Teaching Guide

Designed for Professors and Students of Law, Feminist Theory, and Sexual and Social Ethics

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** Suggested Supplemental Reading:

Erika Bachiochi, "Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights," *Harvard Journal of Law & Public Policy* (Summer, 2011).

**Suggested Supplemental Reading Material:

1. Maggie Gallagher, "Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?" *Notre Dame Journal of Law, Ethics and Public Policy* (2004).

2. Helen Alvaré, "An Anthropology for the Family Law of Indis/solubility," *Ave Maria Law Review* (2006).

Preface

Background: Why Study Women, Sex, & the Church*?*

Academic feminist theory is marked by several significant strains of feminist thought. Those taught or engaged in most college and law school classes on the topic include: liberal or "formal equality" feminism; radical or "dominance" feminism; socialist or Marxist feminism; relational or "difference," "care," or "dependency" feminism; anti-essentialist feminism; critical-race feminism; post-modern feminism; pragmatic feminism; "third-wave" feminism; and lesbian and queer theory.[1] Each perspective provides a philosophical or ideological framework within which to analyze gender relations, reproduction, family, work, poverty, and a whole host of other modern-day issues that affect women in a special or particular way.

Perennially absent from the list of feminist perspectives is that represented by women of faith, specifically those whose scholarship self-consciously concerns itself with the full flourishing of women in society, even as it rejects many of secular feminism's central tenets. Secular feminists, for their part, have generally taken a rather hostile view toward Christianity, and Catholicism in particular, for the latter's patriarchal ecclesial structure, as well its teachings on sexuality, marriage, and abortion. Indeed, feminists *within* the Christian tradition (e.g., feminist theologians) have often not hesitated to make use of one or another strain of secular feminist theory to criticize Christian (and especially Catholic) structures, norms, and teachings.

However, over the last decade, a body of literature has developed from within the vast Catholic intellectual tradition that seeks to engage secular feminist perspectives on precisely those issues in which secular feminists take most interest: relationships between men and women, sexuality and reproduction, marriage, family, and work. These "new Catholic feminists" have begun to develop an intellectually robust set of non-theological arguments that remain faithful to Catholic teaching while focusing, as a matter of priority, on the full flourishing of women.

[1] This list was compiled from feminist perspectives discussed in the following law casebooks: Cynthia Grant Bowman, et al., *Feminist Jurisprudence: Cases and Materials* (West: Fourth Edition); Katharine T. Bartlett and Deborah L. Rhode, *Gender and Law: Theory, Doctrine, Commentary* (Aspen Publishers: Fifth Edition); Barbara Allen Babcock, et al., *Sex Discrimination and the Law: History, Practice, and Theory* (Little, Brown and Company: Second Edition).

Women, Sex, & the Church: A Case for Catholic Teaching (Pauline Books & Media, 2010) [hereinafter WSC] presents such non-theological arguments, relying on data from the medical and social sciences to corroborate its claim that Catholic perspectives on abortion, sex, marriage, reproductive technologies, contraception, and work contribute to the full flourishing of women in a way that secular feminist perspectives fail to. The eight Catholic scholars who write in this book offer an alternative viewpoint that sometimes corroborates, and often challenges, widespread secular feminist views about each of these topics. This perspective would enrich any law school or college classroom engaging feminist theory.

The Purpose & Methods of this Teaching Guide

This Teaching Guide to WSC was commissioned by the Terrence J. Murphy Institute for Catholic Thought, Law & Public Policy, whose mission includes developing "curricular resources for relating law and the Catholic tradition in the classroom." The Guide's purpose is to place the topics covered by WSC (i.e., abortion, marriage, sex, contraception, reproductive technologies, work/family balance, and social justice) in their respective legal contexts. The Guide draws especially upon the work of "new Catholic feminist" legal scholars who have engaged these topics in the law journals. Key law review articles are thus suggested throughout for more intensive study. Though the Guide will certainly assist college professors and students as they study WSC in classes dedicated to topics as diverse as Catholic (or Christian) sexual ethics and feminist theory, law or pre-law feminist jurisprudence courses will especially benefit.

The chapters in this Guide track the topics from the book chapters, offering a distinctively new Catholic feminist *legal* perspective on each of them. Some topics, such as abortion and marriage, lend themselves to such study quite readily. As matters involving the state's putative interest in the protection of vulnerable children (born and unborn), these are issues are heavily debated within the legal (and political) community. Other topics, such as non-marital sex and contraception, are currently understood (even from the Catholic perspective) as moral rather than properly legal issues. Still, insofar as they intersect with legal themes such as freedom, consent, the equality of and relationship between the sexes, abortion, cohabitation, and marriage, legal scholars have taken a keen interest in them. A final topic covered in WSC itself, the Catholic priesthood, receives no attention in the Guide at all. Though the topic certainly bears studying, it presents an intra-Catholic issue outside the scope of the law.

The Guide is intended for academic study, and so engages the topics covered from a theoretical, rather than practical or political, perspective. Though particular philosophical commitments are advocated, the Guide itself advocates no particular legislative proposals, even as it urges greater regulation in some areas (e.g., reproductive technologies) and attempts to

shore up some misinformation in others (e.g., common law history of abortion).

The Guide was prepared with reference to three standard casebooks on feminist legal theory: Cynthia Grant Bowman, et al., *Feminist Jurisprudence: Cases and Materials* (West: Fourth Edition) [FJ]; Katharine T. Bartlett and Deborah L. Rhode, *Gender and Law: Theory, Doctrine, Commentary* (Aspen Publishers: Fifth Edition) [G&L]; Barbara Allen Babcock, et al., *Sex Discrimination and the Law: History, Practice, and Theory* (Little, Brown and Company: Second Edition) [SD].

The Guide often offers new Catholic feminist perspectives on the issues raised in these textbooks (e.g., the benefits of marriage to women), or fills in critical sources of information or argumentation lacking in them (e.g., historical and current pro-life feminist arguments).

The following table provides suggestions for which sections of the three reference casebooks might be profitably supplemented with chapters of WSC.

WSC Chapter(s)	FJ pages	GL pages	SD pages
Intro. & Chapter 1 (General Theory)	Chapter 3 OR 132-150	Background for Introductory Class; OR 435-453	Background for Introductory Class OR 323--412
Chapter 2 (Abortion)	423-493	582-618	956-1071
Chapter 4 (Marriage)	548-653	229-246; 378-400	1173-1215
Chapters 3, 5 & Conclusion (pp. 179-185) (Non-Marital Sex and Reproduction)	403-422 OR 293-400	576-582 OR 519-579	927-955 OR 1367-1493
Chapter 6 (Reproductive Technologies)	532-547	618-634	1086-1157
Chapter 8 & Conclusion (pp. 185-192) (Work/Family Balance)	654-729; 1007-1025	152-183; 454-467	415-578

Study questions are offered at the end of each chapter of this Guide. For more general discussion questions, visit http://erika.bachiochi.com/docs/StudyGuide_Women_Sex_and-the-Church.pdf.

Chapter 1: Articulating a New Catholic Feminist Legal Theory [WSC, Intro, & Chapter 1]

I. Introduction

Inspired by Pope John Paul II's *Mulieris Dignitatem* ("On the Dignity and Vocation of Women") (1988) and his *Letter to Women* (1995), Catholic intellectuals (especially theologians, philosophers, and legal scholars) have spent the last two decades seeking to articulate a "new" Catholic feminism. Unsatisfied with both mainstream liberal feminism and the strain of scholarly Catholic feminism that has approached Church teaching with more skepticism than it has secular feminist claims, a number of Catholic women have sought to articulate a Catholic feminist perspective that is both faithful to magisterial teachings of the Church and thoroughly pro-woman. These thinkers have often referred to themselves as "new Catholic feminists," in reference to the charge issued by Pope John Paul II in ¶ 99 of *Evangelium Vitae*:

> In transforming culture so that it supports life, women occupy a place, in thought and action, which is unique and decisive. It depends on them to promote a 'new feminism' which rejects the temptation of imitating models of 'male domination,' in order to acknowledge and affirm the true genius of women in every aspect of the life of society, and overcome all discrimination, violence and exploitation.

New Catholic feminists dispute many of the philosophical (and political) perspectives of secular feminists, but share an essential commitment to the full flourishing of women in society. Feminist theories differ, suggests Catholic legal scholar Teresa Stanton Collett, in their respective answers to the perennial feminist question: whether "men and women are essentially the same or essentially different, and where differences exist (whether essential or individual), how [such] differences [ought to] be accounted for in law and society?"[2] Feminism in its various strains is unified, Collett continues, by "a belief that the present social order has not justly accounted for whatever differences exist."[3]

Critical, then, to the divergent answers to these questions presented *within* secular

2 Teresa Stanton Collett, "Independence or Interdependence? A Christian Response to Liberal Feminism," in *Christian Perspectives on Legal Thought*, ed. Michael W. McConnell et al. (Yale University Press, 2001), 179.

3 Ibid.

feminism and *between* secular feminism and "new Catholic feminism" are the divergent anthropological commitments (i.e., philosophical views of the human person) that each perspective takes.

II. New Catholic Feminism's Philosophical Commitments

Catholic scholars who seek to articulate or work within the emerging perspective of "new Catholic feminism" are surely not of one mind on each and every philosophical, legal, sociological, or economic question. But it is fair to say that fundamental to the new Catholic feminist perspective as a whole is its faithfulness to the Catholic anthropological view that

1) women and men share an equal dignity as created by God,

2) such an equality is based in a philosophically rigorous view of the complementarity of the sexes, and

3) human beings are by nature social beings whose happiness is derived not in their autonomous detachment from other human beings, but in their interdependence with and self-giving toward them.

These beliefs are core Catholic principles, and therefore fundamental to the new *Catholic* feminist approach.

Professor Collett speaks for such an approach as a whole when she writes that "authentic equality of the sexes must be founded upon personalism and complementarity, rather than the exaggerated individualism that appears to lie at the heart of contemporary liberal feminism."[4]

In WSC chapter 1, Catholic philosopher Laura Garcia provides an accessible theoretical differentiation between such secular (especially liberal) feminist tendencies toward "exaggerated individualism" and the Catholic view of "equality in difference." Garcia also distinguishes the Catholic view of freedom based upon human interdependence and sociality from liberal feminist

4 Ibid., 186. The term "personalism" here refers to the philosophical school of thought appropriated and then developed by Pope John Paul II. First enunciated in *Love and Responsibility*, he wrote that the "the personalistic norm" was defined thus: "This norm, in its negative aspect, states that the person is the kind of good which does not admit of use and cannot be treated as an object of use and as such the means to an end. In its positive form the personalistic norm confirms this: the person is a good towards which the only proper and adequate attitude is love." Karol Wojtyla, *Love and Responsibility* (Ignatius Press, 1993), 41. The Holy Father reiterated this foundational Christian principle throughout his pontificate, often quoting *Gaudium et spes*, ch. 24 "man...cannot fully find himself except through a sincere gift of himself."

views of freedom as autonomy. She then describes what she takes to be the divergent views of human happiness that underlie the respective theories of equality and freedom.

III. New Catholic Feminist Legal Theory

If new Catholic feminist theory is itself still relatively young, new Catholic feminist *legal* theory is in its infancy, with only a handful of Catholic legal thinkers contributing scholarship toward its development. But it only makes sense that a new Catholic feminist legal theory would emerge. After all, the philosophical concepts underlying the disputes within feminism itself—equality, liberty, and dignity--are fundamentally legal concepts. How a feminist theory defines these terms necessarily contributes to its views about the common good, the political order, issues in constitutional law, and beyond. So though comparatively little has been published toward this end, it is possible to begin to articulate the contours of such a theory.

A. Similarities with Relational Feminism

Although new Catholic feminist legal theory is a newly emerging perspective, it is possible to state with some confidence that such a theory is critical both of liberal feminism's normative commitment to autonomy and of radical feminism's preoccupation with power structures. As a perspective that is rooted in the Catholic tradition and especially John Paul II's personalist approach, new Catholic legal feminism would instead prioritize women's well-being and happiness, thus agreeing with relational feminist legal scholar Robin West's criticisms of these other approaches:

> *[L]iberal-legal* feminist theorists—true to their liberalism—want women to have more choices, and...*radical-legal* feminists theorists—true to their radicalism—want women to have more power. Both models direct our critical attention *outward*...Neither…have committed themselves to the task of determining the measure of women's happiness or suffering...[neither] aim for happiness or well-being *directly*.[5]

Surely this does not mean that new Catholic feminist voices would fail to join liberal and radical (and relational) feminism in criticizing political and legal structures which systematically deny women choices that are open to men or that institutionalize unequal distributions of power, for otherwise it would be inaccurate to consider itself feminist. But such criticism would be

5 Robin West, "The Difference in Women's Hedonic Lives," *Wisconsin Women's Law Journal* 15 (2000): 155-6 (italics in original).

grounded in prior views about, among other things, the nature of man and woman as equal in dignity, rather than in a tendency to view autonomy or power as fundamental categories of analysis. Again, most new Catholic feminists would likely agree with relational feminist Mary Becker: "Relational equality has a different focus [than equal treatment and power] of working for human happiness for women (and men)..."[6] Though a commitment to equality is an essential component of any feminist legal theory, both relational and Catholic legal feminism seek to articulate a gender equality that is consistent, not with the values traditionally espoused by male-oriented ways of thinking, but with women's lived experience.

Thus, most new Catholic feminists are far more comfortable aligning themselves with care or relational feminists who appreciate gender differences and whose strong commitment to the re-evaluation of "care work" has inspired some consensus among representatives of each group. Just as relational feminists view human beings as embedded in relationships of care and reciprocity over their lifetimes (as sometimes dependents, sometimes care-givers, and sometimes providers, in relational feminist philosopher Eva Kittay's version[7]), new Catholic feminists, as Catholics, understand such human interdependence as essential to their normative assessment that human beings flourish when they generously give of themselves to others in love. Both kinds of feminists view women as more predisposed to this relational quality in human beings, as evidenced by their unique capacity for childbearing, as well as their historical (and present-day) tendency to disproportionately care for infants, young children, and the aged and infirm.

New Catholic feminist legal scholar Elizabeth Schiltz writes that in coining the term the "feminine genius," the late Pope John Paul II was pointing to this "unique capacity [women have] for developing a special sensitivity to the fact that humans exist to be loved...that each and every human is entrusted to each and every other human being..."[8] Neither relational nor new Catholic

6 Mary Becker, "Towards a Substantive Feminism" (1999), quoted in *Feminist Jurisprudence*, 144.

7 Eva Feder Kittay, "Searching for an Overlapping Consensus: A Secular Care Ethics Feminist Responds to Religious Feminists," *University of St. Thomas Law Journal* 4 (2007): 480.

8 Elizabeth Schiltz, "West, MacIntyre and Wojtyla: Pope John Paul II's Contribution to the Development of a Dependency-based Theory of Justice," *Journal of Catholic Legal Studies* 45 (2007): 401, referencing John Paul II, *Mulieris Dignitatem,* n. 30), [hereinafter "West, MacIntyre and Wojtyla"] The relevant portion of *Mulieris Dignitatem* n. 30 reads: "In our own time, the successes of science and technology make it possible to attain material well-being to a degree hitherto unknown. While this favors some, it pushes others to the edges of society. In this way, unilateral progress can also lead to a gradual *loss of sensitivity for man, that is, for what is essentially human.* In this sense, our time in particular *awaits the manifestation* of that 'genius' which belongs to women, and which can ensure sensitivity for human beings in every circumstance: because they are human! - and because 'the greatest of these is love' (cf. 1*Cor* 13:13)."

feminists see this "humanizing" capacity for care as a quality only women exhibit, or should exhibit. Rather, because human beings are dependents, care-givers, or providers at various stages of their lives, it is a human quality that is essential to justice in any decent society. As such, both relational and new Catholic feminist legal theorists share a commitment to the view that care work, disproportionately undertaken by women, ought to be better recognized, supported, and potentially even remunerated. WSC chapter 8 (and Guide chapter 6) takes up the question of the legal and cultural recognition of care work from a new Catholic feminist perspective.

B. Differences with Relational Feminism

1. Abortion: Grounding Human Dignity

Such similarities in many of the philosophical commitments of relational and new Catholic feminists has led some within both liberal (pro-choice) feminist and pro-life feminist circles to question relational feminists' commitment to abortion rights. In an article published in the *Harvard Journal of Law & Public Policy* in Summer 2011, Erika Bachiochi writes that "[a]bortion advocates skeptical of relational feminism have noted that so-called 'care feminists,' like [Robin] West and Carol Gilligan, for instance, are unable to satisfactorily ground their support for abortion without abandoning their philosophical commitment to an 'ethics of care.'"[9] After all, with few exceptions, justifications for abortion from a feminist perspective have been based on bodily and decisional autonomy arguments of which relational feminists tend to be critical.

This striking distinction in viewpoint between relational and new Catholic feminists concerning abortion may be due, in part, to how they ground their respective views of human dignity. With Catholic feminists, most relational feminists tend to be skeptical of the liberal (i.e., Kantian) tendency to ground dignity in the capacity of the human being to make rational choices since, as Catholic legal scholar Mary Ann Glendon writes, "[such an] understanding has ominous implications for persons of diminished capacity."[10] But an alternative philosophical foundation upon which both types of feminists agree is not necessarily forthcoming.

9 Erika Bachiochi, "Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights," *Harvard Journal of Law & Public Policy* 34 (2011): 935. See, e.g., Pamela S. Karlan and Daniel R. Ortiz, "In a Diffident Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda," *Northwestern University Law Review* 87 (1992-3): 882-3.

10 Mary Ann Glendon, "The Bearable Lightness of Dignity," *First Things*, May 2011. http://www.firstthings.com/article/2011/04/the-bearable-lightness-of-dignity.

New Catholic feminists understand human dignity as *given*, because it is grounded in their belief that human beings are made in the image and likeness of God. This quality of givenness imposes an obligation upon both caretakers and society at large to protect the dignity of every human being, regardless of their developmental capacity or dependency. On the other hand, most secular relational feminists tend to view dignity as *ascribed*, that is, something determined by the community: "When we recognize another as having human dignity, we recognize that this is someone that another valued enough to provide the care required to survive—that valuing, I believe, is what we honor as we *ascribe* dignity to person."[11] If dignity is ascribed or determined by the community, rather than given by nature, it is far easier to determine that some human beings are not worthy of such ascription, perhaps explaining the differences in viewpoint about abortion.

2. Marriage and Family:

Though relational feminists and new Catholic feminists are both committed to high quality care-giving of dependents, their prior philosophical commitments engender disagreements about the capacity of same-sex and cohabiting (non-married) heterosexual care-givers to adequately care for dependent children. This fundamental disagreement about the merit of such "diverse family forms" leads Catholic legal scholar Susan Stabile to be skeptical about the capacity for "secular feminists to dialogue with Catholic feminists."[12] While relational feminists want to focus not on the marital status of the caregivers, but on "units of dependency relations"[13] or the "vertical" dependency relationship between caregiver and child, new Catholic feminists maintain the Catholic view that dependent children deserve to be raised, if at all possible, by their married biological mother and father. (Arguments for this proposition are taken up in WSC chapter 4, supplemented by material in this manual.)

Putting aside the relative merits of each claim at this juncture, two theoretical points shed light on the nature of this disagreement:

a. <u>Priorities in care-giving</u>: Relational feminists tend to "construct [their theories] from the perspective of the person giving the care,"[14] ensuring that the caregiver is herself adequately

11 Kittay, 488 (italics mine).

12 Susan J. Stabile, "The Challenges of Opening a Dialogue between Catholic and Secular Feminist Legal Theorists," *Journal of Catholic Legal Studies* 48 (2009): 38.

13 Kittay, 484.

14 Schiltz, "West, MacIntyre and Wojtyla," 393.

cared for--by society. This priority of focus may be due to the fact that relational feminists are hesitant to make specific demands upon the women who traditionally undertake such care-giving, since for too long "they have had little say in that demand...[keeping them] in a subordinate position where their well-being counted for less than those whom they served."[15] For relational feminists, thus, of equal concern to the quality of care the dependent child receives is society's "recognition of *its* [society's] responsibility to ensure that this unit [of dependency relations] is enabled to give, at minimum, adequate care."[16] Relational feminists prioritize "legislation that helps to ensure that women (or men doing care work) are not called upon to forego their own well-being as they tend to another..."[17]

While new Catholic feminists would agree that both the community of the family and the community at large must take pains to protect against "exploitative self-sacrifice"[18] on the part of the caregiver, ensuring she has the care she needs to nurture her dependents, most new Catholic feminists would likely not be so hesitant about prioritizing the needs of the dependent child over those of the care-giving adult. Therefore, for all the reasons laid out in chapter 3 of this Guide and WSC chapter 4, new Catholic feminists would want to call upon all feminists to ensure that families are structured according to the needs of the young, even if at times those needs may be at the cost of the autonomy or desires of care-giving adults.

b. Complementarity: Fundamental to the Catholic view that children deserve to be raised by their own mother and father (if possible) is the underlying belief that women and men each bring something unique to the parenting of their children, because women and men are both different and complementary. Professor Garcia makes a more than adequate case for sexual difference in WSC chapter 1, but something more should be said concerning the notion of sexual complementarity, a perspective central to new Catholic feminist legal thought.

Just as the work of Carol Gilligan was foundational to much of the development of a "care ethic" in feminism, the work of Sister Prudence Allen has been foundational the development of the idea of "integral complementarity" in much new Catholic feminist theory. Some often mistakenly assume that by complementarity, new Catholic feminists are articulating what Allen would call "fractional complementarity," where male and female are understood to

15 Kittay, 479.

16 Ibid, 483 (italics mine).

17 Ibid., 479.

18 Ibid., 487.

be "significantly different, but each provides only a fraction of one whole person: woman [provides] half of the mind's operations (i.e., intuition, sensation, or particular judgments) and man the other half (i.e., reason or universal judgments)."[19] Professor of Law Cathleen Kaveny articulates the dangers inherent in adhering to such a theory:

> In the abstract, the notion of gender "complementarity" embraced by John Paul II seems (and is) very attractive. Gender complementarity emphasizes that men and women are different but that they need each other. Frequently (though more frequently in the writings of the new feminists than in papal writings), it goes one step further, attempting to define a set of corresponding and *mutually exclusive* "masculine" and "feminine" traits.[20]

Allen instead articulates a more robust theory of complementarity which she calls "integral complementarity." In this view, male and female are each whole persons unto themselves, and "when they enter into interpersonal relations, the effect is synergistic; something more happens in relationship than parts of a person adding up to one person; something new is generated."[21]

Philosopher Sarah Borden has also made a significant contribution to this line of thought with the use of Aristotelian categories to make key philosophical distinctions between sexual equality and sexual difference. She writes:

> As embodied and developing in certain kinds of biological matter, the individual is female; when a human form develops in other material combinations, the individual is male. *Qua form* or formal principle, all human beings are the same: human. *Qua* biological matter, however, we have a sex, and our sex is determined by our material principle.
>
> We are not human souls contained within a sexed body, but sexed human beings. Further, because our differences lie, not on the side of form, but of matter, our differences do not undermine our equality but, rather, point to differing conditions for the development of our common human capacities.
>
> [O]ur differing biological matter offers to us differing *influences* for the development of our common capacities. Thus, an Aristotelian could say that

19 Prudence Allen, "Man-Woman Complementarity," *Logos* 9 (2006): 90.

20 Cathleen Kaveny, "What Women Want: Buffy, the Pope & the New Feminists," *Commonweal Magazine,* November 18, 2003 (italics mine).

21 Ibid., 95.

> women's common biological matter, differing from men's biological matter, offers different *incentives* for women's development in contrast to men's. Biological matter does not determine how the human capacities are developed, but sexually relevant biological matter may offer a motivation making it intelligible why many women tend to develop certain of the human traits more quickly than many men, and vice versa. If this is right, then we can distinguish certain emphases among the human traits and describe them as more feminine and others as more masculine.
>
> The claim is not that our material conditions *qua female*, or *qua male*, determine the pattern of our human development but, rather, that they offer influences in combination with environmental and cultural matter encouraging our human development in certain ways rather than others.[22]

Though new Catholic feminists agree on the notion of complementarity and sexual difference, disagreements abound within this emerging perspective about the proper way to conceive of such differences (much as they do within secular relational feminism).

Discussion Questions:

1. Discuss the Catholic view of "human nature" or "human dignity" as foundational for the equality between men and women. What are alternative, feminist explanations for equal rights between men and women? (See WSC pg. 17, 20-21)

2. Does a view of equality based upon achievement or attributes, rather than the moral principle of a shared human nature, undermine secular feminist arguments? Does the achievement or attribute-based view of equality end up denigrating relational values more often associated with women? (See WSC pg. 18-19, 21)

3. Define the view of freedom as *autonomy*. What is the view of happiness that underlies this view? Define the view of freedom as *the power to choose the good*, or alternatively, *the power to love*. What is the view of happiness that underlies this view? Why has this view fallen into disrepute? (See WSC pg. 27-28)

4. Try to define the differences between men and women. Do all women share certain attributes? All men? Is there a way to make intelligent distinctions without alienating those of either sex who do not share such attributes? Does "difference" necessitate "inequality"? Where does "difference" originate (is it social, biological, or ontological)? Discuss both historical and current views. (See WSC pg. 19, 21-25)

22 Sarah Borden, "An Aristotelian Account of Sex and Gender," unpublished book chapter (italics in original).

Chapter 2: Abortion [WSC, Chapter 2]

I. Introduction

With contraception, abortion has been regarded as the *sine qua non* of the mainstream feminist movement since the 1960s and 70s. To take a stand against abortion, as pro-life feminists and new Catholic feminists do, is popularly thought to undermine one's ability to call oneself a "feminist." The assumption that a feminist must be pro-choice is, however, a recent historical phenomenon. During the first wave of feminism, represented by the movement for female suffrage in the 19th century, feminist leaders were, without exception, against abortion. These feminists regarded abortion as morally reprehensible both because it took the life of the dependent child in the womb *and* because it violated women *as* women, those uniquely endowed with the capacity to bear children. More recently, contemporary pro-life feminists have begun to reclaim some of the arguments of the earliest feminists, and supplement them with the insights of intervening decades of development of feminist theory, as well as scientific and sociological data on the effects of the widespread availability of abortion.

WSC chapter 2 thus provides a valuable supplement to any feminist theory course by outlining the arguments of contemporary pro-life feminists; a recent law review article summarized below places such arguments in their modern-day *legal* context. Students would benefit from reading both the WSC chapter (for the new Catholic feminist perspective) and the law review article (for the secular pro-life feminist legal perspective). This section of the Guide fills in the pieces missing from those two sources in order to assist professors interested in offering a more complete picture of the controversial issue of abortion to their students.

II. Abortion History

The common law history of abortion law was central to the Court's decision in *Roe v. Wade*. (See *Roe v. Wade*, 410 U.S. 113, 132-3 "[T]he restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage...[they] are not of ancient or even of common law origin.") Yet the Roe Court relied almost exclusively on the historical account of Cyril Means, a law professor who also worked as general counsel for the National Abortion Rights Action League (NARAL). Alternative historical accounts, relying upon more extensive historical research, have recently questioned the veracity of several central historical claims relied upon by the Roe Court. For a book length treatment of the historical data, see Joseph Dellapenna, *Dispelling the Myths of Abortion History* (Carolina Academic Press, 2006); for an

article length treatment, see both Clarke Forsythe, "The Effective Enforcement of Abortion Law Before Roe v. Wade," in *The Silent Subject*, ed., Brad Stetson (Praeger, 1996); and appendices A & B in Benjamin Linton, "Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court," *St. Louis University Public Law Review* 13 (1993).Paul Benjamin Linton, 13 *St. Louis U. Pub L Rev* 15 (1993).

What follows is a brief survey of the historical accounts presented to the Court and historical evidence to the contrary:

1. Historical account presented to the Court: *The common law did not treat abortion as a crime, at least until quickening.*

New evidence: Common law sources indicate that abortion was considered a crime by the common law both before and after quickening—in both England and America. The cause for confusion in the historical account upon which the Roe Court relied was not the failure of the common law to enunciate the anti-abortion principle, but in the lack of effective enforcement of the crime at common law. Until the advent of medical science, authorities were often unable to legally determine whether first, a pregnancy existed before quickening (since signs of earlier pregnancy were at best ambiguous), and second, whether fetal demise was caused naturally or by abortion. "Quickening was thus an evidentiary distinction, not a moral one. Because of these evidentiary problems...and because homicide, at common law, was invariably a capital crime...judges and juries were reluctant to convict on uncertain evidence."[23] Thus, evidentiary issues rather than absence of law explain both the lack of prosecutions before 1840 and the rate of acquittal or conviction for lesser offenses in the years to follow.

2. Historical account presented to the Court: *Abortion was a common and generally accepted practice throughout history.*

New evidence: Due to both the ineffectiveness of abortion (i.e., there were no intrusive techniques) and the life-threatening danger inherent in the techniques that did exist, infanticide was far more prevalent than abortion in both practice and prosecution until well into the 19th century. Thus, abortion, though a common law crime, was rarely prosecuted (or, as explained above, was difficult to prove). As techniques improved and abortion became more widely used, statutes were passed: "By 1861, 70 percent of the American states...had adopted statutes. By 1895, abortion was clearly a serious crime in every state."[24] Between 1840-1880, most states

23 Forsythe, 182.

24 Dellapenna, 430.

abolished the quickening limitation by statute, based on developing medical understanding of fetal life, and prohibited abortion from conception.

3. Historical account presented to the Court: *Nineteenth century laws were enacted by the largely male medical profession both to perpetuate traditional roles for women and to quash competition by the largely female midwifery practice—but* not *to protect the life of the fetus.*

New evidence: Recent scholarship has revealed that court decisions from forty states recognized that the 19th century statutes were passed to protect the life of the unborn child: "The unanimous sense of the legal and the general community was that abortion was a crime because it involved the killing of a child [the term used in most statutes]—if one could prove that the child was alive at the time of the abortive act and died as a result."[25]

Women were considered the second victims of abortion, and thus, "no woman has ever been convicted in the U.S. of the crime of abortion..."[26] Rather, abortion practitioners were always those prosecuted for abortion. (Similarly, few pro-life advocates today would suggest that women ought to be incarcerated for procuring abortion: "A parallel can be found, perhaps, in the disinclination to charge girls as accessories in the crime of statutory rape."[27])

Support for the laws did come from within the medical community, but also from the 19th century feminist movement which was strongly and unambiguously anti-abortion. The Historians' Amicus Brief filed with the Court in *Casey v. Planned Parenthood* (1992) (excerpted in *Feminist Jurisprudence*) casually dismisses early feminists' principled opposition to abortion, instead opining that "[o]pposition to abortion and contraception...can only be understood as a reaction to the...anxieties created by women's challenges to their historic roles of silence and subservience."[28]

25 Ibid., 237.

26 Ibid., 301.

27 Forsythe, 184.

28 *Feminist Jurisprudence*, 427.

III. The Views of Early American Feminists & Today's Pro-Life Feminists

A. "Child murder"

Feminist Jurisprudence, one of the three reference casebooks in this Guide, appropriately excerpts an amicus brief of Feminists for Life (on pg. 428 *et seq.*).[29] The brief notes that "early feminists did not oppose abortion out of adherence to social norms [but rather] understood that life begins at conception, and thus, induced abortion is the killing of that young life."[30] For this reason, these pro-life feminists referred to abortion as "child-murder" and "ante-natal murder." Dozens of quotes such as these can be found on the Feminists for Life website at http://feministsforlife.com/history/index.htm.

B. Calls for Male Chastity

Calls for male chastity went hand-in-hand with opposition to abortion among early American feminists; once one appreciates the inestimable value of the unborn child, perhaps one more readily recognizes the reproductive potentialities of sexual intercourse, and so grants far fewer allowances to often relentless male sexual desire. As pro-life feminist Erika Bachiochi writes in the context of the abortion issue:

> A sexual ethic that denies that women have far more at stake in sexual intercourse than men utterly neglects the authentic sexual needs of women... Women are likely to exercise restraint in their sexual activity, and ask that their partners do the same, when they recognize that the act in which they seek to engage has the potential to make them a mother, and their partner a father.[31]

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29 FJ also includes a (brief) section on 'Feminism and Opposition to Abortion", which includes few paragraphs from a pro-life article by Elizabeth Fox Genovese (pp. 486-493). Unfortunately, this excerpt is followed by excerpts from an article by Kristin Luker that is replete with dismissive characterizations of pro-life women such as the following: ". . . pro-life women have *always* valued family roles very highly and have arranged their lives accordingly. They did not acquire high-level educational and occupational skills, for example, because they married, and they married because their values suggested that this would be the most satisfying life open to them." G&L contains only a brief reference to the arguments of Feminists for Life (p. 607), while SD does not include any discussion of such arguments. One general primer on feminist legal theory (Nancy Levit & Robert R.M. Verchick, *Feminist Legal Theory: A Primer* (NYU Press 2006) contains a fair (if brief) discussion of pro-life feminism, including the opposition to abortion by feminist pioneers Elizabeth Cady Stanton and Susan B. Anthony (pp. 143-144).

30 *Feminist Jurisprudence*, 428.

31 Erika Bachiochi, "Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights," *Harvard Journal of Law & Public Policy* 34 (2011): 947.

Thus, whenever secular feminists decry the so-called "double standard" that looks aghast at female sexual escapades while ignoring the same behavior in men, most new Catholic feminists would probably agree, but not for the same reasons. Rather than encourage women to mimic male sexual license, new Catholic feminists would likely follow their feminist foremothers, and call upon men to exert self-control, and upon society to extol male chastity. Early American feminist Sarah Norton wrote: "Perhaps there will come a time...when the unchastity in men will be placed on an equality with the unchastity of women, and when the right of the unborn will not be denied or interfered with..."[32] "Votes for women and chastity for men" was a slogan coined by English suffragist Christable Pankhurst.[33]

C. A Critique of Popular Equality Arguments for Abortion

Pro-life feminism has likewise been ignored in legal scholarship, until recently, when the *Harvard Journal of Law & Public Policy* published a lengthy article entitled "Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights" by Erika Bachiochi in 2011. The article critiques popular secular feminist equality arguments for abortion rights, from both a constitutional perspective (i.e., why abortion ought not be protected by the Equal Protection Clause) and a philosophical perspective (i.e., why restrictions on abortion neither represent a deprivation of equal citizenship, equal social status, women's reproductive autonomy, nor perpetuate "separate spheres" for men and women). The article also confronts the "self-defense" and "good samaritan" arguments, explores the affirmative duty of care mothers have for their unborn children, calls for far greater paternal responsibility for unborn—and born—human life, and outlines the contours of a pro-woman sexuality. Thus, much that is covered from a pro-choice perspective in legal textbooks such as *Feminist Jurisprudence* is given a pro-life rebuttal in this article. (N.B.: The "tough cases" of rape/incest, the life of the mother, and fetal abnormalities are discussed in WSC, Chapter 2.)

IV. *Doe v. Bolton* and the Oft-Mentioned "Health" Exception

In pro-choice popular and scholarly accounts of *Roe v. Wade* and its progeny, mention is rarely made of *Doe v. Bolton*, the case decided the same day as *Roe* in 1973. Doe creates the "health exception" the Court inscribed into its abortion jurisprudence and explains why abortion,

32 Quoted in Dellapenna, 20.

33 "Women, Suffrage and Politics," *The Papers of Sylvia Pankhurst, 1882-1960*, Internationaal Instituut voor Sociale Geschiedenis, Amsterdam, available online at http://www.ampltd.co.uk/digital_guides/women_suffrage_and_politics_sylvia_pankhurst/introduction-to-sylvia-pankhurst.aspx

though more apt to be subject to regulation after *Casey* (e.g., waiting periods, informed consent, and parental notification), is still legal through all nine months of pregnancy. Harvard Law Professor Mary Ann Glendon explains the situation thus:

> It is something of a puzzle why the public has never really grasped how extreme the legal treatment of abortion is in the United States....First, journalists and other opinion leaders—even Justice O'Connor []—have persisted in mis-describing *Roe v. Wade* as a case that permits abortion in the first trimester of pregnancy, but permits regulation thereafter. That was a flagrant mis-statement of *Roe* which permitted no regulation at all in the interest of protecting the unborn child for the first two trimesters. Moreover, when *Roe* is read with *Doe*, as the Court explicitly said it should be, third trimester restrictions in favor of the child were effectively ruled out as well—for *Roe*'s dictum that such restrictions might be permissible if they did not interfere with the mother's health was negated by *Doe*'s definition of "health" as "well-being"....It was *Doe* [not Roe] that set the U.S. on a far more extreme course than that taken in most other liberal democracies...(Even Sweden, the poster country for women's equality and liberal attitudes toward human sexuality, strictly regulates abortion after the eighteenth week of pregnancy.)[34]

To better understand Glendon's critique, the pertinent language from *Roe* and *Doe* follows:

The health exception enunciated in Roe: "For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother*."[35]

The health exception defined as "well-being" in Doe: "[T]he medical judgment [of the attending physician] may be exercised *in the light of all factors*--physical, emotional, psychological, familial, and the woman's age --*relevant to the wellbeing of the patient*. All these factors may relate to health."[36]

V. The Scientific and Moral Status of Unborn Life

WSC chapter 2 adequately, if briefly, describes current scientific understandings of

34 Mary Ann Glendon, "From Culture Wars to Building a Culture of Life" in *The Cost of "Choice": Women Evaluate the Impact of Abortion*, ed. Erika Bachiochi (2004), 4-6.

35 *Roe v. Wade*, 410 U.S. 164-5 (1973). (italics mine).

36 *Doe v. Bolton*, 410 U.S. 192 (1973) (italics mine).

embryonic life, as well as the philosophical debate over personhood. It is, therefore, unnecessary to describe those here. Still, it is important to notice that of the feminist jurisprudence textbooks studied, none addresses the facts of embryology, scientific facts that are essential to the pro-life (and Catholic) perspective.

VI. How Many Women Died from Illegal Abortion Before Roe?

Again, WSC chapter 2 confronts this question head-on, but it ought to be noted that the false assumption that at least 5,000 women annually died from illegal abortion is still reported in law school textbooks without also offering evidence to the contrary (e.g., *Feminist Jurisprudence*, 463).

VII. Medical Studies Concerning Women's Health After Abortion

A. Current Data: Pro and Con

Chapter 2 in WSC summarizes the current medical data showing a negative impact on women's health after abortion. The claim that women's health is adversely affected has been strongly criticized, and a number of points not mentioned in the chapter would be of use here:

1. The data supporting an increased risk of placenta previa, pre-term birth, and low birth weight in subsequent pregnancies *are not controverted*, yet the data is scarcely known by the public [see WSC chapter 2].

2. The fact that abortion causes a woman to lose the protective effect of a full-term pregnancy, and that this delay of the first full-term pregnancy is a serious risk factor for breast cancer is also not controverted. Controversy exists over whether abortion itself causes breast cancer, a proposition that has been supported by scores of epidemiological studies, but has also been discredited by others. The mechanisms of breast physiology may provide the strongest evidence of the link between abortion and breast cancer. For a readable account of the evidence—from the studies and from physiology—for the link, see Angela Lanfranchi, "The Abortion-Breast Cancer Link" in *The Cost of "Choice,"* ed. Erika Bachiochi (2004).

3. Studies showing the increase in depressive symptoms, anxiety, drug and alcohol abuse, and suicide after abortion are growing in number, but the American Psychological Association rejects the view that *single* abortions may cause mental health problems. A recent meta-analysis of existing psychological literature of the mental health risks of abortion found significant methodological shortcomings with several of the studies

> denying mental health risks. The meta-analysis reported that according to objective scientific standards, current epidemiological literature, on the whole, indicates that "abortion is a statistically validated risk factor for the development of various psychological disorders." Substance abuse and suicidal behaviors were those most closely associated mental health risks, but anxiety and depression were also noted.[37]
>
> Since abortion is the single most common surgical procedure American women undergo, one hopes more and better studies will be conducted. In the meantime, in addition to the studies that do show psychological harm, anecdotal evidence of myriad women indicate that abortion has caused them such harm. In light of the mixed scientific data and anecdotal testimony, casebook authors of *Feminist Jurisprudence* appropriately ask: "How should feminists respond when scientific studies refute the lived experience of some women?"[38]

B. Jeannie Suk: Comparing Women's Trauma in Roe, Casey *and* Gonzales v. Carhart

Pro-choice law professor Jeannie Suk recently published a noteworthy article on abortion trauma in the *Columbia Law Review*. She writes,

> Abortion trauma is a notion with which those committed to abortion rights are deeply uncomfortable. To some, the idea that women might suffer from psychological harm that can trace to their abortions may be more alarming than the argument that abortion is murder. If the idea is indeed threatening, it is not merely because it revisits old sexism that we all know to be outmoded [which was Justice Ginsburg's argument in her *Carhart* dissent]. Rather it is because it resonates so profoundly with now common legal sensibilities of more recent vintage: feminist visions of women with bodies violated and minds traumatized.[39]

Suk argues that, while there are analytical distinctions that might be drawn, *Roe* and *Carhart* both recognize an important state interest in protecting women's mental health. The Court in *Roe* sought to protect women from the psychological harm that might result *due to bearing an unwanted child*, the Carhart Court to protect women from harm *abortion might cause them*. Feminists have long defended the merits of offering

37 Priscilla K. Coleman , "Abortion and Mental Health: Quantitative synthesis and analysis of research published 1995-2009," *The British Journal of Psychiatry* 199 (2011): 180-186.

38 *Feminist Jurisprudence*, 473.

39 Jeannie Suk, "The Trajectory of Trauma," *Columbia Law Review* 110 (2010): 1201.

evidence of women's trauma in legal disputes (e.g., in cases of rape, domestic violence, and unwanted pregnancy), yet "abortion trauma is not seen as a variant of the trauma that feminism has emphasized."[40]

VIII. Social Indicators of Familial and Cultural Health

Contrary to the claim both before *Roe* and since that abortion would improve the living conditions of children and their mothers, it is important to recognize that all of the social indicators of familial and cultural health have declined since the 1970s (e.g., the rate of children born out of wedlock, of child abuse, and of infanticide have all increased exponentially since the 1970s).[41] This is not to claim that abortion is the cause of these societal troubles, but it is a mistake to assume that abortion will eradicate "child unwantedness" and thus better the living conditions of children as a whole.

IX. Catholic Teaching on Abortion and Animus Toward Sex

Secular feminists often argue that opposition to abortion is one and the same as opposition to contraception, and that both speak of an underlying animus toward sex. The question is especially important for students considering the issues of abortion, contraception, and non-marital sex from a new Catholic feminist perspective since Catholics, unlike some pro-lifers, believe all three threaten the dignity of the human person, of marriage, and of the sexual act.

However, it is equally important to *distinguish between* the three from a Catholic perspective as well. More will be said to illuminate the pro-woman case for the unpopular Church teaching on contraception in chapter 4 in this Guide and WSC chapter 5, but suffice it to say here, the Church is not opposed to abortion *because of* its principled opposition to contraception or non-marital sex. The new Catholic feminist position concerning abortion, like that of the Church as an institution, regards abortion as morally reprehensible because in each abortion, the life of a unique, valuable, and dependent human being is terminated. The Catholic understanding that life begins at fertilization rests not on religious doctrine, but on scientific fact. It is this scientific fact, coupled with the Catholic view that every human life possesses an inviolable God-given dignity, that animates new Catholic feminist pro-life convictions—not their

40 Ibid., 1228.

41 See Forsythe, Clarke and Steven B. Presser, "The Tragic Failure of Roe v. Wade: Why Abortion Should be Returned to the States," *Texas Review of Law and Politics* 10 (2005): 126-136.

views about sex and contraception.

Discussion Questions:

1. Is abortion a religious issue? Why is or why isn't this question relevant to the law? (See WSC 38-40)

2. Are there differences between a human being and a human person? What do some philosophers claim such differences to be? Are these claims compelling? What is the legal significance of this question? (See WSC pgs. 38-40)

3. Describe the feminist arguments *for* abortion and contrast them with the feminist arguments *against* abortion. (See WSC pgs. 37, 41-45)

4. Do parents have duties to their born children but not their unborn children? Why the distinction? (See WSC pg. 52-53; see also Bachiochi, *Embodied Equality*, at 932-940).

5. Do you think that *Roe v. Wade* should have been decided differently? Argue pro and con.

Chapter 3- Marriage [WSC, Chapter 4]

I. Introduction

In recent years, the question of whether and how the law should regulate marriage has become increasingly more debated—and divisive—in light of the new movement to recognize same-sex marriage. Family law scholars who criticize the law's support for traditionally-defined (i.e., heterosexual, monogamous, indissoluble) marriage regard the institution as a creation of the state offering substantial legal and monetary benefits. Legally excluding same-sex or nonmarital cohabiting couples from such benefits appears to them an assault on equal protection rights, and even a mere pretense for bigotry. Yet principled accounts in support of marriage as a union between one man and one women, instituted primarily (though not exclusively) for the procreation and education of children, and thus the perpetuation of civilized society, are numerous. An eloquent statement of the view can be found in the report issued by the Institute for American Values and signed by numerous scholars entitled, *Marriage and the Law: A Statement of Principles*:

> As scholars and as citizens, we recognize a shared moral commitment to the basic human dignity of all our fellow citizens, black or white, straight or gay, married or unmarried, religious or non-religious, as well as the moral duty to care about the well-being of children in all family forms. But sympathy and fairness cannot blind us to the importance of the basic sexual facts that give rise to marriage in virtually every known society. The vast majority of human children are created through acts of passion between men and women. Connecting children to their mother and father requires a social and legal institution called marriage with sufficient power, weight and social support to influence the erotic behavior of young men and women.[42]

Monogamous, lifelong marriage is also a wealth-building institution which a vast body of scholarship shows provides numerous advantages to spouses, children, and society at large, advantages that flow from the nature of the marital union itself and that are therefore not shared by cohabiting couples. Indeed, the "retreat from marriage" lauded by many influential family law scholars has impacted poor, working-class, and minority populations the most, with

42 *Marriage and the Law: A Statement of Principles* can be found online at http://www.americanvalues.org/html/mlawstmnt2.html.

disproportionate numbers of such children born outside marriage. Economist Jennifer Roback Morse's account in WSC chapter 4 offers a readable survey of this data to corroborate the new Catholic feminist view that monogamous, life-long marriage is best for women, for children, and for society, and that its alternatives have proven especially harmful to the poor.

Rather than make a case against same-sex marriage per se, Roback-Morse's WSC chapter makes the case in favor of traditionally-defined marriage. A few key philosophical assumptions underlie this view, assumptions that underlie much of new Catholic feminist thinking, as mentioned in chapter 1 of this Guide:

1. Mothers and fathers are both essential to the upbringing of their children (even if research has not yet pinpointed, with precision, the specific qualities each brings to parenting[43]);

2. As social beings, solidarity within relationships yields happiness in the lives of individuals, families, and society at large;

3. Marriage is fundamentally tied to the procreation and education of children.

This chapter will mine leading law review articles and other sources to provide assistance in articulating these assumptions and the arguments that follow.

II. Defining Marriage

As Roback-Morse notes early on in her WSC chapter, defining marriage is a central theme in current debates about marriage. Maggie Gallagher's 2004 article in the *Notre Dame Journal of Law, Ethics and Public Policy*, "Rites, Rights, and Social Institutions: Why and How Should the Law Support Marriage?" provides a helpful delineation of how proponents and opponents of traditional marriage respectively define marriage. The article is short and readable, so if time permits, might also serve as a beneficial supplement for students. The following provides a summary of how Gallagher believes that marriage is viewed by the competing camps:

43 "Much remains that we do not know about the link between fathers and their children. Yet the first 'stage' of that work, that of establishing that fathers matter, is well advanced. The next stage, exploring the unique contributions of fathers as compared with mothers or other adults, remains less developed." David Eggebeen, "Do Fathers Matter Uniquely for Adolescent Well-being?" Center for Marriage and Families, Research Brief No. 14, October 2008, but see "The Secrets of Dads' Success: How Fathers' Teasing, Tickling, Wrestling Teach Kids to Whine Less and Be More Independent," *Wall Street Journal*, June 14, 2011

A. Proponents of Traditionally-defined Marriage:

1. Marriage is not merely a ceremonial rite, nor an individual right, but a social institution: "[T]he foundation of the family and of society, without which there would be neither civilization nor progress."[44]

2. "Marriage arises in every known society out of the need to manage the biological reality that sex between men and women produces children, the twin social realities that societies need babies in order to survive, and babies need mothers and fathers."[45]

3. Rights and duties between husband and wife and toward their mutual children must be publicly, not merely privately, defined. "[B]iological strangers must be joined in some way that produces a new generation of family ties strong enough to perform the basic functions families play in any given society."[46]

4. Other relationships (e.g., friendships, casual loves, political bonds, colleagues) are important and treasured; but only marriage has been singled out across cultures and generations for public support.

5. Why? Because societies depend on marriage for their continued existence. The following, quoted directly from Gallagher's article, explains the line of argument:

   a. "Only societies that reproduce survive."

   b. "Children do better when raised by their own two married parents." [see WSC chapter 4].

   c. "Marriage is key to integrating men into family life." [see below].

   d. "When parents do not get and stay married, their children are less likely to confine childbearing to marriage and to avoid divorce, creating a downward intergenerational cycle of family fragmentation." [see WSC chapter 4].

   e. "Whole communities suffer when marriage is no longer the normal, usual, and

44 *Maynard v. Hill*, 125 U.S. 190 (1888).

45 Gallagher, 232.

46 Ibid.

generally reliable way to raise children."[47]

6. In sum, "giving babies the mothers and fathers they need, so that society has the next generation *it* needs, is the fundamental *public* purpose of marriage."[48]

Gallagher contends that we need not return to the day of imposing criminal penalties regulating sexual conduct deemed threats to marriage (e.g., fornication, adultery) in order to articulate and uphold the social purpose of marriage law. Moreover, defining marriage in the law plays an essential educative and channeling function, by defining both its boundaries (contrasting it with other relationships) and its essential characteristics as a "permanent, faithful, parenting partnership, in which satisfying the intimacy and sexual needs of the adults is a goal, but not the entire substance of the relationship."[49]

Gallagher then offers principles and proposals as to how the state can support marriage which are treated more extensively in a 2004 report, written by Gallagher and co-sponsored by the National Fatherhood Initiative, the Institute for American Values, and the Institute for Marriage and Public Policy entitled, "Can Government Strengthen Marriage? Evidence from the Social Sciences." This study is downloadable at http://familyscholars.org/2004/01/01/can-government-strengthen-marriage/.

B. Opponents of Traditionally-defined Marriage:

1. By the 1980s, the courts had transformed their view of marriage to a form of individual self-expression, and increasingly viewed marriage not as a social institution, but as an individual right.

2. The state's place in supporting this individual marital right is in conferring certain material legal benefits.

3. Thus, preferring one form of union to another denies individuals equal protection of the laws (that is, equal access to a "bag of goods"). It follows that the law should abolish distinctions between cohabitation and marriage, and between heterosexual and homosexual marriage.

47 Ibid., 233.

48 Ibid.

49 Ibid., 237.

4. The underlying social institution that gives rise to legal benefits is not marriage, per se, but domestic partnership (whether between married or unmarried persons).

5. Marriage could thus be usefully split into two concepts, according to the American Law Institute (2002): marriage as a public, legal creation of the state which conveys certain benefits, and marriage as a private religious or symbolic ceremony.

Gallagher criticizes the view for, among other things, emphasizing the rights of adults over children, and undermining the norms of commitment intrinsic to the marital relationship.

III. Feminist Suspicion of Marriage

Catholic legal scholar Helen Alvaré rightly notices the deep suspicion many feminists feel about the institution of marriage. Even while some feminists have noted the inadequacy of the no-fault divorce regime to contend satisfactorily with women's tendency to sacrifice professional achievement to manage the care work of the family, suspicion of the institution of marriage itself still runs through the feminist legal literature (including the casebooks studied here). Alvaré insightfully notes the pervasive "tendency [among feminists] to conflate the concept of indissoluble marriage with the concept of 'traditional' breadwinner/homemaker marriage."[50] For new Catholic feminists, it is essential to disassociate traditional *inequalities* within marriage (e.g., concerning childcare and household responsibilities as well as decision-making authority) from the traditional *form* of marriage as exclusive and indissoluble. (N.B.: While Catholic teaching discourages divorce—and restricts remarriage without prior annulment—it also recognizes the necessity of civil divorce for both women and their children in some cases, e.g., desertion and abuse.)

Alvaré's response to marriage skeptics is quintessentially new Catholic feminist:

> Yet current, almost hyper-awareness of past inequities, combined with current sensitivities toward women's equality and legal safeguards, have vastly expanded women's horizons in U.S. society. It is widely accepted that *there is not, and need not logically or practically be, any necessary connection today between marriage and limited roles for women*...it is possible for marriage skeptics to avoid the drastic course of devaluing marriage itself, and pursue the course of assisting men, women, employers, and the state to achieve a fair work/family balance for both men and women. This is not an easy project, even given the likely long-term net

50 Helen Alvaré, "An Anthropology for the Family Law of Indis/solubility," *Ave Maria Law Review* 42 (2006): 540.

> benefits for employers and society. But it is a possible choice and an eminently worthwhile project, especially in light of all there is to gain for marriage, children, and society.[51]

Alvaré's article, *An Anthropology for the Family Law of Indis/solubility*, would also provide a fitting supplement from a new Catholic feminist *legal* perspective to Jennifer Roback Morse's WSC chapter on marriage—especially for law (and pre-law) students.

IV. Marriage Connects Children with Their Parents...

A....*Especially Their Fathers*

> The primary benefits of marriage for children...are not a set of legal incidents that the law can confer upon other family structures...The law of marriage protects children to the extent that it succeeds in getting men and women to have and raise their children together. Because women are connected to their children naturally, through the process of gestation and birth, marriage is especially important for effectively connecting children to their fathers, not only satisfying more children's longing for a loving father, but creating more equal distribution of parenting burdens between men and women.[52]

Though secular feminists have criticized marriage as an inherently patriarchal institution that institutes and perpetuates unequal roles for men and women, marriage actually creates far greater gender equality vis-a-vis childrearing than the alternatives. Marriage "wrestles with the problematic of fatherhood, the biologically based sexual asymmetry in which men and women jointly have sex, but women alone bear children."[53] While women are obligated to their children by the realities of gestation and birth, law and culture must act affirmatively to support men to assume their paternal duties. "[S]ociety [must] conspire to transform sperm donors into true lovers and good husbands, and thereby reliable fathers."[54] Thus, the goal of an authentically feminist vision of marriage from the perspective of new Catholic feminists would work to eliminate unjust inequities within marriage, as well as the violence and conflict that can threaten women

51 Ibid (italics mine).

52 Marriage and the Law, 7.

53 Ibid., 15.

54 Ibid., 24.

and children, while preserving the institution itself.

B. Married Fathers Invest More, Sharing the Duties of Parenthood with Children's Mothers

1. Married fathers are far more likely than non-marital cohabiting fathers to invest in their children.[55]

2. A father's relationship with his children is sometimes coterminous with his relationship with their mother. Divorced fathers invest *far less* than fathers married to their biological children's mother.[56]

3. Women disproportionately assume the costs and burdens of raising children outside of marriage or after divorce, regardless of the amount or consistency of child support benefits.[57]

4. Fathers investment appears to correlate directly with reduced behavioral problems in boys, reduced psychological problems in girls, and intellectual and academic achievement in both.[58]

5. As articulated in the book's conclusion, the data also shows that marriage has transformative effects on men especially. Married men "work harder to stay employed and advance in their jobs, are less likely to commit crimes or be the victims of crimes, and have less substance abuse and better health than their unmarried counterparts."[59]

V. Benefits to Adults: The Happiness Studies

Helen Alvaré has mined "happiness studies," a cottage industry of sociological research documenting the lifestyles and choices that tend to make human beings, across cultures, happiest.

55 Robin Fretwell Wilson, "Evaluating Marriage: Does Marriage Matter to the Nurturing of Children?" *San Diego Law Review* 42 (2005): 869.

56 Ibid.

57 Marriage and the Law, 9.

58 A. Sarkadi et al., "Father's Involvement and Children's Developmental Outcomes: A Systematic Review of Longitudinal Studies," *Acta Paediatrica* 97(2008).

59 Women, Sex & Church, 184.

She writes: "Their conclusions provide strong support for the position that stable marriage is one of the most important causes of human happiness, not only in the absolute sense, but relative to situations of divorce, remarriage, and cohabitation."[60] Further, these results do not seem to be due to a "selection effect," wherein happier people tend to marry and stay married; rather, researchers have found marriage itself effects such happiness.

Alvaré points to the human need for solidarity within relationships as underlying the findings of these studies. Feminists often talk of power as a key analytical framework within which to measure the goods of marriage. But new Catholic feminists would likely emphasize the need for mutual self-giving, an attribute that may come more naturally to women but is required of men in abundance as well for both stability and happiness in marriage.

VI. Covenant Marriage

In the feminist legal theory casebook material on divorce, secular feminists display certain hesitancy in supporting no-fault divorce laws. One even noted, "No fault was not a feminist demand, nor was sex equality a motivating force behind the reform...some now argue that no-fault divorce has contributed to women's inequality."[61] Most new Catholic feminist legal scholars would wholeheartedly agree, pointing, as Roback-Morse does, to the vulnerability women (and children) may especially experience after divorce. While specific reforms to current divorce law are well beyond the scope of WSC and this Guide, it would be helpful to mention the support among some pro-marriage family law scholars of a legal form called "covenant marriage."

Marriage today is easy both to enter and to exit. Indeed, in no other form of contract law is one party able to legally breach the contract with the weight of the law on his side. Noting the inexhaustible data showing the deleterious impact divorce has upon children and divorce agreements have upon women, a few states (Louisiana, Arizona, and Arkansas) have offered those intending to marry an alternative: covenant marriage.

The common principles in the covenant marriage statutes of these states are as follows[62]:

60 Alvaré, "An Anthropology for the Family Law of Indis/solubility," 503.

61 Sex Discrimination and the Law, 1224-5.

62 Katherine Shaw Spaht, "Covenant Marriage: An Achieveable Legal Response to the Inherent Nature of Marriage and its Various Goods," *Ave Maria Law Review* 4 (2006): 469.

1. mandatory premarital counseling concerning the seriousness of marriage;

2. the signing of an agreement (i.e., covenant) that contains promises to take reasonable steps to preserve the marriage in the case of marital difficulties;

3. grounds for divorce limited to serious fault on the part of one spouse or a lengthy time period of separation.

Though only a small minority of couples in these states have opted for covenant marriage, a study of Louisiana's covenant marriage law revealed positive results: 1) women (in particular those with a vested interest in childbearing) led men in selecting covenant marriage; 2) covenant couples were more educated and held more traditional attitudes; 3) after two years, they described better overall marital quality than their standard counterparts, including higher levels of commitment, agreement, and a greater sharing of housework.[63] In the researcher's view, covenant marriage "reserves the traditional, conventional, and religious aspects of the traditional institution, but also resolves the various inequities often associated with gender in modern marriages...[this due to] the presence of a set of guiding principles around which these two individuals orient their behaviors and thinking."[64]

VII. The Argument From Procreation

The biological reality that sex sometimes leads to procreation (even when not planned or expected) is a key factor in understanding the importance of the institution of marriage. Philosopher Bertrand Russell once said, "it is through children alone that sexual relations become important to society, and worthy to be taken cognizance of by a legal institution."[65]

Proponents of gay marriage often insist that such reasoning would seem to indicate that married couples who are infertile cannot then be married (in the sense defended by advocates of "traditional" marriage). In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court case that legalized same-sex marriage in that commonwealth, Chief Justice Margaret Marshall argued against an assumption of fertility as a condition for marriage: "General Laws c. 207 contains no requirement that the applicants for a marriage license attest to

63 Ibid., 486-7.

64 Ibid., 488.

65 Quoted in David Blankenhorn, "Protecting Marriage to Protect Children," *LA Times.com*, September 19, 2008. http://www.latimes.com/news/opinion/commentary/la-oe-blankenhorn19-2008sep19,0,6057126.story.

their ability or intention to conceive children by coitis. Fertility is not a condition of marriage..."[66]

But both the Chief Justice and gay marriage advocates misunderstand the procreative argument. The argument can be broken down this way:

1. Procreation *fulfills* the multi-faceted union of persons that is marriage, but procreation *is not necessary* to marriage (i.e., marriages with adopted or foster children, or no children at all, are still very much marriages).

2. Marriage, however, is necessary to procreation, not in the strict biological sense (since, of course, procreation can and does occur outside of marriage) but in the sense that, according to study after study, child-rearing is best undertaken in marriage.

3. Only sexual relations between a man and a woman (not a man and a man, nor a woman and a woman) are potentially procreative. Procreation implies children, and children do best when raised by the biological coupling whose union created them. Thus procreation occurs properly in marriage.

4. As Maggie Gallagher writes, "[T]he primary purpose of marriage as a *legal* institution is to manage the sexually-based phenomenon known as 'procreation'. This is not quite the same as saying 'marriage is in order to produce children.' Marriage is not a factory for childbearing. *Marriage [has always] existed to encourage men and women to create the next generation in the right context and simultaneously to discourage the creation of children in other context—out of wedlock in fatherless homes.*"[67]

5. Therefore, even though marriage is the optimal setting for children to be raised, marriage is not a mere means for raising children. The communion that exists between man and woman is most deeply fulfilled when their love can be shared by another human being, their child. But the failure to have a child, or even the lack of intention to do so, does not negate their marital union.

<u>Discussion Questions:</u>

1. What do studies say about the impact on children of non-marital child-rearing and

66 *Feminist Jurisprudence,* 577.

67 Maggie Gallagher, "(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman," *University of St. Thomas Law Journal* 2 (2004): 44 (italics mine).

parental separation? Is there a debate among social scientists in this regard? How does this impact on children affect society at large? (See WSC pg. 83-84)

2. What are the particular disadvantages the poor experience in a culture that increasingly devalues marriage? How are marriage and poverty related? (See WSC pg. 86-90)

3. Attempt to list all of the negative effects to women, men, children, and society of non-marital child-rearing and divorce. What type of impact does marriage have on the rest of society? (See WSC pg. 83-90)

Chapter 4: Non-Marital Sex & Contraception
[WSC Chapters 3, 5, & Pgs. 179-185 of the Conclusion]

I. Introduction

The major secular feminist motivation behind legalizing both contraception and abortion in the 1970s was the hope that their use would enable women to wield greater control over reproduction. Such control would not only free them from the likelihood of multiple pregnancies throughout a lifetime, which many women experienced as emotionally and physically burdensome, but also enable them to pursue educational and professional endeavors similar to those pursued by men.

A secondary motivation was the belief engendered by both the sexual and feminist revolutions that women, like men, ought to be able to experience the pleasures of sex without the fear of pregnancy. If men could engage in sex free of the worry that a resultant pregnancy would interfere with their personal and professional plans, modern sexual equality required women to be able to do the same.

The only legal (and moral) requirement taken seriously in academia after the 1970s was that sex be consensual. Issues of consent, then, became the focal point for feminist discussion of sex within both philosophical and legal academic circles. Defining the contours of sexual assault and rape obviously took priority, but other issues implicating the role of consent in sexual behavior include the criminality of marital rape, date and acquaintance rape; statutory rape; the culpability of an intoxicated or otherwise "mistaken" assailant; pornography; and prostitution.

The understanding that consent indicates whether or not an act of sexual intercourse was rape (or should be regulated or prohibited in the context of "sex industries" like pornography or prostitution) has been assumed by all but the most radical feminists. Radical feminists such as Catherine MacKinnon and Andrea Dorkin have famously argued that because of the patriarchal power differential between the sexes, women can never meaningfully consent to heterosexual intercourse. Rather, for these feminists, heterosexual sex is akin to rape.

II. Sexual Asymmetry

A. *Women are Disproportionately Burdened*

Although new Catholic feminist legal scholars would not agree that all heterosexual sex be considered rape, the radical feminist idea that an asymmetrical power differential exists between men and women in sexual relations corresponds with some new Catholic feminist thinking on sexual matters. Most new Catholic feminists would not, however, locate the primary reason for sexual asymmetry in patriarchal gender relations, even if societal inequities are partly to blame. Rather, a fundamental cause of sexual asymmetry inheres in the basic biological reality that women rather than men become pregnant.

As Erika Bachiochi writes,

> For the law to treat women and men equally...it must not ignore the biological reality that men and women's bodies differ with regard to reproduction, a difference whose consequences are varied and significant. Men's reproductive design makes them distant from the physical, emotional, and social complexity of pregnancy. It also enables them to shirk the responsibilities that come with siring offspring. Women are not so designed. The life-giving consequences of the potentially procreative sexual act confront them with immediacy and gravity, a vulnerability that callous men have exploited throughout human history.[68]

The decades-long effort on the part of secular feminists to try to equalize the sexual experiences of men and women through contraception and abortion has not cured this sexual asymmetry. Heterosexual sexual intercourse is still potentially procreative, and women are still the ones whose bodies bear their offspring. Indeed, half of all U.S. pregnancies each year are unexpected, and half of those end in abortion.[69] It is arguable that the attempt to ignore or reject the distinct sexual experience of women through contraception and abortion has actually exacerbated this asymmetry, leading men to completely disassociate sex from reproduction and leaving women alone to tend to any and all of sex's potential consequences. After all, contraception and abortion's widespread availability offers men a strong rationale to abandon a child who results from a nonmarital sexual encounter, since fatherhood is not what they had bargained for [see WSC chapter 2 and WSC conclusion].

68 Bachiochi, "Embodied Equality," 916.

69 Guttmacher Inst., Facts on Publicly Funded Contraceptive Services in the United States 1, 4 (2009), available at http://www.guttmacher.org/pubs/fb_contraceptive_serv.pdf .

Women continue to be disproportionately burdened by the consequences of sex, which is increasingly nonmarital and contraceptive, for a number of additional reasons discussed throughout WSC:

1. Due to the release of the hormone oxytocin, women in general become far more emotionally connected than men do after sex, a connectedness that, if unwarranted by the status of the relationship, can lead to emotional vulnerability and even depression [see WSC chapter 3].

2. Women have a far greater risk than men do of contracting STDs [see WSC chapter 3].

3. STDs affect women more profoundly than men, including an increased risk to women's future fertility and the health of future offspring [see WSC chapter 3].

4. Contraception is treated as women's responsibility, has myriad physical and emotional side effects, and often fails [see WSC chapter 5].

5. By contracepting, one may mistakenly believe one has eliminated the possibility of pregnancy, thus increasing the likelihood of abortion. (This may account for the data that shows that, year after year, most women who have abortions were contracepting in the month they became pregnant.)[70] If abortion is chosen, it can cause women lasting harm [see WSC chapter 2].

New Catholic feminists, as Angela Franks writes in WSC chapter 5, wholeheartedly support the ability of couples who are married to determine for themselves whether they believe they are prepared to be parents and to practice natural family planning (NFP) if they do not. But unlike contraception which is used in an effort to suppress or reject the procreative potential of sex (albeit unsuccessfully in numbers of cases), couples using NFP acknowledge sex's procreative potential and work with this biological reality to avoid (or achieve) pregnancy. When sex is confined to marriage and the procreative potentialities of sex are acknowledged through the use of NFP rather than contraception, men join women in accepting and taking responsibility for the potential consequences of sex, not just its pleasures.

B. Mating Markets: Economists Weigh In

A burgeoning cottage industry has arisen within the disciplines of economics (and

70 Guttmacher Institute, In Brief: Facts on Induced Abortion in the United States, May 2010, at http://www.guttmacher.org/pubs/fb_induced_abortion.html.

derivatively, sociology) seeking to use economic models to analyze sexual relationships between men and women in the decades after the legalization of contraception and abortion. Several such thinkers have theorized that, rather than free women, legal abortion and widespread contraception have led to the development of "mating markets" far more hospitable to men's preferences than to women's.

In the conclusion of WSC, Erika Bachiochi summarizes one such theory, that of Nobel Laureate, economist George Akerlof. Bachiochi treats the topic more generally in a forthcoming article discussing secular feminist and Catholic responses to sexual asymmetry in the Oxford University journal, *Christian Bioethics* (vol. 18, 2012). In the recently released book, *Premarital Sex in America* (New York: Oxford U. Press, 2011), sociologists Mark Regnerus and Jeremy Uecker provide a thorough, compelling, and data-packed account of "sexual economics," while Timothy Reichart offers keen insight into similar theories in an article entitled, "Bitter Pill" in the May 2010 issue of the journal, *First Things*. Helen Alvaré provides persuasive treatment of many of these arguments in a chapter in the book, *Person, Moral Worth, and Embryos,* ed. Stephen Napier (Dordrecht: Springer, 2011). Finally, Catholic economist Catherine Pakaluk has produced two cutting-edge working papers analyzing mating markets, both worthy of serious and studied attention.[71] These theorists all argue, at base, that the availability of both contraception and abortion has so lowered the "cost" of sex to men that it has created a mating market that has both pushed women to engage in sexual relations that are neither desirable to them nor in their best interests, and has, in turn, disproportionately burdened women with the consequences of nonmarital sex.

C. Secular Feminists Shari Motro & Robin West on Asymmetry

The gender asymmetry in modern heterosexual relations has not gone entirely unnoticed by secular feminists. Shari Motro recently penned two law review articles displaying such an understanding.[72] She writes, "By trivializing the asymmetry in sexual risk—celebrating the pill as the great equalizer and framing abortion as a privilege—the current paradigm creates a cognitive dissonance of sorts in women's lived experience. The slogans tell women they are free, but they are still vomiting through their pregnancies, hemorrhaging through their abortions, losing their libido under the pill."[73] She goes on to say:

71 Catherine Pakaluk's working papers available online at http://stein-center.org/.

72 Shari Motro, "The Price of Pleasure," *Northwestern University Law Review* 104 (2010): 970; Shari Motro, "Preglimony," *Stanford Law Review* 63 (2011).

73 Motro, "The Price of Pleasure," 970.

> Sex is complicated. Men and women who don't want babies choose to have sex anyway for a variety of reasons—sometimes wholeheartedly, sometimes with ambivalence and fear. The critical difference is that when women choose sex they are choosing something fundamentally different from what men are choosing when they choose sex. Women are choosing something that, along with whatever benefits they hope to gain from it, has a much higher chance of hurting their bodies. Men and women are *un*equal in sex because for women, sex is tinged with something else, a biological difference that adds a sacrificial layer.[74]

Secular feminist legal scholar Robin West has written persuasively of the limits of consent as the legitimating criterion for "good" sex. She writes,

> [A] powerful array of societal forces still pushes heterosexual women and girls to have sex that they patently do not desire, some of which leads to unwanted pregnancies...[Consensual but] unwanted sex that is not enjoyed is alienating to the woman who experiences it: she gives her body over—willfully, but still she gives it over—for use by a man, as part of a bargain she has struck that gives her no pleasure...From this, I would argue that a girl or young woman owes a moral duty to not just herself but also to her future self not to engage in sex she does not want...[75]

Neither Motro nor West fault abortion and contraception for exacerbating such an asymmetrical power differential, nor do either view confining sex to marriage as a plausible—or desirable—remedy. Motro acknowledges that marriage has been viewed as that institution into which sex should be channeled in order to "mitigate the vulnerabilities" that go along with "accidental procreation," but perceives the institution as "clearly ineffective" today in doing so,[76] while West argues that couples who do not intend to become pregnant have a moral obligation to use contraception.[77]

74 Ibid.

75 Robin West, "From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights," *Yale Law Journal* 118 (2009): 1429-30.

76 Motro, "The Price of Pleasure," 952.

77 West, "From Choice to Reproductive Justice," 1429.

III. Connecting the Dots: Non-marital Sex, Cohabitation & Divorce

No one denies that contraception and abortion have increased the incidence of nonmarital sex. Indeed, for feminists opposed to the "patriarchal" institution of marriage, this is as it should be. Motro and West are among the few secular feminists who have acknowledged that perhaps modern women are not enjoying so-called "free" sex as much as 1970s feminists thought they would. Casual and nonmarital sex is not as free—at least for women—as those feminists had hoped.

As heavily documented in WSC chapters 3 & 4, pre-marital sex is also strongly correlated with cohabitation, and both lead to an increased risk of divorce.

Yet, as Helen Alvaré has written, state-sponsored sex-ed and marriage programs fail to make the causal relationship between premarital sex/cohabitation and divorce at all clear—despite its prevalence in the literature. Instead such programs discuss disease and pregnancy-prevention, "communicating...[only] that *unprotected* sex makes babies."[78] Alvaré argues that the state ought to "desist from messages and programs arguably fueling the mating market...[by failing to] posit the natural connection between sex and marriage commitment, or even sex and procreation."[79] Alvaré notes that women (and especially disadvantaged women) would be especially assisted by programs which affirmatively connected sex to relationships and children. "Incorporating messages about the community goods associated with sex—beginning with the needs of children—is a crucial part of any state effort to curb the current mating market facing women."[80]

Further, Alvaré argues that "sexualityism" is to blame for the reticence of many in both academia and government to question the new sexual norms that, in her view, "immiserate women." According to Harvard University economist, Lant Pritchett who coined the term employed by Alvaré, "sexualityism" is the pervasive cultural view that the "expression of human sexuality is *in and of itself* a positive good and limitations on that expression are *in and of themselves* bad."[81] New Catholic feminists such as Alvaré argue that only by confronting these

78 Helen Alvaré, "Abortion, Sexual Markets and the Law," in *Persons, Moral Worth, and Embryos*, ed. Stephen Napier (Springer, 2011), 270 (italics mine).

79 Ibid.

80 Ibid.

81 Ibid., 262 (quoting Pritchett).

new norms will women be free to resist engaging in a mating market that appears to cause them far more harm than good.

IV. Potential Remedies

There are two courses of action currently discussed to remedy the problem of asymmetry within sexual relationships between men and women. The first is to raise the cost of sex for men, an idea secular feminist law professor Shari Motro concretizes in her two recent articles:

> Studies show...that adolescent men who expect to pay child support should their partner become pregnant have fewer partners, less frequent intercourse, and are more likely to use contraceptives...It's only logical that one way to reduce unintended pregnancies might be to raise the stakes for men, to make sure all pregnancies have concrete consequences for both parties involved.[82]

Professors of Law Robin West and Akhil Amar have recently opined similar views.[83]

The second course of action, thoroughly embraced by the new Catholic feminist perspective, is to persuade women, as a whole, to demand higher expectations from men by explicitly linking sex to marriage. WSC chapter 3 takes this view, as does the book's editor in the conclusion. Alvaré also notes the necessity of inspiring groups of women to recognize the costs of these new sexual norms through "consciousness-raising" and the like, techniques adopted by prior schools of feminism: "The goals of a new movement for women, a 'new feminism' addressed to the mating market, would certainly be different from the goals of older feminisms, but...[t]imes have changed, and forms of oppression with them."[84]

V. New Feminism's Call to Male Chastity

New Catholic feminists are not the first feminists throughout history to voice the demand that sex be wedded to marriage. The early American feminists were unequivocally opposed to abortion and hesitant to embrace contraception because of the fear, in part, that disconnecting sex from its potentially procreative capacity threatened marital fidelity. If men could find women

82 Motro, "The Price of Pleasure," 940.

83 See "Embodied Equality," 945.

84 Alvaré, "Abortions, Sexual Markets, and the Law," 268.

willing to contracept or abort, the first wave of feminists thought, they would be more willing to go outside the marriage or not marry at all. Modern-day economists have corroborated their views.

The early American feminists instead pursued an ideal of "voluntary motherhood" in which women and men, in appreciation of the creative potential of the sexual act, engaged in the act according to the so-called "rhythm" of the female reproductive system. An early forerunner to the highly scientific and effective NFP [see WSC chapter 5], this method required self-restraint, especially on the part of the man, an essential characteristic of an authentically pro-woman sexuality.

Catholic feminist psychiatrist, Sidney Callahan, in her criticism of the "masculiniz[ation] of female sexuality," comments upon how the ethic of commitment and self-discipline, so revered in the world of work by feminists, is denounced as unnatural in the sphere of sexuality. Yet, such an ethic would benefit women in every stage of their lives:

> While the ideal has never been universally obtained, a culturally dominant demand for monogamy, self-control, and emotionally bonded and committed sex works well for women in every stage of their sexual life cycles. When love, chastity, fidelity, and commitment for better or worse are the ascendent cultural prerequisites for sexual functions, young girls [are protected], adult women justifiably demand male support in childrearing, and older women are more protected from abandonment as their biological attractions wane...[85]

Commitment and sexual restraint, while not at all antithetical to sexual pleasure, are the necessary ingredients of true "reproductive choice," or as earlier feminists called it, voluntary motherhood.

Women would lose very little were they to call men to self-mastery by demanding that they postpone sex until marriage. As Helen Alvaré writes,

> Gains from older feminisms need not be traded away; in fact, it is more likely than not that restructuring the mating market to protect the interests of women and children will *consolidate, not undercut,* the real gains from earlier feminist movements. Women are more likely to finish school, pursue interesting work,

85 Sidney Callahan, "Abortion and the Sexual Agenda," in *The Ethics of Abortion,* ed. Robert M. Baird & Stuart Rosenbaum (New York: Prometheus Books, 1989), 139-140.

marry well, and maintain financial security if they avoid uncommitted sexual relationships, and all the negative trends that accompany them.[86]

Discussion Questions:

1. How do the costs of sex differ for men and women? Explore and discuss potential remedies for this sexual asymmetry.

2. How and why is casual sex more harmful to women than to men? How then does the collegiate culture of casual sex stand up and against the feminist goal of academic and intellectual success? Debate the merits of contraceptive sex and reserving sex for marriage from a feminist perspective. (See WSC chapters 3 & 5 and pgs 179-185)

3. What rights do governments violate when they try to force contraception on women? Why is it a violation if, as is claimed, contraception is good for women? What's wrong with enforced sterilization? (See WSC pgs. 101, 103-104)

4. What social problems did the promoters of contraception expect to solve? What was the actual result? (WSC pgs. 108-110)

5. Who makes money from contraception? (Think of not only those selling contraceptives, but also those who deal with their effects.) Why isn't there a male chemical contraception industry?

6. Discuss why NFP is pro-woman while contraception is not.

7. How could the law channel sexual activity into marriage? How else could the law incentivize (or coerce) men to be more responsible for their born and unborn offspring?

8. How do answers to the questions raised above relate to debates about the decriminalization or regulation of prostitution and the pornography industry?

86 Alvaré, "Abortion, Sexual Markets, and the Law," 268.

Chapter 5-Reproductive Technologies
[WSC, Chapter 6]

I. Introduction

Demand for assisted reproductive technologies (ART) continues to grow across the United States and Europe as increased numbers of couples experience issues of infertility. Same-sex couples have also looked to reproductive technologies to enable them to have children. In the United States alone, the fertility industry grosses somewhere in excess of $3 billion annually, with almost three percent of all births attributed to ART.

Notably, some secular feminists have expressed reservations similar to those of new Catholic feminists concerning the advent and development of reproductive technologies. This Guide chapter will first highlight those shared feminist concerns, most of which Katie Elrod discusses in greater detail in WSC chapter 6. (Additionally, the secular feminist critique can be found in law school casebooks such as *Feminist Jurisprudence*). This chapter will then supplement the uniquely Catholic critique of reproductive technologies offered in WSC with the *legal* perspective of Catholic scholar, Helen Alvaré.

II. Shared Feminist Critique

Those reservations expressed by both secular and new Catholic feminists include:

1. The paucity of regulation governing this large and profitable business in the United States.
2. ART's high cost and low success rate.
3. The cost and discomfort of egg-extraction and embryo-implantation.
4. The use of ovulation-stimulating drugs, risking the production of multiple embryos, with unknown long-term harm to the woman.
5. The use of abortion to "selectively reduce" the number of implanted embryos, and the accompanying emotional trauma often experienced by the woman.
6. The potential for sex selection (or disability discrimination) in determining which embryos should be aborted.

7. The pressure women may feel to undergo genetic screening to create the "perfect child."

8. The understudied but potential health problems to the children created by in vitro fertilization.

9. The anonymity of egg, sperm or embryo donors, translating into a lack of information about the genetic past of the donor.

10. The focus on ARTs has taken attention away from solving regulatory problems associated with adoption.

III. New Catholic Feminist Critique

Among the handful of new Catholic feminist legal scholars writing on the topics discussed in *Women, Sex & the Church*, only Helen Alvaré has contributed to the debates surrounding ARTs. Thus, this section will summarize the more relevant concerns and arguments found in two of her law review articles on the topic. The first, "The Case for Regulating Collaborative Reproduction: A Children's Rights Perspective," *Harvard Journal on Legislation* 40 (2003) focuses on the constitutional reasoning in favor of regulating these technologies, while the second, "Catholic Teaching and the Law Concerning Reproductive Technologies," Fordham Urban Law Journal 30 (2002-03), is more expressly Catholic.

Alvaré writes that the lack of regulation of ARTs in the U.S. may be due to a number of factors: the profitability of the industry; the penchant for scientific progress; the difficulty of making suitable rules for an ever-changing industry; the current preference in family law for the desires of adults over the well-being of children; the nation's ongoing struggle over abortion as potentially infecting regulatory protection for the treatment of embryos; and the reluctance to regulate technologies that answer human longings for "something as natural and beautiful as a baby."[87]

A. Constitutional Arguments: Is there a fundamental right to have a child?

Due to the expansive state of constitutional jurisprudence on issues of "reproductive freedom," some have also suggested that regulations on ARTs would not pass constitutional muster in the United States: "[T]he right [protected by the Court] is one of procreational

87 Alvaré, "The Case for Regulating Collaborative Reproduction," 33.

autonomy, the fundamental right to decide whether, when, and how to bear or beget a child."[88] Alvaré strongly disagrees with this assumption, arguing that the "[v]alues concerning family and procreation that inhere in the steps of collaborative reproduction are not those values protected by the Supreme Court's cases involving more traditional means of reproduction."[89]

According to Alvaré, current Supreme Court jurisprudence does not support the argument that collaborative reproduction would be constitutionally protected because:

1. The cases delineating parental rights concern decision-making over traditional subject matters involved in creating a family: the right to "marry, establish a home and bring up children..." *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

2. Cases extending protection for nontraditional family arrangements have generally been between children and biological relatives (e.g., grandparents); further, the rights of natural parents have been afforded protection over the potential rights of foster parents. "State laws almost universally express an appropriate preference for the formal family." *Lehr v. Robertson*, 463 U.S. 248, 256-57 (1983).

3. The only two high court cases that have treated affirmative rights to procreate have facts limiting such rights to the marital context. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) and *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639 (1974).

4. The "right to privacy" cases involved a right to avoid procreation through contraception and abortion, not a right to affirmatively create a child. *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972) and *Roe v. Wade*, 410 U.S. 113, 154 (1972). Alvaré writes, "[These] cases show a willingness to accord constitutional protection to means deemed necessary to avoid procreating in situations where the Court is convinced that individual and social harms might otherwise result...This is a troublesome conclusion for supporters of constitutional protection for collaborative reproduction...[which] may lead to difficulties and uncertainties in family relations...because of the deliberate severeance of the relationship between the donor 'parent' and the child."[90]

88 Elizabeth Price-Foley, "Constitutional Implications of Human Cloning," *Ariz. Law Review* 42 (2000).

89 Alvaré, "The Case for Regulating Collaborative Reproduction," 34.

90 Ibid., 40.

B. The Church's Legislative Recommendations concerning ARTs

Noting that the Church does not reject ARTs because they are artificial, but because they "place technology over persons," Alvaré delineates the legislative recommendations offered by the Church, and then compares them with extant regulation of ARTs. The recommendations are based upon the twofold view that ARTs, first, threaten the human dignity of both mother and the created child, a perspective that is discussed at length in WSC chapter 6, and second, impinge on the right of children, if at all possible, to be born into families comprised of their married biological mother and father.

In short, the recommendations are as follows:

1. Though the Church would propose allowing procedures on embryos that are directed toward healing, it calls for a ban on every procedure that fertilizes embryos outside the human body, maintaining that the experimental nature of the procedure risks the life of the embryo.

2. The Church proposes banning the use of donor gametes or embryos, as well as surrogate motherhood, since the procedures seek to create new human life outside of marital intercourse.

Underlying these proposals is the view that creating embryos in labs will inevitably lead to "neonatal euthanasia" where, for genetic reasons, certain embryos will be discarded in favor of others. Such technological control over human life results in the commodification of human beings, and can lead to a "radical eugenics" wherein privileged parents are given the capability of electing only "desirable" traits for their children. Alvaré notes that non-Catholics have expressed similar concerns. For instance, she quotes Professor Twila Perry: "Because the standard of beauty in this country is a white one, in the world of reproductive technology, the genetic material of Blacks is essentially worthless."[91]

The Church would, in its prudence, favor those legislative proposals that, while not as comprehensive as its recommendations, move toward greater regulation of these procedures.

Further, the Church has made it abundantly clear that: "Every child which comes into the world must in any case be accepted as a living gift of the divine Goodness and must be brought

91 Twila L. Perry, "Race Matters: Change, Choice, and Family Law at the Millennium," *Family Law Quarterly* 33 (1999): 472.

up with love."[92]

IV. My Daddy's Name is Donor: A New Study of Young Adults Conceived Through Sperm Donation

Central to the new Catholic feminist critique of ARTs is fact that in cases of sperm, egg or embryo donation, the children created are denied relationships with their biological parents. According to the Church, it is only "through the secure and recognized relationship to his own parents that the child can discover his own identity and achieve his own proper human development."[93] The UN Convention on the Rights of the Child echoes this view, stating that each child "shall have… as far as possible, the right to know and be cared for by his or her parents."[94]

Until recently, little research had been conducted to ascertain the potential harm of such a denial. Family scholar Barbara Whitehead notes the similarity between the inadequate attention currently paid to the impact on children conceived by ARTs and a similar inattention paid to children's well-being after divorce:

> In the l970s, when no-fault divorce swept the nation, the legal and social-science community favored the reform. They were little concerned about its impact on children. It was not until the 1990s, when large-scale studies demonstrated significant harms to the roughly one million children per year who experienced parental divorce, that the scholars changed their minds. By then, however, it was too late to reverse course. A high-divorce-rate society had taken root.[95]

But recently, the Commission on Parenthood's Future at the Institute for American Values released a report exploring the potential harm. They reported fifteen major findings resulting from their research into the lives of those conceived through sperm donation. Those relevant to our purposes are as follows:

1. "Young adults conceived through sperm donation (or 'donor offspring') experience

92 Ibid., 31.

93 *Donum Vitae*, 23.

94 United Nations, Convention on the Rights of the Child, Art VII (1989).

95 Barbara Whitehead, "Answered Prayers," *Commonwealth*, Oct 20, 2006.

profound struggles with their origins and identities.

2. "Family relationships for donor offspring are more often characterized by confusion, tension, and loss.

3. "Donor offspring often worry about the implications of interacting with – and possibly forming intimate relationships with– unknown, blood-related family members.

4. "Donor offspring are more likely to have experienced divorce or multiple family transitions in their families of origin.

5. "Donor offspring are significantly more likely than those raised by their biological parents to struggle with serious, negative outcomes such as delinquency, substance abuse, and depression, even when controlling for socio-economic and other factors.

6. "Donor offspring believe they have a right to know the truth about their origins.

7. "Donor conceived persons born to single mothers seem to be somewhat more curious about their absent biological father, and seem to be hurting somewhat more, than those born to couples, whether those couples were heterosexual or lesbian.

8. "Regarding troubling outcomes, even with controls, the offspring of lesbian couples who used a sperm donor to conceive appear more than twice as likely as those raised by their biological parents to report struggling with substance abuse."

These findings and more available online at
http://www.familyscholars.org/assets/Donor_FINAL.pdf.

Discussion Questions:

1. Does a woman (or couple) have a right to a child? Make both philosophical and constitutional arguments for and against.

2. How much does IVF cost? How is IVF regulated? What kind of testing did IVF undergo before its use on humans? (WSC pgs. 126-127).

3. What are the health risks to women and to the children conceived through IVF? (WSC pgs. 127-130).

4. How might ART objectify women? (WSC pgs. 130, 132). How might children be commodified by ART? (WSC p. 131).

Chapter 6: Work/Family Balance
[WSC: Chapter 8 & Conclusion, pgs. 185-192]

I. Introduction to Catholic Social Teaching

For more than one hundred years, the Catholic Church through its social doctrine has offered principled guidance on, among other things, matters of wealth and poverty, the role of the state, and work and workers' rights. Catholic social teaching has sometimes been regarded as offering a "third way," distinct from either statist policies or pure market-based solutions, because of its ardent critiques of both ideologies. But the Church has always maintained that the intention of its social teaching is not to "propose economic or political systems or programs, nor...show preference for one or the other..."[96] Rather, the foundation of Catholic social teaching, according to John Paul II "'rests on the threefold cornerstones of human dignity, solidarity and subsidiarity.'"[97]

The Church has sought to enunciate how these "cornerstones" might guide governments, businesses, and workers alike in thinking through how to engage in, negotiate, and regulate the relationships involved in the universal human enterprise of work. However, though the Church has articulated firm principles from which to think about these issues, there is no definitive Catholic teaching on the practical matter of how individuals, families, communities, or governments might negotiate work/family balance. Erika Bachiochi compares how Catholic social teaching differs from Catholic sexual teaching in this regard in the book's conclusion under the subtitle, "The Dignity of the Human Person is at the Heart of All Catholic Teaching." Pages 185-192 of the book's conclusion should be assigned together with WSC chapter 8, as both delve into matters that fall into realm of the social (rather than sexual) teachings of the Church.

Though the principles underlying the Church social doctrine have remained unchanged, the way such principles interact with new historical phenomena leads to certain developments in Catholic thought. One can point to post-industrialization and the rise of second-wave feminism as catalysts for rethinking how work and family interact with one another. Such "development of doctrine" is most recognizable in the social encyclicals of John Paul II.

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96 John Paul II, *Sollicitudo Rei Socialis (On Social Concern)* (Boston: Pauline Books & Media, 1987), 41.

97 John Paul II, *Apostolic Exhortation, Ecclesia in America,* (1999), 55.

The 1960s and 70s witnessed a profound movement of women—including mothers of young children—from full-time occupation in the home into either full or part-time engagement in the workplace. The Church, and new Catholic feminists along with it, have thus sought to respond to this new phenomenon by embracing the potential gains for both women and the world, while seeking to alleviate potential tensions between women's work outside the home and the care work they continue to disproportionately conduct within the family.

Catholic legal scholar Mary Ann Glendon offers some of the rationale underlying the movement of women into the workforce in the decades following post-industrialization, and some of the dilemmas that remain:

> [F]or most of human history, most men, women, and children...lived together in closely interdependent economic units, toiling together for subsistence. [But in the 19th century, most remunerative work moved outside the home and men began working for wages.] The wage-earning husband and father was no longer so dependent on his wife and children, but their economic welfare depended more than ever on him...[T]hat asymmetrical dependency seems to have marked the erosion of marriage as a reliable support institution...Full-time motherhood [became] a risky occupation [such that] women [] hedged their bets in two ways: by having fewer children, and by maintaining at least a foothold in the labor force even when their children [were] very young. But that strategy...does not protect mothers very well against the four deadly Ds: divorce; disrespect for nonmarket work; disadvantages in the workplaces for anyone who takes time out for family responsibilities; and the destitution that afflicts so many female-headed families. To make matters worse, women's work outside the home may even marginally increase the risk of divorce while hedging against its effects![98]

A. Historical Approaches: The Predominance of the Family Wage

Since its emergence as a serious body of Church teaching, Catholic social thought has paid special attention to the role of work in the life of both the individual and of the family. From the Church's first social encyclical in 1891 (*Rerum Novarum*) to as recently as 1981 (*Laborem Exercens*), the Church has sought to prescribe institutional protections for male workers on whom, traditionally, the economic stability of the family depended, through the

98 Mary Ann Glendon, "Is the Economic Emancipation of Women Today Contrary to a Healthy Functioning Family?" in *The Family, Civil Society, and the State*, ed. Christopher Wolfe (Rowman & Littlefield, 1998), 90 [hereinafter "Economic Emancipation of Women"].

delivery of a "family wage". Much of the impetus for the strong support of the family wage on the part of the Church (and the U.S. government in the social policies of the New Deal) was the hope that a family-sustaining wage would protect families against what was then regarded as the unfortunate necessity of mothers having to work.

Though two-income families are becoming more the expectation and the norm, it's worth noting that during the decades of relatively strong family wage policies, the United States witnessed several positive social developments that can be attributed to the family wage. The middle class grew, while the populations of both the very rich and the poor shrank; moreover, the income and wealth gaps between the rich and poor were far more modest than any time since. Allan Carlson writes that "this was the expected result of family-wage-earning men being married to lower-earning or non-wage-earning women..."[99] As family wage policies weakened, and women entered the workforce (either out of necessity or desire) in the decades since, U.S. household incomes have grown more unequal, with two professionals dramatically out-earning single income households (most notably, single mother households). With this data in mind, one can understand the historical hesitancy of unions to support the Equal Rights Amendment which, in seeking to guarantee equality of pay for women, also threatened to undermine blue-collar male earnings.

Despite some of its positive societal effects, family wage policies simultaneously encouraged discrimination against female employees. Even while some family wage proponents supported equal pay for equal work, job segregation by gender was the norm for some time; that is, female-dominated occupations (education, nursing) saw far lesser earnings than male-dominated occupations (medicine, law). As the movement for gender equality grew and more women entered historically male-dominated occupations seeking equal pay, increased labor supply threatened the feasibility of the family wage, and its most ardent supporters—especially unions and Catholic theorists—began looking for alternatives. As Allan Carlson writes: "The challenge facing the early twenty-first century is to find policy vehicles that deliver the positive benefits...of a family-wage system without engaging in systematic gender discrimination."[100]

II. New Catholic Feminist Thought on Work/Family Balance

As a legal scholar, new Catholic feminist Elizabeth Schiltz has gone a long way toward

99 Allan Carlson, "Rise and Fall of the American Family Wage," *University of St. Thomas Law School* 4 (2006-7): 564.

100 Ibid., 557.

framing the work/family balance issue from a legal perspective in WSC chapter 8, delineating how Church teachings on family, work, and human flourishing offer uniquely helpful guidance on "managing the tensions" between what she refers to as "public" and "private" vocations. Schiltz and other legal scholars offer additional insight into the issue in law review articles that help to contextualize the issue even further. Indeed, under the leadership of Professor Schiltz, University of St. Thomas Law School hosted a conference in 2007 whose express purpose was to gather together secular and Catholic feminist thinkers to discuss "Restructuring the Workplace to Accommodate Family Life." This Guide chapter will readily refer to and quote from presentations made at that conference.

In her introduction to the *St. Thomas Law Review* publication of the conference proceedings, Schiltz summarizes the traditional approaches taken by feminist and Catholic thinkers, respectively, and the recent convergence of thinking that has begun to occur among the two groups:

> Feminist legal theorists have traditionally started from the perspective of women and how best to ensure the flourishing of women...Catholic social theorists, on the other hand, have traditionally started from the perspective of the family and how best to protect and preserve the family structure...In recent years, [relational] feminists have begun to acknowledge that the flourishing of many women might involve being able to care for their families....[and so have called] for workplace restructuring to accommodate family life, rather than insisting that women be released from family obligations. Catholics (perhaps most forcefully Pope John Paul II) have begun to acknowledge that the flourishing of the larger human family might require greater access to the public sphere by women, including women who have significant family responsibilities. They have begun to call for workplace restructuring to accommodate family life, rather than insisting that women be released from all responsibilities in the workplace.[101]

A. Women's Work Essential in Both the Family and the World

While John Paul II argued for the preservation of the family wage as late as 1981, he also indicated the necessity of alternatives that support women's work both inside and outside of the home. As Schiltz suggests in WSC chapter 8, John Paul II sought to encourage the "both/and" solution to the mounting modern tensions surrounding work and family life: though societal

101 Elizabeth Schiltz, "Workplace Restructuring to Accommodate Family Life," *University of St. Thomas Law Journal* 4 (2006-7): 344.

structures and policies ought not "compel" women to work outside the home, "[t]here is no doubt that the equal dignity and responsibility of men and women fully justifies women's access to public functions..."[102] As such, a woman's role in the family and her profession "should be harmoniously combined, if we wish the evolution of society and culture to be truly and fully human."[103]

As Schiltz notes, John Paul II offers two solutions in *Laborem Exercens* to the devaluation of care work in the family performed disproportionately by women:

1. economic compensation for the work women do in the family (through either a family wage or some other sort of financial support for mothers who devote themselves exclusively to their families), and

2. institutional restructuring such that women who work outside the home are not penalized professionally for dedicating some of their energies to care work inside the home.

In seeking the "both/and" solution, John Paul II echoes all Catholic social teaching in its concern for the preservation of the family and women's indispensable role within it. Schiltz writes: "[The] conviction that the preservation of the family is key to the development of society prompted John Paul II to decry the persistent devaluation of the difficult work of preserving the family, which is, of course, traditionally the unpaid work of women."[104]

This devaluation of women's work in the family, especially in light of the fact that even after decades of liberal feminism, women continue to seek to engage in such work, is of special concern to relational and new Catholic feminists alike. Relational feminists such as Robin West, Eva Kittay, Joan Williams, and Martha Fineman have offered compelling reasons to support women's work inside as well as outside the home. Some have argued that children are a "public good" (far more essential than many other resources) and that women's disproportionate care of them in the home creates a "collective or societal debt" toward women: women take on the costs but all of society benefits. From an economic perspective, if we do not publicly support the care-taking of women, and the sacrifices of present and future earnings they make to do so, then ours is a system of "free-riders." (The textbooks reviewed here cover these relational feminist arguments quite well.)

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102 John Paul II, *Familiaris Consortio* (1981), 23.

103 Ibid.

104 Elizabeth Schiltz, "Motherhood and the Mission," *Catholic University Law Review* 56 (2007): 31.

But both Schiltz and Catholic legal scholar Susan Stabile are convinced that new Catholic feminists have an ability to articulate an even stronger foundation for policy changes urged by both groups because of the multiplicity of interacting foundational principles underlying the Catholic view. Equal and just treatment of women is essential to both groups, but additional Catholic components such as the common good (e.g., the preservation of the family for human and societal flourishing), human dignity, and the belief in the transformative potential of the "feminine genius," all contribute to a bolder view of the issue. Stabile writes:

> [The] Catholic focus is not only on the well-being of the woman, but also that of the larger family unit and, indeed, of the world as a whole, which needs the presence of women in all venues...
>
> [The] workplace has an affirmative obligation to support families...[this is a] central theme of the common good...Catholic thought demands that it must the aim of *every human institution* to promote human dignity, to promote the fundamental rights of persons to life, bodily integrity, and the 'means that are suitable for the proper development of life.'" This includes the workplace; in the words of the Compendium [of the Social Doctrine of the Church], "businesses should be characterized by their capacity to serve the common good of society."[105]

Mary Ann Glendon gives a similar new Catholic feminist defense of policies supporting women's work both inside and outside of the home:

> [T]hose who do not want to see any interference with market forces in the form of family policy or labor policy need to think again...The market, like our democratic experiment, requires a certain kind of citizen, with certain skills and certain virtues...it depends on culture, which in turn depends on nurture and education, which in turn depends on families. Capitalism...long took...women's roles in nurture and education for granted...Today we need to attend to social capital, to consider how to replenish it, and to reflect on how to keep from destroying it....Promoting women's exercise of all their talents, rights, and responsibilities without undermining their roles within the family will require calling not only husbands and fathers to their family responsibilities but also governments and private employers to their social duties. That will involve nothing less than a

105 Susan J. Stabile, "Can Secular Feminists and Catholic Feminists Work Together to Ease the Conflict Between Work and Family?" *University of St. Thomas Law Journal*. 4 (2006-7): 458-9 [hereinafter "Can Secular Feminists and Catholic Feminists Work Together"].

cultural transformation.[106]

B. The Feminine Genius

The Catholic view that women, particularly mothers, have something unique to offer society, not only through their care work in the family but also through their personal and professional engagement in the world, is a central feature of Schiltz' argument in WSC chapter 8. But it's worth noting that in articulating the potentially transformative effect of the "feminine genius" in the world, John Paul II urges women to "reject[] the temptation of imitating models of 'male domination.'" That is, it is women *as women* who have a special "humanizing" capacity. As Swedish politician Jaane Haaland-Matlary writes:

> [W]omen's special capacity for self-giving in pregnancy, child-birth and care for the infant is held up as indicative of women's particular capacity for self-giving, which is the essence of the feminine itself. It is also the exemplar of true Christian behaviour [sic].
>
> Therefore, the startling implication of Catholic teaching on the feminine is that women have a special ability to "humanize" the family, and society and politics as well, provided that such self-giving actually takes place. If a woman is able to live this self-giving, this way of living which looks to the good of the other, she will influence society to the maximum extent, and men should look to her in order to imitate her way of 'other-regarding' love.[107]

This view is echoed in the thinking of law professor Michael Selmi who writes that "increasing workplace equality will require persuading men to behave more like women, rather than trying to induce women to behave more like men. Achieving this objective would create a new workplace norm where all employees would be expected to have and spend time their children, and employers would adapt to that reality."[108]

Indeed, secular feminist Joan Williams notes that young male attorneys seek to spend far more time with their children than did their fathers and grandfathers. In doing so, these young

106 Glendon, "Economic Emancipation of Women," 93.

107 Jaane Haaland-Matlary, "Men and Women in Family, Society and Politics," L'Osservatore Romano. Vatican. January 12, 2005. p. 6-7. Available online at http://www.catholicculture.org/docs/doc_view.cfm?recnum=6309&longdesc.

108 *Feminist Jurisprudence,* 660.

men, with many of their female colleagues, collide with what Williams calls the "ideal worker" norm:

> The ideal worker norm around which traditional law firms are organized is not a meritocracy; it is a masculine norm that systematically advantages people who can and are willing to live a traditionally masculine life, which means that it disadvantages most women and men who do not want their lives to be almost entirely work. People are being promoted not based on their talent but based on the schedule they can keep.[109]

C. Work as Self-Gift

In WSC chapter 8, Schiltz discusses the Catholic view of work as contributing in a unique way to thinking through this issue. Other Catholic (and Christian) feminists have similarly offered insightful views. The key insight of this material is that work should not be regarded as a purely economic concept or solely a place where one's individual autonomy is exercised, but is more fundamentally the way the human person offers herself, her talents, time, and resources as a gift to others.

In *Centesimus Annus*, John Paul II wrote, "More than ever, work is *work with others* and *work for others*; it is a matter of doing something for someone else."[110] And in *Laborem Exercens*: "Man must work out of regard for others, especially his own family, but also for the society he belongs to, the country of which he is a child, and the whole human family of which is a member."[111] This central self-giving aspect of work is that which ultimately gives work meaning, but also that which allows the human person to grow in virtue through her work. Catholic philosopher Deborah Savage notes,

> [John Paul II's] Law of the Gift only has meaning when it is an exchange between persons. We cannot really make a gift of ourselves to a bottom line, a meal, a report...self-gift only has meaning when at the other end of the process is a person or persons to whom we make that gift...our employees, our customers...our current or future family, our friends, the poor...we find ourselves only when we

109 Joan Williams, "The Politics of Time in the Legal Profession," *University of St. Thomas Law School* 4 (2006-7): 400.

110 John Paul II, *Centesimus Annus*, (1991), 31.

111 John Paul II, *Laborem Exercens* , (1981), 16.

raise our heads up long enough to ask: who is it that I am serving?[112]

This perspective underlies the Catholic view that women's work in the home is of value regardless of whether it is remunerated, though remuneration (even in the form of tax benefits) would certainly be proper as a matter of social justice. Lutheran legal scholar Marie Failinger writes that Christian views of work contribute to an understanding of care work as worthy, regardless:

> Secular feminists accounts of the value of women's work, particularly the care of the family, struggle to offer a sustainable rationale for treating such work as equal to the work of public life... the Christian tradition has rejected any attempts to identify particular forms of work as more worthy than other forms of work, so long as that work serves the dignity of the human person and the purpose of human life... [then, quoting John Paul II, *Laborem Exercens*] "the basis for determining the value of human work is not primarily the kind of work being done but the fact that the one who is doing it is a person. The sources of the dignity of work are to be sought primarily in the subjective dimension, not in the objective one."[113]

Failinger echoes the words of John Paul II and Savage above in noting that Martin Luther also viewed the value of work to inhere not in itself, but "in the fact that it is done in service to the neighbor."[114] Thus, the "Christian view of work focuses on the dual dignity of the one who serves and the one who is served..."[115]

Failinger argues that while Betty Friedan's famous criticism of the cult of domesticity rang true for some women who were ill-suited to domestic work, it was ultimately damaging to others who enjoyed and found meaning in such work: "women who excel at domestic work can be forced into public work that they are not suited for or even happy with, because the legally reinforced economic reward structures of Western capitalism value some forms of work over

112 Deborah Savage, "Women's Work," unpublished public lecture, February 17, 2011, available online at http://www.stthomas.edu/spssod/continuing/siena/pastevents.html.

113 Marie Failinger, "Women's Work: A Lutheran Feminist Perspective," *University of St. Thomas Law Journal* 4 (2006-7): 427.

114 Ibid.

115 Ibid., 427-8.

others and threaten extreme economic vulnerability to those who stay at home."[116]

D. Subsidiarity, Solidarity & the Option for the Poor

Inasmuch as new Catholic feminists join with relational feminists to urge workplace and social policy changes to support the work women do both inside and outside of the family, Susan Stabile notes that the Catholic principle of subsidiarity mitigates against a wholly statist solution:

> Subsidiarity arguably should make Catholic feminist legal thought more hesitant about reliance on legal or government changes, especially in a situation like this where what is ultimately required is social change and conversion of heart [of employers]. The law may simply be too blunt an instrument with which to address the particulars of women's experience.[117]

She explains elsewhere: "subsidiarity expresses a preference for reliance on intermediate institutions rather than the state to secure economic [sic] social and economic justice...[this principle] explains the Church's commitment to unions as a means of furthering employee interests."[118] Subsidiarity does not, however, obviate the need for governmental action on the matter; it simply calls upon individuals, communities, localities--and especially businesses--to make just and beneficial changes, rather than looking primarily (or exclusively) to government to intervene in workplace matters.

In Catholic social thought, subsidiarity works hand in hand with the principle of solidarity ("a *firm and persevering determination* to commit oneself to the common good...the good of and of each individual, because we are *all* really responsible *for all.*")[119] Central to solidarity is the "preferential option for the poor," the Catholic view that the poor ought to be foremost in policymakers' vision when contemplating policy, and in the vision of all people in working for social justice.

In the first few pages of the book's conclusion, Erika Bachiochi lays out the intersection

116 Ibid., 428-9.

117 Stabile, "Can Secular Feminists and Catholic Feminists Work Together," 466- 467.

118 Susan Stabile, "Workers in the Vineyard," unpublished working paper (2007), 36-37. Available online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015397.

119 *Sollicitudo Rei Socialis*, 38.

between the Church's sexual teaching and its preferential option for the poor. On the matter of the option and work/family balance, a bit more ought to be said. Elite professionals' struggle with work/family balance pales in comparison to the hardship of working-class and poor families (and especially single mothers) who seek to raise children while working in industries that provide low wages, inadequate benefits, and little to no flexibility. The principles of Catholic social teaching necessitate attention to these families in generating social policies in support of working mothers.

Discussion Questions:

1. What is the "feminine genius," as defined by Pope John Paul II? What importance is it to our culture for women in the workplace to be mothers as well? Do you think it makes any difference that many of the world's women leaders have no children? (For example, the last three women nominated to the Supreme Court – Elena Kagan, Sonia Sotomayor, and Harriet Miers -- were all single and childless.)

2. Discuss how a family wage could strengthen a family, a community, and a society at large.

3. Discuss the idea of "work as gift." Is this tenable in our society?