

Amoris Laetitia, Pastoral Discernment, and Thomas Aquinas¹

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THE CRITICAL IMPORTANCE and pastoral obligation of carefully discerning the particular situation of persons in problematic moral circumstances—particularly those of Catholics who have divorced and civilly remarried—is clearly a paramount concern of Pope Francis. He makes this issue the centerpiece of his Apostolic Exhortation *Amoris Laetitia* (AL) following the Ordinary Synod of Bishops on the Family that took place in Rome in October of 2015. And in more recent remarks, he has again revealed just how pressing an issue he believes it to be, particularly for the formation of candidates to the priesthood.

During the Pope's encounter with Jesuits gathered for their General Chapter in Rome in October of 2016, the Holy Father was asked: "In your speech you clearly proposed a morality that is based on discernment. How do you suggest that we proceed in the field of morality with regard to this dynamic of discernment of moral situations?" He responded as follows:

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Discernment is the key element: the capacity for discernment. I note the absence of discernment in the formation of priests. We run the risk of getting used to “white or black,” to that which is legal. We are rather closed, in general, to discernment. One thing is clear: today, in a certain number of seminaries, a rigidity that is far from a discernment of situations has been introduced. And that is dangerous, because it can lead us to a conception of morality that has a casuistic sense, . . . [and] I am very afraid of this.² This is what I said in a meeting with the Jesuits in Krakow during the World Youth Day. There the Jesuits asked me what I thought the Society could do and I replied that an important task of the Society is to form seminarians and priests in discernment.³

² “Casuistry” is a term that broadly describes a method of doing moral theology. The word derives from the Latin *casus*, meaning an “event” or “occurrence.” The method proceeded by analyzing moral problems (also referred to as “cases of conscience”) presented in confession, and proceeded to elaborate answers. These “cases” (hence, “casuistry”) were generally presented in large bound volumes or “manuals” for seminarians in the course of their preparation for Holy Orders and their role as confessors. This was an approach to teaching moral theology that was in vogue from the sixteenth century to well into the mid-twentieth century. The Dominican theologian Servais Pinckaers observes with regard to casuistry and its evident inadequacy in our day as a method for doing moral theology that we need to distinguish carefully between method and contents: “The current perception of the inadequacies of casuistry challenges Catholic ethicists to strive for a renewal that can no longer be limited to partial adaptations, but should lead to a revision of the foundations of this branch of theology. This is not to say that the teaching of the manuals should be discarded as old-fashioned or outmoded. We need to distinguish here between the container and the contents, between a systematization of moral theology that is a period piece and its contents, which include positions and concrete moral laws belonging to revelation and the tradition of the Church. These latter have permanent value. Certain parts of moral theology at the rational level, such as the teaching on natural law, also have lasting value and may be endorsed by us, even though they require reinterpretation in order to be fully useful. The critic should endeavor to remain always in the service of the up-building and renewal of Christian moral theology” (*The Sources of Christian Ethics*, trans. Mary Thomas Noble [Washington, DC: Catholic University of America Press, 1995], 293).

³ A complete text of the Holy Father’s remarks on this occasion can be found in the original Italian in *Civiltà Cattolica*, December 10, 2016 (anno 167), 417–31 (quoted here at 420–421), and in English online, accessed October 31, 2017, http://jesuits.org/Assets/Publications/File/GC36-Dialogue_of_Pope_Francis_ENGLISH.PDF

Here the Holy Father is referring to a parting comment he made at an encounter with twenty-eight Polish Jesuits on July 30, 2016.⁴ On that occasion, the Pope observed:

The Church today needs to grow in the ability of spiritual discernment. Some priestly formation programs run the risk of educating in the light of overly clear and distinct ideas, and therefore to act within limits and criteria that are rigidly defined *a priori*, and that set aside concrete situations. . . . And then the seminarians, when they become priests [have a difficult time accompanying the faithful].

And [then] people leave the confessional disappointed. Not because the priest is bad, but because the priest doesn't have the ability to discern situations, to accompany them in authentic discernment. They don't have the needed formation.

Today the Church needs to grow in discernment, in the ability to discern. And priests above all really need it for their ministry. This is why we need to teach it to seminarians and priests in formation: they are the ones usually entrusted with the confidences of the conscience of the faithful. . . . We need to form future priests not [in] general and abstract ideas, which are clear and distinct, but [in] this keen discernment of spirits so that they can help people in their concrete life. We need to truly understand this: in life not all is black on white or white on black. No! The shades of gray prevail in life. We must teach [them] to discern in this gray area.

With these convictions seemingly still very much at heart, the Holy Father continued elaborating his response to the question posed to him at the October encounter with Jesuits in Rome. Here Francis contrasts what he refers to as a “decadent Scholasticism” (referring to the Scholastic methodology that he apparently encountered during his philosophical and theological studies as a young Jesuit in the 1960's in Argentina) to the “great Scholasticism” of Aquinas and Bonaventure:

⁴ The Italian original can be found at *Civiltà Cattolica*, September 10, 2016 (anno 167), 345–49 (quoted here at pp. 348–49), and the English translation here, accessed October 31, 2017, <https://zenit.org/articles/popes-conversation-with-jesuits-during-his-trip-to-poland/>.

We studied theology and philosophy with manuals. It was a decadent scholasticism. . . . When the great Scholasticism began to lose force, there arose that decadent scholasticism with which at least my generation and others have studied. It was this decadent scholasticism that provoked the casuistic attitude. . . . The whole moral sphere was restricted to “you can,” “you cannot,” “up to here, yes, but not there . . .” It was a morality very foreign to discernment.

In the field of morality we must advance without falling into situationalism: but, rather, it is necessary to bring forward again the great wealth contained in the dimension of discernment; this is characteristic of the great Scholasticism. We should note something: St. Thomas and St. Bonaventure affirm that the general principle holds for all but—they say it explicitly—as one moves to the particular, the question becomes diversified and many nuances arise without changing the principle. This scholastic method has its validity. It is the moral method used by the *Catechism of the Catholic Church*. And it is the method that was used in the last apostolic exhortation, *Amoris laetitia*.

Our intention in this essay is to examine ideas that Pope Francis has advocated in these two discourses as they present themselves in AL. In the first section (“AL’s Teaching on Pastoral Discernment”), we offer a schematic overview of the many laudable elements in AL’s teaching on pastoral discernment, especially as it is presented in chapter 8 of that document. The second section (“AL’s Teaching on Pastoral Discernment: Areas of Concern”) is divided into five subsections. The first considers AL’s innovative treatment of “mitigating factors” and how they affect moral responsibility; the second considers AL’s understanding of moral precepts as ideals and the nature of moral conscience; the third considers the relationship between what AL calls “general moral principles” and “matters of detail”; the fourth considers the possible application of the legal concept of an internal forum; and the fifth considers “general moral principles” as exceptionless moral norms. In the first and (especially) the third and fifth subsections, we consider in some detail AL’s use of Thomas Aquinas.

AL’s Teaching on Pastoral Discernment

In its call upon the Church’s pastors to a merciful accompaniment and careful pastoral discernment with regard to the divorced and civilly

remarried, AL in a sense offers nothing new. The document builds on and reiterates an invitation that was urged some years ago in another synod on the family and synthesized by Pope St. John Paul II in his post-apostolic exhortation *Familiaris Consortio*: “Pastors must know that, for the sake of truth, they are obliged to exercise careful discernment of situations. . . . I earnestly call upon [them] and the whole community of the faithful to help the divorced, and with solicitous care to make sure that they do not consider themselves as separated from the Church, for as baptized persons they can, and indeed must, share in her life” (§84).

For the most part, then, AL offers a summation of what has long been sound pastoral practice both inside and outside the confessional with regard to the pastoral discernment of, as AL puts it, “those situations that fall short of what the Lord demands of us” (AL §7). Among other important elements, AL reiterates the following:

Sound pastoral discernment, taking into account “the complexity of various situations” and “how people experience and endure distress because of their condition,” is not incompatible with care for the truth; indeed, care for the truth demands this. (AL §79)

Divorced persons who, for the sake of bearing witness to marital fidelity, have not remarried must especially be the focus of the Church’s pastoral concern. (AL §242)

The divorced who have entered a new union should be made to feel part of the Church. They are not excommunicated: they should be made to know that they remain part of the ecclesial community [AL §243], where, like the penitent prodigal son, they might “experience being touched by an ‘unmerited, unconditional and gratuitous’ mercy.” (AL §297)⁵

⁵ The words “unmerited, unconditional and gratuitous” are taken from Francis’s homily on February 15, 2015, to the then newly created Cardinals (*Acta Apostolicae Sedis* 107 [2015]: 258). A note makes reference to 1 Cor 13. The words are said in reference to charity, not mercy, although the immediately preceding paragraph speaks of mercy, mentioning “the repentant prodigal son.” The sentence in AL is followed by an exclamatory affirmation that “no one can be condemned for ever, because that is not the logic of the Gospel!” One can only speculate about the Pope’s meaning here. A charitable interpretation would say that he is referring to some kind of perpetual “condemnation” during one’s life (the possibility of eternal condemnation after death being

This pastoral discernment should identify elements that can foster evangelization and human and spiritual growth in the lives of the civilly divorced and remarried, as well as elements in their lives that can lead to a greater openness to the fullness of the Gospel regarding marriage. (AL §293)

Pastoral discernment and accompaniment will assist such individuals in understanding the divine pedagogy of grace in their lives and offer them assistance so they can reach the fullness of God's plan for their lives, something always possible by the power of the Holy Spirit. (AL §297)

Pastoral discernment will be attentive to those situations whose complexity is such that they "should not be pigeonholed or fit into overly rigid classifications leaving no room for a suitable personal and pastoral discernment." (AL §298)

Regarding discernment, after quoting the *Relatio finalis* of the Synod itself to the effect that sound pastoral practice requires "humility, discretion and love for the Church and her teaching, in a sincere search for God's will and a desire to make a more perfect response to it," AL affirms, in language harmonious with prior magisterial teaching, that:

These attitudes are essential for avoiding the grave danger of misunderstandings, such as the notion that any priest can quickly grant "exceptions," or that some people can obtain sacramental privileges in exchange for favors. When a responsible and tactful person, who does not presume to put his or her own desires ahead of the common good of the Church, meets with a pastor capable of acknowledging the seriousness of the matter before him, there can be no risk that a specific discernment may lead people to think that the Church maintains a double standard. (AL §300)

AL's Teaching on Pastoral Discernment: Areas of Concern

Beyond this, however, there are affirmations made in AL on the nature of pastoral discernment that we find concerning because they lend

a matter of revealed truth); the Church cannot withdraw Christ's offer of forgiveness to the repentant sinner.

themselves to interpretations that would validate pastoral applications that are inconsistent with the Church's constant and universal practice, founded on the Word of God, of not admitting the divorced and remarried to Holy Communion—a practice that the Church has long held to be binding and not subject to modification because of diverse circumstances or situations.⁶ Pastoral approaches to the contrary, based on language found in AL, would constitute an injustice to the persons involved and hardly embody the very mercy, accompaniment, conscience formation, and sound discernment championed by Pope Francis. We maintain that any use that AL is put to by pastoral ministers should be in continuity with prior magisterium.

Discernment and Mitigating Factors

One area of concern is AL's treatment of "mitigating factors" as they might affect the moral status of the divorced and civilly remarried and their consequent standing within the Church. Regarding such "'irregular' situations," AL §301 suggests that the fact that the Church has "a solid body of reflection concerning mitigating factors and situations" will allay any fears that, in exercising pastoral discernment in these regards, "the demands of the Gospel are in any way being compromised."⁷ It would appear that Pope Francis has in mind primarily

⁶ "The doctrine and discipline of the Church in this matter are amply presented in the post-conciliar period in the Apostolic Exhortation *Familiaris Consortio*. The Exhortation, among other things, reminds pastors that out of love for the truth they are obliged to discern carefully the different situations and exhorts them to encourage the participation of the divorced and remarried in the various events in the life of the Church. At the same time it confirms and indicates the reasons for the constant and universal practice, 'founded on Sacred Scripture, of not admitting the divorced and remarried to Holy Communion' [*Familiaris consortio*, 84]. The structure of the Exhortation and the tenor of its words give clearly to understand that this practice, which is presented as binding, cannot be modified because of different situations" (Congregation for the Doctrine of the Faith [CDF], "Letter to the Bishops of the Catholic Church Concerning the Reception of Holy Communion by the Divorced and Remarried Members of the Faithful" [1994], accessed October 31, 2017, http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_14091994_rec-holy-comm-by-divorced_en.html; *Acta Apostolicae Sedis* [AAS] 86 [1994]: 976).

⁷ As the Holy Father acknowledges, the Church possesses a treasure-trove of moral reflection on these mitigating factors and the crucial role they play in the moral evaluation that confessors in particular must endeavor to make. (see especially, *Catechism of the Catholic Church*, §1735). Certainly, in recent centuries this whole reality has constituted an important part of the teaching

reflection that has been done in recent years (he quotes a remark from St. John Paul II's *Familiaris Consortio*), for he states: "Hence it can *no longer* simply be said that all those in any 'irregular' situation are living in a state of mortal sin and are deprived of sanctifying grace." But he also cites Thomas Aquinas, so his claim is clearly that whatever he states in AL §301 is consistent with the tradition going back at least to the thirteenth century. The question, then, is whether AL §301 is so consistent.

In speaking of those in irregular situations and who are neither in a state of mortal sin nor deprived of sanctifying grace, the Holy Father is clearly not referring to couples who have decided to live "as brother and sister," for he immediately introduces the issue of a "rule" of which the individuals involved are not ignorant, but rather, do not accept.⁸ "A subject," he says, "may know full well the rule,

of advanced coursework in moral theology—although the fundamental principles of such teaching can be found in Thomas Aquinas: see, for instance, *ST* I-II, q. 73, aa. 2 and 6. It leads the confessor to be mindful that, while the penitent might well be in a moral situation that is objectively grave (i.e., involving grave matter), his degree of consent might not be such that he is in a state of mortal sin.

⁸ See also AL §298, where one reads: "The Church acknowledges situations 'where, for serious reasons, such as the children's upbringing, a man and woman cannot satisfy the obligation to separate.'" At this point, a note is appended in which St. John Paul's *Familiaris Consortio* (§84) is initially cited. This is followed by the following remark: "In such situations, many people, knowing and accepting the possibility of living 'as brothers and sisters' which the Church offers them, point out that if certain expressions of intimacy are lacking, 'it often happens that faithfulness is endangered and the good of the children suffers.'" Here the note cites the Second Vatican Council's *Gaudium et Spes* (§51). This calls for a number of remarks. First, the words translated here "the good of the children" are *bonum prolis*, "the good of progeny," reference being made to one of the traditional goods of marriage, another of which is mentioned in the same sentence: *bonum fidei* ("the good of fidelity"). As Michael Pakaluk has pointed out, the Council Fathers are teaching here that, "if a married couple (and they are concerned with married couples; they are not addressing the particular case of the divorced and remarried) abstain from intimacy for too long, they may lose their zest for having more children, and thus may fail to enjoy this particular good of the marriage bond as fully as they might" (Michael Pakaluk, "The Other Footnote in *Amoris Laetitia*," *First Things*, May 26, 2016, access October 31, 2017, <https://www.firstthings.com/web-exclusives/2016/05/the-other-footnote-in-amoris-laetitia>]. Secondly, *Gaudium et Spes* §51, begins by acknowledging the difficulties of periodic abstinence (and not of the brother-sister solution) but immediately adds: "To these problems there are those who presume to offer dishonorable solutions

yet have great difficulty in understanding ‘its inherent values.’” He clearly holds that this “mitigating factor” is sufficient in certain cases to ensure that the individuals involved are not in a state of mortal sin or deprived of sanctifying grace.

It is worth noting that the words “its inherent values” are taken from *Familiaris Consortio* (§33) and that John Paul is speaking there not about the Church’s teaching regarding communion to the divorced and remarried, but about its teaching on the responsible transmission of life.⁹ Nor does he suggest there that those having difficulty comprehending these “values” and, so, disobeying the norm are without sin. Quite the contrary: he goes on immediately to say that the Church, as both teacher and mother, “never ceases to exhort and encourage all to resolve whatever conjugal difficulties may arise without ever falsifying or compromising the truth”; he speaks also in the same section of the Sacrament of Reconciliation.

Turning to Aquinas’s “reflection concerning mitigating factors and situations,” we find in his works, of course, a theoretically more elaborated account. One who knows what the Church teaches regarding the reception of communion by the divorced and civilly remarried but does not accept it does not *believe* that the norm is good and true, and a person who does not believe a moral truth can be said not to know that truth. He is, at least in that sense, ignorant of the corresponding norm. But whether an act performed in ignorance of

indeed; they do not recoil even from the taking of life. But the Church issues the reminder that a true contradiction cannot exist between the divine laws pertaining to the transmission of life and those pertaining to authentic conjugal love.” Thirdly, *Familiaris Consortio* §84 depicts the situation of the divorced and civilly remarried in a manner quite different from what we find in AL §298. John Paul emphasizes that fidelity to Christ and to the original marriage covenant “means, in practice, that when, for serious reasons, such as for example the children’s upbringing, a man and a woman cannot satisfy the obligation to separate, they ‘take on themselves the duty to live in complete continence, that is, by abstinence from the acts proper to married couples.’” Finally, whereas, immediately after the quotation from *Familiaris Consortio* §84, the note in AL 298 cites *Gaudium et Spes* §51, *Familiaris Consortio* at the same place cites John Paul’s own homily at the conclusion of the sixth Synod of Bishops, October 25, 1980 (*Acta Apostolicae Sedis* 72 [1980]: 1082). In that passage, John Paul praises men and women in irregular unions who nonetheless “testify to the indissolubility of marriage” by “living continently, that is, abstaining from acts that are proper only to married couples.”

⁹ The words “inherent values” are a direct translation of the Italian version’s *valori insiti*; the official Latin version speaks not of values, but of goods: “. . . bonorum, quae eadem continentur norma morali.”

a moral norm is culpable or not depends on the way in which voluntariness is involved.

Thomas draws a distinction between the situation in which voluntariness (that is, of the objectively evil act itself) occurs subsequent to a state of ignorance and the situation in which voluntariness (of the ignorance itself) precedes the act. A case of the former would be a person who, through no voluntary act of his own, does not know that fornication is a sin—and so performs that act. This person “voluntarily performs an act of fornication but does not voluntarily commit a sin.”¹⁰ On the other hand, says Thomas, if the voluntariness occurs before the act—that is, if it has to do with the ignorance itself—then the act performed is a sin: “When therefore a person directly wills to be ignorant so as not to be pulled back from sin by the knowledge, such ignorance does not excuse sin either wholly or in part but rather increases it, for it appears that, out of great love of sinning, the person wills to suffer the loss of knowledge so that he might freely cling to the sin.”¹¹

Clearly, Aquinas would not agree that a couple’s “difficulty in understanding” the inherent values of the Church’s teaching on the illicitness of living in a sexual relationship with a second legal spouse diminishes the likelihood that they are “living in a state of mortal sin and are deprived of sanctifying grace.” If anything, their unwillingness to address the difficulty, perhaps even deliberately avoiding enlightenment on the issue, would increase that likelihood.¹²

¹⁰ Aquinas, *De malo*, q. 3, a. 8. corp.: “. . . puta cum aliquis nescit fornicationem esse peccatum, uoluntarie quidem facit fornicationem set non uoluntarie facit peccatum.” All Latin citations of Aquinas are taken from the Leonine edition unless otherwise noted; all English translation of *ST* comes from the translation done by the Fathers of the English Dominican Province (London: Burns, Oates and Washbourne, 1920), although we do make occasional adjustments [e.g., see note 22 below]; unless otherwise noted, all other English translations of Aquinas are our own.

¹¹ “Cum ergo aliquis directe vult ignorare ut a peccato per scientiam non retrahatur, talis ignorantia non excusat peccatum nec in toto nec in parte, set magis auget: ex magno enim amore peccandi uidetur contingere quod aliquis detrimentum scientie pati velit ad hoc quod libere peccato inhereat” (Aquinas, *De malo*, q. 3, a. 8. corp.).

¹² The presence of a “difficulty” in embracing a moral norm indicates that the person has some knowledge both of what the norm requires and of how his or her behavior is at odds with the norm. Clearly then, AL §301 is not here referring to persons in a state of invincible ignorance. In the latter state, “difficulties” of this sort simply do not arise, since one is (without guilt) either

Immediately after mentioning the difficulty one might have in understanding the inherent values of “the rule,” AL §301 mentions, as a second mitigating factor, a person’s being in “a concrete situation that does not allow him or her to act differently and decide otherwise without further sin.” We might call this a situation of “perplexity.” One might imagine a situation in which a woman, for instance, believes that, in conscience, she must continue sexual relations with a man not her husband in order to preserve the well-being of their family (or families). If she intends to continue so, a priest might advise her that she cannot present herself for reception of the Eucharist, although she is not cut off even from that sacrament, and, indeed, that she is welcome and encouraged to attend Mass, where she might pray that she and her partner might find a way of living together peaceably that does not involve adultery. But that does not appear to be the solution the Pope has in mind since, as in the first mitigating factor, he is urging this as a way in which “the rule” might not apply.

Interestingly, a note appended to the next sentence but one cites a passage in Aquinas where he alludes to his way of understanding the sort of moral situation the Pope apparently has in mind.¹³ In

unaware of the norm or of the fact that one’s behavior is at odds with the norm. Consequently, this discussion rests within the domain of vincible ignorance, which, of itself, does not excuse from culpability. In *ST* I-II, q. 94, a. 4 (to be discussed extensively below), Aquinas speaks about those whose understanding of a precept is distorted “by passion, or evil habit, or an evil disposition of nature.” He gives as an instance “the Germans of old” [*apud Germanos olim*], who, he says, according to Julius Caesar, thought theft not iniquitous. As we have been reminded by Michael Pakaluk in his helpful comments on a draft of this article, in the relevant passage in *Gallic Wars*, Caesar says that these Germans thought that theft was wrong but did not prohibit it when it occurred outside the boundaries of their community, but rather encouraged such acts as useful for disciplining youth and preventing sloth (Julius Caesar, *Gallic Wars* 6.22–23). That Aquinas was familiar with this section of the work is indicated by his use of book 6, chapters 13 to 18, in his *De regno* II, ch. 3 (Leonine Ins. 143–48). Aquinas’s point would be, therefore, that such arbitrary line drawing is an indication that a passion, evil habit, or evil disposition of nature is at work and deflecting reason.

¹³ One sentence later in AL §301, we read: “Saint Thomas Aquinas himself recognized that someone may possess grace and charity, yet not be able to exercise any one of the virtues well,” at which point a note is appended containing references to two works. The second reference—which interests us—is to *De malo*, q. 2. a. 2. It is difficult to find anything in this article having to do with people who have infused virtues but cannot exercise them well. The first reference is *ST* I-II, q. 65, a. 3, ad 2, where Thomas says that those

answer to the eighth objection to his thesis that sin involves not just the interior act of the will but also the exterior act willed, Thomas mentions both that “an erroneous conscience binds” and that, “if someone intends to perform a meritorious work, committing something that according to its genus is a mortal sin, he does not merit, for an erroneous conscience does not excuse.”¹⁴ One might think again of the woman mentioned just above. She intends to do a good thing, but that involves committing adultery; that does not make the latter act not to be a sin—indeed, a mortal sin—because “an erroneous conscience does not excuse.”

Aquinas wrote of these matters more extensively a couple of years later in *Summa theologiae* [ST] I-II, q. 19, aa. 5–6. There he acknowledges that someone is obliged to follow even an erring conscience, since “an erring conscience binds.” But, even in so doing, the person sins in performing the act his conscience obliges him to perform (assuming, of course, that he is responsible for his erring conscience).¹⁵ The third objection in ST I-II, q. 19, a. 6, argues that

blessed with infused, as opposed to acquired, virtues can experience difficulty in acting in accordance with the virtues. He does not suggest that they are any less obliged to act in accordance with the virtues. (Michael Pakaluk has suggested in comments on a draft of this article that a Spanish speaker, reading or translating the sentence in *De malo*, q. 2, a. 2, ad 8, beginning “Qui enim habet uoluntatem dandi eleemosinam et non dat quia non habet facultatem, tantundem meretur quantum si daret . . .” might have misunderstood the word *facultas* as meaning not “the material means,” but rather the *facultad* or “facility” or “ease in doing.” This would then come close to the position attributed to Thomas in AL §301—that is, that “someone may possess grace and charity, yet not be able to exercise any one of the virtues well.”)

¹⁴ Aquinas, *De malo*, q. 2, a. 2 (at Leonine lns. 285–86 and 289–92). In affirming that “an erroneous conscience does not excuse,” Aquinas has in mind, not error stemming from invincible ignorance (which certainly can excuse), but error stemming from willed ignorance or negligence, also called vincible ignorance (see *In III eth.*, lec. 3, Marietti nos. 411–13 [Leonine lns. 73–115]).

¹⁵ See note 14. See also the corpus of ST I-II, q. 19, a. 5, at the beginning of which he says he will be inquiring “whether the will is evil when it is at variance with erring reason”—that is, “whether an erring conscience binds” [“idem est quaerere utrum voluntas discordans a ratione errante sit mala, quod quaerere utrum conscientia errans obliget”]. The key idea in his argument is that one sins *whenever* one does what one believes is wrong, whether one is correct in believing this or not. At the end of the corpus of a. 5, Aquinas says: “We must therefore conclude that, absolutely speaking, every will at variance with reason, whether right or erring, is always evil.” So, one is obliged to follow even an erring conscience. If one does (as one is obliged) follow an erring conscience and the error is the result of willful ignorance or negli-

this places the person in a situation of “perplexity.” Thomas denies this: the person “is not perplexed, because he can pull away from his error, since his ignorance is vincible and voluntary” (*ST* I-II, q, 19, a. 6, ad 3). He must correct his erroneous conscience.

Read in its entirety, AL §301 would seem to be implying that the subjective conviction that one is facing great difficulty in making the right moral choice renders one not responsible for performing an action not in harmony with the relevant objective moral norm. As E. Christian Brugger has observed, such an assertion is in tension with the Church’s consistent and perennial understanding of the action of grace in the life of the disciple: “This seems to contradict the defined doctrine in [the Council of] Trent on justification, canon 18: ‘If any one says the commandments of God are impossible to keep, even by a person who is justified and constituted in grace: let him be anathema.’”¹⁶ A person might well share with a priest in a pastoral context the conviction or fear that his situation leaves him no options other than to perform acts that are sinful. But, clearly, sound and genuinely pastoral accompaniment and discernment would oblige a priest to assure the individual that with God’s grace, all things are possible, including living according to the Church’s moral teaching rooted in the Gospel.

Personal Discernment, Moral Ideals, and Conscience

At times, AL shifts from consideration of pastoral discernment (the work of discernment shepherded by a prudent and knowledgeable moral guide such as a priest) to consideration of “personal discernment,” presumably the discernment that the individual caught in the problematic moral situation can engage in himself. And at the heart of “personal discernment” would be what the individual perceives in his subjective awareness to be the requirement of conscience. In this regard, Francis observes: “We also find it hard to make room for the consciences of the faithful, who very often respond as best they can

gence, the objectively immoral act that one performs in following the erring conscience is, for the person acting, an immoral act. On these matters, see Richard Schenk, “Perplexus supposito quodam: Notizien zu einem vergessenen Schlüsselbegriff thomanischer Gewissenslehre,” *Recherches de théologie ancienne et médiévale* 57 (1990): 62–95.

¹⁶ E. Christian Brugger, “Five Serious Problems with Chapter Eight of *Amoris Laetitia*,” *Catholic World Report*, April 22, 2016, accessed November 1, 2017, <http://www.catholicworldreport.com/2016/04/22/five-serious-problems-with-chapter-8-of-amoris-laetitia/>.

to the Gospel amid their limitations, and are capable of carrying out their own discernment in complex situations. We have been called to form consciences, not to replace them” (AL §37). Here AL expresses an unreasonable optimism about the individual’s ability to navigate his own way through morally complex circumstances. Not uncommon is the human tendency to allow a sentimental and subjective “sense” of one’s situation and what one ought to do about it to obfuscate a genuine and sound judgment of conscience. A sincere judgment of conscience, as human experience clearly reveals, can simply be wrong, not in accord with prudent moral reasoning such as looks to objective and true moral norms as one’s guide.

At AL §303, the document places the judgment of conscience itself in tension with objective moral norms. The text reads in part:

Yet conscience can do more than recognize that a given situation does not correspond objectively to the overall demands of the Gospel. It can also recognize with sincerity and honesty what for now is the most generous response which can be given to God, and come to see with a certain moral security that it is what God himself is asking amid the concrete complexity of one’s limits, while yet not fully the objective ideal. In any event, let us recall that this discernment is dynamic; it must remain ever open to new stages of growth and to new decisions which can enable the ideal to be more fully realized.

This is to suggest that, by way of personal discernment, an individual could arrive at the determination that continuing to engage in what one knows to be gravely sinful behavior (e.g., sexual intimacy with a person who is not one’s spouse) is “the most generous response” one can give at this time and that, further, God is somehow “asking” this of one.

A further problem with this passage is that the relevant moral norm (i.e., prohibiting fornication or adultery) is presented as an “objective ideal” to be attained. AL in fact criticizes Catholic moral theology for treating the moral life as, in essence, a matter of rule-following. It insists, rather, that the moral life is not, in the end, about conformity to moral rules, but about ever-closer approximations to the Gospel “ideal.”¹⁷ The document implies that, in lieu of attaining the ideal,

¹⁷ As Brugger has also observed: “The term ‘objective ideal’ . . . will be read by many as removing them doubly from the obligation not to act: once because

there can be degrees of disorder that an individual knowingly, deliberately, and indeed, *with moral rectitude*, allows into his life, since this is the “most generous response” he can make in pursuit of the ideal.¹⁸

Occasionally AL seems even to be counseling leaving men and women entrusted to the Church’s pastoral care in a state of perpetual moral ignorance, on the pretext that they would not be sinning formally. Notwithstanding the possible applicability in a pastoral setting of the principle of “leaving the penitent in good faith,”¹⁹ it is difficult to see how this could constitute sound pastoral practice.

Moral Rules and “Matters of Detail”

According to AL, sound pastoral discernment would “recognize that, since ‘the degree of responsibility is not equal in all cases’ the consequences or effects of a rule need not necessarily always be the same” (AL §300). It is in this context that Aquinas is referenced, as follows:

I earnestly ask that we always recall a teaching of Saint Thomas Aquinas and learn to incorporate it in our pastoral discernment: “Although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects. . . . In matters of action, truth or practical rectitude is not the same for all, as to matters of detail, but only as to the general principles; and where there is the same rectitude in matters of detail, it is not equally known to all. . . .

an ideal is only an ideal, and once because what is objectively applicable may not be subjectively applicable, i.e. applicable to me in my circumstances and state of will” (“Five Serious Problems”).

¹⁸ Occasionally spoken of in such contexts is the “the law of gradualness.” See, for instance, AL §293–95 and 300, but most importantly *Familiaris Consortio* §34 (“What is known as ‘the law of gradualness’ or step-by-step advance cannot be identified with ‘gradualness of the law’”). See also the Pontifical Council for the Family’s “Vademecum for Confessors Concerning Some Aspects of the Morality of Conjugal Life,” which states: “The pastoral ‘law of gradualness’ . . . consists of requiring a decisive break with sin together with a progressive path towards total union with the will of God and with his loving demands” (3.9, accessed November 1, 2017, http://www.vatican.va/roman_curia/pontifical_councils/family/documents/rc_pc_family_doc_12021997_vademecum_en.html). See also Thomas Berg, “Conscience, Freedom, and the ‘Law of Graduality’ at the Synod on the Family,” *Homiletic and Pastoral Review*, September 2015, available at <http://www.hprweb.com/2015/09/conscience-freedom-and-the-law-of-graduality-at-the-synod-on-the-family/>.

¹⁹ See the Pontifical Council for the Family, “Vademecum for Confessors,” 3.7–8.

The principle will be found to fail, according as we descend further into detail” [ST I-II.94.4]. (AL §304)²⁰

The document uses the quoted portion of ST I-II, q. 94, a. 4, as support for its final assertion in AL §304: “It is true that general rules set forth a good which can never be disregarded or neglected, but in their formulation they cannot provide absolutely for all particular situations. At the same time, it must be said that, precisely for that reason, what is part of a practical discernment in particular circumstances cannot be elevated to the level of a rule. That would not only lead to an intolerable casuistry, but would endanger the very values which must be preserved with special care.”²¹

This use of ST I-II, q. 94, a. 4, is incorrect, the problem depending at least in part upon the mistranslation of the Latin word *propria* as “matters of detail.”²² This becomes clear when one reads that word in the context of the article as a whole and of several of Thomas’s

²⁰ As will be explained below, this last phrase (“The principle will be found to fail, according as we descend further into detail”), because lifted from its original context, does not accurately represent what Thomas is saying in that place.

²¹ ST I-II, q. 94, a. 4, is also featured in the document published by the International Theological Commission in 2009 under the title, *A la recherche d’une éthique universelle: nouveau regard sur la loi naturelle*. On the document’s use of ST I-II, q. 94, a. 4, see Kevin L. Flannery, “Determinacy in Natural Law,” *Nova et Vetera (English)* 9 (2011): 763–73.

²² The Fathers of the English Dominican Province translation of ST is the translation used in the English version of AL and, as noted above, in our article. We do, however, make the occasional adjustment. As indicated, we do not, for instance, accept the translation of *propria* as “matters of detail,” as in “the more we descend to matters of detail.” The equivalent of that is found in other versions of the document. The relevant phrase in Latin reads: “quanto magis ad propria descenditur.” In the Spanish version we find, “cuanto más se afrontan las cosas particulares”; in the Italian, “quanto più si scende alle cose particolari”; in the French, “plus on aborde les choses particulières”; in the German, “je mehr man in den Bereich des Spezifischen absteigt.” In ST I-II, q. 94, a. 4, Thomas also speaks of *particularia* (. . . *magis ad particularia descenditur* . . .). Translating *particularia* as “matters of detail” would be fine, but the *particularia* are not equivalent to the *propria*. Also, in the Spanish version, immediately after the words “cuanto más se afrontan las cosas particulares,” that translation gives “tanta más indeterminación hay.” (Similarly, later in AL §304, after speaking about *lo particular*, the translation reads “tanto más aumenta la indeterminación”; in both places, the Italian version has *l’indeterminazione*.) In Thomas’s Latin, the word corresponding to *indeterminación* is *defectus*. Translating *defectus* as *indeterminación* (or *l’indeterminazione*) is also unacceptable, as will be explained below.

other writings. Because he presupposes that his readers are familiar with the Aristotelian distinction between the “common” (or, as it comes through to the English translation of Thomas just quoted, “general”) and the “proper” as set out in Aristotle’s *Posterior analytics* 1.10, Thomas tends to move rather loosely among terms like *principia communia* (common principles), *principia propria* (proper principles), *praecepta communia* (common precepts), and *praecepta propria* (proper precepts)—sometimes also speaking in abbreviated fashion simply of *communia* and *propria*. The words “common” and “proper” correspond to Aristotle’s *ta koina* (common things) and *ta idia* (proper things) in *Posterior analytics* 1.10. In that place, Aristotle explains that some principles are common even to different sciences, although they enter into the individual science in an analogous manner. Thus, although the principle “should equals be taken from equals, the results are equals” (76a41) is common to multiple sciences, when it enters into geometry, it does so as a common principle of *geometry*. The proper principles in geometry would include those having to do with the particular properties of lines (76a40).²³

So, near the beginning of the body of *ST I-II*, q. 94, a. 4, we find a reference to Aristotle’s *Physics* 1.1: “Now the process of reason is from the common to the proper [*ex communibus ad propria*], as stated in book one of the *Physics*.” In that chapter of the *Physics*, common principles (*principia communia*) are at issue.²⁴ Immediately after citing *Physics* 1.1,

²³ At *Rhetoric* 1.2.1358a12ff, Aristotle says that the idea of “more and less” is common to physics, justice, and politics. In what follows in the present essay, because Aristotle’s *ta koina* are quite different from “general principles,” we prefer to use the translation “common” for *communia* (as in *principia communia*)—although, when referring to AL’s translation, we must sometimes revert to “general.” All English translation of the works of Aristotle comes *The Complete Works of Aristotle: The Revised Oxford Translation*, ed. Jonathan Barnes (Princeton, NJ: Princeton University Press, 1984).

²⁴ Thomas is making reference only to the very first sentence of the *Physics*. Aristotle does not use in that first chapter the “common”/“proper” terminology set out in the *Posterior analytics* (and appearing repeatedly in *ST I-II*, q. 94, a. 4). Aristotle says rather that, in any intellectual enterprise, it is necessary to begin by determining “the things related to the first principles” [184a15–16]. Thomas speaks of these as common (see *In I phys.*, lec. 1, no. 4)—common, that is, in the sense that all things considered within the “physical” sciences (including, also, for instance, astronomy and biology) presuppose them. It is necessary to begin with these and only eventually get to that which is proper. Aristotle does not discuss proper principles in *Physics* 1.1. Immediately after saying that we must begin with “the things related to the first principles,” he discusses how we are to arrive at the latter—that is, by considering that which

Thomas speaks in *ST* I-II, q. 94, a. 4, of the “proper conclusions” (*conclusiones propriae*) and the “common principles” (*principia communia*) in speculative reason. Then comes a piece of the passage we are considering where he speaks of the *communia* (tellingly translated in AL as “general principles”) and the *propria* (translated as “matters of detail”) in practical reason. In the Latin, there is no explicit mention of what the adjectives modify: this is simply presupposed.

This is followed immediately by a remark about the “principles” (*principia*) and “conclusions” (*conclusiones*) in speculative reason—which remark itself concludes with the explanation that the principles (*principia*) are sometimes called “common notions” (*communes conceptiones*). In the next sentence, he uses again the abbreviated forms: “But in matters of action, truth or practical rectitude is not the same for all, with respect to proper [principles] [*propria*], but only as to the common [principles] [*communiam*]: and where there is the same rectitude in the proper [principles] [*in propriis*], it is not equally known to all.”²⁵ But, in the immediately subsequent sentence, it becomes clear that he has been speaking about *principia* (in either the speculative or the practical sphere): “It is therefore evident that, as regards the common principles [*communiam principia*] whether of speculative or of practical reason, truth or rectitude is the same for all, and is equally known by all.”

In articles coming later in *ST* I-II, Thomas tends to divide the practical sphere into “common principles” (*communiam principia*) and “proper conclusions” (*conclusiones propriae*). That is to say, he considers the lower principles as conclusions (or sometimes “quasi conclusions” [*ST* I-II, q. 94, a. 4; q. 97, a. 4, ad 3]) of the common principles. In any case, it is clear that the proper conclusions are not “matters of detail.” They are propositions, sometimes spoken of by Thomas as

is “more intelligible to us” (*nobis magis nota*) rather than that which is “more intelligible by nature” (*magis nota naturae*) (*In I phys.*, lec. 1, no. 6). That which is “more intelligible to us” might even be called “matters of detail.” We must go from these to the first (or common) principles and *then* to the proper principles. (We use here the translation “intelligible” and not “known” for *nota* or *notum* because that which *magis notum naturae* may not be known. Thomas actually says in this section that things that are *nobis magis nota* are *intelligibilia in potentia* (*In I phys.*, lec. 1, no. 7). He also says that that which is *magis notum naturae* is not more *known* by nature, but rather “more known with respect to itself and with respect to its proper nature.”)

²⁵ The Fathers of the English Dominican Province translate *communiam* as “general principles,” thereby supplying the understood *principia*, but they fail to do the same for the word *propria*, forms of which occur twice in the sentence.

principles and sometimes as conclusions, sometimes as precepts.²⁶

So, what bearing does this have upon the argument of *ST* I-II, q. 94, a. 4? It means that the contrast there, such as it is, is not between “general principles” and concrete moral situations to which the “general principles” supposedly cannot be applied, but between common principles and proper principles. What sometimes happens is that a proper principle “is found not to hit the mark” (*invenitur deficere*).²⁷ This never happens with a common principle (such as “do not steal”). A proper principle, however, such as “return deposits to their owner” can fail to hit the mark—but only in the sense that, when it was originally formulated, the lawmaker wisely did not mention explicitly the many situations that would make it not applicable. But they are there implicitly in the law, since it is presupposed in law that all the exceptions cannot be mentioned and, indeed, ought not to be mentioned—although they are there “in the intention of the lawmaker.”²⁸ When the man who owns the weapon given to another

²⁶ Regarding the latter, see, for instance, *ST* I-II, q. 98, a. 5, corp.: “Respondeo dicendum quod lex vetus manifestabat praecepta legis naturae, et superaddebat quaedam propria praecepta.”

²⁷ The argument of *ST* I-II, q. 94, a. 4, corp., is derived from Aristotle’s *Nicomachean Ethics* [EN] 5.10; see especially 1137b13–24. The word corresponding to *deficere* (or *defectus*) is *hamartēma* [EN 5.10.1137b 17], which signifies “an act not hitting the mark.” That Thomas takes the idea of a “defect” in this sense from this passage is apparent in the first objection in *ST* I-II, q. 100, a. 8, where he refers to *EN* 5.10 and then says immediately, “Defectus autem legis in aliquibus particularibus casibus est ratio dispensandi.” The Leonine edition of *ST* gets the reference in *ST* I-II, q. 100, a. 8, obj. 1, wrong in referring to *EN* 5.7.1134b18ff. See also Thomas’s commentary on *EN* 5.10, where he uses repeatedly the language of *defectus* and also speaks of the intention of the legislator (*In V eth.*, lec. 16, nos. 1083–86).

²⁸ See, for instance, *ST* I-II, q. 100, a. 8, corp.: “I answer that, as stated above, in relation to precepts a dispensation must be effected when there occurs some particular case in which, if the letter of the law be observed, the intention of the lawmaker is negated [*contrariatur intentioni legislatoris*].” The back reference (“as stated above”) is to *ST* I-II, q. 97, a. 4, and q. 96, a. 6, both of which are about the intention of the lawmaker. In the former, Thomas says that determination of the intention of the lawmaker ought not to be left to individuals not in authority, except in cases of “evident and immediate danger [*evidens et subitum periculum*]”; leaving this to the decision of “just anyone [*cuiuslibet*],” he says, would itself be dangerous (*periculosum*). He also says that one in authority who, of his mere will (*pro sola voluntate*), grants dispensation from a law is either unfaithful or imprudent. He then cites Luke 12,42: “And the Lord said, ‘Who do you think is the faithful [*fidelis*] and wise [*prudens*] dispenser [*dispensator*], whom his lord sets over his household?’”

in trust returns and (eyes darting back and forth and mumbling curses about the local sovereign) asks for his weapon back, the other person is not obliged to give it to him—because not returning that deposit is already *in the law* (because it was in the intention of the lawmaker). In such a case, the proper principle *as formulated* misses the mark.

The manner in which AL §304 represents the argument of *ST I-II*, q. 94, a. 4, misses—we do not say deliberately distorts—this understanding. Recall that it quotes *ST I-II*, q. 94, a. 4, in this manner: “Although there is necessity in the general principles, the more we descend to matters of detail, the more frequently we encounter defects. . . . In matters of action, truth or practical rectitude is not the same for all, as to matters of detail, but only as to the general principles; and where there is the same rectitude in matters of detail, it is not equally known to all. . . . The principle will be found to fail, according as we descend further into detail.” This last phrase—“the principle will be found to fail, according as we descend further into detail”—because lifted from its original context, does not accurately represent what Thomas is saying in that place. The Latin runs: “*Et hoc tanto magis invenitur deficere, quanto magis ad particularia descenditur.*” The word *hoc* refers not to a “general principle” but to the *proper* principle mentioned just previously in *ST I-II*, q. 94, a. 4: “Goods entrusted to another should be restored to their owner.”²⁹

This assembly of bits of *ST I-II*, q. 94, a. 4, would suggest that, as soon as we leave general (or, speaking more properly, common) principles, we enter into the realm of the indeterminate, where the application of precepts depends upon “pastoral” or “practical discernment” (AL §304). Thomas’s position is rather that, also below the level of common principles, there are principles that, given the appropriate circumstances, are quite determinate but that, in other (inappropriate) circumstances, must be applied (or not applied) according to the mind of the legislator. The application of such precepts does not depend upon pastoral or practical discernment, but upon a correct understanding of the intention of the legislator. When the legislator decrees that deposits must be returned, he, even by so doing, knows

²⁹ This error does not appear in the Spanish and Italian translations—which, however, to much the same effect, fail to translate the word *hoc*: “Cuanto más se descende a lo particular, tanto más aumenta la indeterminación” / “E tanto più aumenta l’indeterminazione quanto più si scende nel particolare.” (The original language of AL §304 was Spanish, although much of the reworking was done in Italian.)

that there will be situations in which it would be irrational—and so contrary to his intention—to apply the precept. A prudent interpreter of the precept will immediately recognize such circumstances for what they are.

Let us apply all this to the sorts of cases at issue in AL. If it is established that a “marriage” is not a true marriage, the proper principle “individuals living in irregular and actively sexual relationships ought not to receive communion” does not encounter a concrete situation in which it does not apply. There is no need to invoke the “intention of the lawmaker” clause, since the application of the law is apparent. The ordinary means of establishing whether there is or is not a true marriage is a marriage tribunal (including, if envisaged by procedural law, also recourse to higher tribunals). In no way would such cases, on the supposed grounds that universal principles do not reach into “matters of detail,” be left to the “discernment” (read: the personal conscience) of the parties involved—or even to the personal judgment of one designated as a “dispenser” of the law.³⁰

It is possible that the ordinary canonical procedure is not sufficient to establish that the original “marriage” was not a true marriage. As is explained in the next subsection of the present essay, such cases, which are extremely rare, are resolved not in a marriage tribunal (in the external forum) but in the internal forum, employing the same legal principles employed in the external forum. But neither would such cases be like the situation of the madman asking for his weapon, for the proper principle (“individuals living in irregular and actively sexual relationships ought not to receive communion”) would still hold—since the relationship established by the “second” (in fact, the only true) marriage would not be irregular.

So, in neither of these two cases—where the couple are in an adulterous union or where the union is a true marriage but verifiable only in the internal forum—does Thomas Aquinas’s *ST* I-II, q. 94, a. 4, have any bearing; it ought not to have been cited where it is cited in AL. Indeed, it ought never be cited at all in support of the notion that, with respect to “general principles,” “the more we descend to *matters of detail*, the more frequently we encounter defects.”³¹

³⁰ See *ST* I-II, q. 97, a. 4 (and the previous note).

³¹ As mentioned above in note 22, for the Latin *defectus*, the Spanish and Italian versions have, respectively, *la indeterminación* and *l’indeterminazione*. The English “defects” is defensible as a translation, but *la indeterminación* and *l’indeterminazione* are not.

The Internal and the External Fora

Any number of passages from AL would lead one to conclude that the moral and ecclesial norm “individuals living in irregular and actively sexual relationships ought not to receive communion” will fail to hold in some cases of persons living in such relationships. The norm presumably would fail from time to time in the context of pastoral counseling as a counselor probes further, for example, into the “matters of detail” of the life and circumstances of the individual he finds himself counseling. What kinds of details would cause the norm to fail? As we saw in the “Personal Discernment, Moral Ideals and Conscience” subsection, AL suggests a detail such as the personal conviction that remaining in the actively sexual relationship constitutes “what for now is the most generous response which can be given to God.” And AL leaves room for plenty of other such deep personal convictions, not least among them the conviction that one’s prior marriage was invalid. The logic of AL, therefore, leads one to conclude that, in light of such “matters of detail,” the norm would not apply, thus leaving open a path to communion.

Here we are compelled to draw attention to a feature of AL that, though less than evident, is undeniably operative in the overall logic, especially of the document’s chapter 8 (AL §§291–312). This has to do with the underlying conception of internal and external fora at work in the exhortation. Granted, the term “internal forum” appears only once in the body of AL (§300),³² but the common issue (and the problems) associated with the concept are present throughout chapter 8. We find there a tendency to pit the internal forum (supposedly the domain of personal conscience) against the objective requirements of the moral order as known in the external forum and to play the former off against the latter with a view to validating personal choices that contradict the requirements of the objective moral and ecclesial order.³³

³² “Conversation with the priest, in the internal forum, contributes to the formation of a correct judgment on what hinders the possibility of a fuller participation in the life of the Church and on what steps can foster it and make it grow” [AL §300].

³³ As F.J. Urrutia puts it, “the difference between the exercise of power for the internal forum and for the external forum lies neither in the matter ruled on, nor in the nature of the act itself, but in the way in which the power is exercised”—that is, privately or publicly (Francisco Javier Urrutia, “Internal Forum–External Forum: The Criterion of Distinction,” in *Vatican II: Assessment and Perspectives*, col. 1, ed. René Latourelle [Mahwah, NJ]: Paulist Press,

The terms “internal forum” and “external forum” are legal terms. A forum, according to Roman law, was a public place where official judgments were discussed and issued, but in the Church, a forum came to designate a “place” for judgments, possibly public or private. Following the Council of Trent, the internal forum was commonly equated with the “forum of conscience.”³⁴ This usage found its way into the 1917 Code of Canon Law (see canon 196), but logical difficulties associated with this overly facile phrasing soon surfaced. Judgments made in the external forum are binding in conscience. It was also recognized that matters—the very same matters—dealt with in the internal forum could move into the external forum. An impediment to a previous marriage determined in the internal forum might, for instance, have to be rendered public when other facts become public that would otherwise suggest a couple were not married validly. In the 1983 Code of Canon Law, canon 130, the internal forum is no longer equated with the forum of conscience and it is made apparent that one and the same power of jurisdiction is exercised in both fora.³⁵

Contrary to what is suggested by the underlying presuppositions of AL, we must affirm that an individual’s personal convictions “in conscience” about the invalidity of a prior marital bond or about his or her most generous response that can be given to God at present, while these should be heard and taken into consideration in the

1988], 644–45). See also Urrutia, “Foro Giuridico (Forum Iuridicum),” in *Nuovo Dizionario di Diritto Canonico*, ed. Carlos Manuel Corral Salvador, Gianfranco Ghirlanda, and Velasio De Paolis (Milan, IT: Edizioni Paoline, 1993), 536–39. In an article that appeared before the publication of the 1983 revised Code of Canon Law, Urrutia affirms: “Any concept of internal forum that implies the fora are so distinct and separable that it is possible to work out a solution in one of them without these solutions affecting the other is unacceptable. In fact, anything that takes place in the external forum affects the internal forum” (“The ‘Internal Forum Solution’—Some Comments,” *The Jurist* 40 [1980]: 132).

³⁴ See Urrutia, “Foro Giuridico (Forum Iuridicum),” 536.

³⁵ Can. 130 stipulates: “Of itself, the power of governance is exercised for the external forum; sometimes, however, it is exercised for the internal forum alone, so that the effects which its exercise is meant to have for the external forum are not recognized there, except insofar as the law establishes it in determined cases”; see *Codex Iuris Canonici—Code of Canon Law* (1983) [CIC], Latin–English ed. (Washington, DC: Canon Law Society of America, 1998); available also at, accessed November 6, 2017, http://www.vatican.va/archive/ENG1104/_PE.HTM).

context of pastoral counseling with gentleness and compassion, have, as such, no bearing on the resolution of that individual's situation with regard to the reception of the Eucharist—an event governed, in any case, by norms applicable in the external forum (see, for example, canon 915 of the Code of Canon Law). Pastoral ministers, in their capacity as pastoral ministers, are not free to apply the law of the Church as they see fit. Rather, they are obliged to remain faithful to true moral teaching as interpreted by the Church's authentic magisterium and in conformity with current Church law—none of which is at odds with a genuine pastoral concern for individuals.

It is possible—though admittedly an extreme rarity these days—that the ordinary canonical procedure is not sufficient to prove that a null marriage is canonically invalid. We have in mind, for instance, the hypothetical situation in which a person might have occult knowledge of some fact that would indicate with moral certainty the invalidity of the prior union but, for any number of reasons, is unable to prove that fact before a tribunal. If one party to a marriage, null because of the impediment “vitiating consent,” refuses to make a judicial deposition but the other party knows with moral certainty that the other person's consent was vitiated, a solution in the internal forum is sometimes possible.³⁶ Cases of this type in which recourse to the internal forum is appropriate are extremely unlikely to occur in places like the United States or in Western Europe. But such a case could present itself in places where there are no real judicial structures.

In its 1994 “Letter to the Bishops of the Catholic Church Concerning the Reception of Holy Communion by the Divorced and Remarried Members of the Faithful,” the Congregation for the Doctrine of the Faith states:

In inviting pastors to distinguish carefully the various situations of the divorced and remarried, the exhortation *Familiaris Consortio* recalls the case of those who are subjectively certain in conscience that their previous marriage, irreparably broken, had never been valid [*Familiaris Consortio* §84]. It must be discerned with certainty whether, by way of the external forum

³⁶ Possible in such a situation would be a solution permitting conjugal relations and the reception of communion. Even given, however, certainty in the internal forum that a previous union was not a valid marriage, the party (or parties) involved could not go on to contract a valid marriage.

established by the Church, objectively nullity would emerge. The discipline of the Church, while it confirms the exclusive competence of ecclesiastical tribunals with respect to the examination of the validity of the marriage of Catholics, also offers new ways to demonstrate the nullity of a previous marriage, in order to exclude as much as possible every divergence between the truth verifiable in the judicial process and the objective truth known by a correct conscience.³⁷

Appended to the last quoted word is a note making reference to canons 1536, §2, and 1679, “concerning the probative force of the depositions of the parties in such processes.” Both canons allow for the prudent weighing of evidence other than judicial deposition.

In 1998, then-Cardinal Ratzinger commented upon the same letter:

It is certainly not ruled out that errors may take place in marital procedures. In some parts of the Church there are not yet ecclesiastical tribunals that work well. Sometimes the processes last too long. In some cases they end with problematic judgments. In principle, it does not seem out of the question that *epikeia* could be applied in the “internal forum.” The 1994 Letter of the Congregation for the Doctrine of the Faith [cited just above] makes reference to this when it says that with the new canonical avenues all discrepancies between the truth verifiable in the case and the objective truth should be excluded “as much as possible” (cf. Letter, no. 9).³⁸

It bears repeating, however, that the determination of whether there was or was not an earlier valid marriage would not depend on the personal consciences as such of those involved. That is to say, it would not depend on their subjective impressions regarding the invalidity of the prior bond. Any discernment would be an application of the *same principles used in the external forum*. To be sure, just as in the external forum, what would be requisite here would be the

³⁷ CDF, “Reception of Holy Communion by the Divorced and Remarried Members of the Faithful,” §9 (*AAS* 86 [1994]: 978). The Vatican’s on-line translation is here altered.

³⁸ CDF, *On the Pastoral Care of the Divorced and Remarried* (Washington, DC: United States Conference of Catholic Bishops, 2012), 16–17.

manifestation of, not a subjective impression, but a *fact* indicative of invalidity.³⁹

The Disregard of “General Principles”

In the final three sentences of AL §304, it is said of what are called there “general principles” that they “can never be disregarded or neglected” and that “in their formulation they cannot provide absolutely for all particular situations.” On the other hand, “what is part of a practical discernment in particular circumstances cannot be elevated to the level of a rule.” The section concludes with a footnote referring us to another text in Aquinas. The note reads: “In another text, referring to the general knowledge of the rule and the particular knowledge of practical discernment, Saint Thomas states that ‘if only one of the two is present, it is preferable that it be the knowledge of the particular reality, which is closer to the act.’” Again, it is appropriate to ask whether the remark quoted offers support for the idea to which it is linked.

The quotation is taken from Aquinas’s commentary on a passage in the sixth book of Aristotle’s *Nicomachean Ethics* [EN] in which Aristotle says that practical wisdom (in Aquinas, *prudentia*) includes knowledge both of universal truths and of their particular applications.⁴⁰ Aquinas is simply repeating the point that Aristotle makes, as follows: “Now practical wisdom is concerned with action; therefore one should have both forms of it, or the latter in preference to the former” (EN 6.7.1141b21–22). Aristotle’s point (and Aquinas’s) is

³⁹ See Urrutia, “The ‘Internal Forum Solution,’” 138–39: “Admittedly in a personal matter of this nature where such powerful emotions are likely to be present, particularly in view of the hardships that led to the breakdown of the first union and also because of the fact that another union is so far happily successful, the most honest and sincere person may rather easily mistake a doubt (particularly a reasonable doubt) for moral certitude. The person could very easily, even with the best of intentions, be reinterpreting past facts under the light of the past sorrowful experiences and the present happiness. However, it should be carefully noted that what is to be required is not that the person be certain about the validity or the invalidity of their first union. . . . What is really needed is that they be certain about some fact which, if it actually took place, would render the first union invalid.”

⁴⁰ The quotation in Thomas’s commentary is found at *In VI eth.*, lec. 6., no. 1194. Thomas does not speak there of *principia communia*, but of *universalia*, so continuing to speak of “the general knowledge of the rule” in this (the final) note of AL §304 is misleading, as is the reference to “general principles” in AL §304 itself. The passage in Aristotle is EN 6.7.1141b14–22; see also his *Metaphysics* 1.1.981a12–b10.

that, in practical matters, knowledge of particulars—if one has to opt for one over the other—is more useful than knowledge of universal truths, although it is even better to have both.⁴¹

In illustration of this point, Aristotle and Thomas speak of two types of doctor. One—we might call him the “academic doctor”—understands the theory of medicine; the other—let us call him the “practical doctor”—is not well-versed in the theory but has long experience in caring for people’s health. The academic doctor, according to Thomas, knows that “light meats are easily digestible and healthy” but does not know which meats are light; the practical doctor knows that the flesh of fowls is light and healthy but knows nothing about digestion.⁴²

Drawing the analogy that AL §304 apparently wants to draw, corresponding to the academic doctor would be those who have not only studied the relevant canon law but also understand it: they understand not only what it says but also why it says it. Corresponding to the practical doctor might be a judge on a local marriage tribunal who has not studied in great depth the relevant canon law—the history of its formulation and the legal principles so involved—but, since he has been a member of the tribunal for many years and has considered many cases, has an accurate “sense” for what satisfies the Church’s criteria, as set out in canon law, for a valid marriage.⁴³ It is quite possible for the academic judge to lack this sense. If asked to adjudicate a particular case, he might not immediately know, for instance, under which canon it falls. Applying what Aristotle and Aquinas say about the two types of expertise, the judge with the vast

⁴¹ The larger passage in Aquinas reads as follows: “Because therefore prudence is active reason, it is suitable for the prudent man to have familiarity with both, that is both the universals and the particulars; or, if it happens that he has only one of the two, he ought rather to have the latter, that is, familiarity with the particulars” (*In VI eth.*, lec. 6, no. 1194).

⁴² One of the two principal critical editions of *EN*, that by Ingram Bywater, eliminates from the text the words in line 1141b20 that have Aristotle saying that the “practical doctor” knows that the flesh of fowls is light; in other words, he knows only that the flesh of fowls is healthy.

⁴³ *CIC*, Canon 1421, no. 3, says that tribunal judges are to be persons of good repute who hold either a doctorate or a licentiate in canon law. In the chapter following that in which he speaks of the academic and the practical doctors, Aristotle speaks of the more “hands on” practical knowledge as perception: *EN* 6.8.1142a27. On this issue, see Kevin L. Flannery, *Action and Character according to Aristotle: The Logic of the Moral Life* (Washington, DC: Catholic University of America Press, 2013), 1–38.

practical experience would be more useful in deciding the case.

None of this is to say, however, that a good judgment issued by the “practical judge” could contradict the law as understood by the academic judge. Indeed, if a particular judgment did contradict the law as formulated, that would show that the practical judge’s sense of the law was less accurate than desirable. Following Aristotle and Aquinas, the best situation would be to have a judge with lengthy experience on a tribunal as well as a good academic grasp of the law. This judge’s particular judgments would be applications of what he knows academically and could very well serve as models for those with less academic backgrounds.⁴⁴

So, again, we must conclude that the passage in Aquinas ought never to have been cited in support of the ideas put forward in that part of AL §304. Aquinas was cited there, of course, in order to demonstrate that the ideas put forward are consistent with the tradition. That attempt has failed.

What then can we say about the passage in AL §304 to which the note referring to Aquinas’s commentary on the *Nicomachean Ethics* is appended? The first part, which says of “general principles” that they “can never be disregarded or neglected” but also that “in their formulation they cannot provide absolutely for all particular situations,” must be read with extreme caution, since it appears to open a door to conclusions that cannot be squared with the Church’s teaching that some moral norms are exceptionless. Also the next bit—“At the same time, it must be said that, precisely for that reason, what is part of a practical discernment in particular circumstances cannot be elevated to the level of a rule”—is problematic. As Aquinas explains two articles before *ST* I-II, q. 94, a. 4, it is at the level of “particular circumstances”—that is to say, the level where our understanding meets the natural inclinations—that “practical discernment” discovers the precepts of the natural law. Such discernment can indeed

⁴⁴ In the chapter immediately following the chapter in *EN* containing the remarks about the academic and the practical doctors, Aristotle says that, although it is true that the practical knowledge is more useful, in the practical sphere itself, there is still an expertise that is “architectonic.” This is the practical wisdom (*phronēsis/prudentia*) as possessed by the lawmaker. This latter is contrasted with the practical wisdom of the local official who is involved in particular applications of the law, whom Aristotle compares to a manual worker (*a cheirotechnēs*). In effect, the lawmaker is being compared to an architect, the local official to those who construct the building according to the architect’s plan. In Aquinas, see *In VI eth.*, lec. 7, nos. 1197–98).

be “elevated to the level of a rule.” It is true that not every moral perception is reasonably made into a rule; but it is also true that all such moral perceptions are simply specifications of the “rules”—the precepts—of the natural law, as residing in the “intention of the lawmaker,” the author of all nature. If properly conducted, practical discernment can never contradict the precepts of the natural law.

When, in the discernment of particular situations, it becomes evident that the individual’s moral problem involves behavior that can never be rightly ordered toward the love of God and neighbor (such as is the case of being sexually involved with a person not one’s spouse) and is therefore prohibited by an exceptionless moral norm, sound pastoral discernment must, in all cases, take as point of departure the exceptionless moral norm that bears upon that individual’s situation.

Despite the statement towards the end of AL §304 that general principles “can never be disregarded,” that is precisely what the argument of AL §304 encourages the reader in certain instances to do—even where the moral norm in question is a specific and exceptionless moral norm. To the contrary, however, the *Catechism of the Catholic Church* affirms: “It is . . . an error to judge the morality of human acts by considering only the intention that inspires them or the circumstances (environment, social pressure, duress or emergency, etc.) which supply their context. There are acts which, in and of themselves, independently of circumstances and intentions, are always gravely illicit by reason of their object; such as blasphemy and perjury, murder and adultery. One may not do evil so that good may result from it” (§1756).

In a number of places, Thomas Aquinas too affirms the reality of exceptionless moral norms. Frequently cited in this regard is *ST II-II*, q. 33, a. 2, on fraternal correction. Thomas distinguishes there precepts formulated in the negative that are applicable “always and at all times” (*semper et ad semper*) from positively formulated precepts directing us toward acts of virtue to be effected in the presence of certain circumstances. Sinful acts such as are prohibited by the negative precepts of the moral law, affirms Aquinas, “are evil in themselves, and cannot become good, no matter how, or when, or where, they are done.”⁴⁵

⁴⁵ “Actus autem peccatorum sunt secundum se mali, et nullo modo bene fieri possunt, nec aliquo tempore aut loco.” Note, however, that Thomas also acknowledges that positive precepts can sometimes be reformulated as nega-

The Church's perennial teaching on the reality of exceptionless moral norms was reaffirmed by Pope St. John Paul II in the encyclical *Veritatis Splendor*:

Reason attests that there are objects of the human act which are by their nature "incapable of being ordered" to God, because they radically contradict the good of the person made in his image. These are the acts which, in the Church's moral tradition, have been termed "intrinsically evil" (*intrinsece malum*): they are such always and per se, in other words, on account of their very object, and quite apart from the ulterior intentions of the one acting and the circumstances. Consequently, without in the least denying the influence on morality exercised by circumstances and especially by intentions, the Church teaches that "there exist acts which per se and in themselves, independently of circumstances, are always seriously wrong by reason of their object" (§80).

Since the Apostolic age—and drawing upon the teaching of Jesus Christ himself—the Church has consistently taught that sexual intercourse with a person other than one's spouse is always, without exception, a gravely disordered behavior "incapable of being ordered to God." Sound pastoral discernment will embrace such true, exceptionless moral principles and endeavor to find a way, consistent with God's mercy and justice, of explaining their application even to particular situations that call for personal asceticism and sacrifice.

Conclusion

A pastoral accompaniment, enlivened by genuine concern for the human and spiritual good of divorced and remarried individuals, requires leading them to a proper understanding of the nature of

tive precepts and negative precepts as positive (*ST* I-II, q. 100, a. 4, ad 2, and q. 100, a. 7, ad 1). The characterization of some moral norms as exceptionless does not depend just upon their formulation as negative or positive, but upon natural and eternal law themselves. The concept (and the assertion) of exceptionless moral norms also occurs in Aristotle: *EN* 2.6.1107a8–17 (to which passage Thomas refers in *ST* II-II, q. 33, a. 2). See Christopher Kaczor, "Exceptionless Norms in Aristotle? Thomas Aquinas and the Twentieth-century Interpreters of the *Nicomachean Ethics*," *The Thomist* 61 (1997): 33–62. See also John Finnis, *Moral Absolutes: Tradition, Revision and Truth* (Washington, DC: Catholic University of America Press, 1991), 31–37.

conscience. Pastoral ministers need to help them to discover that living according to the truth of the Gospel and the Church's teaching is life-giving and possible with God's grace. Even in those cases where individuals are subjectively convinced that their previous marriage was null, the ordinary means of determining the truth of such a conviction is a canonical investigation in the external forum. In the extremely rare case that such an investigation is not possible, the concepts and criteria to be employed in the internal forum are precisely those employed in the external forum. When, by these means, a marriage is determined not to have been null and resumption of the still valid marriage is impossible, as is also separation from the current partner, no other pathway to the reception of the Eucharist exists other than the confessional and the determination to live "as brother and sister." Even in such a case, it is essential for the couple to do all that they can to avoid giving scandal.

Not admitting the divorced and remarried to communion remains the sound pastoral practice of the Church. Nothing in *Amoris Laetitia* has changed that. Nor is such a practice at odds with a careful discernment of the particular situations that the divorced and civilly remarried find themselves in. On the contrary, the invitation to refrain from communion, in the context of genuinely accompanying a couple, can and should be the very *fruit* of sound pastoral discernment. By acting in this way:

The Church professes her own fidelity to Christ and to His truth. At the same time she shows motherly concern for these children of hers, especially those who, through no fault of their own, have been abandoned by their legitimate partner. With firm confidence she believes that those who have rejected the Lord's command and are still living in this state will be able to obtain from God the grace of conversion and salvation, provided that they have persevered in prayer, penance and charity. (*Familiaris Consortio* §84) N&V