

CURRENT THEOLOGY

NOTES ON MORAL THEOLOGY 1995

PASTORAL CARE OF THE DIVORCED AND REMARRIED

On July 10, 1993, the three bishops of the ecclesiastical province of the Upper Rhine in Germany issued a pastoral letter calling for increased dialogue with divorced and remarried Catholics. It was read in all the churches of the three dioceses in September that year. The letter stated that a pastoral dialogue was needed to determine whether the "generally valid" prohibition against the remarried receiving the Eucharist "applies also in a given situation."¹ The German letter was noteworthy for several reasons, not least being the reputation of the three ordinaries who signed it. Walter Kasper of Rottenburg-Stuttgart is a theological scholar of international repute, Karl Lehmann of Mainz, also a distinguished theologian, is president of the German episcopal conference, and Archbishop Oskar Saier of Freiburg, a canon lawyer, is vice-president of the conference.

On October 14, 1994, the Congregation for the Doctrine of the Faith (CDF) sent a letter to the worldwide episcopacy entitled "Concerning the Reception of Holy Communion by Divorced-and-Remarried Members of the Faithful."² Written after a series of meetings between the German bishops and Cardinal Ratzinger, head of the CDF, the curial letter reaffirmed the traditional ban on reception of the Eucharist for those living in irregular unions. The three German prelates responded to the CDF letter with a public message to the people of their dioceses in which they noted that in regard to their position and that of the CDF "we do not find ourselves in any doctrinal disagreement," but "the difference has to do with the question of pastoral practice in individual cases." The bishops maintained that there does "exist room, beneath the threshold of the binding teaching, for pastoral flexibility in complex individual cases that is to be used responsibly."³

This extraordinary series of public statements by the CDF and members of the German episcopacy raises a number of issues. Also, the exchange takes place in a context which should be examined if the breadth of the issues is to be understood. We shall first comment on the remote and proximate contexts for the discussion. Then we will exam-

¹ "Pastoral Ministry: The Divorced and Remarried," *Origins* 23 (March 10, 1994) 670-73, at 673 (hereafter cited as "Pastoral Ministry"). The German letter was accompanied by a more detailed statement of "Principles of Pastoral Care" an excerpt of which appeared in translation in the same issue of *Origins* 673-76 (hereafter cited as "Principles").

² *Origins* 24 (October 27, 1994) 337, 339-41 (hereafter cited as "Reception").

³ "Response to the Vatican Letter" (hereafter cited as "Response") *Origins* 24 (March 10, 1994) 341-44, at 341.

ine the substance of the German bishops' position as well as the CDF letter. Following that we will survey representative responses from other episcopal and theological quarters. Finally, we shall offer comments upon the many issues raised by this exchange of viewpoints between members of the German hierarchy and the Roman Curia.

Contexts for the Discussion

At the beginning of this century the options available to the divorced and remarried was a settled matter. There was widespread agreement among Catholic canonists and moralists that the options in dealing pastorally with those whose marriage was invalid due to the existence of a prior bond were four: (1) declare the nullity or secure the dissolution of the first marriage, and then validate the present union; (2) advise the remarried couple to separate to remove them from cohabitation as a proximate occasion of sin; (3) leave the couple in good faith, i.e. dissimulate, decide not to inform them of their canonical status or moral situation; (4) permit the couple to live as brother and sister, i.e. to continue cohabitation but without any sexual relationship, in those rare instances where this arrangement seemed possible.⁴

The presumption behind these pastoral options was that those whose marriages were invalid due to the existence of a prior bond of marriage were living in a sinful situation, an adulterous union. Their lives together placed them in the proximate occasion of serious sin, thus endangering their salvation. Moreover, it was intolerable because it could be a source of scandal to the faithful.

The Church's marriage tribunals functioned ponderously, and declarations of nullity were slow and very few. The tribunals could respond to only a tiny fraction of the pastoral need. Often couples could not separate, since their obligations to their children, their dependence on one another, or their economic condition simply did not permit it. Living together as brother and sister was an arrangement "full of dangers" and to be suggested only in the rarest of cases.⁵

Then, in the 1940s in the U.S., partly because of northward migration of African Americans, the "good faith" option began to expand and be more frequently utilized.⁶ When the validity of the prior marriage, after investigation, remained in doubt, the marriage tribunal issued a written "decree of good faith," which permitted prospective converts to be received into the Church while continuing in their existing marriage.⁷ The decree was issued only if the existing marriage seemed

⁴ J. Krol, "Permission for Parties Invalidly Married to Live as Brother and Sister," *Jurist* 11 (1951) 7-32, at 11; B. Sullivan, *Legislation and Requirement for Permissible Cohabitation as Invalid Marriages: A Historical Synopsis and a Commentary*, Canon Law Studies 356 (Washington: Catholic University of America, 1954) 48, 81.

⁵ Sullivan, *Permissible Cohabitation* viii.

⁶ R. Carey, "The Good Faith Solution," *Jurist* 29 (1969) 428-38, at 428.

⁷ Carey describes the procedures and their development (*ibid.*).

stable, if the parties gave assurance that they were in good faith when they entered the marriage, and if there seemed to be no danger of scandal from the continuance of the union.⁸

The "decree of good faith" was not a judicial decision; it declared neither the nullity of the former marriage nor the validity of the existing marriage.⁹ It provided a process of consultation for the parish priest, and the assurance of an official-looking document for the couple. The procedure was administrative, and the decision was seen as "canonico-moral."¹⁰ In the late 1960s, tribunals began to question the issuance of the decrees, and asked whether the parish priest could not more simply assist the couple in making what is essentially a moral decision about receiving the sacraments, consulting the tribunal by phone when help or advice were needed.¹¹

The "good faith solution" which at first was used for the marriages of two non-Catholics, was then extended to marriages which involved one Catholic party. The Catholic could have entered the second marriage in good faith if he or she thought the first marriage in question was invalid but was unable to establish that fact canonically. The suggestion arose whether this solution could be extended even to situations in which the first marriage was clearly valid, in view of the harm that would be done to the couple, their children, and to society, if they were obliged to separate before returning to the sacraments.¹²

Here we should note a basic distinction, made by Ladislav Orsy in 1970, which is still widely used in analyzing individual circumstances: (a) "conflict situations" refer to contexts where the internal and external forums are in conflict, that is, an earlier marriage was invalid but cannot be proved to be so canonically, for any of a variety of reasons including physical or moral impossibility; in this situation the fundamental human right to marry can override the merely ecclesiastical law which requires that the nullity be established before another marriage can be contracted (cc. 1060, 1085.2); (b) "hardship situations" are those situations where a first marriage, presumably valid, has in fact broken down, and one of the parties has remarried and desires to return to sacramental and ecclesial communion without abandoning the second union.¹³

In 1971, a committee of the Catholic Theological Society of America

⁸ *Ibid.* 432-33.

⁹ The decree was based on the solution very often given by the Holy Office: *relinquendi in bona fide* (*ibid.* 430). Some tribunals issued a *decretum non-inquietandi*, meaning that the parties are "not to be disturbed," their present marriage is to remain in peaceful possession.

¹⁰ *Ibid.* 434.

¹¹ *Ibid.* 434-35.

¹² *Ibid.* 436-37.

¹³ Ladislav Orsy, "Intolerable Marriage Situations: Conflict Between External and Internal Forum," *Jurist* 30 (1970) 1-14, at 10. The five articles in that issue of the *Jurist* are of lasting value.

submitted its study of the "problem of second marriages." In the section dealing with "second marriages and participation in the life of the Church," the committee endorsed a reconsideration of the Church's pastoral practice by stating that respect for a couple's conscience should permit reception of the Eucharist by those who present themselves "after appropriate consultation, reflection and prayer."¹⁴

In June 1972, Bishop Robert Tracy of Baton Rouge, motivated by a desire to have a uniform pastoral practice in his local church, wrote a pastoral letter on "Good Consciences Cases" to be read in all of the churches of the diocese. His plan envisioned that an administrative procedure, i.e. a "decree of good conscience," would be issued by the tribunal. But he also called it "an internal forum solution."¹⁵ The Baton Rouge process extended this internal forum solution to those whose previous marriage was of doubtful validity, on the presumption that its invalidity was not canonically provable. The solution was proposed as well to Catholics who believe in their consciences that their first marriage was not a true marriage, but that their present one is, and that they have a serious moral obligation to maintain the second union.¹⁶

On August 17, 1972, Cardinal Krol of Philadelphia, the president of the NCCB, issued a statement saying that the issue of the reception of the sacraments by divorced and remarried Catholics was under study by the Holy See and by the NCCB's Committee on Pastoral Research and Practices. He referred to a letter from the Holy See which made clear that "dioceses are not to introduce procedures that are contrary to current discipline" while the studies are under way.¹⁷ The September 1972 meeting of the NCCB Administrative Board decided to send to the Vatican its study of the issue of permitting the sacraments to divorced and remarried Catholics.¹⁸

On April 11, 1973, Cardinal Seper, the prefect of the CDF, wrote back to the president of the NCCB. His letter spoke of "new opinions which either deny or attempt to call into doubt the teaching of the Magisterium of the Church on the indissolubility of matrimony" and which are used as arguments "for justifying abuses against current

¹⁴ "Divorce and Remarriage," *Origins* 2 (October 12, 1972) 251-54, at 254. The members of the CTSA committee were John Connery, S.J., Joseph Kerns, Richard McCormick, S.J., Brendan McGrath, O.S.B., James McHugh, John Thomas, S.J., and George Wilson, S.J.

¹⁵ "It is a recognition by the Church in an official way of the right of a party involved in a second marriage by reason of his [sic] good conscience in the matter to receive the sacraments with no official decision being rendered one way or the other as to the validity or invalidity of a previous marriage or marriages" (Robert Tracy, "Divorce, Re-Marriage and the Catholic," *Origins* 2 [July 27, 1972] 130, 135-36, at 135).

¹⁶ *Ibid.* 135-36.

¹⁷ John Krol, "Good Conscience Procedures," *Origins* 2 (September 7, 1972) 176-177.

¹⁸ See "On File," *Origins* 2 (September 28, 1972) 220.

discipline on the admission to the Sacraments of those who are living in irregular unions." The final paragraph of the letter stated:

In regard to admission to the Sacraments the Ordinaries are asked on the one hand to stress observance of current discipline and, on the other hand, to take care that the pastors of souls exercise special care to seek out those who are living in an irregular union by applying to the solution of such cases, in addition to other right means, the Church's approved practice in the internal forum.¹⁹

The leadership of the NCCB was uncertain about the meaning of "approved practice in the internal forum." Did it include "internal forum solutions" as they were being used in the U.S.? Was it limited to the brother-sister arrangement? Did it include some form of "good faith" or dissimulation? The NCCB president wrote back to the CDF for an official interpretation.

On March 21, 1975, Archbishop Hamer, the secretary of the CDF, wrote to Archbishop Bernadin, who had become the NCCB president:

I would like to state now that this phrase [*probata praxis Ecclesiae*] must be understood in the context of traditional moral theology. These couples [Catholics living in irregular marital unions] may be allowed to receive the sacraments on two conditions, that they try to live according to the demands of Christian moral principles and that they receive the sacraments in churches in which they are not known so that they will not create any scandal.²⁰

This response did not clarify the American pastoral scene, and the bishops continued to work toward guidelines which could command common agreement. A 29-page draft of January 1976, "Pastoral Care of Catholics in Irregular Marriages"²¹ allowed for the "internal forum solution" in situations where the first marriage was invalid or doubtful but not provable in the external forum. In cases where the first marriage was presumably valid, the draft offered the possibility of leaving persons in "good faith" or "good conscience" about their continued cohabitation, and admitting them to the sacraments, even when their consciences were inculpably erroneous or perplexed. This was understood as an application of the principle of the lesser of two evils. The brother-sister arrangement could be permitted rarely for those who accept the invalidity of their present marriage. The work of the NCCB Committee came to naught; no guidelines were ever issued.²² Pastoral practice regarding access to the sacraments by the divorced and remarried continued to be and still remains diverse in the U.S.

¹⁹ The final words in the Latin original are *probata Ecclesiae praxim in foro interno* (Protocol nos. 1284/66 and 139/69).

²⁰ Prot. no. 1284/66.

²¹ A working draft from the subcommittee of the NCCB Pastoral Research and Practices Committee.

²² The fate of these efforts is described by James Provost, "Intolerable Marriage Situations Revisited," *Jurist* 40 (1980) 141-96, at 176-77.

During the 1980 International Synod on the Family there was concern expressed to improve pastoral care toward the divorced and remarried. At the time there was criticism of the synod's final text for failing to catch the nuances of the discussion, i.e. not consistently distinguishing between conflict and hardship cases, and within the hardship category ignoring the difference between those who were abandoned and people in other situations. Overall, however, the tone of the synod discussions and the declared desire to provide a positive program of pastoral care was a big step forward in the Church's ministry to those in irregular unions.²³

In 1981, John Paul II issued his apostolic exhortation *Familiaris consortio* which provided his thoughts on the synod topic. In paragraph 84 he addressed the situation of the divorced and remarried. There he made distinctions not found in the synod statement. The distinctions, however, did not make any practical difference in pastoral care—all divorced and remarried are to be extended pastoral care and all are to be excluded from the Eucharist. While gracious in tone and strong in his affirmation of the place of the divorced and remarried within the Catholic community, the pope repeated the synod's reasons for eucharistic exclusion—namely, a contradiction between the objective state of those in irregular unions and the unity which the Eucharist signifies. Furthermore, he asserted that admitting remarried persons to the Eucharist without resolving the issue of the first marriage would cause error and confusion among believers.

One of the principal authors of the draft of *Familiaris consortio* proposed a different approach to the divorced and remarried than the one found in the papal text. Immediately after the synod, Cardinal Ratzinger sent a pastoral letter to the priests of the Archdiocese of Munich-Freising in which he stated that those in conflict cases could receive the Eucharist provided no scandal was caused. He also called for further study of those in hardship cases who wished to receive the Eucharist. That call was echoed by other members of the hierarchy in the next two synods. The Japanese bishops' conference as well as several individual bishops attending the 1983 synod on reconciliation and penance called for a less strict norm than that articulated by John Paul II. At the time of the 1985 extraordinary synod, the Japanese bishops' conference again called for reconsideration of the treatment of the divorced and remarried. During the meeting other bishops made similar requests.

Evident in all this is that the positive tone and obvious concern for

²³ This account of the synod relies upon James Provost, "Intolerable Marriage Situations: A Second Decade," *Jurist* 50 (1990) 573–612. This essay along with Provost's earlier article (see n. 22 above) are indispensable reading for those who wish to pursue the recent historical background of the present discussion. An essay by Peter Hünermann, "A Church in Dialogue," *Tablet* 249 (1995) 896–98, offers useful background on the immediate context for understanding the German bishops' initiative.

the divorced and remarried expressed by the pope in *Familiaris consortio* has been welcomed, but a number of bishops wish to press the issue beyond the papal position. As James Provost has stated, a "consensus supporting a more wholesome pastoral attitude to divorced remarrieds" exists, but the agreement "does not extend to the issue of access to the sacraments."²⁴ On this question the papal position is a firm stance of exclusion, whereas other bishops have been willing to give greater nuance to their position or have called for more discussion about the present discipline.

The German Bishops' Pastoral

It is within this ecclesial context that the letter of the three German bishops must be read: the official teaching has been restated without further refinement or additional argument and the pastoral practice exhibits a divergence of approaches, some going beyond the papal position. As they begin their letter the bishops comment on the characteristics of the situation of the divorced and remarried and then turn their attention to the teaching of the gospel on the topic. They note that with regard to pastoral care "the church is not simply free," for the standard of the Church must be "the word, will and example of Jesus."²⁵ Their conclusion makes two points. "The church cannot assume the right to disregard the word of Jesus regarding the permanence of marriage; but equally it cannot shut its eyes to the failure of many marriages. For wherever people fall short of the reality of redemption, Jesus meets them in mercy with understanding for their situation."²⁶

The bishops do not question the Church's teaching on indissolubility but make clear the place of the divorced and the divorced remarried in the Church. For a person in the former category there is "no restriction with regard to his or her rights or position in the church." Concerning those persons who have civilly remarried after divorce they too "belong to the church and thus to the parish community in which they live."

²⁴ For the post-1980 synod reactions, see Provost, "Intolerable Marriages: Second Decade" 586-90.

²⁵ "Pastoral Ministry" 670. It does seem, however, that the present leaders of the Church are more conservative on this matter of the Church's freedom than need be. In an excellent essay, New Testament scholar PHEME PERKINS concluded that on the matter of divorce, as well as in other areas, the early Church "did not assume that Jesus had formulated a universally binding rule that could be inserted into any context without modification" ("Jesus and Ethics," *Theology Today* 52 [1995] 49-65, at 63-64). See also the conclusion of Raymond Collins, "the fact that the tradition of Jesus' saying on divorce exists in so many different versions and that it is almost impossible to recover the most primitive versions of the saying with any surety . . . stands as evidence that the first generations of Christians experienced a need not only to pass along Jesus' teaching on divorce but also to adapt it to ever new circumstances" (*Divorce in the New Testament* [Collegeville: Liturgical, 1992] 231).

²⁶ "Pastoral Ministry" 670.

While "their membership rights are somewhat reduced, they are neither excommunicated nor excluded from the church"; in fact, the Church must "give them special care because of the difficult situation in which they find themselves." In this, the German prelates are in full accord with the papal viewpoint. Inevitably, the question arises whether giving "special care" to the divorced remarried includes permission to receive the Eucharist. The bishops warn that "one must not take an all-or-nothing stance here." They acknowledge, citing *Familiaris consortio*, that present official teaching declares "divorced and remarried people generally cannot be admitted to the eucharistic feast as they find themselves in life situations that are in objective contradiction to the essence of Christian marriage."²⁷ Quoting their own catechism, the German bishops go on to point out that canon law can "set up only a valid general order; it cannot regulate all of the often very complex individual cases."²⁸

Quoting *Familiaris consortio*, the bishops distinguish between those abandoned and those culpable for destroying a valid marriage. Further, those who have entered into a second marriage for the sake of raising children and who believe their first marriage to be invalid are different than those who admit the validity of their first union. In differing with the papal exhortation the German bishops ask whether these different situations can lead to different treatment.

Unless there is a process of "spiritual and pastoral dialogue, which should include elements of repentance and conversion, there can be no participation in the eucharist." While the participation of a priest is necessary in this process "the priest does not pronounce any official admission in a formal sense." Rather the priest is present to insure that a serious and informed discernment occurs, and then he is to "respect the judgment of the individual's conscience." Respect here has "different degrees," and it "may be in a certain borderline situation that is extremely complex" the priest "cannot in the end forbid" a person's participation in the Eucharist.²⁹

In an interview for the Italian magazine *Il Regno*, Cardinal Ratzinger noted the bishops' "pastoral intentions" but said their text "pre-

²⁷ Ibid. 672.

²⁸ Ibid. 673, quoting *The Creed of the Church* (the Catechism for Adults of the German Bishops' Conference) 395.

²⁹ "Pastoral Ministry" 675. The bishops suggest eight criteria for discernment: (1) responsibility for the collapse of the first marriage "must be acknowledged and repented"; (2) it must be clear "that a return to the first partner is really impossible"; (3) "restitution must be made for wrongs done"; (4) any "obligations to the wife and children of the first marriage" must be met; (5) "scandal should be taken into consideration"; (6) the second relationship "must have proved itself over a long period of time to represent a decisive and also publicly recognizable will to live permanently together"; (7) whether or not there exist moral obligations of "fidelity to the second relationship" should be determined; (8) it should be clear that "the partners seek truly to live according to the Christian faith and with true motives" (ibid. 674).

sents some problems."³⁰ Over a year later in its formal reaction, the CDF reaffirmed the position of *Familiaris consortio* that those who have left valid first marriages and have remarried may not receive communion. Such a stance is "not at all a punishment or a discrimination" against the remarried but merely expresses the reality of the situation, namely, that "their state and condition of life objectively contradicts that union of love between Christ and his church which is signified and effected by the eucharist." The CDF document also adds the risk of "error and confusion regarding the church's teaching about the indissolubility of marriage" as a reason for denying communion to the divorced remarried. Only after sacramental absolution may such persons receive the Eucharist, and absolution is contingent upon a readiness "to undertake a way of life that is no longer in contradiction to the indissolubility of marriage." This means either separation or, in cases where that causes serious difficulties, the agreement to live according to the brother/sister solution.³¹

In the CDF's account of the discernment process, a priest has a different role than that suggested by the German bishops. Confronted by a couple in an irregular union who have decided they can in good conscience receive the Eucharist, "pastors and confessors, given the gravity of the matter and the spiritual good of the church, have the serious duty to admonish them that such a judgment of conscience openly contradicts the church's teaching."³² In doing this the priest accompanies the couple, but only to the extent "compatible with the dispositions of divine law, from which the church has no power to dispense."³³ The argument concludes: "Sacramental communion with Christ includes and presupposes the observance, even at times difficult, of the order of ecclesial communion, and it cannot be right and fruitful if a member of the faithful, wishing to approach Christ directly, does not respect this order."³⁴

On the same day the CDF statement was issued, the three German bishops made public their joint response. They began by stating "it was not and could not be our intent to introduce doctrinal innovations or a new canon law. Rather, we have attempted, even while upholding the doctrine and discipline of the church, to arrive at acceptable solutions in terms of their pastoral application."³⁵ After recounting the process of meetings they had with the CDF since their initial letter, the bishops emphasized the points of agreement which existed between their position and the congregation. They saw "no fundamental disagreement whatever" on fundamental matters of church teaching. What they reiterated, however, was that the issue for them was the "pastorally difficult" work of concrete application of the Church's teaching

³⁰ As reported in *Origins* 23 (March 10, 1994) 670.

³¹ "Reception" 339.

³² *Ibid.*

³³ *Ibid.* 340.

³⁴ *Ibid.*

³⁵ "Response" 341.

in "delicate and highly complex human situations." Admitting that the issue around which controversy swirls is reception of the Eucharist by the divorced and remarried, the bishops repeated that they made no call for "official admission, but rather of an approach to the table of the Lord under precisely stated conditions." For them, the "distinction between admission and approach is fundamental." A few lines later they state the matter as the difference between "approval" and "toleration." The bishops make clear that the Church "still has much to learn at all levels" in its pastoral care of the divorced and remarried but they also acknowledge that in light of the CDF response certain of the statements and principles in their letter "cannot be the binding norm of pastoral practice."³⁶

Reactions

In a letter issued in July of 1994, before the CDF's reaction, the bishops of Pennsylvania addressed the pastoral care of the divorced and remarried. They reaffirmed the positive measures of pastoral concern which have become widely accepted since the 1980 synod. Those who are divorced and remarried are encouraged to be active members of the Church, and priests are instructed to "do everything possible to include to the extent allowed divorced Catholics in the life of their parishes." The bishops make distinctions between different situations but make it clear that "those who have remarried and live in a sexual relationship cannot be readmitted to holy communion."³⁷

The Pennsylvania bishops continue with an extended commentary on the "internal forum" solution which they deem "unacceptable, unnecessary and pastorally unsound." They consider it pastorally unsound because such an approach "cannot bring about the full reconciliation of the couple to the church." They find it unnecessary because the 1983 Code of Canon Law has made tribunal procedures "responsive enough to declare invalid all marriages which truly are." Finally, it is unacceptable for a variety of reasons. First, such an approach, especially when applied beyond the conflict situation to include hardship cases, "has the effect of ratifying an erroneous judgment of conscience against the reality of objective moral truth"; second, it "undermines the teaching of the Lord and the church on indissolubility of marriage"; third, it risks scandal, so that "others will be confused, weakened and misled into immoral behavior themselves."³⁸

During the same summer, Rene Gracida, Bishop of Corpus Christi, issued a pastoral letter in which he repeated the official teaching and urged people in irregular unions to seek the help of the mar-

³⁶ Ibid. 342-43.

³⁷ "Pastoral Care of Divorced Catholics Who Remarry," *Origins* 24 (August 18, 1994) 205-08, at 206.

³⁸ Ibid. 207-08.

riage tribunal. Like the Pennsylvania bishops, Gracida is confident that the revised Code of Canon Law provides that "proof of nullity can be met whenever there really was something that prevented the relationship from being a valid marriage." For those whose first marriage was valid but now find themselves in a second civil marriage, the brother/sister alternative is recommended with the bishop's assurance that "with God's grace, a Christian can do everything God asks."³⁹

On the day the CDF letter was released, Archbishop Francis Stafford of Denver made a brief statement which asserted that the congregation was clarifying a teaching, not judging people. Emphasizing that the Church "cannot serve human needs without first serving the truth about the human person," Stafford stated that the Church's position on divorce and remarriage is not of its own making but "comes directly from the words of Christ." To violate that teaching is to rupture a sacramental covenant. Since the "eucharist is the defining act, the central celebration of Christian unity and community," those who participate must not be living a life which violates the sacramental unity. One cannot simply exalt the individual's conscience over the Church's teaching, especially on a matter so central to the Church's life as marriage.⁴⁰

The German prelates also evoked several replies from scholars. An open letter to the three Germans was published by Germain Grisez, John Finnis, and William E. May. Stating that while they "believe there are very serious problems" in the way that the bishops treat conflict cases, the authors of the open letter chose to focus on the Eucharist and hardship situations.⁴¹ In their opinion, the options open to someone in such a situation who decides to receive Communion are three. First, the person admits that he or she is committing adultery and that adultery is a mortal sin but maintains that "persisting in mortal sin is not inconsistent with receiving Communion."⁴² Second, that the person acknowledges the commission of adultery but does not consider it grave matter and thus not a mortal sin. Or the final option is that, although "the present relationship does not meet the Church's official, canonical requirements, it has come to have the moral reality of marriage, and so is valid."⁴³ Therefore there is no adultery, since the first marriage no longer binds; and if one follows the directives proposed by the three German bishops in reviewing one's conscience, the individual may receive Communion. It is this third option which Gri-

³⁹ Rene Gracida, "Pastoral Ministry to the Divorced and Remarried: A Pastoral Letter," *Fellowship of Catholic Scholars Newsletter* (June 1994) 16-19, at 18.

⁴⁰ Francis Stafford, "The Ecclesial Dimension of Conscience," *Origins* 24 (October 27, 1994) 345.

⁴¹ Germain Grisez et al., "Letter to: Archbishop Saier, Bishop Lehmann, and Bishop Kasper," *Fellowship of Catholic Scholars Newsletter* (June 1994) 20-27, at 22 (the same letter was also published in *New Blackfriars* 75 [1994] 321-30 under the title "Indissolubility, Divorce and Holy Communion").

⁴² *Ibid.* 22.

⁴³ *Ibid.* 23.

sez-Finnis-May see the Germans espousing. They view such a position as "indefensible" since it puts the bishops in the contradictory position of saying both that they believe in the Church's teaching about indissolubility and that in some cases valid marriages dissolve.

Ladislas Orsy, in a brief article, observes that the bishops are "on solid ground" in upholding the general prohibition against eucharistic participation by the divorced and remarried while stressing the need to examine individual cases. In his mind such a posture is not advocacy of the arbitrary nor a weakening of the teaching on indissolubility. For Orsy, faithful observance of the law "ought to be coupled with the spirit of mercy" and this balance he believes the bishops have achieved.⁴⁴

John Grabowski of the Catholic University of America comments on how the German bishops use the internal-forum approach to conflict cases. He is sympathetic to the bishops while raising questions about their proposal. "Specifically, they must clarify the relationship of their proposal to the already established annulment procedure, the authority of individual conscience vis-à-vis the power of jurisdiction with the ecclesial community and the theological status of second marriages." Despite these unresolved matters, Grabowski considers the German proposal as "at least a step toward a more nuanced pastoral approach."⁴⁵

Moral theologian Kevin Kelly, writing after the CDF response, hears the Congregation's response as "saying nothing new," either in its arguments for the Church's position or in the practical pastoral advice offered. The argument about a civilly remarried couple being in a state which is an objective contradiction to the unity the Eucharist signifies "proves too much," according to Kelly, for it overlooks the objective sinfulness present in the lives of us all. That is why, Kelly maintains, we begin the Eucharist with a rite of penance and just before reception of the sacrament say, "Lord, I am not worthy." Regarding the other rationale for the Church's ban, the "argument about scandal is an argument from consequences" and "no empirical evidence is offered to prove the truth of this assertion." As for the approved pastoral solutions, separation or the brother/sister relationship, Kelly sees major difficulties. The first would frequently lead to great injustices as a result of new obligations, and the second "seems to imply that the heart of marriage lies in sexual intercourse rather than the whole loving relationship of shared life together." Since the Vatican letter does little to advance the pastoral question, Kelly does not

⁴⁴ Ladislas Orsy, "Divorce and Remarriage: A German Initiative," *Tablet* 248 (1994) 787.

⁴⁵ John Grabowski, "Divorce, Remarriage and Reception of the Sacraments," *America* 172 (October 8, 1994) 20-24, at 24.

believe those divorced and remarried persons who are already receiving the sacraments should change their minds.⁴⁶

Issues at Stake

While certain items in this dispute merit comment regardless of how one reads the document by Kasper, Lehmann, and Saier, other items depend very much on what one thinks the German bishops intended. Grabowski interprets the document as concerned solely with conflict cases.⁴⁷ Given the common use of the internal forum in dealing with such cases, the fact that none of the pastoral principles offered by the bishops are new, the improving tribunal practice in many nations, and the enormity of the number of hardship cases, this interpretation seems too narrow. On such a reading the bishops' statement is largely a rehash of things said by them and others (including Cardinal Ratzinger) years earlier.

The broader reading of the German letter is the one taken under review by Grisez, Finnis, and May, namely, that the bishops were willing to consider hardship cases within the range of those pastoral solutions by which people might be able to receive the Eucharist. The broader reading is presumed in the CDF response, since it specifically cites three examples of cases in addition to those who believe their previous marriage to be null but not provably so.⁴⁸ Finally, the text of "Principles of Pastoral Care," the document accompanying the pastoral letter, clearly addresses the hardship case.⁴⁹ Including hardship cases in their pastoral approach raises the stakes considerably when assessing the letter of the German bishops and the subsequent reactions.

Brother/Sister Solutions

Matthäus Kaiser has argued that the present discipline of the Church is incompatible with the theology of marriage. He claims the present discipline reflects an understanding of marriage as contract

⁴⁶ Kevin Kelly, "Divorce and Remarriage: Conflict in the Church," *Tablet* 248 (1994) 1374-75, at 1374. Two scholarly replies from Italian authors should also be noted: G. Marchesi, "Un problema per la Chiesa: La cura pastorale dei divorziati," *Civiltà cattolica* 145 (1994) 486-95; and S. Consoli, "Il problema della partecipazione ai sacramenti dei fedeli separati o divorziati," *Monitor Ecclesiasticus* 119 (1994) 84-94.

⁴⁷ Grabowski, "Divorce, Remarriage and Reception" 21-22.

⁴⁸ The three cases involve those unjustly abandoned, those who have gone through a period of penance, and those in a second union who for moral reasons cannot separate ("Reception" 339).

⁴⁹ After discussing the conscience which is "convinced that the earlier, irreparably destroyed marriage was never valid" the bishops state, "the situation would be similar when those concerned already have come a long way in reflection and penance. Moreover, there could also be the presence of an insoluble conflict of duty, where leaving the new family would be the cause of grievous injustice" ("Principles" 674); note the similarity to the examples which the CDF document cites.

(see c. 1012 of the 1917 Code). This contract gave to each partner the "life-long mutual right to sexual union oriented toward procreation" (see cc. 1110–1111). This legal relationship "existed independently of whether there was or was not a personal relationship between the partners." This way of viewing the matter led to three consequences. (1) No violation of a right exists "if it is mutually agreed that the right will not be exercised." Hence divorced persons are not excluded from the Eucharist. (2) If a divorced person remarries the legal right of the other person is violated since "the right to sexual union excludes any third party" and "this right cannot be transferred to another partner." Therefore, the divorced remarried person is excluded from the Eucharist since adultery is a sin. (3) Adultery "exists exclusively in sexual communion. Thus, nothing stands in the way of admission to the sacraments if the partners of the new marriage reject sexual union, even if they live together in personal community." In other words, the brother/sister relationship permits eucharistic participation.⁵⁰

Kaiser argues that it is the contractual model of marriage which continues to shape our pastoral practice.⁵¹ Moreover it is precisely the brother/sister solution which demonstrates this. For a couple may share all other aspects of married life—spiritual, emotional, psychological, financial, parental, intellectual—at an intimate level, and none of this violates the rights of the former spouse; but should there be the physical intimacy of sexual union, then the rights of the former partner have been transgressed. Such a viewpoint makes no sense, Kaiser argues, in a model of marriage as covenant, a partnership in the whole of life. In the theology articulated at Vatican II, "marriage is the personal living and loving community of husband and wife who mutually give and accept each other as persons and are bound together in a new reality so that they are no longer two but one." In this framework sexual union is not a right existing in isolation but is meant to give "expression and realization" to the "personal community of life and love" that is the marital union of husband and wife.⁵² Precisely for this reason the bishops at Vatican II had to relinquish the claim that the primary end of marriage was procreation. Sexual union serves marital intimacy as well as procreation. Absent such intimacy no right to sexual union exists.

In this newer model of marriage three consequences result. (1) Marriage is not only attained through the consent of the partners, but the

⁵⁰ Matthäus Kaiser, "Why Should the Divorced and Remarried (not) be Admitted to the Sacraments?" *Theology Digest* 41 (1994) 8–14, at 9; original German text in *Stimmen der Zeit* 118 (1993) 741–51.

⁵¹ Anne Thurston makes a similar point: "One of the problems in the practice of the Roman Catholic Church is that the move towards a description of marriage as covenant rather than contract has not sufficiently penetrated pastoral practice when it comes to the breakdown of marriages" ("Living with Ambiguity," *Doctrine and Life* 44 [1994] 537–42, at 538).

⁵² Kaiser, "Why Should the Divorced and Remarried" 10.

couple is bound by God into a unity. Such a community of love can be destroyed, "and this is confirmed by divorce." Once "there is no more personal community between divorced spouses, they no longer have the right to sexual union which is the expression of personal unity." (2) "The other component for the realization of marriage, union by God, cannot be annulled because what God does is irrevocable." Thus, the divorced spouses are not free to remarry, nor is the Church able to witness or solemnize a new marriage. (3) However, if the divorced person enters into a civil marriage, "there is a mutual personal self-sharing between husband and wife" and their sexual union is an expression of their loving community. There is no violation of the rights of previous spouses to sexual union, "because that right ceased to exist with the destruction of the personal living and loving community." In sum, once one accepts the Council's understanding of marriage as covenant, "the sexual union of divorced and remarried persons is judged differently than extra-marital, adulterous, sexual relationships."⁵³ This is because no spousal rights to sexual union perdure once the community of marriage has ended. Following Kaiser, one can conclude that the brother/sister relationship is a practice which should be explicitly abandoned by the Church in its ministry to the divorced and remarried.⁵⁴

The Question of Sin

The issue of sin arises not only in regard to adultery. Kaiser makes the point that "not only the remarriage, but the divorce is an offense against God's command." Whether this offense is a sin must be judged not only by the objective situation but by personal culpability, for the

⁵³ Ibid. 11. This is a needed corrective to the assertion of the Catechism that the remarried spouse is "in a situation of public and permanent adultery" (*Catechism of the Catholic Church* [New York: Paulist, 1994] no. 2384).

⁵⁴ Leading authors have long looked askance at the brother/sister arrangement. Bernard Sullivan began his doctoral dissertation on the subject by gathering their opinions: "... [C]anonists and theologians uniformly warn that the sanctioned cohabitation in the brother-sister arrangement is a '*res plena periculis*' and is seldom to be recommended; some say '*raro*' (Vermeersch-Creusen, Merkelbach, Sporer-Bierbaum); others say '*raris-sime*' (DeSmet, Genicot, Coronata, Chretien, Payen); others say '*fere numquam*' (Gasparri, Vlaming-Bender, Capello). It is evident that all apparently mean to say as Chelodi and Wernz-Vidal put it: 'Cohabitation on the brother-sister basis is permissible only in extraordinary circumstances and when no other remedy is possible' " (Sullivan, *Permissible Cohabitation* viii). In the face of this extreme reluctance, American canonists like Sullivan and Krol continued to promote it as a pastoral option, suggesting detailed requirements and procedures, and constructing printed forms for requesting permission from the local ordinary to live as brother and sister (Sullivan, *ibid.* 81-171; John Krol, "Parties Invalidly Married" 22-32, and "Permissible Cohabitation in Invalid Marriages," *Jurist* 18 [1958] 279-306, at 299-306). By the late 1960s, canonical attitudes seemed to have changed: "As for the possibility of a brother-sister relationship, this is clearly unrealistic among the great majority of people" (Carey, "Good Faith" 432). It was astonishing to see this arrangement put forward as a pastoral option in *Familiaris consortio* no. 84, and again in the *Catechism* no. 1650.

present pope has "expressly acknowledged that not every divorced spouse lives in mortal sin." Each case must be examined. Some may not be sinfully culpable for their divorce, e.g. the abandoned. Yet other spouses may well have "destroyed the personal living and loving community of a marriage in a mortally sinful way." Such persons must earnestly undergo an examination of their actions and in "true repentance turn from sin" through the sacrament of penance. Such individuals are not excluded from the Eucharist, even if the divorce remains in effect, since reestablishment of the loving communion of the first marriage may no longer be possible. Divorced persons in this situation are free to receive the sacraments, although they were culpable in a serious way for the break-up of the marriage and their divorced state is not altered.

Remarriage must be assessed in the same way as divorce, according to Kaiser, for "in every instance remarriage of a divorced person is as objective an offense against God's command as divorce." Objective invalidity, however, "says nothing about whether the remarriage of the divorced person is also considered mortal sin." Some remarried may not be guilty of mortal sin, "for example, when a divorced person remarries for the sake of the children's education." Kaiser believes that due to "circumstances the moral guilt is diminished or entirely removed" in specific cases. Even those who have "mortally sinned through the remarriage can later earnestly repent of the sin and, after examining their conscience, come to the conviction that under the prevailing circumstances the marriage should be pursued."⁵⁵

Once we move beyond the preconiliar understanding of marriage as contract, we find that the divorced and remarried are in no different a situation pastorally than the divorced. Divorce, like remarriage, objectively violates God's will for married life. In many cases sinful culpability is present when a marriage dies. Just as the divorced person may repent yet persist in the "objectively wrong" status of being divorced, so the remarried may honestly pursue a path of repentance and sacramental forgiveness yet remain in a canonically invalid second union. The Church acknowledges this to be so since it encourages a couple to live up to the obligations, both human and Christian, that derive from the new marriage. The Church cannot tell a couple that their present state in life is their duty while at the same time tell them that their present state of life entails persisting in sin. True, the official teaching presently maintains that the couple meet their obligations while living as brother and sister. But since, as has already been argued, no rights of former spouses are violated by the sexual sharing present in the new marriage, because no such right exists, the full intimacy of marriage at all levels can and should occur in the second marriage. Thus, provided the divorced and remarried honestly seek to

⁵⁵ Kaiser, "Why Should the Divorced and Remarried" 12.

build a life of personal self-giving and loving communion, their participation in the Eucharist should be permitted when they approach the table, irrespective of the canonical status of their marriage.

This conclusion is valid, we believe, even if the pastoral minister continues to question the nature of the second union. Canon 915 of the 1983 Code of Canon Law (for the Western Church) gives canonical criteria for "non-admission" to Holy Communion. Canon 915 says that those "who obstinately persist in manifest grave sin" are to be excluded. It places the burden of not admitting such persons on the one administering Communion. The norm is a general one, but it is tightly drawn. The Relator for the Commission for Revision of the Code and some commentators say that it refers to those living in irregular unions, specifically the divorced and remarried.⁵⁶

However, as John Huels notes, the canon is restrictive of rights and therefore must be interpreted strictly (c. 18). Canons 213, 843.1, and 912 state strongly the right of the faithful to the sacraments, and to Communion in particular. Each word of the prohibition must be carefully weighed, and "a minister may doubt whether a baptized person in an irregular marriage who comes to Communion is *obstinately* persisting in *manifest, serious* sin."⁵⁷

The minister cannot assume, for example, that the sin of public concubinage arising from divorce and remarriage is always grave in the internal forum. Any prudent doubt about either the gravity or the public nature of the sin should be resolved by the minister in favor of the person who approaches the sacrament.⁵⁸

Canon 712 of the 1990 Code of Canons of the Eastern Churches states the norm more broadly: "Those who are publicly unworthy are to be prohibited from the reception of the Divine Eucharist."⁵⁹ The interpretation of *publici indigni* must take account of the same issues as those mentioned above. Following Kaiser, since adultery is not at issue and the failure to witness to the nature of marriage occurs with divorce, not remarriage, it does not seem that the unresolved canonical nature of the second marriage merits an absolute and universal ban on reception of Communion.

⁵⁶ "Certo certius textus respicit etiam divortiatos et renuptiatos," *Communicationes* 15/2 (December, 1983) 194. See also J. Manzanares, *Codigo de Derecho Canonico* (Madrid: BAC, 1985); A. Marzoa, *Codigo de Derecho Canonico* (Navarra: Eunsa, 1983); G. Damizia, *Commento al Codice de Diritto Canonico* (Rome: Urbaniana University, 1985)—all a propos of canon 915.

⁵⁷ *CLSA Advisory Opinions 1984-1993*, ed. P. Cogan (Washington: CLSA, 1995) 285. It should also be noted that "questions of 'sin' and 'grave' are not canonical notions and need to be dealt with by confessors, not by those dispensing the Eucharist" (Provost, "Intolerable Marriages: Second Decade" 595).

⁵⁸ *The Code of Canon Law: A Text and Commentary*, ed. J. Coriden, T. Green, and D. Heintschel (New York: Paulist, 1985) 653.

⁵⁹ "Arcendi sunt a susceptione Divinae Eucharistiae publici indigni."

Eucharistic Unity

Ever since the International Theological Commission issued a document of 16 theses on the sacrament of marriage, magisterial pronouncements have repeated the argument found in Thesis 12: "In receiving the divorced and remarried to the eucharist, the church would let such parties believe that they can, on the level of signs, communicate with him whose conjugal mystery they disavow on the level of reality." The thesis continues with the statement that such a couple embodies an "objective contradiction" with the life and teaching of the Lord, thus making it impossible for the couple to share the sacrament of unity.⁶⁰ Appeal to an "objective contradiction" to eucharistic unity has replaced the more traditional "living in sin" argument in magisterial statements.⁶¹ This emphasis on an objective contradiction between the state of life of the divorced and remarried and the unity celebrated in the Eucharist reflects a reluctance to impute subjective evil to couples in a second civil marriage. This is not surprising given the testimony of pastors and people about the graced dimension of so many second marriages. The argument from eucharistic unity is at the heart of the CDF rejection of the German bishops' proposal and it was the substance of John Paul II's reasoning in *Familiaris consortio*.

Does the present emphasis on this argument from unity do justice to the sacramental theology of the Church? A number of years ago the British Jesuit John Mahoney named two principles which must be held in tension regarding the Eucharist. On the one hand, the sacrament is for humankind and for our salvation. On the other hand, the Church must prevent the sacraments from being administered in a lax manner which undermines the integrity of the Eucharist. The early Church in developing its eucharistic discipline appealed to both the Matthean text, "do not give to dogs what is holy" (Matthew 7:6) and the Pauline warning to the Corinthians not to receive the body and blood of the Lord unworthily (1 Corinthians 11:27-29).⁶² These texts have helped to shape a restrictive approach on the part of the Church concerning admission to the Eucharist. Nonetheless, we should remember that

⁶⁰ "Christological Theses on the Sacrament of Marriage," *Origins* 8 (1978) 200-04, at 203. Although released by the ITC, the document was written by an individual, Fr. Gustave Martelet, S.J., a member of the Commission.

⁶¹ One of the interesting consequences of such a shift is to raise in a different way the question of which marriage is truly the "objective contradiction" to Christ's teaching. As Thurston writes, "There are relationships which become destructive for all involved and where without stretching language far beyond what words can bear it is not possible to talk of such marriages as 'symbolizing the union between Christ and the Church.' Paradoxically the second union may in fact be the means of restoring faith, of renewing hope and of embodying love" ("Living with Ambiguity" 538).

⁶² John Mahoney, S.J., *Seeking the Spirit: Essays in Moral and Pastoral Theology* (London: Sheed and Ward, 1981) 158.

Paul himself warned against Christians judging one another. Paul called upon believers to examine themselves "and so eat of the bread and drink of the cup." This attitude has fostered the presumption that if persons present themselves to the minister, the Eucharist should not be refused.

Then there are examples of the other principle of eucharistic practice, namely, that the sacrament is for a weak and sinful humankind. In the "Decree on Ecumenism" the bishops acknowledged that the lack of unity within the Church generally ruled out eucharistic sharing, but the desire for grace "sometimes commends" the practice.⁶³ Evidently the concern for unity is not so great that it creates an absolute prohibition against all eucharistic sharing. Inevitably the question arises: If those not in full unity of faith with the Catholic Church can, by way of exception, share in the Eucharist, is it not possible that those lacking full conformity in public status with the Church may also share in the Eucharist, at least on an exceptional basis? The exclusion of the divorced and remarried from any reception of Communion is stated as an absolute, but this seems to go beyond what is necessary to maintain the necessary integrity of eucharistic symbolism, given the ecumenical experience.

Furthermore, there is the matter of the one-sided nature of the theory informing the present discipline. Sacraments not only celebrate what is already fulfilled, but they effect what they celebrate. The Church does not believe there must be no original sin before baptism, nor no mortal sin before penance. Rather, these sacraments bring about what they celebrate, the forgiveness of sin. Must the sacrament of the Eucharist presume unity in order to celebrate it? Or may it be the means whereby unity is effectively created? Because the present church discipline does not give sufficient weight to the concern expressed in the second question we do not appear to have a balanced view of sacramental effectiveness.

Behind the present policy there also lurks an understanding of the sacraments which suggests we have not fully appropriated the teaching of Vatican II about being a pilgrim people. The people who are the Church need the sacraments not only because they are holy but because they are sinful. Sacraments are not rewards for a life well lived but a means to deepen one's love of God and desire for conversion. Restricting the sacraments to those faithful who are completely integrated into the life of the Church overlooks the example of Jesus who seems to have been generous in sharing his table with all who approached him, even public sinners. "It may be that in our human and very understandable concern that God's gracious gift in Christ, and especially in his body and blood, be not abused, we risk forgetting

⁶³ "Decree on Ecumenism" no. 8.

Jesus' own retort that he came to share his earthly and heavenly table with those who needed him. . . . [W]e tend to think that because God gives his grace freely he gives it grudgingly."⁶⁴

A remaining difficulty with the argument from unity is the tendency found in Martelet's original paper to objectify metaphors.⁶⁵ The unity argument tends to treat metaphorical language as if there is a one-to-one equivalency. But saying "the Church is the body of Christ" is a different sort of statement than saying "you are sitting on a chair." The richness of the metaphor is precisely that it offers insight and meaning at many levels. To take one meaning from the metaphor and conclude this is all it means is to misunderstand the nature of metaphor.

A good example of the abuse of marital metaphor was provided years ago by Theodore Mackin. One cannot simply move from saying that the sacramental marriage of a man and woman is a symbol of Christ's love for the Church to the claim that such a marriage is thereby indissoluble. One can argue that because such a sacramental marriage should witness to Christ's love it needs to embody a faithful and permanent bond of love which does not end. That is to draw a reasonable implication, namely, that if marriage is to be a sign of Christ's love, then a couple should imitate the qualities of Christ's love. But to conclude that because Christ's love for the Church cannot end, then this couple's love for each other cannot end, is doing something more. In the first case we are drawing out moral implications, in the second we are making an ontological claim.⁶⁶ To state that indissolubility is a moral ideal, an ethical obligation, is a justifiable conclusion from the prior claim that sacramental marriage is meant to be a sign of Christ's love. Such a conclusion does not determine, however, what we are to do when people fail to live up to their moral obligation. At that point the Church may decide that the punishment should be severe, e.g. the exclusion of the divorced and remarried from the Eucharist. What the

⁶⁴ Mahoney, *Seeking the Spirit* 162.

⁶⁵ Whether it be Origen's struggle with how to interpret Scripture or Aquinas's insistence on the analogical nature of theological discourse, there are numerous examples of the Church's wrestling with the problem of religious language. Within the contemporary English-speaking world of theology, a world profoundly shaped by Wittgenstein, there has been significant interest in what some have called the "linguistic turn"; see a number of the essays and reports in *Catholic Theological Society of America Proceedings 42* (1987). Martelet's paper and subsequent magisterial usage of his argument do not reflect familiarity with the literature in this area.

⁶⁶ Theodore Mackin, *Divorce and Remarriage* (New York: Paulist, 1983) 517. A related point can be made about how defenders of the present policy make reference to the words of Jesus in the Synoptic Gospels as if his teaching on the permanence of marriage is to be equated with the Church's claim that *ratum et consummatum* marriages cannot be dissolved even by the Church itself. Familiarity with the evolution of the Church's teaching on indissolubility should provide the lesson that the present position has been achieved only after considerable and long development. Acting as if further development now is impossible due to the teaching of Jesus seems to ignore the historically conditioned nature of the present teaching.

Church cannot say is that this is the only possible alternative because the metaphor requires it. Theology must be cautious when translating metaphorical language, as in speaking of marriage and the Eucharist, into simple assertions.

Scandal

Mentioned along with eucharistic unity in both the CDF response and previous magisterial statements is the danger of scandal if those who are divorced and remarried are admitted to eucharistic sharing. Scandal, like the oft-noted right of the faithful not to be disturbed, has a paternalistic tone and may be invoked where the risk is minimal. While scandal should not be dismissed as unimportant, over-frequent reference to the risk of scandal can make the Church and its ministers overly fearful and lacking in the initiative and fortitude which reflects a Spirit-filled community. The large number of annulments being granted in recent years makes it implausible for third parties to presume that those living in a second marriage and receiving the Eucharist are engaged in scandalous activity.

The possible scandal involved in the topic under review is that people will come to think that the Church no longer maintains that marriage is to be governed by permanence and fidelity. Surely if people come to think such is the case there will be a great loss for the Church. What is not at all certain, however, is that people will believe the Church has changed its teaching on marriage if one extends eucharistic hospitality to the divorced and remarried. For one thing, quite apart from the Church's teaching, people earnestly desire their marriages to be permanent and faithful. In reports from those regularly engaged in premarital-preparation programs there is little reason to conclude that couples enter into marriage indifferent to the ideals of permanence and fidelity. Every couple wants its marriage to be a success. Even as they admit that marriages often do not succeed, they want theirs to succeed. That is why divorce is a tragedy and many people who know nothing of Catholicism see it exactly that way. The actual legal decree of divorce may not be experienced by all as a tragedy since for some it is a relief, an end to wrangling, fear, and anger. But the existential process of the breakdown of a marriage leading to the legal judgment is deeply painful for all.

Even if the Church were to be silent about permanence and fidelity in marriage, the human yearning for a committed and exclusive love would remain strong. "Indissolubility is misunderstood if it is seen as an externally imposed law, it is rather a law written in the human heart: human relationships reach for permanence, long for communion."⁶⁷ To presume that a change in eucharistic discipline regarding the divorced and remarried will lead to people giving up their own

⁶⁷ Thurston, "Living with Ambiguity" 538.

commitment to the ideals of marriage or that they will no longer know that the Catholic Church teaches those ideals seems unlikely. Even many Catholics who have undergone the torment of divorce do not want the Church to change its teaching on permanence and fidelity in marriage. What they seek is understanding and support for themselves and others when their lived reality falls short of the beauty and truth of the teaching.

In the CDF response as well as earlier magisterial statements, no evidence is cited to gauge the risk of scandal that will result from permitting the remarried to receive the Eucharist. Therefore it is at least equally plausible that "an across-the-board denial of the sacraments to divorced people who have remarried gives scandal by weakening the witness of the Church to the compassion and forgiveness of Christ."⁶⁸ Indeed, testimony from a number of priests who work in programs with alienated Catholics indicates that the single biggest reason people cease active participation in the Church is that they have found themselves in irregular marital situations and feel unwanted and rejected by the Church. Exclusion from the Eucharist is the most commonly cited expression of how the Church manifests its nonacceptance of the divorced and remarried.⁶⁹

In those situations where the risk of scandal is real, there is no insuperable obstacle to eucharistic sharing for the divorced remarried. After all, the Church permits the reception of the Eucharist by those living in a brother/sister relationship, yet this officially sanctioned solution does little in itself to resolve the danger of scandal. As Kelly remarks, "unless a couple had a 'brother and sister' logo on their doorpost, neighbours and fellow parishoners would be none the wiser and so the alleged scandal would presumably still be given."⁷⁰ If measures are available to avoid scandal caused by those living in a brother/sister relationship, similar means are at hand for other divorced and remarried persons.

Pastoral Care/Pastoral Solutions

One of the positive developments within the Church in recent decades has been the growing sensitivity to divorced and remarried Catholics. No longer is the language of bigamy or excommunication found in formal teaching. The Church has now reached out in a wide variety of ways to those who have suffered the break-up of a marriage, e.g. better tribunal practice, parish-based support groups, weekend retreat programs, welcoming attitudes among parish staff and congregations. The official teaching of the Church has encouraged such developments and both the CDF and the German bishops agree that

⁶⁸ Kelly, "Divorce and Remarriage: Conflict" 1374.

⁶⁹ This statement is based on interviews conducted by K. Himes of priests working with alienated Catholics in Bergen County, N.J., Boston, Mass., New York, N.Y., Providence, R.I., and Wilmington, Del.

⁷⁰ Kelly, "Divorce and Remarriage: Conflict" 1374.

many things can be done to support those who are divorced, whether single or remarried. People whose marriages have failed are still members of the Church and are entitled to pastoral care appropriate to their situation. In providing such care ministers ought not make the mistake of equating it only with the celebration of the sacraments. Even without admission to the Eucharist, much can and should be done for the divorced and remarried by pastoral leaders.

Undoubtedly, however, it is the question of reception of the Eucharist by those divorced in civil second marriages which occasioned the exchanges we have reported here. What can be done? In their second letter, the three German bishops emphasize that, when discussing reception of communion by those in noncanonical second marriages, the "distinction between admission and approach is fundamental for us." They go on to say that the model of pastoral care being proposed does not entail the "approval" of the divorced remarried participating in the Eucharist, but "a toleration of this."⁷¹ Toleration within the tradition is an attitude which "first considers another's activity as threatening certain values, then disagrees with the activity, and refuses to approve or recommend the activity, but to prevent greater harm it permits the activity with which it disagrees."⁷² The episcopal trio obviously believes that the greater harm to be prevented is that which is done to the person denied the Eucharist. The values being threatened are the indissolubility of marriage and the integrity of the Eucharist.

However, the proposal of the German bishops treats both conflict and hardship cases together, using the language of toleration to deal with situations in which what is being tolerated is quite different. In conflict cases, indissolubility is not truly at issue; only the adequacy of existing measures in the external forum is being questioned.⁷³ Nor is the integrity of the Eucharist at stake since there is good reason to think that the present, not the former union is the genuine marriage. Thus the person is not living in a state of life which objectively contradicts the symbol of unity which is the Eucharist.⁷⁴

⁷¹ "Response" 343.

⁷² James Keenan, S.J., "Toleration, Principle of," in Judith Dwyer, ed., *The New Dictionary of Catholic Social Thought* (Collegeville, Minn.: Liturgical, 1994) 951-52, at 951.

⁷³ Despite the confidence of the Pennsylvania bishops in the tribunal system, Provost documents the many concerns which still remain. After examining the evidence he concludes, "The conflict situation continues to exist in many parts of the Church, even those with well functioning tribunals" ("Intolerable Marriages: Second Decade" 599-603, at 603). See also the comments of Tim Buckley, C.Ss.R. "Many have found the tribunal process one of growth and healing but, for all the pastoral relief which the annulment process has brought to these people, it remains a sad fact that for many others it is not the solution" ("Caring for the Remarried," *Priests and People* 9 [1994] 325-30, at 328). The reasons the author mentions as to why the tribunals are inadequate for many are not first of all canonical but emotional and psychological. Buckley recently spent five years investigating pastoral care of the separated, divorced, and divorced and remarried at the request of the bishops of England and Wales.

⁷⁴ We believe that the language of toleration is inadequate. If the pastoral minister

When the principle of toleration is employed in cases of hardship, however, the analysis changes, for now indissolubility and eucharistic integrity are arguably at greater risk. Here the conclusion is not that the validity of the first marriage is uncertain, but that the validity of the Church's policy is. The bishops avoid facing this by insisting on their agreement with the Church's teaching and treating the hardship case as if it asks no more of the Church than the conflict case, a pastoral attitude of tolerance. Joining hardship cases with conflict cases, as the bishops appear to do, does not advance the question. We maintain that making pastoral exceptions to existing policy is not fully adequate as a response to the situation. A new policy toward the divorced and remarried receiving the Eucharist is also needed.⁷⁵

The language of pastoral care can obscure the true nature of what is involved. For example, describing the outcome of a discernment process as a "good faith" solution is, in our opinion, unsatisfactory. There is a tendency to link "good faith" with invincible ignorance and the pastoral practice of dissimulation. However, many couples are fully aware of what the Church teaches regarding indissolubility and marriage. In any number of instances people simply do not see why the ban on eucharistic participation must be absolute when it comes to those in canonically irregular marriages. None of the rationales presented, including the two most commonly cited—scandal and eucharistic unity—justify an absolute ban on eucharistic sharing.

Still, even as the debate about present policy continues, pastoral care must be accorded individual cases. Perhaps the first thing needed is an acknowledgement that admission to the sacraments of penance and Eucharist is essentially a moral, not canonical decision. This seemed to be the direction in which things were heading during the 1970s. Today, we continue to muddle the moral-discernment process necessary for eucharistic participation with canonical categories employed in marriage. "Laws are necessary but clumsy and limited ways of organizing human affairs; they never absolve us from the exercise of

and the individual, having engaged in dialogue, conclude there is probable cause to believe that a first marriage was invalid, then reception of Communion by the person should not just be tolerated but encouraged. In such a conflict case, the harm is a matter of allowing some marriage situations to remain unresolved canonically while denying the Eucharist to those seeking it in good conscience. Since the legal irregularity is a considerably lesser evil than the denial of the Eucharist, we believe ministers should recommend eucharistic participation. Toleration toward eucharistic participation may be the apt term when a minister remains dubious of the initial marriage's invalidity but the individual in good faith concludes that it was null. The pastor's practice is described by the traditional term of dissimulation.

⁷⁵ Even an ideal tribunal system is not the best answer. We agree with Thurston when she writes that too often "attempts to extend the concept of nullity seem to me inappropriate here." Our present pastoral procedures require "that the failed marriage is negated rather than taken up in the human experience of the gap between what we desire and what we realize." We need a process in which "the fragile nature of all human relationships" is sufficiently recognized ("Living with Ambiguity" 539).

discernment or from the exercise of making responsible and conscientious decisions."⁷⁶ Terms like "valid" and "invalid," "internal forum" and "external forum," are not especially helpful in making the necessary moral choices.

More appropriate and accurate categories would be something similar to what the German bishops, following many others, propose.⁷⁷ Certainly an assessment of motivation is needed, i.e., that the person is seeking reconciliation for religious reasons, not for extrinsic reasons. Evidence of a sincere conversion of heart should also be manifest, i.e., that if the person was the cause (main or partial) of the breakdown of the first marriage, he or she has repented. Obviously the person should not be in a state of serious sin, but the pastoral minister cannot presume that a noncanonical marriage is demonstration of such a state. After all, if lack of canonical form can cause invalidity, then many baptized Catholics throughout the world are living in canonically invalid marriages, yet no one thinks all such persons are living in serious sin. Whatever obligations stem from the first union should be acknowledged and properly met. Finally, the present commitment should demonstrate the qualities of a genuine marriage, i.e., that the person and the new partner are living in a public and responsible family relationship as husband and wife, and that their union is stable and established, holding itself out to the community as a marriage, not a temporary or trial relationship. These are the sorts of concerns which should be assessed in a serious moral discernment process.

When this moral framework is employed and the couple maintains that the new marriage exists, then three pastoral options are possible: (1) convalidate their present marriage after seeking annulment or dissolution of the first marriage; (2) leave the couple in good faith, dissimulate; (3) admit them to penance and Eucharist, without any formal judgment about the first union. Separation is most often impossible, economically and morally, and may be inadvisable. As we have already suggested, the brother/sister arrangement should not be proposed. In following this approach a priest's intervention does not seem to be essential. It is an exercise of moral discernment, and a morally sensitive third party is advisable to assist in the honest formation of conscience. But there is no need to assume that a priest is the only person or even always the best one for such a task. A spiritual director, retreat master, pastoral associate, permanent deacon, or other similar pastoral minister may fulfill the role.

Important to remember, however, is that simply addressing this issue at the level of pastoral care is inadequate as a complete response to the topic of divorce, remarriage, and the Eucharist. Making exceptions to a general rule is too important an activity to leave the matter as is. As John Mahoney once put it: "[Exceptions] are the growth points of

⁷⁶ *Ibid.* 541.

⁷⁷ See n. 28 above.

understanding. And to surrender before them as impenetrable moral mysteries is to abdicate all serious moral enquiry."⁷⁸ The community of the faithful must press on to ask why this is a legitimate exception, i.e. what makes it so. Unless we are willing to ask such questions we shall not achieve deeper insight into the realities of life as disciples. For several decades now the suggested pastoral practice which goes under the rubric of the "internal forum" relies on finding reasons to excuse people from culpability or to adapt a norm to a person's situation. This is clearly what the German bishops have in mind. What we are suggesting is that the questions arising in pastoral practice ought to compel us to open up the question at another level.⁷⁹ What is the moral obligation stemming from a failed first marriage? What is the moral reality of the second union? Unless our Church is willing to allow a free and honest dialogue on such matters, we will force pastors and couples to continue to search for adaptations to norms which should themselves be examined and open to revision.⁸⁰

Need for a Church Dialogue

Just this sort of dialogue is what can be hoped for as a result of the German bishops' letter, although the public nature of the CDF response to the bishops may have dimmed this hope. As Kevin Kelly observed, "[I]n the present climate this makes it difficult for individual bishops, or groups of conferences of bishops, to beg to differ from the CDF line without seeming to challenge the authority of the Pope himself." What is dismaying is that although the relationship of the local ordinary's pastoral role to that of the pope or the episcopal college remains unresolved, any effort to assert the role of the local bishop is

⁷⁸ *Seeking the Spirit* 42. See also the comment by Tim Buckley, "It is said that hard cases make bad law but, in this arena, there are so many hard cases that of necessity we must ask whether the law as it stands truly represents the will of God for his people" ("Caring for the Remarried" 326).

⁷⁹ In this we are in agreement with Buckley. "The three German bishops chose to address the problem in the practical pastoral arena, which is where so much of the debate has centered in recent times. This is understandable in view of the continuing urgency of the problem for so many people, but I believe the time is long overdue when the more fundamental systematic theological questions must be addressed" (ibid. 329). Buckley maintains that "the evidence from [his] research suggests that the *sensus fidelium* would be totally in harmony with the teaching that marriage *per se* is a sacred and permanent union as expressed in the *Catechism* (1614), but not with the discipline the Church employs to defend its concept of the indissolubility of the bond as expressed in the same *Catechism* (1640)" (ibid.).

⁸⁰ Because the German letter did not directly address the question of indissolubility, indeed explicitly affirmed the present understanding and teaching on it, we did not survey the literature on this topic. Since the last time this topic was addressed in these "Notes" several worthwhile essays on indissolubility have appeared, including Bernard Cooke, "Indissolubility: Guiding Ideal or Existential Reality?" in *Commitment to Partnership*, ed. William Roberts (New York: Paulist, 1987) 64–75; and four papers by Cooke, John Erickson, Theodore Mackin, and Margaret Farley in *Divorce and Remarriage*, ed. William Roberts (New York: Paulist, 1990).

interpreted as a challenge to Rome. We may be grateful that the German bishops in their response to the CDF indicate that they do not think the matter is closed. This is important for matters beyond the pastoral care of the divorced and remarried. For several years now the atmosphere within the Church has been unreceptive to free inquiry and free expression, so that pastors and scholars are reluctant to risk exploring what is behind pastoral intuitions. The letter of the German hierarchs may provide an opportunity to overcome such reluctance.

Ladislas Orsy believes that the initial German text was "a model of what today a pastoral letter ought to be" and was an initiative by the bishops which took seriously the "power conferred on them directly through their sacramental ordination." The bishops "balanced their unflinching communion with the universal church with the quiet assertion of their own authority."⁸¹ Addressing the present imbalance between the universal and local Church is an important ecclesiological concern. In Peter Hünemann's view, the bishops of the Upper Rhine were demonstrating "how bishops should function." They had taken up a pressing pastoral concern for the Church in Germany and had answered the frustration of many German Catholics who wondered if, in the present situation, "the bishops [are] any more than Vatican officials."⁸² By exercising their rightful role as pastoral leaders in their local churches, the three Germans have signalled that they see themselves as more than Roman legates to the local church. Although the first stage of the conversation has ended with the Vatican reasserting a rigorist position on eucharistic participation, there remains reason for hope. As an editorial in the London *Tablet* suggested, both for the sake of the specific issue of the treatment of the divorced and remarried but also for the sake of the larger ecclesial issue of the authentic role of the local bishops, "what counts is that the matter has been raised at the episcopal level, responsibly and pastorally."⁸³

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THE RETURN OF CASUISTRY

Simon, a 29-year old man who has recently tested positive for HIV, applies to enter a major religious order known for its apostolic work. Aside from the applicant's HIV status, his health and psychological status are fine, his reasons for entering the religious order are fundamentally ministerial, and his prayer life over the past few years has consistently evidenced a vocation to the priesthood in this particular

⁸¹ Orsy, "A German Initiative" 787.

⁸² Hünemann, "A Church in Dialogue" 898.

⁸³ "Dialogue on Divorce," *Tablet* 248 (1994) 1335-36, at 1335.