

Communion for the Divorced and Remarried: Why Revisionists in Moral Theology Should Reject Kasper's Proposal

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Introduction

CARDINAL WALTER KASPER'S PROPOSAL for admitting divorced and remarried Catholics to Holy Communion has been in the limelight for some time now.¹ It played a significant role in the process of preparation for the Third Extraordinary General Assembly of the Synod of Bishops last year, and can be expected to figure in the discussions of the Fourteenth Ordinary General Assembly of the Synod of Bishops this year. The proposal is similar to earlier proposals presented by Kasper and others from the 1970s and onwards,² but today a large number of bishops seem to be positive toward the general thrust of the argument. There

¹ The proposal was outlined in Kasper's address to the extraordinary Consistory of Cardinals on Feb 20, 2014. An English translation of the address is available in the small book *The Gospel of the Family* (New Jersey: Paulist Press, 2014).

² For example, Karl Lehmann, "Indissolubility of Marriage and Pastoral Care of the Divorced Who Remarry," *Communio: International Catholic Review* 1 (1974): 219–42; Walter Kasper, *Theology of Christian Marriage* (New York: Crossroad, 1981); Oskar Saier, Karl Lehmann, and Walter Kasper, "Pastoral Ministry: The Divorced and Remarried," in *Marriage: Readings in Moral Theology* No. 15, ed. Charles E. Curran and Julie Hanlon Rubio (New York: Paulist Press, 2009), 380–96. For an overview of the history of the debate about Communion for the divorced and remarried, see Nicholas J. Healy, "The Merciful Gift of Indissolubility and the Question of Pastoral Care for Civilly Divorced and Remarried Catholics," *Communio: International Catholic Review* 31 (2014): 306–330.

are other, more radical views about how to deal with the situation of the divorced and civilly remarried in circulation,³ but the characteristic feature of Kasper's proposal is that it insists on preserving the doctrine of the indissolubility of marriage, while recommending a change in the pastoral praxis of the Church. Such a change is motivated, according to Kasper, by the Church's duty to reflect Christ's mercy.⁴

The mercy Kasper appeals to, however, is not supposed to be a "deceptive mercy" that—in the words of Pope Francis—"binds the wounds without first curing them and treating them".⁵ Kasper emphasizes that "the mercy of God . . . is no cheap grace, which dispenses with conversion," and he insists that *repentance* is a necessary condition for admission to the sacraments for divorced and remarried Catholics: "For the one who repents, forgiveness is possible. If forgiveness is possible for the murderer, then it is also possible for the adulterer."⁶

Normally, conversion and repentance are inextricably linked with a firm intention to change one's behavior—for the murderer, not to murder again, and for the adulterer not to continue with the adultery.⁷ If the Church were to give absolution to the murderer and the adulterer without requiring a change of behavior, we would clearly be talking about a form of "cheap grace." When it comes to divorced and remarried persons, however, there is a special problem. Their situation may, arguably, make it extremely difficult or impossible to do what Catholic

³ For example, Theodore Mackin, "The International Theological Commission and Indissolubility," in *Divorce and Remarriage: Religious and Psychological Perspectives*, ed. William R. Roberts (Kansas City, MO: Sheed and Ward, 1990); Edward Schillebeeckx, "Christian Marriage and the Reality of Complete Marital Breakdown," in *Catholic Divorce: The Deception of Annulments*, ed. Pierre Hégy and Joseph Martos (New York: Continuum, 2000), 82–107; Michael G. Lawler, "Divorce and Remarriage in the Catholic Church: Ten Theses," *New Theology Review* 12 (2013): 48–63.

⁴ Walter Kasper, "The Message of Mercy: What Does Mercy Mean for the Life and Mission of the Church?," *America: The National Catholic Review* 211 (2014). See also *Mercy: The Essence of the Gospel and the Key to Christian Life* (New York: Paulist Press, 2014).

⁵ Pope Francis, "Speech at the Conclusion of the Synod," Vatican Radio, Oct 18, 2014.

⁶ Kasper, *The Gospel of the Family*, 32.

⁷ The Council of Trent defines repentance or contrition as "sorrow of the soul and the detestation of the sin committed, together with the resolve not to sin any more. This disposition of contrition was necessary at all times for the attainment of the remission of sins" (Heinrich Denzinger, *Compendium of Creeds, Definitions, and Declarations on Matters of Faith and Morals*, 43rd ed., ed. Peter Hünermann [San Francisco: Ignatius Press, 2012], §1679).

doctrine seems to require of them—to end the second marriage relationship, or at least the sexual aspect of it—without causing harm to other people, for example the children of the second marriage. This means that some divorced and remarried persons face a dilemma. They are required to get out of an intimate relationship for moral reasons, but responsibilities contracted in the context of this relationship would make it morally problematic to withdraw from it. The centrality of dilemma-situations of this kind for Kasper's proposal is clearly reflected in the conditions that he lists for admitting divorced and remarried persons to the sacraments:

If a divorced and remarried person is truly sorry that he or she has failed in the first marriage, if the commitments from the first marriage are clarified and a return is definitively out of the question, *if he or she cannot undo the commitments that were assumed in the second civil marriage without new guilt . . .* do we then have to refuse or can we refuse him or her the sacrament of penance and communion, after a period of reorientation?⁸

If the italicized sentence—the one that points to the moral dilemma—were deleted, Kasper would be unable to defend his proposal against the accusation that it encourages a “cheap grace” that ignores the need for true repentance and conversion. With the sentence included, however, he can argue that the remarried person's hands are tied, and that the irregular situation in which he or she lives is not an obstacle to obtaining absolution and Holy Communion. This kind of view was also embraced (but later abandoned) by Joseph Ratzinger, who claimed that “the granting of communion cannot here depend on an act that is either immoral or practically speaking impossible [namely, to end the civil marriage, or practice abstinence within it].”⁹

The fact that a moral dilemma is fundamental to Kasper's case means that his proposal must be evaluated from a moral-theological perspective.

⁸ Kasper, *The Gospel of the Family*, 32 (my italics).

⁹ Joseph Ratzinger, “Zur Frage nach der Unauflöslichkeit der Ehe: Bemerkungen zum dogmengeschichtlichen Befund und zu seiner gegenwärtigen Bedeutung,” in *Ehe und Ehescheidung: Diskussion unter Christen*, ed. Franz Heinrich und Volker Eid (München: Kösel Verlag, 1972), 35–56. Translation by Joseph Bolin, 2011, <http://www.pathsoflove.com/texts/ratzinger-indissolubility-marriage/> (accessed Nov 18, 2014). Later, Ratzinger changed his position on the issue of Communion to divorced and remarried persons in response to *Familiaris Consortio* (see “Church, Pope and Gospel [Letter to the Editor],” *The Tablet* 26 (1991).

This is what I intend to do in the present article. Moral evaluations of Kasper's proposal and similar proposals are not lacking, of course, but most of the criticism that the proposals have received in this area is based on presuppositions that can be described as "traditionalist."¹⁰ The critics presume—with reference to the Church's tradition—that some acts are "intrinsically evil" in the sense that they are always gravely immoral, regardless of surrounding circumstances and further intentions on the part of the agent. The act of having sexual intercourse with someone who is not one's legitimate spouse (such as a person whom one has civilly married after a previous divorce) is such an act.

The existence of intrinsically evil acts, and the identification of extra-marital sex as such an act, have been clearly confirmed by the contemporary magisterium and must be considered authoritative teaching. However, many of those who defend Cardinal Kasper's proposal disagree with the magisterium in this respect, which means that they embrace "revisionist" theories of various kinds in moral theology.¹¹ It is therefore worthwhile to evaluate Kasper's proposal by means of a method that does not take "traditionalist" presuppositions (such as the existence of intrinsically evil acts) for granted. Below I will suggest and apply a method of this kind. The method does not foreclose the possibility that the intentions behind and the circumstances surrounding the extra-marital sexual activity of divorced and remarried persons might affect the moral status of their behavior so that it no longer constitutes a moral obstacle to receiving the sacraments. In what follows, I will present the method and simultaneously specify what I mean by "traditionalism" and "revisionism" in moral theology.¹²

¹⁰ For example, Germain Grisez, John Finnis, and William E. May, "Indissolubility, Divorce and Holy Communion," *New Blackfriars* 75 (1994): 321–330; Velasio De Paolis, "The Divorced and Civilly Remarried and the Sacraments of the Eucharist and Penance," in *Remaining in the Truth of Christ: Marriage and Communion in the Catholic Church*, ed. Robert Dodaro (San Francisco: Ignatius Press, 2014), 181–209, especially 191–201.

¹¹ For "revisionism" in moral theology, see Servais Pinckaers, O.P., "Revisionist Understandings of Actions in the Wake of Vatican II," in *The Pinckaers Reader: Renewing Thomistic Moral Theology*, ed. John Berkman and Craig Steven Titus (Washington D.C.: Catholic University of America Press, 2005), 236–72.

¹² A note of clarification: Kasper's proposal addresses two kinds of "situations" that need to be dealt with. The first concerns those Catholics who are "subjectively convinced in conscience that their irreparably broken, previous marriage was never valid," even though the juridical evidence for this may be lacking (Kasper, *The Gospel of the Family*, 28). The second situation concerns those cases in which the validity of the first marriage is not in question. Ladislav Orsy has coined the

The Method

Everybody agrees that adultery is gravely immoral. Most moral theologians would also agree that if you have committed adultery, you should not receive Eucharistic Communion unless you have ended the adulterous relationship and resolved not to do it again. This I will, at least initially, take as common ground. So the moral-theological question that is actualized by Kasper's proposal is not whether unrepentant adulterers can receive Communion in good conscience. The question, instead, is whether people who are divorced and remarried (and whose first marriage is valid and consummated) must always, and necessarily, be *counted* as adulterers. Only if this question receives a negative answer is it reasonable to consider Communion for divorced and remarried persons.

Some proponents of "fundamental option"-theories might express disagreement here. It could be argued that the choice to commit adultery does not necessarily change one's fundamental orientation towards God, and that unrepentant adulterers could therefore be admitted to Holy Communion. This argument might have a shred of plausibility if it is applied to single instances of adultery committed during shorter periods of time. However, it has no plausibility at all if applied to a person's decision to commit adultery perpetually. *If* living in a civil marriage after a divorce is indeed adultery, and if a person who knows this nevertheless chooses to continue with the adultery for the rest of his/her life, then this long-term commitment can hardly fail to have an impact on the fundamental orientation of that person. So the crucial question, also for "fundamental-option" theorists, is whether living in a civil marriage after a divorce is adultery, or not.

This is, in any case, how Kasper himself seems to pose the problem. With reference to a magisterial statement from 1994, according to which divorced and remarried persons can receive spiritual Communion, Kasper argues that this statement "raises questions": "For the one who receives spiritual communion is one with Jesus Christ. How can he or she then be in contradiction to Christ's commandment? Why, then,

term "conflict situations" for the first category (where the internal and external forums are in conflict) and "hardship situations" for the second category (when the previous marriage is presumably valid) (Ladislav Orsy, "Intolerable Marriage Situations: Conflict between External and Internal Forum," *Jurist* 30 [1970]: 10). My focus in this article is only on "hardship situations." The question of which authority (individual conscience or ecclesiastical tribunal) is to *decide* when it is appropriate for a person to receive Communion is logically secondary to the question about under what conditions it *is* appropriate for a person to receive Communion.

can't he or she also receive sacramental communion?"¹³ So Kasper's argument is not that those who contradict Christ's commandment against adultery can receive Communion anyway. Instead, he questions whether Christ's commandment against adultery is always applicable to the sexual behavior of divorced and remarried persons.

For "traditionalists," this issue is clear cut. The morality of a given act depends primarily on the "object" of that act, where "object" is understood to mean the act itself in the sense of "a freely chosen kind of behavior" or (in another formulation) "the proximate end of a deliberate decision." Some objects are "intrinsically evil": "There exist acts which *per se* and in themselves, independently of circumstances, are always seriously wrong by reason of their object."¹⁴ *Having sexual intercourse with a person who is not one's spouse* belongs in this category. This means that all instances of this kind of behavior are morally wrong, and should be classified either as "adultery" (if you are married) or as "fornication" (if you are unmarried). So divorced and remarried people live in a state of persistent adultery.

For "revisionists," the issue is less clear. According to Joseph Fuchs, "A moral judgement is legitimately found only under a *simultaneous* consideration of the three elements (actions, circumstance, purpose), premoral in themselves."¹⁵ The three elements that Fuchs mentions are usually called the *fontes moralitatis* or "sources of morality," and they are found in the writings of St Thomas Aquinas.¹⁶ The three "sources" are, first, *the act itself* (or "object"), second, *the intention, purpose, or end* of the act, and third, the *circumstances* surrounding the act. The idea that the morality of an act flow from these three sources has provided a common framework for much of the post-conciliar debate between "traditionalists" and "revisionists" in moral theology.

The post-conciliar debate has to an important extent been about how the three sources are constituted and related to each other. While traditionalists claim that the "object" can be determined and morally

¹³ Kasper, *The Gospel of the Family*, 30.

¹⁴ John Paul II, *Veritatis Splendor* (1993), §78, 80. For the history of the debate, see Servais Pinckaers, "A Historical Perspective on Intrinsically Evil Acts," in *The Pinckaers Reader: Renewing Thomistic Moral Theology*, ed. John Berkman and Craig Steven Titus (Washington D.C.: The Catholic University of America Press, 2005), 185–235.

¹⁵ Joseph Fuchs, "The Absoluteness of Moral Terms," in *Readings in Moral Theology No. I: Moral Norms and Catholic Tradition*, ed. Charles E. Curran and Richard McCormick (New York: Paulist Press, 1979), 121.

¹⁶ Thomas Aquinas, *Summa Theologiae* I-II, q. 18.

evaluated in itself, independently of the agent's intention and the particular circumstances surrounding the act, revisionists deny this and argue for a more holistic view that "expands the object" so that it includes intentions and particular circumstances, most importantly the foreseeable effects or consequences of the action. If a revisionist conception of the moral object is accepted, then the moral evaluation of the behavior of a divorced and remarried person might conceivably yield a different verdict than that which "traditionalists" typically reach. Since it might not be possible for a divorced and remarried person to get out of the second marriage without causing harm to the second spouse and their common children, it is possible to argue that the circumstances that such a person is in affect the moral status of her behavior, so that it does not count as adultery (that is, as gravely immoral). The crucial factor that determines the moral status of a certain behavior is, for many revisionists, whether the person who exhibits it has "proportionate reason" to act as she does. "Proportionatism," in this sense, was the original form of revisionism after Vatican II, and it is still relevant in the contemporary debate.

Dana Dillon has pointed out that both the traditionalist and the revisionist (or proportionalist) approaches are "rooted in arguments about the relationship between the object and the other fonts of morality, especially the end."¹⁷ The availability of such a common framework for moral evaluation of acts—the framework of the three *fontes moralitatis*—should be seen as an important asset for Catholic moral theology. It might be true that, since the heyday of the so-called proportionalist debates, "the world of Catholic moral theology . . . has now sorted itself into two worlds, one that focuses on acts, and another that focuses on agents."¹⁸ It is very questionable, however, if a polarization between act- and agent-centered approaches to ethics is fruitful. As Dillon points out, what we do shapes who we are, and every act matters in this respect.¹⁹ A framework for act-analysis is clearly needed also in an agent-centered approach to ethics. The matrix of the three *fontes moralitatis*, moreover, can be adapted to accommodate concerns about the particularity and context of the agent, as the work of the proportionalists has shown.

I therefore suggest that the question posed above—whether living in a second marriage after a divorce can be distinguished from adultery—can

¹⁷ Dana L Dillon, "Expanding in a Different Direction: Reclaiming the Twofold Nature of the Moral Object," *The Heythrop Journal* 53 (2012): 587.

¹⁸ *Ibid.*, 585.

¹⁹ *Ibid.*, 591.

be fruitfully discussed in terms of the three sources of morality, provided that no specific construal of the relationship between the sources, or their respective relevance for moral evaluation, is taken for granted.

I will now give a general description of the method whereby I will address this question. I ask the reader for some patience if the description is a bit abstract and not immediately transparent. The method will be much more easily understood when it is applied to some concrete materials in the next section.

The method proceeds by way of a thought-experiment, and the first step is to construct a possible scenario (Scenario A) that everybody agrees would count as a clear case of adultery. The second step is to compare this scenario with another imagined scenario that describes the ideal-typical situation and behavior of a divorced and remarried person (Scenario B). The comparison between the two scenarios is to be made in terms of the three *fontes moralitatis*, which means that it should take into account the *object*, *intention*, and *circumstances* (including foreseeable consequences) of the behavior that is exhibited by the protagonists in scenarios A and B, respectively.

The three sources of morality are supposed to exhaust the morally relevant features of any act. Traditionalists and revisionists, however, have different views about how to delimit the object of the act, as we have seen. Traditionalists want to construe it more narrowly than revisionists, who argue for an expansion of the object so that it includes much of what the traditionalists view as pertaining to the other two fonts. This debate between traditionalists and revisionists need not concern us here, however, because the method I am suggesting takes into account all three fonts of morality, and does not presume any particular understanding of how the moral object is to be conceived.

This is how a comparison between scenarios A and B can help us determine whether Scenario B (the ideal-typical behavior of a divorced and remarried person) constitutes adultery or not. Scenario A (a clear case of adultery) can be imaginatively modified so that the protagonist's *actions* (however described) and *intentions*, as well as the relevant *circumstances* in which they occur, match the protagonist's *actions*, *intentions*, and *circumstances* in Scenario B. If this modification is done, so that the actions, intentions and circumstances of the two protagonists are the same in both scenarios, then everybody must agree—regardless of how one understands the moral object—that scenarios A and B are morally equivalent. So if A is a case of adultery, then so is B.

The question, however, is if it is possible to modify Scenario A in

the way suggested without changing it so drastically that it would no longer (uncontroversially) count as a case of adultery. This remains to be seen. However, *if* Scenario A can be modified so as to match Scenario B with respect to all three fonts of morality, and *if* this modification can be done without causing us to reverse our initial verdict that Scenario A is a case of adultery, then anybody must admit that Scenario B is also a case of adultery. Since Scenario B is an ideal-typical description of the situation and behavior of a divorced and remarried person, it would then be difficult to claim that divorced and remarried persons do not, in the ideal-typical case, commit adultery.

Of course, unless Scenario A is modified so as to become an exact copy of Scenario B, there must be *some* circumstances that differ between the two scenarios. Theoretically, it can always be argued that those circumstances are morally relevant, and that they constitute the difference between adultery and non-adultery. It remains to be seen, however, whether such an argument can be credibly pursued.

It is clear that the method I have suggested does not take “traditionalist” assumptions about how to morally evaluate acts for granted. In fact, the method proceeds from “revisionist” assumptions. The method assumes that *any* difference between the two scenarios (A and B) could, in principle, constitute a reason to regard the scenarios as *morally* different—Scenario A as a case of adultery, and Scenario B as a case of non-adultery. Traditionalists would not accept this. They would say that a difference that merely concerns the intentions of the agent or (non-essential) circumstances of the situation could not justify the judgment that A constitutes adultery and B does not, if the moral object (narrowly conceived) is the same between the two scenarios.

The reason why the method proceeds from revisionist premises is that, from a traditionalist perspective, the issue is already settled. It remains to be seen, however, whether the moral acceptability/tolerability of civil unions for divorced persons can be defended on the basis of revisionist assumptions.

Comparing Scenarios A and B

In scenario A, we imagine a man, John, who lives a double life. He is sacramentally and validly married to Jane, and they have one child. However, in another part of the city, John has also a second family consisting of Veronica and two children fathered by John. John manages to spend quite a lot of time with Veronica’s family on weekdays, when John’s wife Jane believes that John is out of town for work. John has

dedicated the weekends to spending time with Jane and his official family. Jane does not know about John's other family, even though she has been married to John for ten years, and even though John has had a relationship with Veronica for seven years. The reason why John is with his mistress Veronica is because he loves her, and because they have common children. If John would leave Veronica, not only would she suffer, but the children would also suffer because of the breakdown of their family. This scenario is, of course, completely realistic, and many real-world examples of a similar kind can be found. I presume that nobody would hesitate to classify John as an adulterer, and his behavior as adulterous.

Scenario B represents a more common situation. Kurt is married to Agnes, their marriage is valid, but Kurt has divorced Agnes and civilly married Louise. He has one child with Agnes, and two with Louise. The reason why Kurt divorced Agnes was that their relationship was very disharmonious, and the reason why he now is with Louise is that he loves her, and because they have children together. If Kurt would leave Louise, not only would she suffer, but their common children would also suffer because of the breakdown of their family.

Let us now compare these two scenarios with respect to the acts, intentions, and circumstances of their protagonists (John and Kurt). The kind of behavior that qualifies John as an adulterer is primarily (but not exclusively) the sexual behavior, including (but not limited to) acts of actual sexual intercourse with Veronica. A traditionalist would hold that the moral object of John's sexual behavior is adequately captured by saying that *John choses to have sexual intercourse with Veronica, who is not his wife*. The fact that Veronica is not John's wife is a circumstance that is constitutive of—an integral part of—the object of the act.

For a traditionalist, John's intention is of secondary importance. Since the object of John's sexual behavior is intrinsically evil, it does not matter if John's intentions are good. The object itself is sufficient for making the behavior immoral (adulterous). The same goes for the (non-essential) circumstances.

A revisionist, on the other hand, might be inclined to include John's intentions and all the morally relevant circumstances in the (expanded) object of John's behavior, so that the object could perhaps be described in something like the following way: *John chooses to have sexual intercourse with Veronica, who is not his wife, because he loves Veronica and wants to preserve his second family*.

Theoretically, it could be argued, from a revisionist point of view,

that the consequences that would follow if John were to terminate his sexual relationship with Veronica are very negative for the children, and that John therefore has “proportionate reason” to continue that relationship. I believe, however, that few, if any, revisionists would be willing to take this position. Richard McCormick clearly would not. With respect to the famous case of Mrs. Bergmeier—who was told that the only way for her to be released from unjust detention was to become pregnant—McCormick argues that it was wrong for her to sleep with her jailer.²⁰ This shows that McCormick does not view his revisionist moral theory as condoning extra-marital sex for purely utilitarian reasons—not even in extreme circumstances. Even though there are moralists who disagree with McCormick on the Bergmeier case,²¹ this in itself does not mean that they would approve of John’s behavior. The suffering that would afflict John’s children in the case of a separation between him and Veronica would not be nearly as extreme as the suffering that afflicted Mrs. Bergmeier and her family as a consequence of her imprisonment. Since most revisionist moral theologians want to dissociate themselves from crude forms of utilitarianism, I will assume that nobody, or very few, would deny that John’s behavior is gravely immoral (that is, adulterous).

If we turn to the case of the divorced and remarried Kurt, it is apparent that Kurt’s actions—as described above—and the intentions behind those actions, are exactly the same as John’s. Kurt as well as John has sexual intercourse with a woman who is not his (legitimate) wife, and Kurt as well as John does it because he loves his new partner and wants to preserve his second family. If the morality of a certain kind of behavior could be determined just by looking at the object of that behavior (narrowly understood), and on the intentions behind it, then we would have to say that Kurt is an adulterer as much as John.

However, for revisionists, even the non-essential circumstances²² that surround an act can change the moral species of that act. A circumstance that is morally relevant in this case is the consequences that would probably follow if John and Kurt, respectively, were to terminate their sexual relation with their second partners (Veronica and Louise, respectively). It

²⁰ Richard A. McCormick, “A Commentary on the Commentaries,” in *Doing Evil to Achieve Good*, ed. Richard McCormick and Paul Ramsey (Chicago: Loyola University Press, 1978).

²¹ For example, Sanford S. Levy, “Richard McCormick and Proportionate Reason,” *The Journal of Religious Ethics* 13 (1985): 276.

²² “Essential circumstances” are circumstances that are constitutive of the act itself, while non-essential circumstances are not.

is clear, however, that in this respect, John's and Kurt's circumstances are strikingly similar. By terminating his adulterous relationship with Veronica, John would be responsible for splitting up a family with two children. By terminating his relationship with his second wife Louise, Kurt would be responsible for splitting up a family with two children. The fact that John, because of his double-life, must share his time between two families is irrelevant in this context. There are many fathers who, for work related reasons, spend half of their time or more away from home. These kinds of families are also true families, with a moral value as great as any.

There is, however, a second circumstance that is morally relevant and might be appealed to in order to morally distinguish the case of Kurt from the case of John. This circumstance is the fact that John's situation depends on deception. John's wife Jane does not know about John's second family, and John is certainly culpable not only for his sexual behavior, but also for hiding the truth from his wife. This deception would, furthermore, be impossible without a substantial amount of lying on John's part. Kurt, on the other hand, does not need to lie, and his family situation does not depend on deception at all.

Can this factor—the deception on John's part—be the circumstance that makes John an adulterer, and which distinguishes him from Kurt? It cannot. In order to demonstrate this, I will modify the story about John. Suppose that Jane, after some years, exposes John's double-life. She discovers the existence of Veronica and of John's two illegitimate children. Jane, however, is a very magnanimous and liberal-minded person. So she accepts that John has another woman, and that he spends time with his other family during weekdays.

Would this turn of events mean that John is no longer an adulterer? Not according to any reasonable understanding of Catholic marriage. The situation of John is now very much like bigamy, and unless bigamy and other forms of polygamy are to be accepted as compatible with a Catholic understanding of marriage, John's behavior must still be described as adulterous, despite the fact that no deception whatsoever is involved.

One circumstance that distinguishes the behavior of Kurt from the behavior of John is the fact that Kurt currently only sleeps with one woman, while John alternates between two. Is this the silver bullet we are looking for—a circumstance that is present only in John's case, and that explains why John's behavior is adulterous?

Perhaps, but we can avoid this silver bullet by modifying, again, the story about John. Suppose that John's wife Jane suffers an accident and

becomes paralyzed from the waist down. As a result, she becomes incapable of having a sex-life. Jane's condition is permanent, and John and Jane decide never to have sex again. However, John continues—with Jane's permission—to have regular sex with Veronica.

Is John's behavior, in this modified scenario, still adulterous? I cannot see how it could fail to be. But in this scenario, John does not alternate between having sex with two women. He only has sex with one—his mistress. If John is still an adulterer despite the fact that he does not alternate between two sex partners, then we have ruled out “alternating between two sex partners” as a circumstance that can explain why John is an adulterer even though Kurt is not.

But maybe John's adultery consists in the fact that he *lives* with two women alternately (which Kurt does not). This suggestion depends on an ambiguity in the meaning of “lives.” It is obviously morally unproblematic for a married man to alternate between living—in the literal sense—with his wife and with a woman who is not his wife. A married man might, for instance, live with his sister during the week for work-related reasons, or because he feels responsible for helping her raise her many children. Such a man is not an adulterer. And he does not become an adulterer even if he has a relationship to his sister that is characterized by interpersonal love, intimacy, and mutuality either.

If there is a moral problem with “living” with two women alternately, as John does, it must be because his relationships with them have an erotic dimension. But suppose that John's relationship to his wife, after her accident, is not only sexless but also erotically dead. No erotic feelings exist between the spouses, so John's erotic life is restricted to his relationship with his mistress Veronica. Is John thereby, in his present state, not an adulterer, because only *one* of his relationships has an erotic dimension? This would be a false conclusion. Even a very bad marriage is still a marriage. Those who think otherwise, and who argue that valid and consummated marriages that “die” erotically or emotionally thereby cease to exist, are explicitly rejecting the doctrine of the indissolubility of marriage. In this essay, my business is not to discuss this position, which is clearly different from Kasper's.

Let us try another angle. Could the factor that morally distinguishes the situation of John from that of Kurt be the existence of a conflict of loyalties in John's case? Kurt can be completely loyal to his second wife, because his relationship to his first wife has ended. But John has to split his loyalty between two women. It could be argued that this is what makes John an adulterer.

This is a problematic suggestion, because people's loyalties are often split. A man might feel a conflict of loyalty between his wife and his mother. It can be argued that this makes him a rather bad husband, but it certainly does not make him an adulterer. So the fact that John's loyalty has to be divided between two women cannot explain why he—and not Kurt—is an adulterer. The same thing holds for a conflict of *devotion*. A man can be equally devoted to his wife and to his son, and this does not make him an adulterer. If the question is devotion that includes an erotic dimension, then it has already been answered above.

Finally, could it be that John is an adulterer because he *initiated* his relationship with Veronica in a very dishonest way, while Kurt played with open cards from the start?

It is certainly the case that John's behavior in the past was more culpable than Kurt's, because John initially kept his wife Jane in the dark about his other woman, Veronica. However, what matters here is not what happened in the past. Cardinal Kasper admits that people who have remarried after a divorce have done something very culpable, something that constitutes a violation of Christ's commandment. However, this does not—according to Kasper—entail that people who have lived in a second, civil marriage for a long time are *currently* violating Christ's commandment by staying with their second spouse and honoring the responsibilities they have contracted towards their second family.

So the past behavior of Kurt and John is not relevant in the present context. It is not possible for defenders of Kasper's proposal to appeal to the past behavior of John in order to explain why John is (currently) an adulterer, even though Kurt (currently) is not.

Results

In the preceding section I have suggested a number of features that are present in Scenario A but are missing in Scenario B, and that could potentially—given revisionist presumptions—explain why Scenario A is a case of adultery, while Scenario B is not. Some of these features have been rejected because it is too far-fetched to assume that they could, by themselves or in combination, be constitutive of adultery. For other features, it has been possible to modify Scenario A so that the features in question are no longer part of it. The modifications I have made, however, cannot reasonably be said to have changed the moral species of Scenario A. None of the modifications have altered the scenario so profoundly that it no longer counts as a case of adultery. I contend that

this is true both when one looks at the modified Scenario A with traditionalist and with revisionist eyes.

Let me summarize the main points of the comparison above: John's and Kurt's behavior, narrowly described, is the same. Both are validly married, but they are both in sexual relationships with women who are not their (legitimate) wives. The reason why they behave this way—the main intentions behind their behavior—is that they love and want to express their love for their second partners, take responsibility for the family they have with them, and enjoy these loving relationships. So the (narrowly understood) “object” of John's and Kurt's behavior, and the main, important intentions behind it, are the same.

Moreover, the consequences that would follow if John or Kurt were to end their relationships with their second partners are the same. Taking this course of action would hurt their partners and cause harm to the children. In this respect, John and Kurt are in exactly the same circumstances. They face the same moral dilemma if they want to regularize their situations.

A difference between scenarios A and B, however, is that John's relationship-situation (his having two partners) depends on deception. But this circumstance is accidental, and can be changed. In the modified Scenario A1, both John's wife and his mistress are aware of the situation, and accept it. This modification, however, does not entail that John is no longer an adulterer.

The circumstance that John alternates between having sex (or other erotic exchanges) with two different women, while Kurt only has it with one woman, is also accidental. In the modified Scenario A2, John no longer sleeps with (or have any erotic exchanges with) his wife, but only with his mistress. So John does not alternate between having sex with two women. This modification, however, does not mean that John is not an adulterer.

The differentiating circumstance we are looking for cannot—as we saw—be that John's situation involves a conflict of ultimate loyalties or devotion, while Kurt's situation does not. Conflicts of loyalties or devotion are not, on any reasonable view, sufficient conditions for adultery.

Finally, let us keep all the modifications I have done to Scenario A so far, and add a final modification: the circumstance that John has moved away from Jane.

In Scenario A3, John lives with his mistress Veronica full time, and this is accepted by his wife Jane. John and Jane have very little contact with each other, and only in order to make arrangements for their common

child.²³ Is this scenario a case of adultery on John's part? To claim that it is not entails that married people can live and sleep with whomever they want, on the condition that their spouses allow it, and on the condition that they do not simultaneously live and sleep with their spouses. But this is surely an absurd understanding of marriage, on all accounts.

If it is this hard to find a differentiating circumstance that justifies the verdict that John is an adulterer but not Kurt, we must ask why many people would be inclined to deliver precisely this verdict. I believe that this is because many people would see the fact that Kurt and Agnes are *divorced*, while John and Jane are not, as the decisive difference. If one believes that a divorce dissolves the bond of marriage, then this is a very reasonable view. Kurt and Agnes are no longer married, while John and Jane are, and this is why John is an adulterer and Kurt is not. But if one—with Cardinal Kasper—does not admit that a divorce dissolves the bond of marriage, then one cannot appeal to the fact that Kurt is divorced in order to explain why he is not an adulterer. It would be irrational to hold *both* that the occurrence of a divorce leaves the bond of marriage intact *and* that the occurrence of a divorce can, by itself, constitute the difference between adultery and non-adultery.

There is, of course, another difference between the two scenarios, and this is that Kurt and Louise are civilly married, while John and his second partner Veronica are not. But the contraction of a civil marriage that involves a previously married person is also, like divorce, a juridical act whose validity the Church does not accept. Since Kasper concurs with the Church in this respect, he cannot appeal to the fact that Kurt and Louise are civilly married in order to distinguish the situation of Kurt from the situation of John. An invalid marriage act cannot constitute the difference between adultery and non-adultery.

But maybe this is a premature conclusion. It could be argued that the fact that someone has contracted a civil marriage shows that this person is committed for the long term to his partner, and that he is prepared to take responsibility for their common children. A relationship confirmed by a civil marriage could therefore be seen as having a higher moral value than a merely informal relationship of cohabitation. It could hence be argued that the (officially confirmed) relationship between Kurt and Louise is morally different from, and superior to, the (informal) relationship between John and Veronica. Even though the Catholic Church

²³ In order to accommodate the conditions that Kasper lists in *The Gospel of the Family*, 32, let us also say that a return to Jane is “definitively out of the question” for John, because Jane is now involved with a new man.

does not recognize the civil marriage between Kurt and Louise as valid, the Church could nevertheless acknowledge that their contraction of such a marriage has moral significance as a sign of commitment.

But this argument will not stand. The fact that Kurt and Louise are civilly married does not entail that Kurt is more committed to Louise than John is to Veronica, and the morally significant circumstance must surely be the *actual* level of commitment in the relationships rather than whether a specific *sign* of commitment (civil marriage) is present. It would be absurd if the Catholic Church would decide to measure the level of commitment in an irregular relationship *only*, or primarily, by reference to the occurrence of a certain juridical act which the Church herself strictly forbids and views as a violation of the bond of marriage. It would be absurd, in other words, if the Church required that a divorced person must perform a canonically *illegal* act as the only proper way to display commitment to his/her new partner.

So if the Church is to determine the moral value of a certain irregular relationship on the basis of the level of commitment that exists between the parties, the Church must acknowledge the possibility that couples who are not civilly married, but who have stayed together for many years and have common children, can be equally or more committed to each other compared to couples that have contracted a civil marriage. This means that we can elaborate on Scenario A once more and stipulate that John is as committed to Veronica as Kurt is to Louise, despite the fact that John and Veronica are not civilly married. Is John still an adulterer, even though his level of long-term commitment equals that of Kurt? Of course he is. A married person's strong commitment to his mistress does not make him less of an adulterer—if anything, it makes him more of an adulterer. But then it cannot be the case that Kurt's long-term commitment to Louise prevents him from being classified as an adulterer.

We have found that there are only two circumstances that distinguish the situation of Kurt (in Scenario B) from the situation of John (in Scenario A3): namely, the circumstances that Kurt has procured a divorce and contracted a new, civil marriage, while John has done neither of these things. To continue to claim, in this situation, that Kurt is not an adulterer even though John is, entails a denial of either the *indissolubility* or the *exclusivity*²⁴ of the marriage relationship. Since the mere fact that a divorce has occurred and a new civil marriage has been

²⁴ By the "exclusivity" of the marriage relationship, I mean the monogamous nature of that relationship.

contracted makes it possible for Kurt to have sex with a woman who is not his wife (without him being counted as an adulterer), it must *either* be the case that the divorce has dissolved his previous marriage (denial of indissolubility), *or* that his previous marriage is compatible with his having sex with a woman who is not his wife (denial of exclusivity).²⁵ This conclusion, together with the fact that Kasper's proposal commits him to claiming that Kurt is not an adulterer, undermines Kasper's contention that his proposal is merely "pastoral" and does not put in question the Catholic doctrine of marriage.

Conclusion

This investigation has shown that the ideal-typical sexual behavior of divorced and remarried persons (illustrated by Kurt) must be counted as adulterous by revisionists in moral theology as well as by traditionalists—provided that they subscribe to the indissolubility and exclusivity of marriage. The fact that divorced and remarried persons may confront a moral dilemma if they want to regularize their situation cannot be adduced as a reason to deny that the second, civil union is adulterous. John, in Scenario A3, faces exactly the same kind of dilemma. If we are to say that the existence of this type of dilemma obliterates the morally problematic (adulterous) character of the second, civil union for divorced and remarried persons, then we must—on pain of logical inconsistency—also admit that the presence of the same dilemma obliterates the morally problematic (adulterous) character of John's relationship to Veronica in Scenario A3. Admitting the latter would mean that a married man can, with his wife's permission, live with his mistress *if leaving her would cause harm to some people*. Rather than accepting this consequence, we should acknowledge the tragic character of the dilemma that confronts some divorced and remarried Catholics who want Holy Communion. Like most moral dilemmas, this one has no good solution. The least bad solution may be for the civilly married spouses to stay together for the sake of the children but take on the great sacrifice of abstaining from sexual relations. This is the Church's official recommendation.²⁶

²⁵ Naturally, I agree with Healy that "Indissolubility . . . includes and requires exclusivity" (Healy, "The Merciful Gift of Indissolubility," 323–24). It is only for reasons of clarity that I have distinguished between indissolubility and exclusivity above.

²⁶ It has been argued that the relevance of the "brother-sister solution" (sexual abstinence) depends on an outdated "contractual" understanding of marriage, according to which the marriage contract primarily establishes mutual rights to sexual union oriented to procreation. The Second Vatican Council allegedly

There are three logically possible moves that the defenders of Kasper's proposal can make in response to the argument of the present study. First, and most implausibly, they can argue that John, despite appearances, is not an adulterer in Scenario A3, and so Kurt need not be seen as an adulterer either. Second, they can bite the bullet and claim that unrepentant adulterers should be admitted to Communion. Third, they can challenge my conclusion that Scenario A3 and Scenario B are morally equivalent.

I cannot see how the first move can be defended without radically changing the Catholic understanding of what kind of behavior is compatible with being married. Revisionists who chose this move would have great difficulties to explain what distinguishes their moral reasoning from the crudest forms of utilitarianism. The first move seems to commit one to the claim that John can stay with his mistress, and that this does not constitute adultery, provided that John's taking this course

replaced that understanding with a "personalist" or "covenantal" understanding—marriage as "a partnership of all of life" (*totius vitae consortium*). As Himes and Coriden argue: "In the conciliar treatment of marriage interpersonal love, mutuality, and intimacy are as much a part of the nature of marriage as sexual intercourse. So why can all the qualities of the marital relationship be exercised in the second relationship, save sexual intercourse, and the first marriage not be contradicted?" (Kenneth R. Himes and James A. Coriden, "The Indissolubility of Marriage: Reasons to Reconsider," *Theological Studies* 65 [2004]: 482.) The answer should be very obvious. In order to spell it out, we may imagine a married woman who has a twin sister. For work-related reasons, the woman lives with her twin during the weeks, and spends time with her husband only on weekends. The two sisters love each other and have a very intimate relation on the spiritual, emotional, psychological, financial and intellectual levels. Even though the relationship between the sisters is characterized by "interpersonal love, mutuality, and intimacy" (maybe more so than most marriages), it is essentially different from a marriage, and few people would view it as in any sense adulterous or morally problematic. The reason for this is the absence of any sexual dimension. Add a sexual dimension, and everything changes—the relationship could now be described as adulterous. This shows that a "personalist" understanding of marriage cannot be totally divorced from a more traditional characterization of marriage in terms of sexual union and procreation, unless we want to classify deep personal relationships between (e.g.) twin sisters as instances of adultery. The magisterium has, in my view, succeeded fairly well in keeping a personalist accent and the traditional emphasis together. *Gaudium et Spes*, for example, does not only present marriage as an intimate union of persons. The constitution also states that "by their very nature, the institution of matrimony itself and conjugal love are ordained for the procreation and education of children, and find in them their ultimate crown" (Paul VI, *Gaudium et Spes*, §48).

of action will lead to less suffering for all the parties involved compared to alternative courses of action.

While the first move undermines the very idea of Catholic marriage, the second move entails that the sacrament of penance is superfluous. If a person who knowingly violates God's commandment and intends to continue to do so for the rest of his life can still be one with the Lord by fruitfully receiving him in the Eucharist, why is it *ever* necessary to repent and confess one's sins? Grave sin, apparently, is no obstacle for the most intimate communion with God.

The second move, however, has sometimes been defended by an argument of the following kind. Why should civil remarriage after a divorce be singled out as a sin that merits official exclusion from Communion, when other unrepented sins of an equally or more serious character usually do not result in exclusion, even though these sins may be widely known? There are many answers to this question, but in the present context we need only note one thing. The mentioned argument does nothing to establish that a divorced and remarried person who decides to receive Communion does not thereby do something that is seriously wrong or harmful for his/her soul. The argument only claims that the Church should not actively prevent such a person from receiving Communion. This means that the argument is irrelevant in the present context. What Kasper wants is not to make it formally possible for divorced and remarried persons to do what they should not do. What Kasper is looking for is an acknowledgment that some divorced and remarried persons can receive Communion fruitfully and in good conscience.²⁷

²⁷ However, arguments about the propriety of the Church's disciplinary rules may have a certain relevance in another respect, namely in connection to the second part of Kasper's proposal—the part that concerns “conflict situations” (see footnote 12 above). In cases where the validity of the first marriage of a divorced and remarried person is in question (even though juridical evidence for invalidity may be lacking), it could be argued that the individual's conscience should be allowed to decide about participation in the Eucharist. Nothing said so far in this article contradicts this proposal. This could be seen as a weakness of my argument, because if the individual conscience-model is accepted without restrictions, it would be impossible for the Church to exclude *any* divorced and remarried person from receiving Communion. The Church simply would not know who has a reasonable doubt about the validity of their first marriage, and who has only a very spacious conscience. However, to give the individual's conscience an unrestricted primacy in this area will undermine the legitimacy of any Eucharistic discipline. How can the Church exclude (e.g.) torturers from Communion (as William Cavanaugh recommends, see *Torture and Eucharist*:

The third possible move on part of the defenders of Kasper's proposal—to question the moral equivalence between Scenarios A and B—seems to be the only way forward. In order to successfully pursue the third move, Kasper's advocates need to be able to point out some morally significant feature that I have overlooked and that is present in Scenario A3 and absent in Scenario B, or vice versa, and they need to make credible that this feature constitutes the difference between adultery and non-adultery. I present this as a challenge to anyone who thinks that Kasper's proposal is a good idea. NV

Theology, Politics, and the Body of Christ [Malden, MA: Blackwell Publishers, 1998]), if the judgment of individual conscience must always be respected? It is unclear, however, if an unrestricted primacy for the individual's conscience is what Kasper is after. In his recent book, Kasper says that "because marriage as a sacrament has a public character, the decision about the validity of a marriage cannot simply be left to the subjective judgment of the parties concerned" (Kasper, *The Gospel of the Family*, 28). The 1993 pastoral letter that Kasper wrote together with Bishops Saier and Lehmann, however, is less clear. It states that the person who is to take a conscientious decision "will be in need of the clarifying assistance . . . of a church office holder; such assistance will sharpen the conscience and see to it that the basic order of the church is not violated." On the other hand, this office holder (a priest) "will respect the judgment of the individual's conscience." Here it seems that the individual's conscience is the final judge. The unclarity returns, however, when it is said that "this respect [for the individual's conscience] has different degrees" (Saier, Lehmann, and Kasper, "Pastoral Ministry: The Divorced and Remarried": 391–392). Because of its nebulous character, this part of the three bishops' proposal could, if interpreted in a liberal way, be used as a Trojan horse to undermine the legitimacy of any kind of exclusion from Eucharistic Communion. The fact that it can be so used, however, should make us very suspicious about it.

