

Pastoral Care of Divorced Catholics

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Introduction

In Matthew, Chapter 12, we find Jesus walking through some wheat fields on a Sabbath. His disciples were hungry, so they began to pick heads of wheat and eat the grain. When the Pharisees saw this, they said to Jesus, "It is against our Law for your disciples to do this on the Sabbath!" Jesus answered,

Have you not read how David and his men, being hungry, went into the house of God, and ate the bread offered to God, even though it was against the Law for them to eat it -only the priests were allowed to eat that bread. The scripture says, 'It is kindness that I want.' If you really knew what this means, you would not condemn people who are not guilty.

Then Jesus went to the synagogue, where there was a man who had a paralyzed hand. Some people there questioned Jesus: "Is it against the Law to heal on the Sabbath?" Jesus answered, "What if one of you has a sheep and it falls into a deep hole on the Sabbath? Will you not take hold of it and lift it out? A human being is worth much more than a sheep! So then, our Law does allow us to help someone on the Sabbath."

Later on in Matthew 23 Jesus addressed the scribes and Pharisees:

You lock the door to the Kingdom of heaven in people's faces, but you yourselves don't go in, nor do you allow in those who are trying to enter. You give to God one tenth even of the seasoning herbs, but you neglect to obey the important teachings of the Law, such as justice and mercy and honesty.

Vatican II reminded us that we are a pilgrim people on the way to conversion, wholeness, and holiness.¹ Moreover, that same council discovered several systematic distortions of the Christian message, such as sexism, with its domination and exploitation of women in the Church. This discovery led the council members to view marriage in the Church more as a lived- covenant of love,² rather than as merely a legal contract.

Marriage, as a covenant of love, is a dynamic and life-giving reality that calls for growth and development, and, as such, it can die. What are Catholics to do when they find that their marriage is dead? To help answer that question we will discuss the birth, life and death of positive law, as well as the interpretation of Canon Law in our pastoral care of divorced and remarried Catholics.

Positive Law

Positive law (civil or ecclesiastical) is a norm of action, adopted by a community of free and intelligent persons, which enables them to grow peacefully in grace and wisdom. Such a norm must be reasonable, fostering the common good, as well as, the dignity and rights of human persons.³ Because purely human law is based on changing historical and cultural circumstances, it admits of exceptions. The life of a law in a community has its own stages: *It is conceived; it is born; it lives; it dies or fades away.*⁴

We divide the life span of a human law into two periods. In the first period the legislator assesses the nature of the community and its *needs* and determines the *values* that fulfill these needs. Such a determination leads to a norm: "The community ought to do this or that." Then, through the act of promulgating, the law is born.

During the second period, the law is received by the community which adjusts to the new norm. Interpretation belongs to this second period. When a law is officially suppressed because it has served its purpose, or because the whole matter has to be legislated all over again, it dies.

Here are some examples of the life cycle of a civil law. The law demanding compulsory education of children till age sixteen recognizes the value of a good education for developing good citizens. To preserve that value the law regarding compulsory attendance was promulgated. Interpreting this law, parents may decide to send their children to public school, parochial school, or to home school. Another example is the system of traffic regulations. To protect human life it is necessary to drive safely and carefully. The city council institutes and promulgates traffic laws that flesh out what is careful and safe under different conditions. They demand following traffic signals and legislate on which side of the street to drive.

Another example of the birthing of a law is the regulation that children must wear school uniforms. The regulation was designed to uphold the value that wearing a uniform would develop self-respect and school loyalty. In time, however, parents, officials, and school children felt that this regulation militated against a person's right to develop their own dress code. The rule died when it was abandoned by school officials, because it was in conflict with the more basic right of self-determination.

An example of the death of a positive law took place in our small town of Ionia, Michigan. Several years ago the state highway department, after surveying our town, decided that it needed a system of one-way streets. However, after implementing the system, the law makers soon found out that it was impossible to enforce the one-way street regulations because it did not fulfill a genuine need. Thus the system of one-way streets died.

The Church tries to protect the rights and needs of Catholics through Canon Law and Tribunal procedures.⁵ Canon Law must serve all Catholics in their struggle for dignity, self-affirmation, survival, and freedom in the church and in the world. Canon Law, like any other law, must be interpreted throughout its life to determine when the law obliges and when it does not.

To obey laws as intelligent people, we must understand both the letter of the law and the spirit of the law. A literal interpretation tries to understand the meaning of the individual words of the law, and takes the wording of the law at face value. The spirit of the law is a wider perspective and points beyond the literal interpretation to the meaning of the law and to the value a law intends to uphold.⁶ Sometimes, however, Canon Law might not correspond to the Spirit of the Law here and now. When there is a conflict between the letter of the law and the spirit of the law, we use interpretive principles of law, and apply it to specific situations in a suitable way.

Saint Paul in the Epistle to the Romans reminds us that Christian life is freedom from sin, death, and the law, and notes that the primary law for the Christian is the Spirit, who dwells in the hearts of the just (Romans 8:2). Every other law, such as positive law, is secondary. Matthew in chapter 15 shows Jesus' style of interpreting the Law:

Some Pharisees asked Jesus, "Why do your disciples disobey the teachings handed down by our ancestors? They don't wash their hands in the proper way when they eat!"

Jesus answered, "Why do you disobey God's command and follow your own teaching? For God said, 'Respect your father and your mother.' But you teach that if people have something they could use to help their father or mother, but say, 'This belongs to God,' they do not need to honor their parents. In this way you disregard God's command. How right

Isaiah was when he prophesied about you!

'These people, says God, honor me with their words, but their heart is far away from me. It is no use for them to worship me, because they teach human rules as though they were my laws!'

Then Jesus instructed the people, "It is not what goes into your mouth that makes you ritually unclean; rather, what comes out of it makes you unclean." Then the disciples informed Jesus, "You hurt the Pharisees' feelings by what you said." To this Jesus replied,

"Anything that goes into your mouth goes into your stomach and then out of your body. But the things that come out of the mouth come from the heart, and these are the things that make you ritually unclean. For from your heart come the evil ideas that lead you to kill, commit adultery, and do other immoral things. But to eat without washing your hands, as they say you should, does not make you unclean." [15:1-20]

Equity

What, then, are some principles for interpreting Canon Law. The first principle we will discuss is that of equity. Pope Paul VI reminded us that in canon law equity should govern the application of norms to concrete cases.⁷ Equity takes the form of mercy or pastoral charity, and seeks the true welfare of the faithful.⁸

Both Roman Law and English Law used principles of equity.⁹ When the shortcomings of Roman Law began to work to the disadvantage of Roman citizens, and proved insufficient to handle the needs of non-citizens, a special magistrate was appointed in 242 B.C.E. to administer justice. He appealed to the demands of human nature, to the image of a good head of the family, and to the ways of a reasonable person. Later, in the development of English law, the English chancellor used to grant "equity" when the literal observance of the law led to injustice. The development of the notion of equity in England was similar to the pattern that evolved in Rome. In both cases, the shortcomings of the legal system were recognized, and a correction, based on the needs of human beings, was brought into the law from the field of morality.

In other words, when the Roman magistrate or the English chancellor found the legal system too narrow to accommodate the demands of human life, he had recourse to ethical principles [or moral philosophy] to develop new legal norms. Authentic equity, therefore, comes into play when the law is unable to uphold an important human value. When this happens the community turns to other (non-legal) systems, like moral philosophy and religion, to justify a departure from the legal system.

Later we will deal with the ambiguity of the Church's position on the indissolubility of marriage. Right now, as an example of applying the principle of equity to the situation of divorced Catholics, we would reason like this. Since moral theology teaches that a doubtful law does not oblige, the doubtful law of the indissolubility of marriage should not prevent a divorced couple from entering a subsequent marriage to achieve conjugal happiness. When the higher principles of moral theology prevail over the uncertain doubtful law of the indissolubility of marriage, we have authentic equity.

Epikēia

Another principle of interpretation is that of *Epikēia*.¹⁰ Moral theology developed its notion of *epikēia* from Aristotle's discussion of *Epikēia* in his *Nicomachean Ethics*. For Aristotle, *epikēia* is an act of

justice that originates in the virtue of justice. Its function is to balance, to correct, to complete the application of the law, and to temper the law's harshness.

Epikēia is an indispensable part of every legal system, and helps the system avoid the sickness of legalism. Epikēia makes the validity of a decision depend on the virtue of justice. In contrast, legalism places greater value on rigidly observing the letter of the law than on granting true justice. Christ himself was quick to reject such legalism. He would cure whether it was the Sabbath or not [Luke 14:1-6]. He was undisturbed that his disciples should pick grain to eat on the Sabbath [Matthew 12:1].

In our own time we had an example of the use of epikēia in the act of civil disobedience, when blacks sat at a whites-only lunch counter or in the front seats of the bus. These acts are based on the notion that an unjust law does not oblige. Thomistic theory not only justifies possible civil disobedience but sees that going against the letter of the law in light of the spirit of the law is a matter of virtue -the virtue of *epikēia*.¹¹

Another example of Epikēia is that of breaking the speed law while driving my pregnant wife to the hospital at night. The natural law makes clear that people driving cars must take due care to avoid threatening the lives or property of others. To achieve this goal, someone must stipulate which side of the street to drive on, the meaning of various signs and signals, the speed at which one ought to travel, and other details. If I break the speed law while driving my wife to the hospital, there's no doubt that I can be ticketed and fined. But it does not follow that I was wrong in speeding. In the end I have to tolerate that punishment, rather than do what I honestly believe to be "not good."

Thomas' general vision of law led him to a much richer understanding of the reality of epikēia.¹² He would argue this way. Since law is essentially the intelligent ordering of means to an end, we view epikēia as the correct interpretation of the *intention* of the law. Every human law tries to express concretely the intention and the spirit of the law. But since everyday life is complex and constantly shifting, it is to be expected that the letter of the law will not always succeed in serving the spirit of the law. In the case of rushing to the hospital, breaking the speed law was necessary to serve the spirit of the law, to safeguard human life.

Epikēia is not an attempt to escape from one's duty, but is rather a response to the higher law of justice and to the Spirit of the law. Since it is the exercise of the virtue of justice, epikēia will not lead to anarchy. The notion of epikēia is not the replacing of duty with un-Christian license, since one may forsake the letter of the law only if it does not serve the common good in a particular case.¹³

The virtue of epikēia helps Christians discern the inner meaning of human law so they can intelligently obey it in the majority of cases, and can reasonably ignore it in exceptional cases. Christians do not hide out in the law; they respect the law, use it, and willingly go beyond it if they must.

Many canon lawyers feel that *epikēia* requires greater emphasis today to deal with the tension relating to law in the Church.¹⁴ In contrast to a merely literal and rigid application of rules, epikēia promotes the wise and flexible application of human laws to individual cases according to the spirit of the law. Applying rules always involves discretionary judgment and discernment.¹⁵ Pope Paul VI reminded us again that *the purpose of laws is to help the faithful in their spiritual lives, which must be inspired by personal conscience and a sense of responsibility rather than by precepts. A suitable discretionary authority belongs to both pastors and the faithful* [The Pope Speaks 22(1977)178].

Discretion or the discernment of spirits refers to the process of discovering, evaluating, and deciding on a course of action. ¹⁶ For example, what is a wife to do when she realizes that her marriage has gone sour and died? Should she remain in an abusive marriage or seek a divorce? Enter epikeia which uses the rules for the discernment of spirits when we feel called upon to make consequence-laden decisions, like seeking a divorce or getting married a second time when there are children involved.

We priests have a special calling to teach the faithful how to make trustworthy decisions in the midst of changing situations. As spiritual guides we can be helpful in leading persons through transition periods of divorce and remarriage so that these persons get more in touch with themselves and with *the Mystery*, who is Christ.

The twelfth chapter of Matthew's gospel illustrates the virtue of epikeia. Christ breaks the letter of the law by healing the man with a withered arm on the Sabbath. He reminds his hearers that they too would break the letter of the law even to free a sheep that may have fallen into a ditch. Here are a few present-day examples of the use of epikeia: It's OK for a starving person to steal food. An unemployed man might salvage copper from Selfridge Field to provide for his family during the depression. In certain cases of emergency, the letter of the law is no longer binding. Many of us choose not to observe traffic signals in the inner city at night time.

Oikonomia

A third interpretive principle is that of *oikonomia* or *economy*.¹⁷ The Eastern churches developed the principle of economy (similar to the notion of dispensation), by which the unintended harshness of a given law is removed. One way to understand oikonomia is to visualize the origins of the Christian community. It emerged as a community turned toward a transcendental person: Christ, the Risen One. This orientation was so strong that for a long time members of the Christian community did not feel the need for an elaborate legal system. (In fact, a really elaborate legal system developed in the West only.)

The early Christian communities believed that the Spirit of Christ held them together; in their need they had to turn to Him. In the case of oikonomia the *oikonomos*, or leader of the house of God, would turn to the Risen One and bring the difficult situation to Him. Through the *analogia fidei*, that is, by paying attention to the whole plan of revelation the oikonomos searched how Jesus would heal a wound, would redress an injustice, or bring peace where it is needed. Oikonomia is rooted in the Spirit of Christ, who is present in the community. ¹⁸

By analogy, in a situation where the law is unable to protect the rights of an individual I might ask myself, "What would Christ do in this situation?"

You recall the story of the young priest who noticed a Lutheran gentleman in line to receive Holy Communion during Sunday Mass. Well schooled in Canon Law, he was faced with a moral dilemma. Should he give Holy Communion to this Protestant, or not? Later on at the rectory he discussed the matter with his pastor. The pastor asked the young priest, "Well, what did you do?" The young priest replied, "I asked myself, "What would Christ do in this situation?" With this, the pastor exclaimed, "Oh no, you didn't!"

A personal example has to do with my mother's situation. My mother is ninety-two years of age, and has this sickness of "old age." During her long convalescence my mother asked my sister, Monica, to be anointed. Monica asked mother if she wanted her to notify the parish priest. My mother said,

"No." She wanted me to anoint her. She has requested, also, that when she dies that I celebrate her funeral. In the general context of God's plan for the salvation of the world, how would Christ deal with these situations?" Like Christ we would deal with them by reflecting on the *spirit* of the law, and by applying the interpretive principles of *equity*, *epikeia*, and *oikonomia* to these situations.

The principle of *oikonomia* permitted the Orthodox churches to allow remarriage after divorce. Even the Latin rite of the Catholic Church does not exclude the kind of flexibility embodied in the principle of economy. For example, fifteen years ago the theologian, Bishop Walter Kasper of Germany, without mentioning the interpretive principles, proposed that the church admit divorced-and-remarried persons to the sacraments under certain conditions.¹⁹

The Indissolubility of Marriage

In this paper we are concerned with the law(s) that deal specifically with the indissolubility of marriage. Biblical scholars and historians have indicated that it is doubtful whether Christ taught the absolute indissolubility of marriage.²⁰ Christians in the early years of the church believed that marriages could be dissolved. For example, witnesses of Catholic tradition from 180 to 380 in both the East and West make clear that a man dismissing an adulterous wife and remarrying could receive communion.²¹ Around 380 Eastern and Western Churches diverged in their treatment of divorce and remarriage. The East used the canons of Basil the Great (d. 379) to allow remarriage after divorce, a practice still in force in the Orthodox Church. Another example is found in, St. Epiphanius of Cyprus (d.403) who wrote:

He who cannot keep continent after the death of his wife, or who has separated from his wife for a valid motive, as fornication, adultery, or another misdeed, if he takes another wife, or if the wife takes another husband, the divine word does not condemn them or exclude them from the Church or life; but she tolerates it rather on account of their weakness.²²

The acceptance in Roman law from 331 to 566 that marriage could be dissolved is evidence that the indissolubility of marriage had not yet been definitely established. Eventually, in the twelfth century the Western Church taught that Christian marriage could never be dissolved.²³ Note that the present difference in discipline between Roman Catholics and Orthodox began to develop many centuries before the break between the two Churches in the eleventh century. Careful examination of scripture and early patristic evidence shows that the position of the Roman Church on the indissolubility of marriage is ambiguous. Or as Native Americans might express it: "White man speak with forked tongue."

We can interpret marriage law either as merely a contract or as a living covenant. Marriage as a legal contract implies a world-view in which women were owned and treated as the property of men, and reflects a cultural condition of dominance of men over women.²⁴ The tragedy of divorce in that culture was not the loss of a loving relationship, but the loss of property. Christ's teaching on divorce deepened the concept of marriage to elevate the position of women so that they are not to be taken, given, nor owned as property.

As mentioned before, Vatican II reminded us that marriage is a living covenant of love, and not merely a legal contract. Yet, Church law still speaks of the indissolubility of marriage from the perspective of marriage as a legal contract. However, the practice of the Roman Church itself treats marriage as only relatively indissoluble; that is, the marriage contract, in virtue of the Pauline or Petrine privilege, can be broken in the external forum. If we treat marriage as a covenant, we would

speak of the *stability* of the marriage, and of the *indissolubility* of the marriage as an ideal.

Apart from the Church's teaching, people earnestly desire their marriages to be permanent and faithful. Couples want their marriages to be successful. Even if they admit that marriages often do not succeed, they want theirs to succeed. That is why people who know nothing of Catholicism see divorce as a tragedy.

The use of the interpretive principles of equity, *epikeia*, and *oikonomia* is paramount in the pastoral care of divorced Catholics. Their use can maintain the balance of the ideal of marriage as permanent with the compassion Jesus showed to those who could not achieve this ideal. The German Bishops' Pastoral [July 10, 1993] counseled the Church not to shut its eyes to the failure of many marriages.²⁵ For, wherever people fall short of the ideal, Jesus meets them in mercy with understanding. Those persons who have civilly remarried after divorce "belong to the church." The German bishops would agree that the permanence of a marriage is an important ideal. But the permanence of marriage is not an ultimate value, and it is not the only value. It must sometimes yield to other values, i.e., the right of divorced Catholics to a happy married life and to conjugal love in a subsequent marriage.

Internal Forum

The church encourages the use of the internal forum in instances where divorced and remarried Catholics may not be able to produce sufficient evidence for a declaration of nullity or a dissolution of a previous bond of marriage in the external forum. Catholic moral theology distinguishes between external forum [such as canon law and its procedures], and the internal forum, which is private and a matter of conscience. In 1932, Cardinal Gasparri wrote about using the *internal forum* in certain cases.²⁶ In 1973 Cardinal Seper encouraged pastors of souls to follow up those who are living in an irregular union, and to use the approved practice of the Church in the *internal forum*.²⁷

Until the present legislation of the Church is brought up to date, I am suggesting that we can deal with the dilemma of divorced and remarried Catholics with compassion, by a creative interpretation of Canon Law, using the principles of equity, *epikeia*, and *oikonomia* in the internal forum.

At this point let us look at some individual cases involving the pastoral care of divorced and remarried Catholics. In the first case there is convincing evidence that the first marriage wasn't valid, although there is not enough evidence for the couple to get a declaration of nullity in the external forum. But there is solid evidence that a present second marriage is a valid marriage. For example, Joe and Sue got married after Sue's divorce. Their pastor agrees that Sue's first marriage was not valid, but that evidence is lacking for an external forum annulment. On the other hand, Joe's and Sue's marriage (her second) is in its sixth year, is alive and growing. The priest encourages them to return to the sacraments, using the internal forum solution. In such a situation the married couple can be encouraged to recognize the validity of their present marital status. Such a couple has the right to receive the sacraments and to share fully in the life of the church.

In a second case of Julie and Sam there is good evidence that the first marriage was not a real marriage and that the second marriage is. However, there is a genuine psychological barrier for Sam to go through the Tribunal process. Because of this limit to the applicability of the external forum, Sam and Julie may make a conscience decision with the priest in the internal forum, and return to the sacramental life of the church.

A third case is that of a dead marriage. A couple, now, in a subsequent marriage, are living up to the responsibilities of their marriages including those to the children of the present marriage and of their prior marriages. The first marriages are now dead and broken, and there is no possibility of returning to their first spouses. They believe that the second marriage is what God wants for them now. Theologians endorse an internal forum solution for such a case if the spouses are sorry for any guilt that they may have incurred in the break-down of the first marriage, when everything humanly possible has been done to save the first marriage, and when the second marriage has become a morally binding union that cannot be dissolved without causing fresh injustice. These conditions being fulfilled, theologians would encourage such a couple to participate in the full life of the church.²⁸

We must recognize, however, that the right to receive the sacraments will not necessarily be recognized canonically, i.e., in the external forum of church law. In other words, making a decision in the internal forum regarding a marriage situation does not give church authorization for a canonical priest to officiate at a wedding. A canonical priest might be barred from officiating at such a wedding, but a non-canonical priest would not be. Sometimes a parish priest would like to break a diocesan rule or help in a second marriage, but he cannot because it would be reported to the chancery office and he could lose his job. Henry Fehren, a retired canonical priest and a published author, writes in **Joined in Christ: A Sourcebook for Marriage Ceremonies** [page 3-3]:

If the priesthood means anything to a married non-canonical priest he has the obligation to help people wanting a priest to officiate at their wedding or to baptize their children. He is often more free to show the compassion of Christ than a parish priest restricted by unchristian, man-made chancery rules, rules which I believe Christ would have ignored.

In conclusion, if divorced and remarried Catholics can be admitted to the full life of the church through the use of the internal forum, then it is legitimate for married (non-canonical) priests to officiate at the weddings of divorced Catholics, using the principles of epikeia, equity, and economy in the internal forum.

Again Henry Fehren encourages us:

Married priests can fulfill an urgent pastoral need by assisting at weddings. The demand is great and this is a wonderful and appropriate way of exercising the priesthood. I can see no reason for hesitating. Jesus did not teach any canon law and would not, I believe, endorse the reasons the official church often gives for refusing to validate the marriage of couples.

Many couples will come to us who have been turned away. The reasons for being turned away by a parish priest may vary; the couple are not parishioners or have not given their weekly envelopes; the couple wants the ceremony and wedding reception in the same place; the couple does not wish to participate in what can be a dishonest annulment process.

Jesus said that the Scribes and Pharisees, while neglecting justice and mercy, "bind heavy loads to carry, to lay on other people's shoulders" and "shut the doors of the kingdom of God in people's faces" [Matthew 23:4, 13, 23]. I wish that you married priests would assert yourselves more strongly and not be so cautious. Jesus calls you friends, not servants. You are in great demand. Help Jesus. Help God's people.

In the same vein Linda Pinto [Joined in Christ, page 1-1] reminds us:

"The call to *priesthood* and *marriage* is a call to *service* and to *love*. The people of God summon those ordained and married for a ministry they are uniquely gifted to offer. You have

heard God's call twice, once in priesthood and once in marriage. You are now asked to heed God's call again."

Finally, I'd like to share with you a communication I received from Courtney and George May regarding this paper. *[George is a married Catholic priest, as well as, a Canon lawyer and a civil lawyer.]*

Dear Ed and Judy,

Thanks for sending along the material on Internal Forum and Divorced/Remarried Catholics. Both Courtney and I read and discussed it. She is mystified by this aspect of Catholicism, which is not present in the evangelical tradition in which she was reared.

We feel very encouraged by the fine work you are doing. One of these days *epikeia* may find its way back into the practice of the external forum as well as the internal forum. Perhaps some young and daring bishop(s) will simply begin applying the concept to the marriages of divorced/remarried Catholics in their jurisdictions, with due notice to the Holy See. Marriage is, after all, a public institution as well as a unique personal relationship.

Much of the present quandary with regard to divorced/remarried Catholics arose in the wake of post- Tridentine "refonns " touching on the ecclesiastical form of marriage and the Church's jurisdictional claims to witness marriages. The Roman Curia has compounded the quandary by overly strict application of the law, or selective application (cf John T. Noonan's **Power to Dissolve** Harvard University Press, Cambridge, Mass., 1972). No doubt about it - *epikeia* will result in a public corrective to current marriage and annulment praxis, perhaps by way of confrontation.²⁹

Endnotes

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