

“Doctrine, Law and Practice in Light of *Mitis Iudex* and *Amoris Laetitia*”

**Keynote Address for the North West Regional Canon Law Convention
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† Most Reverend Thomas John Paprocki*

My dear brothers and sisters in Christ:

It is good to be with you here at the North West Regional Canon Law Convention. The topic of my presentation is, “Doctrine, Law and Practice in Light of *Mitis Iudex* and *Amoris Laetitia*.” There are many issues pertaining to justice and mercy in relation to doctrine, canon law and pastoral practices regarding marriage and divorce that have arisen from two documents issued by His Holiness Pope Francis: first, his Apostolic Letter issued *motu proprio*, *Mitis Iudex Dominus Iesus*, by which the canons of the *Code of Canon Law* pertaining to cases regarding the nullity of marriage were reformed, with an effective date of December 8, 2015; second, his Post-Synodal Apostolic Exhortation, *Amoris Laetitia*, on love in the family, issued on the Solemnity of Saint Joseph, March 19, 2016.

*Bishop of Springfield in Illinois and Adjunct Professor of Law, Notre Dame Law School, South Bend, Indiana, and Loyola University Chicago School of Law.

LAW FOLLOWS THEOLOGY

In discussing these issues, it is essential to see that law in the Church is not just a question of following rules, but how the law guides our free moral choices between right and wrong as disciples of Jesus of Christ and stewards of God's creation. As a canon lawyer and as a professor of canon law, I have always tried to abide by the maxim, "law follows theology," that is, law does not emerge *ex nihilo*, out of nothing, nor does it exist in a vacuum isolated from its moral and theological underpinnings. If we can see this connection between law, morality, discipleship and stewardship, we can begin to understand their relationship to justice and mercy, for Jesus in the Gospel of Saint Matthew stated in no uncertain terms that we would be judged on how we treat the least of our brothers and sisters, for the way we treat them in fact is how we treat Christ (cf. Matthew 25:31-46). Those who did not in their lifetime care for the least of their brothers and sisters will go off to eternal punishment, but the righteous to eternal life. (Matthew 25:46). This is how Christians understand the justice of God's judgment as described by Jesus.

JUSTICE AND MERCY

But Jesus did not speak only of the justice of God's judgment; He also spoke of God's mercy. Perhaps the passage of Sacred Scripture where God's mercy is described most poignantly was the parable of the Prodigal Son (cf. Luke 15:11-32). Although the traditional title of the parable refers to the son who demanded and squandered his inheritance in dissolute living, the real focus of the story is the father who shows great mercy in receiving his repentant son back into his loving arms. This, of course, points to God the Father, and the merciful embrace that he extends to all of his wayward children who turn back to Him.

So which is it: God the Just Judge or God the Merciful Father?

The Catholic answer to such a question, of course, is not either/or, but both. My main point with regard to the theme of mercy and justice is that these attributes of God are not contradictory, inconsistent or incompatible. God is all merciful as well as all just.¹ It may be difficult for us from our human perspective to understand how that can be, but God does not have to diminish one of His attributes in order to manifest another.² Just as Jesus is true God and true man without either nature

canceling or detracting from the other, God is always merciful and always just.³

MERCY, LAW AND JUSTICE IN *AMORIS LAETITIA*

All of this must be kept in mind, then, when looking at a practical application of mercy, law and justice, for example, in relation to the Post-Synodal Apostolic Exhortation of His Holiness Pope Francis on Love in the Family, *Amoris Laetitia*, which was released on April 8, 2016. Some praise it; others do not. Some find it helpful; others less so. Most everyone finds it to be very long, which unfortunately means they probably have not or will not read it, at least not in its entirety.

Some have questioned whether the Holy Father's Apostolic Exhortation, *Amoris Laetitia*, is an exercise in papal magisterium. Unlike Pope Benedict XVI's books which he specifically said were his personal reflections on the life of Jesus of Nazareth and were not intended as papal teaching,⁴ an apostolic exhortation is an official exercise of the papal magisterium by the Holy Father in carrying out his office of teaching. As an Apostolic Exhortation, this form of teaching exhorts the faithful to act

according to established doctrine and canon law. An apostolic exhortation normally does not establish new doctrine or laws. An apostolic exhortation, as the name implies, ordinarily does not overrule existing doctrine or laws, but urges people to follow existing doctrine and laws.⁵

In my reading of the papal exhortation, I found plenty of solid material for thoughtful reflection and prayerful meditation. The Holy Father's great love of the family is foremost in his mind and heart, as it is in mine. In particular, I share the Holy Father's pastoral empathy as a Shepherd of souls for people in irregular marital arrangements. The Church does not seek to exclude anyone and wishes to welcome everyone honestly seeking God. The good intentions of people who want a change in the Church's eucharistic discipline and teachings are understandable, but the law is a yes, not a no. In other words, the law exists to positively sustain and protect the sacraments and the believing community, not to push anyone out. But it does need to reinforce and support the truth of both marriage and the Eucharist, and thus, current Church teaching and discipline continue to make good sense.

In this regard, in my statement released on the day the document was issued, I noted, "There are no changes to canon law or church doctrine introduced in this document." Having since then read the document again, patiently and carefully, as the Pope requested, I stand by my initial statement, despite claims to the contrary from some commentators.

As the basis for my statement that there are "no changes to canon law or church doctrine introduced in this document," I cited Pope Francis himself, as he stated in the document: "neither the Synod nor this Exhortation could be expected to provide a new set of general rules, canonical in nature and applicable to all cases."⁶ Nevertheless, some people are citing other passages of the document which they claim contradict this statement, notably footnote 351, in which Pope Francis says with reference to persons living in an objective situation of sin, "In certain cases, this can include the help of the sacraments." The key here is the phrase, "in certain cases," so it will be necessary to consider which cases those might be, which I will come back to later.

Adding to the discussion are the Pope's comments on board a flight in response to a reporter who asked Pope Francis if there are "new concrete

possibilities that did not exist before the publication of the Exhortation or not,” the Holy Father answered, “I can say yes. Period.” But these new “concrete possibilities” could be referring to a variety of pastoral initiatives to address irregular situations. Indeed, Pope Francis himself seemed annoyed with the focus on the question of Holy Communion for those in irregular situations, as he went on to say in answer to the next question, which asked specifically about footnote 351: “One of the recent popes, speaking of the Council, said that there were two councils: the Second Vatican Council in the Basilica of St. Peter, and the other, the council of the media. When I convoked the first synod, the great concern of the majority of the media was communion for the divorced and remarried, and, since I am not a saint, this bothered me, and then made me sad. Because, thinking of those media who said, this, this and that, do you not realize that that is not the important problem? Don’t you realize that instead the family throughout the world is in crisis? Don’t we realize that the falling birth rate in Europe is enough to make one cry? And the family is the basis of society. Do you not realize that the youth don’t want to marry? . . . Don’t you realize that the lack of work or the little work (available) means that a

mother has to get two jobs and the children grow up alone? These are the big problems. I don't remember the footnote, but for sure if it's something general in a footnote it's because I spoke about it, I think, in '*Evangelii Gaudium*.'"⁷

AUTHORITATIVE WEIGHT OF PAPAL PRONOUNCEMENTS

So what is one to make of all this? The starting point for interpreting papal statements and ecclesiastical documents is to remember that they do not all carry the same authoritative weight.⁸ They bear different names because they carry varying levels of importance and authority. They are grouped, for example, on the Vatican website (www.vatican.va) under different categories with a variety of titles, including: apostolic constitutions, encyclicals, motu proprios, apostolic exhortations, apostolic letters, audiences, homilies, letters, messages, speeches, prayers and daily meditations.⁹ At the top of this hierarchy in terms of importance and authority are apostolic constitutions, highest in significance because they constitute papal legislation defining laws and doctrines. Among the lowest levels of authority would be extemporaneous answers given in response to

impromptu questions during an in-flight press conference on an airplane. Footnotes in an apostolic exhortation would also rank low in significance,¹⁰ particularly since apostolic exhortations themselves, as a rule, simply exhort, encourage and urge the faithful to follow existing church laws and teachings. Apostolic exhortations by their very nature are not vehicles for introducing or amending legislative texts or making dogmatic pronouncements. Hence, if the Roman Pontiff wished to use this type of text to do so he would by necessity need to establish that with manifest certitude.

Thus, it is important to note that the *Catechism of the Catholic Church* was promulgated on October 11, 1992, by Pope St. John Paul II by means of an Apostolic Constitution, *Fidei Depositum*, the objectively highest level of papal authority.¹¹

HOLY COMMUNION FOR THE DIVORCED AND REMARRIED?

With regard to the question of Holy Communion for the divorced and remarried, the *Catechism* says clearly in paragraph 1665, “The remarriage of persons divorced from a living, lawful spouse contravenes the plan and

law of God as taught by Christ. They are not separated from the Church, but they cannot receive Eucharistic communion. They will lead Christian lives especially by educating their children in the faith.” There is nothing in *Amoris Laetitia* that changes, amends or repeals this doctrine.

Moreover, the 1983 *Code of Canon Law*, which remains currently in force with some amendments that we will discuss later, was promulgated by Pope St. John Paul II on January 25, 1983, by means of an Apostolic Constitution, *Sacrae Disciplinae Leges*.

Canon 915 of this *Code of Canon Law* says that those “who obstinately persist in manifest grave sin are not to be admitted to Holy Communion.” There is nothing in *Amoris Laetitia* that changes, amends or repeals this canon. While we cannot judge people’s consciences, we can judge external situations to determine if they are manifestly gravely sinful and whether there is obstinate persistence from an objective perspective. This is relevant to the reception of Holy Communion, which is an external, public act as well. Since we are dealing with a right to the sacraments (cf. canon 213), each of these factors – obstinacy, persistence, manifest, grave and sinful – must be interpreted strictly (cf. canon 18). Nevertheless, the question of the

proper disposition of the soul while receiving Holy Communion is eminently pastoral. It has long standing in the Church going back to the early centuries.¹²

BIBLICAL CRITERION FOR THE RECEPTION OF HOLY COMMUNION

The Bible clearly teaches about the proper disposition to receive Holy Communion in the *First Letter to the Corinthians*, where Saint Paul wrote, “Whoever eats the bread or drinks the cup of the Lord in an unworthy manner will be guilty of profaning the body and blood of the Lord. Let a man examine himself, and so eat of the bread and drink of the cup. For anyone who eats and drinks without discerning the body eats and drinks judgment upon himself” (1 Cor 11:27-29). This biblical teaching is reflected in canons 915-916 of the Catholic Church’s *Code of Canon Law*. As mentioned earlier, canon 915 addresses the situation where the minister of Holy Communion is not to admit individual persons to the Sacrament under the circumstances that are clearly defined in that canon. Canon 916, on the other hand, says that a “person who is conscious of grave sin is not to celebrate Mass or to receive the Body of the Lord without prior

sacramental confession unless a grave reason is present and there is no opportunity of confessing; in this case the person is to be mindful of the obligation to make an act of perfect contrition, including the intention of confessing as soon as possible." Thus, while canon 915 puts the burden of discernment on the minister of Holy Communion, canon 916 places the responsibility for self-discernment on the person who desires to receive the Sacrament. These principles for the proper disposition for receiving or being admitted to Holy Communion are in keeping with the maxim that "law follows theology," that is, the laws of the church are not created in a vacuum, but are practical applications of biblical and theological truths in actual situations.

BIBLICAL BASIS FOR THE INDISSOLUBILITY OF MARRIAGE

The biblical basis for the Church's teaching on the indissolubility of marriage is found in the Gospel of Matthew 19:3-12 and the Gospel of Mark 10:2-12, where Jesus says, "Whoever divorces his wife and marries another commits adultery against her; and if she divorces her husband and marries another, she commits adultery." The whole question of the indissolubility

of marriage and the grounds for invalidity of marriage in the Church are beyond the scope of this presentation, but suffice it to say that, based on this biblical teaching of Jesus, the Church views divorce and remarriage without a declaration of invalidity (popularly known as an “annulment”) from an ecclesiastical tribunal as an adulterous relationship and therefore manifestly gravely sinful, objectively speaking.

Since that is the case, how is it that Pope Francis can suggest, as he did in footnote 351 with reference to the pastoral care of persons living in an objective situation of sin, “In certain cases, this can include the help of the sacraments”? Are there some cases where divorced and civilly remarried persons can receive Holy Communion without getting an annulment? The answer is yes.

EXCEPTION FOR HOLY COMMUNION “IN CERTAIN CASES”

But before anyone rushes to the presses with the story that Bishop Paprocki says that divorced and civilly remarried persons can receive Holy Communion without getting an annulment, it is important to add the qualifier, as Pope Francis did, that this applies “in certain cases.” The

qualifier, "in certain cases," means that there is no indiscriminate, universal or blanket permission for the divorced and civilly remarried to receive Holy Communion. So what are some examples of these certain types of cases?

BROTHER-SISTER SOLUTION

One obvious example is what is known in the Church as the brother-sister solution, in which the couple lives together publicly as husband and wife but abstains from all sexual intercourse. In such cases, the couple who agree to live as brother and sister may receive Holy Communion with the approval of the bishop, provided there is no danger of scandal. Given the condition of there being no public scandal, some may question how scandal can be avoided if the couple presents themselves as husband and wife. The answer is that in some cases it may not be generally known that one of both of the parties were previously married, especially if that previous marriage was in another part of the country. Also, even if the previous marriage is known, the frequency of declarations of invalidity or annulments from diocesan tribunals these days may lead people to assume

that the previous marriage had been declared invalid by the Church, thereby obviating scandal.

An example of this approach can be seen in the guidelines for the Archdiocese of Philadelphia issued by Archbishop Charles Chaput, which state,

Every Catholic, not only the divorced and civilly-remarried, must sacramentally confess all serious sins of which he or she is aware, with a firm purpose to change, before receiving the Eucharist. . . . With divorced and civilly-remarried persons, Church teaching requires them to refrain from sexual intimacy. This applies even if they must (for the care of their children) continue to live under one roof. Undertaking to live as brother and sister is necessary for the divorced and civilly-remarried to receive reconciliation in the Sacrament of Penance, which could then open the way to the Eucharist.”¹³

Catholics in these circumstances thus have a free choice: if they persist in sexual activity outside of valid marriage, they must refrain from taking Holy Communion; if they wish to receive Holy Communion, they must refrain from sexual activity outside of valid marriage. The latter may seem impossible to those steeped in our sex-saturated culture, but “with God, all things are possible” (Matthew 19:26).

This same reasoning applies to the Church's discipline with regard to acting as a lector, an Extraordinary Minister of Holy Communion, a godparent, a catechist, or a teacher or administrator in a parish school.

INTERNAL FORUM SOLUTION

Another possible case where a divorced and civilly remarried couple without an annulment may be admitted to Holy Communion involves what is known as the internal forum solution. In contrast to the external forum, where acts of ecclesiastical governance are public and verifiable with objective proofs, such as in a diocesan tribunal, the internal forum deals with matters of conscience, such as in confession or spiritual direction. Pope Francis makes reference to the internal forum in *Amoris Laetitia*, where he says,

What we are speaking of is a process of accompaniment and discernment which guides the faithful to an awareness of their situation before God. Conversation with the priest, in the internal forum, contributes to the formation of a correct judgment on what hinders the possibility of a fuller participation in the life of the Church and on what steps can foster it and make it grow.¹⁴

The use of the internal forum solution, however, is premised on being precluded from obtaining an external forum solution.¹⁵ This may be the case when the grounds for invalidity cannot be proved through objective and verifiable evidence, but which may be known to a party with private information that cannot be shared or proven publicly. As in the case of the brother-sister solution, this approach requires a lack of danger of public scandal.

Another possible case would be an impoverished diocese with no canon lawyers and no functioning tribunal. The inaccessibility of the parties to a competent ecclesiastical forum should not be the reason for denying them access to the sacraments if they otherwise have the verifiable proofs needed for a declaration of nullity. In this case, however, Pope Francis has made some rather significant changes to canon law to increase accessibility to an external forum solution. In all cases, an external forum solution is to be preferred not only for the sake of the parties but also for the common good of the Church and the well-being of the institution of marriage.

DUBIOUS AND CONTRARY OPINIONS

Unfortunately, some bishops and canonists have ventured far afield in their interpretation of *Amoris Laetitia*. For example, Archbishop Charles Scicluna of Malta and Bishop Mario Grech of Gozo issued a document entitled, “Criteria for the Application of Chapter VIII of *Amoris Laetitia*,” in which the bishops say that if “a separated or divorced person who is living in a new relationship manages, with an informed and enlightened conscience, to acknowledge and believe that he or she are [sic] at peace with God, he or she cannot be precluded from participating in the sacraments of Reconciliation and the Eucharist.”¹⁶ The suggestion of simply being “at peace with God” as the basis for receiving Holy Communion exalts subjective emotional sentimentality over any objective criteria of intrinsic evil. Seen from this dubious perspective, the intrinsic evil of adultery should no longer preclude adulterers from receiving Holy Communion if only they subjectively feel “at peace with God.” If this criterion is justifiable, then pity poor Saint John the Baptist, Saint Thomas More and Saint John Fisher who, as Archbishop Samuel Aquila of Denver has pointed out, all lost their heads after staking their lives on the principle

that adultery is intrinsically evil despite the subjective feelings of their respective monarchs, King Herod and King Henry VIII, who in their own minds must apparently have felt that they were “at peace with God”!¹⁷

Similarly, Cardinal Francesco Coccopalmerio, President of the Pontifical Council for Legislative Texts, has published a book on *Amoris Laetitia*, written in his personal capacity and so far available only in Italian but reported in unofficial translations in the English-language media, saying that a couple should have “absolution and access to the Eucharist as long as – I repeat – there is the impossibility of immediately changing the situation of sin.”¹⁸ He argues that the divorced and remarried can take Communion when it is impossible for them to avoid having sex. Unfortunately, this approach also places subjective feelings over objective norms and suggests that the demands of the natural moral law are sometimes just too difficult for people to achieve. These subjective approaches to morality turn the dreaded slippery slope of scandalous behavior into a virtual avalanche of self-exculpation wherein the objective determination of intrinsic evil is deeply buried.

CORRECTIVE AND CORRECT OPINIONS

Contrary to some bishops who have advocated admitting the divorced and remarried to Holy Communion,¹⁹ Cardinal Gerhard Müller, Prefect of the Vatican Congregation for the Doctrine of the Faith, has said, “It is not possible to live in God’s grace while living in a sinful situation,” noting that people living in sin “cannot receive Holy Communion unless they have received absolution in the sacrament of penance.” Müller importantly added that the “Church has no power to change the Divine Law” and that “Not even a pope or council can change that.”²⁰ He explained this point further in an interview with the Italian magazine *Il Timone*, portions of which were translated into English in the newspaper *L'Espresso* and re-published elsewhere, saying, “The confusion on this point also concerns the failure to accept the encyclical *Veritatis Splendor*. For us marriage is the expression of participation in the unity between Christ the bridegroom and the Church his bride. This is not, as some said during the [2015] Synod, a simple vague analogy. No! This is the substance of the sacrament, and no power in Heaven or on Earth, neither an angel, nor the Pope, nor a council, nor a law of the bishops, has the faculty to change it.”²¹

Along these lines, the Bishops of Western Canada have issued pastoral guidelines affirming the Church's teaching that precludes divorced and remarried Catholics from receiving Holy Communion unless their previous marriage had been formally declared null. The document, signed by the six bishops of the Province of Alberta and the Northwest Territories, says, "It may happen that, through media, friends or family, couples have been led to understand that there has been a change in practice by the Church, such that now the reception of Holy Communion at Mass by persons who are divorced and civilly remarried is possible if they simply have a conversation with a priest. This view is erroneous."²²

MITIS IUDEX DOMINUS IESUS

In 2015, Pope Francis did formally change canon law to expedite and simplify the procedures for handling cases petitioning for a declaration of nullity of marriage. He did this by means of a formal document known as a *Motu Proprio*. As a result, these irregular situations of divorced and remarried persons can often be regularized.

The promulgation of the Motu proprio *Mitis Iudex Dominus Iesus*, issued by the Supreme Pontiff Francis on August 15, 2015, has put into place a major reform of the canonical process for the declaration of the nullity of marriage in the *Code of Canon Law* effective December 8, 2015. This reform replaced, in their entirety, canons 1671-1691 in Book VII of the *Code of Canon Law*, Part III, Title I, Chapter I, Cases to Declare the Nullity of Marriage.

I wrote an article describing the interpretation and implementation of this reform in the Diocese of Springfield, Illinois, which was published in volume 2 of the 2015 issue of *The Jurist*, in the hope that my reflections might be of assistance to other bishops and canonists as they interpret and implement this reform in their dioceses and tribunals.²³ My article along with several other helpful articles written in light of *Mitis Iudex* have been collated and published in a book entitled, *Justice and Mercy Have Met: Pope Francis and the Reform of the Marriage Nullity Process*, edited by Kurt Martens, Ordinary Professor of the School of Canon Law at the Catholic University of America in Washington, D.C.²⁴ In my article, I note that the

new canons and accompanying procedural rules themselves contain provisions that require some decisions for their proper implementation.

ROLE OF THE DIOCESAN BISHOP

One of the key points of emphasis noted by Pope Francis in various parts of the document is the role of the diocesan bishop. Two of the six “fundamental criteria which have governed the work of reform” as mentioned in the introduction to the Motu proprio call for greater involvement of the diocesan bishop. Pope Francis is frankly addressing the reality that in many dioceses (if not most) it has been the practice of the diocesan bishop to “leave the judicial function in matrimonial matters completely delegated to the offices of his curia.” The Holy Father is, in a sense, reminding bishops of their responsibility to exercise judicial power as well as legislative and executive power of governance, as provided by canon 391. Even when this judicial power is exercised vicariously through his judicial vicar, the diocesan bishop should remain involved in some way, as he does with the vicarious exercise of his executive power of governance through his vicar general, episcopal vicars and those to whom

he delegates executive power. Of course, this will depend to a great extent on the bishop's familiarity with canon law, and especially with the canons dealing with the nullity of marriage.

In my case, my involvement in marriage nullity cases will be greatly assisted by the fact that I have a doctorate in canon law (J.C.D.) and experience serving for several years as a judge on the Court of Appeals for the Province of Chicago. Yet even in those circumstances where the diocesan bishop does not have a degree in canon law or any tribunal experience, he is still ultimately responsible both canonically and pastorally for the exercise of judicial power in his diocese. In such cases, the diocesan bishop will need to decide, in consultation with his judicial vicar and tribunal staff, the best way for him to be involved in such cases.

COLLEGIATE TRIBUNAL OF THREE JUDGES VS. SINGLE CLERICAL JUDGE

One of the key issues that I addressed in my article and which I wish to emphasize here is raised in new canon 1673, §3, which says, "Cases of nullity of marriage are reserved to a college of three judges. A clerical judge

must preside; the remaining judges can even be laypersons.” There is an exception in §4: “The bishop moderator, if a collegial tribunal cannot be constituted in the diocese or in a nearby tribunal chosen according to the norm of §2, is to entrust cases to a single clerical judge who, where possible, is to employ two assessors of upright life, experts in juridical or human sciences, approved by the bishop for this task.”

Using language similar to canon 1425, §4, the new canon 1673, §4 speaks of the bishop entrusting a trial of first instance to a single clerical judge if he is “unable” (*nequeat*) to constitute a collegial tribunal. Addressing this in his commentary published in *America Magazine*, Cardinal Coccopalmerio said: “If it’s possible, the tribunal should be collegial and formed of three members who are clerics; if it’s not possible that all the members are clerics, it’s permitted that one only need be a cleric and be the president of the tribunal, while the others can be lay people; if, moreover, it’s not possible that the tribunal can be collegial, it’s permitted that it be formed of one judge only, but he should be a cleric.”²⁵

Thus, the criterion for establishing a tribunal consisting of a single judge is *impossibility* to form a collegiate tribunal of three judges in the

diocese or in a neighboring tribunal. In determining the *impossibility* of establishing a three-judge collegiate tribunal, the question of *impossibility* must be distinguished from *inconvenience*. In a diocese that has at least three credentialed clerical judges, it may be geographically inconvenient for them to function as a collegiate tribunal if they are also assigned to parishes in parts of the diocese that are distant from each other or the seat of the tribunal, but that would not necessarily amount to impossibility in an age when documents can be photocopied and sent by postal mail or scanned and sent by electronic mail. It may also be burdensome for them if they have other pastoral responsibilities, but such burdens do not necessarily constitute moral impossibility to perform the task.

The new canons themselves make it easier to constitute a collegiate panel using one cleric and two lay judges. Previously, in marriage nullity cases, canon 1421, §2 allowed the conference of bishops to “permit lay persons to be appointed judges” and “when it is necessary, one of them can be employed to form a collegiate tribunal.” This was also adopted as a complementary norm for the United States in 1983. New canon 1673, § 3, now provides that in a collegiate tribunal of three judges in marriage

nullity cases a “clerical judge must preside,” but “the remaining judges can even be laypersons.” In a small diocese with only one priest-canonist, it may be a financial burden to hire additional credentialed lay canonists to serve as judges, but that does not necessarily make it impossible. Moreover, even when it is impossible to constitute a three-judge collegiate tribunal, new canon 1673, §4 says that the single clerical judge, “where possible, is to employ two assessors of upright life, experts in juridical or human sciences, approved by the bishop for this task.” Although these assessors do not need to have canon law degrees, they must be “experts in juridical or human sciences,” such as a civil lawyer or psychologist. So, either way, three people need to be employed, whether as a collegiate tribunal of three judges or a single clerical judge with two assessors who are experts in juridical or human sciences.

In the Tribunal of the Diocese of Springfield, Illinois, in addition to a religious brother with a canon law degree who serves as Defender of the Bond, we currently have five priests along with me who have canon law degrees to serve as judges. So with five priests and myself having canon law credentials, and a caseload of about 120 cases per year in our diocese, it

has not been impossible to form a collegiate tribunal of three judges for our marriage cases.

Moreover, new canon 1673, §4 adds a new requirement not found in the prior requirements for the collegiate tribunal in marriage cases according to canon 1421, §4, namely, if a collegiate tribunal of three judges cannot be constituted in the diocese, then it must be determined if that can be done “in a nearby tribunal.” Thus, before determining that a single clerical judge is warranted due to the impossibility of establishing a collegiate tribunal of three clerics (bishop, priests and/or deacons), or two clerics and a lay judge, or one cleric and two lay judges, the option must first be explored of constituting a three-judge collegiate tribunal in the tribunal of a nearby diocese or perhaps by sharing credentialed personnel with a nearby diocese.

QUALITY CONTROL

There is an additional reason for using a collegiate tribunal of three judges rather than a single clerical judge: since the mandatory appeal has been abolished, a three-judge panel will help provide some “quality control,” at

least by peer review. Previously, the single clerical judge would be aware that there would be a mandatory appeal in which an appellate tribunal consisting of three judges with credentials in canon law would review his sentence. Even if this appellate review rarely resulted in a negative decision, the dynamic of the first instance decision being automatically reviewed undoubtedly provided a good measure of quality control motivating the judge to make sure that he did a good job. Without the review of the three appellate judges in the mandatory appeal, a three-judge tribunal in first instance provides for the two other credentialed canon lawyers serving as judges to review the work of the *ponens* and for all three of them to serve as resources for each other in reviewing the facts of the case and coming to the right conclusion with moral certitude.

A further measure of “quality control” is the involvement of the diocesan bishop himself. In his *Motu proprio*, the Holy Father expressed his hope “that in large as well as in small dioceses the bishop becomes a sign of the conversion of ecclesiastical structures and does not leave the judicial function in matrimonial matters completely delegated to the offices of his curia.”

“IMPOSSIBLE” VS. “INCONVENIENT” OR “CHALLENGING”

Father John Beal, Ordinary Professor in the School of Canon Law at the Catholic University of America in Washington, D.C., has written an article entitled, “The Ordinary Process According to *Mitis Iudex*: Challenges to Our ‘Comfort Zone.’”²⁶ Father Beal starts by pointing out that the “iron grip of the familiar and the comfortable can be so strong that extraordinary effort—and sometimes intense outside pressure—are needed to overcome inertia and resistance and prompt adaptation to changed circumstances.”²⁷ His main thesis, with which I fully agree, is that “Tribunals cannot simply ‘cherry pick’ those elements of Pope Francis’ reform that they find congenial and ignore the rest. As occurred with the previous reforms of the matrimonial procedure, tribunal practitioners will have to accept the bitter with the sweet and learn new ways of dealing with cases.”²⁸

Unfortunately, Father Beal violates his own principle in rejecting the clearly-stated preference of *Mitis Iudex* for a three-judge collegiate tribunal in cases involving the invalidity of marriage, apparently preferring to stay within the comfort zone of single judge tribunals, as has been the practice

in many tribunals in recent years. After reviewing my analysis of this issue, Father Beal says that he finds my reasoning “unconvincing.”²⁹ In order to come to that conclusion, however, he misstates and misrepresents my argument. He says, “Bishop Thomas Paprocki has insisted that the law permits the use of a single judge for marriage nullity cases only when there is an absolute impossibility of forming a collegiate tribunal to hear any case of marriage nullity.”³⁰ Nowhere in my article, however, do I use the word “absolute” or the phrase “absolute impossibility.” I do distinguish between *impossible* and *inconvenient*.³¹ To say that we may have to do things that are inconvenient, burdensome, difficult or challenging does not necessarily amount to an absolute impossibility. I do not exclude the notion of moral impossibility, but would caution against too easily jumping to the conclusion that something is morally impossible because it is inconvenient, burdensome, difficult or challenging. An example of moral impossibility in this context would be a diocese that has a priest who is a credentialed canon lawyer but who is related to one of the parties to the marriage nullity trial. Certainly it would be morally impossible for such a priest to be expected to function impartially as a judge in the tribunal. In contrast,

paying a higher salary for two lay judges and a cleric rather than simply paying a single clerical judge is financially challenging, but is not morally impossible unless the diocese is so impoverished that it could not hope to raise the funds needed to pay the additional salaries. But it smacks of clericalism to exclude lay judges simply because their salaries would be higher than a cleric's remuneration. Perhaps we would see more lay students going to study canon law if they knew that there were adequately paying jobs to which they might hope to be hired after they graduated with their canon law degrees.

Father Beal also claims that I focus "exclusively on the impossibility of forming a collegiate tribunal to hear an individual case that might be presented to a tribunal and ignores the broader question of the impossibility of dealing expeditiously with the volume of cases which may reasonably be expected to be presented to a tribunal."³² That misrepresents my position as well as the requirements of the new legislation. There is nothing that prevents a three-judge tribunal from acting expeditiously if they work diligently. Moreover, expediting cases so decisions can be reached more quickly is not one of the reasons given in the new legislation

for the bishop to entrust cases to a single judge rather than a panel of three judges.

While I agree that “*nequeat* is also the word used to express this ‘impossibility’ in canon 1425, §4 of the Latin code” and that there “is no reason to think that the use of the word *nequeat* in the two recent apostolic letters is meant to suggest a greater degree of ‘impossibility’ than it did in the previous law,”³³ Father Beal ignores the fact that the new legislation reduces the likelihood of “impossibility” by allowing for two lay judges instead of only one as well as the option of collaborating with a nearby tribunal. Father Beal does not like the option of approaching a nearby tribunal for their assistance because the it would detract from “giving prominence to the bishop’s own judicial role” and the “proximity between judge and faithful would be thwarted,”³⁴ but the fact that the legislator has provided a requirement that is outside of his comfort zone does not justify rejecting it. In Father Beal’s own words, “a tribunal’s decision to ignore the provisions of the revised law that it finds inconvenient would seem to suggest that such a tribunal and its diocesan bishop have opted for ‘business as usual’ rather than committing themselves to ‘the conversion of

ecclesiastical structures' called for by Pope Francis."³⁵ With regard to his rejecting the law's preference for collegiate tribunals, Father Beal is being logically inconsistent.

THE RELATIONSHIP BETWEEN LAW AND PASTORAL CARE

There may be a temptation on the part of some to treat the whole question of judicial processes for determining the nullity of marriage as being opposed to genuine pastoral care for those who find themselves in the unfortunate situation of a broken marriage. This is not a new misunderstanding. Following the Second Vatican Council, a debate over canon law ensued in which law and pastoral care were posed in opposition to each other. Pope John Paul II addressed this false dichotomy directly in his allocution to the Roman Rota on January 18, 1990, when he said "it is not true that to be more pastoral the law must make itself less juridical. The juridical dimension and the pastoral dimension are inseparably united in the pilgrim Church on this earth."³⁶

Pope Benedict XVI took up this topic with the judges of the Roman Rota in 2006, explaining that "that love of the truth links the institution of

canonical causes of the nullity of marriage with the authentic pastoral sense that must motivate these processes.”³⁷ He returned to this theme in his address to the Rota in 2011, saying that he wanted “to consider the juridical dimension that is inherent in the pastoral activity of preparation and admission to marriage, to try to shed light on the connection between such activity and the judicial matrimonial processes.” The Holy Father noted that the relationship between the law and pastoral ministry

is often the object of misunderstandings to the detriment of law but also of pastoral care. Instead, it is necessary to encourage in all sectors, and in a particular way in the field of marriage and of the family, a positive dynamic, a sign of profound harmony between the pastoral and the juridical that will certainly prove fruitful in the service rendered to those who are approaching marriage.³⁸

Pope Francis has also weighed in on the topic of the relationship between law and pastoral care in his address to the judges of the Roman Rota on January 24, 2014, saying:

The juridical dimension and the pastoral dimension of the Church’s ministry do not stand in opposition, for they both contribute to realizing the Church’s purpose and unity of action. In fact the judicial work of the Church, which represents a service to truth in justice, has a deeply pastoral connotation,

because it aims both to pursue the good of the faithful and to build up the Christian community.³⁹

It would be good for diocesan bishops and tribunal officials to keep these papal reflections in mind when implementing the new norms for marriage nullity cases, since the judicial function of the diocesan bishop is a true exercise of his pastoral care as the shepherd of souls of his spiritual flock.

CONSCIENCE

Another approach suggested by some is to bypass ecclesiastical authority altogether—whether in the external or internal forum—and just “follow your conscience.” This approach, however, is usually based on a faulty notion of what conscience is and how it works. Cardinal Thomas Collins, Archbishop of Toronto, explains the matter this way:

It is sometimes suggested that our conscience is some kind of subjective oracle that on its own provides adequate direction in life. It is granted that we should take a good look at Church teaching, but the basic point is that we go with our conscience. Church teaching, or doctrine, presents us with the challenges of the Gospel call to discipleship. Those challenges are sometimes seen to be burdensome, not really capable of being lived in the

real world, except perhaps by a heroic few. They are seen by some as forming a kind of abstract Christian ideal that we certainly honor, but meanwhile we have got to get along with the challenges of real life. There is a wall between doctrine and life. If we think of things that way, the role of conscience is to adapt the abstract Christian ideal to what is practicable in our current situation, particularly as it is shaped by contemporary secular culture. This approach disregards the reality of grace, and the simple fact that Jesus has not called us to a way of life that cannot, in fact, be lived. Plenty of people live Christian discipleship to the full; this is especially evident wherever Christianity is actually flourishing, but it is true everywhere.⁴⁰

The word “conscience” comes from two Latin words, “co-” (which means “together” or “with”) and “science” (which means to have knowledge about something). Conscience means to share knowledge with someone else about what is right or wrong. Conscience does not act in isolation on some sort of personal or individual intuition disconnected from someone or something else. For a Catholic, a properly formed conscience means to share God’s knowledge and the Church’s teaching about right or wrong. So those who invoke “conscience” to justify their rejection of the natural moral law or divine law as taught by the Catholic Church are saying that they have chosen to follow the thinking, knowledge

and values of someone or something other than the Pope or the Catholic Church.

Those who are in “irregular situations” should talk to a qualified spiritual director or a priest in the context of sacramental confession, but forming a good conscience means that they will recognize and repent of their sins, resolve to reform their lives in accord with Christ’s teachings and receive absolution in the Sacrament of Reconciliation before receiving Holy Communion. In contrast to a false notion of mercy that demands acceptance of that which is morally unacceptable, true mercy extends forgiveness to those who are sorry for their sins and amend their behavior.

Archbishop Alexander Sample, the Archbishop of Portland in Oregon, in his Pastoral Letter on the reading of *Amoris Laetitia* in light of Church teaching, entitled, “A True and Living Icon,” offers a helpful reminder that there is always hope for redemption from a sinful situation, saying, “Because persons are free, conscience can develop and mature. No one is trapped within a permanently erroneous conscience, and by God’s grace and moral education can cooperate in attaining a well-formed conscience.”⁴¹

In the end, the Catholic Church respects freedom of conscience in that no one is coerced into believing or accepting what the Church teaches, but those who reject Church teaching should also have the integrity to respect the Church's responsibility to safeguard the integrity of its teachings and sacramental practices. One of the unfortunate distractions about the debate surrounding *Amoris Laetitia* is that it puts the focus on the question of who can receive Holy Communion. The real question is not access to Holy Communion, but getting to heaven. The sacraments are means to that end. Indeed, receiving the sacraments unworthily only compounds the problem, since to do so is a sacrilege. That is why Saint Thomas Aquinas in his Prayer of Thanksgiving after Mass wrote, "I pray that this Holy Communion may not be for me an offense to be punished, but a saving plea for forgiveness." If one does not understand the notion of a sacrilegious communion, this prayer makes no sense. A proper disposition is necessary for the recipient of Holy Communion in order to receive any spiritual benefit from the sacrament.

CONCLUSION

I conclude by reaffirming my agreement with the Holy Father that the gravest problems of marriage and the family in the 21st century have to do with the harsh fact that these basic constitutions are in crisis. Where the Holy Father wants us to devote our attention is for everyone to “realize that . . . the family throughout the world is in crisis.” The best way for us to help families and to show justice, mercy and love to all people is to speak the truth, and act accordingly.

May God give us this grace. Amen.

¹ Cf. Pope Saint John Paul II, encyclical letter, “*Dives in Misericordia*,” n. 13.

² Cf. St. Thomas Aquinas, *Summa Theologiae*, First Part, q. 21, a. 3.

³ Cf. St. Thomas Aquinas, *Summa Theologiae*, First Part, q. 21, a. 4.

⁴ “It goes without saying that this book is in no way an exercise of the magisterium, but is solely an expression of my personal search ‘for the face of the Lord’ (cf. Ps 27:8). Everyone is free then to contradict me.” Joseph Ratzinger/Pope Benedict XVI, *Jesus of Nazareth: From the Baptism in the Jordan to the Transfiguration* (New York: Doubleday, 2007), pp. xxiii-xxiv.

⁵ Cf., Doctor Kurt Martens, J.C.D., “What is the ‘ordinary magisterium?’ A brief history of a disputed idea,” *Catholic Herald*, August 30, 2016, at <http://www.catholicherald.co.uk/commentandblogs/2016/08/30/what-is-the-ordinary-magisterium-a-brief-history-of-a-disputed-idea/>.

⁶ Pope Francis, Post-Synodal Apostolic Exhortation on Love in the Family, *Amoris Laetitia*, April 8, 2016, n. 300.

⁷ “In-Flight Press Conference of His Holiness Pope Francis,” April 16, 2016, English translation of the questions and transcript of the responses given by the Pope, at https://w2.vatican.va/content/francesco/en/speeches/2016/april/documents/papa-francesco_20160416_lesvos-volo-ritorno.html.

⁸ For a helpful overview of the authoritative weight of papal statements and ecclesiastical documents, see Doctor Kurt Martens, J.C.D., “Nature of Authority of Roman Documents,” *Proceedings of the Sixty-Ninth Annual Convention of the Canon Law Society of America 2007*, pp. 131-164. See also John M. Huels, “A Theory of Juridical Documents Based on Canons 29-34,” *Studia Canonica* (1998), pp. 337-370.

⁹ Encyclicals do not necessarily contain definitely declared teachings, but apostolic letters can. Hence, *Ordinatio sacerdotalis* contains a secondary object of the infallible magisterium. So even though apostolic letters are lower in rank on this list, they can present infallible teaching. The content and the declared intent of the Supreme Pontiff are they key interpreters at times, not necessarily the rank of document. The objective rank is not the sole or at times even the primary interpreter of the authority of the content, for instance, St. John Paul II’s speeches to the Rota. However, in the case of *Amoris Laetitia*, Pope Francis has not indicated an intent to change church doctrine or canon law.

¹⁰ Some “notes” do weigh very heavily, however, such as the *nota praevia* added by Pope Paul VI to *Lumen Gentium*.

¹¹ It should be noted that the content of the catechism does not obtain its definitive or authoritative character by inclusion in the text that St. John Paul II promulgated, but due to the source of the teaching itself.

¹² From the first apology in defense of the Christians, Saint Justin, who was born in the year 100 A.D. and died as a martyr in 165 A.D., wrote, “No one may share the eucharist with us unless he believes that what we teach is true, unless he is washed in the regenerating waters of baptism for the remission of his sins, and unless he lives in accordance with the principles given us by Christ.” *Patrologia Graeca* 6, 427. English translation in the Office of Readings for the Third Sunday of Easter, *Liturgy of the Hours*, vol. 2 (New York: Catholic Book Publishing Co., 1975), p. 694.

¹³ “Pastoral Guidelines for Implementing *Amoris Laetitia*,” Archdiocese of Philadelphia, July 1, 2016, p. 4, at http://archphila.org/wp-content/uploads/2016/06/AOP_AL-guidelines.pdf.

¹⁴ Pope Francis, *Amoris Laetitia*, n. 300.

¹⁵ “The decision as to which forum is applicable in a given case should be guided by the following criteria: what is legally or factually known, or possibly going to be known, is to be decided in the external forum; what is secret and likely to remain secret may be decided in the internal forum. . . . The canon clearly prefers the exercise of the power of governance in the external forum.” Myriam Wijlens, commenting on canon 130 (“*Potestas regiminis de se exercetur pro foro externo . . .*”), in John P. Beal, James A. Coriden and Thomas J. Green, eds., *New Commentary on the Code of Canon Law* (New York: Paulist Press, 2000), p. 186. Marriage by its nature is a public institution. According to canon 1130, a grave and urgent cause is needed for the local ordinary to give permission for a marriage to be celebrated in secret. I would also argue from logic and common sense that most people would prefer their marriages to be recognized in the external public forum.

¹⁶ Archbishop Charles Scicluna and Bishop Mario Grech, “Criteria for the Application of Chapter VIII of *Amoris Laetitia*,” document published by the Archdiocese of Malta and the Diocese of Gozo, January 8, 2017, p. 7, n. 10.

¹⁷ Cf. Archbishop Samuel Aquila, "Did Thomas More and John Fisher Die for Nothing?" *Denver Catholic*, October 19, 2015, at <http://denvercatholic.org/did-thomas-more-and-john-fisher-die-for-nothing/>.

¹⁸ Cardinal Francesco Coccopalmerio, *Il Capitolo Ottavo della Esortazione Apostolica Post-Sinodale Amoris Laetitia* (Vatican City: Libreria Editrice Vaticana, 2017), quoted in English by Dan Hitchens in "Cardinal: Catholics can take Communion if continence is 'impossible,'" *Catholic Herald*, February 15, 2017, accessed April 20, 2017 at <http://www.catholicherald.co.uk/news/2017/02/15/cardinal-remarried-can-take-communion-if-continenence-is-impossible/>.

¹⁹ Elise Harris, "German bishops say the divorced-and-remarried may receive Communion," *Catholic News Agency*, February 1, 2017, at <http://www.catholicnewsagency.com/news/german-bishops-say-the-divorced-and-remarried-may-receive-communion-43199/>; "San Diego's Bishop McElroy strongly encourages Communion for divorced/remarried," November 29, 2016, at <https://www.catholicculture.org/news/headlines/index.cfm?storyid=30063>; Agostino Card. Vallini, "La letizia dell'amore: il cammino delle famiglie a Roma," *Relazione del Cardinale Vicario, Convegno Pastorale 2016, Diocesi d Roma, Basilica di San Giovanni in Laterano*, September 19, 2016, at <http://www.vicariatusurbis.org/wp-content/themes/abba/DOCUMENTI/Cardinale/VALLINI/RelazioneSacerdoti20160919.pdf>. For a helpful analysis of the guidelines issued by the bishops of Argentina, see Father Raymond J. de Souza, "What Argentina's 'Amoris Laetitia' Guidelines Really Mean," *National Catholic Register*, September 23, 2016, at <http://www.ncregister.com/daily-news/what-argentinass-amoris-laetitia-guidelines-really-mean>.

²⁰ Reported and translated from *Die Tagespost* by Maike Hickson in, "Cardinal Müller: Communion Remains Off-Limits for 'Remarried,'" *1Peter5*, May 4, 2016, at <http://www.onepeterfive.com/cardinal-muller-communion-remains-off-limits-for-remarried/>.

²¹ "No pope or angel can change communion teaching: Muller," as reported in *CathNews*, a service of the Australian Catholics Bishops Conference, February 1, 2017, at <http://cathnews.com/cathnews/28267-no-communion-for-divorced-remarried-mueller>.

²² Deborah Gyapong, *Canadian Catholic News*, "Alberta, NWT bishops reaffirm no Communion for divorced," *The Catholic Register*, September 21, 2016, at <https://www.catholicregister.org/item/23140-alberta-nwt-bishops-reaffirm-no-communion-for-divorced>.

²³ Thomas John Paprocki, "Implementation of *Mitis Iudex Dominus Iesus* in the Diocese of Springfield in Illinois," *The Jurist*, 75 (2015) 593-605.

²⁴ Kurt Martens, ed., *Justice and Mercy Have Met: Pope Francis and the Reform of the Marriage Nullity Process* (Washington, D.C.: Catholic University of America Press, 2017).

²⁵ Ibid.

²⁶ John P. Beal, "The Ordinary Process According to *Mitis Iudex*: Challenges to Our 'Comfort Zone,'" *The Jurist*, 76 (2016) 159-196.

²⁷ Beal, 159.

²⁸ Beal, 196.

²⁹ Beal, 170.

³⁰ Beal, 170.

³¹ Paprocki, 597.

³² Beal, 170.

³³ Beal, 171.

³⁴ Beal, 173.

³⁵ Beal, 186.

³⁶ John Paul II, Address to the Tribunal of the Roman Rota, January 18, 1990: AAS 82 (1990) 874. English translation from http://w2.vatican.va/content/john-paul-ii/en/speeches/2003/january/documents/hf_jp-ii_spe_20030130_roman-rota.html, accessed November 3, 2015.

³⁷ Benedict XVI, Address to the Tribunal of the Roman Rota, January 28, 2006: AAS 98 (2006) 138. English translation from *Origins* 35/36 (February 23, 2006) 601.

³⁸ Benedict XVI, Address to the Tribunal of the Roman Rota, January 22, 2011: AAS 103 (2011) 113. English translation from *Origins* 40/36 (February 17, 2011) 599.

³⁹ Francis, Address to the Officials of the Roman Rota for the Inauguration of the Judicial Year, January 24, 2014: AAS 106 (2014) 89. English translation from *Origins* 43/36 (February 13, 2014) 588.

⁴⁰ Cardinal Thomas Collins, "Letters from the Synod," (Number 19), October 21, 2015, at <https://www.firstthings.com/web-exclusives/2015/10/letter-number-nineteen>.

⁴¹ Archbishop Alexander Sample, Pastoral Letter on the Reading of *Amoris Laetitia* in Light of Church Teaching, "A True and Living Icon," October 7, 2016, at <https://archdpx.org/documents/2016/10/PASTORAL%20LETTER%20A%20True%20and%20Living%20Icon%20FINAL%20-%20Updated%20101016-2.pdf>.