

“The Rule of Law, not the Law of Rules, reflects that God’s mercy *is* God’s justice, and Divine justice *is* Divine mercy. Fr. Bednar builds on this theological premise of Pope Francis’ *Amoris Laetitia* and then articulates a clear, compelling, effective pastoral application of this foundational Christian teaching to couples trying their best to live a wholly holy life. Something that not only theologians and parish staff will want to study, but married couples and those moving towards married life as well.”

—Rev. James T. Bretzke, SJ, John Carroll University

“Gerald J. Bednar, Catholic priest, experienced attorney theologian, and pastor, has provided a much-needed study of *Amoris Laetitia*. ‘Mercy is not an alternative to the law. It is a way of applying the law.’ Bednar has provided a rich resource for all who seek to understand and to live Jesus’ words: ‘I have come to call not the righteous but sinners’ (Mark 2:17), in the light of the magisterium of Pope Francis.”

—Francis J. Moloney, SDB
Catholic Theological College, University of Divinity,
Melbourne, Australia

“This is a brilliant book, reflective of the author’s training in law and systematic theology as well as teaching for three decades in a major seminary. On every page one detects the skillful theologian-lawyer summarizing and applying the teaching of Pope Francis in *Amoris Laetitia* with precision, respect, and care. The numerous examples from the daily lives of laypersons bring this book to life as Bednar applies the pope’s teaching in focused and nuanced ways.”

—Msgr. Kevin W. Irwin, The Catholic University of America

“An incisive and illuminating reading of *Amoris Laetitia*, Gerald Bednar’s book is pastoral theology at its finest. He utilizes the breadth and depth of Scripture, tradition, and a wealth of ministerial experience in order to argue for the continuity of *Amoris Laetitia* with the Catholic Church’s enduring concern for distressed families and marriages. Patient, careful, and measured, this book models the nuance that immediate popular reception of the 2016 apostolic exhortation often lacked.”

—Kevin G. Grove, CSC, University of Notre Dame

Mercy and the Rule of Law

*A Theological Interpretation of
Amoris Laetitia*

Gerald J. Bednar



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Preface

Few Catholics today have an adequate notion of what the rule of law actually means. Even fewer Catholics have any passable knowledge of the church's complex history concerning divorce and remarriage. Little wonder then that the promulgation of the apostolic exhortation *Amoris Laetitia* by Pope Francis in 2016 caused such a stir among the laity, the press, some theologians, and even some bishops. This book endeavors to introduce concepts and contexts that will help explain the document and resolve some confusion about it. In focusing on *Amoris Laetitia* and the rule of law, I attempt to address the issues in a way that helps to open a door to further discussion among theologians and clergy whose critical comments have so often missed the point of this important document.

Pope Francis and the bishops who met in synod to help discern the church's teaching have remained faithful to the church and to the Lord's call for mercy. On October 8, 2013, Pope Francis announced that he would convene an Extraordinary Synod the following year to provide a forum for the discussion of the challenges of pastoral care of families.¹ As the synod met and deliberated in October 2014, two opposing groups emerged: those who saw no need to change current practices and those who wanted to enhance the role of mercy in ministry to families, especially to the divorced and remarried. The participants could not reach a consensus. After the pope commended members of

1. Stephen Walford, *Pope Francis, the Family and Divorce: In Defense of Truth and Mercy* (New York: Paulist Press, 2018), 18–24, provides an excellent summary of the events leading to the publication of *Amoris Laetitia*.

the synod for their frankness and appealed to a spirit of collegiality, he called for continuation of the discussion at the Ordinary General Assembly of the Synod of Bishops the following year.

On October 4, 2015, the synod began its deliberations, which lasted for three weeks. The pope had made clear that he did not want any rigid or rigorist interpretation of doctrine to interfere with an effective pastoral application of mercy. This led to suggestions that the synod had been rigged in favor of Cardinal Walter Kasper's proposal that favored a prominent role for mercy. Cardinal George Pell sent Pope Francis a letter signed by thirteen cardinals who expressed their concerns about the working document and the process that would be followed, including the selection of those who would actually draft the document. Different working groups of participants produced a variety of different approaches to the wide array of issues presented to them. The synod approved a Final Report consisting of ninety-four paragraphs. Participants voted on each paragraph separately. The paragraph that addressed the possibility of the sacraments of penance and Eucharist for those in irregular marriages passed by one vote more than the two-thirds majority required by synod rules. The Final Report was presented to the Pope as a guide for the writing of an apostolic exhortation.

Among many other important issues, the 2016 apostolic exhortation *Amoris Laetitia* responds to the question, "Can a divorced and remarried Catholic receive Communion?" The answer is "No." Pope Francis keeps that traditional answer in place. But "No" is the correct answer *only in the absence of certain unusual circumstances*.

First, the negative answer assumes that no annulment has been obtained. Obviously, if an annulment has been officially declared, then a divorced and remarried Catholic *can* receive Communion.²

Second, the answer also assumes that no dissolution based on the Pauline privilege has been granted. When one of two non-Christian spouses desires baptism and the other spouse refuses to live in peace

2. This situation presents no real problem. In the church's eyes, if no marriage ever existed, neither did a divorce. Canon law tribunals in the United States require the couple to obtain a civil divorce before proceeding with a petition for a declaration of nullity. The couple qualifies as "married and divorced" in the civil sense.

with the prospective Christian spouse, the valid marriage between them can be dissolved. After a divorce, the newly baptized Christian may remarry and receive Communion in the church (see canon 1143).

Third, the answer assumes that no dissolution “in favor of the faith” has been granted. According to this favor, sometimes popularly called the “Petrine privilege,” a Catholic person in some situations may be divorced, remarry, and continue to receive Communion in the church.³

Fourth, the answer assumes that the marriage is based on a valid consent between the parties and has been consummated. If it remains unconsummated, a spouse may petition the pope to dissolve even a sacramental marriage for a just cause (see canons 1142 and 1698). Such a couple must obtain a divorce, and can thereafter marry other partners and receive Communion, all with the official blessing of the church.

Fifth, the negative answer assumes that the couple in question is not living together in a so-called “brother-sister” relationship (that is, abstaining from conjugal relations) to avoid a serious injustice. Church officials allow this practice even though the “brother-sister” relationship objectively violates an existing marital bond. For this reason, the relationship cannot be blessed or recognized in any way in the church. Abstention from sexual relations does not make the “brother-sister” relationship right, nor does it establish chastity, as we will consider at greater length in chapter 3. Church leaders do not permit the relationship; they tolerate it.

Pope Francis points to a sixth unusual circumstance regarding the question of a divorced and remarried couple receiving Communion: some divorced and remarried Catholics may receive Communion if they are caught in a dilemma. If they cannot remain continent while living together, and if it is impossible for them to break apart without grave injustice, they would have no viable alternative. In chapter 8 of *Amoris Laetitia*, the pope gives such irregular couples a process that may lead to Communion for them. As in the “brother-sister” relationship, it can happen by way of tolerance, not by way of permission.

3. For example, if a baptized Catholic is married to a non-baptized person and the non-baptized person leaves the marriage, the Catholic spouse may apply for a dissolution of the non-sacramental marriage to enable the Catholic to enjoy a sacramental marriage with another.

In any event, the teaching of *Amoris Laetitia* indicates that Communion is not automatically precluded for all divorced and remarried Catholics. Because of the impossible circumstances of those caught in dilemmas, mercy allows them to make the most generous response they can give to God, tolerates their unfortunate dilemma, and offers penance and Communion to those trapped in such less than ideal circumstances.

How can this be said? That is the subject matter of this small book. Hopefully this short treatise can serve as an introduction to the sometimes-labyrinthine ways taken in Scripture and tradition to reach pastorally sensitive solutions for certain distressed marriages. No doubt the content of this book is not the last word on the subject. Readers can refer to the footnotes to help guide further exploration into the issues that pique their interest.

When *Amoris Laetitia* first became available, I read it eagerly. I quickly noticed that one highlight is its well-informed interpretation of Paul's admonition that Christians must receive the Eucharist "worthily" (see 1 Cor 11:27-29). I emailed my friend at the Australian Catholic University, Fr. Francis Moloney, SDB, who had recently written a book that included an exposition of that passage. We were both overjoyed to see the pope adopt an exegetical approach that took full advantage of modern scholarship. It set the stage for a teaching that more adequately responds to pastoral problems than previously was possible. Frank and I continued to share ideas on the topic. I am most grateful for his guidance, expertise, and encouragement.

My first teacher in systematic theology, Fr. Al Laubenthal, STD, has remained the best of my teachers. He has been of invaluable assistance in reviewing my text and pointing out various implications of my positions and the way that I state them. He has read and offered commentary on every version I produced and has been a most faithful friend and colleague. Fr. George Smiga, STD, professor of Scripture, also took a lively interest in the text and made many helpful suggestions. The late professor of Scripture, Fr. Larry Tosco, CSJ (1942-2019), kindly added his guidance and support from the very early stages of this project. Fr. James Bretzke, SJ, recently and happily assigned to nearby John Carroll University, most generously reviewed my text and made very helpful comments regarding ethics. I feel humbled to have received personalized guidance from such an expert. Msgr. Kevin

Irwin, STD, and Fr. Scott Detisch, PhD, were kind enough to review the chapter on penance and the Eucharist. I am most grateful for their very encouraging remarks. Fr. Gary Yanus, JCD, undertook the nearly impossible task of trying to make sure that my comments regarding canon law did not stray too far from the path. His good nature, competence, and support lifted my spirits. Fr. Damian Ference, currently writing his dissertation in philosophy at the Angelicum, kindly took the time to read through the text on a flight to Rome. His observations helped in solidifying several of my arguments. Msgr. Jeremiah McCarthy, PhD; Fr. Joe Koopman, STD; Beth A. Rath, PhD; and Sr. Lisa Marie Belz, OSU, PhD, also offered most helpful feedback and suggestions. I thank Alan Rome, the librarian at St. Mary Seminary, who has been most accommodating in finding volumes that the seminary collection did not possess. I am most grateful to Martin Cloutier, a parishioner at St. Helen Parish in Newbury, Ohio, who kindly checked my translations from the French originals of several articles and books that I used. Special thanks to Stephanie Lancour at Liturgical Press for coordinating the editing of the manuscript. The editor's insights and suggestions have greatly improved the text.

Any errors in the text belong to me alone. My apologies to those who tried so hard to keep me on target. I welcome correction wherever it is needed. Regardless of its shortcomings, I hope that the text can help to stimulate a more profound discussion among theologians, unburdened by the nastiness that has marred some of the commentary so far. I feel compelled to repeat a request made by Pope Benedict XVI in the first volume of his trilogy, *Jesus of Nazareth*: "I would only ask the reader for that initial good will without which there can be no understanding."⁴ Too many readers impatiently liberate themselves from the text of *Amoris Laetitia* so decisively that they offer refutations of positions that the pope does not adopt. Pope Francis has provided a great service to the church and serious thinkers need to build upon his thinking, each from his or her own area of expertise.

Finally, I am grateful to Cleveland's St. Mary Seminary, where I have taught systematic theology for thirty years, and to Fr. Mark Latcovich, PhD, its president-rector, for making available a semester-long sabbatical

4. Pope Benedict XVI, *Jesus of Nazareth: From the Baptism in the Jordan to the Transfiguration*, trans. Adrian J. Walker (New York: Doubleday, 2007), xxiv.

in 2019, which enabled me to pursue many of the ideas that make up this book. Rev. John Herman, CSC, the rector at Moreau Seminary, provided a lovely residence at the University of Notre Dame, my alma mater, where I was able to work, reminisce, pray, and enjoy the marvelous hospitality for which the Congregation of Holy Cross is so justly famous.

My blessings to all who contributed to this project and to all who will read this text. May this slim volume serve the glory of God.

Introduction

You tread upon my patience.

—King Henry IV in *King Henry IV, Part I* 1.3.4

Patience.

In contentious times, people grow impatient when others express opinions that contradict what seems obvious to them. Why should people listen to other voices when they can feel the truth so viscerally? That's how the impatience of Henry IV grew. He knew in his gut that a conspiracy formed against him. He soon encounters his opponent, Hotspur, who admits to impatience of his own. When impatience meets impatience, ugly things can happen.

This short treatise presents a theological interpretation of Pope Francis's 2016 apostolic exhortation *Amoris Laetitia* ("The Joy of Love"; hereafter AL) for all those who feel their patience "tread upon" and who have noticed a certain negligence of thought and speech regarding the document. Some members of both the press and the public have reacted precipitously to AL.¹ Contrary to what some may think, Pope Francis does not say that the divorced and remarried can now simply receive absolution and Communion. Far from it. Lacking the leisure to research the issues adequately, hasty commentators usually express their frustration with catch phrases and provocative headlines.

1. Cardinal Walter Kasper has expressed some frustration over the careless nature of the discussions surrounding AL and how some people "now declare themselves to be a self-appointed super-magisterium" (*The Message of Amoris Laetitia: Finding Common Ground* [New York: Paulist Press, 2019], 5).

They miss the fact that couples are at times caught in *dilemmas*, situations in which all options for moving forward are unacceptable. They seem unaware of the concern of Pope Francis for children. AL attempts to protect not only adults who enjoy the spousal bond but also children who look to their bond with their parents for nurture and security.

Attention has focused on chapter 8 in view of its merciful treatment of irregular marriages, although the apostolic exhortation has many other valuable insights to share on family life. When challenged, many good Catholics tend to revert to what they learned in high school catechism classes. Even trained pastors will use terms like the “absolute indissolubility of marriage,” “bigamy,” “adultery,” and “intrinsic evil” in their critiques simply to catch a hearing. This sort of talk easily leads to the testiness that has infested political discourse in the United States today. Such petulance should not make its way into discussions about the faith. Christian discourse should rise to a higher level.²

As an aid to a more helpful discussion among the faithful, chapter 1 begins with an overview of AL. What does it say, and what does it not say? Following Stephen Walford’s advice, I give a very brief synopsis of each chapter of the document to provide an overall context, but I save a discussion of chapter 8 for a section of its own, since it calls for a much more detailed analysis than the other chapters.³ In that eighth chapter, the pope calls attention to the fact that some families have become trapped in irregular marital unions. Caught in a dilemma, whatever choices these divorced parents have, they seem to be problematic in one way or another. They have no legitimate alternative to choose. They must find the least offensive way of proceeding with their lives while giving their children the support they need. Impatient commentators on AL often neglect the dilemmas people face, which constitute the heart of the pastoral concerns of chapter 8. AL insists that the church’s ministers need to treat such people with mercy, respect, and love. It does not say that divorce has become acceptable, that the annulment process no longer counts, or that adultery is no longer an intrinsic evil.

2. James Heft, SM, has offered a compelling analysis of the situation in his lecture at Loyola University Chicago. See “Is Pope Francis a Heretic?” *Origins* 49, no. 12 (August 1, 2019): 182–86.

3. Stephen Walford, *Pope Francis, the Family, and Divorce: In Defense of Truth and Mercy* (New York: Paulist Press, 2018), 53n51.

Chapter 2 deals with “The Rule of Law, Not the Law of Rules.” Many people have a woefully deficient notion of law. They tend to reduce law to a set of rules that need to be applied, quite rigidly at times, to generic situations. Such is not the case either in civil law or in church law. Discussions of AL based on flawed understandings of the nature and function of law are bound to fail. In my estimation, this misunderstanding has contributed most to the impatience and contentiousness on display in some of the discussions of AL. A brief excursus into the realm of civil law will make it easier to understand the sense of how the church applies its own law in the midst of its reliance on mercy. It follows the lead of Jesus. To the surprise of some, Jesus chooses mercy over justice and generosity over fairness at practically every turn in the Gospels. Catholics need to reacquaint themselves with the very unconventional reasoning process of Christ, whose decisions flowed from love and mercy. This leads to a consideration of how Thomas Aquinas treated the application of laws and rules to specific situations. He very carefully distinguishes principles themselves from their application. The application of the law requires the virtue of prudence, a factor often overlooked today. This chapter can yield surprising results for those who consider law as consisting of only the rigid application of so many rules.

Chapter 3 zeroes in on the issues raised in AL’s chapter 8. Some thinkers tend to oppose mercy and law. This chapter contradicts that notion and views mercy as a way of applying law. Laws can be enforced mercifully or harshly. The Lord commits the church to the merciful application of the law. This means that it must attend to the concrete circumstances of any case it considers. When this happens, mercy can override a rule without overturning the law, as the Lord did in his ministry.

Chapter 4, “Entering the Field Hospital,” invites the reader to take a look at real people caught in real predicaments that produced very real difficulties, even dilemmas. What does conversion require of such couples? What can they do once their decisions have put them in a bind? One case features a woman who simply struggled on her own after divorce. Another concerns a woman who tried the “brother-sister” relationship as a way to satisfy her obligation. A third case presents a situation in which a tribunal denied an annulment to a woman who was nonetheless convinced that her marriage was null. In addition, reports of the experiences of children provoke deep sympathy for those caught in the predicaments of such families. In view of such dilemmas, church

leaders judge that sometimes it is lawful to tolerate a lesser moral evil in order to avoid a greater evil or in order to promote a greater good. Pope Francis applies that principle to the dilemmas faced by so many of the divorced and remarried couples in the church today.

By this point, many readers will wonder what sort of Scriptural and historical warrants exist to support the pope's pastoral approach. Chapter 5, "Scriptural Basis and Historical Experience," explores the scriptural foundations and the ways that various popes handled marital dilemmas. It will interest readers to know that scholars can detect the same sort of development within Scripture that continues afterwards in the early church. The church has long had the power to manage marital bonds in the cases that come before it, at least since the days of St. Paul. The power of the keys (Matt 16:19 and 18:18-19) furnishes church leaders with the authority to administer concrete cases as they arise. Popes such as St. Innocent I and St. Leo the Great have exercised that power in ways that Pope Francis now proposes. Those early medieval popes understood the indissolubility of marriage, but those saintly leaders also recognized when to use the power of the keys to advance the merciful ministry that Jesus requires of his leaders.

Chapter 6 will consider the arguments of those who have either publicly questioned AL or give it an unduly restrictive interpretation. Major deficiencies in those works will be noted. Critical works that have appeared prior to the promulgation of AL will receive attention as relevant topics arise in the text and footnotes. The chapter closes with a brief reminder of the place of mercy in the church's ministry.

Finally, chapter 7 deals with the topic of reconciliation and Communion. In what circumstances can those in irregular marital unions receive absolution and come to Communion? Catholics have grown so accustomed to receiving Communion in ordinary circumstances that many do not realize that present doctrine and practice actually permit Communion in certain extraordinary cases, such as those described in chapter 8 of AL. Catholics have learned that they should not take Communion if they know that they have committed a grave sin which they have not yet confessed. Generally this is good spiritual advice. It does not, however, cover all situations, nor has it been taught from the beginning of the church's reflection on eucharistic discipline, as will be shown.

The propositions contained in this text need faithful and serious consideration before anyone undertakes to contradict the pope's ap-

ostolic exhortation. Although such reflection takes time, energy, and honesty, the effort will greatly benefit those who try. One quality will reward all readers.

Patience.

CHAPTER TWO

The Rule of Law, Not the Law of Rules

A Gospel Perspective

Before delving directly into the topic of divorce and remarriage, it will help to gain a precise understanding of the rule of law. An awareness of the possibilities afforded by the rule of law will make it easier to appreciate how church leaders could take merciful approaches to those caught in the impossible circumstances that some distressed marriages present.

1. The Rule of Law versus the Law of Rules¹

Oliver Wendell Holmes observed, “The life of the law has not been logic; it has been experience.”² That pithy sentence in his 1881 classic, *The Common Law*, clarified the reasoning process employed by the

1. Moral theologians usually treat the topics covered in this chapter under the heading of *aequitas*, as it was found in Roman law, or its Greek equivalent, *epikeia*. The canonical usage of those terms differs somewhat in that *epikeia* refers to a private, merciful interpretation, and *aequitas* refers to a juridical authority’s power to fill a *lacuna* in the law. I have chosen to develop the simpler language found in the civil courts of equity in the United States. It seems to me to offer a more intelligible entry into a discussion of the Torah and related topics.

2. Oliver Wendell Holmes, *The Common Law* (New York: Holmes Press, 2012), 1.

better judges in the legal world. They do not simply apply rules; rather, they see beyond the rules to discern the American character at its best, which the rules try to express in their own limited but essential way. This has its ecclesiastical equivalent, as we will see. But first it will be helpful to consider the insight of Holmes. He highlighted the difference between what I will call the “rule of law” as opposed to the “law of rules.”

The rule of law envisions the relationships between people in a given society. Not just a set of rules, “the law embodies the story of a nation’s development through many centuries.”³ In the United States, it describes the American character. Not merely a logically consistent code, the law gives authoritative expression to the experience and expectations of the people. Its nuances must be discerned through the wisdom bestowed by historical research, the distinctions observed in judicial precedent, and knowledge of the culture. When people follow the law, their brand of natural justice will rise among them.⁴ Dante likened this natural sense of justice to the natural instincts that guide a bird to build its nest in one way and not another.⁵ Just as each species builds its own nest in its own way, each nation produces its own version of the law in which its own notion of justice resides.

The law of rules, on the other hand, assumes that the constitution and its collection of statutes, ordinances, and regulations give full expression to the law. Sometimes rules capture an element of the law very well. At other times, a statute may be so badly drafted that it obfuscates the law it tries to express. Other statutes clearly state their objectives but may contain loopholes that can defeat the purpose of the law. People may also become so skillful at avoiding statutory requirements that they can profit handsomely in their dealings with the unwary. In those cases, upright citizens detect a lack of fairness, even though the rules have been followed to a tee. Therefore, Justice Holmes and others

3. Holmes, *Common Law*, 1.

4. Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), 2, 7, chap. 2. See also Eric Voegelin, *The New Science of Politics* (Chicago: University of Chicago, 1952), 27, 46, 159, where he notes that societies have operative myths that provide the “self-evident” truths against which their constitutions make sense. Holmes’s use of the term *law* functions in a fashion similar to Voegelin’s term *myth*.

5. *Paradiso*, 18:111.

have concluded that there must be more to the law than rules. Justice must look beyond rules to achieve a fair result.

Despite Holmes's treatise, judges well into the twentieth century still struggled to incorporate properly his insight into their opinions. In 1927, a company sought to foreclose a mortgage that had become past due because of a simple clerical error. A check for \$4,219.69 had been sent and cashed, but, due to a miscalculation, it was \$401.87 short. When the secretary discovered her error, she immediately notified the mortgagee that the difference would be paid as soon as her boss, the president, who was the only one authorized to write checks, returned from his business trip in Europe. When he returned, she forgot to tell him about the shortage. After twenty days elapsed, the plaintiff filed for foreclosure. Her boss tendered the balance the same day. It was refused, and the matter went to court. In *Graf v. Hope Building Corp.*, Judge O'Brien, writing for the majority, had only to refer to the agreement and to the logic of the rules of contract law to reach his conclusion.⁶ Nothing stood in the way of foreclosure. The secretary's mathematical error, her forgetfulness, and the president's immediate tender of the balance due could not override the rule, no matter how innocent or inconsequential the infraction.

Chief Judge Cardozo dissented. He understood the rules very well but thought that the law required a different result. The all-too-human error of the secretary and the immediate offer to pay the full balance owing should not trigger foreclosure. In Cardozo's opinion, the majority ruling simply did not describe how society operates in America. The law favors mercy to those who make an honest mistake in a situation like that. He wrote in his dissent, "In this case, the hardship is so flagrant, the misadventure so undoubted, the oppression so apparent" that the court should require the mortgagee to accept late payment in such circumstances.⁷ Cardozo did not want to change the rules; he simply wanted to follow the law. Such judgments require skill to distinguish substantive harm from mere technicalities. St. Thomas More cautioned, "Laws must be applied not mechanically but prudently. . . . Laws, like medicines, can be applied well only by individuals who show

6. 254 N.Y. 1 (1930).

7. 254 N.Y. 14.

prudence, courage and temperance.⁸ Good judgment includes the recognition of many subtle factors.⁹

According to the rules, O'Brien was right. According to the law, Cardozo was right.¹⁰ Everyone has an interest in justice and fairness. Unfortunately, at times people equate that interest with an uncritical adherence to the rules.

2. Law as Alive in the Scriptures

The situation described in the civil courts above has its ecclesiastical equivalent. Both clergy and laity apply rules to religious controversies. But they can also confuse the rules with the law and at times mistakenly expect that their uncritical adherence to the rules will produce the graceful result promised by Christ himself.

John Meier notes the complexity of the law: "Coming as it did from Yahweh . . . and comprising as it did both narratives and commandments (but also with elements of prophecy and wisdom), this religious *tôrâ* can roughly be translated as 'divine revelation.'¹¹ The Torah needed to be discerned, not simply read as if it were only a set of Rules. Indeed, he notes how fluid the Pentateuch was in Jesus's day. Rewriting certain stories was possible.¹² Not only different interpretations existed, but

8. Thomas More, *The Yale Edition of the Complete Works of St. Thomas More*, vol. 12 (New Haven: Yale, 1976), 225. While a proper implementation of the Law allows for more humane decisions, at times it requires prodigious judicial talents. Some judges can rationalize, innocently or not, in such a way that their rendition of the law can produce decisions that fly in the face of the society's notion of common sense and decency. See the decisions allowing for abortion in *Roe v. Wade*, 410 U.S. 113 (1973); and for the compelled sterilization of women, an opinion in which Justice Holmes himself wrote, "Three generations of imbeciles is enough" (*Buck v. Bell*, 274 U.S. 200 [1927]).

9. Among other things, those factors include historical awareness, research into legal precedents, a knack for identifying relevant facts, appreciation of the richness of human relations as it is expressed in the society's foundational writings, an understanding of the wisdom of its recognized sages, and the benefit of mature experience in the American culture.

10. Although Judge O'Brien would claim that the rules did in fact embody American Law, Cardozo's dissent has been cited approvingly in no fewer than 179 cases. See, for example, *Gottlieb v. Gottlieb*, 25 N.Y.S.3d 90 (2016).

11. John Meier, *A Marginal Jew: Rethinking the Historical Jesus*, vol. 4: *Law and Love* (New Haven: Yale, 2009), 28–29, 30–32.

12. Meier, *A Marginal Jew*, vol. 4, 31.

Meier points out that “at times, knowledgeable 1st-century Jews would claim that the written Law of Moses contained important commandments that . . . simply are not there in the text.”¹³ These possibilities cohere nicely if one supposes that the Torah referred not only to the written rules contained in the Pentateuch but also to an unwritten source, the Torah as God intends it and as Jesus understood it. Indeed, rabbinic Judaism eventually recognized that the full Torah existed only in heaven.

Paul respected the law, calling it “holy and just and good” (Rom 7:12), but he also knew the difference between the Torah and its writing. He asserts that God “has made us competent to be ministers of a new covenant, not of letter but of spirit; for the letter kills but the Spirit gives life” (2 Cor 3:6). Indeed, Walter Kasper rightly insists that “the gospel does not mean a book, much less a codex.”¹⁴ James Dunn observes, “The point is that *gramma* [letter] is not simply a synonym for *nomos* [law].”¹⁵ Jesus could see the distinction easily, and, after his conversion, so too could Paul.

According to Paul, at one point the law served the function of identifying sin to the people so as to enable them to regulate their lives. However, this led the people to become fascinated with the rules and, therefore, with sin, and they sunk even lower.¹⁶ Furthermore, sometimes self-interest distorted their perspective. Many of the Jews in Jesus’s day approached the law properly, carefully discerning its requirements. Others unfortunately used the law to exploit their privileged status as the chosen people. The rule of law became for them the law of rules. They extracted these rules from their context, and manipulated them to prop up their exclusive, exalted status. Biblical theologian Olivier-Thomas Venard, OP, notes that a Christian who reads the Scriptures faithfully knows that the letter is “necessary but not sufficient.”¹⁷

13. Meier, *A Marginal Jew*, vol. 4, 32.

14. Kasper, *The Message of Amoris Laetitia: Finding Common Ground* (New York: Paulist Press, 2019), 13.

15. Paul regards the Law as a positive force that Christ came to activate in us by purging it of sin so the law might be fulfilled in us. “For the law of the Spirit of life in Christ Jesus has set you free” (Rom 8:2). See James D. G. Dunn, *The Theology of Paul the Apostle* (Grand Rapids: Eerdmans, 1998), 149.

16. See Dunn, *Theology of Paul*, 143–50; and also Rom 2:28 and Gal 3:1-5, 14.

17. Olivier-Thomas Venard, *A Poetic Christ: Thomist Reflections on Scripture, Language and Reality* (New York: T & T Clark, 2019), 101.

The law was given to regulate life, not to increase sin (see Gal 3:21). Christ fulfills the law by infusing it with life, something the law could not do by itself. Indeed, the law of Christ is now written on the heart, as Jeremiah once promised (see Jer 31:33).¹⁸

Jesus brings the idea of the law to the forefront. He offers the commandments of the love of God and neighbor as a summary statement of the law (see Matt 22:37-40). Paul follows suit: “the one who loves another has fulfilled the law” (Rom 13:8).¹⁹ As in the civil law, the way of the Torah is not always perfectly expressed in each particular rule. Christians need the guidance of Jesus to help them determine what to do on the practical level. Jesus understood the intended sense behind the law and did not hesitate to correct deficient notions as the need arose. “You have heard it said. . . . But I say to you. . . .” (see Matt 5:21-48). How could he do this?

John presents Jesus as the incarnate Light of the World (John 1:9, 8:12). Light functioned as a symbol of the Torah in Jesus’s day.²⁰ Jesus embodied the Torah. Francis J. Moloney, SDB, writes that “Jesus claims to be the perfection of the Law. . . . [He] personifies . . . the light of the Law. . . . What once the Law was to Israel, now Jesus is to the world.”²¹ In effect, Jesus *is* the Torah. He perfects it as it applies to everyone, Jew and Gentile alike.²² Jesus, therefore, sees beyond the written Torah, right to the Father’s will. He fulfills the law and even modifies it as needed.²³ Walter Kasper agrees that “the Word of God is not a kind of travel guide or concrete description of the way, but rather a light for the journey of life (Ps. 119:105).”²⁴

18. See Dunn, *Theology of Paul*, section 6, esp. 130, 133, 135, 145, 149.

19. The complexity of the New Testament situation eventually results in Matthew’s complaint that some Christians teach others that Torah observance makes no difference. Matthew’s gospel insists that every letter of the Law retains its importance (see Matt 5:17-19).

20. See, for example, Wis 18:4; Ps 119:105; 84:11; 16:11; and Prov 6:23.

21. Francis J. Moloney, *Signs and Shadows: Reading John 5–12* (Minneapolis: Fortress Press, 1996), 94–95.

22. See Stanley Marrow, *The Gospel of John: A Reading* (New York: Paulist Press, 1995), 251; and Gerald Borchert, *John 12–21, The New American Commentary*, 25 B (Nashville: Broadman & Holman, 2002), 109.

23. See Jacob Neusner, *A Rabbi Talks with Jesus*, rev. ed. (Montreal: McGill-Queens University Press, 2000), especially chaps. 3–6.

24. Kasper, *Message of Amoris Laetitia*, 14.

Theologian Servais Pinckaers notes that Thomas Aquinas considered the law as “a work of wisdom, first engaging the intelligence, and only then the will.”²⁵ While various types of laws are interrelated, the evangelical law represents “the most perfect possible participation in the eternal law that can be found on earth and the closest approximation to our final goal.”²⁶ In other words, the law does not consist in mere precepts, ordinances, and obligations. It needs to be discerned, not simply read. It flows from revelation and penetrates the interior of the human person. Therefore, Pinckaers argues, the law becomes “the very source of the virtues.”²⁷ The law “enlightens the reason as to the nature and character of things.”²⁸ This gives rise to a morality of freedom, a virtue ethics, that integrates the challenge of the Sermon on the Mount into each person’s striving for excellence. It indeed represents the rule of law and not the law of rules.

Believers fulfill the law by following Christ. On a practical level, that implies that leaders exhibit a healthy spirituality, intelligent Scriptural exegesis, and a mature theological analysis that takes into account the historical dimension of the church. All this needs to inform one’s discernment of the law of the Lord.

Although people often wish Jesus would give more clear-cut rules, he does the opposite. He frequently puts his disciples in positions that require difficult judgments. Paul compares the law to a *pedagogue* (*paidagogos*; Gal 3:24), that is, in Paul’s context, a slave who accompanied a child to make sure the child arrived at school, where the teacher would provide the child with its real education and formation. Those who stay only with the pedagogue have not yet found their master. At some point, they need to let go of the pedagogue to encounter their Lord.

It will help to recall how often Jesus’s teaching seems foreign to the ways people typically think in twenty-first-century America. For example, one might expect to find ringing endorsements of justice and fairness from Jesus. Yet practically at every turn, Jesus does not side with the rules of justice in its modern American sense; rather, he

25. Servais Pinckaers, *The Sources of Christian Ethics*, trans. Sr. Mary Thomas Noble, OP (Washington, DC: The Catholic University of America Press, 1995), 181.

26. Pinckaers, *Sources of Christian Ethics*, 181. See Thomas Aquinas, ST I-II, q. 106, a. 4.

27. Pinckaers, *Sources of Christian Ethics*, 183.

28. Pinckaers, 420.

sides with mercy. Nor does he side with fairness; rather, he sides with generosity. It's worth taking a closer look at this surprising element of the Gospels.

3. The Advice of the Gospels

First, it should be noted that *justice* in the Gospels means something very different from the way Americans typically use the term today. *Justice* or *justification* refers to a work of God reconciling sinners to himself. It refers to the ability of a believer to walk uprightly with others before God. The gracious will of God produces justification that saves those lost in sin. Paul sees this work as achieved by Christ who reconciles all to the Father (see Eph 2:4-10).²⁹

Although this time-honored use of the term *justice* has a long history, Jesus also speaks of justice in its American sense, that is, as ensuring that people receive their due.

A. Not “Justice” but Mercy

One group of sayings that confronts the American sensibilities on justice can be found at Matthew 7:1ff. and Luke 6:37ff. For example, in Luke 7:1 (“Do not judge, so that you may not be judged”), the act of judging itself comes under scrutiny. Luke 7:3 (“Why do you see the speck that is in your neighbor’s eye, but do not notice the log in your own eye?”) suggests that the only legitimate act of judgment is self-judgment. Rather than attempting to correct another, the Christian must clean his or her own soul first, a never-ending task.

Although people can hunger for justice to be done to and for others, the Gospels continue to question whether any human being is in a position to judge at all. Jesus compares the kingdom of God to a man who sowed seed in a field. During the night, an enemy came and planted weeds among the wheat. As the crops came up, the farmer and his slaves could not separate the weeds from the wheat. The farmer tells them to let both grow to term. Only at the end will they be judged—and then by the reapers at the end of time, not by the slaves who now stand ready to pull the weeds (Matt 13:24-30).

29. See Dunn, *Theology of Paul*, 337, 342–44.

When it comes to judgment, humility and mercy come together as natural allies in the Scriptures. Indeed, most priests can share stories of those they judged to be a perfect couple during marriage preparation but who divorce rather quickly after the wedding. Likewise they can think of couples for whom they held no hope yet whose marriages endure.

The scribes and Pharisees put the issue of justice front and center as they drag the woman caught in adultery before Jesus (John 7:53–8:11). They cite the command of Moses to stone such a woman. Will Jesus authorize a “just” stoning? Famously, he scribbled on the sand, straightened up, and said to them, “Let anyone among you who is without sin be the first to throw a stone at her.” Although the facts and the rules line up perfectly for a conviction, Jesus works cleverly with the law and implements it in a way that results in mercy. In that scene, the law achieves its intended effect.

What if a disciple sins? What should the other disciples do? Jesus answers that they must “rebuke the offender, and, if there is repentance, you must forgive” (Luke 17:3). Although Jesus allows for judgment here, he also calls for mercy, not punishment. Given his prior cautions, judgment can come only as a result of careful discernment under the law. Even if the offender repeats his offense “seven times a day” (Luke 3:4) and asks forgiveness, the disciple must forgive. Mercy never ends, regardless of what justice might otherwise require.

In Matthew 18:23–35, Jesus gives Peter incentive to forgive seventy-seven times. He does so simply by contrasting a life that has received mercy with a life that has not. In the parable, a king, out of the mercy of his heart, forgave his slave an enormous debt of ten thousand talents. Set free, that forgiven slave then encountered a fellow slave that owed him a mere hundred denarii. The debtor slave begged for mercy to no avail and was imprisoned until he could pay back the debt. The king became so enraged at the merciless conduct of the slave he had just forgiven that he gave him a taste of his own medicine and handed him over to the torturers until he paid his entire debt, an impossible task. In telling the parable, Jesus does not indicate that mercy comes to an end, but he rather puts on full display a world made completely unlivable by its unswerving dedication to rules. Once again, the Lord presents mercy as necessary. It produces a much more livable world than justice would allow.

Another pericope that touches on the superiority of mercy over justice comes at Matthew 5:38–42. Justice would seem to require punishment

that equals the crime: “An eye for an eye and a tooth for a tooth.” Jesus instructs his disciples to do the opposite: “Do not resist an evildoer.” This counsel baffles those dedicated to justice. Jesus further instructs the disciples to be generous by going the extra mile and giving not only one’s cloak, but one’s coat as well. He sets aside the rules of justice and fairness, and commands mercy and generosity instead.

In the Sermon on the Mount, far from counseling that one may claim what is justly due, Jesus forbids even anger (Matt 5:21-22). Justice works in reverse to the American way. An American crying “Give me justice” wants restitution. The scales of justice must be balanced, as if vengeance could erase a felony. But for Jesus, reconciliation constitutes the primary task, *even for the victim* (Matt 5:22). There can be no thought of obtaining justice by sending the criminal to jail. Furthermore, if any disciples wrong another, they cannot offer their gifts at the temple. They must first be reconciled and only then offer their gifts. American courtroom “justice” takes a back seat to mercy.

Finally, Jesus has choice words for lawyers. He pronounces woes to those who attend to the finer points of tithing spices while neglecting “the weightier matters of the law: justice and mercy and faith” (Matt 23:23). The justice Jesus has in mind is the justice by which God justifies the sinner. This brand of justice removes the log from one’s own eye. Because the members of his audience have failed to do so, Jesus calls them “blind guides” who manage to “strain out a gnat but swallow a camel!” (Matt 23:24). Once again, justice refuses to adjudicate the guilt of others. It rather tends to one’s own shortcomings. Otherwise, woeful lawyers merely “load people with burdens hard to bear” while not lifting “a finger to ease them” (Luke 11:46).

These images capture nicely the pastoral concerns of Pope Francis with regard to applying mercy to couples in irregular situations. But is this fair to other couples?

B. Not “Fairness” but Generosity

Just as the Gospels advocate mercy while giving second-class status to American justice, so too they advocate generosity while making fairness a lesser concern.

Perhaps the clearest story in this regard is found at Matthew 20:1-16. One set of laborers, hired early in the morning, agreed to the usual daily wage. The master finds others at about nine a.m. and others at

noon. He hires more at three p.m. and still more at five p.m. Yet at the end of the day, the manager pays everyone a full day's pay. Those who worked all day grumble that the others received exactly the same wage as they, even though they endured the burdens of the entire day. It's not fair! But the landowner insists on his right to be generous. Generosity trumps fairness.

The parable of the Prodigal Son (Luke 15:11-23) constitutes a story that is stunning in its lack of fairness. The younger son takes his inheritance ahead of time and squanders it on a life of gross self-absorption. The older son stays home with his father. The younger son finally returns home out of concern for his own self-preservation. The father adorns the younger son with fine clothes and a ring. To the delight of the father, the household rejoices with a lavish meal complete with music and dancing. The older son understandably cries the age-old complaint of one sibling against another: "No fair!" The father sympathizes with him and assures him of his love and possessions. Nevertheless, the father insists on generosity even if it is not fair.

Something similar could be said of the parable of the rich fool that Jesus told in response to the man who wanted the inheritance that should come to him. After all, what good is it to fill one's barns if one's life will be required of him that very night (Luke 12:20)? In the end, merely receiving one's due pales in comparison to the generosity of God. Fairness as a reliable standard fails again. The same with Jesus's encounter with the tax collector Zacchaeus (Luke 19:1-10). Jesus applauds the tax collector's admission of his lack of fairness, which motivates generosity, not merely a balancing of the scales.

* * *

Both mercy and generosity require discernment, not simply the application of rules. Mercy and generosity do not necessarily produce free passes and plentiful food at every turn. There is nothing automatic about them. One thinks of Paul's admonition that those who would not work should not eat (see 1 Thess 3:10; also 2 Cor 8:11-15) and the Lord's instructions on how to deal with a disciple who gives offense (Luke 17:3-4). Just as rules cannot give adequate expression to justice and fairness, so too the faithful should refrain from turning mercy and generosity into unbending rules. One must discern what mercy and

generosity require in each circumstance. The faithful must carefully consider the matter in light of the entire Gospel. In other words, mercy and generosity do not come to adequate expression in abstract rules, but they become apparent only as part of the discernment of the law in concrete circumstances.³⁰

So too, in a similar way, pastoral ministers must deal with those in irregular marital situations. The task requires sensitivity, imagination, and creativity. No formula reliably gives solutions to every conceivable case.

4. The Flexibility of Mercy and Generosity

Similar to American civil law and the Torah, the Gospel must be discerned, not simply read. Turning Gospel precepts into rules can flatten the law of love and deprive it of its texture. The merciful and generous treatment of couples in irregular marriages falls squarely within the intent of the Gospel.

Mature believers understand the necessity of rules, but they also appreciate the priority of mercy and generosity. The faithful must avoid making up unbending rules for the application of mercy and generosity (see AL 304). Discernment must guide one's search for the requirements of the Law of Love. Perhaps Jesus stressed mercy and generosity so frequently because he knew the human inclination perversely to find so much comfort in the rules that keep their property safe.

In situations of justice and fairness, believers come to understand that, to paraphrase Holmes, the life of the faith has not been logic, but the Christian experience of the divine mystery as the faithful en-

30. Thinkers too often mistakenly identify the manipulation of abstract terms with rationality itself, whereas the Christian strives to foster faithfulness to Christ who calls for attention to the concrete particularities involved in any potential act of mercy. Thus, St. John Henry Newman noted the harm caused by "excessive attachment to system" and the "love of order and regularity." He considered them forms of impatience, which impede philosophical investigation. Reason makes progress like a "clamberer up a steep cliff, who, by quick eye, prompt hand and firm foot, ascends how he knows not himself, by personal endowments and by practice, rather than by rule, leaving no track behind him, and unable to teach another" (*Fifteen Sermons Preached Before the University of Oxford Between A.D. 1826 and 1843* [Notre Dame, IN: University of Notre Dame Press, 1997], I:10 and XIII:7 [pp. 9 and 257]). See also Malcolm Bull, *On Mercy* (Princeton: Princeton University Press, 2019), 119.

counter God through Christ and in the Spirit. This means accepting the occasionally difficult responsibility to achieve a subtle and flexible understanding of the requirements of the law in the Spirit of Jesus Christ. Yes, this is sometimes challenging and even perplexing, but it is always a grace-filled exercise aimed at the closest one can come to the peace of Christ in one's circumstances.

Pope Francis employs the understanding of law in use ever since God first revealed the Torah. Law is something to be discerned in the context of mercy and love, not something to be applied in an ideologically rigid fashion. Laws and rules give us direction. They point the way. They do not fully embody the response that would be appropriate in every circumstance that life presents.

Revelation comes in a person, Jesus Christ, not in a book. It remains for Christians to discern the presence of Christ through the Holy Spirit and to react accordingly. Francis uses the law in such a way in chapter 8, where he considers the dilemmas that people can enter—sometimes through their own fault and sometimes through the fault of others. Rules alone do not suffice in such situations. They lack the required human discernment, the human touch. They lack faith.

In other words, a principle is one thing; its application is quite another. Principles do not apply themselves. It takes human judgment, prudence, and discernment to know which facts are relevant in what way and how a principle may apply in a given concrete circumstance. Nor can a correct concrete judgment be made into a rule. Much more is involved in making these complex judgments.

Pastors sometimes dream of simply applying a rule to a generic situation and being done with it. They might even feel virtuous for imagining themselves as promoting the true faith while holding someone else's feet to the fire. But the pope likens those dreams to using laws as if they were stones to throw at people (AL 305). Those actions actually betray the faith. Referencing a document prepared by the Vatican's International Theological Commission, Francis notes that natural law is not a pre-established "set of rules that impose themselves *a priori* on the moral subject; rather, it is a source of objective inspiration for the deeply personal process of making decisions."³¹

31. International Theological Commission, *In Search of a Universal Ethic: A New Look at Natural Law* (2009), 59, cited in AL 305.

Pastors who resist this sort of thinking wish that guidance of the faithful were a much simpler task than it is. Pastors must not retreat from duties that call for profundity; they are called to love their people enough to grapple with the real issues that life brings. Francis notes that a person may well be in an objective situation of sin, but still might “be living in God’s grace.” Such a person “can also grow in the life of grace and charity, while receiving the Church’s help to this end” (AL 305). Here he reminds priests that the confessional is not to be turned into a torture chamber, nor the Eucharist into a prize for the perfect.³²

5. Aquinas on Laws and Rules

Pope Francis cites Aquinas in his effort to escape an approach to morality based solely on rules (AL 304). Although his approach has drawn criticism (which will be addressed in chapter 6 below), Francis properly cites the Angelic Doctor for pastoral purposes. He hopes to dissuade those who might inappropriately use Aquinas’s thought to criticize couples who have no morally pristine alternatives to pursue. The pope finds support in Aquinas’s commentary on Psalm 42, where the saint distinguishes harsh judgments from merciful ones. Aquinas claims that harsh judgments focus on abstract notions of the human while mercy looks at the concrete condition of a specific person and wants to do that person justice.³³ Mercy achieves a higher form of justice, a more profound compliance with the law.

At one point in his *Summa Theologiae*, Aquinas considers “Whether the Natural Law Is the Same in All Men?”³⁴ He answers that, when dealing with speculative reason, we treat universal principles, which are the same for all people, but the moral actor also needs to attend to the practical reason, which deals with contingent matters, particular facts that vary from circumstance to circumstance. For example, a person ought to return property borrowed from its rightful owner. That general principle communicates something essential about everyone’s moral rectitude. It applies to everyone universally. However, when the issue is whether a particular borrower needs to return an item to a

32. See AL 305n351.

33. Kasper, *Message of Amoris Laetitia*, 16.

34. ST I-II, q. 94, a. 4.

particular lender, the universal principle may well fail. Circumstances are not always the same. “[C]onsequently, although there is necessity in the general principles, the more we descend into matters of detail, the more frequently we encounter defects [in the general principles].” Aquinas borrows an example from Plato. Everyone understands that “goods entrusted to another should be restored to their owner. Now it is true for a majority of cases.” But what if the rightful owner has become a traitor and intends to use the knife to fight against one’s country? Must the knife still be returned? The general principle directing the person to return the knife has failed. “And this principle will be found to fail the more, according as we descend further into detail . . . because the greater the number of conditions added, the greater the number of ways in which the principle may fail . . .”³⁵

Aquinas rejects any cookbook approach to the application of rules to complex circumstances. AL cites Thomas’ observation that might be summed up in the common adage that principles are one thing while the application of those principles to concrete circumstances is quite another. AL notes that various factors might inhibit one’s ability to follow a rule precisely. One might be in the state of grace even though external acts make it appear that one is in the state of mortal sin. This can be due to mitigating factors and situations. For example, aside from ignorance, a person may “have great difficulty in understanding ‘[a rule’s] inherent values,’ or be in a concrete situation which does not allow him or her to act differently and decide otherwise without further sin” (AL 301). AL then cites Aquinas to point out that even a saint may have the habits of all the virtues and yet experience great difficulty in bringing a particular virtue to action because of circumstances.³⁶ A person may have charity, which includes all the virtues, but may find it difficult to exercise a virtue (say, honesty) because of the circumstances. Aquinas states that just as a person who has acquired the habit of science (whereby science comes easily to the person) may find it difficult to understand scientific theories when he is sleepy; so, too, the exercise of a habit of moral virtue may be rendered difficult by an inhibiting circumstance. Thus a charitable person may feel sleepy and may not

35. See *Republic*, 331c. ST I-II, q. 94, a. 4.

36. ST I-II, q. 65, a. 3, ad. 2 and 3.

be quick-witted enough to avoid a lie. Those circumstances reduce the person's moral culpability.

What might constitute those inhibiting circumstances in irregular marriages? Such partners may find themselves in a dilemma. They may have been married for some time before they raise the issue of their invalid marriage in confession, only recently aware of the significance of what they have done. Their invalid marriage may have produced several children. Furthermore, the marriage may have withstood the test of time. It may have even flourished by its "proven fidelity, generous self-giving, and Christian commitment" (AL 298). They may feel that they cannot satisfy the obligation to separate without causing new damage, falling into new sins, such as the neglect of their children. In suing for divorce of the irregular marriage, one might also be acting unjustly to one's partner. Bonds have developed not only with the children but also between mother and father. Psychological, emotional, and financial dependencies may have developed that cannot be set aside easily. It may well be cruel to expect one to simply divorce and leave a family structure that has proven successful. We will have the opportunity to bring this into focus by considering real cases in chapter 4 below.

Pope Francis recognizes that any person's culpability for mortal sin may also be "diminished or even nullified by ignorance, inadvertence, duress, fear, habit, inordinate attachments, and other psychological or social factors" (AL 302, citing CCC 1735). Once again, outward appearances alone do not suffice to make a valid judgment on one's state of sin. Moreover, "affective immaturity, force of acquired habit, conditions of anxiety or other psychological or social factors" may also "lessen or extenuate moral culpability" (AL 302, citing CCC 2352). The pope and synod fathers have no intention of altering the general rule against divorce, but they realize "that responsibility with respect to certain actions or decisions is not the same in all cases" (AL 302).

Once again, a principle is one thing; its application is quite another. A person may live in a state of objective sin according to all outward appearances but may actually live in God's grace and receive the church's help to advance in that state of grace (AL 305). At this point, footnote 351 asserts that, in proper cases, this assistance includes the help of the sacraments, especially confession and Eucharist. Those in distress must desire to change the situation but lack the power to act on that desire. This involves a more informed interpretation of Scripture than has usually been the case when Catholics consider who may receive

Communion “worthily.” The Scriptural justification for sharing the sacraments with properly disposed couples in irregular unions will be taken up in detail in chapter 7 below.

Those who consider this line of thinking to be an innovation have to contend with the fact that not only Thomistic scholars have cited these mitigating factors but also that the manualists taught the same thing. Moral acts never occur in a vacuum; only universal principles do. Circumstances always accompany real actions in the real world. The theological manuals of the 1930s through the mid-1960s typically included sections on the significance of circumstances. For example, the manual by Hieronymus Noldin, published in 1960, enumerated seven circumstances that may affect the moral quality of an act: who, what, by what aids, why, how, [and] when. The author has lifted these factors straight out of Thomas Aquinas’s *Summa*.³⁷ The manuals taught that concrete circumstances can be determinative of the moral quality of the act, as did Thomas.³⁸ The more astute priests of those days understood the implications of such texts for irregular marriages and applied them as necessary when appropriate cases arose. They did not hesitate to apply the virtue of prudence, which Aquinas described as the virtue of discerning what is to be done in the particular concerns of life.³⁹

The virtue of prudence takes into account the concrete circumstances and fashions a plan of action designed to produce concretely whatever good can be realized from a given situation. Prudence operates in a world of complex contingencies where things can go wrong. Prudence sees what is possible. It assesses a particular situation, decides on a course of action that may or may not work, and then takes the risk. A giant step removed from the logical assurances of abstract prin-

37. Hieronymus Noldin, *Summa Theologiae Moralis*, I: *De Principiis*, 33rd ed. (Innsbruck: Felizian Rauch, 1957), 73ff., citing ST, I-II, q. 7, a. 3.: “*quis, quid, ubi, quibus auxiliis, cur, quomodo, quando.*”

38. Noldin, *Summa Theologiae Moralis*, I, 74: “*Actus humanus moralitatem accipit etiam a circumstantiis, quae in concreto determinant: nam circumstantiae efficere possunt, tum ut actus sit vel non sit naturae rationali conveniens, tum ut magis vel minus conveniens sit*” (emphasis in the original). “A human act receives its *moral quality* also from circumstances, which determine [morality] in the concrete: for circumstances are able to effect not only whether the act comports with natural reason or not, but also whether it agrees with natural reason more or less.”

39. ST I-II, q. 57, a. 4, ad. 3.

principles, prudence depends on knowledge gained by experience—what typically happens in the real world. Hence, prudence cannot be reduced to a principle. Jean-Pierre Torrell, OP, notes that prudence “closes the deliberative processes by daring to prescribe action in a specific situation, singular each time, that will never repeat itself as such.”⁴⁰

In a 2016 interview on AL, Cardinal Christoph Schönborn, the general editor of the *Catechism of the Catholic Church*, called attention to the fact that St. John Paul II wrote in his apostolic exhortation *Familiaris Consortio* (n. 79) that “pastors must know that, for the sake of truth, they are obliged to exercise careful discernment of situations.” This discernment, the cardinal said, especially pertains to those who are “subjectively certain in their consciences that the first marriage, now irreparably destroyed, was never valid.”⁴¹ The cardinal further recalled a comment by Cardinal Ratzinger offered in response to a question posed to him by Schönborn in 1994 concerning internal forum solutions. The future Pope Benedict XVI said, “There is no general norm that can cover all particular cases. The general norm is very clear, and it is equally clear that it cannot cover all the cases exhaustively.”⁴² This is precisely the approach taken by AL.

Perhaps the only innovation by Pope Francis in this regard is that he chose to acknowledge those real possibilities for irregular marriage cases in the context of an apostolic exhortation. AL requires a sense for the proper functions and necessary limitations of rules. Francis simply discusses openly what more pastorally effective priests have been practicing for years without making a spectacle of themselves or their parishioners. Indeed, they knew intuitively how to apply the International Theological Commission’s insight that “natural law . . . is a source of objective inspiration for the deeply personal process of making decisions.”⁴³ The apostolic exhortation now gives those astute priests added confidence to continue their ministry of mercy.

40. Jean-Pierre Torrell, *St. Thomas Aquinas*, vol. 2: *Spiritual Master*, trans. Robert Royal (Washington, DC: The Catholic University of America Press, 2003), 270.

41. Antonio Spadaro, “The Demands of Love: A Conversation with Cardinal Schönborn,” *America* (August 15–22, 2016): 25.

42. Spadaro, “The Demands of Love,” 26.

43. International Theological Commission, *In Search of a Universal Ethic*, 59, cited in AL 305.

When Pope Francis deals with irregular marriages, he is aware that varying circumstances attend each couple. Not all couples face the same circumstances. Each case must be assessed taking into account the circumstances that may well alter one's conclusion if only general principles were applied. The dilemmas encountered by couples offer no easy, universal solutions.

Those who would apply the law to any situation need to enter into the type of discernment described in AL. They cannot presume that Christ's graceful response comes automatically, as if no human touch were required.

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