have in the New Testament, the Second Vatican Council taught, is what the sacred authors wrote, by “*selecting* some things from the many which had been handed on by word of mouth or in writing, *reducing* some of them to a synthesis, *explicating* some things in view of the situation of their churches, and preserving the form of proclamation but always in such fashion that *they told the honest truth about Jesus*” (*Dei Verbum*, 19). I apologise for the emphases, but I absolve myself with the defense that it is a shorthand way of explaining what I do not have the space to explain in detail. As Catholic theologians, you will understand exactly what both this text and I mean, but I explain it anyway for the body of the faithful.

In the contemporary Catholic Church, our gospels are taught to be not exactly the precise words (the ancient *ipsissima verba*) of Jesus, but the creative result of a process of selecting, of reducing, of explicating,

of preaching rather than reporting, the words and actions of Jesus. It is not always easy to separate the words of Jesus from the words of Mark, Matthew, Luke and John. The difficulty looms large for the text on which you have chosen to construct your argument. Before dealing with your fallacy, however, I must first clarify something else.

There is another Catholic hermeneutical principle here, again clearly articulated by *Dei Verbum*. "Since holy Scripture must be read and interpreted according to the same Spirit by whom it was written, no less serious attention must be given to the content and unity of *the whole of Scripture*, if the meaning of the sacred texts is to be brought to light" (*Dei Verbum*, 12). The ancient and time-honoured practice of proof-texting, saying what must be on the basis of one text literalistically read (see *NB*, 325) rather than what is the basis of the *total* evidence, is no longer honoured in the Catholic tradition.

The Synoptic Gospels present divorce sayings of Jesus four times: in Mark 10:11–12, in Matthew 5:32 and 19:9, and in Luke 16:18. Paul also reports a divorce saying and attributes it to the Lord in 1 Cor.7:10–11. These texts and their contexts are complex, and a full exposition of them would require a book in itself. Here I wish to make only one point. To speak of the New Testament *teaching* on divorce and remarriage, as if there were one unified teaching, is not correct. There are several New Testament teachings on divorce and remarriage and, however much we want them to agree, they do not. Nor are they all words of Jesus, though they are all in the Catholic tradition incontrovertible words of God. Among those words of God are exceptions to the word of Jesus on which your argument is based, introduced to the tradition by Paul in 1 Cor.7:12–16 and by Matthew in 5:32 and 19:9.

Every New Testament word on divorce and remarriage is both a New Testament word and a word of God, whether it is a word of Jesus or not. To isolate one word and to permit it to override all the others, and to claim anything like indissolubility-excluding-the-very-possibility-of-exceptions, as you have attempted to do, holds as of no account the Catholic veneration of the New Testament as the word of God. That the word of God "is a mysterious *truth*" (*NB*, 327) who could deny? It is, however, a word of *truth* that is far from self-evident when couched in the words of men; it is a word that always stands in need of authentic interpretation. Interpret is what Paul and Matthew did, and the Catholic Church did and continues to do "since well before the Reformation" (*NB*, 327), all on the basis of "the situation of their churches." I find it intriguing that you would ignore such a basic fact of the Catholic tradition.

The Pauline exception to Jesus' word on divorce became expanded and enshrined in the law of the Catholic Church as the Pauline Privilege, at least as early as Gratian in the twelfth century, and continues as a much-used part of that law today (Can.1143). The sixteenth century Popes, Paul III, Pius V and Gregory XIII, extended the Pauline Privilege in a series of rulings that go far beyond the word of God found in Paul's exception. These rulings, dissolving marriages held to be valid, are lumped together under the misleading heading of Petrine Privilege. Selective amnesia always would like to forget the Petrine Privilege, but the Catholic Church is never concerned to rewrite history, only to interpret it.

Gratian initiated another exception to the word of Jesus concerning the indissolubility of marriage, which you do not mention directly, though you allude to it as a given several times. It is the exception of the valid, but non-consummated marriage. Since Gratian, such a valid marriage has been held by the Church to be dissoluble, a belief that is still enshrined in the Church's law (Can. 1142). You allude to other historical interpretations and practices over the years, based on the interpretation of Matthew's *porneia*, and you note that "even the Council of Trent took care to avoid condemning" them (NB, 326).

You could have put that even more forcefully. You could have said, for it is true, that the practices you allude to are practices of the Eastern Churches, that a proposition condemning them was put before the Council of Trent, and that the Council refused to condemn them because it could not be demonstrated that the Eastern interpretation and practice did not have equal claim to the gospel and to the name Christian. You probably know that one of the forty-three propositions presented to John Paul II by the 1980 Synod of Bishops requested study of the Eastern practice for the illumination it might provide to Roman practice.

With such a well-known history of Church teaching and practice, I am at a loss to understand your proposal of an indissolubility-excluding-the-very-possibility-of-exceptions. Were that proposal to be established, you would be unable to "consistently affirm what the Church has believed for centuries about the indissolubility of marriage *in the sense in which the church has believed it*" (NB, 328). You would have to concede something I know you do not want to concede, namely, that "the Catholic Church has erred and errs" (NB, 328), both in theory and in practice, in its understanding of the revelation contained in that word of God we call the New Testament.

The three Bishops, I submit, are closer to understanding and correctly representing the ongoing Catholic tradition about divorce and remarriage than are you. That long tradition, in spite of all the deliberate

obfuscation and public dishonesty, is a tradition of indissolubility-with-room-for-exceptions. In fact, in the Catholic tradition only that marriage which is both sacramental and consummated is held to be indissoluble (Can. 1141). All others are held to be dissoluble, and have been officially dissolved by the Catholic Church at one time or another, which makes your literalistic argument about the universal extension of *whoever* historically untenable (NB, 325).

III

You articulate the second matter much better than you articulate the first. You follow your articulation, however, with a cryptic sentence which cries out for clarification, not so much for theologian-bishops in the Church as for the dwindling ranks of faithful. Your sentence is this: "Though we believe there are serious problems in your authorizing the making of that decision and giving ecclesial effect to it, we will not examine those problems" (NB, 323). For clarification, I will examine a problem of concern to me.

I note, first, that you say very carefully "there are serious problems *in your authorizing* the making of that decision." The force of your words (the ancient *vi verborum*) leads me to understand that your problems are with the Bishops' *authorizing* the making of the decision of conscience, and not with anyone's *making* such a decision. That is wise. Though there are always emotional problems clouding the clarity of a decision of conscience, there are no ecclesial problems with making one. That claim requires explanation for the multitude of faithful who do not understand the Church's teaching and practice in this matter. Many of them are divorced and remarried, and their personal situation in the Church could be much ameliorated if they only understood that teaching and practice.

Despite the vast array of possibilities available through ecclesiastical tribunals, there are marriage cases which cannot be settled in a tribunal because of some canonical deficiency. I cite such a case from my counselling experience, though I have changed some detail for obvious reasons. Bob and Carol had been "married" eight years. To Bob's great sorrow, and with no medical explanation he knew, no children had been born in the marriage. One evening, Carol told Bob two shocking things: one, she was leaving him to marry another man; two, they had not had children because she had never wanted children and had had herself sterilized before their wedding to ensure she would not have any. It later transpired that she had told two friends of her intention and her action before she and Bob were married. The case for annulment is clear, but it could not be resolved in tribunal because Carol

refused to testify to what she had done and her friends refused to testify to what they knew. It is a classic case for a Catholic decision in conscience.

When a case is settled in a marriage tribunal, it is said to be settled in the external forum, the forum of law. Longstanding Catholic tradition and practice, however, demonstrate that questions of morality are settled ultimately not in the external forum but in the internal forum of good conscience and good faith. The Catholic tradition refers to this procedure as *epikeia*. Father John Catoir, for ten years chief judge in a canonical tribunal, puts it bluntly. Catholics, he explains, were led to believe that the reward of heaven or the damnation of hell was somehow linked to the judgment of canon law and the Catholic Church, but that is an incorrect understanding of the revelation entrusted to the Church. No one's destiny before God is linked to canonical standing in the Catholic Church. How does this internal forum tradition relate to Bob's case?

In honest conscience Bob *knows*, after counselling, that his first attempt at marriage resulted in a non-marriage, because his wife consented to it fraudulently (Can. 1098). Before the marriage, she had acted deliberately to defraud him of children. He also knows that, were a tribunal able to consider his case, his non-marriage would be declared just that, a non-marriage, and he would be free to attempt marriage again. If he meets someone else, falls in love with her and marries her while his apparent first "spouse" is still alive, two questions of importance to them arise. Is their second marriage a valid marriage in the eyes of the Catholic Church, and can they take communion in the Church? The answer to both questions is a qualified yes.

In the external forum, Bob's "second" marriage cannot be considered valid because the putative "first marriage" has not been annulled and, therefore, Bob and his wife cannot share communion in the Church. In the personally, morally and religiously more crucial internal forum, however, as long as Bob and his wife have married after a conscientious judgment that they are free to marry, the Church can and does accept their decision of conscience, cannot and does not consider them sinners, cannot and does not refuse them full communion in the life of the Church. Since coming to a truly conscientious internal forum decision is always a complex and difficult process, it is always wise and honest to seek counsel. The Bishops mandate seeking the "clarifying assistance and the unbiased accompaniment of a church officeholder ... (to) ...sharpen the conscience" (PPC IV, 4). They know, however, that the moral and ecclesial bottom line is not an officeholder's counsel but Bob's and his wife's judgment that they are free to marry and, therefore, to share in full communion in the Church. "The priest," the Bishops add,

“does not pronounce any official admission in a formal sense” (Ibid.). He is an official *counsellor*, not in any sense a *judge*.

Neither priest nor Bishops *authorize* anything. Authorization is given by the tradition, the *praxis* and, arguably, the law of the Catholic Church (Can. 843, 1). That is why I am puzzled by your unexplained assertion that you have “serious problems in (the Bishops’) *authorizing* the making of that decision” (323), for they are careful not to authorize anything. I have taken care to explain the tradition and *praxis* of the Church, so that the body of the faithful who do not understand the subtleties of Catholic teaching, and about whom you and I as teachers in the Church are rightly concerned, might know that you cannot possibly, or at least legitimately, have problems with a couple conscientiously making and following a decision of conscience. I add, for the sake of completeness, that the Catholic moral tradition usually lists general criteria to be fulfilled for a conscientious internal forum judgment. Such criteria look very like the eight criteria listed by the Bishops for the internal forum decision in question (PPC IV, 3).

IV

Gentlemen, Colleagues, and Brothers in Jesus: There are other matters in your Letter that I would like to clarify and to have you clarify. Space constriction, however, does not permit that. (I have written openly to you for the same reason that you wrote openly to Bishops Saier, Lehmann and Kasper, “in the hope that you and other concerned leaders in the Church will think through the implications of what you have done” (NB, 329). I include in that hope the CDF, to whose subsequent letter I shall turn in a moment. I have written for two other reasons. First, if you are correct in your assessment of what “most Catholics” (NB, 330) take the Church’s teaching to be, and I believe you are, I want them to know without obfuscation what the Catholic teaching and practice about divorce and remarriage is. Second, I want me and you and the whole body of the faithful to learn a good principle (which is Wittgenstein’s): do not say what must be, but look and see what is. My position, and I believe also that of the Bishops, is that when you do not say what *must* be the teaching of the Catholic Church about divorce and remarriage, but instead look to see what it is in both theory and practice, you discover a quite different theory and practice than the one you presume in your letter.

Now, a concluding comment on the September letter of the CDF. There is standard, obfuscating rhetoric in it. “In fidelity to the words of Jesus,” the Congregation piously proclaims, “the Church affirms that a new union cannot be recognized as valid if the preceding marriage was

valid" (OS, 339). I offer two comments. First, the statement flatly contradicts, and is flatly contradicted by, the centuries-old Catholic practices connected with the Pauline Privilege, the Petrine Privilege and the dissolution of valid, sacramental, but non-consummated marriages. Secondly, since the CDF is concerned with a prior marriage that was *valid*, the statement does not touch cases such as that of Bob and Carol.

The CDF does acknowledge the existence of cases such as Bob's, but insists that "it must be discerned with certainty by means of the external forum established by the Church whether there is objectively such a nullity of marriage" (OS, 340). Bob would love to have the nullity of his first "marriage" discerned in the external forum; it would make his new life so much easier. The objective fact, however, is that the nullity in his case cannot be discerned in the external forum, not because it *cannot* be discerned but because it cannot get into that forum to be discerned. Bishops Saier, Lehmann and Kasper appear to understand that pastoral case better than the CDF.

The Bishops know the dilemma that faces Bob and his wife. "Canon Law can posit only a *generally* valid order of things; it cannot, however, regulate all *individual* cases which are often very complex" (OS, 343). It is for such difficult individual cases as Bob's that "the doctrinal tradition has developed the concept of *epikeia*, while Canon Law has come up with the principle of canonical equity" (Ibid.). The Bishops know the doctrinal and the canonical tradition. They know also that, embedded in those traditions, is the important notion of communion in both the College of Bishops and the Church, and they have withdrawn their Principles of Pastoral Care for the sake of solidarity and communion. They should be lauded for that.

The Bishops know one further aspect of the Catholic tradition: how teachings move forward in it. They insist on continuing to share, therefore, with you and me and the entire Church their conviction that discussion must continue, to come to full and authentic understanding of the Word of God, the ongoing tradition of the Church and life-long fidelity in marriage. Their words can stand as fitting conclusion to this theological letter. "According to the witnesses we cited from Church tradition there does, in light of newer research, exist room, beneath the threshold of the binding teaching, for pastoral flexibility *in individual cases* that is to be used responsibly. Such flexibility does not stand in contradiction to the indissolubility of marriage" (OS, 344). The historical Catholic tradition says "Amen" to that.