

Remaining in the
Truth of Christ:
Marriage and
Communion in the
Catholic Church

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Because it is the task of the apostolic ministry to ensure that the Church *remains in the truth of Christ* and to lead her ever more deeply into that truth, pastors must promote the sense of faith in all the faithful, examine and authoritatively judge the genuineness of its expressions and educate the faithful in an ever more mature evangelical discernment.

—St. John Paul II, *Familiaris consortio*,
no. 5 (emphasis added)

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The Argument in Brief

Robert Dodaro, O.S.A.

The essays in this volume represent the responses of five Cardinals of the Roman Catholic Church and four other scholars to the book *The Gospel of the Family*, published earlier this year by Walter Cardinal Kasper.¹ Kasper's book contains the address he gave during the Extraordinary Consistory of Cardinals held on February 20–21, 2014. An important focus of that meeting was to prepare for the two sessions of the Synod of Bishops convened by Pope Francis for 2014 and 2015, concerning the theme “Pastoral Challenges to the Family in the Context of Evangelization”. Toward the end of his address Cardinal Kasper proposed a change in the Church's sacramental teaching and discipline, one that would permit, in limited cases, divorced and civilly remarried Catholics to be admitted to Eucharistic Communion following a period of penance. In making his case, the Cardinal appealed to early Christian practice as well as to the long-standing Eastern Orthodox tradition

¹ Walter Cardinal Kasper, *The Gospel of the Family*, trans. William Madges (Mahwah, N.J.: Paulist Press, 2014).

of applying mercy to divorced persons under a formula by which second marriages are “tolerated”—a practice generally referred to by the Orthodox as *oikonomia*. Kasper hopes his book will provide “a theological basis for the subsequent discussion among the cardinals”, and that the Catholic Church will find a way to harmonize “fidelity and mercy in its pastoral practice”.²

The purpose of the present volume is to answer Cardinal Kasper’s invitation for further discussion. The essays published in this volume rebut his specific proposal for a Catholic form of *oikonomia* in certain cases of divorced, civilly remarried persons on the grounds that it cannot be reconciled with the Catholic doctrine on the indissolubility of marriage, and that it thus reinforces misleading understandings of both fidelity and mercy.

Following this introductory chapter, the volume examines the primary biblical texts concerning divorce and remarriage. The subsequent chapter treats the teaching and practice prevalent in the early Church. In neither of these cases, biblical or patristic, do the authors find support for the kind of “toleration” of civil marriages following divorce advocated by Cardinal Kasper. Meanwhile, the fourth chapter examines the historical and theological background of the Eastern Orthodox practice of *oikonomia*, while the fifth chapter traces the centuries-long development in current Roman Catholic teaching on divorce and remarriage. The urgency of these chapters is made clear by Cardinal Kasper’s assertions that in regard to the doctrine of the indissolubility of marriage, “the tradition in our case is not at all so unilinear, as is often asserted”, and that “there

²Ibid., pp. v, 26–27.

are historical questions and diverse opinions from serious experts, which one cannot simply disregard.”³ Given the gravity of the doctrinal question involved, these historical claims require a scholarly response.

In the light of the biblical and historical findings of this first part of this volume, the authors of the remaining four chapters reiterate the theological and canonical rationale for maintaining the coherence between Catholic doctrine and sacramental discipline concerning marriage and Holy Communion. The studies included in this book thus lead to the conclusion that the Church’s long-standing fidelity to the truth of marriage constitutes the irrevocable foundation of her merciful, loving response to the individual who is divorced and civilly remarried. This book therefore challenges the premiss that traditional Catholic doctrine and contemporary pastoral practice are in contradiction.

The purpose of this first chapter is to summarize and highlight the principal arguments against Cardinal Kasper’s proposal as they are presented in this book.

Divorce and Remarriage in Sacred Scripture

The New Testament records Christ as condemning remarriage after divorce as adultery. In Gospel passages that treat of divorce, the condemnation of remarriage is always absolute (see Mt 5:31–32; 19:3–9; Mk 10:2–12; and Lk 16:18; cf. Lk 5:31–32). Saint Paul echoes this same teaching and insists that it is not his, but Christ’s: “to the married I give charge, *not I but the Lord*” (1 Cor 7:10; emphasis added).

³Ibid., p. 44.

The key biblical text from Genesis 2:24 (“Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh”) establishes the truth that marriage is between one man and one woman, that it is only found outside of one’s family of origin, that it requires physical intimacy and closeness, and that it results in their becoming “one flesh”. That this verse represents the true Christian definition of marriage is made clear when Jesus quotes it in his reply to the Pharisees that Moses had permitted divorce as a concession to “*your* hardness of heart, . . . but from the beginning it was not so” (Mt 19:8; cf. Mk 10:5–6; emphasis added). In his explanation to the Pharisees on this occasion (Mk 10:6–9), Jesus alludes both to Genesis 1:27 (from the beginning of creation, “God created man in his own image, . . . male and female he created them”) and to Genesis 2:24. Taken together, these passages describe marriage in the original state in which God created it. Jesus’ point is that the indissolubility of marriage between a man and a woman is founded on a divine law that overrides contemporary Jewish norms concerning divorce: “What therefore God has joined together, let not man put asunder” (Mk 10:9).

The Exception Clauses in Matthew’s Gospel

If Jesus’ teaching concerning divorce and remarriage is so clear, how are we to interpret the two passages in Matthew’s Gospel that appear to allow divorce in the case of *porneia* (Mt 5:32; 19:9)? Two authors in this volume directly confront this question. Paul Mankowski, S.J., suggests on philological grounds that *porneia* may refer not to adultery,

as is commonly supposed, but to incest, and perhaps also to polygamy (a practice then current among gentiles). In this case, Mankowski argues that these two passages may represent “diriment exceptives” inasmuch as they are not exceptions to the rule, but conditions under which the rule does not apply, given that separation between a man and woman in either of these cases does not constitute “divorce”, there being no real marriage to dissolve.

John Rist, in his essay in this volume, offers a different explanation. He interprets *porneia* in these passages as “adultery” on the part of the wife. Jewish law not only permitted divorce in this case; it required it (Dt 24:4; Jer 3:1). In ancient societies, Hebrew and pagan, adultery on the part of the wife risked the introduction of the children of strangers into the family estate, because property passed from the father to his heirs. Jesus clearly rejects this logic, which he said Moses had allowed because of the “*your* hardness of heart”, and points to the original divine command about marriage as a lifetime commitment. Hence, remarriage after divorce is not permitted as long as the other spouse continues to live.⁴

The Patristic Evidence

Cardinal Kasper seeks to ground his argument in the experience of the early Church. However, the few examples he cites will not support his conclusion, and the vast recorded experience of the early Church flatly contradicts it. His

⁴For further treatment of the scriptural basis for the Catholic Church’s teaching on marriage, see the remarks at the beginning of the chapter in this volume by Gerhard Ludwig Cardinal Müller (chap. 6).

discussion of the patristic evidence is brief; he refers his readers to three published studies on divorce and remarriage in the early Church.⁵ Yet, it is clear that he relies for the specific cases he mentions exclusively on one author and ignores the counterarguments of others. For example, he suggests that “there are good reasons for assuming” that canon 8 of the First Ecumenical Council held at Nicea in A.D. 325 confirmed an already existing pastoral practice in the early Church “of tolerance, clemency and forbearance” toward divorced and remarried Christians.⁶ But the historical evidence for his conclusion, which has been advanced by Giovanni Cereti, is deeply flawed, as was demonstrated decades ago by Henri Crouzel, S.J., and another eminent patristic scholar, Gilles Pelland, S.J. In the third chapter of this volume, John Rist carefully reviews this and other cases and contends that Cereti has failed to this day to respond adequately to substantive objections to his arguments. It is not clear whether Kasper is aware of the level of detail in the scholarly objections, not only to Cereti’s interpretations of this canon, but to those of the other patristic texts he cites. Nevertheless, the Cardinal employs them as evidence for his proposal.

Although Rist accepts that the “merciful” solution proposed by Kasper was not unknown in the early Church,

⁵See Kasper, *Gospel of the Family*, pp. 36–37, where the Cardinal cites Giovanni Cereti, *Divorzio, nuove nozze e penitenza nella Chiesa primitiva* (Bologna: Dehoniane, 1977; second edition, Bologna: Dehoniane, 1998; third edition, Rome: Aracne, 2013); Henri Crouzel, S.J., *L’Eglise primitive face au divorce. Du premier au cinquième siècle* (Paris: Editions Beauchesne, 1971); Joseph Ratzinger, “Zur Frage nach der Unauflöslichkeit der Ehe. Bemerkungen zum dogmengeschichtlichen Befund und zu seiner gegenwärtigen Bedeutung”, *Ehe und Ehescheidung—Diskussion unter Christen*, ed. Franz Henrich and Volker Eid (Munich: Kösel-Verlag, 1972), pp. 35–56.

⁶Kasper, *Gospel of the Family*, p. 31.

he argues that it was generally condemned as “unscriptural” and that “virtually none of the writers who survive and whom we take to be authoritative defend it” (p. 80). Rist accuses Kasper of the “unfortunate practice all too common elsewhere in academia”, whereby a “very few cases” are selected in order to claim the existence of a practice, even when the contrary historical evidence is “overwhelmingly superior” (p. 90). When this tactic fails to convince, Rist adds, the claim is then made that the scant evidence “at least leaves the solution open”. Scholarly procedures such as this, Rist concludes, “can only be condemned as methodologically flawed” (p. 90). Pelland makes a similar point:

In order to speak of a “tradition” or “practice” of the Church, it is not enough to point out a certain number of cases spread over a period of four or five centuries. One would have to show, insofar as one can, that these cases correspond to a practice accepted by the Church at the time. Otherwise, we would only have the opinion of a theologian (however prestigious), or information about a local tradition at a certain moment in its history—which obviously does not have the same weight.⁷

Eastern Orthodox Doctrine and Practice

Outside of the limited circles of a few specialists, the Eastern Orthodox practice of *oikonomia* as applied to divorce and remarriage is not well understood, even in general terms.

⁷Gilles Pelland, S.J., “Did the Church Treat the Divorced and Remarried More Leniently in Antiquity than Today?”, *L’Osservatore Romano*, English Edition, February 2, 2000, p. 9.

Cardinal Kasper cites it as encouragement for the Catholic Church. In the fourth chapter of this volume, Archbishop Cyril Vasil', S.J., offers a rare up-to-date account of the history, theology, and law behind this practice. He locates the fundamental difference between Eastern Orthodox and Catholic positions on divorce and remarriage in a divergence over their understandings of Matthew 5:32 and 19:9. Historically, Orthodox authorities interpreted *porneia* as adultery and read these passages as providing an exception to Christ's prohibition of divorce. Catholic interpretations, on the other hand, held that Christ intended the marriage bond to remain intact even if, on account of adultery, the couple should separate.

During the first millennium the Church in both East and West resisted attempts by the emperors to introduce divorce and remarriage into ecclesiastical law and practice. The Council in Trullo in 692 marks the first sign of acceptance by the Church of motives for permitting divorce and remarriage (motives reducible, however, to the absence and presumed death of one of the spouses). A major change takes place in 883 when under Patriarch Photios I of Constantinople an ecclesiastical legal code incorporates a much longer list of reasons for permitting divorce and remarriage. A further complicating factor arises in 895 when the Byzantine Emperor Leo VI rules that in order to attain legal recognition marriages have to be blessed by the Church. By 1086 in the Byzantine Empire, only ecclesiastical tribunals were permitted to investigate marriage cases, and they were required to do so on the basis of imperial and civil law that permitted divorce and remarriage for a large number of reasons extending beyond adultery. Thus, from the ninth century the Eastern Church falls progressively under the

sway of successive Byzantine political rulers, who persuade the bishops to accept liberalized divorce and remarriage rules. Patriarch Alexius I of Constantinople (1025–1043) for the first time permitted a Church ceremony (a blessing) for second marriages in the case of women who divorced adulterous husbands. As missionary efforts brought Christianity from Constantinople to other nations, these and similar marital customs and ethics developed within the Orthodox Churches in those lands.

Archbishop Vasil' illustrates these developments by looking closely at Russia, Greece, and the Middle East, observing similarities and differences between those churches. He notes the lack of a coherent basis—or even of a common terminology—for comparing the theological, canonical, and pastoral rationales behind practices associated with *oikonomia* among the different Orthodox Churches. This confused context explains, in part, the difficulty in locating a mature theological literature on *oikonomia* among Eastern Orthodox writers. Vasil' concludes that it may not be possible to determine a uniform “Orthodox position” on divorce and remarriage, and therefore also on *oikonomia*. At best, he fears, one can talk about the practices within a given Orthodox Church—although even here the practices are not always consistent—or one can speak about the shared position of a few bishops, or the viewpoint of a particular theologian. There are open disagreements among Orthodox bishops and theologians over the theology and law concerning these issues.

At the heart of the dilemma one finds the issue of the indissolubility of marriage. Roman Catholic theology, following Saint Augustine, views indissolubility in both a legal and spiritual sense as a bond (*sacramentum*) that binds the

spouses to each other in Christ for as long as they live. However, Eastern Orthodox authors eschew the legal sense of this bond, and they view the indissolubility of marriage solely in terms of a spiritual bond. As has been stated, Orthodox authorities generally interpret Matthew 5:32 and 19:9 as permitting divorce in the case of adultery, and they insist that there are patristic grounds for doing so. If there is a common point of view among Eastern Orthodox bishops and theologians, this is it. But from this point on, Orthodox authors begin to take divergent views. Hence, while many hold the relatively strict position that divorce and remarriage are permissible only in cases of adultery, some, like John Meyendorff, suggest that the Church may grant a divorce on the grounds that the couple has refused to accept the divine grace that is offered to them in the sacrament of matrimony. Ecclesiastical divorce, in Meyendorff's view, is merely the Church's acknowledgment that this sacramental grace has been refused. Paul Evdokimov modifies this thesis, maintaining that because reciprocal love constitutes the image of the sacrament, once this love grows cold, the sacramental communion, which is expressed in the sexual union of the couple, dissipates. As a result, that relationship deteriorates into a form of "fornication".⁸ Other Orthodox writers speak of the moral or spiritual "death" of a marriage and liken it to the physical death of one of the spouses, thus dissolving the bond and making remarriage possible.

⁸See John Meyendorff, "Christian Marriage in Byzantium: The Canonical and Liturgical Tradition", *Dumbarton Oaks Papers* 44 (1990): 99-107, esp. pp. 102-3; John Meyendorff, "Il Matrimonio e l'Eucaristia", *Russia Cristiana* 119 (1970): 7-27; 120 (1970): 23-36; and Paul Evdokimov, "La grâce du sacrement de mariage selon la tradition orthodoxe", *Parole et Pain* 35-36 (1969): 382-94.

In the light of their understanding of indissolubility, John Rist asks what relationship the Orthodox see between the first and second marriages in the case of divorce. Rist believes the question will be difficult to answer coherently because the Orthodox view of indissolubility leaves God's role in the sacrament ambiguous. If the evil actions of one or the other spouse (adultery, abandonment, etc.) can effectively destroy the bond, so that the second marriage should be celebrated with less ceremony and even in a penitential spirit, then are there two different grades of marriage in Orthodox thought? Given that Catholic theology indicates a clear role for God in the indissoluble marriage bond, Rist suggests that it would be even more difficult for Catholics to make theological sense out of the second marriage (a remark that calls to mind Cardinal Kasper's reference to "a willingness to tolerate something that, in itself, is unacceptable").⁹

Catholic Doctrine and Practice in the Middle Ages

In the fifth chapter Walter Cardinal Brandmüller sketches a concise overview of Western Church teachings on marriage and divorce from the Synod of Carthage (407) to the Council of Trent (1545–1563) that complements Archbishop Vasil's account of developments in the Eastern Church. Brandmüller notes that even during the evangelization of Germanic-Frankish peoples, among whom indigenous marriage customs deviated from Christian norms, bishops acting through Church councils gradually

⁹Kasper, *Gospel of the Family*, p. 31.

established the principle of the indissolubility of marriage. Despite this development, Brandmüller acknowledges that there were occasions in the Middle Ages in which Church synods and councils permitted remarriage after divorce, notoriously so in the case of King Lothair II (835–869). However, he examines some of these instances and finds in many of them compromising circumstances, such as the application of outside political pressure, that mitigate the doctrinal significance of the decisions taken by these councils. He holds that the outcomes of general councils and particular synods can only embody *paradosis* or tradition “if they themselves correspond to the demands of the authentic tradition in terms of both form and content” (p. 141). Hence during the Middle Ages, as in the patristic era, the existence here or there of highly dubious exceptions to the otherwise manifest standard teaching and practice of the Church concerning the indissolubility of marriage is more suggestive of anomalies than of parallel or alternative traditions that might be subject to retrieval today.

Current Catholic Teaching

Current teaching of the Church’s Magisterium on divorce, remarriage, and Holy Communion can most concisely be apprehended by focusing on sections from the Apostolic Exhortations *Familiaris consortio* (paragraph 84), issued by Saint John Paul II in 1981, and *Sacramentum caritatis* (paragraph 29), issued by Pope Benedict XVI in 2007.¹⁰ These

¹⁰See the collection of Magisterial texts at the back of this volume. The principal points of Catholic teaching are also spelled out in the *Catechism of the Catholic Church*, nos. 1644–51, included in the texts at the back of this volume.

are summarized by Gerhard Ludwig Cardinal Müller in the sixth chapter of this volume. The latter document belies the claim that Church doctrine relegates divorced and civilly remarried Catholics to second-class membership. Benedict XVI expressly urged that they “live as fully as possible the Christian life through regular participation at Mass, albeit without receiving communion, listening to the word of God, Eucharistic adoration, prayer, participation in the life of the community, honest dialogue with a priest or spiritual director, dedication to the life of charity, works of penance, and commitment to the education of their children.” Cardinal Kasper has argued that this statement demonstrates a softening of attitudes toward divorced and remarried Catholics and a tendency toward a revision of the current discipline.¹¹ But Cardinal Müller explains, by quoting *Familiaris consortio* (no. 84), the irreformable nature of the teaching concerning the faithful whose “state and condition of life objectively contradict that union of love between Christ and the Church which is signified and effected by the Eucharist.” The Cardinal continues:

Reconciliation through sacramental confession, which opens the way to reception of the Eucharist, can only be granted in the case of repentance over what has happened and a “readiness to undertake a way of life that is no longer in contradiction to the indissolubility of marriage”.
(p. 153)

Yet as Müller points out, far from treating the divorced and civilly remarried with judgmental coldness and aloofness, pastors are obliged by the Magisterium “to welcome

¹¹ See Kasper, *Gospel of the Family*, p. 27.

people in irregular situations openly and sincerely, to stand by them sympathetically and helpfully, and to make them aware of the love of the Good Shepherd” (p. 163).

Marriage and the Individual Person Today

Cardinal Müller returns to an issue introduced in an earlier essay in this volume by John Rist: the nature of the individual person who seeks to marry in today’s world. Both authors raise the question concerning the intentions or “mentality” of the spouses before, during, and after they exchange their marriage vows. What do they understand marriage to be? Do they understand that it is indissoluble, or do they expect only to try it out and see whether it works for them? How do they view the personal question of bringing children into the world? Do they understand that openness to children is a requirement for a valid sacramental marriage? And, more centrally, given the superficiality of relationships in the world today, are young Catholics even capable of understanding the Church’s language about sacraments, fidelity, indissolubility, and openness to children?

John Rist also worries that people today are taken in by the concept of “sequential” or “serial” selves that has developed in contemporary philosophy. This concept encourages a shift in traditional belief about human nature; specifically it promotes the view that personal identity changes during one’s lifetime. Rist observes that “many hardly believe themselves to be the same person from conception to death” because they “are subject to such ongoing and psychologically radical variations as they

proceed through life” (p. 65). Hence, these people would conclude, “I am not the same person as I was when I married, and my wife is not the same person either”, resulting in a belief that their marriage has become “a fictional relationship” (p. 66).

Cardinal Müller accepts that “today’s mentality is largely opposed to the Christian understanding of marriage, with regard to its indissolubility and its openness to children”, and that, as a consequence, “marriages nowadays are probably invalid more often than they were previously”. He suggests that “assessment of the validity of marriage is important and can help to solve problems” (p. 155).

Nevertheless, in a Church in which the term “prophetic” has today become a catchword within movements that openly challenge prevailing cultural trends, Müller invites the Church to resist “pragmatically accommodating the supposedly inevitable” and to proclaim “the gospel of the sanctity of marriage” with “*prophetic candor*” (pp. 158–59; emphasis added). The difficulties involved in accepting Christ’s teaching concerning the sanctity of marriage were first acknowledged not by a Synod of Bishops, but by the apostles who, when they heard this teaching directly from the Lord, responded with incredulity, “If such is the case of a man with his wife, it is not expedient to marry” (Mt 19:10). However, both Cardinal Müller and Paul Mankowski, S.J., in their respective essays in this volume, recognize that along with his “hard” teaching concerning the indissolubility of marriage, Christ also promised, in the words of Mankowski, “a new and superabundant afflatus of grace, of divine help, so that no person however fragile should find it impossible to do God’s will” (p. 61).

Mercy and the Rules of the Church

But what about failure in a marital relationship, breakdown, and divorce? Does the Church's current teaching and practice concerning divorced and civilly remarried Catholics demonstrate the quality of mercy that Jesus showed to sinners? Cardinal Müller replies that in order to avoid an incomplete view of Jesus' mercy we need to look at the entirety of his life and teaching. The Church cannot appeal to "divine mercy" (p. 61) as a way of jettisoning those teachings of Jesus that she finds difficult.

The entire sacramental economy is a work of divine mercy, and it cannot simply be swept aside by an appeal to the same. An objectively false appeal to mercy also runs the risk of trivializing the image of God, by implying that God cannot do other than forgive. The mystery of God includes not only his mercy but also his holiness and his justice. (p. 61)

In the eighth chapter of this volume, Velasio Cardinal De Paolis, C.S., echoes Cardinal Müller's view: "Mercy is often presented in opposition to the law, even divine law. But setting God's mercy in opposition to his own law is an unacceptable contradiction" (p. 201). De Paolis notes that Kasper does not propose "mercy" as a way to Eucharistic Communion for *all* divorced and civilly remarried Catholics, but only for those who fulfill certain conditions. He finds the reasoning behind Kasper's conditions illogical. He asks what it is about *civil* marriage that qualifies it as more morally sound than mere cohabitation. The Church does not regard civil marriage following divorce

as a valid marriage. So the fact that Catholics in this situation are married according to the laws of the State does not make their behavior more morally respectable than a couple who live together outside of marriage. To Kasper's argument that the education of the children of spouses in a civil marriage makes it objectively a better moral option (a "lesser evil") than the alternatives, De Paolis replies that fictive marriages wear down the basic principles of marriage and family as well as of sexual morality in general, and he wonders what kind of moral education the couple in that condition would be passing on to their children:

Respect for the moral rule that prohibits marital life between people who are not married cannot admit exceptions. The difficulty one encounters in respecting the moral law does not then permit that person to turn around and violate the same moral law. (p. 193)

Discipline and Doctrine

Cardinal De Paolis also observes that "a distinction is often made between doctrine and discipline in order to say that in the Church doctrine does not change, whereas discipline does" (p. 204). However, a change in Church practice aimed at permitting divorced and civilly remarried Catholics to receive the Eucharist necessarily involves a change in doctrine. No one should be under any illusion about this. De Paolis points out that in Catholic theology, "discipline" refers to something broader than human laws. For example, "discipline includes the divine law, such as the commandments, which are not subject to change

although they are not directly of a doctrinal nature. . . . Discipline often includes everything to which the believer must feel committed in his life in order to be a faithful disciple of our Lord Jesus Christ” (p. 204). Hence, the distinction between the discipline of the sacraments and Catholic doctrine is not as clear as many believe it to be or would like it to be.

In the seventh chapter of this volume, Carlo Cardinal Caffarra outlines reasons that Cardinal Kasper’s proposal necessarily involves a change in doctrine and not just in sacramental discipline. He notes that according to “the tradition of the Church, founded on the Scriptures (see 1 Cor 11:28), . . . communion with the Body and with the Blood of the Lord requires of those who participate therein that they not find themselves in contradiction with what they receive.” The Cardinal concludes that “the *status* [emphasis in original] of the divorced and civilly remarried is in objective contradiction with that bond of love that unites Christ and the Church, which is signified and actualized by the Eucharist” (p. 173).

Caffarra explains that in the Catholic view, marriage consists of a bond that is not simply moral, but also ontological, because it integrates Christ into the marriage. “The married person is *ontologically* . . . consecrated to Christ, conformed to him. The conjugal bond is put into being by God himself, by means of the consent of the two (spouses).” Caffarra concedes that if the marital bond were only moral and not ontological, it could be dispensed. However, given the ontological nature of the sacramental bond, “the spouse remains integrated into such a mystery, even if the spouse, through a subsequent decision, attacks the sacramental bond by entering into a

state of life that contradicts it” (p. 173; emphasis in original). As a consequence, the admission of divorced and civilly remarried Catholics to the sacraments of penance and the Eucharist would not only mark a change in sacramental practice or discipline; it would introduce a fundamental contradiction into the Catholic doctrine concerning matrimony, and therefore also the Eucharist.

Caffarra sees in Kasper’s proposal other consequences for the doctrine of the indissolubility of marriage. He argues that the admission of divorced and civilly remarried Catholics to the sacraments of penance and the Eucharist, even under the restrictive conditions that Kasper suggests, would essentially “recognize the moral legitimacy of living *more coniugali* [as husband and wife] with a person who is not the true spouse” (p. 174) and would “persuade, not only the faithful, but also any attentive person of the idea that, at its heart, there exists no marriage that is absolutely indissoluble, [and] that the ‘forever’ to which every true love cannot but aspire is an illusion” (p. 177).

In his book, Cardinal Kasper raises two other options for allowing divorced and civilly remarried Catholics to approach the sacraments of penance and the Eucharist: an appeal to *epikeia* (the presumption that the law should not be applied in a particular case because of extenuating circumstances), and the application of the moral principle of prudence. However, Cardinal Caffarra objects that an appeal to prudence cannot be made in this case, because “that which is in itself . . . intrinsically illicit can never be the object of the prudential judgment.” In other words, “a prudent adultery cannot exist”. Caffarra holds that “the reference to *epikeia* is equally without a foundation” (p. 175). As a virtue, *epikeia* can only be applied to human

laws, not divine laws. But the laws concerning the indissolubility of marriage, the prohibition of adultery, and access to the Eucharist are divine laws (see Mk 10:9; Jn 8:11; 1 Cor 11:28). The Church cannot excuse the faithful from their obligation to obey God's law.

Canonical Procedures Governing Declarations of Nullity

Cardinal Kasper also suggests that in the case of the faithful who are divorced and civilly remarried, the Church's judicial process governing declarations of nullity should be simplified. Specifically, Kasper suggests the adoption of "more pastoral and spiritual procedures".¹² He proposes that in lieu of diocesan marriage tribunals, "the bishop could entrust this task to a priest with spiritual and pastoral experience as a penitentiary or episcopal vicar."¹³ In the ninth chapter of this volume Raymond Leo Cardinal Burke draws from extensive papal legislation and commentary, as well as from the experience of the Apostolic Signatura, to explain why Kasper's recommendations, if adopted, would weaken the Church's efforts to guarantee justice for the faithful.

Burke points out that the faithful are badly served by tribunals that fall "into a kind of pseudo-pastoral pragmatism", and he quotes Saint John Paul II, who "warned precisely against the temptation to exploit the canonical process 'in order to achieve what is perhaps a "practical" goal, which

¹²Ibid., p. 28.

¹³Ibid., p. 29.

might perhaps be considered “pastoral”, but is to the detriment of truth and justice’”¹⁴ (p. 213). Burke emphasizes that if tribunals give the impression that their main purpose is to enable those in failed marriages to remarry in the Church by offering superficial or erroneous explanations, or by employing incorrect procedures, the faithful could become “disedified and even scandalized” (p. 215).

At the heart of the canonical procedures that aim to establish the truth of a claim of nullity in a given case of marriage is a dialectic process known as the *contradictorium*. It embodies the principle *et audiatur altera pars* (and the other party is to be heard). Burke explains that this principle has historically determined the canonical procedures at use in issuing declarations of nullity, including the requirement of a defender of the bond and of a double conforming sentence. He defends these advances against the charge of a “burdensome juridicism” (p. 224) on the grounds that they strengthen the dialectic process that in turn guarantees that the tribunal can reach a “moral certitude” (p. 227) that the nullity of the marriage has been proven. Burke asserts that defenders of the bond too often have been manifestly negligent in fulfilling their obligations, resulting in a lack of integrity in the judicial process. Were all the ministers of the tribunal, including judges, to be more scrupulous in the performance of their responsibilities, “the process to arrive at a double conforming decision, with the decree of ratification, will not take too long” (p. 234).

¹⁴Saint John Paul II, “Address to the Tribunal of the Roman Rota”, January 28, 1994, *Acta Apostolicae Sedis* 86 (1994): 950, no. 5. English translation in *Papal Allocutions to the Roman Rota 1939–2011*, ed. William H. Woestman, O.M.I. (Ottawa: Faculty of Canon Law, Saint Paul University, 2011), p. 229, no. 5.

Sense of the Faithful (*Sensus fidelium*)

Toward the conclusion of his book, Cardinal Kasper cites Blessed John Henry Newman's famous essay, "On Consulting the Faithful in Matters of Doctrine", and he discusses the canard attributed to Newman "that, in the Arian crisis in the fourth and fifth centuries, it was not the bishops, but rather the faithful who preserved the faith of the Church".¹⁵ Kasper lionizes Newman as a "forerunner of the Second Vatican Council" and links his essay with the Council's affirmations concerning "the sense of the faith, which is given to every Christian by virtue of baptism".¹⁶ Most commentators on Newman's essay mistake his understanding of "faithful" as referring only to the "laity". But as the eminent Newman scholar Ian Ker points out, Newman included priests and monks among the "faithful" in his argument, so that the distinction he drew was not between clergy and the laity, as so many today believe.¹⁷

¹⁵Kasper, *Gospel of the Family*, p. 46. This English translation of Kasper's book wrongly cites the title of Newman's article as "On Consulting the Faithful in Matters of Faith". See John Henry Newman, "On Consulting the Faithful in Matters of Doctrine", *The Rambler*, 3rd Series, July 1859, pp. 189–230; and John Henry Newman, *On Consulting the Faithful in Matters of Doctrine*, edited with an introduction by John Coulson (London: Geoffrey Chapman, 1961), pp. 75–101.

¹⁶Kasper, *Gospel of the Family*, p. 46, referencing the Second Vatican Council, Pastoral Constitution on the Church, *Lumen gentium*, nos. 12 and 35.

¹⁷See Ian Ker, "Newman on the *Consensus Fidelium* as 'the Voice of the Infallible Church'", *Newman and the Word*, ed. Terrence Merrigan and Ian Ker (Louvain: Peters, 2002), pp. 69–89; Ian Ker, "Newman, the Councils, and Vatican II", *Communio* 28 (Winter 2001): 708–28, esp. pp. 725–26. See also Hermann Geissler, F.S.O., "Das Zeugnis der Gläubigen in Lehrfragen nach John Henry Newman", *Communio* 41 (2012): 669–83, translated as *The Witness of the Faithful in Matters of Doctrine according to John Henry Newman* (Rome: International Centre of Newman Friends, 2012). At p. 9, n. 22, Geissler offers this clarification: "Newman's main desire is simply to say that pure belief

Moreover, historians disagree with Newman's version of this controversy and insist that insofar as the positions of the early Church faithful can be ascertained on the Arian question, in the main they tended to adhere to the view of their local bishop whatever his position was. It was not, therefore, the laity who were responsible for the victory of the Nicene faith over the Arians.¹⁸ Nevertheless, Kasper forges an analogy between Newman's "faithful" and the married laity in today's Church, whom he contrasts with the "celibate" Cardinals in the Consistory, because the laity "live out their belief in the gospel of the family in concrete families and sometimes in difficult situations". He then pleads for the Church to "listen to their witness" and not to allow the question of the divorced and remarried to "be decided only by cardinals and bishops".¹⁹

However, "sense of the faithful" cannot be understood in Catholic theology as an expression of majority opinion within the Church, and it is not arrived at by conducting polls. It refers to an instinct for the authentic faith possessed by the faithful, understood as both the hierarchy and the laity together, as the one Body of Christ. Newman referred to this dynamic as *conspiratio*, a breathing together between pastors and laity. Hence, while it would be

during the Arian confusion was maintained by the faithful under the leadership of some influential confessing bishops, whilst many pastors, influenced by the Arian establishment at the imperial court, did not fulfil their responsibilities as teachers of the faith. All members of the Church count among the faithful, including also the pastors."

¹⁸See Yves M.-J. Congar, O.P., *Jalons pour une Théologie du Laïcat* (Paris: Éditions du Cerf, 1953), p. 395. English edition, *Lay People in the Church: A Study for a Theology of Lay People*, revised edition with additions by the author, trans. Donald Attwater (London: Chapman, 1965), pp. 285–86.

¹⁹Kasper, *Gospel of the Family*, p. 47.

erroneous to suggest that the lay faithful lack an instinct for the authentic faith, it is an abuse to employ the concept in an effort to pit a putative “voice of the laity” against either the bishops or Church teachings. Nor do these principles represent an isolated, conservative point of view. Each has been articulated by the Second Vatican Council and by successive popes thereafter, most recently by Pope Francis in his December 2013 address to the International Theological Commission.²⁰

Conclusion

The authors of this volume jointly contend that the New Testament presents Christ as unambiguously prohibiting divorce and remarriage on the basis of God’s original plan for marriage set out at Genesis 1:27 and 2:24. The “merciful” solution to divorce advocated by Cardinal Kasper is not unknown “in the ancient Church, but virtually none of the writers who survive and whom we take to be authoritative defend it; indeed when they mention it, it is rather to condemn it as unscriptural. There is nothing surprising in that situation; abuses may exist occasionally, but their mere existence is no guarantee of their not being abuses, let alone being models to be followed” (p. 80). The current Eastern Orthodox practice of *oikonomia* in cases of divorce and remarriage stems largely from the second millennium and arises in response to political pressure on the Church from Byzantine emperors. During

²⁰See the collected statements of the Magisterium concerning *sensus fidelium* at the end of this volume.

the Middle Ages and beyond, the Catholic Church in the West resisted such efforts more successfully and did so at the cost of martyrdom. The Eastern Orthodox practice of *oikonomia* is not an alternative tradition to which the Catholic Church can appeal. *Oikonomia*, in this context, rests on a view of the indissolubility of marriage that is not compatible with Roman Catholic theology, which understands the marital bond as being rooted ontologically in Christ. Hence, civil marriage following divorce involves a form of adultery, and it makes the reception of the Eucharist morally impossible (1 Cor 11:28), unless the couple practice sexual continence. These are not a series of rules made up by the Church; they constitute divine law, and the Church cannot change them. To the woman caught in adultery, Christ said, “[G]o and do not sin again” (Jn 8:11). God’s mercy does not dispense us from following his commandments.

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